Merger Assessment Guidelines

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1. Introduction

1.1 This publication explains the substantive approach of the Competition and Markets Authority (CMA) to its analysis when investigating mergers and supersedes the Merger Assessment Guidelines from 2010.[1]

Purpose of merger control and the CMA's role

1.2 The CMA's primary duty is to promote competition for the benefit of consumers. Part of this responsibility is to investigate mergers between organisations, to ensure that they do not result in a substantial lessening of competition.[2]

1.3 The protection of the welfare of consumers is at the heart of what the CMA does, including its role with regard to merger control.[3] Mergers have the potential to have a significant impact on consumers and their welfare, including an impact on the prices they pay for goods and services, and the range and quality of those goods and services that they have available to them. Consumers' interests are taken into account at every stage of the CMA's assessment of mergers, and is therefore implicit throughout these Guidelines, from considering the effect that any particular theory of harm might have on consumers, to weighing up relevant customer benefits that may arise as a result of a merger.[4] It is important that the CMA continues to adapt its approach to merger control as appropriate to ensure that it is fulfilling its statutory duty. It is also important that the CMA provides appropriate guidance to businesses considering entering into transactions which may have an impact on competition in the UK. It is with these two aims in mind that the CMA has produced these Merger Assessment Guidelines.

Background to these guidelines

1.4 While the CMA's role and the legal tests that it applies remain the same,[5] since the previous Merger Assessment Guidelines were published in 2010,

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[1] The Enterprise and Regulatory Reform Act 2013 established the CMA as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers.
[2] What amounts to a substantial lessening of competition is set out in further detail in Chapter 2 below.
[3] Of course, not all mergers involve businesses that are consumer-facing. In these guidelines customers of merger firms are sometimes used as proxies for consumers.
[4] The CMA will also have particular regard to vulnerable consumers and the extent to which they may be impacted by a merger.
[5] Further discussion of the standard of proof that the CMA will apply at Phase 1 and Phase 2 is provided in Chapter 2 below.

the UK economy has changed and with it the type of mergers that the CMA reviews. For example, digital technologies have changed, and will continue to change, the way goods and services are sold, delivered and used by consumers and the way that businesses compete. These changes have not introduced new theories of harm or economic principles in the field of merger control, but nevertheless require the CMA to consider carefully its approach to the assessment of mergers in such digital markets, to ensure that it is delivering on its duties to promote competition for the benefit of consumers. For example, in dynamic markets,[6] firms that may not compete head-to-head today might do so in the future. The threat of future disruption may inspire incumbent suppliers to improve their offer in the present, for the benefit of consumers. Fast-changing and evolving markets make predicting the future uncertain. The CMA needs to be prepared for these challenges and to be able to take effective decisions for the benefit of consumers.

1.5 To help it improve its decision making, the CMA continues to learn from various studies into its merger case work.[7] The Merger Assessment Guidelines also reflect the CMA's merger control casework, as well as the work undertaken by other teams within the CMA, such as the CMA's Market Studies and Market Investigations regime.

1.6 The courts of England and Wales have also clarified the meaning of some aspects of the applicable legislation since 2010. References to the relevant case law have been included in these Guidelines where appropriate.

1.7 In addition to the learnings from recent CMA cases and case law, as described above, the CMA has also benefited from the experience of other competition authorities around the world, as well as the large number of expert reports and academic literature that has been produced in recent years, including Unlocking digital competition, the Report of the Digital Competition Expert Panel, March 2019 (the Furman report);[8] and the Ex-post Assessment of Merger Control Decisions in Digital Markets, Final Report, May 2019 (the Lear report).[9] A theme in each of these reports is the risk of under-enforcement, particularly in relation to digital markets (including the loss of potential competition in these markets), by competition authorities such as the

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[6] Dynamic markets are typically those which are growing and/or evolving and in which competition revolves around bringing new and innovative products to market.
[7] For example, Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019; and KPMG, Entry and expansion in UK merger cases: an ex-post evaluation, April 2017.
[8] Unlocking Digital Competition: Report of the Digital Competition Expert Panel, March 2019.
[9] Ex-post Assessment of Merger Control Decisions in Digital Markets, Final Report, May 2019.

CMA. These two reports have suggested concrete changes to the CMA's Merger Assessment Guidelines to address this risk of under-enforcement.

1.8 Indeed, the Furman report noted that over the 10 years to 2018 the five largest digital firms have collectively made over 400 acquisitions globally. None has been blocked and very few have had conditions attached to approval, in the UK or elsewhere, or even been scrutinised by competition authorities.[10] The Stigler Center has noted that, in dealing with digital markets that have high levels of uncertainty and move quickly, competition authorities need to recalibrate how they assess some mergers because under-enforcement can be very costly.[11]

1.9 In light of all the valuable insights gleaned over the past 10 years, we have updated our Merger Assessment Guidelines in order to provide greater clarity and guidance to our merger work in future. The findings as set out in the reports referred to above have been carefully considered (and largely adopted) in the updates to these Guidelines.

1.10 In the years immediately following the introduction of the previous Merger Assessment Guidelines there were 70-100 Phase 1 cases a year. Over the past five years the number of Phase 1 cases reviewed has been around 55 to 65 per year. Despite this decline in overall case numbers, there has not been a corresponding decline in the number of mergers being referred for in-depth Phase 2 investigation (meaning a greater proportion of cases are referred for Phase 2 investigation). There has also been an increase in the proportion of cases requiring remedies (including prohibition and unwinding) at both Phase 1 and Phase 2. The large majority of cases that the CMA investigates are horizontal mergers, where the firms compete head-to-head. In recent years non-horizontal mergers have accounted for less than 20% of the CMA's Phase 1 cases.

Purpose of these guidelines

1.11 The Merger Assessment Guidelines are applicable to the CMA's Phase 1 and Phase 2 investigations. It is guidance that forms part of the advice and information published by the CMA under section 106 of the Enterprise Act 2002 (the Act).[12]

[10] Unlocking Digital Competition: Report of the Digital Competition Expert Panel, March 2019, page 12.
[11] Chicago Booth Stigler Center for the Study of the Economy and the State, Stigler Committee for Digital Platforms: Final Repot, 2019.
[12] A list of the CMA's Mergers Guidance (including these Merger Assessment Guidelines) can be found on the following webpage, and at Annex 2 to the CMA's Guidance on Jurisdiction and procedure (CMA2).

1.12 The CMA will have regard to the Merger Assessment Guidelines when conducting Phase 1 and Phase 2 investigations. The CMA will also follow relevant judgments of the Competition Appeal Tribunal (CAT) and other courts in its application of the merger provisions in Part 3 of the Act. However, merger assessment is inevitably case specific and must take account of the particular transaction and the markets being analysed. The methodologies employed in merger analysis should not be applied in a rigid and mechanistic way. The CMA will therefore consider each merger with due regard to the particular circumstances of the case,[13] including the information available and the time constraints applicable to the case. The particular analytical methods used by the CMA may vary across investigations, even across cases in the same industry. The review of any merger, particularly in fast-changing and evolving markets, will be largely case-specific. Whilst these Merger Assessment Guidelines provide a framework for merger analysis, the particular circumstances of a sector, market or business and the consumers who will be affected by the merger, are the critical factors in any case. The CMA will apply the Merger Assessment Guidelines flexibly, departing from them where it considers it appropriate to do so.[14] While past case references are included in the Merger Assessment Guidelines for illustrative purposes, decisional practice naturally evolves over time and the cases referenced will not constrain the approach of the CMA.

[13] *Ecolab Inc. v Competition and Markets Authority* [2020] CAT 12*,* paragraph 93: 'merger decisions of the CMA do not constitute precedents and it is axiomatic that each case turns on its own facts and that the characteristics of one market may be very different from those of another. Consistency is achieved by the CMA applying its statutory guidance…'.
[14] The CMA will typically set out its reasons for departing from guidance.

2. A substantial lessening of competition

What is an SLC?

2.1 If the CMA finds that a relevant merger situation has been created (or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation), it must decide whether the creation of that situation has resulted, or may be expected to result, in an SLC within any market or markets in the UK for goods or services.[15] Although the CMA is required to determine whether a merger it investigates will lead to an SLC, the term 'substantial lessening of competition' is not defined in the Act. How the CMA understands and typically applies the term is set out below.

2.2 The CMA views competition as a process of rivalry between firms seeking to win customers' business over time by offering them a better deal. Rivalry creates incentives for firms to cut price, increase output, improve quality, enhance efficiency, or introduce new and better products. This is because rivalry provides the opportunity for successful firms to take business away from competitors, and poses the threat that firms will lose business to others if they do not compete successfully.

2.3 In its merger assessments, the CMA will develop a general understanding of the competitive process, including of the competitive parameters that are most important to the process of competition in the relevant industry. The nature of competition may influence the theories of harm the CMA considers, or the frameworks it applies to assess it.

2.4 Both price and non-price aspects of competition are often important parts of the competitive process. In some cases, non-price competition may be the primary focus: for example, when customers do not pay a monetary price for consuming digital services or content, where firms compete mainly by innovating, or where prices are regulated.[16] The fact that customers do not

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[15] Sections 22 and 35 of the Act for completed mergers and sections 33 and 36 of the Act for anticipated mergers.
[16] Nevertheless, price may still be relevant in all of these cases, including when prices are zero. A price of zero may be higher than the price level that would prevail in the presence of greater competition if customers could plausibly be paid for access to their private data. Examples of cases where non-price competition was the primary focus include: Celesio AG/Sainsbury's Pharmacy Business, Experian Limited/Credit Laser Holdings (ClearScore) (Provisional Findings), Illumina Inc/Pacific Biosciences of California Inc. (Provisional Findings), and Future Plc/TI Media Limited.

pay a monetary price for a good or service does not preclude competitive effects from arising.[17]

2.5 The range of possible non-price aspects of competition that firms may use to win customers is wide, and terms such as 'quality' should be interpreted broadly. Examples might include, for example, staffing levels in store; speed and responsiveness to customer queries; the level of privacy offered to users of digital services; the benefits to users of a platform being able to interact with a large base of other users actively using the same platform; the reassurance afforded to customers by a well-known brand or good reputation; the sustainability of a product or service; and the ability to enjoy content without being served with advertisements. Innovation will play a key role in some merger investigations.

2.6 The CMA will consider any merger in terms of its effect on rivalry over time in the market or markets affected by it. When levels of rivalry are reduced, firms' competitive incentives may be dulled, to the detriment of customers.

2.7 Some mergers will lessen competition but not substantially so, because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. However, some mergers lead to a lessening of competition that is substantial. Since merger assessments are prospective, an element of judgement is necessary in deciding whether any loss of competition is substantial rather than any exact quantitative measurement.[18]

2.8 The CMA does not apply any thresholds to market share, number of remaining competitors or on any other measure to determine whether a loss of competition is substantial. The CMA will decide whether a loss of competition is substantial under the applicable legal standard.[19]

2.9 Substantial in the context of an SLC does not necessarily mean '*large*', '*considerable*' or '*weighty*' in absolute terms. Rather, it can encompass a

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[17] In Future Plc/TI Media Limited, the CMA considered the impact of the merger on the supply of technology websites on the readers of those websites. While readers of website content often do not pay a fee for consuming that content, websites can monetise readers' attention through advertising.
[18] The meaning of substantial lessening of competition is considered in *Global Radio Holdings Limited v CC* [2013] CAT 26, paragraphs 18 to 25. That the likelihood of an SLC varies with the facts of a case and is prospective is discussed in *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6, paragraphs 115 and 246.
[19] At Phase 1, the CMA must meet the 'realistic prospect' standard (paragraphs 2.33 to 2.34). At Phase 2, the decision is made on a balance of probabilities standard (paragraph 2.36).

range of meanings and will depend on the facts of the case.[20] A lessening of competition in a market (or in a particular segment of a market) may be considered substantial even if that segment or market is small in total size or value.[21] In considering whether a lessening of competition is substantial, the CMA may also take into account whether the market to which it applies is large or is otherwise important to UK customers,[22] or whether there is only limited competition in the market to begin with.[23]

2.10 While all merger assessments are prospective, there can be a higher degree of uncertainty in some markets, such as those characterised by potentially significant changes in competitive conditions. The CAT has previously held that all mergers should be assessed on a case-by-case basis to the same evidential standard regardless of the theory of harm being considered. There is, therefore, no special elevated evidential burden for particular theories of harm,[24] including theories of harm that involve changes in future competitive conditions. The fact that there may be some uncertainty in how the market is likely to develop in future is a relevant consideration, but may not be determinative. It does not, by itself, reduce the likelihood that a merger could give rise to competition concerns, and the presence of some uncertainty therefore does not in itself preclude the CMA from finding competition concerns on the basis of all the available evidence where the CMA is satisfied that the relevant standard of proof is met.

How an SLC might arise

2.11 The CMA assesses the potential competitive effects of mergers by reference to 'theories of harm'. A theory of harm is a hypothesis about how the process of rivalry could be harmed as a result of a merger. Theories of harm provide a framework for assessing the effects of a merger and whether or not it could lead to an SLC relative to the counterfactual.

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[20] The meaning of the word substantial in the context of an SLC is considered in *Global Radio Holdings Limited v CC* [2013] CAT 26; and *R v Monopolies and Mergers Commission ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23.

[21] For example, in Rentokil Initial plc/Cannon Hygiene Limited, the CMA found that an SLC would be likely to arise in relation to two segments within a more broadly defined market.

[22] In J Sainsbury's Plc/Asda Group Ltd., in assessing what may constitute 'substantial' for the purposes of its assessment of in-store groceries, the CMA had regard to the fact that groceries were a non-discretionary expenditure that accounted for a significant share of household spend.

[23] For example, in Celesio AG/Sainsbury's Pharmacy Business, the CMA found that regulation inhibited to some extent the degree of competition, but the amount of competition was still sufficiently significant that its loss would be a matter of concern.

[24] *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6, paragraph 114.

2.12 In formulating theories of harm, the CMA will consider how a merger might affect rivalry between firms seeking to win customers' business over time by offering them a better deal. The theories of harm will depend on the levels of the supply chain at which the merger firms operate; the links between the merger firms and with their rivals; the nature of competition and how firms go about winning customers from each other; and any long-run dynamics in the relevant sectors.

2.13 The theories of harm may also depend on the level of control that one merger firm is acquiring over the other.[25] For example, a theory of harm with respect to a firm that is acquiring material influence over another may be different – and require different analyses – to that involving a firm that is acquiring full legal control over another.[26] Although each level of control can encompass a range of shareholdings or other abilities to influence the target firm, in general the CMA will assess the merger on the basis of the specific shareholding or influence that results from the relevant merger situation. However, in some rare instances, if the CMA has evidence that a merger firm has another transaction in contemplation that will further increase its shareholding or influence in the target firm but still remain within the same overall level of control, the CMA may take that into account in its analysis of competition and any consideration of remedy options.[27]

2.14 The CMA will generally take a forward-looking approach to the assessment of any theories of harm, considering the effects of the merger both now, and in the future.

2.15 Theories of harm are commonly classified according to whether the merger in question is horizontal or non-horizontal. Horizontal mergers – discussed in Chapters 4, 5 and 6 – combine firms that are currently active, or absent the merger would be active in the future, at the same level of the supply chain and compete to supply products that are substitutable for each other. Chapter 4 discusses the possibility that horizontal mergers can give rise to unilateral effects from losses of existing competition, and Chapter 5 discusses unilateral effects from losses of potential competition. Chapter 6 discusses the possibility for coordinated effects as a result of a merger. Non-horizontal mergers – discussed in Chapter 7 – combine firms that offer products that are

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[25] See Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2 revised) for a discussion on the levels of control that exist under the Act.
[26] Amazon.com NV Investment Holdings LLC/Roofoods Ltd (Deliveroo).
[27] Section 29(2)(a)(ii) of the Act and Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2 revised), paragraph 4.42.

not substitutable but operate in related markets; for example, at different levels of the supply chain, or selling products that are complementary.

2.16 The theories of harm discussed in Chapters 4 to 7 are not exhaustive – the CMA may consider any theory of harm involving a potential SLC that could arise as the result of a merger. For some mergers, the CMA may consider several theories, sometimes affecting the same market.[28] The CMA may revise the theories of harm as its assessment progresses.

Examples of when a merger can result in an SLC

2.17 When considering whether a merger gives rise to an SLC, the CMA will consider the characteristics of each merger on a case-by-case basis. These Merger Assessment Guidelines discuss how the CMA approaches its assessment of mergers under its main theories of harm, which are whether a merger would lead to:

(a) the merged entity being able to profitably and unilaterally raise its prices, worsen its quality or service and non-price factors of competition, or reduce innovation efforts at one or more of the pre-merger businesses;

(b) coordination occurring between some remaining suppliers or becoming more stable as a result of the merger; or

(c) the foreclosure of rivals when the merger is between firms at different levels of a supply chain or when the merger is between firms in different markets which are nevertheless related in some way.

2.18 When considering whether a loss of competition is substantial under any theory of harm, the CMA will consider each merger on its merits. Given the case-specific nature of the competitive dynamics and evidence, it is not possible to provide a comprehensive list of scenarios of when the CMA will find an SLC. As such, the following are examples of scenarios in which the CMA may be more likely to find an SLC and do not constitute a threshold for the CMA finding (or not finding) an SLC:

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[28] These may include different effects on the same aspect of competition (for example, unilateral and coordinated effects on price), the same effects on different competitive aspects (for example, unilateral effects on price and on quality), or different effects on different aspects (for example, unilateral effects on price and coordinated effects on innovation). These theories of harm may apply over different time periods—for example, short-run unilateral effects on price and long-run coordinated effects on innovation.

(a) the merger involves the market leader and the number of significant competitors is reduced from four to three;[29]

(b) the merger firms are close competitors in a differentiated market;[30]

(c) absent the merger, one of the merger firms would have entered or expanded and could be expected to become a strong competitor to the other firm or would have made efforts to enter or expand and thereby threatened the other firm;[31]

(d) innovation is a key aspect of competition between the merger firms and the level or pace of future innovation or product development is threatened by a merger;[32]

(e) a merger prevents effective competition emerging in other markets or services, even if these markets or services are new or nascent at the time of the merger;

(f) a merger strengthens one or more of the conditions for coordination in a market which is susceptible to coordination or where there is evidence of pre-existing coordination; or

(g) when a merger between firms at different levels of a supply chain, or a merger between firms in otherwise related markets, is expected to lead to the foreclosure of one important rival.[33]

How the CMA assesses evidence

2.19 The CMA does not have a prescriptive list of evidence that it will take into account in its assessments. Instead, the CMA will in each case undertake reasonable evidence gathering, consider the relevant available evidence and decide the weight to place on that evidence in its decision-making. The

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29 *Tobii AB v Competition and Markets Authority* [2020] CAT 1, paragraph 353. The Competition Appeal Tribunal upheld the CMA's finding that the loss of competition could be expected to be substantial in a merger involves the market leader and the number of significant suppliers in a market is reduced from four to three. For the avoidance of doubt, this judgment does not preclude the CMA from finding an SLC in markets where there is a higher number of suppliers, for example if the merger reduced the number of suppliers from five to four.

30 For example, in both Ecolab Inc/The Holchem Group Limited and Hunter Douglas NV/247 Home Furnishing Ltd, the CMA found that the merger firms were close competitors in differentiated markets.

31 For example, the CMA considered the expansion of the merger firms in the Provisional Findings of Illumina Inc/Pacific Biosciences of California Inc.

32 For example, the Provisional Findings in Illumina Inc/Pacific Biosciences of California Inc and Experian Limited/Credit Laser Holdings (ClearScore) considered innovation as a key aspect of competition.

33 *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6, paragraph 114: 'It is clear that vertical mergers can and do raise competition concerns'.

evidence gathered and used will depend on factors such as the theories of harm being investigated, the nature of competition in the marketplace and what evidence is available. In general, after reasonable evidence gathering, where the evidence supporting competition concerns is strong at an early stage, especially if there is little evidence to the contrary, the CMA will expect to undertake less detailed further analysis in deciding whether there is an SLC.

2.20 The CMA must take reasonable steps to acquaint itself with the relevant information to enable it to answer each of the statutory questions including whether the merger will lead to an SLC.[34] Where the CMA has persuasive evidence of a particular proposition to answer a statutory question, there may be little additional value of gathering further evidence on the same proposition and evidence submitted on those points may need to be more persuasive to counter it. In considering appeals of CMA decisions, the CAT has said that it will not intervene merely because it considers that further inquiries would have been desirable or sensible, but will assess whether the CMA has a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did.[35]

2.21 The CMA also has a wide margin of appreciation in its use of evidence.[36] Given the case-specific nature of merger investigations, the CMA may apply different analytical methodologies and approaches in different cases.[37] In assessing the evidence, the CMA is not required to make precise predictions about the future such as whether any particular innovations will take place or whether a specific price rise or particular degrading of service quality will take place after a merger.[38]

2.22 Nor will the CMA normally quantify the expected loss of competition or detriment to customers. The CAT has confirmed that the CMA is not required to quantify any SLC, although there may be occasions when the CMA will estimate some quantification of the SLC or adverse effect.[39] Notwithstanding this position, any direct evidence that price increases, deteriorations in non-

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[34] *BAA Limited v Competition Commission* [2012] CAT 3, paragraph 20(3); *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1065B; *Barclays Bank plc v Competition Commission* [2009] CAT 27, at [24].

[35] *BAA Limited v Competition Commission* [2012] CAT 3, paragraph 20; *R v Royal Borough of Kensington and Chelsea, ex p. Bayani* (1990) 22 HLR 406, at 415.

[36] See *Société Coopérative de Production SeaFrance SA v CMA* [2015] UKSC 75 paragraph 44.

[37] *JD Sport Fashion plc v Competition and Markets Authority* [2020] CAT 24, paragraph 97.

[38] *BSkyB and Virgin Media v Competition Commission and BERR* [2010] EWCA. Civ 2, paragraph 69. See also *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6, paragraph 246.

[39] *Tobii AB v Competition and Markets Authority* [2020] CAT 1*,* paragraphs 392-393.

price competitive parameters or losses of innovation would occur as a result of the merger may be considered as evidence that the merger is likely to give rise to an SLC. However, the CMA is not required to separately assess the expected impact of a merger on each parameter of competition in order to identify an SLC.[40]

2.23 The CMA does not normally consider specific pieces of evidence in isolation when considering the question of an SLC, although it is common for the CMA to weight pieces of evidence differently.

2.24 The previous experience of the CMA is that the evidence it uses and the weights it attaches to different types of evidence evolve over time with the CMA's decisional practice. For example, the CMA has increasingly interrogated the merger firms' internal documents as a part of its merger investigations and has more closely scrutinised evidence on deal valuation, for example when considering losses of actual and potential competition or when seeking to understand the rationale for and synergies arising from mergers.[41]

2.25 In attaching weight to different pieces of evidence, there is no set hierarchy between quantitative evidence, such as consumer surveys or statistical or econometric analysis, and qualitative evidence, such as internal documents or the statements or conduct of market participants, and the CMA may attach greater weight to one or the other as appropriate in the circumstances, depending on the relative quality of such evidence.[42]

2.26 The CMA may take into account any evidence of an explicit intention on the part of the merger firms to take a particular course of action that would be consistent with an SLC, such as raising prices, foreclosing a rival, reducing their efforts to innovate, or to enter or expand in a market absent a merger. However, there is no requirement for the CMA to find any such direct evidence of explicit intentions, and the CMA will often rely on an assessment of the firms' economic incentives.

2.27 Merger assessments involve the CMA assessing the likely development of markets several years into the future. Some aspects of the CMA's assessment may be subject to a large degree of uncertainty. Whilst the degree of uncertainty will be appropriately weighted in the CMA's assessment of whether the relevant standard of proof is met, the presence of some

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[40] *JD Sport Fashion plc v Competition and Markets Authority* [2020] CAT 24, paragraphs 95-100.
[41] Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019; and Unlocking Digital Competition: Report of the Digital Competition Expert Panel, March 2019.
[42] *Aberdeen Journals v OFT* [2003] CAT 11, paragraphs 126-127.

uncertainty will not in itself preclude the CMA from concluding that the SLC test is met on the basis of all the available evidence.

2.28 In the context of sectors that are characterised by fast-moving technological and commercial developments or assessments of potential or dynamic effects that are particularly dependent on the evolution of competitive conditions, the types of evidence that are available to the CMA may be more restricted (for example, in many instances recent evidence from the pre-merger period will be a good indicator of future competitive conditions without the merger, however this is unlikely to be the case in nascent markets with dynamic effects). In such cases, the CMA may place particular weight on evidence such as internal documents, the expected number of competitors after the merger, similarities between the characteristics of the products or services that are under development, and the views and expansion plans of market participants. As with uncertainty, the absence of certain types of evidence such as historical data will not in itself preclude the CMA from concluding that the SLC test is met on the basis of all the available evidence assessed in the round.

2.29 The CMA will maintain an open mind regarding the assessment of evidence, including internal documents, in each case, and its interpretation of that evidence will be affected by the context in which it was generated. For example:

(a) Where internal documents support claims being made by merger firms or third parties that have an interest in the outcome of the CMA's investigation, the CMA may be likely to attach more evidentiary weight to such documents if they were generated prior to the period in which those firms were contemplating or aware of the merger, or if they are consistent with other evidence.

(b) In the context of completed mergers, the CMA may not attach weight to evidence that the merged entity has not changed its behaviour post-completion, as merger firms may have an incentive to delay any change in behaviour until the CMA has completed its investigation or is no longer able to investigate the transaction.

(c) The decision by a merger firm to enter or expand through a merger (ie inorganically) may supplant any efforts or plans the firm would otherwise have made towards organic entry or expansion. Therefore, when considering whether a merger firm may have entered or expanded absent the merger, the CMA may consider the incentives and ability of the firm to enter or expand and other available evidence. Where the CMA is satisfied that there is sufficient evidence of incentive and ability of a firm to enter or

expand, a lack of direct evidence of efforts or explicit entry or expansion plans made available to the CMA may not be sufficient to demonstrate that the firm would not have entered absent the merger.

(d) An absence of internal documents pointing to, for example, competitive interactions between the merger firms may not be probative if the merger firms do not normally generate documents in the ordinary course of business or where merger firms have document retention policies whereby documents are regularly deleted.

2.30 The CMA may also consider the purpose and effect of the internal document (for example, whether it was a document for the board or executive decision-making). When considering the weight to place on internal document evidence the CMA will consider that evidence alongside all of the evidence that it has.

Standard of proof

2.31 Under the UK's two-phase merger control regime, the CMA is required to apply different evidential thresholds when answering the statutory questions in the Act at Phase 1 and Phase 2. At Phase 1, the CMA applies a 'realistic prospect' threshold, whereas at Phase 2, the CMA applies a 'balance of probabilities' threshold.[43] The approach described in these guidelines is applicable to both phases of investigation.

2.32 When answering the statutory questions, it is not necessary for the CMA to assess whether the applicable evidential threshold is met at each step of the analytical process.[44] The standard of proof applies to the CMA's overall conclusions on the statutory questions which it has to decide, given the totality of evidence available to it.[45] Accordingly, the CMA may form a view that the SLC test is met based on a single theory of harm or based on several theories of harm affecting the same market.[46] At Phase 1, in keeping with the nature of the realistic prospect threshold (paragraphs 2.33 to 2.34), the CMA may find

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[43] The 'realistic prospect' formulation is shorthand for more complex statutory language. The Court of Appeal clarified the meaning of 'is or may be the case that … may be expected to result' used in sections 22 and 33 in its judgment dated 19 February 2004 in *IBA Health Limited v OFT* [2004] EWCA Civ 142.

[44] Clarity about the application of the threshold applicable to the CMA when answering the SLC question was provided by the Court of Appeal in *BSkyB and Virgin Media v Competition Commission and BERR* [2010] EWCA. Civ 2*,* paragraph 69. See also *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6, paragraph 246.

[45] *BSkyB and Virgin Media v Competition Commission and BERR* [2010] EWCA. Civ 2*,* paragraph 69.

[46] For example, the CMA may consider vertical foreclosure effects and horizontal effects affecting the same market.

that multiple theories of harm each individually give rise to the realistic prospect of an SLC (based on the requisite legal standard), even where the conditions under which those theories of harm may lead to an SLC are different (such that it would be unlikely for both theories of harm to materialise, and give rise to an SLC, at the same time).

Phase 1

2.33 At Phase 1, the CMA examines mergers that are notified to it and mergers in relation to which it decides to initiate an investigation.[47] The CMA has a duty to refer for further investigation in Phase 2 any relevant merger situation where it believes, objectively justified on the evidence, that it is or may be the case that the relevant merger situation has resulted or may be expected to result in an SLC.[48] If the CMA believes that the relevant likelihood of an SLC is greater than fanciful, but below 50%, it has a wide margin of appreciation in exercising its judgement whether to refer. At the end of its Phase 1 investigation, the CMA might clear a merger unconditionally, decide the test for reference is met and therefore refer the merger for Phase 2 investigation or accept undertakings in lieu of reference to remedy the competition concerns it has identified. [49]

2.34 The realistic prospect threshold at Phase 1 is intentionally a lower and more cautious threshold for an SLC finding than that applied by the CMA after more extensive investigation at Phase 2.

Phase 2

2.35 By law, Phase 2 inquiries are conducted by an inquiry group of independent panel members, supported by CMA staff. The inquiry group is the decision-making body for Phase 2 merger inquiries.[50]

2.36 At Phase 2 investigation, the inquiry group decides whether: (i) there is a relevant merger situation falling within the UK merger control regime, (ii) that relevant merger situation has resulted, or may be expected to result, in an SLC, and (iii) it should take action to remedy any SLC identified. At Phase 2, the CMA will apply a 'balance of probabilities' threshold to its analysis, ie is it

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[47] Further information on the CMA's mergers intelligence function can be found in the Guidance on the CMA's mergers intelligence function (CMA56).
[48] Sections 22 and 33 of the Act.
[49] Mergers: exceptions to the duty to refer (CMA64) and Merger remedies (CMA87).
[50] Section 34C of the Act.

more likely than not that an SLC will result?[51] The CMA must therefore form an expectation which has a higher level of probability than that required of the CMA at Phase 1. Phase 2 investigations are more in-depth than those carried out at Phase 1.

[51] The Court of Appeal has endorsed the approach of expressing an expectation as a more than 50% chance, *IBA Health Ltd v OFT* [2004] EWCA Civ 142, paragraph 46.

3. The counterfactual

What is the counterfactual?

3.1 Applying the SLC test involves a comparison of the prospects for competition with the merger against the competitive situation without the merger. The latter is called the 'counterfactual'.[52] The counterfactual is not a statutory test but rather an analytical tool used in answering the question of whether the merger gives rise to an SLC.[53]

3.2 The counterfactual may consist of the prevailing, or pre-merger, conditions of competition, or conditions of competition that involve stronger or weaker competition between the merger firms than under the prevailing conditions of competition.[54] The appropriate counterfactual may increase or reduce the prospects of an SLC finding by the CMA.

3.3 The CMA's conclusion on the counterfactual does not seek to ossify the market at a particular point in time. For example, an assessment based on the prevailing conditions of competition might reflect that, absent the merger under review, a merger firm would have continued making investments in improvements, innovations or new products.

3.4 Only events that would have happened in the absence of the merger under review—and are not a consequence of it—can be incorporated into the counterfactual.[55]

3.5 The CMA will not use as a counterfactual a competitive dynamic that involves violations of competition law, eg a cartel.[56]

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[52] Developments which have arisen or are likely to arise as a result of the merger will not form part of the counterfactual assessment but will be examined as part of the competitive assessment.
[53] Because of the particular nature of rail franchises, the CMA's approach to the counterfactual in rail franchises is set out in its rail franchise guidance: Rail Franchise Mergers: review of methodologies and guidance.
[54] The conditions of competition before a merger in anticipated acquisitions are generally referred to as the 'prevailing conditions of competition' and in completed acquisitions as 'pre-merger conditions of competition'. The discussion of the counterfactual in these guidelines is equally applicable to both anticipated and completed acquisitions and therefore the terms 'pre-merger' and 'prevailing' are interchangeable.
[55] For example, if the merged entity has plans to close down stores or redirect investment funding after the merger but such actions would not have occurred without the merger, then the CMA would not incorporate these in the counterfactual.
[56] For example, in Fenland Laundries Limited/Fishers Services Limited, the CMA considered whether a JV agreement contained horizontal partitioning of the market. In that case, the CMA found that it was not clear that the JV agreement infringed competition law and the CMA did not disregard the existence of the JV agreement in its counterfactual analysis (paragraph 29).

The CMA's approach to the counterfactual

3.6 In determining the counterfactual, the depth of analysis in the CMA's assessment is usually not to the same level as in its competitive assessment. Indeed, in many cases the counterfactual assessment is likely to be brief, although this will vary across cases.

3.7 The counterfactual is not intended to be a detailed description of the conditions of competition that would prevail absent the merger. Those conditions are better considered in the competitive assessment.

3.8 The counterfactual assessment will often focus on significant changes affecting competition between the merger firms, such as entry into new markets in competition with each other, significant expansion by the merger firms in markets where they are both present, or exit by one of the merger firms.[57]

3.9 Moreover, the CMA is likely to only focus on significant changes where there are reasons to believe that those changes would make a material difference to its competitive assessment. For example, where a firm that is being acquired could, in the counterfactual, have remained an independent competitor by raising external funding, or alternatively could have remained an independent competitor by being acquired by a firm with no current or potential activities in the relevant sector, the CMA would be unlikely to seek to consider the relative likelihood of those scenarios arising since both lead to the same conditions of competition. The CMA will generally conclude on the counterfactual conditions of competition broadly – that is, prevailing or pre-merger conditions of competition, conditions of stronger competition or conditions of weaker competition. If two or more possible counterfactual scenarios lead to broadly the same conditions of competition the CMA may not find it necessary to select the particular scenario that leads to its counterfactual.[58]

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[57] See for example PayPal Holdings Inc/iZettle AB.

[58] For example, in Rentokil Initial/Cannon Hygiene, the CMA considered that absent the merger the target firm would have been sold to another purchaser but did not consider it necessary to specify which of the alternative bidders would have been most likely to acquire it since any of the alternative bidders would have resulted in pre-merger conditions of competition. In PayPal Holdings Inc/iZettle AB, the CMA did not consider it necessary to assess the likelihood of each alternative scenario occurring since the most likely counterfactual was that PayPal would have sought to improve its offline payment service capabilities through one, or a mix of, the potential scenarios. In BT Group plc/EE Limited, the merger took place when a parallel merger was being assessed by the European Commission. In that case the CMA considered a counterfactual of the prevailing conditions of competition was appropriate given the most likely scenario was that either the parallel transaction did not proceed, or the European Commission would require remedies in clearing the merger.

3.10 Significant changes affecting competition from third parties which would occur with or without the merger (and therefore form a part of the counterfactual) are unlikely to be assessed in any depth as part of the CMA's counterfactual assessment. This includes entry or expansion by a third party. Likewise, where there is evidence to indicate that entry and/or expansion may be likely in reaction to any adverse effects from the merger, this will be considered in the countervailing factors part of the CMA's SLC assessment (Chapter 8).

3.11 The CMA seeks to avoid predicting the precise details or circumstances that would have arisen absent the merger. For example, the CMA might assess, as part of the counterfactual, the likelihood that one of the merger firms would have entered or significantly expanded (see paragraph 3.17), but not the precise characteristics of the product or service it would have introduced or the level of sales it would have achieved. Similarly, the CMA (at Phase 1 or Phase 2) will not have as its counterfactual a sale of the target firm to a purchaser that is likely to result in a referral for an in-depth Phase 2 investigation, given the uncertainty over whether such an acquisition would, ultimately, be cleared or subject to subsequent remedial action.[59] In this scenario, the counterfactual will often be the prevailing or pre-merger conditions of competition.

3.12 In its assessment of mergers at Phase 1, the CMA is required to assess whether the merger creates a realistic prospect of an SLC. While the counterfactual is not a statutory test, the 'is or may be the case' standard in the Phase 1 SLC test also has implications for its approach to the counterfactual. In Phase 1 investigations, if the CMA must consider multiple potential counterfactual scenarios where each of those scenarios is a realistic prospect, it will choose the one where the merger firms exert the strongest competitive constraint on each other, and where third parties exert the weakest competitive constraints on the merger firms.

3.13 At Phase 2, the CMA has to make an overall judgement as to whether or not an SLC has occurred or is likely to occur.[60] To help make this assessment the CMA will select the most likely conditions of competition as its counterfactual against which to assess the merger. In some instances, the CMA may need to consider multiple possible scenarios before identifying the relevant

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[59] This is consistent with the CMA's approach to considering competing bids in the counterfactual (paragraphs 3.37-3.39). See also the Final Report in Bauer Media Group/Celador Entertainment Limited/Lincs FM Group/Wireless Group Limited/UKRD Group Limited, paragraph 16 and the Final Report in PayPal/iZettle at paragraph 7.37.

[60] '[it] is not necessary for the [CMA] to isolate each step in the analytical process and to apply the balance of probability separately at each stage [of the SLC assessment]', *BSkyB and Virgin Media v Competition Commission and BERR* [2010] EWCA. Civ 2*,* paragraph 55.

counterfactual (eg a merger firm being purchased by alternative acquirers). In doing this, the CMA will consider whether any of the possible scenarios make a significant difference to the conditions of competition and, if any do, the CMA will find the most likely conditions of competition absent the merger as the counterfactual.

3.14 Establishing the appropriate counterfactual to assess the merger against is an inherently uncertain exercise and evidence relating to future developments absent the merger may be difficult to obtain. Uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual. As part of its assessment, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger firms to pursue alternatives to the merger, which may include reviewing evidence of specific plans where available.[61]

3.15 The time horizon that the CMA considers when describing the counterfactual will depend on the context. In some markets, relevant developments may not take place for some years while in others the relevant time horizon for the counterfactual will be shorter.[62] For example, when considering entry by a merger firm, becoming successful can take longer than two years in some instances (although the CMA will maintain a reasonable period).[63] In contrast, the time horizon over which a firm may exit the market could be significantly shorter than two years. The time horizon for considering the counterfactual will be consistent with the time horizon used in the CMA's competitive assessment (for example, but not exhaustively, entry or expansion by third parties and whether a merger is expected to result in efficiencies).

3.16 Three specific examples of situations where the CMA may use a different counterfactual which are discussed below are:

(a) entry or expansion by one of the merger firms;

(b) the exiting firm scenario; and

(c) where there are competing bids.

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[61] PayPal Holdings Inc/iZettle AB.

[62] The CMA considered the relevant time horizon for the counterfactual in PayPal Holdings Inc/iZettle AB; and Amazon.com NV Investment Holdings LLC/Roofoods Ltd (Deliveroo).

[63] For example, Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019.

Entry or expansion by one of the merger firms

3.17 The CMA will consider whether the counterfactual situation should include the entry by one of the merger firms into the market of the other firm or, if already within the market, whether the firm would have expanded had the merger not taken place. One example of when this is likely to be relevant is where one merger firm is a start-up company or newly active in a market. Another example is where an established firm decides to enter a new market through acquisition, where it otherwise would have invested in organic entry by developing its own product or service.[64] In both scenarios, a merger may eliminate potential competition between the firms.

3.18 The CMA will consider evidence on the likelihood of the merger firms' entry or expansion. This may include direct evidence of their intentions to enter or expand, which could include their broader commercial strategy and the rationale for the merger.[65] The CMA may also take into account any history of entry into closely related markets. Responses by existing competitors to the threat of entry or expansion by the merger firms may also be relevant to the likelihood it will occur. Further, the CMA may consider evidence on the ability and incentive of merger firms to enter or expand in competition with each other.[66]

3.19 The CMA will consider the timeliness and strength of entry or expansion (and whether, taking this into account, it would be sufficient for the merger would give rise to an SLC) in its competitive assessment.[67] In markets which have a lengthy but prescribed set of steps to go through in order to develop products, get regulatory approval and supply them to customers, for example, the period for considering entry may be longer than it would otherwise be. Notwithstanding this, entry would also have to be sufficiently likely in those circumstances.

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[64] The CMA considered the prospect of entry by the acquiring firm in Illumina Inc/Pacific Biosciences of California Inc.

[65] The CMA considered the intention of the merger firms to enter or expand, including their broader commercial strategy and rationale for the merger, in Amazon.com NV Investment Holdings LLC/Roofoods Ltd (Deliveroo).

[66] In PayPal Holdings Inc/iZettle AB, the CMA considered PayPal's incentives to improve its offline payment services capabilities absent the merger, in light of evidence on the importance of these services to customers, PayPal's valuation of the synergies it would realise from the ability to cross-sell offline services, and the resources available to PayPal to pursue such expansion. See also, Amazon.com NV Investment Holdings LLC/Roofoods Ltd (Deliveroo), where the CMA considered whether, absent the merger, Amazon would choose to re-enter the supply of online restaurant platforms in the UK.

[67] See, for example, paragraph 4.15 or Chapter 5 on potential competition.

3.20 Where the CMA's competitive assessment considers a loss of dynamic competition (see paragraphs 5.17 to 5.24) where the merger firms compete by making efforts or investments towards entry or expansion (or respond to such efforts made by potential entrants), the CMA may not conclude in the counterfactual on whether entry or expansion would ultimately occur, but rather may conclude on whether or not such efforts would have continued absent the merger.

The exiting firm scenario

3.21 The CMA may consider whether, absent the merger, one of the merger firms is likely to have exited the market.[68] In forming a view on an exiting firm scenario, the CMA, in both its Phase 1 and Phase 2 investigations, will use the following framework of cumulative conditions:

(a) the firm is likely to have exited (through failure or otherwise); and, if so

(b) there would not have been an alternative, less anti-competitive purchaser for the firm or its assets to the acquirer in question.

3.22 The exiting firm scenario is most commonly considered when one of the firms is said to be failing financially. However, exit may also be for other reasons, for example because the target firm's corporate strategy has changed.

3.23 For the CMA to accept an exiting firm argument at Phase 1, it would need to see compelling evidence that it was inevitable that the considerations listed in paragraph 3.21 would be met. At Phase 2, the CMA will consider what is most likely. Where the CMA concludes that one of the merger firms would exit absent the merger and there would have been no alternative, less anti-competitive purchaser for the firm or its assets, it will not find an SLC.

3.24 When considering any exiting firm argument, the CMA will usually attach greater weight to evidence that has not been prepared in contemplation of the merger. It may be particularly important in the context of an exiting firm scenario for the CMA to understand the rationale for the transaction under review (ie to consider why the purchaser is acquiring a firm or its assets in the context of claims that it would have exited from the market).

[68] The CMA has considered the exiting firm scenario in, for example, East Coast Buses Limited/First Scotland East Limited; Poundland Group plc/99p stores Limited; Chemring Group plc/Wallop Defence Systems Limited; Alliance Medica Group Limited/IBA Molecular UK Limited; and Amazon.com NV Investment Holdings LLC/Roofoods Ltd (Deliveroo).

3.25 If the CMA finds that the merger firm would not be likely to exit absent the merger, it does not follow that it may instead decide that the firm would be a weaker competitor in the counterfactual. However, if the CMA does consider that the firm will be a weaker competitor in the future it is likely to assess the strength of competition between the merger firms in its competitive assessment.

Limb 1 – likelihood of exit

3.26 The first question the CMA will consider is whether one of the firms would have exited the market absent the Merger.

3.27 The CMA is likely to be mindful that if a firm has entered administration, although the financial position of the firm would be serious, being in administration may not be sufficient to demonstrate that exit is inevitable or likely.

3.28 Where a firm may be exiting because of financial failure, consideration is given both to whether the firm is unable to meet its financial obligations in the near future and to whether it is unable to restructure itself successfully. In practice, the CMA will carefully examine the firm's profitability over time, its cash flows and its balance sheet in order to determine the profile of assets and liabilities.[69] It may consider the action the management has taken to address the firm's position and will review contemporaneous internal documents such as board minutes, management accounts and strategic plans.[70] The CMA will also typically request and consider contemporaneous analysis provided by external legal, financial and insolvency advisers, as well as external auditors, in relation to the position of the company.[71] The CMA may also request evidence from the company's debt or equity providers, such as the banks that provide its financial facilities. If the firm is part of a larger

[69] For example, in Poundland Group plc/99p stores Limited, the CMA rejected the exiting firm scenario after an in-depth Phase 2 investigation and following a detailed assessment of the financial and operational performance of the target 99p. The CMA's review of Chemring Group plc/Wallop Defence Systems Limited also contained detailed assessment of Wallop's profitability and balance sheet.
[70] See for example, the CMA's assessment of Limb 1 in East Coast Buses Limited/First Scotland East Limited; Poundland Group plc/99p stores Limited; and Chemring Group plc/Wallop Defence Systems Limited.
[71] In Alliance Medical Group Limited/IBA Molecular UK Limited, the CMA considered (amongst other factors) the financial due diligence carried out by PwC and the analysis of the performance of IBA by the Monitoring Trustee.

corporate group, the CMA will also consider the parent company's ability and incentive to provide continued financial support.[72]

3.29 A merger firm may exit for strategic rather than financial reasons absent the merger. The CMA would need to be satisfied that the business would have ultimately exited for strategic reasons unrelated to the transaction in question.

Limb 2 – alternative purchasers

3.30 When considering if there were alternative purchasers, the CMA will seek to identify who the alternative purchaser(s) might have been and take this into account when determining the counterfactual. The CMA may consider the marketing process for the target firm as well as offers received for it.[73] The CMA will not restrict its analysis to alternative purchasers who were willing to pay the same or similar price that was agreed in the merger under investigation, but rather if there was an alternative purchaser willing to acquire the firm at any price above liquidation value.[74] Importantly, the CMA will consider alternative purchasers that would have operated the business as a competitor.

3.31 If the CMA considers that a more competitive realistic counterfactual or the most likely counterfactual (as applicable) would have involved an alternative purchaser for the firm or its assets, it will conduct its analysis of the impact on competition of the merger on the basis of that counterfactual (ie whether the effect of the merger under review would be substantially less competitive than the effect of an acquisition by that alternative purchaser).

3.32 Where there are multiple alternative purchasers, including one or more which is not active in the same markets as the exiting firm, the CMA will normally consider the most likely counterfactual to involve the target being under independent ownership that maintains (or, in some instances, increases) the competitive constraint of the exiting firm.[75] As set out above (see paragraph 3.6), the depth of analysis undertaken by the CMA with respect to the

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[72] In Chemring Group plc/Wallop Defence Systems Limited, the CMA found that limb 1 had not been met because the parent company would have been able to provide continued financial support to the target business that was experiencing financial difficulties.

[73] In Chemring Group plc/Wallop Defence Systems Limited, the CMA considered the sales process undertaken and the acceptability of alternative offers received.

[74] In East Coast Buses Limited/First Scotland East Limited the CMA concluded that an operator should not be considered as offering a realistic prospect of being a less anti-competitive purchaser as the operator's estimate of the value to it of the depot alone (without the employees associated with it) would have fallen considerably below the liquidation value of the property.

[75] In Euro Car Parts Limited/Andrew Page Limited, the CMA adopted the alternative purchaser that was not present in the market, over alternative purchasers that were already present.

counterfactual will not be at the same level of detail as the competitive assessment and the CMA will not conduct a full competitive assessment of each alternative purchaser. In an assessment of the competitiveness of the exiting firm (or its assets) under different alternative purchasers, the CMA may therefore only differentiate between purchasers when this could make a material difference to competitive conditions.

Competing bids

3.33 Where there is more than one bidder with an active or 'live' bid for a target business at the time of the CMA's assessment, the CMA will examine each competing bid separately, if the CMA has jurisdiction to do so.[76]

3.34 At Phase 1 the CMA will consider whether each proposed merger would create a realistic prospect of an SLC as against the scenario in which competition between the merger firms is strongest, as long as it believes that scenario is realistic. Such a scenario will not include competing bids.

3.35 At Phase 2 the appropriate counterfactual will depend on the circumstances of the case. If only one merger is referred, the counterfactual used by the CMA may be the prevailing or pre-merger competitive situation or the sale of the target firm to one of the alternative purchasers.

3.36 If two or more merger situations involving competing bids are referred for Phase 2 investigation, but there are other merger situations involving other bids that are not, the counterfactual is more likely to involve a merger that is not referred than one of the referred mergers or the prevailing conditions of competition.

3.37 The CMA will not take into account the possibility of remedies being implemented to address competition concerns raised by the alternative mergers, ie a sale to a 'remedied bidder' would not become the counterfactual situation.

3.38 Where mergers involving all the bids are referred, the counterfactual will often be the prevailing or pre-merger conditions of competition.

[76] Considering alternative bidders may be relevant in other counterfactual considerations. For example, see the discussion on the exiting firm scenario and footnote 55.

4. Horizontal unilateral effects

4.1 Unilateral effects can arise in a horizontal merger when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity profitably to raise prices or degrade non-price aspects of its competitive offering (such as quality, range, service and innovation) on its own and without needing to coordinate with its rivals.[77] Unilateral effects giving rise to an SLC can occur in relation to customers at any level of a supply chain, for example at a wholesale level or retail level (or both), and is not limited to end consumers.

4.2 The competitive constraint eliminated by a merger may be an existing constraint, or a potential or future constraint. The following sections discuss the CMA's approach to losses of existing competition, including issues relating to differentiated products (including two-sided platforms and local mergers) and undifferentiated products.[78] The assessment of mergers involving losses of potential competition is discussed in Chapter 5.

4.3 Horizontal unilateral effects are the most common type of theory of harm that gives rise to competition concerns in mergers considered by the CMA. While the following sections discuss the theory of harm in greater detail, the concern under horizontal unilateral effects essentially relates to the elimination of a competitive constraint by removing an alternative that customers could switch to. The CMA's main consideration is whether there are sufficient remaining good alternatives to constrain the merged entity post-merger. Where there are few existing suppliers, the merger firms enjoy a strong position or exert a strong constraint on each other, or the remaining constraints on the merger firms are weak, competition concerns are likely. Furthermore, in markets with a limited likelihood of entry or expansion, any given lessening of competition will give rise to greater competition concerns.

4.4 One way in which the CMA may assess whether there are sufficient remaining alternatives is through a consideration of measures of concentration. Concentration can be measured in different ways, and the relevance of different measures to a given assessment will depend on the specific circumstances of a case. Measures of concentration might include, for example: shares of supply (by volume, by value, of capacity, or other

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[77] In these guidelines, the CMA may use 'price' as shorthand for other forms of competitive parameter, including quality, range, or service. For example, instead of raising prices post-merger, a merged entity may find it profitable to degrade quality, reduce range or lower service levels.

[78] The large majority of mergers that the CMA examines involve products or services that are differentiated along at least some dimensions.

measures), counts of the number of competitors, or the Herfindahl-Hirschman Index (HHI).[79]

4.5 While the following sections discuss certain aspects of the CMA's approach in the context of horizontal mergers, many will also be relevant to non-horizontal mergers (which are discussed further in Chapter 7).

Differentiated products

4.6 Unilateral effects may arise in differentiated product markets because a price increase becomes less costly when the products of the two firms are brought under common ownership or control. Absent the merger, firms face a trade-off when considering whether to raise prices or reduce quality, range or service. On the one hand, the firm will incur a cost because some customers will switch away, and the firm will lose the profits they would have earned on those customers. On the other hand, the firm also gains, because it makes a bigger profit on the customers that remain (because of the higher price, or the lower cost associated with reduced quality, range or service).

4.7 After the merger, it would no longer be as costly for the merged entity to raise prices or reduce quality: it would recoup the profit on recaptured sales from those customers who would switch to the products of the other merger firm.

4.8 In differentiated markets, horizontal unilateral effects are more likely where the merger firms are close competitors or where their products are close substitutes. The more closely the merger firms compete the greater the likelihood of unilateral effects because the merged entity will recapture a more significant share of the sales lost in response to a price increase (or another worsening in the offering), making the price rise more profitable. The merger firms need not be each other's closest competitors for unilateral effects to arise. It is sufficient that the merger firms compete closely and that the remaining competitive constraints are not sufficient to offset the loss of competition between them resulting from the merger.[80]

4.9 The concept of close competition is not limited to products or services that have similar characteristics. A firm may be a close competitor if it represents a

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[79] The HHI is a measure of market concentration that takes account of the differences in the sizes of market participants, as well as their number. The HHI is calculated by adding together the squared values of the percentage market shares of all firms in the market. The change in the HHI (known as the 'delta') can be calculated by subtracting the market's pre-merger HHI from its expected post-merger HHI.
[80] See for example Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd, paragraph 6.72. The CMA has frequently found competition concerns in relation to close competitors that were not each other's closest competitors, including for example Diebold Incorporated/Wincor Nixdorf AG, and the Provisional Findings in Illumina Inc/Pacific Biosciences of California Inc.

significant competitive force or exerts a strong constraint on other firms. For example, a firm that has a particular reputation or incentive to compete aggressively or behave as a 'maverick', or that is actively disrupting the status quo using a new technology or business model, may represent a close competitor to other firms, even if their respective offerings are quite different.

4.10 Closeness of competition is a relative concept. Where there is a degree of differentiation between the merger firms' products, they may nevertheless still be close competitors if rivals' products are more differentiated, or if there are few rivals. The CMA will consider the overall closeness of competition between the merger firms in the context of the other constraints that would remain post-merger. For example, where the CMA finds evidence that competition mainly takes place among few firms, any two would normally be sufficiently close competitors that the elimination of competition between them would raise competition concerns, subject to evidence to the contrary.[81] The smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors. In such a scenario, the CMA will require persuasive evidence that the merger firms are not close competitors in order to allay any competition concerns.

4.11 The constraints exerted by the merger firms on each other may be asymmetric, such that one merger firm may be a close competitive constraint on the other, without the reverse being the case.[82]

4.12 Some factors may make horizontal unilateral effects more or less likely in the context of a differentiated market. For example:

(a) **Market power.** While the focus of the CMA's assessment is on the *change* in the competitive constraints on the merger firms arising from the merger, where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns. Conversely, evidence that firms are price takers may suggest that the incremental change from a merger between two firms is unlikely to have an effect. Evidence relevant to market power may include the level and stability of market shares; the number and strength of competitive

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[81] The CMA has found or provisionally found competition concerns in concentrated markets with few significant players in previous cases, including for example Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd; Diebold Incorporated/Wincor Nixdorf AG; Prosafe SE/Floatel International Limited (Provisional Findings); Ecolab Inc/The Holchem Group Limited; Experian Limited/Credit Laser Holdings (ClearScore) (Provisional Findings); Rentokil Initial plc/Cannon Hygiene Limited; and JLA New Equityco Limited/Washstation Limited.

[82] For example, large supermarkets may be a good alternative for customers of convenience stores, while convenience stores may be a poor alternative for customers of large supermarkets.

constraints; the extent of past entry or exit; or the impact of past changes in concentration on prices.

(b) **Profit margins**. Where incremental profit margins are high,[83] unilateral effects are more likely because the value of sales recaptured by the merged entity will be greater, making it less costly to raise prices or worsen non-price aspects of the competitive offering.[84]

(c) **Capacity.** Where firms have significant spare capacity, they may be better able to compete. Conversely, firms facing capacity constraints may not be able to serve customers switching away from rivals and may provide a less effective constraint.

4.13 The types of evidence the CMA may rely on to assess closeness of competition are diverse and will vary from case to case. Examples include evidence on products' characteristics or their intended use, which might be indicative of their substitutability. The CMA often gathers the views of customers or competitors. The CMA may review firms' internal documents, which can describe their perceptions of the competitive importance of rivals or reflect which competitors they monitor or respond to. The CMA might gather evidence on customer switching or diversion, for example from the data held by firms or from customer surveys.[85] Past competitive interactions, such as to each other's offers in tenders or negotiations, reactions to each other's innovations, or through other responses to each other's competitive offering generally, may also be informative. Evidence of an impact on competitive outcomes following previous comparable mergers, or previous entry or exit, may also provide relevant evidence. The CMA will normally not gather evidence from every possible source and will decide which sources to prioritise, and the CMA may consider evidence not described here. The CMA's broader approach to assessing evidence is described in paragraphs 2.18 to 2.28.

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[83] That is, the profits earned on marginal customers that may be lost in the event of a price increase or other deterioration in the competitive offering.

[84] Incremental profits may include not only the profits earned directly on sales, but also any associated profits arising from sales, for example because sales have strategic value or contribute to a firm's ability to make greater future profits – for example, by contributing to the firm's reputation, brand awareness, customer loyalty, or network effects.

[85] A diversion ratio between Product A and Product B represents the proportion of sales that would divert to Product B (as opposed to Products C, D, E etc) as customers' second choice in the event of a price increase for Product A. The cross-price elasticity of demand of Product A to Product B is a measure of the percentage change in the quantity of Product A sold when the price of Product B rises by 1 per cent. Higher diversion ratios are associated with closer competition between two firms. Diversion ratios may be combined with other evidence to generate 'pricing pressure indices', which may be used by the CMA to judge whether the merged entity would be likely to find a price rise profitable.

4.14 Measures of concentration such as shares of supply can be useful evidence when assessing closeness of competition, particularly when there is persuasive evidence on demand- and supply-side substitution as to which potential substitutes should be included or excluded, and when, although differentiated, the degree of differentiation between firms is more limited. In such circumstances, a firm with a higher share of supply is more likely to be a close competitor to its rivals, and therefore a merger that removes the competitive constraint such a firm exerts on its rivals would be more likely to raise competition concerns. In cases such as this, market shares can represent a readily available source of evidence on which the CMA can base its assessment of closeness.

4.15 In other cases, such as where the boundaries of the market are not as clear-cut, where reliable estimates of shares of supply are not readily available, or where there is a high degree of differentiation, the CMA may rely to a greater extent on other sources of evidence on closeness of competition. Where products are more differentiated or customer preferences are more diverse, shares of supply may not provide evidence on the closest alternatives available to the merger firms' customers, as these may be different from the products that achieve the greatest sales across a wider body of customers. Market definition is discussed in paragraphs 9.1 to 9.15.[86]

4.16 The CMA's assessment is generally forward-looking and will seek to account for the future evolution of competitive conditions, including constraints from rival entry or expansion. Entry or expansion by rivals may be accounted for in two broad scenarios:

(a) **Entry that would have occurred irrespective of the merger**. In such circumstances, even though such entry or expansion would form part of the counterfactual, the CMA will often consider such entry or expansion as a constraint on the merged entity in its competitive assessment.[87]

(b) **Entry triggered by the merger**. In this scenario, the CMA will consider whether such entry would replace the constraint eliminated by the merger. This is discussed as a countervailing factor (see paragraphs 8.1 to 8.43).

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[86] Shares of supply may also be a useful indicator when there are limitations on the evidence the CMA can gather during its investigation—for example, when the number of overlaps between the merger firms is very large.

[87] For example, a merger may be characterised as reducing the number of existing competitors from two to one. To the extent the CMA finds evidence that a rival would have entered absent the merger, the merger may be characterised as reducing the number of competitors from three to two. In this scenario, the merger may be concerning even if the entrant was broadly equivalent to the firm eliminated by the merger – unlike where entry is triggered by the merger.

4.17 Where new entry or expansion by rivals is unlikely, for example because barriers to entry are high, or because the chance of successful and profitable entry is low, any given lessening of competition is likely to be longer lasting, and is more likely to result in an SLC, given the lower likelihood that it will be diminished by the emergence of new entry or expansion in the long run.

4.18 While the constraint from rivals may increase as a result of the merger by triggering entry or expansion, it can potentially also decrease. Competing suppliers may respond to a price rise by the merged entity by increasing their own prices, reducing the risk of losing sales to them and thereby making such a price increase more profitable.

4.19 Where a customer has the ability and incentive to trigger new entry, it may be able to restore competitive conditions to the levels that would have prevailed absent the merger. The two main ways customers may be able to trigger new entry – sponsored entry and self-supply – are assessed under the same framework that the CMA applies to other forms of countervailing entry and expansion (see paragraphs 8.41 to 8.43).

4.20 Most other forms of buyer power that do not result in new entry – for example, buyer power based on a customer's size, sophistication, or ability to switch easily – are unlikely to prevent an SLC that would otherwise arise from the elimination of competition between the merger firms. This is because a customer's buyer power depends on the availability of good alternatives they can switch to, which in the context of an SLC will have been reduced. In that sense, market power and buyer power are two sides of the same coin, and an SLC can be interpreted as a substantial lessening of customers' buyer power.

Two-sided platforms

4.21 Some firms operate two-sided (or multi-sided) platforms which supply services to two distinct but related customer groups.[88] Examples include media publishers or social media platforms, which serve consumers on one side and advertisers on the other; shopping centres, which serve both retail tenants and shoppers; and online food delivery platforms, which serve both restaurants and consumers.[89] Two-sided platforms are typically differentiated products, but have some specific characteristics that may affect the CMA's approach to the assessment. These are discussed below.

[88] Firms can also operate multi-sided platforms that intermediate between more than two customer groups. The guidance set out in this section relating to two-sided markets can be extended to multi-sided platforms.
[89] The CMA has considered two-sided platforms in a number of cases including Just-Eat plc/Hungryhouse Holdings Limited, Taboola.com Ltd/Outbrain Inc; and Future Plc/TI Media Limited.

4.22 Two-sided platforms are often characterised by network effects, where the value of the product for customers on one side of the platform depends on the volume of users either on the same side (direct network effects) or on the other side (indirect network effects). Network effects may operate in one direction (eg a social network will be more attractive to advertisers if it has more users, but not vice versa) or both directions (eg a food delivery platform will be more attractive to users if it has more restaurants and vice versa).[90]

4.23 Where network effects are strong, the growth of a two-sided platform may be self-reinforcing: growth in customer numbers increases network effects; increased network effects attract more customers; more customers lead to greater network effects, and so on. In some circumstances, this may lead to a 'tipping' effect, where one platform becomes dominant and smaller platforms exert only a weak constraint and find it difficult to expand.

4.24 When assessing competitive effects in mergers involving two-sided platforms, the CMA may consider each side of the platform separately, or it may consider the overall competition between the platforms (incorporating both sides in one assessment). The CMA's approach will depend on:

(a) **How competition works.** Where competition primarily involves platform operators improving aspects of their offer that affect one side of the platform (for example, charges applied or service levels offered to users on one side), the CMA may assess each side separately.[91] Where competition is focused on aspects of the platform that affect both sides (for example, improvements to technology that benefit the overall efficiency of the platform), the CMA may assess both sides together.[92]

(b) **Competitive conditions.** Where competitive conditions (such as the number and strength of alternatives available) are different on the two sides of the platform, a platform operator may have different incentives as regards what it offers to users on either side, and the CMA may therefore assess each side separately.[93]

(c) **Network effects.** Where indirect network effects are strong, the platform operator's incentive to compete for users on each side of the platform are more likely to be influenced by competitive conditions on the other side of

[90] Two-sided platforms sometimes also involve users on one side of the platform being offered a product or service at a zero price. As discussed in paragraph 2.4, users may pay a non-monetary price, such as providing personal data, advertising space, or even their attention (for example, as a reader of a news feed).
[91] For example, in Taboola.com Ltd/Outbrain Inc, the CMA considered the impact of the merger for publishers separately from the impact on advertisers.
[92] The CMA took this approach in PUG LLC (Viagogo)/StubHub.
[93] The CMA took this approach in Taboola.com Ltd/Outbrain Inc.

the platform. When they are strong in both directions, the assessment of the two sides may be sufficiently closely linked that a single assessment would be appropriate.

4.25 Network effects and the risk of tipping may influence the CMA's competitive assessment of two-sided platforms. Network effects mean that mergers among platforms are more likely to give rise to competition concerns because network effects mean that:

(a) **Mergers are more likely to induce a tipping effect.** Mergers may harm customers if they accelerate the market towards tipping, whereas customers would have benefited from a longer period of competition between platforms vying to be the 'winning platform' prior to tipping occurring. Mergers may also award network effects to a platform with lower relative merit, and cause demand to 'tip' to that weaker platform.

(b) **Platform mergers are more likely to have a strong effect on incentives**. Lost sales are more significant in the presence of network effects because in addition to the profits lost directly on those lost sales, the platform may also lose further profits as their platform becomes less attractive and additional customers switch away. The platform may also suffer a reduction in the chance that demand will 'tip' to their platform. The recapture of sales between two merging platforms may therefore have a more substantial impact on the incentive to raise prices or reduce quality, range, service levels or innovation.

(c) **Larger platforms are more likely to exert a strong constraint on rivals**. Where network effects are important, larger platforms with more significant network effects may represent a more attractive option for users.

(d) **Barriers to entry are likely to be high**. Barriers to entry may also be increasing for each successive entrant: as the pool of available users shrinks, the cost of building sufficient network efficiencies to compete may rise. Moreover, incumbent platform operators that have market power derived from network effects may be able to amplify their effect, for example by limiting interoperability with rival platforms. Multi-homing by users of platforms may increase the ability of new entrants to acquire customers and build up network effects, but existing network effects may nevertheless still represent a barrier to doing so.

Local mergers

4.26 Firms that compete in many different local areas may take different approaches to how they adjust different parameters of competition depending on conditions in each local area. This section discusses how the different approaches taken by firms active across local areas may affect the CMA's approach to the competitive assessment. However, the broad principles set out in this section may also apply to the analysis of mergers involving firms that are active across multiple markets or segments of other types (such as product segments, customer groups, or distribution channels).[94]

Flexing of parameters of competition

4.27 There are three broad approaches that firms typically take when competing in many different local areas:

(a) firms may set their competitive offering uniformly across all of the local areas they operate in – for example, a national retail chain offering a broadly consistent price, quality, range and service level in every store they operate in the UK;

(b) firms may 'flex' or tailor their offering to suit the specific conditions in each different area – for example, a chain of petrol stations setting a different price at each location depending on the prices set by local competitors;[95] or

(c) firms may take a mixed approach – for example, a retailer offering the same price in every store, but adjusting its range or level of service at individual stores depending on local competition.[96]

4.28 In practice, the CMA will seek to ensure that its assessment reflects the reality of how firms compete in a market or markets. Where firms mainly compete by improving aspects of their offer in a uniform way at the national level, the incentives of the firm to improve prices or non-price aspects of its competitive offer will depend on the aggregate conditions of competition across the geographic areas in which its stores are active. In such circumstances, the CMA will conduct its competitive assessment at the aggregate level, reflecting

[94] Other examples might include firms that compete across temporal markets (such as 'peak' and 'off peak' ticket sales), or across the supply of standalone and bundled services.

[95] For example, J Sainsbury's Plc/Asda Group Ltd (fuel), and Cellnex UK Limited/Arqiva Services Limited, where parameters of competition were flexed locally.

[96] J Sainsbury's Plc/Asda Group Ltd (groceries).

the aggregate effect of the loss in the competitive constraints on the merger firms across those different local areas.

4.29 Even where there is material variation in the merger firms' competitive offerings across different local areas, the CMA may nevertheless conduct its assessment at the aggregate level where there is evidence that such variation is not driven by differences in competitive conditions (but rather, for example, by differences in local demand).

4.30 Where firms mainly compete by flexing aspects of their competitive offering that are tailored for the specific competitive conditions within each local area, the CMA's assessment may focus on competition at this narrower level.[97] The CMA will typically only carry out an assessment at both the local and the aggregate national level where important aspects of competition take place at each level.

4.31 The CMA may consider how a merger might change the merger firms' incentives to set their competitive offering uniformly across different local areas.[98] For example, a merger firm may decide to move away from having a uniform competitive offering if a merger creates profitable opportunities to raise prices in individual local areas. The CMA will tend to consider this only where there is evidence of the merger firms considering changing their approach, other firms already taking a different approach to the merger firms, or firms changing their approach over time.

Filtering and decision rules

4.32 Where the merger firms do tailor their offering to each specific local area, this may result in the CMA having to consider a large number of overlaps between the merger firms. In such cases, the CMA may employ a filtering approach. Filtering generally involves identifying some areas as requiring no further consideration based on systematic information that is relatively easy to gather. For example, the CMA might gather information on the number of stores operated by effective competitors within a certain drive time of each of the merger firms' stores, and eliminate some areas from further consideration where sufficient competition would remain based on this information. By

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[97] Examples of this include competition for specific customer groups that would be affected to a greater extent by a loss of competition between the merger firms (for example, because of a stronger preference or requirement to use the merger firms' products, or because of less availability of good alternatives) and where the merged entity could tailor its competitive offering for those customers (for example, by setting separate, higher prices).

[98] The CMA considered the incentive of firms to move from nationally uniform offering to a varied local offering in Poundland Group plc/99p stores Limited.

eliminating these areas, the CMA may make it feasible to gather further information for a more manageable number of areas (ie those that 'failed' the filter) and give them further consideration.[99]

4.33 Where a filter has been applied and local areas remain for further consideration, there may be limited time available (or it may not be compatible with the efficient conduct of the CMA's investigation) to conduct a detailed competitive assessment of a large number of local areas. Therefore, the competitive assessment of local areas that fail a filter will typically be based on an assessment of factors that can be systematically analysed across all local areas (rather than an in-depth assessment of the varied indicators of competition). Where the merger firms conduct a non-systematic review of competitive conditions in individual local areas (ie considering different factors in different areas), it may be difficult for the CMA to verify whether the material presented to it provides a balanced picture of each particular area, or whether it presents a partial view which is favourable to the interests of the merger firms. The CMA may be better able to attach weight to reviews that have been conducted systematically, such that the same factor is taken into account across all local areas.

4.34 In some cases, a filtering approach may not be capable of reducing the number of local areas under consideration to a sufficiently small number to allow the CMA to review a wider range of evidence on an area-by-area basis. In such cases, the CMA may apply a 'decision rule' approach. This involves developing a systematic measure or set of measures that can be used to describe the impact of the merger on competition in each area, and comparing that measure or measures to a threshold above which the CMA considers the SLC test would be met.[100]

Undifferentiated products

4.35 In markets involving undifferentiated products, such as raw materials or mass-produced commodities, firms select the volume of output they supply to the market and receive the market price. For some firms – especially large ones – the volume they decide to supply to the market can have a material impact on total supply and, therefore, may influence the market price.

[99] For example, in the Motor Fuel Limited/Murco Petroleum Limited, following a filtering exercise, the CMA identified just six local areas which required a more detailed local competitive assessment.
[100] The CMA applied a decision rule approach to its assessment of unilateral effects in the supply of in-store groceries, online groceries and fuel in J Sainsbury's Plc/Asda Group Ltd.

4.36 Mergers in undifferentiated product markets may give rise to unilateral effects.[101] Without a merger, it is costly for one of the merger firms to cut its volumes, as it will lose the margins on the volumes it no longer sells. However, to the extent a volume reduction reduces total supply and results in an increase in market prices, the firm will earn greater profits on the volumes it continues to sell.

4.37 After a merger, it may become more attractive for the merger firms to restrict volumes, as they will benefit not only from the increased profits on their own volumes, but also the increased profits on the volumes of the other merger firm.

4.38 Some factors may make horizontal unilateral effects more or less likely in the context of an undifferentiated market:

(a) **Concentration of rivals.** Where the market is concentrated among few rivals, price increases may be more likely.

(b) **Shares of supply.** The merged entity may have a greater incentive to restrict volumes to the extent it has a large share of supply, as the benefits of a higher price would apply to a greater volume than would be the case for a smaller firm.

(c) **Spare capacity of rivals**. If rivals have spare capacity, they may be expected to respond to a reduction in volumes by expanding their own production. This may prevent an increase in price levels.

(d) **The merger involves a marginal supplier.** Suppliers that are less efficient earn lower margins, and therefore the loss from withholding volumes from a small and less profitable plant may be smaller.

(e) **Competitive fringe.** Firms that currently do not supply significant volumes, but could rapidly and profitably begin doing so if prices were to rise, may act as a constraint on prices. Evidence of firms actively monitoring prices, or evidence of entry or expansion in response to past price fluctuations, may be relevant to assessing the credibility of the competitive fringe as a constraint. When considering the constraint of a competitive fringe, the CMA may consider evidence on the reasons why they are currently not supplying significant volumes, and whether these may have implications for their ability to constrain the merged entity.

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[101] For example, Breedon Group plc/Cemex Investments Limited.

4.39 Paragraphs 4.15 to 4.19, which related to third party entry and expansion and buyer power in differentiated markets, are also relevant to undifferentiated markets. As in differentiated markets, where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns (see paragraph 4.12(a)).

5. Potential and dynamic competition

5.1 Unilateral effects may also arise from the elimination of potential or dynamic competition. In this chapter, the term 'potential competition' is used to refer to competitive interactions involving at least one firm that has the potential to enter or expand in competition with other firms. Potential competition is relevant to the potential for a merger to substantially lessen competition where, absent the merger, entry or expansion by either or both merger firms may have resulted in new or increased competition between them.

5.2 Mergers involving a potential entrant can lessen competition in different ways. First, a merger involving a potential entrant may imply a loss of the future competition between the merger firms after the potential entrant would have entered or expanded.

5.3 Second, existing firms and potential competitors can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic competition. Firms that are making efforts or investments that may eventually lead to their entry or expansion will do so based on the opportunity to win new sales and profits, which may in part be 'stolen' from the other merger firm. Incumbent firms that are making efforts to improve their own competitive offering may do so to mitigate the risk of losing future profits to potential entrants. In this sense, potential entrants can be thought of as dynamic competitors, even before they effectively enter and begin supplying customers. A merger may reduce the incentives of dynamic competitors to continue with efforts to enter or expand, or the incentive of incumbent firms to mitigate the threat of future rival entry or expansion. The impact of such a reduction in efforts would affect customers in the present, rather than solely from the future point in time when entry or expansion has occurred.

5.4 Losses of dynamic competition are more relevant when the investments involved in entering or expanding represent an important part of the competitive process, in industries where the process of entering markets takes place over a long period of time and involves significant costs or risks, or where key aspects of the competitive offering are set during the investment phase rather than flexed on an ongoing basis. Examples might include digital platforms, where the costs and time required to build up a significant user base and achieve network efficiencies might involve years of losses (with ongoing uncertainty about whether the platform would eventually be successful), or pharmaceutical mergers where investments in new products might involve years of investment in products that may never come to fruition.

5.5 The following paragraphs discuss aspects of how the CMA approaches losses of future and dynamic competition in mergers involving potential entrants.[102] While this section discusses competitive interactions with potential entrants, similar reasoning may apply to competitive interactions with firms that are already active in the market but have the potential to expand significantly.

5.6 The guidance set out in relation to losses of existing competition (see paragraphs 4.1 to 4.37) is also relevant to the assessment of potential competition, and therefore the following paragraphs should be read in conjunction with that section.

Loss of future competition

5.7 In assessing whether a merger involving a potential entrant leads to a loss of future competition between the merger firms, the CMA will consider evidence on:

(a) whether either merger firm would have entered or expanded absent the merger; and

(b) whether the loss of future competition brought about by the merger would give rise to an SLC, taking into account other constraints and potential entrants.

5.8 The following paragraphs set out the CMA's approach to assessing the prospect and impact of potential entry.

Assessment of whether either merger firm would enter or expand

5.9 Entry by the merger firms will typically be considered as part of the counterfactual (paragraph 3.17). In some cases, evidence relevant to the counterfactual and evidence relevant to the competitive assessment will be overlapping.

5.10 The CMA may consider a range of evidence on the prospect of entry by the merger firms. Entry may be considered more likely where a merger firm has the incentive and ability to enter; has well-developed plans or has already taken significant steps towards entry; where incumbent firms are taking action

[102] Losses of future competition and losses of dynamic competition are interrelated, as they both involve the constraint from potential entrants. As both depend on the likelihood of entry or expansion by a potential entrant, and the impact of such entry or expansion on competition, the CMA's assessment of each may to an extent rely on overlapping evidence. The CMA may therefore consider them together or separately.

in anticipation of its entry; or where it has a past history of entry into related markets.[103]

5.11 The decision to pursue a merger may supplant the creation of detailed business plans assessing alternative routes to enter or expand. Therefore, the CMA is likely to consider the merger firms' ability and incentive to enter.

5.12 For example, the CMA may conclude on the prospect that one of the merger firms would have entered absent the merger, without concluding on the precise characteristics of the product it would launch, or which particular assets (out of a set of possible options) it might acquire in order to enter.

Assessment of the loss of future competition

5.13 If one of the merger firms is a potential entrant, then the merger will remove any future competition between them.

5.14 The CMA's assessment of competitive effects from the loss of the future competition between the merger firms is similar to its assessment when the merger firms are existing suppliers (see Chapter 4), except that the CMA's assessment will reflect the future competitive conditions expected after entry or expansion by the merger firms has taken place.

5.15 The impact of a potential entrant on competition is likely to be more significant when there are fewer strong existing competitive constraints on the other merger firm; where the other merger firm would already have market power absent the merger (with greater market power being associated with a greater likelihood of an entrant having a bigger impact on competition); and/or where there are few other potential constraints. In line with paragraph 4.12(a), where one merger firm has a strong position in the market and there are few significant potential competitors, even small increments in market power may give rise to competition concerns. Therefore, the acquisition by any such firm of a potential entrant may be concerning even if that potential entrant is expected to be small. The CMA will take into account entry or expansion by non-merging rivals over a similar time horizon as the merger firms' entry or expansion.

5.16 Evidence relevant to the CMA's assessment of the loss of future competition brought about by the merger might include, firms' internal documents,

[103] The CMA has considered the likelihood of entry in a number of recent cases including: Amazon.com NV Investment Holdings LLC/Roofoods Ltd (Deliveroo); PayPal Holdings Inc/iZettle AB; Roche Holdings, Inc./Spark Therapeutics, Inc.; and the Provisional Findings in Illumina Inc/Pacific Biosciences of California Inc.

business forecasts or valuation models. The CMA may consider the likely characteristics of the potential entrant's future product or service, in particular any that would make it attractive to customers, for example if it is planning to introduce a disruptive new business model or technology.[104] The CMA may also consider whether the potential entrant has any features that would affect how well-placed it is to enter, such as existing customer relationships from related products that could enable it to cross-sell or bundle them to gain scale quickly.[105] Any commercial responses made by existing firms in anticipation of rival entry may also be indicative of the entrant's expected impact.

Loss of dynamic competition

5.17 In some sectors, an important aspect of how firms compete involves efforts or investments aimed at protecting or expanding their profits in the future. This includes efforts that may give firms the ability to compete in entirely new areas (ie to enter), or the ability to compete more effectively in areas where they are already active (ie to expand). Examples of the types of efforts or investments firms might make include developing new products or improving existing ones; introducing more efficient or disruptive business models; introducing new features that benefit customers but also increase customer stickiness; or sacrificing short-run margins (or even operating at a loss) in order to attract users to their platform and benefit from network efficiencies, to achieve a minimum efficient scale, to scale up a distribution network, or to establish a reputation.

5.18 Where investment and innovation efforts represent an important part of the competitive process itself, this can lead to dynamic competitive interactions between existing competitors and potential entrants that are making efforts to enter or expand (ie, dynamic competitors). Existing firms may invest in the present in order to protect future sales from dynamic competitors. Dynamic competitors making investments in the present will do so in order to win new sales in the future, including by winning sales from other suppliers.

5.19 Mergers can reduce the dynamic competitive interactions between an existing supplier and a dynamic competitor, or between two dynamic competitors:[106]

[104] For example, the Provisional Findings in Experian Limited/Credit Laser Holdings (ClearScore).
[105] In Amazon.com NV Investment Holdings LLC/Roofoods Ltd (Deliveroo), the CMA considered that Amazon would be well-placed to be an effective entrant.
[106] Antitrust and Innovation: Welcoming and Protecting Disruption, by Carol Shapiro, Giulio Federico, and Fiona Scott Morton. Innovation Policy and the Economy, Volume 20 and Ioannis K, Valletti T, 2020, Innovation considerations in horizontal merger control, *Journal of Competition Law and Economics*, Vol: 16, Pages: 220-261, ISSN: 1744-6414.

(a) A merger involving an existing supplier and a dynamic competitor may lead the existing supplier to reduce its efforts in the present to protect against the possible impact of the dynamic competitor, as any future loss of sales to the dynamic competitor would not reduce the profits of the merged entity.

(b) A merger involving a dynamic competitor making efforts towards entry or expansion may lead the merged entity to reduce those efforts. After a merger, any profits that the dynamic competitor would expect to 'steal' from the other merger firm would no longer contribute to an incentive to enter, as these profits would already be captured by the merged entity.

5.20 There may be some uncertainty about the outcome of investments and innovation efforts absent the merger, including whether the investments being made by merger firms would ultimately result in products or services being made available to customers. However, uncertainty about the outcome of a dynamic competitive process does not preclude the CMA from assessing the impact of the merger on that dynamic process.[107] A process of dynamic competition can increase the likelihood of new innovations or products being made available, and therefore has economic value in the present.

5.21 Accordingly, while the CMA's assessment of dynamic competition may, in some cases, focus on entry and expansion in relation to specific products, in others, it may consider a broader pattern of dynamic competition in which the specific overlaps may not be identified easily at the point in time of the CMA's assessment. Examples might include two digital platforms exhibiting a pattern of using their existing platforms or suites of integrated services as a launchpad to enter into new, overlapping services; two pharmaceutical companies engaging in research programmes that are likely to treat the same illnesses; or two firms with geographic expansion strategies that are likely to target similar local areas.[108] Where this is the case, the CMA may assess a broader loss of competition arising from a reduction in the merger firms' incentives to continue investing in these competing programmes or strategies, rather than focusing on individual future overlaps.[109]

[107] For example, the European Commission case of COMP/M.7275 - Novartis/GlaxoSmithKline Oncology Business. The CMA also considered the impact of uncertainty on the assessment of dynamic competition in its Provisional Findings in Illumina Inc/Pacific Biosciences of California Inc.
[108] For example, two retail firms may have a strategy involving opening new stores and tend to open stores in the same types of local areas, leading to greater competition; or two pharmaceutical firms may have research programmes that have are likely to develop products with similar applications.
[109] For example, in Pure Gym Limited/The Gym Limited, the CMA found at Phase 1 that in the absence of one of the merger firms, the other may not have the same incentive to maintain policies such as a uniform network-wide

5.22 When assessing losses of dynamic competition, the CMA may consider evidence on any direct response of an incumbent merger firm to the threat of entry or expansion by the other merger firm or may consider evidence on the incumbent's incentive to respond to any such threat.

5.23 The likelihood of successful entry by a dynamic competitor and the expected closeness of competition between a dynamic competitor and other firms are both relevant to the constraint exerted by a dynamic competitor on other firms and the CMA will take this into account. The elimination of a dynamic competitor that is making efforts towards entry or expansion may lead to an SLC even where entry by that entrant is unlikely and may ultimately be unsuccessful. This may be the case if, for example, there is evidence that the competitor's entry or expansion would have a significant impact on other firms' future profits. In such circumstances, the removal of the threat of entry may lead to a significant reduction in innovation or efforts by other firms to protect those future profits.

5.24 Firms may use different levers to respond to dynamic competition. For example, firms may be more likely to flex their prices (which may be changed rapidly in the short-run) in response to competition from existing competitors, while using investment and innovation efforts to protect their profits from long-run, dynamic threats from potential entrants. Therefore, competition concerns may arise in relation to losses of existing competition despite the presence of dynamic constraints from potential entrants. Conversely, a loss of dynamic competition may be significant even though there are sufficient constraints to protect existing competition on aspects of competition that can be flexed in the short run.

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price-for-life policy or 24/7 opening. The CMA also found that the merger is likely to materially alter the incentives of the merger firms to expand their networks. See also, European Commission cases M.7932 – Dow/DuPont, M.8084 – Bayer/Monsanto, and COMP/M.7275 - Novartis/GlaxoSmithKline Oncology Business.

6. Coordinated effects

6.1 Coordination occurs when firms operating in the same market act on a common understanding to limit their rivalry.

6.2 Coordination may take different forms and can affect any aspect of competition. For example, firms may coordinate by fixing prices, by dividing up the market between them, such as by geographic area or customer characteristics, or by allocating contracts among themselves in bidding competitions. Firms which operate across a number of related markets may coordinate on avoiding launching competing products. Coordination may also involve firms reaching a collective understanding that they will avoid taking an overly aggressive stance in terms of their competitive offering. Regardless of the mechanism used, in many instances, coordination will result in firms keeping prices higher than they would otherwise have been in a more competitive market.

6.3 Coordination can be explicit or tacit. Explicit coordination is achieved through communication and agreement between the parties involved. Tacit coordination is achieved through implicit understanding between the parties, but without any formal arrangement. Both can be germane to an assessment of the effects of a merger although explicit coordination is caught by the Chapter 1 prohibition of the Competition Act 1998 and may be subject to sanction regardless of whether a merger takes place.

6.4 A merger may give rise to an SLC through coordinated effects. Coordinated effects arise when a merger enables or strengthens coordination.

6.5 Coordinated effects have been considered by the CMA relatively infrequently in the past. Some commentators have argued that enforcement in this area should be strengthened,[110] based partly on evidence which, they suggest, demonstrates that coordination in concentrated markets is common and has the effect of restricting competition and raising prices, even when imperfect. As it has in recent cases, the CMA will consider seriously the impact of mergers in concentrated markets on the potential for firms to coordinate,

[110] Jonathan B. Baker and Joseph Farrell. 'Oligopoly Coordination, Economic Analysis, and the Prophylactic Role of Horizontal Merger Enforcement.' *University of Pennsylvania Law Review*, 168 U. Pa. L. Rev. 1985 (2020); John Kwoka, 'Reviving Merger Control: a comprehensive plan for reforming policy and practice', October 9 2018.

including tacitly through the recognition of their interdependence and avoidance of competition.[111]

Pre-existing coordination

6.6 When assessing coordinated effects, the CMA will consider whether firms in the market were coordinating pre-merger. In those instances where there is evidence of pre-existing coordination, this will indicate that the necessary conditions for coordination are met pre-merger.[112] However, pre-existing coordination is not a necessary condition for a coordinated effects SLC finding.

6.7 The CMA will consider a range of evidence on whether there was coordination in the market before the merger. For example, pre-merger trends in competitive parameters such as prices, market shares, entry, capacity or margins may be consistent with coordinated behaviour. There may also be evidence that firms are aware of their strategic interdependence or seek to facilitate such an understanding through, for example, information sharing, public or private communications, or structural links.

6.8 Evidence of some competition between some or all market participants is not inconsistent with also finding evidence of coordination, as rivals may not coordinate over all competitive parameters or in all regions, coordination may not include all firms in the market and coordination may be characterised by periods during which the coordinating group reverts to fully competing.

6.9 If the pre-merger market shows evidence of coordinated outcomes, the CMA will consider whether the conditions for coordination have been strengthened or weakened as a result of the merger.[113] In general, a horizontal merger in a market already showing evidence of coordinated outcomes is likely to make coordination more sustainable or more effective, unless the structure and scale of the merged entity is so different from those of its predecessors that

[111] See for example Breedon Group plc/Cemex Investments Limited, J Sainsbury's Plc/Asda Group Ltd and Yorkshire Purchasing Organisation/Findel Education Limited.

[112] Although the CMA will nevertheless assess the preconditions for coordination and whether the merger materially changes any of them. In Breedon Group plc/Cemex Investments Limited, the CMA considered the findings of a 2013 Market Investigation that three cement producers (including one of the merger firms) had recognised and exploited the structural susceptibility of the market to coordination. The CMA found that the features of the market had not materially changed since that Market Investigation.

[113] In J Sainsbury's Plc/Asda Group Ltd, the CMA found that while there was not sufficient evidence to support a finding of pre-existing coordination in online delivered groceries, there was some evidence of retailers recognising their mutual independence which was relevant to the assessment of the conduciveness of the relevant markets to coordination and the likelihood of coordination emerging post-Merger. The CMA ultimately concluded that the Merger would make coordination more likely than not as the merger would impact on two of the three conditions for coordination and all three conditions were likely to be met post-merger.

the incentive to coordinate has been removed. Where the CMA has not found evidence of pre-existing coordination, it will consider to what extent the merger may enable future coordination.

Framework for assessing coordination

6.10 When considering whether a merger increases the likelihood of coordination or makes it more effective (more stable or profitable for example), the CMA will analyse the extent to which the following three conditions are met:

(a) Firms are able to reach a common understanding of the terms of coordination.

(b) Coordination is internally sustainable among the coordinating group, ie firms find it in their individual interests to adhere to the coordinated outcome.

(c) Coordination is externally sustainable, ie it is unlikely that coordination will be undermined by competition from outside the coordinating group.

6.11 The CMA will assess the extent to which these conditions are met in relation to the form (or forms) of coordination that it considers to be most likely in the particular market on the basis of the available evidence.

Ability to reach the terms of coordination

6.12 For coordination to emerge, the firms involved need to be able to reach a common understanding about their objectives (for example, a price below which they would not sell or customers they will not target). This includes firms recognising their interdependence and avoiding competitive actions. For example, where firms have different geographic strengths, they may be able to reach an understanding that they will avoid competing strongly outside their core areas. Such an understanding need not involve a precise outcome but needs to be sufficiently clear to enable their behaviour to be aligned. It need not involve explicit communication; for example, the terms of coordination might emerge over time through repeated competitive interaction.

6.13 Factors that may be relevant to assessing whether the firms in a market would be able to reach an understanding on the terms of coordination may include:

(a) **Number of coordinating firms.** The fewer firms in the coordinating group, the lower the complexity and the easier it will be to reach a common understanding.

(b) **Suitable focal point for coordination**.[114] This may be more challenging in a complex environment, for example where products are differentiated, firms sell a large number of products or differ in their capabilities, product portfolios, customer mix and strategies. However, even in these circumstances, firms may be able to come to a common understanding through simplifying the parameters of competition or focusing on a subset of parameters such as coordinating on known pricing points. Market division may be an easier means of coordinating than fixing prices. For example, firms may be able to reach an understanding to avoid targeting each other's customers, areas of geographic strength or areas of product development.

(c) **Symmetry**. Firms may find it easier to reach a common understanding if they are relatively symmetric, for example in terms of cost structures, market shares, capacity levels and extent of vertical integration.

(d) **Structural links.** The existence of significant structural links between firms in the market (such as being each other's customers or suppliers, holding cross-shareholdings or belonging to trade associations) may also assist in reaching a common understanding on the terms of coordination.

Internal sustainability

6.14 Coordination will be sustainable where the incentive to coordinate is higher than the incentive to deviate from the coordinated outcome for each coordinating firm. Deviating may include, for example, offering discounts to the coordinated price, targeting another firm's customers or failing to match a price rise. Typically, deviating firms will make a short-term gain from having a more competitive offer than the coordinating firms so for coordination to be internally sustainable, the gain to firms from deviation must be outweighed by the costs of future reduced profits.

6.15 The size of the gain from deviation will depend on the characteristics of the industry. This may be relatively low in some cases, for example where there is strong customer loyalty or where many customers are already committed to long-term contracts. On the other hand, there will be a greater incentive to deviate where there are more coordinating firms since the profits from coordination are shared between a greater number of participants, lowering

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[114] In J Sainsbury's Plc/Asda Group Ltd, the CMA found that there would be significant challenges for the hypothetical coordinating group to reach a common understanding, in spite of the high levels of transparency and sophistication in the market, in relation to each of the different potential focal points for coordination, due to factors such as the volatility of pricing, interdependencies with other products, and differing underlying data on sales.

the relative payoff from coordination compared to the profit from deviating (although this assumes that a deviating firm has correspondingly greater spare capacity relative to its current sales). The gain from deviation may also be higher for some firms than others where firms have very different incentives; for example, if a firm particularly values having a reputation for offering the lowest price in the market. Such a firm is sometimes termed a 'maverick'. If it is unable to price discriminate, a large firm may have a lower incentive to deviate than smaller firms if it will have to offer lower prices to its whole customer base.

6.16 Where there is an incentive to deviate, in order to sustain coordination firms must be able to detect and respond to deviation in a timely manner.

6.17 In assessing whether this is likely, the CMA will consider evidence on the ease with which firms can detect the choices of their rivals. Factors which may enhance the ability to detect rivals' choices are:

(a) **Observability of rivals' behaviour.** Transparency around firm's strategic choices and market outcomes will typically assist coordination, particularly where it enables timely detection of deviations. Online markets may be particularly transparent. Where there are firms outside the coordinating group, it may also be important to be able to observe whether any changes to market outcomes are a result of competition from these firms.

(b) **Market stability.** Where demand is predictable, it is easier for firms to detect deviation from coordination.

(c) **Practices which enhance transparency.** These may include public announcements or the exchange of information through trade associations.

6.18 The aspects of firms' commercial strategies where transparency is required will depend on the form of coordination at issue. For example, an understanding in relation to the allocation of customers may be feasible even if the firms in the market cannot observe each other's prices. Publicly available information on firms' pricing, product portfolio or investment decisions may enable the detection of deviation. The CMA may also consider whether firms can infer their rivals' actions from market outcomes even if they cannot observe them directly. For example, a firm's knowledge of its own or competitors' sales volumes and capacities might, in some contexts, provide enough information to determine whether or not deviation from coordination is taking place.

6.19 In assessing whether other firms' responses would be sufficient to disincentivise deviation and thus sustain coordination, the CMA may consider, for example:

(a) **Swiftness of response**. How swiftly any response would follow on from deviation. For example, in a market where prices are set using algorithms, the response to deviation may be automatic and almost immediate. Customers may be able to encourage deviation by offering long-term contracts (which prevent an immediate response by fixing the terms of firms' competitive offers during the period of the contract). Conversely, most-favoured customer clauses may raise the expected cost of deviation by guaranteeing a competitive response.

(b) **Effectiveness of response.** Whether other firms' responses would be sufficient to disincentivise deviation. A more severe response may be more likely to discourage deviation but may also be less credible, as it is more costly to the responding firms. Often the response will take the form of a reversion to more intense competition by the other firms rather than a deliberate punitive strategy, particularly where coordination is tacit.

External sustainability

6.20 It is not necessary for all firms in the market to be involved in coordination but those firms which coordinate need to be able collectively to exercise a degree of market power.

6.21 In assessing whether coordination would be externally sustainable, the CMA may consider:

(a) **Existing competition.** Coordination will be less sustainable where existing competitors outside the coordinating group (the competitive 'fringe') make up a significant proportion of the market or are able to impose a strong competitive constraint.

(b) **Dynamic competition.** External sustainability will typically be easier where entry is unlikely and any existing competitive fringe is unlikely to be able to expand. It will be more difficult if there is a firm with the capacity to take significant share from any group of firms that tried to coordinate without its participation (eg a 'maverick').[115]

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[115] In Yorkshire Purchasing Organisation/Findel Education Limited, the CMA found at Phase 1 that there were few external constraints which could destabilise coordination due to high barriers to entry and expansion. The

Effect of the merger

6.22 The CMA will consider the impact of the merger on the likelihood and effectiveness of coordination. In doing so, the CMA will consider the extent to which the three conditions for coordination in paragraph 6.10 are met pre-merger and whether the merger strengthens these conditions.

6.23 These conditions could be strengthened in a number of ways. For example, in relation to each of the three conditions set out above:

(a) as the number of firms in the market reduces, it may become easier to reach and monitor an understanding;

(b) the incentives to sustain coordination are likely to be higher in markets with fewer firms, as the payoff from coordinating is shared between a smaller number of participants, raising the relative payoff from coordination compared to the profit from deviating; and

(c) if the firm being acquired is a fringe competitor which could disrupt coordination, this may make external sustainability more likely post-merger.

6.24 However, the merger does not need to strengthen all of these three conditions in order to lead to an SLC. If some or all conditions are met pre-merger then the merger may need to have only a limited impact in order to enable or strengthen coordination.[116]

CMA did not conclude on the external sustainability of coordination in its Provisional Findings at Phase 2, as its provisional conclusion was that coordination was unlikely to be internally sustainable.

[116] In J Sainsbury's Plc/Asda Group Ltd, the CMA found that the Merger would impact on two of the three conditions for coordination and that all three conditions are likely to be met post-Merger such that the Merger would make coordination over delivery pricing in online delivered groceries more likely than not.

7. Vertical and conglomerate effects

7.1 Non-horizontal mergers combine firms that do not directly compete, but that operate in related markets. The CMA typically distinguishes between two types:

(a) Vertical mergers are those between firms active at different levels in the same industry (ie an upstream firm and a downstream firm), so competition in one market could be directly affected by outcomes in the other.

(b) Conglomerate mergers are those between firms that are not active within the same supply chain, and so cannot directly affect each other's markets, but which are nevertheless related in some way. For example, this may be because their products target similar customers or may be purchased alongside each other. These mergers raise the possibility that competition in one market may be indirectly affected by actions in the other.

7.2 Non-horizontal mergers do not involve a direct loss of competition between the merger firms. Instead, a common concern is that they may result in the foreclosure of current or potential rivals – that the merged entity will be able to use its position in one market to harm the competitiveness of its rivals in the other. This would weaken the constraints that the merged entity faces and as a result harm competition and therefore customers.

7.3 Another possible concern is that the merged entity may gain access to commercially sensitive information of its rivals through its role as their supplier or customer. Depending on the industry context, this could include data on specific sales and bids, overall pricing strategies and algorithms, technical product specifications or innovation plans. This could allow the merged entity to compete less aggressively, eg with prices or product specifications only marginally better than its rivals and may also deter rivals from innovating. The CMA may assess this concern as a separate theory of harm, or as part of a broader foreclosure theory of harm.

7.4 In certain circumstances these mergers may also give rise to other concerns. For example, they may directly incentivise an increase in the downstream party's prices, if any lost sales from customers switching to rivals would be mitigated by increased sales of inputs to these downstream rivals. Alternatively, the merger may facilitate coordination between the merged entity and its rivals, for example by facilitating flows of information between rivals.

7.5 Non-horizontal mergers can also give rise to potential and dynamic competition issues if, in the absence of the transaction, the merger firms may have launched competing products. In some cases, the fact that they are in closely related markets may mean they have an enhanced ability and incentive to expand in this way. The framework for the assessment of these issues is set out in Chapter 5.

7.6 Non-horizontal mergers may also result in efficiencies, such as reduced prices or better product integration. We discuss the framework for assessing them in more detail in Chapter 8.

7.7 The CMA has frequently investigated vertical mergers, and in several cases found that these give rise to competition concerns, in particular when one of the merger firms had a degree of pre-existing market power which it would be able to use to foreclose its rivals.[117] However, a number of commentators continue to warn of the substantial risks of under-enforcement against vertical mergers.[118]

7.8 The rest of this section discusses the three main foreclosure theories of harm:

(a) Input foreclosure: where a merger involves one party that supplies an input to rivals of the other party, the merged entity may restrict these rivals' access to this input or offer it on worse terms, directly harming the rival's competitiveness and therefore competition in the downstream market.

(b) Customer foreclosure: where a merger involves one party that buys inputs from rivals of the other party, the merged entity may restrict these rivals' access to this customer, which would in turn harm the rival's competitiveness and therefore competition in the upstream market.

(c) Conglomerate effects: where a merger involves two parties in adjacent markets, the merged entity may link the sales of the two products and

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[117] Recent examples of cases where the CMA has assessed vertical mergers in detail include: Thermo Fisher Scientific / Roper Technologies (Gatan) (Provisional Findings), Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd, BT Group plc/EE Limited, Tesco plc/Booker Group plc, Intercontinental Exchange Inc/Trayport; LN-Gaiety Holdings/MCD Productions.
[118] For example, see Steven C. Salop (2018), 'Invigorating Vertical Merger Enforcement', The Yale Law Journal, and Jonathan B. Baker, Nancy L. Rose, Steven C. Salop and Fiona Scott Morton (2020), 'Recommendations and Comments on the Draft Vertical Merger Guidelines'. In addition, the CMA's own study into digital advertising found that Google has previously undertaken a number of vertical mergers with firms throughout the digital advertising value chain, mostly notably acquiring DoubleClick, and has subsequently been able to leverage its wider ecosystem to preference its own activities and further reinforce its market power.

thereby restrict its rivals' access to customers, which would in turn harm the rival's competitiveness and therefore competition.

Input foreclosure

7.9 The concern with an input foreclosure theory of harm is that the merged entity may use its control of an important input to harm its downstream rivals' competitiveness, for example by refusing to supply the input (total foreclosure) or by increasing the price or worsening the quality of the input supplied to them (partial foreclosure). This might then harm overall competition in the downstream market, to the detriment of customers. This may occur irrespective of whether the merger firms have a pre-existing commercial relationship.

7.10 In assessing this concern, the CMA will consider whether three cumulative conditions are satisfied.[119]

(a) Would the merged entity have the ability to use its control of inputs to harm the competitiveness of its downstream rivals?

(b) Would it have the incentive to actually do so, ie would it be profitable?

(c) Would the foreclosure of these rivals substantially lessen overall competition?

7.11 The CMA may use the same framework in similar situations where the merged entity could use its presence in one market to directly harm the competitiveness of its rivals in another, even if there is not a conventional supplier/customer relationship. For example, it could do this by using control of a complementary product to deteriorate its interoperability with competitors, or a distribution channel to make it harder for rivals to attract customers. These situations give rise to the same three questions: would the merged entity have the ability to harm its rivals' competitiveness, would it have the incentive to do this and would this harm overall competition?

Ability to foreclose rivals

7.12 In assessing the ability of the merged entity to foreclose its rivals, the CMA will go beyond examining simply whether it could supply its inputs to them on

[119] In practice, the CMA is likely to apply this framework flexibly and consider these as overlapping analyses, rather than as distinct chronological stages.

worse terms and will consider whether it would be able to harm their competitiveness by doing so.

7.13 The CMA may consider a wide range of mechanisms through which the merged entity could potentially harm its rivals when supplying inputs. These may include, for example: refusing or restricting supply, increasing prices, reducing quality or service levels, deteriorating product interoperability, slowing the rollout of upgrades, restricting licensing of intellectual property, shutting down APIs,[120] reprioritising R&D spending, or limiting access to data. The CMA's focus will be on understanding if collectively these would allow the merged entity to foreclose its rivals, not on predicting the precise actions it would take.[121]

7.14 When assessing whether the merged entity will have the ability to foreclose its rivals, the CMA will typically focus on two issues.

(a) **Market power upstream**. If downstream rivals can easily switch away from the upstream party to a range of effective alternative suppliers, then they will be less likely to suffer harm than if the merged entity occupies an important position upstream. The starting point for this assessment will be the structure of the upstream market. The CMA may also investigate if there are features that may limit the constraint from upstream rivals, such as economies of scale, switching costs, direct or indirect network effects, brand and reputation, high fixed costs, control of intellectual property, access to data or integration into wider ecosystems. It may also consider whether any attempt at foreclosure would be accommodated by rival suppliers also competing less aggressively.[122]

(b) **Importance of the input**. The merged entity could only harm the competitiveness of its rivals if the input it supplies plays an important role in shaping downstream competition.[123] In assessing this the CMA will have regard to all foreclosure mechanisms, so will consider not only the proportion of rivals' costs that the input accounts for, but also for example the role it plays as a determinant of product quality or the rate of

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[120] Application Programming Interface.

[121] *British Sky Broadcasting Group PLC v The Competition Commission and The Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25, paragraph 80; *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6, paragraphs 245 and 268.

[122] For example, if an increase in the price of the input by the upstream party was followed by other upstream suppliers also increasing their prices, this would further limit the ability of downstream rivals to switch away from it to get a good deal. These accommodating responses by rivals could arise because they have a unilateral incentive to act in this way, or potentially as part of a coordinated arrangement if they are also vertically integrated.

[123] *Tobii AB v Competition and Markets Authority* [2020] CAT 1, paragraph 426.

innovation. Its focus will be not on predicting the precise impact of each possible deterioration on rivals' businesses, but on the overall question of whether in aggregate they could be foreclosed.

7.15 The CMA's assessment of the ability of the merged entity to foreclose its rivals is unlikely to place material weight on contractual protections, for example, to continue supplying both the current version and future upgrades of the input. In practice, such contracts may not completely remove a firm's ability to harm its rivals, given that certain rivals might not be covered by these contracts, the contracts might not protect all ways in which the competitiveness of rivals could be harmed, and the contracts may be of limited duration. Moreover, over time contracts may be renegotiated or terminated, and firms may waive their rights to enforce any breaches in light of their overall bargaining position (reflecting the change in market structure brought about by a merger). However, the CMA may consider any financial or reputational costs of terminating contracts in its assessment of foreclosure incentives.[124]

Incentive to foreclose rivals

7.16 Even where the merged entity would have the ability to foreclose its rivals, it may not have the incentive to do so. This is because while foreclosure may result in additional profits downstream, it may also result in costs such as a loss of sales upstream. If these costs are greater than the benefits, the merged entity will not have the incentive to engage in input foreclosure. The CMA will therefore consider whether the merged entity would have the incentive to pursue a foreclosure strategy, in particular through a consideration of the magnitude and likelihood of the costs and benefits.

7.17 Where the CMA is considering several possible ways in which the merged entity may foreclose its rivals, it may either undertake one common assessment of incentives or several related assessments. It will be more likely to undertake distinct assessments where there are major differences in how these foreclosure strategies may affect the market and the merged entity.

7.18 The assessment of incentives typically involves a combination of quantitative and qualitative evidence, though the balance will vary between cases. The CMA may undertake more extensive quantitative analysis in simple markets with high quality data, but focus on a qualitative assessment in complex and

[124] For example, see the discussion of this point in the CMA's Provisional Findings in Thermo Fisher Scientific inc/Roper Technologies (Gatan), paragraph 10.125.

dynamic markets, where firms' current positions and margins may not be a good guide to the future, and strategic considerations may play a greater role. In any event, its focus will be on the relative magnitude of the overall cost and benefit of foreclosure, not on predicting the exact size of each element.[125]

7.19 The CMA's assessment of incentives may consider the following factors:

(a) **Business strategy**. The purpose of the incentives analysis is to predict the merged entity's behaviour, and it may be possible to understand this directly from its past conduct, business strategy and deal rationale. For example, if the merger firms' internal documents show that it would be strategically beneficial to stop supplying rivals, it may not be necessary to try to infer their behaviour from their financial incentives.

(b) **Gain in downstream sales**. This will be greater if the merged entity has a more successful downstream offering, and if this competes closely with the rivals that may be foreclosed. It is also likely to be greater if the merged entity has a particularly strong ability to foreclose, as this would likely result in substantial switching away from the affected rivals. These additional sales may in turn enable it to increase downstream prices.

(c) **Loss of upstream sales**. This is likely to be lower if the merged entity has strong market power upstream, and if it can engage in price discrimination or similar targeted deterioration of supply. This would allow it to hinder specific rivals in competing for customers that its downstream division is best placed to win, whilst minimising the risk to its upstream sales by otherwise continuing to offer its input on competitive terms.

(d) **Relative profit margins**. Foreclosure is more likely to be profitable if margins downstream are relatively large compared to those upstream.

(e) **Other costs and benefits**. Particularly in complex and dynamic markets, firms may not focus on short term margins but may pursue other objectives to maximise their long-run profitability, which the CMA may consider. This may include eliminating a possible long-term threat, increasing the stickiness of existing customers, positioning themselves strongly in high-growth markets, gaining customers to obtain direct or indirect network effects, obtaining access to customer data or enabling cross-selling within a broader ecosystem.

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[125] *Intercontinental Exchange, Inc. v CMA and Nasdaq Stockholm AB* [2017] CAT 6 , paragraph 246.

Effect on competition

7.20 In this part of the assessment the CMA will consider whether the harm to competitors it has identified will result in substantial harm to overall competition in the downstream market. This will include through raising barriers to entry for potential entrants, where the negative impact on customers may take some time to materialise.

7.21 In practice, this will build on the same evidence as the assessment of the ability and incentive to foreclose. When it has been established that there will be harm to competitors this will often directly imply there will be harm to overall competition, where the foreclosed firms play a sufficiently important role in the competitive process on the downstream market. Competition concerns may be particularly likely to arise if one of the merger firms has a degree of pre-existing market power in the downstream market, and already faced limited competitive constraints pre-merger.

7.22 However, if sufficient credible rivals to the downstream party would be unaffected, for example because they are vertically integrated, then foreclosure of some marginal competitors may not harm competition.

Customer foreclosure

7.23 The concern with a customer foreclosure theory of harm is that the merged entity may use its control of a downstream firm to switch purchases from rivals to itself, and thereby restrict its competitors' access to customers. While a loss of sales by competitors is not problematic in and of itself, and a firm using its own inputs can result in efficiencies, this may be a concern if it would result in these rival suppliers becoming less effective competitors for other customers. The merged entity would then face less competition in the upstream market, resulting in higher prices and lower quality.

7.24 In addition to explicit reductions in purchases, the CMA may also consider other actions that may result in a loss of sales by its upstream rivals. For example, if a phone manufacturer pre-installed its own social networking app into its handsets, this may reduce the usage of alternative social networks and therefore the size of their user bases, making them less effective competitors.

7.25 In assessing a customer foreclosure theory of harm, the CMA will again typically use the ability, incentive and effect framework.

Ability to foreclose rivals

7.26 The assessment of the merged entity's ability to foreclose will consider not only whether it could restrict its rivals' access to customers, but whether it could harm their competitiveness by doing so. It will typically focus on two issues.

(a) **Size of the customer**. The merger may only have a significant impact on rivals' volumes if the downstream party is an important customer that accounts for a substantial proportion of purchases. The CMA will consider this in the context of the full range of alternative sales opportunities that rivals have, including different channels, customer segments, uses and geographies.

(b) **Importance of scale upstream**. A loss of sales would typically only result in other firms becoming less effective rivals if there is a link between volumes and competitiveness. For example, fewer sales could lead to an increase in costs if economies of scale are substantial. It may also result in a reduction in product quality through the loss of direct or indirect network effects, a reduction in customer data, or a diminished incentive to innovate, if these are important. Most significantly, it could reduce the total number of rivals, either through driving firms to exit or deterring potential entrants, if they are financially marginal.

Incentive to foreclose rivals

7.27 In assessing the incentive to foreclose, the CMA will consider whether the benefit of additional sales upstream, as a result of foreclosing rivals, would exceed the potential cost of losing sales downstream, as a result of a deteriorated offering. It may consider the following factors.

(a) **Business strategy**. The merger firms may be more likely to pursue customer foreclosure if their broader strategy or deal rationale involves self-supply, or where either party has considered or used customer foreclosure strategies in the past, in which case it may not be necessary to try to infer their behaviour from their financial incentives.

(b) **Gain in upstream sales**. This will be greater if the merged entity has a more successful upstream offering, and if this competes closely with the rivals that may be foreclosed. It is also likely to be greater if the merged entity has a particularly strong ability to foreclose, as this would likely result in a large volume of switching away from the affected rivals.

(c) **Loss of downstream sales**. Switching purchases from rivals to the upstream merger firm could reduce the competitiveness of the

downstream party's offering and result in it losing customers. For example, if rivals offer inputs that are significantly lower cost or higher quality than those of the upstream party.

(d) **Relative profit margins**. Foreclosure will be more profitable if margins are larger upstream, where the merger firms may gain sales, than downstream, where they may lose them.

(e) **Other costs and benefits**. These may include increasing the stickiness of existing customers of the upstream party, positioning it strongly if the upstream market is growing rapidly, gaining customers to obtain direct or indirect network effects or obtaining access to customer data.

Effect on competition

7.28 The CMA will consider whether the harm to competitors it has identified will result in substantial harm to overall competition in the upstream market.

7.29 This will again largely build on the evidence considered under ability and incentive, and when it has been established that there will be harm to competitors this will often directly imply there will be harm to overall competition, where the foreclosed firms play a sufficiently important role in the upstream market. The CMA will also consider the impact of foreclosure on potential competitors through raising barriers to entry, where the negative impact on customers may take some time to materialise.

Conglomerate effects

7.30 The concern with a conglomerate theory of harm is that the merged entity may restrict its rivals in one 'focal' market from accessing customers using its strong position in an 'adjacent' market.[126] The merged entity could do this through linking the sales of the two products in some way, thereby encouraging customers who want its product in the adjacent market to also purchase its product in the focal market, at the expense of rivals. For example, it may only offer the products as a bundle, integrate them within a digital ecosystem, or offer customers of the adjacent product a discount if they also purchase its focal product, potentially through increasing the stand-alone price of the adjacent product.

[126] This can also apply to leveraging between different segments of the same market as well as between different markets.

7.31 This loss of sales by competitors is not problematic in and of itself, and linked sales of related products can result in efficiencies. However, competition concerns may arise if such a strategy would result in rivals in the focal market becoming less effective competitors, which may result in higher prices or lower quality in the longer term. Particularly in digital markets, this may take place through denying entrants growth opportunities, ie a loss of sales relative to the counterfactual, thereby protecting and reinforcing the power of incumbents.

7.32 The CMA will again typically use the ability, incentive and effect framework to analyse this theory of harm.

Ability to foreclose rivals

7.33 The CMA's assessment of the merged entity's ability to foreclose its rivals will focus not only on whether it would be able to link the sales of the two products in some way, but whether it could harm its rivals' competitiveness by doing so. The CMA may consider the following factors:

(a) **Market power in an adjacent market**. The merged entity will only be able to have a substantial impact in the focal market if it occupies an important position in an adjacent market. If it does not, then any attempt to make customers take the focal product alongside the adjacent one may result in customers buying the adjacent product from rivals. This assessment will typically begin with a consideration of the structure of the adjacent market, and may also consider if it has any features that limits the constraint from rivals.

(b) **Feasibility of a combined offering**. The CMA may consider whether customers have an incentive to buy the two products together, or if it would be realistic for the merger firms to link sales of the two products in some way, for example through bundling or tying. In assessing this the CMA may have regard to how the market, products and business models may evolve in future.

(c) **Loss of sales by rivals**. Competitors in the focal market are more likely to be foreclosed if the merged entity can deprive them of a substantial volume of sales. This will be the case if a sufficiently large number of customers in the focal market are or could be customers in the adjacent market, and if their behaviour can be easily influenced by the combination. It is less likely if rivals can realistically mitigate any loss, for example by developing or partnering to create their own combined offering.

(d) **Importance of scale**. A loss of customers in the focal market would typically only result in other firms becoming less effective rivals if there is a link between volumes and competitiveness. This could be through economies of scale, direct or indirect network effects, access to data, incentives to innovate – if these factors are important. Alternatively, this could be by driving them to exit or deterring potential entrants, if they are financially marginal.

Incentive to foreclose rivals

7.34 In assessing the incentive to foreclose, the CMA may consider whether any potential gain in sales from foreclosing rivals in the focal market would be outweighed by any loss of sales in the adjacent market.

(a) **Business strategy**. The merged entity may be more likely to pursue a combined offering if its business strategy involves this approach, it has a history of doing this with similar products or its deal rationale involves plans to do so post-merger, in which case it may not be necessary to try to infer their behaviour from their financial incentives.

(b) **Gain in sales in focal market**. This may be greater if the merged entity has a more attractive offering in the focal market, and if this competes closely with the rivals that may be foreclosed. It is also likely to be greater if the merged entity has a particularly strong ability to foreclose, as this would likely result in a large volume of switching from the affected rivals.

(c) **Loss of sales in adjacent market**. These are likely to be greater if many customers of the adjacent product have little interest in purchasing the focal product, and if the merged entity would need to pursue an aggressive strategy to foreclose competitors, such as by tying sales. These losses may be lower if the merged entity can provide the combined offering on a targeted basis to only those customers who would be likely to accept it.

(d) **Relative profit margins**. Foreclosure may be more profitable if margins are relatively higher in the focal market than the adjacent one.

(e) **Other costs and benefits**. These may include the merger firms increasing the stickiness of existing customers in the focal market, positioning themselves strongly if the focal market is rapidly growing, gaining customers to obtain direct or indirect network effects, obtaining access to customer data or enabling cross-selling within a broader ecosystem.

Effect on competition

7.35 The CMA will consider whether the harm to competitors it has identified will result in substantial harm to overall competition in the focal market.

7.36 This will again largely build on the evidence considered under ability and incentive, and when it has been established that there will be harm to competitors this will often directly imply that there will be harm to overall competition, where the foreclosed firms play a sufficiently important role in the focal market. The CMA will also consider the impact of foreclosure on potential competitors through raising barriers to entry, where the negative impact on customers may take some time to materialise.

7.37 Conglomerate effect concerns may be greatest in nascent and digital markets, as new customers may be more easily diverted between firms, scaling particularly critical, competitors more easily marginalised, and the future benefits of controlling these markets especially large. However, these anticompetitive effects may not emerge in full until after the market has reached maturity, so in assessing these mergers the CMA may focus on their impact on the structure of the market and competition over the longer term. Such an assessment will likely be subject to a degree of uncertainty, but this will not in itself preclude the CMA from concluding that the SLC test is met on the basis of all the available evidence (paragraph 2.10).

8. Countervailing factors

8.1 In some instances, there may be countervailing factors that prevent or mitigate any SLC arising from a merger. There are two main ways in which this could happen: through merger efficiencies or through the entry and/or expansion of third parties in reaction to the effects of a merger. The CMA's experience is that it is uncommon for a merger to be cleared on the basis of countervailing factors alone.

Merger efficiencies

8.2 In some instances, mergers can give rise to efficiencies. Examples of efficiencies might include cost savings; the elimination of double marginalisation through vertical integration; greater innovation or quality arising from the combination of unique assets; or better meeting customers' needs by enabling the integration or interoperability of complementary products.

8.3 Merger efficiencies fall into two categories:

(a) **Rivalry-enhancing efficiencies:** Efficiencies that change the incentives of the merger firms and induce them to act as stronger competitors to their rivals—for example, by reducing their marginal costs giving them the incentive to provide lower prices or a better quality, range or service.

(b) **Relevant customer benefits:** Benefits to UK customers resulting from a merger, other than through improved competition in the market related to the SLC finding—for example, greater levels of innovation resulting from the combination of unique assets of the merger firms applying to products other than those where the firms compete, or reduced carbon emissions (to the extent firms do not normally compete on sustainability).

8.4 Rivalry-enhancing efficiencies may prevent an SLC by offsetting any anticompetitive effects. The CMA will generally first consider whether there is scope for an SLC and, if there is, it will consider rivalry-enhancing efficiency claims from the merger firms. In some cases, the CMA may consider efficiencies and the evidence for an SLC together.

8.5 While relevant customer benefits do not prevent an SLC, they may outweigh an SLC and any adverse effects of the SLC. While the CMA does not take relevant customer benefits into account in its competitive assessment, it may take them into account when considering whether to refer a merger for a Phase 2 investigation and the overall benefit to consumers of having such an investigation. Relevant customer benefits may also be taken into account when the CMA considers options to remedy competition concerns and whether any of the remedy options would result in relevant customer benefits being unrealised. These are discussed at the end of this section.

8.6 Cost and revenue synergies often form part of the rationale for mergers, and it is not uncommon for firms to make efficiency claims in merger proceedings. Many efficiency claims by merger firms are not accepted by the CMA because the evidence supporting those claims is difficult to verify and substantiate. Some studies have found that firms often do not fully realise the expected synergies from their mergers and, even for the synergies that they do realise, firms do not always pass on the benefits to their customers.[127] This indicates the difficulty involved in accepting prospectively that a merger is likely to lead to efficiencies.

8.7 Most of the information relating to the synergies and cost reductions resulting from a merger is held by the merger firms. Merger firms who do wish to make efficiency claims are encouraged to provide verifiable evidence to support their claims in line with the CMA's framework (paragraph 8.8) early in the CMA's merger review process.

Framework for assessing merger efficiencies

8.8 This section discusses an assessment of efficiencies that result in stronger rivalry in a market. The CMA will use the following criteria when it assesses whether merger efficiencies mean that the merger does not result in an SLC. The merger efficiencies must:

(a) enhance rivalry in the supply of those products where an SLC may otherwise arise;

(b) be timely, likely and sufficient to prevent an SLC from arising;

(c) be merger-specific; and

(d) benefit customers in the UK.[128]

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[127] John Kwoka, 'Reviving Merger Control: a comprehensive plan for reforming policy and practice', October 9 2018.

[128] See, for example, J Sainsbury's Plc/Asda Group Ltd, in which the CMA considered rivalry-enhancing efficiencies might lead to an incentive to reduce some grocery and general merchandising prices but not fuel prices.

Merger efficiencies must enhance rivalry

8.9 Because the CMA has a duty to consider whether a merger will lead to an SLC in a market, if merger efficiencies are to be relevant in its assessment those efficiencies must be expected to affect competition in order to counter what would otherwise be an SLC finding. To do this, efficiencies need to enhance rivalry in a way that counteracts the effects on competition identified in the SLC assessment.[129] Efficiencies due to the merger must be likely to strengthen the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers.

8.10 The CMA will generally view reductions in the merger firms' marginal or variable costs as being more likely to result in an incentive to reduce price or make short-run improvements in quality than reductions in fixed costs. Some fixed cost savings or other efficiencies from a merger may enhance the ability of firms profitably to innovate or invest in entry or expansion, although cost reductions from a reduction in output will not be considered as efficiencies.

8.11 However, efficiencies are not restricted to price competition. It may be that some mergers result in efficiencies pertaining to (for example) product or service quality or innovation. For example, a merger might bring together complementary assets in research and development activities or otherwise reduce incremental costs in innovation.

Merger efficiencies must be timely, likely and sufficient to prevent an SLC

8.12 The CMA will assess whether the claimed efficiencies are to be realised (and the resultant rivalry-enhancing effects felt) within the same timeframe as the CMA has adopted in the rest of its analysis. However, usually the longer the time period necessary for efficiencies to be realised, the greater will be the level doubt that efficiencies will be realised at all.

8.13 The merger efficiencies must be likely to be realised. This means that the evidence supporting efficiencies needs to be verifiable. Merger firms may, for example, wish to submit evidence of efficiencies realised from previous mergers or mergers in analogous markets.

8.14 The greater the expected adverse effect of a merger, the greater the expected efficiencies must be.

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[129] Efficiencies do not only need to affect the market which is the subject to the CMA's SLC assessment. For example, R&D efficiencies may affect multiple markets.

8.15 At Phase 1, the evidence must be sufficient to satisfy the CMA within the time available in an initial investigation that efficiencies would prevent the realistic prospect of an SLC. At Phase 2, the CMA must be satisfied that the evidence shows that that the criteria are met. As noted above, it is for the merger firms to demonstrate that the merger will result in efficiencies.

Merger efficiencies must be merger-specific

8.16 The CMA will assess whether the merger efficiencies are reliant on the merger in question or whether they would be brought about by other means. The CMA may, for example, investigate whether there are significant barriers to the merger firms achieving the same improvements without the merger.

8.17 It may be relevant to the CMA's assessment whether the merged entity has a greater incentive to achieve the same improvements absent the merger than as a result of the merger. For example, efficiencies arising from greater scale may need to be significant when the merger itself substantially lessens competition and therefore lessens the incentive to compete to achieve greater scale.[130]

8.18 Examples of actions that may result in efficiencies without a merger might include a firm investing in innovation (eg by investing in staff or R&D capability), entering into a licensing agreement or using a buying group. In the case of vertical mergers, alternative means to achieve the reduction of double marginalisation include contractual agreement and non-merger expansion along the supply chain.

8.19 In addition, the CMA will consider ways in which customers and consumers are able to access benefits without the merger. For example, claims by merger firms that efficiencies will arise by one merger firm getting access to the cutting-edge technology or innovation of the other merger firm will not be accepted by the CMA if customers can get the benefit by switching to the other merger firm.

Merger efficiencies must benefit customers in the UK

8.20 The CMA will consider whether, even if the merger does give rise to efficiencies, the merged entity would have the incentive to allow customers in the UK to benefit from the efficiencies. The CMA may consider the strength of

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[130] Joseph Farrell and Carl Shapiro (2000), 'Scale economies and synergies in horizontal merger analysis', UC Berkeley, Center for Competition Working Paper No. CPC00-15

competition that is likely to exist after the merger when evaluating this incentive.

Relevant customer benefits

8.21 The Act allows relevant customer benefits to be taken into account.[131] These benefits are defined as being lower prices, higher quality or greater choice of goods or services in any market in the UK, or greater innovation in relation to the goods or services. What constitutes higher quality, greater choice or greater innovation will depend on the facts of individual cases. It might be, for example, that benefits in the form of environmental sustainability and supporting the transition to a low carbon economy are relevant customer benefits in some circumstances. A merger may lead to lower energy costs and some benefits that customers may value (such as a lower carbon footprint of the firm's products).

8.22 The Act defines customers for the purpose of considering relevant customer benefits as being both direct and indirect customers of the merged entity and future customers.[132] In this way the CMA is able to take into account a broader range of efficiencies and benefits from a merger to consumers and to society more generally.

8.23 Rivalry-enhancing efficiencies, as discussed above, are concerned with the question of whether a merger will lead to an SLC. They therefore must be relevant to the process of rivalry in the market in which the CMA is considering the SLC question. Relevant customer benefits, on the other hand, can be taken into account even if they are expected to be realised in markets other than the one subject to an SLC finding.

8.24 Because a merger may realise significant benefits to customers (which may not affect rivalry in an SLC market) the CMA is able to take into account relevant customer benefits in one of two ways.

8.25 First, in its Phase 1 investigation as an exception to the duty to refer a merger for Phase 2 investigation (if the efficiencies arising from the merger result in

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[131] Relevant customer benefits are defined in section 30 of the Act.

[132] Section 30(4) of the Act. 'Indirect customers' means customers of a customer of the merged entity (or a customer further down the chain of customers).

relevant customer benefits which outweigh the SLC and any adverse effects caused by the merger).[133]

8.26 Second, in considering remedy options. If any of the effective remedy options preserves relevant customer benefits that any of the alternative effective remedy options do not, the CMA may select the remedy option that allows for relevant customer benefits to be realised.[134] At Phase 2, the CMA may modify a remedy to ensure that relevant customers benefits can be realised.[135] In rare cases, the CMA may decide that no remedy is appropriate.[136]

8.27 How the CMA takes relevant customer benefits into account – as an exception to its the duty to refer a merger for Phase 2 investigation as well as in its consideration of remedies – is considered in separate guidance.[137] As with rivalry-enhancing efficiencies, the CMA's experience to date is that has been rare for a merger to be cleared on the basis relevant customer benefits.[138]

Entry and expansion

8.28 In its competitive assessment, the CMA may take into account entry and/or expansion plans of rivals who will enter or expand irrespective of whether the merger proceeds. However, any analysis of a possible SLC includes consideration of the direct responses to the merger by rivals, potential rivals and customers. If effective entry and/or expansion occurs as a result of the

[133] In the investigations into the anticipated merger between Derby Teaching Hospitals NHS Foundation Trust and Burton Hospitals NHS Foundation Trust (2018), the CMA found that the relevant customer benefits in relation to the creation of the relevant merger situation outweighed the SLC and any adverse effects of the SLC. Therefore, the CMA applied the relevant customer benefit exception under section 33(2)(c) of the Act.

[134] Section 73(4) relating to undertakings in lieu at the end of a Phase 1 investigation and section 41(5) in relation to remedies after a Phase 2 investigation; In Macquarie UK Broadcast Ventures Limited/National Grid Wireless Group, significant relevant customer benefits contributed to the selection of a behavioural remedy; also in Imerys Minerals Limited/Goonvean Limited, when selecting a behavioural remedy, the CMA noted that to the extent that efficiencies existed, these would be eliminated if full divestiture had been required, but possible relevant customer benefits would not be affected by the chosen price control remedy.

[135] Merger remedies (CMA87) paragraph 3.16.

[136] Merger remedies (CMA87) paragraph 3.16; In Central Manchester University Hospitals NHS Foundation Trust/ University Hospital of South Manchester NHS Foundation Trust, the CMA found that the merger may be expected to give rise to an SLC. However, the prohibition would result in the loss of substantial relevant customer benefits which may be expected to arise as a result of the merger. The CMA found that, when balanced against the nature of the SLC and its resulting adverse effects, the relevant customer benefits were likely to be more significant. The CMA, therefore, concluded that it would be disproportionate to prohibit the merger, and that it should be cleared.

[137] Mergers: Exceptions to the duty to refer (CMA64) and Merger remedies (CMA87).

[138] At the time of publishing the Merger Assessment Guidelines the CMA has only ever cleared three cases on the basis of relevant customer benefits: Central Manchester University Hospitals NHS Foundation Trust/South Manchester NHS Foundation Trust, University Hospitals Birmingham NHS Foundation Trust/Heart of England NHS Foundation Trust and Derby Teaching Hospitals/Burton Hospitals.

merger and any consequent adverse effect (for example, a price rise), the effect of the merger on competition may be mitigated. In these situations, the CMA might conclude that no SLC arises as a result of the merger.

8.29 The CMA therefore considers the possibility of entry and/or expansion as a countervailing measure to what might otherwise be an SLC finding. If the CMA considers that an SLC would not arise from the merger, it may not conclude on the evidence regarding entry and expansion or even consider it. This means that when the CMA does consider the evidence on effective entry or expansion, it will be doing so in cases which have features that might lead to competition concerns (eg the market is concentrated). The CMA considers that entry and/or expansion preventing an SLC from arising would be rare. The CMA's evaluation of a selection of some of its past cases has shown that in some instances, when it has relied on entry or expansion to clear mergers, that entry or expansion did not in fact materialise.[139]

8.30 The CMA will seek to ensure that the evidence is robust when confronted with claims of entry or expansion being timely, likely and sufficient to prevent an SLC from arising. It is likely to place greater weight on detailed consideration of entry or expansion and previous experience of entry and expansion (including how frequent and recent it has been).

Framework for assessing entry and expansion

8.31 The CMA will use the following framework to determine whether entry or expansion would prevent an SLC. The entry or expansion must be:

(a) timely;

(b) likely; and

(c) sufficient to prevent an SLC.

8.32 These conditions are cumulative and must be satisfied simultaneously. If, for example, it is likely that entry by a rival would occur rapidly after a merger, but to achieve sufficient expansion to offset the adverse effects of the merger the rival would need a period of time further in the future (which would not be timely within the context of the markets at issue), then the CMA may conclude that entry and expansion would not prevent an SLC.

[139] KPMG, Entry and expansion in UK merger cases: an ex-post evaluation, April 2017.

Timeliness of entry or expansion

8.33 The CMA will consider whether the effect on competition and the market will be timely. It is not just a case of entry or expansion occurring in a timely manner but the effectiveness of that entry or expansion on market outcomes must be timely. What is considered to be timely in order to prevent or mitigate the adverse effects of a merger will depend on the industry and the characteristics and dynamics of the market, and the timeframe over which the CMA expects an SLC to result from a merger. Typically, entry or expansion being effective within two years of an SLC arising would be considered by the CMA to be timely although, depending on the nature of the market, the CMA may consider a period of time shorter or longer than this (for example, see paragraph 3.15).[140]

8.34 Generally, the further out in time that entry or expansion is expected to occur the less certainty the CMA can attach to whether such entry or expansion would occur.

Likelihood of entry or expansion

8.35 In considering whether any potential rivals will enter or existing rivals will expand in response to a merger, the CMA must be satisfied that the rivals will have both the ability and incentive to do so. The CMA will consider the scale of any barriers to entry and/or expansion. In a market characterised by low barriers to entry and/or expansion, potential entrants may nevertheless be discouraged from entering by the small size of the available market (for example because the market itself is small or declining),[141] or the credible threat of retaliation by incumbents (whether in the same market as the merged entity or another market where that new entrant is already present).[142]

8.36 The circumstances around potential entry or expansion may fall into three broad categories:

(a) A firm with the potential to enter or expand may find it profitable to enter (or expand) at pre-merger prices. In such cases, the CMA might expect to

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[140] In general, the same standard of evidence, and the relevant time period, of entry or expansion by one of the merger firms in the counterfactual will be applied to entry or expansion by a third party, whether in the CMA's assessment of countervailing factors or in its assessment of the theory of harm(s).

[141] In Prosafe SE/Floatel International Limited (Provisional Findings), the CMA found evidence that value of contracts were small relative to the cost of entry for firms operating outside North-West Europe.

[142] In Arriva Rail North/Northern rail franchise, the CMA considered incumbent's ability to credibly threaten to retaliate against operators seeking to enter their 'core territories'.

see evidence that the firm was actively planning to enter or expand pre-merger. In such cases, the CMA may assess the impact of such entry as part of its competitive assessment.

(b) A firm may only find it profitable to enter or expand if prices remain above pre-merger levels. Such cases of entry or expansion are unlikely to restore pre-merger prices and are unlikely to prevent an SLC from arising.

(c) A firm may find that it would be profitable to operate (or add capacity) at pre-merger prices, but nevertheless would not find it profitable to enter or expand because its entry or expansion would push prices down below pre-merger levels. In such cases, a merger that causes prices to rise may introduce the buffer that the firm needs in order be able to enter and expand and subsequently compete at pre-merger prices. Therefore, when considering countervailing entry and expansion, the CMA may be particularly interested in evidence that entrants or incumbents were actively monitoring the opportunity to enter or expand prior to the merger, that such entrants could operate (or expand) profitably at pre-merger prices, and/or that entry or expansion would quickly become attractive if prices were to start rising.

Sufficiency of entry or expansion

8.37 Entry or expansion should be of sufficient scope and effectiveness to prevent an SLC from arising as a result of the merger. Entry or expansion needs to be successful over a sustained period of time. Sufficiency to constrain the merged entity may come from a single entrant or firm expanding or from several, in aggregate.

8.38 Expansion is unlikely to constrain the merged entity where that expansion results from a rival simply gaining some sales from a merged entity which has raised prices. The CMA may therefore examine evidence as to whether any entry or expansion would increase the competitive constraint that rivals exert on the merged entity, for example by introducing additional capacity, or new or better competitive offerings. The CMA may consider the history and experience of past entry or expansion.

8.39 Small-scale entry that is not comparable to the constraint eliminated by the merger is unlikely to prevent an SLC. In a differentiated market, entry into a market niche may be possible, but to the extent the niche product may not necessarily compete strongly with other products in the overall market, it may not constrain incumbents effectively.

Barriers to entry and expansion

8.40 Potential or actual competitors may encounter barriers which reduce or even severely hamper their ability to enter or expand in the market. Barriers to entry and expansion are specific features of the market that give incumbent firms advantages over potential competitors. Barriers to entry and expansion hinder the ability of potential entrants or firms looking to expand to constrain the exercise of market power by incumbents. The CMA will therefore identify barriers to entry and/or expansion in its analysis. Where barriers are low, and the costs of entry or expansion are not substantial relative to the profits that are available, entry and/or expansion might be expected to occur in order to capture sales from the merged entity if it were to increase prices and/or worsen non-price factors of competition. Conversely, this is less likely where barriers are substantial relative to available profits.

8.41 Often barriers to entry or expansion are related to the nature of the market. While it is not possible to provide a comprehensive list of barriers to entry and expansion (given that such barriers are liable to vary between different sectors and over time), common barriers include:

(a) Initial set-up costs and costs associated with investment in specific assets are more likely to deter entry or expansion where a significant proportion of them are sunk.[143]

(b) Customers may place a high value on the reputation and track record of suppliers.[144] This might be especially true where the product or service being provided is important for the customer, and where the quality of the product is difficult to ascertain in advance.

(c) Consumers may demonstrate a high level of brand loyalty, be tied into long contracts or exclusivity agreements, or face other significant switching costs, which may make entry or expansion more difficult and require investment. For example, in some digital markets switching might involve giving up access to an ecosystem of products and services.

(d) Economies of scale may be present.[145] These may prevent small-scale entry from acting as an effective competitive constraint in the market.

[143] ie the costs cannot be recovered when exiting from the market. The CMA considered the upfront costs required for entry in Tobii AB/Smartbox Assistive Technology Limited and Sensory Software International Ltd, and its Provisional Findings in Illumina Inc/Pacific Biosciences of California Inc.
[144] In Ecolab Inc/The Holchem Group Limited, the CMA found that customers had low switching rates and placed value on reputation, reliability and a proven track record.
[145] These arise where average costs fall as the level of output rises over a range of output volume.

Further, in the presence of economies of scale, large-scale entry or expansion will generally be successful only if it expands the total market significantly, or substantially replaces one or more existing firm; and if the entrant can afford the risk that such investment will involve, especially in terms of sunk costs. Many markets exhibit economies of scale.[146]

(e) Network effects.[147] In such circumstances, the need to attract a large number of customers to one or both sides of the entrant's platform in order to be an effective constraint may make sufficient entry and expansion both costly and risky, particularly in the presence of larger incumbents.[148] Many digital markets are characterised by considerable network effects as well as non-digital markets.[149]

(f) The technology and production methods used in the market may themselves present barriers to an entrant. For example, intellectual property rights of rivals and interoperability requirements may need to be taken into account by entrants.

(g) Early mover advantages. Incumbents may have early mover advantages as a result of branding or creating switching costs. The data held by many digital market firms allow them to hone, improve and personalise their products and services, and this may be difficult for an entrant to replicate in a timely manner.[150] Early mover advantages may be strengthened by the combination of the merger firms.

(h) Regulations, licensing arrangements, intellectual property rights and trade barriers may also form considerable barriers to entry.[151]

8.42 Barriers to entry and expansion might be particularly high if some of these factors are present in combination. For example, an incumbent might have a large cost advantage from its scale and/or data while also benefitting from network effects.

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[146] For example, many digital and software markets as well as other markets such as pharmaceutical markets.
[147] See the section on *Nature of competition*, in Chapter 9.
[148] See the Final Report of Intercontinental Exchange Inc/ Trayport, in particular paragraphs 7.112-7.170 and 9.4-9.16.
[149] For example, card payment systems.
[150] Early mover advantages are also present in non-digital markets.
[151] For example, in Bauer Media Group/Celador Entertainment Limited/Lincs FM Group/Wireless Group Limited/UKRD Group Limited the CMA found that the lack of available radio spectrum was a barrier to entry; in Ladbrokes plc/Gala Coral Group Limited planning approval was considered to be a barrier to entry; and in the Provisional Findings of Illumina Inc/Pacific Biosciences of California Inc intellectual property rights were provisionally viewed as a barrier to entry.

8.43 Finally, when considering the likelihood of successful entry by third parties, the CMA may consider the strategic behaviour of the merged entity or other incumbents which itself might create or strengthen a barrier to entry or limit the ability of a new entrant to gain a foothold in the market. This might involve strategic, temporary price cuts, entering into exclusive dealing arrangements or long contracts, or otherwise increasing customer stickiness, for example. The merged entity's ability to engage in this behaviour may be increased through the merger.

Self-supply and sponsored entry

8.44 The above discussion focuses on entry or expansion by third party rivals to constrain the merged entity. However, there may be instances in which third party rivals do not enter or expand solely on the market signals of a post-merger price rise or quality degradation but instead either the customer itself enters (self-supply) or a third party is encouraged and supported by customers to enter or expand (sponsored entry).[152] Although the above considerations are applicable to these scenarios, we discuss these specific types of entry and expansion below.

8.45 In these circumstances the CMA will consider whether:

(a) entry or expansion meets the timely, likely and sufficient requirements discussed above; and

(b) after entry or expansion occurs, supply will be available to the market (thereby potentially preventing an SLC from arising in the market) or only to the individual customer. Even if self-supply or sponsored entry protects particular customers, it may not prevent the merged entity from raising prices or worsening quality of service for other customers.

8.46 In addition, the CMA is also likely to consider whether such mitigating strategies by customers will be effective in addressing the SLC and its adverse effects in a dynamic context. A customer self-supplying may be far less effective than a third party over time, especially if the self-supply activity is not the customer's core business. For example, if product innovation or ongoing efficiencies to reduce costs (especially, but not only, if substantial economies of scale are present) are important elements of competition self-supply is unlikely to be an effective countervailing measure.

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[152] For example, in John Menzies plc/Airline Service Limited the CMA found that self-supply of de-icing services at London Heathrow was a credible option for airlines with a large presence but not a credible option for airlines with relatively few airlines movements.

9. The market in which an SLC arises

The role of market definition

9.1 Where the CMA makes an SLC finding, this must be 'within any market or markets in the United Kingdom for goods or services'.[153] The CMA is therefore required to identify the market or markets within which an SLC exists. An SLC can affect the whole or part of a market or markets. Within that context, the assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.

9.2 Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the sources of competition to the merger firms that are the immediate determinants of the effects of the merger. While market definition can be an important part of the overall merger assessment process, the CMA's experience is that in most mergers, the evidence gathered as part of the competitive assessment, which will assess the potentially significant constraints on the merger firms' behaviour, captures the competitive dynamics more fully than formal market definition. Consequently, while the appropriate approach will reflect the circumstances in each case, the CMA anticipates that in future, merger assessments will place more emphasis on the competitive assessment as opposed to static market definition.

9.3 Market definition can sometimes be helpful in developing certain types of evidence that may be relevant for the competitive assessment. For example, the relevant market can be used as the basis for calculating market shares or for constructing other measures of concentration, which may be helpful in some cases (especially where products are homogenous). On the other hand, measures of concentration can often be interpreted without concluding on a bright-line market definition. For example, the CMA may calculate concentration measures on multiple different bases, including and excluding different firms, depending on which firms the CMA wishes to compare. The CMA may then attach greater weight to concentration measures that include firms whose products are more substitutable, and less weight to concentration measures that include firms whose products are less substitutable. In some cases, market definition may be a less relevant part of the competitive assessment. Evidence on closeness of competition can often be interpreted

[153] Sections 22(1)(b) and 33(1)(b) of the Act for Phase 1 and sections 35(1)(b) and 36(1)(b) of the Act for Phase 2.

without having defined the relevant market, for example: internal documents discussing competitors; views from customers or competitors on the closest substitutes for the merger firms' products; analyses of bidding data; evidence on diversion between the firms; and data on customers won and lost.

9.4 While market definition can sometimes be a useful tool, it is not an end in itself. The outcome of any market definition exercise does not determine the outcome of the CMA's analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. In many cases, especially those involving differentiated products, there is often no 'bright line' that can or should be drawn. Rather, it can be more helpful to describe the constraint posed by different categories of product or supplier as sitting on a continuum between 'strong' and 'weak'. The CMA will generally not need to come to finely balanced judgements on what is 'inside' or 'outside' the market. Not every firm 'in' a market will be equal and the CMA will assess how closely two merger firms compete. The constraint posed by firms 'outside' the market will also be carefully considered.

9.5 There may be no need for the CMA's assessment of competitive effects to be based on a highly specific description of any particular market definition (including, for example, descriptions of the precise boundaries of the relevant markets and bright-line determinations of whether particular products or services fall within the relevant market). The CMA may take a simple approach to defining the market – for example, by describing the market as comprising the most important constraints on the merger firms that have been identified in the CMA's assessment of competitive effects.

Defining markets

Product markets

9.6 Product market definition starts with the relevant products of the merger firms.[154] In identifying what other significant competitive alternatives should be included in the relevant market, the CMA will pay particular regard to demand-

[154] The outcome of any market definition exercise will depend on the starting point, ie the overlapping products of the merger firms. Therefore, there is no one market definition that can be expected to apply across all cases in a similar area.

side factors (the behaviour of customers). The CMA may also consider supply-side factors.

Demand-side factors

9.7 The relevant product market is identified primarily by reference to demand-side substitution. One framework the CMA may use for considering substitution that the CMA may use involves considering evidence on the response of customers to a small but significant increase in price (or equivalent reduction in the value offered to customers in terms of quality, range or service) of the products of the merger firms. The CMA will often consider qualitative evidence on demand- and supply-side responses and often will not seek to produce quantitative estimates of what customers would do in response to price increases or how such responses would affect the profitability of a supplier or suppliers. Types of evidence the CMA might consider when evaluating the closeness of substitution between products are described at paragraph 4.13 of the chapter on *Horizontal unilateral effects*.

Supply-side factors

9.8 The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the CMA may aggregate several narrow relevant markets into one broader market based on considerations about the response of suppliers to changes in prices. The CMA may aggregate markets when:

(a) firms routinely use their existing production assets to supply a range of different products that are not demand-side substitutes[155] and there is evidence that firms in practice shift their existing capacity between these different products depending on demand for each; and

(b) the same firms compete to supply these different products and the conditions of competition between the firms are the same for each product; in this case aggregating the supply of these products and analysing them as one market does not affect the CMA's decision on the competitive effects of the merger.

9.9 These conditions are cumulative. Examples of cases where the two conditions may be satisfied might include:

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155 Production assets may include traditional physical assets such as premises and equipment, it may also include other assets. Some examples might include human capital, know-how or intellectual property, technology, reputation and experience.

(a) a merger between two retailers that compete with a set of retailers that all offer the same broad range of products (eg different types of outdoor clothing), where each retailer shifts between offering different specific products simply by changing the products in stock, without any significant adjustments to their supply chain, distribution network, retail stores or brand, and none has a particular strength in any subset of products;

(b) in a market where suppliers bid competitively to supply services which are bespoke to the customer and are therefore not demand-side substitutes, but where those suppliers use the same production assets to compete across tenders, and competitive conditions are similar across those tenders; or

(c) a two-sided market between two social media platforms where the services provided to the two customer groups are different (and therefore not substitutable), but competitive conditions are very similar on both sides because, for example, the same set of social media platforms compete for both sets of customers, and both platforms are similarly competitive for both groups.

9.10 In cases where firms do not currently shift their capacity across different products as a matter of routine, it may be more appropriate for the CMA to consider the prospect that they may start doing so using the CMA's framework for assessing entry by rivals (see paragraphs 8.28 to 8.43).

Parameter flexing

9.11 Where multiple product markets cannot be aggregated on the basis of demand-side or supply-side considerations, the CMA may aggregate them if the main parameters of competition are set uniformly across those markets.

Two-sided markets

9.12 The CMA's approach to market definition in two-sided markets is likely to reflect its approach to conducting the competitive assessment (paragraph 4.24). To the extent the CMA assesses the two sides separately, it may be more likely to define two separate markets.

Geographic markets

9.13 As with product markets, the CMA's focus in defining geographic markets is on demand-side factors and identifying the most important competitive alternatives to the merger firms. The CMA may consider evidence such as:

(a) information on the competitive performance of firms supplying from different geographic areas or over different distances;

(b) information on differences in pricing, sales, advertising and marketing strategies by area, as well as information on delivery costs or barriers to entry when supplying into an area or over different distances or across borders;

(c) the views of market participants on consumer preferences; and

(d) product characteristics such as perishability.

9.14 When determining whether supply-side substitution is sufficient to aggregate geographic markets, the CMA will have reference to the same conditions set out at paragraph 9.8.

9.15 When assessing mergers involving a large number of local geographic markets—for example, mergers of grocery retailers operating in multiple localities—the CMA may examine the geographic catchment area within which the great majority of a store’s custom is located. Catchment areas are a pragmatic approach to identifying the most significant competitive alternatives available to customers of the merger firms.

9.16 Where multiple geographic markets cannot be aggregated on the basis of demand-side or supply-side considerations, the CMA may aggregate them if the main parameters of competition are set uniformly across those markets.