
**Response to the CMA's consultation on changes to its mergers guidance
on jurisdiction and procedure**

1 August 2025

I. Introduction

- (1) Weil, Gotshal & Manges (London) LLP (“**Weil**”) welcomes the opportunity to respond to the CMA’s consultation on changes to the CMA’s merger guidance on jurisdiction and procedure (the “**Guidance**”) and to the mergers notice template (the “**Consultation**”).
- (2) The proposed changes are intended to embed the CMA’s new ‘4Ps’ framework – pace, predictability, process and proportionality – into the UK mergers regime. In this regard, we welcome the efforts made to improve the process and transparency of the CMA’s merger investigations through increased engagement with merger parties. We are already seeing this implemented in live cases with enhanced and more effective interaction with case teams.
- (3) However, we also believe there are missed opportunities to meaningfully advance the 4Ps agenda through the proposed updates to the Guidance. In particular:
 - The updates regarding the CMA’s application of the ‘material influence’ and ‘share of supply’ tests largely reflect the CMA’s recent decisional practice, while retaining flexibility for the CMA to adopt a different approach where it sees fit. This does not enhance predictability. Indeed, it is the expansive approach taken in a number of the CMA’s recent decisions which led to widespread calls for change, due to the *unpredictability* this has created as to when the CMA might assert jurisdiction. We believe the CMA can and should go further to deliver on its intention to “*provide greater certainty over which transactions could meet the CMA’s jurisdictional thresholds*”.¹ Without a materially different approach, in our view the draft revised Guidance (“**Draft Guidance**”) emphasises the need for legislative change in this area.
 - The CMA’s commitment to streamline its pre-notification and Phase 1 processes by prioritising areas for further investigation as early as possible is welcome. However, we are concerned that the new 40 working day (“**WD**”) KPI for pre-notification could be rendered largely meaningless by the strict conditions the CMA proposes to lay down for commencing that 40 WD period. These conditions mean that companies and their advisors will continue to have little certainty how long pre-notification will take in any given case. Greater flexibility will need to be shown in practice than the Draft Guidance suggests.
 - We support the CMA’s intention to take a more proportionate approach to global mergers. However, the Draft Guidance provides little additional clarity on how this will be implemented in practice, with several important questions left open, such as: (a) how and when the CMA will inform the parties that their merger is one it believes is suitable for a ‘wait and see’ approach, and (b) the circumstances in which

¹ Consultation, paragraph 3.4.

the CMA may change its initial assessment. We would hope to see these issues addressed in greater detail in the final Guidance.

- (4) Finally, we note that the Draft Guidance contains proposed revisions which are not explained in the Consultation. Of particular concern is the proposal to remove the concept of “unilaterally” from the description of the *de facto* control test, potentially widening the scope of this type of control. This would significantly increase the unpredictability of the UK merger control regime and has no apparent justification.

II. Material influence and share of supply tests

- (5) The Draft Guidance contains a number of proposed changes in relation to the CMA’s approach to the ‘material influence’ and ‘share of supply’ tests, intended to provide greater predictability and “*certainty for businesses over which transactions fall within [the CMA’s] jurisdiction*”.² This is an area where greater predictability would be widely welcomed. However, we do not believe the changes consulted on materially further this goal.
- (6) When the CMA’s reform programme was announced in February the CMA stated it would “delineate” the CMA’s jurisdictional remit by updating the Guidance.³ We do not see this reflected in the Consultation. Rather, the main revisions to the Guidance are to include greater detail on the factors the CMA will typically take into consideration when assessing an acquirer’s ability to influence the policy of the target company. While these changes may better explain the CMA’s approach in applying the material influence test, they largely reflect the CMA’s existing decisional practice (as the Consultation acknowledges)⁴. This leaves considerable uncertainty as to whether the CMA will find material influence in any given case, in particular where a shareholding below 25% is acquired.
- (7) This is further amplified by wording in the Draft Guidance which makes clear the CMA may continue to deviate from the approach to the material influence test and share of supply tests set out in the Guidance where it sees fit to do so. For example (emphasis added):
- “*These are the factors generally considered by the CMA when assessing material influence...The list of factors is not exhaustive which means that the CMA can exceptionally consider additional factors*”.⁵
 - “*When considering other sources of material influence, the CMA will be more likely to consider these relevant when assessing the shareholding ranges detailed in paragraphs 4.21 to 4.24 above*”.⁶

² Consultation, paragraph 2.6.

³ “New CMA proposals to drive growth, investment and business confidence”, 13 February 2025.

⁴ Consultation, paragraphs 3.8 and 3.11.

⁵ Draft Guidance, footnote 45.

⁶ Draft Guidance, paragraph 4.31.

- “The CMA will *typically* only focus on the factors specified in the Act to determine whether the 25% threshold is met, for example value, cost, price, quantity, capacity and number of workers employed”.⁷

- (8) The proposed changes therefore simply codify the uncertainty arising from the CMA’s existing interpretation of the legislative tests. We see this as a missed opportunity. It is open to the CMA to go further within the existing legal framework, by revising how it exercises its discretion in applying the material influence and share of supply tests.
- (9) We offer some examples below of areas where greater clarity would be welcome to enhance the predictability of the UK regime. Providing clearer guidance on these points would preserve the CMA’s ability to intervene in exceptional cases while improving predictability in the vast majority of transactions. This would enable businesses and advisors to assess UK filing risk with greater certainty, reduce unnecessary transaction delays, and support confidence in the UK as a jurisdiction for investment and deal-making.

Share of supply test

- (10) Determining whether a transaction meets the share of supply test is often one of the most challenging and uncertain aspects of UK merger control for businesses and advisors. The difficulty of predicting how the CMA will define the relevant category of goods or services, and which factors it will apply, can cause significant delays, create unnecessary costs, and potentially deter investment. In our view, the CMA’s proposed changes, which state that the CMA will typically only focus on the factors specified in the Act – namely value, cost, price, quantity, capacity and number of workers employed – do not materially improve certainty for businesses and advisors in this regard.
- (11) While we recognize that all these factors feature in section 23 of the Enterprise Act 2002 (“Act”), only value (sales revenue) and quantity (units sold) are typically appropriate indicators of market presence and are the measures used by the CMA in reviewing the vast majority of transactions (through briefing papers or merger investigations). Given this, a more pragmatic and principled approach would be for the CMA to exercise its discretion to apply value and quantity as the default measures in assessing the share of supply test, reserving the other factors for exceptional cases with clear, specific justification. Alternatively, we would strongly encourage the CMA to provide clear parameters or illustrative examples showing when factors like capacity, cost, or employee numbers would be considered relevant, to promote consistency and predictability in assessments.
- (12) On a related note, we believe the CMA should clarify that substitutability considerations will guide the scope of the category of goods or services used for the share of supply test. While the Act does not require the jurisdictional test to apply to a relevant economic market, this clarification would ensure the share of supply test captures genuine competitive dynamics and aligns jurisdictional assessments more

⁷ Draft Guidance, paragraph 4.72.

closely with substantive competition analysis, enhancing legal certainty for merging parties. It would also be consistent with the additional clarification in the Draft Guidance that in determining the description of goods or services for the purposes of applying the share of supply test the CMA “*will consider those which are relevant to any potential competition concerns arising from the merger*”.⁸

Material influence

- (13) Given that the material influence test is a relatively low threshold for control, businesses have an increased need for certainty in how it will be applied in practice. However, the CMA’s attempts to clarify the factors it will take into account in applying the test in the Draft Guidance do not enhance predictability in any meaningful way.
- (14) We note, in particular, that the CMA’s description of financial agreements or arrangements which may confer material influence does not add any further clarity to the analysis. There is a description of “*commercial agreements*” which may result in a finding of material influence including if they “*compromise the ability of the target entity to make strategic commercial decisions through...explicit prohibition...consent rights*”,⁹ without any corresponding examples. The CMA also fails to cite other relevant types of agreements that it has taken into account in previous cases, such as the impact of and distinction in the analysis between exclusive or non-exclusive supply arrangements,¹⁰ further contributing to uncertainty on the specific types of agreements that may be considered relevant. The CMA could and should go further to spell out examples of how certain agreements will be analysed in practice to provide additional predictability and proportionality.

III. Process

- (15) As set out in our response to the CMA’s call for input on remedies¹¹, we are of the view that a fundamental change in the CMA’s approach to engaging with merging parties — from pre-notification onwards — has been required to secure more effective and proportionate outcomes.
- (16) We therefore welcome the CMA’s recognition that “*pre-notification is most effective where it is accompanied by full and frank engagement with merger parties*”, and are strongly supportive of the proposed changes to the Guidance involving: (i) the introduction of a teach-in session early in pre-notification as a matter of course; and (ii) informal update calls with the merging parties throughout the pre-notification process.
- (17) The key to the success of these changes is that both the CMA and merging parties deliver on the CMA’s expectation that this enhanced engagement be “*conducted in a full and frank manner*”.¹² We offer comments below on specific aspects of the CMA’s

⁸ Draft Guidance, paragraph 4.64.

⁹ Draft Guidance, paragraph 4.32.

¹⁰ *Amazon/Deliveroo; Google/Anthropic*.

¹¹ See Weil, Gotshal & Manges (London) LLP’s response dated 12 May 2025.

¹² Draft Guidance, paragraph 6.41.

proposals where we believe more could be done to improve the predictability of the CMA's process.

Pre-notification

- (18) We are encouraged by the CMA's efforts to improve the pace and proportionality of the pre-notification process. However, we are concerned that the introduction of a new 40 WD KPI for pre-notification will provide limited predictability in practice as a result of the strict conditions which the CMA has set out for the clock to start on the KPI. These conditions risk the KPI becoming primarily a statistic which the CMA reports against, with little practical relevance to merging parties.
- (19) In particular, the requirement that the initial draft Merger Notice be accompanied by "*all supporting documents requested in the Merger Notice template as annexes*" as well as "*all relevant third-party contact details requested in the Merger Notice template*" goes well beyond what is customary currently, whereby supporting documents (in particular internal documents) and contact details are provided in a staged manner. This requirement is particularly concerning given that in the same Consultation the CMA is proposing to *expand* the categories of documents requested under the Merger Notice template.
- (20) In practice, this requirement will provide case teams with ample scope to 'reject' a draft Merger Notice as 'incomplete', and therefore not sufficient to start the KPI ticking. We are concerned that, as a result, considerable time could be wasted over unnecessary back and forth between case teams and merging parties as to whether sufficient information and documents have been provided to start the KPI, rather than the CMA being open to agreeing a sensible, staged, approach. There is a risk that this effectively introduces a 'two-stage' pre-notification: (i) the first where the CMA asks the majority of its questions to ensure it can be satisfied that a draft Merger Notice is 'complete' while it is not 'on the clock', and (ii) a second 40 WD stage in which the CMA is subject to its KPI but has already undertaken the bulk of the work needed to prepare for its Phase 1 review.
- (21) We would therefore encourage the CMA to be less prescriptive in the Guidance, leaving greater room for case teams to take a more pragmatic approach which ensures that the CMA receives the information that is material to its assessment, while delivering the benefits of a more proportionate and expeditious pre-notification. Where merging parties engage constructively and provide information in a timely manner, the CMA should be willing to commence the 40 WD period before a full draft Merger Notice is provided, while retaining the ability to 'stop the clock' in exceptional circumstances if the merging parties repeatedly fail to engage with the CMA's additional information gathering.¹³
- (22) Finally, we note that while the Consultation makes clear that, as part of the CMA's efforts to streamline pre-notification, it is expected that merging parties "*will be*

¹³ Consultation, paragraph 5.13.

required to produce a reduced volume of internal documents and/or respond to fewer questions in requests for information”.¹⁴ We consider it would be helpful for the CMA to clarify that a shortened pre-notification period will also result in a more proportionate approach to information gathering from third parties (where relevant). In particular, information requests to third parties should be focused on key areas where third party evidence may impact the CMA’s substantive assessment. Suitable response periods should also be provided which reflect the fact that, unlike merging parties, third parties will typically be unprepared for such interactions with the CMA and unable to devote resources to handling information requests at short notice.

25 WD target for straightforward cases

- (23) The Draft Guidance does not provide any further clarity on how the CMA will apply its new 25 WD target to approve ‘straightforward’ cases. It is unclear what role this KPI is expected to have in circumstances where the CMA already applies an initial filter to mergers it will investigate using its Mergers Intelligence Function. Further clarity would be welcome on: (a) which cases the CMA will consider to be ‘straightforward’, and (b) when the CMA will inform the parties that it intends to issue a Phase 1 decision on an accelerated timeline (which is important for deal planning purposes).

IV. Global mergers

- (24) The additional clarity provided in the Draft Guidance on the CMA’s approach to multi-jurisdictional mergers is welcome, in particular the confirmation that the CMA is more likely to prioritise for investigation those mergers that “*have UK-specific impact, and which tend to involve local or national markets*”, as opposed to those which concern “*exclusively global (or broader than national) markets*”.¹⁵
- (25) It is clearly right that the CMA should deprioritise investigating mergers where investigations undertaken in other jurisdictions – and any remedies agreed or imposed as part of those processes – would address any UK concerns. However, the Draft Guidance leaves open a number of important questions which would benefit from further clarity:
- How, and as importantly *when*, the CMA will assess whether an investigation in one or more other jurisdictions would be sufficient to warrant deprioritising its own investigation of a merger. In particular, it is unlikely to be clear (either to the merging parties or the CMA) whether or what type of remedies might be imposed or agreed by international regulators for a significant period after deal announcement. In some cases this may be well into a formal merger review by another regulator. For the CMA’s reforms to have any impact, parties will require transparency as to whether the CMA will formally investigate their merger — and potentially require remedies of its own — much sooner. Otherwise a ‘wait and see’ approach will simply leave the parties subject to an

¹⁴ Consultation, paragraph 5.3.

¹⁵ Draft Guidance, paragraph 8.3.

open (and therefore commercially unacceptable) risk that the CMA may intervene at a later date. The statement in the Draft Guidance that the “*CMA may consider whether to open a formal investigation at any point before the expiry of the four-month statutory period, where for example, remedies in other jurisdictions do not fully eliminate any competition concerns relating to the UK*”¹⁶ does not assist in this regard. Further guidance is therefore required on how and at what stage the CMA will provide parties with comfort that it does not intend to prioritise a merger for investigation, and the circumstances in which that assessment might change. The Guidance should also make clear that such a late intervention would be exceptional, not something the CMA will consider as a matter of course.

- How the CMA will approach mergers which relate *predominantly*, but not *exclusively*, to global (or broader than national) markets. In our view, the CMA should be willing to take the same approach where the key areas of overlap between the merging parties relate to broader than national markets, even if there are a small number of national markets in which competition concerns are unlikely to arise.
- Similarly, there may be cases where despite markets being national in nature, remedies imposed or agreed in other jurisdictions would clearly be expected to address any UK-specific concerns (e.g. a divestiture remedy which incorporates the relevant business serving UK customers). For example, in *Microsoft / Activision Blizzard* the CMA considered national markets on a “cautious basis” while accepting that competition took place primarily on a global basis. At the same time, the CMA’s concerns were not based on any UK-specific aspects of the cloud gaming market. We would therefore recommend that the Guidance be revised to provide greater scope for the CMA to deprioritise investigating global mergers in a broader range of circumstances than the Draft Guidance currently envisages.

V. Changes to de facto control test

- (26) Finally, we note that the Draft Guidance introduces uncertainty to areas not covered by the Consultation. In particular, the proposed revisions include removing the concept of “*unilaterally*” determining a company’s policy from the description of the *de facto* control test, potentially widening the scope of this type of control.¹⁷ No justification or explanation has been provided for this change, which significantly increases the unpredictability of the UK merger control regime.
- (27) Where a company moves from material influence to *de facto* control, the CMA may re-investigate the merger - even if the previous acquisition of material influence was already reviewed. Increasing the uncertainty regarding the circumstances in which *de facto* control arises therefore creates substantial uncertainty for investors, which may

¹⁶ Draft Guidance, paragraph 8.5.

¹⁷ Draft Guidance, paragraph 4.34.

face the prospect of a new CMA merger investigation in relation to a long-standing minority investment. This change appears difficult to square with the '4Ps' framework.

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