SLAUGHTER AND MAY

31 July 2025

Slaughter and May response to CMA consultation
Draft revised guidance on jurisdiction and procedure and draft revised merger notice

1. Executive Summary

1.1 We welcome the opportunity to respond to the Competition and Markets Authority's (**CMA**) consultation on proposed updates to the CMA's guidance on jurisdiction and procedure (the **Draft Revised Guidance**) and the Merger Notice template (the **Draft Revised Merger Notice Template**).

1.2 We are supportive of the CMA's initiative to revise its guidance to embed the '4Ps' framework into its mergers processes, and consider that the Draft Revised Guidance largely does this successfully. However, there are some instances where the CMA could make certain additional changes in the final guidance (the **Final Guidance**) to further promote the '4Ps' (per Q7.4 of the consultation). In our response below, we provide specific comments on the key updates proposed in the Draft Revised Guidance and Draft Revised Merger Notice Template, and make suggestions as to where the CMA could further embed the '4Ps' in the Final Guidance.

2. Proposed changes relating to process

Pre-notification KPI

2.1 **We welcome the introduction of the 40 working day pre-notification KPI, which we agree is consistent with the CMA's '4Ps' framework. However, the Final Guidance should be tweaked to provide some clarifications and to ensure that the final revised Merger Notice template does not unnecessarily increase the burden on merging parties.**

2.2 We recognise that case teams need to receive certain minimum information before officially beginning pre-notification for it to be feasible to meet the pre-notification KPI. However, the Draft Revised Guidance increases the burden on businesses at this early stage both by requiring the parties to provide "*all supporting documents requested in the template Merger Notice or enquiry letter*" before pre-notification begins (emphasis added),[1] and by lowering the *de minimis* threshold for Relevant Markets for which documents must be provided from 15% to 10%.[2] Requiring all supporting documents to be provided upfront is both disproportionate – given that in practice, these documents are usually topped up during pre-notification in response to RFIs – and inconsistent with the requirement to provide only an "initial" response to each question; whilst the lowering of the *de minimis* threshold seems to be a step in the wrong direction and is not consistent with the '4Ps' framework. A more proportionate approach would instead be to require the parties to provide an initial set of supporting documents, whose scope could be agreed between the parties and the case team, which could be supplemented during the course of pre-notification (per the usual approach).

2.3 Further, in certain cases it may not be necessary or proportionate for the case team to receive (even initial) responses to *all* of the questions upfront, and the Final Guidance should clarify

[1] Draft Revised Guidance, para. 6.27.

[2] Draft Revised Merger Notice Template, Guidance note to question 9.

that the case team has discretion to waive this requirement before officially beginning pre-notification. The Draft Revised Guidance arguably recognises this already, in its statement that "*[i]n certain mergers, some of the information requested in the template Merger Notice may not be relevant (or may not be required to the full extent indicated in the guidance notes)*",[3] but the Final Guidance should make clear that this flexibility applies to the case team's decision officially to begin pre-notification. This would enable a less prescriptive approach, where the case team would consider early on what information was actually required, in each specific case, to begin pre-notification, and what information could be left out in the first instance. We have seen some indications already of case teams applying this flexibility in practice, and this should be embedded in the in the Final Guidance.

2.4 We otherwise foresee scenarios where there might be a temptation to delay officially beginning pre-notification by identifying minor "gaps" in the Merger Notice, meaning that the total time between first engaging with the CMA and beginning Phase 1 is not in fact reduced. It is this total time, and not the official pre-notification, that is relevant to businesses, and which the CMA must ensure is reduced in order to "*provid[e] certainty at pace for interested parties*" – as it pledges to do in the consultation.[4]

2.5 We agree with the proposed approach of providing an avenue to 'opt-out' from the pre-notification KPI. However, we expect that parties will decide to opt-out only rarely in practice, given that businesses are usually keen to obtain regulatory approval as quickly as possible, and opting out may be difficult to justify to stakeholders. The Final Guidance should clarify that any decision to opt-out would be kept confidential; indeed, it is difficult to envisage circumstances where parties would decide to opt-out if this decision were made public, since it would likely give rise to a (mis-)perception that the parties expected complex issues and/or remedies.

2.6 Although the Draft Guidance also provides the CMA with a power to disapply the KPI, this is (rightly) limited to "*exceptional circumstances […] where the conduct of the merger parties is wholly inconsistent with the Mergers Charter*".[5] We therefore expect in most cases that the KPI will apply. Whilst pace is important, and the KPI is a useful way to keep track of it, this should not come at the cost of engaging properly with the evidence and we can foresee circumstances where the complexity of the case may make it difficult to meet the KPI, despite all parties' best efforts. It would be helpful if the Final Guidance expressly acknowledged this. This would alleviate a concern that in such cases there might be a temptation unfairly to accuse the parties of failing to engage with the Mergers Charter (for example by sending the parties a lengthy RFI/document request mid-way through pre-notification with an unrealistically tight deadline), in order to disapply the KPI in circumstances where the parties were genuinely using their best efforts to engage with the CMA. Disapplying the KPI in such circumstances would be prejudicial to the parties (and in particular could have significant implications for listed parties), including because it would (wrongly) publicly indicate that they had wilfully failed to cooperate with the CMA.

[3] Draft Revised Guidance, para. 6.19.

[4] Consultation document, para. 5.2.

[5] Draft Revised Guidance ,para. 6.34.

Engagement with merger parties

2.7 **We fully agree with the CMA's statement in the consultation that "*pre-notification is most effective where it is accompanied by full and frank engagement with merger parties*",[6] and we support the CMA's initiatives in this area. However, we urge the CMA to be less prescriptive in the Final Guidance as to precisely what form this engagement might take.**

2.8 In particular:

(A) Teach-in: The Draft Revised Guidance explains that "*[e]arly in pre-notification the merger parties will be invited to provide a teach-in for the case team and senior staff […]. These meetings provide an opportunity for key commercial and operational staff from the merger parties to directly engage with the CMA case team. As such, the CMA expects the teach-in to include a presentation by the relevant business people, rather than by external advisers. The CMA may ask in advance for merger parties to present on particular issues of relevance and ask questions during the teach-in*".[7]

We agree that teach-ins can be very useful, particularly in complex cases, and welcome the inclusion in the Draft Revised Guidance of an invitation to a teach-in during pre-notification. However, the Final Guidance would better promote the '4Ps' framework – and in particular, a pacy and efficient process – if it provided for more flexibility as to the timing of the teach-in. In some complex cases, a teach-in might be most useful *before* pre-notification officially commences; whilst in others, it might be most useful slightly later in the process. Introducing an expectation that in all cases where a teach-in is held, the "*relevant business people*" will make a formal presentation in front of the decision-maker and be prepared to answer questions just one week after submitting the Merger Notice,[8] would be contrary to the proportionality principle, and would significantly increase the burden on businesses at an already demanding point in the process. In more complex cases in particular, such a tight timeframe might also make it difficult for attendees from the CMA fully to digest the Merger Notice in advance (which is important for a fruitful discussion).

(B) Additional update calls: The Draft Revised Guidance explains that "*[t]he case team will arrange informal update calls with the merger parties during pre-notification. Typically, one call will take place approximately 20 working days into pre-notification, with another shortly before commencing the formal investigation [...] these calls update merger parties on case progress, including areas of CMA focus and typically an overview of the initial feedback received from third parties, to assist the merger parties in preparing any submissions or remedies proposals*".[9]

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[6] Draft Revised Guidance, para. 5.17.

[7] Draft Revised Guidance ,para. 6.37.

[8] The Draft Revised Guidance does not specify this time frame, but process letters that our clients have received in recent cases have requested that the teach-in take place "*around 5 working days after submission of the initial draft merger notice*".

[9] Draft Revised Guidance, para. 6.38.

We welcome the inclusion of these update calls in the formal pre-notification process and consider this to be a positive step. In particular, our experience on recent cases has shown how helpful it is when the case team indicates at this early stage which areas they do *not* intend to pursue, as this enables the parties to dedicate resources to progressing the remaining key areas of inquiry. Here too, we urge the CMA to retain flexibility as to when these calls will take place, depending on the facts of the case. The Final Guidance should also clarify that in addition to these calls, the case team will provide updates on the direction of travel on an *ad hoc* and ongoing basis – for example, after having received and digested feedback from market participants (which may in some cases be some time after WD20, but significantly before the end of pre-notification).

Engagement with third parties

2.9 **We agree that "*gathering evidence from third parties is generally an integral part of pre-notification*",[10] but the Draft Revised Guidance should go further to ensure that case teams actually receive this input.**

2.10 The Final Guidance should specify that in addition to issuing an invitation to comment, case teams will proactively follow up with third parties to ensure that they receive the relevant input in time to digest it ahead of the update calls discussed above. Since input from third parties is critical in informing the case team's priorities for the investigation (as the CMA explains in the consultation),[11] ensuring that this input is received promptly would enable case teams to provide merging parties with well-informed updates which would improve the predictability of the process (consistent with the CMA's stated priorities).

Straightforward decision KPI

2.11 **We fully support the introduction of the 25-working day decision KPI in straightforward cases.**

New confidentiality colour-coding system

2.12 **The new colour-coding system is an issue for accessibility and is likely to cause mistakes to be made.**

2.13 The preamble to the Draft Revised Merger Notice Template stipulates a new colour-coding system to identify the parties' confidential information, which is already being used in some cases.[12] We understand the CMA's wish to standardise the colours used across its case load, but our experience in recent weeks has shown that the three colours chosen (turquoise, green and olive) are too close to one another, so that it is difficult to tell them apart. To avoid accessibility issues, we suggest the CMA adopt a different colour set (for example, yellow, turquoise and green – which in our experience are the colours most commonly used in practice

[10] Draft Revised Guidance, para. 5.21.

[11] Consultation document, para. 5.23.

[12] Draft Revised Merger Notice Template, para. 21.

and are essentially industry-standard). This would also help to avoid issues in dual-track cases where businesses are notifying transactions to both the CMA and European Commission. In particular, we see more scope for mistakes to be made with respect to confidentiality highlighting if businesses are compelled to use different colours for these two parallel notifications.

3. Proposed changes relating to global mergers

3.1 **The Final Guidance should clarify that the CMA will only intervene in a "wait and see" scenario in exceptional circumstances.**

3.2 The Final Guidance should recognise the significant impact that a late call-in in a "wait and see" scenario will have on a transaction, including the likelihood in many cases that it would have significant repercussions on the deal's timetable. Without fettering its discretion to call-in a merger within the four-month statutory period, the Final Guidance should provide more detail on the circumstances in which it would intervene in a "wait and see" scenario, and in particular should be explicit that the CMA will only intervene in exceptional circumstances. Failing to provide such a clarification would significantly reduce predictability for merging parties, and would likely result in an unfortunate scenario where parties unnecessarily choose to submit a Merger Notice to avoid their deal being called in later. This would increase the burden for both businesses and the CMA, and would also be contrary to the CMA's commitment to improving predictability for businesses. The CMA might adopt a similar approach here as it does with regard to briefing papers – retaining its discretion to call in a deal after indicating that it has no further questions, but rarely doing so in practice (only if new information emerges at a later stage).

3.3 The Final Guidance should also include a statement that the CMA will not open an investigation in a "wait and see" scenario in circumstances where it considers that the agreed remedy *does* address its competition concerns, but it wishes to enforce the remedy itself (which it could only do by opening an investigation and extracting the same remedy). This would give comfort to merging parties and should be uncontroversial given that such a course of action would be contrary to all four of the '4Ps'.

4. Proposed changes to clarify the jurisdictional tests

4.1 **The proposed clarifications to the jurisdictional tests are helpful, but the Final Guidance should go further to provide more bright-line, business-friendly guidance.**

Share of supply and material influence

4.2 We welcome the clarifications to the Draft Revised Guidance in respect of the CMA's approach to applying the 'material influence' and 'share of supply' tests. In particular, we support the deletion of both the reference to establishing 'share of supply' based on pipeline products,[13] and the line "*[w]hilst the share of supply used may correspond with a standard recognised by*

[13] The Revised Draft Guidance no longer contains the following line: "*Moreover, the CMA will take account of the life cycle of the supplies in question, noting that parties may have a material presence in the UK market by virtue of pipeline products or services, or other factors*" (current CMA2 Guidance, para. 4.64(c)).

the industry in question, this need not necessarily be the case" – which suggests that the share of supply used will now always correspond with an industry standard.

4.3 However, the Final Guidance should go further to provide more clear-cut and usable guidance to enable businesses to assess swiftly whether or not their deal will be caught. For example, the confirmation that shareholdings of less than 15% will only provide material influence "*in certain limited circumstances*" where there are "*significant*" other factors at play is a step in the right direction, but we urge the CMA to go further in the Final Guidance by limiting intervention in such cases to "exceptional circumstances" only.

Additional suggestions

4.4 In terms of whether there are any additional changes which would further contribute to promoting the '4Ps', we urge the CMA to provide further guidance on how to allocate turnover by geography in circumstances where the parties do not do this in the ordinary course of business, specifically in respect of the 'safe harbour' threshold within the 'share of supply' test.[14] In line with the CMA's commitment to the 4Ps and, in particular, to providing businesses with "*greater predictability over which deals fall within [the CMA's] jurisdiction*", it is critical that the Final Guidance provides enough information to enable parties (and the CMA itself) to determine quickly and with confidence how the CMA will calculate a party's UK turnover (in the delivery of both goods and services) so as to ascertain whether or not the 'safe harbour' applies. Without further guidance, relevant businesses may spend significant time and resources attempting to allocate their turnover according to various methodologies only for the CMA to adopt a different approach, which would be contrary to the 4Ps. Any further guidance on this should be consistent with the CMA's prioritisation of cases with a UK-specific impact.

[14] Whereby at least one of the enterprises ceasing to be distinct has a UK turnover of more than £10 million (as introduced by the DMCCA).