Merger jurisdiction and procedure – response to the CMA's consultation

A submission by Frontier Economics

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1 Frontier Economics is an economic consultancy that regularly advises clients on both national and European merger investigations, including a significant number of cases before the UK Competition and Markets Authority (CMA).

2 We welcome the CMA's consultation on proposed updates to its guidance regarding jurisdiction and procedures in merger cases. The CMA's proposals cover four key areas: (i) jurisdictional tests, (ii) the approach to global deals, (iii) processes during pre-notification and Phase 1 investigations, and (iv) the merger notice template. Regarding these four areas, we believe that:

(a) The proposed "wait and see" approach to global deals would mark a significant departure from the CMA's recent practice – particularly since Brexit, where it has played an active role in assessing such transactions. Whilst this new approach raises some questions which will need careful consideration, the CMA's aim of more pragmatic case prioritisation is highly worthwhile as it could lead to significant improvements of the merger review process on global deals.

(b) The CMA's proposals in the other three areas, while appearing relatively incremental, are likely to significantly improve aspects of the CMA's merger review process which have not always worked well in the past.

3 For both categories of changes, our response outlines our perspectives on the key challenges and potential benefits in implementing these changes.

1 "Wait and see" can achieve greater proportionality

4 The CMA has taken an active role in reviewing numerous global transactions where neither party was headquartered or primarily active in the UK, including high-profile cases such as Microsoft / Activision, Meta / Giphy, Sabre / Farelogix, Cargotech / Konecranes, Thermo Fisher / Gatan and Illumina / PacBio. In some of these cases,

the CMA was the sole authority to block the deals,[1] despite the relevant markets being transnational or global in nature.

5 The CMA's latest proposals suggest a shift towards a more pragmatic approach for transactions deemed "exclusively global" or "at least broader-than-national" in scope.[2] The proposals indicate a greater willingness to rely on actions taken by competition authorities in other jurisdictions to address concerns that may affect the UK market.

6 The CMA's proposals aim to adopt a more proportionate approach to global transactions. This could bring about significant benefits, such as reducing the burden of parallel filings for merging parties, streamlining the review process and mitigating the risk of diverging outcomes across jurisdictions. In genuinely global markets, there is a strong case for leveraging the capabilities and insights of other experienced competition authorities – a step that can enhance international coherence while preserving the CMA's ability to intervene where necessary.

7 To fully realise the benefits of this more pragmatic approach and ensure it is aligned with the CMA's "4P" principles (pace, predictability, proportionality and process), there are some key areas that it will be important to consider and clarify:

(a) How will the CMA determine whether a deal is "exclusively global"; and

(b) How will the CMA respond to the actions taken by other competition authorities if a transaction is deemed to be "exclusively global".

8 These questions are explored further below.

1.1 Identifying "exclusively global" deals

9 We welcome the CMA's intention to deprioritise global mergers without a significant UK-specific impact, but recognise that determining whether a deal is genuinely "exclusively global" presents practical challenges. Assessing relevant market definitions and competitive conditions within the UK often requires detailed economic analysis and case-by-case judgment, particularly where recent domestic precedent is limited or where authorities in other jurisdictions have reached different conclusions on market definition.[3]

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1 A restructured version of the Microsoft / Activision deal was subsequently accepted by the CMA (see here).

2 See paragraph 4.2, of the consultation document for guidance on the CMA's jurisdiction, procedure and merger notice.

3 For example, in Korean Air / Asiana, the CMA – following detailed market testing as part of its Phase 1 investigation – concluded that the market for air passenger services was national, whereas the market for air cargo services was

10 One possible approach for dealing with this would be to draw on existing wider precedent from the UK and, potentially, other jurisdictions that have previously investigated the relevant sector. However, the CMA would still need to give consideration to:

(a) Which precedents the CMA should consider reliable for its assessments and how it will consider divergent market definitions across authorities. This is particularly the case where an authority has not reached a formal conclusion on a particular point (for example, market definition) but has left the issue open as it is not determinative for the case;

(b) What criteria the CMA should use to determine when a precedent is no longer reflective of current market dynamics, particularly given that the speed at which this will occur will vary between sectors;

(c) How the CMA will scope its review where a transaction affects both global and national markets (e.g. whether it would investigate theories of harm relating to national markets but not global markets).

11 In such cases, caution may be warranted. Nonetheless, precedent can provide a useful starting point, potentially allowing the CMA to pursue a more targeted or proportionate investigation. This might involve, for example, a limited assessment to confirm whether there is any reason to believe that the market definition has materially evolved since the markets were last reviewed, and/or an investigation focused only on UK-specific theories of harm that fall outside the scope of review by other competition authorities. Further guidance on this would help increase predictability for all stakeholders.

1.2 Relying on actions of other authorities

12 In addition to the considerations around identifying which cases are exclusively global, it will also be helpful for the CMA to set out how it intends to approach cases where it chooses to adopt a "wait and see" strategy, relying on interventions by other authorities. It would be helpful to give consideration to:

(a) Timing and procedural alignment – clarifying whether and under what conditions the CMA will commit to relying on the decision of another authority, especially when timelines do not align with the CMA's statutory 4-month review period;

European in scope. The European Commission (EC), on the other hand, considered both passenger travel and air cargo markets to be European in scope.

(b) UK-specific factors – outlining how UK-specific factors will be addressed when other authorities do not have statutory powers to address them;[4]

(c) Statutory differences – setting out how the CMA will address situations where the CMA holds statutory powers which are not held in other jurisdictions (for example, in regard to minority shareholdings);

(d) Concerns raised by third parties in the UK – clarifying how these will be addressed if the CMA has chosen not to intervene;

(e) UK remedies – addressing how remedies will be handled in a UK context given that other jurisdictions may not have the legal power to impose remedies that address concerns in the UK as well as in their own jurisdictions, and the potential role of sectoral regulators in supporting any remedies may vary between jurisdictions.

13 Providing further clarity on these questions could support the more effective use of a "wait and see" approach, and help avoid potentially suboptimal outcomes, such as:

(a) extended timelines, particularly where the CMA initially holds back, but subsequently launches its own inquiry closer to the end of the statutory window;

(b) a scenario where other jurisdictions conclude their reviews without fully addressing competition concerns as they apply to the UK, leaving the CMA with limited scope to act if the statutory window has closed; and/or

(c) situations in which no authority reviews a transaction in global or transnational markets with UK relevance – for example, because the transaction does not meet the jurisdictional thresholds for other authorities to intervene and the CMA's window to act has expired by the time this becomes clear.

1.3 A potential way forward

14 We recognise and support the CMA's efforts to adopt a more proportionate and internationally coordinated approach to global mergers, but as noted above, there are some practical challenges that may need further consideration – in particular, the tension between taking a proportionate and flexible approach, but also ensuring predictability.

[4] The Nvidia / Arm case is a recent example of a case which was reviewed in many countries (e.g., the UK, the US, Europe, China, Japan, South Korea), and where the CMA's investigation considered important UK-specific factors including national security interests which may or may not have been reviewed in other jurisdictions.

15 As the CMA continues to refine its approach, it may be helpful to consider how existing mechanisms could be utilised to provide greater procedural certainty on deals that are likely to fall within the "exclusively global" category. For instance, two potential scenarios may arise where the CMA chooses to "wait and see":

- Scenario 1: where the CMA finds "exclusively global" or transnational markets and does not intervene; or
- Scenario 2: where the CMA identifies UK-specific issues and does intervene.

16 For Scenario 1, the key risk is the uncertainty about the test used by the CMA to determine whether the markets affected by a deal are exclusively global/transnational or give rise to UK-specific considerations. In addition to the steps suggested in Section 1.1 above, the CMA could consider voluntarily publishing details of the assessment it conducts in these cases, setting out the CMA's thinking behind why it chose not to intervene. Over time, this would build a collection of informal precedent, providing useful guidance for businesses and stakeholders and contributing to greater predictability and transparency.

17 For Scenario 2, the main risks relate to potential duplication of workload and delays caused by filings where the CMA intervenes late in its window for one or more of the reasons outlined in Section 1.2 above. Where appropriate and consented to by the merging parties, the CMA could rely on a streamlined or expedited Phase 1 process in such cases – similar to its existing fast-track procedure. Under this process, the CMA could conduct its Phase 1 review based on information already submitted to other competition authorities (or similar information). This would reduce the additional work for the merging parties on a separate UK-specific merger notice, provided that the merging parties grant necessary waivers and there is sufficient alignment in substantive issues under review. Importantly, this approach could also enable the CMA to align the remedies timelines with other authorities and focus its resources on where they are most impactful in these cases: the design and implementation of remedies to address UK-specific concerns. Since other authorities may not have the statutory powers to apply remedies that address concerns in the UK, the CMA's active involvement at the remedies stage may be essential to ensuring that any global solution effectively protects UK consumers.

18 Such steps would help the CMA safeguard effective competition for UK consumers, while reducing administrative burden and improving alignment with other jurisdictions. They would also support a better balance between proportionality and predictability, reduce the risk of unintended delays (pace), and enhance transparency and engagement (process).

2 Incremental improvements to CMA processes

19 The package of changes proposed by the CMA represents a welcome step in improving its processes during pre-notification. Many of the specific proposals should lead to tangible improvements in the experience of various stakeholders. For example:

(a) The introduction of the 40-working-day KPI to limit the pre-notification period – starting from when the merging parties submit a complete Draft Merger Notice (DMN) – would help improve predictability during this phase, which currently lacks statutory timescales or guidance. The proposed flexibility in how the KPI is applied may also encourage more proactive engagement between the CMA and the merging parties, particularly when managing complex cases.

(b) An informal update call during pre-notification could offer a valuable opportunity to discuss the case team's evolving thinking earlier in the process. Under the current process, merging parties receive feedback from the CMA at the State of Play call, which can occasionally feel delayed. An informal call in pre-notification could be especially useful in shaping the follow-up work that both the CMA and the merging parties undertake so that it is sharply focused on the CMA's concerns.

(c) Allowing merging parties to engage with the senior decision-makers earlier – e.g. at the teach-in during pre-notification rather than at the Issues Meeting for the first time – could materially improve the merging parties' experience of the process and provide more focus on the critical issues. It would help assure the parties that senior decision-makers have an early understanding of the business context – through the teach-in and subsequent RFI responses – and allow Issues Meetings to focus more effectively on the evidence gathered since that point.

(d) Publishing the CMA's case page during the pre-notification phase – as has been done in several recent cases – can enhance consistency of the CMA's outreach to third parties and provide greater clarity on the process for the merging parties.

20 Some of the other procedural changes outlined in the consultation may not lead to major shifts in the CMA's merger review process, but they nonetheless provide useful clarifications and refinements to existing practices. For instance:

(a) Further clarification of the share of supply test – specifically confirming that the CMA will apply standard metrics when assessing supply shares and focus its competitive assessment on markets where the threshold is met – will improve predictability.

(b) The CMA's commitment to publishing clearance decisions for straightforward cases by day 25, rather than day 35, is a welcome move to accelerate the merger review timeline. Although this change may not substantially affect the workload for merging parties – whose workload tends to be concentrated earlier in the process – it nonetheless reflects a constructive effort by the CMA to streamline timetables where possible.

(c) Including a small number of additional questions in the merger notice template could help consolidate the CMA's routine information requests during pre-notification, making the process more efficient for notifying parties.

21 Taken together, these proposed changes – alongside recent updates to the Phase 2 process and the CMA's ongoing review of its approach to remedies – represent welcome improvements to the merger review framework.

22 The CMA could take further steps to reform the pre-notification and Phase 1 processes. Based on our experience, two changes could have a meaningful impact:

(a) **Greater transparency in the CMA's third-party market testing.** Feedback collected by the CMA from third parties as part of its market testing is a key part of the Phase 1 assessment. Currently, merging parties may only receive a high-level summary of this feedback (as part of the Issues Letter or Phase 1 decision). Providing more details of the CMA's market testing – appropriately redacted to protect confidentiality or restricted to external advisors – would enable more targeted submissions from the merging parties that directly address the specific evidence that underpins the CMA's concerns. We believe that this could further enhance the quality of engagement with the CMA and, in some cases, could enhance both the pace and predictability of the merger process.

(b) **More engagement in the lead up to the Issues Meeting.** From the merging parties' perspective, the four working day period between receiving the Issues Letter and attending the Issues Meeting is a critical period for the merging parties to digest the CMA's findings and prepare a robust response. While tight timescales may be inevitable within a Phase 1 investigation, the current process could be improved by disclosing elements of the Issues Letter earlier. For example, the CMA could expand the role of the State of Play call such that it provides a fuller view of the CMA's emerging thinking – including details of the market testing as outlined above or sharing this information through more frequent (e.g. weekly) informal discussions during Phase 1.