

Response to the Competition and Markets Authority's consultation - '4Ps' changes to the CMA's mergers guidance (CMA2) and mergers notice template

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1. Introduction

- 1.1 Eversheds Sutherland (International) LLP welcomes the opportunity to respond to the Competition and Markets Authority's ("**CMA**") consultation: "4Ps" changes to the CMA's mergers guidance (CMA2) and mergers notice template, as published on 20 June 2025 ("**CMA2 Consultation**"). We support the CMA's commitment to ensuring that its merger processes embody the principles of pace, predictability, proportionality and process (the "**4Ps**") and its provision of draft amended CMA2 merger guidance ("**Draft Revised Guidance**") and a draft amended merger notice template for consideration.
- 1.2 Embedding the 4Ps into the CMA's merger processes will play a vital role in fostering a regulatory environment that not only safeguards competition, but also promotes economic efficiencies, encourages investment, and supports innovation and sustainable growth.
- 1.3 Our response to the CMA2 Consultation reflects and draws on our extensive experience in advising merger parties, as well as third parties, on both UK and multi-jurisdictional mergers, including during pre-notification, CMA Phase 1 and Phase 2 merger investigations.
- 1.4 The comments and observations set out in this response are ours alone and should not be attributed to any of our clients. We confirm this response does not contain any confidential information and we are happy for it to be published on the CMA's website to the extent necessary.

2. 40-working-day Pre-Notification KPI

- 2.1 We welcome the CMA's commitment to improve the efficiency of the merger review process and fully support the implementation of a new 40 working day pre-notification KPI ("**Pre-Notification KPI**") and the CMA's intention to track and report KPI performance.
- 2.2 We agree that there may be cases where the Pre-Notification KPI may not be appropriate, for example, where they raise complex or novel issues. We support the proposal in paragraph 6.32 of the Draft Revised Guidance, which allows merger parties to request that the Pre-Notification KPI does not apply to their case.
- 2.3 We also support the CMA's emphasis on early and constructive engagement, including teach-ins and informal calls, which can be particularly helpful in facilitating a smooth and efficient review process.
- 2.4 We do consider, however, that there are some areas where further clarification of the Draft Revised Guidance is required to avoid unintended consequences which reduce the pace and predictability of the CMA's merger control regime.
- 2.5 **Pre-notification criteria that the CMA publishes a case webpage potentially causes delay:** A proposed criteria for commencing pre-notification is that the merger parties provide "*typically, consent for the CMA to publish a case webpage announcing that it is starting pre-notification, and to contact relevant third parties.*" For many transactions this creates a considerable risk of prolonging the transaction timetable rather than shortening it.
- 2.5.1 Often there is a period of time after merger parties have met the 'good faith intention' criteria set out at paragraph 6.17 of the Draft Revised Guidance (e.g. by signing heads of terms), but where the transaction has not been made public (e.g. because negotiations relating to the final transaction documents have not been completed).
- 2.5.2 At present, the Draft Revised Guidance provides that the merger parties can provide reasoned submissions and that "*exceptionally*" the CMA will not make the transaction public. The use of "*exceptionally*" is a high threshold and indicates that in most cases, even where parties are able to provide a full draft merger notice, internal documents and third party contact details (i.e. meet the

remaining criteria in paragraph 6.27), the CMA will not commence the Pre-Notification KPI.

- 2.5.3 For many companies, having to wait until a transaction is announced before starting pre-notification will be considered a delay to the CMA merger process, rather than a means to improve its speed and efficiency.
- 2.5.4 We, therefore, propose that the word “*exceptionally*” be removed from paragraph 6.26(iv) of the Draft Revised Guidance, and that the CMA provides criteria or examples of circumstances in which it will accept starting the Pre-Notification KPI without publishing a case webpage and/or contacting third parties. We also suggest that the CMA publish brief anonymised case summaries where the KPI was not met or was disapplied, along with the reasons. This would enhance transparency and provide valuable guidance to future merger parties.
- 2.6 **Risk of an additional further informal process prior to Pre-Notification:** The proposed changes could also *de facto* risk creating an additional period of time prior to Pre-Notification commencing where a case team reviews the materials provided by the merger parties and decides whether to commence the Pre-Notification KPI. We appreciate that this is not the intent of the Draft Revised Guidance and so, as set out below, it would be helpful to clarify the intended process in the final Guidance.
- 2.7 **Engagement once the ‘good faith intention’ criteria has been met:** A key benefit of the current process is that, once the merger parties have met the ‘good faith intention’ criteria, they are able to engage in meaningful early-stage discussions with the CMA. In particular, there is often considerable value in being able to engage with a case team on key pieces of evidence and how this should be presented at an early stage. We consider it important to continue to maintain this potential for engagement including where the Pre-Notification KPI applies. It would be helpful to clarify how the CMA intends to approach and support this type of early and constructive engagement in the final Guidance.
- 2.8 One area where additional clarity would also be helpful is how the proposed Pre-Notification KPI will interact with the CMA’s stop-the-clock powers. The final Guidance should clarify how time spent in pre-notification, including any periods where the CMA is not actively engaging, will be treated for the purposes of the KPI, and whether stop-the-clock powers may be used during this phase. In particular, it would be helpful to understand whether the CMA might issue a formal information request under section 109 of the Enterprise Act 2002 during pre-notification, and if so, whether failure to respond within the specified timeframe could trigger a pause in the KPI timeline. Greater clarity on this point would help parties understand the procedural implications of such requests and plan accordingly.
3. **Phase 1 KPI for straightforward cases**
- 3.1 We welcome the CMA’s proposal to introduce a Phase 1 KPI of 25 working days (“**Phase 1 KPI**”) for clearing straightforward mergers. This is a positive step toward improving transparency and procedural efficiency. However, given that the CMA reviews only a relatively small subset of transactions (e.g. compared with authorities such as the European Commission), and typically those that raise more complex or potentially problematic issues, it would be helpful if the CMA could provide greater clarity on the types of transactions likely to qualify as “straightforward”. This would enable businesses and their advisers to better assess whether they can realistically benefit from the Phase 1 KPI and to factor this into transaction planning. Clearer guidance, supported by illustrative examples, would enhance predictability and ensure the KPI delivers its intended benefits.
4. **Proposed changes to the CMA’s guidance on “material influence”**
- 4.1 We welcome the CMA’s objective of clarifying its approach to assessing “material influence” under the jurisdictional test. We also note the Government’s intention to consult on legislative reform proposals aimed at providing greater certainty around the application of

the material influence and share of supply ("**SoS**") tests.¹ While the details of those proposals are not yet known, we support the broader objective of improving transparency and predictability in UK merger control.

- 4.2 These initiatives represent a constructive step forward. To build on this, we believe that certain aspects of the Draft Revised Guidance could benefit from further refinement to ensure that the material influence test remains clearly defined, proportionate, and consistent with its statutory purpose.
- 4.3 First, the Draft Revised Guidance appears to incorporate concepts more commonly associated with the EU's "decisive influence" test, such as influence over strategic direction, business plans, budgets, and the appointment of senior management. These concepts go beyond the traditional scope of the UK's material influence test, which is intended to capture the ability to "influence" policy, rather than control it. We are concerned that this shift:
- 4.3.1 blurs the distinction between material influence and control, potentially undermining the clarity of the UK's three-tier jurisdictional framework (material influence, de facto control, and legal control); and
- 4.3.2 introduces legal uncertainty for minority investors and strategic partners, particularly in the venture capital and private equity sectors.
- 4.4 Second, paragraph 4.23 of the Draft Revised Guidance introduces the term "significant" ahead of "other factors" when assessing whether an acquisition of less than 15 per cent may give rise to material influence. This suggests a clearer hierarchy, indicating that more substantial evidence is now required to demonstrate that "significant other factors" (such as the acquirer's expertise or commercial agreements) would result in material influence. However, the Draft Revised Guidance does not explain what qualifies as "significant" in this context. Greater clarity on this point would help ensure consistent application and reduce uncertainty for parties assessing jurisdictional risk.
- 4.5 Third, paragraph 4.28 of the Draft Revised Guidance suggests that the appointment of a single board member is unlikely, on its own, to confer material influence, but this is subject to significant caveats. At the same time, the Draft Revised Guidance appears to downplay the traditional emphasis on board-level influence, which has historically been a key factor in the CMA's assessment. This creates ambiguity: on the one hand, board representation is de-emphasised; on the other, board appointment rights (including observers) are described as "main factors" likely to confer material influence. We recommend that the CMA clarify the weight it will attach to board representation, including observer rights, when assessing material influence.
- 4.6 Fourth, paragraphs 4.31 to 4.33 expand the scope of material influence to include financial dependency and commercial agreements. While we recognise that such arrangements may, in limited cases, confer material influence, the current drafting may be overly broad and could inadvertently capture ordinary commercial relationships. In particular, we are concerned that this approach could lower the threshold for material influence by:
- 4.6.1 suggesting that loan conditions or investment dependency could confer material influence based on "regular engagement" with management; and
- 4.6.2 including supply agreements or input sourcing arrangements as potentially conferring material influence, even where these are standard commercial terms.
- 4.7 We recommend that the CMA provide clearer thresholds for when financial or commercial arrangements will be considered relevant, and emphasise that such arrangements must genuinely affect the target's policy decisions, not merely reflect commercial interdependence.
- 4.8 Fifth, while the CMA's current guidance already allows for a non-exhaustive list of factors when assessing material influence, the Draft Revised Guidance introduces a new and

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explicit reference to "exceptional" additional factors. We recognise the value of flexibility in capturing novel or unusual circumstances. However, without further explanation, this new language risks creating uncertainty around the boundaries of the test. To support transparency and predictability, we recommend that the CMA provide illustrative examples of what might constitute "exceptional" circumstances and commit to applying the material influence test in a narrow, evidence-based manner, consistent with its statutory purpose.

5. Clarification on the CMA's approach to the SoS test

5.1 We welcome the CMA's intention to clarify its approach to the SoS test. Greater transparency and predictability in how the test is applied will give businesses greater confidence when assessing jurisdictional risk. We consider that there is an opportunity for the CMA to make further refinements in the final Guidance to ensure the test is applied in a manner that is both legally sound and proportionate.

5.2 Paragraph 4.64 of the Draft Revised Guidance states that the CMA will consider goods or services "relevant to the potential competition concern." We recommend that the CMA confirm in the final Guidance that:

5.2.1 there must be a sufficient prospect of a competition concern arising from an overlap in a relevant commercial activity to justify asserting jurisdiction, as held by the Competition Appeal Tribunal in *Sabre v CMA*²; and

5.2.2 the SoS test should not be used to manufacture jurisdiction by defining artificial or overly broad categories of goods or services that do not reflect the commercial reality of the transaction.

6. Changes to the CMA's approach to global mergers

6.1 We welcome the CMA's clarification that it may take into account merger control proceedings in other jurisdictions when deciding whether to investigate a global transaction. The distinction between mergers with UK-specific impacts and those involving exclusively global or broader-than-national markets is helpful and reflects the increasingly international nature of many transactions.

6.2 To build on this positive step, we suggest that the final Guidance could provide greater clarity on the criteria the CMA will apply when deciding whether to defer to other authorities. This would be particularly valuable in cases where the UK is not a primary market affected by the transaction, where remedies imposed elsewhere are likely to address any UK concerns, or where CMA intervention could risk duplicative or inconsistent outcomes. In such cases, we would welcome a general approach that recognises and complements the efforts of other credible authorities (e.g. the European Commission, US Department of Justice/Federal Trade Commission), supported by illustrative examples of where the CMA has chosen not to pursue a separate investigation due to effective oversight elsewhere.

6.3 We also encourage the CMA to clarify how it intends to proceed in situations where it adopts a "wait and see" approach but ultimately disagrees with the outcome reached by another authority. In such cases, the CMA may consider opening its own merger investigation at a later stage to pursue a UK-specific remedy. While we recognise the importance of protecting UK interests, greater transparency on how such decisions will be made, including the factors the CMA will consider, would help reduce uncertainty for merger parties and support more effective international coordination.

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² [2021] CAT 11, at paragraph 144. This is included in footnote 105 of the Draft Revised Guidance.