JOINT WORKING PARTY OF THE BARS AND LAW SOCIETIES OF THE UK ON COMPETITION LAW

RESPONSE TO CMA CONSULTATION ON REVISED MERGER ASSESSMENT GUIDELINES

15 January 2021

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I. Overview

(1) The Joint Working Party ("**JWP**")[1] welcomes the opportunity to comment on the Competition and Markets Authority's ("**CMA**") consultation on its draft Revised Merger Assessment Guidelines ("**Draft Revised MAGs**").

(2) This response is divided into two parts. In **Section II**, we assess the Draft Revised MAGs against three key objective criteria, namely the extent to which they:

(a) allow for an unbiased implementation of the statutory SLC test (in other words, are tailored to the right enforcement level);

(b) perform the key function of guidelines, namely to help improve and strengthen the predictability of UK merger control; and

(c) are compatible with the guidelines and substantive analysis in other key peer merger control jurisdictions, which will regularly apply in parallel.

(3) The three criteria outlined are, we believe, important not only to the smooth functioning of the UK merger regime for both the CMA and merging parties, but also more broadly to ensuring the UK remains an attractive place to invest and do business. Under-investment within and into the UK economy due to legal uncertainty has negative productivity and consumer welfare implications for the post-pandemic, post-Brexit era. Consequently, it is not the case that there are two diametrically opposed objectives that operate in a zero-sum game fashion – business certainty (a concern only of the private sector) and consumer welfare (a concern only of the CMA/public sector). Both matter from a public policy perspective.

(4) The central thesis of this paper is that the Draft Revised MAGs, when measured against these objective criteria, present a risk of introducing or confirming an inconsistent and asymmetric framework of analysis which routinely favours intervention, undermining predictability and consistency, both with the CMA's own decisions and with those of other leading global merger control authorities. If taken literally, important parts of the Draft Revised MAGs also appear to us to be inconsistent with the statutory SLC test.

(5) In **Section III**, we consider the detail of the Draft Revised MAGs and comment on each section individually from both a practical and a principled perspective with reference to the three criteria outlined in Part II, as relevant.

(6) We would be happy to discuss any aspect of our response with the CMA.

II. Assessment of the Draft Revised MAGs against three objective criteria

A. Level of Enforcement

1. A step change in enforcement policy should be evidenced-based: the under-enforcement debate and current CMA approach

(7) To state the obvious, the UK merger regime should be established and administered in such a way that is most likely to lead to *correct* outcomes. As recognised by the CMA, there is an inherent risk of errors in merger control and a balance must be struck between under-enforcement (i.e. letting through problematic mergers) and over-enforcement (i.e. intervening – either through remedies or prohibition – in mergers that are benign or even procompetitive).

(8) This is not merely so as a matter of policy. It is the law. As the Draft Revised MAGs rightly acknowledge at para. 2.34, the burden and standard of proof is not a matter for the CMA to determine, either on a case-

[1] This paper was drafted by Christian Ahlborn, Daniel Piccinin and Brian Sher on behalf of the JWP. The members of the JWP comprise barristers, advocates and solicitors from all three UK jurisdictions. The JWP is co-chaired by George Peretz QC of Monckton Chambers (GPeretz@Mockton.com, tel 020 7405 7211) and Brian Sher, Partner, CMS (brian.sher@cms-cmno.com, tel 020 7524 6453).

by-case basis or through guidance of this kind. The Enterprise Act 2002, as interpreted by the Courts, only permits the CMA to intervene at Phase 2 if it can show on the balance of probabilities that the merger will produce an SLC. If the CMA applies that standard accurately (i.e. lawfully) it should be expected to err on the side of under-enforcement approximately as often as it errs on the side of over-enforcement.

(9) A number of senior CMA officials have relatively recently (since late 2018 to the present) expressed the view there has been historical under-enforcement, and that the way risks of over and under-enforcement are weighed should be rebalanced. Lord Tyrie was most succinct: "*We have become tougher on mergers*".[2] Similar comments were made in December 2020 by Dr Mike Walker, who cited the OFT's decision in *Facebook/Instagram* as well as the EC's decisions in *Facebook/WhatsApp* and *Google/Doubleclick* as mistakes.[3] Dr Coscelli has also defended higher intervention rates by reference to the CMA's use of richer evidence sources (primarily deal valuation and other internal documents) and the particular challenges of dynamic markets. Dr Coscelli has publicly cited the *Facebook/Instagram* case as a decision that "*does look a bit naive*".[4]

(10) Consistent with this marked shift in tone from a number of key CMA representatives compared to the first years of the CMA, intervention rates in CMA merger cases have shot up dramatically over the past two years. By way of illustration, since 1 January 2019 around 70% of mergers referred to a Phase 2 review have not gone ahead, due to either abandonment, prohibition, or the imposition of remedies that have the same effect as prohibition in completed deals. This is well over twice the rate of the early CMA era from 2014 to 2017.[5] On its own, that statistic might be thought to suggest that the CMA has become less stringent at Phase 1, only referring cases that are highly likely to require intervention. But the data tell a different story. The proportion of Phase 1 cases referred for a Phase 2 investigation climbed above 20% for the first time in the CMA's 2019/20 financial year and sits at around 25% for the 2020/21 year to date, compared to 8-15% in the early CMA years.[6] Taken together, these two statistics show the CMA to be intervening at Phase 2 in a higher proportion of what is already a higher proportion of cases that are referred at Phase 1.

(11) The CMA background notes in the Draft Revised MAGs make only a discreet reference to under-enforcement (paras. 1.7 and 1.8 mention "*under-enforcement, particularly in relation to digital markets*" in the context of the Furman and Lear reports) but do not explicitly endorse that finding. Nevertheless, as we explain below, the Draft Revised MAGs reflect in many instances the significant policy shift seen in recent years.

(12) The specific challenges posed by digital mergers have been considered at length by the CMA's Digital Taskforce, which has recently recommended a broad range of reforms, including a proposed new merger regime for firms with "*Strategic Market Status*" ("**SMS**").[7] The JWP does not comment on those proposals in this response, but considers that reforms thought necessary to address apparent concerns in relation to the enforcement approach in dynamic and innovative digital markets, where future conditions of competition are particularly difficult to predict, should not – without a sound evidential basis – be extended beyond the digital sector. However, the Draft Revised MAGs – which apply to all and not just digital

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2 Andrew Tyrie speech to Policy Exchange: closer to consumers – competition and consumer protection for the 2020s, 25 February 2020, available at: https://www.gov.uk/government/speeches/andrew-tyrie-closer-to-consumers-competition-and-consumer-protection-for-the-2020s.

3 Presentation to CRA Conference Webinar, 17 December 2020.

4 Keynote speech to the annual Fordham Competition Law Institute conference in the USA, 7 September 2018, transcript available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1007&context=fcli_conf.

5 Phase 2 stats | Publications | Insights | Linklaters.

6 *Ibid.*

7 As acknowledged by EU Digital Market Report which, for example, acknowledges a lowered importance of market definition analyses for these sorts of markets. Competition policy for the digital era, a report by Jacques Crémer Yves-Alexandre de Montjoye and Heike Schweitzer dated 4 April 2019.

mergers – are permeated by the view that the CMA needs be stricter on mergers and are designed to facilitate intervention. This raises a number of issues.

(13) The CMA is constrained by the legislative framework under which its merger regime operates. As noted above, the Enterprise Act 2002 (as amended) establishes the boundaries of the CMA's powers. It gives the CMA broad powers and indeed broad discretion, but the CMA's discretion is not without limits. The test for reference at Phase 1 is explicitly designed to avoid under-enforcement, but at Phase 2 such a legislative preference is not endorsed. In particular, the statutory test for prohibition or remedies in Phase 2 requires that the CMA establish, on the balance of probabilities, that the relevant merger situation "*has resulted*" or "*may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or service*" (section 35(1)(b); 36(1)(b)).

(14) It follows that, in order to justify a change to its guidance that tilts the balance towards intervention, it is not enough that the CMA believes that some of its earlier decisions applying the old guidance let some mergers that with hindsight turned out to be anti-competitive slip through the net. Errors of that kind (just like the other) are to be expected if the CMA is applying lawfully drafted guidance correctly. Rather, the CMA must establish that the old guidance systematically tended to clear mergers even though it was **likely, *ex ante***, that those mergers would turn out to be anti-competitive.

(15) While some academics have suggested there may have been under-enforcement outside the digital sector[8], members of the JWP are not aware of any specific empirical evidence on this point in relation to UK merger control more generally. In the Draft Revised MAGs, the CMA provides no evidence of systematic under-enforcement in other markets. Thus, there is no clear evidence cited to justify a change in approach.

(16) To the extent the CMA wishes to pursue a more aggressive approach to merger review, it must do so within the bounds of the existing legal test and standard of proof. This has not changed – and indeed cannot be changed other than through Parliament (as the CMA suggests for SMS firms in its Digital Markets Taskforce advice to Government of 8 December 2020 (Appendix F)).

(17) The JWP believes that the Draft Revised MAGs tilt the balance towards enforcement not properly established as justified on the balance of probabilities, as further outlined below. And this approach would not be limited merely to SMS firm acquisitions, but would apply to all mergers.

2. The Draft Revised MAGs are 'tilting the balance' towards stronger enforcement

(18) The Draft Revised MAGs propose a number of changes to the way the CMA approaches merger assessment which, both individually and collectively, tilt the balance towards higher levels of intervention. To give only a few examples:

(a) Asymmetric treatment of symmetric events creates a bias in favour of intervention

(19) The Draft Revised MAGs purport to establish different evidential burdens for symmetric events, depending upon whether the establishment of the likelihood of the event would point towards intervention or clearance.

(20) This is perhaps most clearly evident in relation to evidence of entry and exit, where little (and indeed even no) documentary evidence is required to establish the likelihood that a merging party would enter a new market, or pursue expansion, in the counterfactual[9]; while establishing entry of a third party is subject to

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[8] See for example: Valletti, Tommaso M. and Zenger, Hans, Increasing Market Power and Merger Control (May 14, 2019). Competition Law & Policy Debate, Vol. 5, No. 1, pp. 26-35, 2019, Available at SSRN: https://ssrn.com/abstract=3387999 or http://dx.doi.org/10.2139/ssrn.3387999.

[9] Paragraph 2.28(c) Draft Revised MAGs: "*a lack of evidence of efforts of explicit entry or expansion plans made available to the CMA will not be sufficient to demonstrate that the firm would not have entered absent the merger*".

strict evidential standards, particularly third party entry in a manner that could prevent an SLC, which is stated by the CMA as likely to be "*rare*".[10]

(21) The JWP can understand how, in a particular case, it must be possible to prove that counterfactual entry by one or other merging party was likely on the basis of a rigorous analysis of the ability and incentive of that party to enter in the counterfactual. In principle, this could well be the case even in the absence of documented entry plans. But the same must logically be true for entry by third parties, including entry induced by a merger. Indeed, a finding that a merger was likely to harm competition by preventing counterfactual entry by a merging party, based solely on an analysis of ability and incentive, necessarily entails a finding that the merging parties had some unique ability and/or incentive to enter that was not shared by any third parties. Otherwise, the very ability and incentives that the CMA finds would have led to counterfactual entry by one or other merging party, would also have been likely to induce post-merger entry by a third party. The criteria of timeliness, likelihood and sufficiency that the CMA imposes on the analysis of merger-induced entry (see para. 8.28) must be applied consistent with the CMA's analysis of counterfactual entry by the merging parties. In other words, the CMA cannot require more timeliness, more likelihood or greater scale for the entry of third parties (and cannot require more compelling or documented evidence of the same) than it requires for a finding of counterfactual entry by the merging parties. Nor is it clear from the Draft Revised MAGs why third party entry which is not induced by the merger should be subject to a different evidential standard than third party entry which is so induced.

(22) The CMA's failure to acknowledge this inherent connection between analysis of counterfactual entry by merging parties and merger-induced entry by third parties is inconsistent with a 'balance of probabilities' standard.

(23) A similar tension exists with the CMA's analysis of counterfactual exit by a merging party (i.e. the failing firm defence). Although the CMA states that it will apply a balance of probabilities test for counterfactual exit at Phase 2 (para. 3.24), the evidential requirements that the CMA identifies at paras. 3.26-3.29 are much greater than those that it contemplates for a finding of likely counterfactual entry by third parties. There is no proper basis for adopting that distinction as a general rule. The statutory test is engaged by counterfactual entry and exit by the merging parties in exactly the same way and so in both cases the CMA must consider all available evidence (whether documentary or economic analysis of abilities and incentives) holistically and to the same even-handed evidential standard.

(b) Lowering SLC test for large/important markets means SLCs will be found even where it cannot be established on the balance of probabilities

(24) The Draft Revised MAGs suggest that the bar to proving an SLC is lower for transactions in markets that are large or otherwise important to UK consumers.[11] While the case law is clear that "*substantial*" is not synonymous with "*large*" or "*weighty*", the Draft Revised MAGs now also suggest in novel fashion for guidelines that substantial can mean "*small*": "*a lessening of competition may also be considered substantial where the lessening of competition is small*" (at para. 2.9). This is said to apply in circumstances where the market to which the small amount of rivalry is lost is in a large or "*important*" market. The apparent rationale is that even a small price increase or deterioration of quality, range, service or innovation may have a substantial effect on overall consumer welfare.

(25) The JWP notes that this interpretation is legally controversial, and that the only example cited in the Draft Revised MAGs (in fn 24) is one of the CMA's own recent decisions, and not any decision of a court or tribunal. It might be helpful for the CMA to explain in more detail why it has adopted this interpretation of the word "*substantial*" by reference to the Tribunal's decision in *Global Radio Holdings Limited v CC* [2013] CAT 26, which the CMA rightly cites at fn 22 as a leading authority on that question. In that regard,

[10] Paras. 8.26-8.27 Draft Revised MAGs.

[11] Para. 2.9 Draft Revised MAGs: "*(A) lessening of competition may also be considered substantial where the lessening of competition is small, but the market to which it applies is large or is otherwise important to UK consumers*".

the JWP notes that the CMA is wrong to say at para. 2.9 that "*[s]ubstantial in the context of an SLC … is capable of meaning 'not trifling'…*". The *Global Radio* decision cited by the CMA said that "*substantial*" in the context of an SLC means the same thing as "*substantial*" in the context of "*substantial part of the United Kingdom*", which the House of Lords held meant "*worthy of consideration for the purpose of the Act*", as the Tribunal noted at *Global Radio* para. 21.

(26) Whatever the correct meaning of the word "*substantial*" in this context, however, there is a practical issue with which the guidance must grapple. This relates to standard of proof rather than the meaning of "*substantial*" in the abstract. In reality, and outside the lab, a very small (e.g. 1%) predicted price or non-price effect is very difficult to identify on the balance of probabilities. The mere fact that such an effect is predicted by a full-blown merger simulation would not be sufficient to establish that it is likely, given the inherent uncertainty of even the most realistic of such models fed with even unusually high-quality data. The position is even worse for the simpler models (such as a GUPPI or IPR price pressure test), that are used more frequently in practice. In other words, the size of the potential price rise is itself relevant to the degree of likelihood because of the margin of error – quite apart from whether a very small price rise is material. Merger control is inherently forward looking and seeks to predict inherently uncertain future events and there are evidential difficulties in establishing the likelihood of very small changes. The data available in merger reviews is generally unlikely to allow projection of price increases with a confidence interval that is sufficiently narrow to conclude that any price increase is more likely than not where the projected increase is only very small.

(27) This means there is very a real risk of harmful, or in any event incorrect or unjustified, intervention based on a projected e.g. 1-2% price increase, where the true impact of the merger is no price increase or even a small price decrease. Even if the guidance maintains the interpretation of "*substantial*" set out in the draft, it should therefore at the very least acknowledge or otherwise grapple with the fact that in many cases the data to prove small effects on the balance of probabilities may not be available.

(c) Reduced importance of countervailing factors

(28) The Draft Revised MAGs give countervailing factors – in particular, buyer power, efficiencies and entry and expansion – reduced importance. For example, while the Draft Revised MAGs acknowledge that buyer power may be a countervailing factor, they disregard the possibility that a sophisticated customer could prompt expansion/improvement of an existing supplier such that it neutralises the SLC (in a similar way to triggering a new entrant). Other types of countervailing factors, such as constraints posed by suppliers, are not even mentioned. While clearly not relevant or material in all cases, countervailing factors often represent real constraints for merging businesses. To routinely disregard or downplay the importance of these constraints again systematically, at the level of principle, tilts the balance towards intervention.

(d) Approach to evidence from the merging parties

(29) Paragraph 2.28 of the Draft Revised MAGs appears to call for an unjustifiably sceptical and one-sided approach to evaluating evidence that is produced by the merging parties. They say that the CMA is likely to place less weight on evidence (i) produced after the period in which the merging firms were contemplating the merger (subparagraph (a)), (ii) any lack of change in the merged parties' behaviour post-merger (subparagraph (b)), and (iii) any absence of documents pointing to competitive interactions if the merging parties do not normally generate such documents in the ordinary course of business or regularly delete such documents (subparagraph (d)).

(30) The JWP agrees that the assessment of evidence (or the absence of evidence of a particular kind) is context-specific and should take into account the incentives of the party producing it. However, the guidance should make clearer that this point cuts both ways. For example, horizontal competitors of the merging parties may have interests that are diametrically opposed to those of consumers: if a merger harms consumers through a softening of competition, that may benefit competitors even more than it

does the merging parties; if a merger benefits consumers because synergies enable the merging parties to offer more attractive products or lower prices, that may harm competitors. Similarly, the Draft Revised MAGs say the CMA is increasingly focusing on deal valuation documents, but do not acknowledge that these documents often present an overly positive assessment of the Target (particularly when produced by the Seller) and/or can be produced with little information or in short time periods (when produced by the purchaser). More generally, internal documents are often produced by individuals outside senior management who do not have an accurate sense of the merging parties' intended strategies. Alternatively, they may have been produced to achieve a particular outcome (e.g. a sales pitch) and may have been drafted over-optimistically by a sub-group of individuals within the company in order to make the internal case for the investment and may not reflect true conditions. It is important that all of these possibilities, rather than only the possibility that a document was drafted with an eye to the CMA's review of it in a merger investigation, are properly considered by the CMA when reading any document.

(31) Further, in order to be even-handed, the guidance should note the corollaries of the reasons for scepticism that it records. In particular at para. 2.28(d), it should note that in a case where the merging parties do normally generate documents in the ordinary course of business and do not regularly delete them, the absence of documents pointing to competitive interactions between merging parties would ordinarily be indicative of absence of such interactions. Similarly, para. 2.28(c) is too unequivocal in stating that a lack of evidence of entry plans will not be sufficient to demonstrate that evidence was unlikely. If, say, a comprehensive strategy review document canvasses a number of potential strategies (e.g. merger, exit, restructuring) but not entry, such a document may well be good evidence that entry was not a likely strategy for that firm.

(32) Finally, whether a piece of evidence comes from the merging parties, competitors or customers, the incentives of that party can only ever be one factor in the CMA's assessment. Documents created in the period in which the merging parties were contemplating the merger may well be strong evidence in a particular case if they appear on their face to contain sound and unbiased analysis. The context may suggest that the document was not produced with a view to influencing the CMA, and in any event the analysis may be more relevant and compelling than other documents produced at an earlier time for different purposes. The CMA should make clear in the guidance that it maintains an open mind to what the documents show in a particular case.

3. Implications

(33) Taken in their totality, the Draft Revised MAGs would endorse a significantly lower bar for CMA intervention in merger cases, allowing the CMA to quote the guidance in support of its already very wide discretion granted under existing judicial review principles. The practical impact of the Draft Revised MAGs is to push the CMA's decision groups (who will naturally want to follow the guidance) towards intervention in mergers where no SLC can be established on an unbiased assessment of the basis of the balance of probabilities. The consequence of this is likely to be increased litigation, including more cases in which the contention is not merely that the CMA has misapplied its guidance, but that the guidance itself is unlawful. As discussed in more detail below, the legal uncertainty that would flow from litigation of that kind is undesirable.

(34) In the view of the JWP, the aspects of the guidance referred to above are not only inconsistent with the legal limits of the CMA's powers as set out in the Enterprise Act 2002, but also risk shifting the balance of the risk of over- versus under-enforcement too far towards routinely favouring over-enforcement. Over-enforcement carries real and potentially material costs for consumers and the efficient functioning of the UK economy. Mergers allow firms an efficient means of reducing costs, eliminating duplicating functions, obtaining access to technology or distribution etc. It is particularly problematic that the question of historical under-enforcement beyond the digital sector is not even addressed explicitly, as the Draft Revised MAGs proceed without any evaluation of empirical evidence to support a view there has been historical under-enforcement, and no consideration of the risks of overenforcement, which are very real.

In examining the Draft Revised MAGs one would have no idea of the Digital Market Unit's SMS merger proposals, for example, and yet it is clear to the UK competition community that the digital merger debate has animated much of the change in course in the Draft Revised MAGs relative to the current 2010 counterpart (the "**Current MAGs**").

B. Predictability

1. The importance of predictability

(35) The ability for well-advised parties to accurately predict the likely outcome of a CMA merger review is important both as a matter of legal principle, but also to the attractiveness of the UK as a place for doing business. Predictability of outcomes is therefore an important goal for the UK merger regime.

(36) Legal certainty is central to the rule of law and requires, on the one hand, that the rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them. Enhancing predictability for business was in fact a key driver in the design of the modern UK merger regime, as recognised by Parliament when the modern merger control regime was introduced in 2002. The Second Reading Speech of the Enterprise Act Bill explains that one of the objectives in introducing a competition test rather than a former pubic interest test would be "*more transparent and predictable decision making. There will also be more transparency in the operation of the competition regime… The effect will be a regime that operates more predictably, more consistently and more proportionately – better regulation"* (paragraph 46 – emphasis added).[12]

(37) Guidelines, including the merger assessment guidelines, should be a key tool to increase the predictability of the regime, rather than to reduce it. This is an important consideration for the CMA and should be reflected in the Draft Revised MAGs, in order to assist merger parties in assessing the likely outcome of a CMA merger review.

(38) Of course, each merger turns on its own facts and some level of uncertainty for merging parties is inherent in merger control. The CMA gathers a broad range of evidence during its investigation, most critically third party feedback which is not available to parties at the time they are negotiating a deal. In the face of this inherent uncertainty, it is critical that merging parties should be able to predict, with a reasonable level of certainty, how the CMA will evaluate evidence the merging parties are able to provide, and thus what the likely outcome of a CMA process would be, if there is no third- party evidence that contradicts the parties' evidence. Assisting merging parties or potentially merging parties to do this is indeed the whole purpose of the merger assessment guidelines.

2. The Draft Revised MAGs inappropriately increase the CMA's discretion and reduce the predictability of the regime

(39) The most important issue for the impact of any guidance on legal certainty is that it should be crystal clear that the guidance itself is lawful. As already explained above, several key aspects of the Draft Revised MAGs appear to the JWP to be unlawful (because they are inconsistent with a balance of probabilities standard) and therefore ripe for judicial review. That is the worst possible start for any guidance, in terms of its effect on legal certainty. Even beyond that basic point, however, the Draft Revised MAGs increase the discretion available to the CMA and thus reduce the predictability of the regime at almost every stage.

(40) There are also a number of specific changes in the Draft Revised MAGs that significantly reduce predictability for potentially merging parties.

[12] Enterprise Bill (Hansard, 10 April 2002) (parliament.uk).

(a) 'Demotion' of market definition and market shares

(41) Market definition is an important and indeed legally required element of the CMA's merger assessment.[13] It is also critical to predictability of outcomes and (relatedly) to a coherent and consistent approach to assessment of transactions both across and within markets.

(42) In practice, establishing the likely approach to market definition and assessing market shares on such basis is an important tool to allow merging parties to assess the likely level of market concentration brought about by a merger. This is important because while demoting market definition, the CMA seeks to place greater prominence on concentration of "*close competitors*" in differentiated markets, expressed as "*few firms*" or "*small […] number of significant players*" arguing that it has a prima facie expectation that any two firm are close competitors in such circumstances (para. 4.9). The only principled basis for arriving at a conclusion on whether there are few firms, or a small number of significant players, is via the traditional assessment of market definition to "*provide a framework for… the analysis of …competitive effects*" (Current MAGs, para. 5.2.1) – in other words, frame whether the merger can fairly be analysed as a '4 to 3' merger, for example. As the Current MAGs correctly put it, it is a "*useful tool, but not an end in itself*" (5.2.2.) The Draft Revised MAGs imply that because it is not an end in itself, it is no longer a useful tool.

(43) Nor need market definition be prescriptive to be a "*useful tool*" for the CMA and aid in enhancing predictability for business. Indeed, the CMA's practice is not to define markets but only 'frames of reference' in Phase 1, but notwithstanding that these frames of reference are not formal market definitions they have significant value to business in outlining the CMA's analytical process in a manner that can be applied to future cases.

(44) To 'demote' the market definition exercise deprives potentially merging parties of an objective framework for analysis which can be applied across cases, by contrast to an exclusive focus on closeness of competition which is inherently far more subjective and case-specific. This is particularly relevant in a Phase 2 context.

(b) No guidance on when an SLC is unlikely

(45) Whilst the Draft Revised MAGs provide a list of examples where an SLC could be expected to arise, there are no examples of when an SLC is unlikely to arise. The Draft Revised Guidelines give the CMA wide scope to answer to the SLC question: "*[t]he 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"*. (para. 2.8). This is out of step with previous versions of the CMA's Merger Assessment Guidelines, which provided an indication of the market shares, competitor numbers and/or concentration measures that would normally be unlikely to give rise to competition concerns. For example, the Draft Revised MAGs remove the guidance in the Current MAGs that combined market shares of under 40% in undifferentiated markets are unlikely to be problematic (Current MAGs, para. 5.3.5). Whilst this has not applied as a true 'safe harbour' in CMA practice for many years and the JWP would support the lowering of this threshold to reflect practice, removing it altogether makes it difficult for merger parties and their advisers to self-assess.

(46) We understand that the CMA's review of a transaction will be case-specific and dependent on the specific facts of the case, and that it needs flexibility to reach the correct decision, but the CMA, with its experience of reviewing merger transactions, is capable of outlining sensible benchmarks for transactions that are unlikely to give rise to an SLC, at least absent exceptional circumstances. We do not consider that providing this type of guidance would tie the CMA's hands in difficult cases (i.e. a transaction which typically would not give rise to an SLC, but because of certain facts does in fact lead to an SLC). The

[13] Under the Enterprise Act 2002 the CMA may only intervene where an SLC is identified in a "*market or markets*": defining the relevant market or markets is thus a necessary legal precursor to an SLC finding.

CMA has wide scope (as recognised by the CAT) to depart from its merger assessment guidelines when it provides well-reasoned explanations for doing so.

(47) Providing greater guidance on transactions that are unlikely to constitute an SLC has no downside for the CMA – for the reasons noted above, it does not restrict its ability to find an SLC in difficult transactions. But it would bring significant benefits – namely, improving the predictability of the CMA's interpretation of the Draft Revised MAGs and making it easier for merging parties to self-assess.

3. Implications

(48) Taken together and with the general lack of clarity in relation to assessment of evidence mentioned above, these changes significantly reduce the ability of parties and their advisers accurately to predict which framework the CMA will apply to the analysis, or how evidence will be weighed and assessed. Such uncertainty risks having a chilling effect on M&A and undermining the attractiveness of the UK as a place for doing business.

(49) Predictability also has benefits for the CMA. Where advisers can predict that the CMA is likely to have serious concerns in relation to a potential transaction, those advisers often give advice that prevents the deal going ahead. Senior officials at the CMA have commented that recent intervention rates may reflect some deals that "*should never have left the boardroom*".[14] Without a level of predictability which necessarily comes from a consistent and clear approach to evaluating evidence and concerns, more public money and time will be 'wasted' on these kinds of transactions.

C. Coherence with peer regimes

1. The importance of coherence with peer regimes

(50) The UK merger control regime should function in a manner that allows it to operate effectively where the UK is only one of several jurisdictions reviewing the transaction. This of course has a procedural aspect, but also has an important substantive aspect: while there will be exceptions that prove the rule, in general where competitive conditions are similar across the jurisdictions where a transaction is being reviewed, merging parties should be able to expect similar outcomes, and – in appropriate cases – be able to negotiate remedies that resolve competition concerns in multiple jurisdictions.

(51) This will be particularly important in relation to mergers subject to parallel review by the EC and the CMA.

(52) The benefits of co-operation with other authorities – in particular, the EU – are recognised by the CMA in its recent *Guidance on the functions of the CMA after the end of the Transition Period* (CMA125), which outlines at paragraph 3.34 (emphasis added) that:

> *Where mergers are subject to investigation in more than one country, there can* ***be substantial benefits to the parties and to the competition authorities*** *in those jurisdictions from encouraging communication and cooperation between the competition authorities. This will be* ***particularly important after 31 December 2020****, as a significant proportion of mergers that will fall under UK jurisdiction will be investigated in parallel by the European Commission and other jurisdictions.*[15]

[14] For example, Colin Raftery at *Competition Enforcement after Brexit: Merger Enforcement*, Dec. 11, 2020 cited with agreement Rebecca Slaughter of the FTC's comment on "*clearly illegal transactions that should never have got out of the boardroom*".

[15] Chapters 8 and 18 of the CMA's recently issued revised Mergers Guidance on Jurisdiction and Procedure (CMA2 Revised, December 2020 similarly discuss the importance of such co-operation.

2. The approach set out in the Draft Revised MAGs will undermine coherence with peer regimes

(53) There are a number of aspects where the Draft Revised MAGs depart from accepted norms in merger reviews.

(i) Market definition: A market definition analysis has an important role to play for convergence between the approaches of various global competition authorities. Market definition continues to play an important role in most peer jurisdictions, and a significant deviation from this by the CMA may cause significant burdens for merger parties in multi-jurisdictional transactions and increase the potential for divergent outcomes.

(ii) Closeness of competition: The CMA's effective emphasis on closeness of competition at the expense of many other factors is at odds with the approach in peer regimes. The Draft Revised MAGs would point towards intervention in any case where the merging parties are close (let alone closest) competitors, regardless of dynamic factors and the broader competitive landscape that should be captured by a full assessment. This is out of step with the DoJ/FTC and EC, which will consider closeness of competition as an important step, but not the decisive question for intervention, in the context of the overall competitive assessment in differentiated markets.

(iii) Lower standard for SLC in large or important markets: Nether the DoJ/FTC nor the EC adopts a differing approach for transactions in larger markets and this new approach is a departure from the Current MAGs.

3. Implications

(54) Just at the moment when coherence with peer regimes – in particular, the EU – is more important than ever, following the end of the Brexit Transition Period, the Draft Revised MAGs threaten to undermine it.

III. Comments on specific changes

(55) In this part we give brief comments on specific changes in the Draft Revised MAGs, on each of (i) conceptual issues; (ii) analytical tools; and (iii) theories of harm and countervailing factors.

A. Conceptual issues: SLC/Scope

1. Non price considerations (para. 2.4)

(56) We welcome that the Draft Revised MAGs focus on non-price competition, particularly in light of the increased number of merger investigations relating to online platforms which offer services for zero monetary price to consumers (albeit while charging users on the 'other side' of the market).

(57) However, we urge the CMA to provide additional clarity on the frameworks it intends to use to investigate and measure a reduction in non-price competition. These concerns are particularly pertinent given the difficulties in measuring a loss of non-price competition in comparison to a loss of price competition (where the literature and approach is more settled). We outline these concerns in more detail with respect to innovation and other non-price competition below.

(a) Innovation

(58) The Draft Revised MAGs note at paragraph 2.8 that "*[i]nnovation will play a key role in some merger investigations".* The CMA has experience of conducting investigations into the pharmaceutical and digital sectors where innovation is a key parameter of competition, but it provides little indication in the Draft Revised MAGs of the framework it would use to measure an innovation SLC. This is troubling given the different approaches that the CMA could opt to use (none of which have been settled on as optimal) and the risk that a poorly considered approach could lead the CMA to reach incorrect decisions.

(59) In previous cases,[16] the CMA has relied on internal documents when investigating whether a transaction results in an innovation SLC. There are issues with this approach – namely that internal documents often do not provide a complete picture, particularly with regards to something as nebulous as innovation, and can be taken out of context to support a theory of harm for which there is little or no other supporting evidence. We outline the issues with internal documents in more detail at paras (29) to (32) above. Moreover, the CMA will generally only have access to merging parties' internal documents, which are likely – viewed in isolation – to overstate innovation by the merging parties and understate (or indeed not even be aware of) innovation by third parties. Consideration should be given to how to rectify this potential evidential gap.

(60) Similarly, the CMA could opt to measure loss of innovation by reference to other metrics, including R&D expenditure, headcount or number of patents. As with internal documents, none of these metrics is a perfect tool for measuring a loss of innovation. For example, high R&D expenditure is by no means an adequate proxy for how innovative a firm is – e.g. a firm may spend more to make-up for inefficiencies or the poor performance of its R&D department.

(61) Whilst the JWP acknowledges that there is inherent uncertainty in all these measures of innovation, we urge the CMA to provide additional guidance on how intends to deal with this uncertainty and how it envisages conducting its investigations int his area going forward.

(b) Other non-price considerations

(62) The Draft Revised MAGs also reference a number of other non-price parameters of competition that the CMA could chose to focus on during an investigation; for example, "*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…"* (para. 2.5). As with innovation, the Draft Revised MAGs provide no indication of the frameworks the CMA intends to use to measure an SLC for these parameters of competition.

(63) Investigations into a loss of privacy and interoperability (for example) are relatively novel from a competition perspective and there is little CMA precedent, meaning it is even more critical to business certainty that the CMA outlines its intended approach. Whilst we understand that there are some tools that can be used to measure privacy related consumer harm in merger analysis,[17] these are often untested and are unlikely to be feasible in the statutory timetables under the Act (particularly during Phase 1). Moreover, privacy considerations often militate *against* interoperability, which is generally considered to be procompetitive. The CMA needs to settle on tools and/or methodologies that are workable not only for itself, but also for the merging parties.

(64) As noted above, we welcome the CMA's focus on non-price competition, but urge the CMA to fully articulate how it intends to investigate these parameters of competition.

2. Lowering of SLC standard

(a) Transactions in large or otherwise important markets

(65) As set out at para. (24) *et seq*. above, the Draft Revised MAGs also propose to lower the SLC test for large/important markets, with the apparent rational being that even a small price increase or deterioration of quality, range, service or innovation may have a "*substantial*" effect in such markets. It is the view of the JWP that such an approach is legally controversial, being supported only by a previous decision of the CMA, and likely to lead to significant practical challenges in its application, particularly when establishing the likelihood of small price effects on the balance of probabilities.

[16] See for example *Illumina/Pacific Biosciences* (2020), *Experian/Clearscore* (2019) and *Thermo Fisher/Roper* (2019)

[17] For example, see The Law and Economics of Data and Privacy in Antitrust Analysis by Geoffrey A. Manne, Ben Sperry :: SSRN.

(b) Transactions in markets with limited competition prior to the merger

(66) Paragraph 2.9 of the Draft Revised MAGs states that "*a lessening of competition may be considered substantial where the lessening is small… if there is only limited competition in the market to begin with".* This approach misapplies the SLC test, which at its heart is a comparison of competition in a market with and without the transaction. In other words, the key question for the CMA to consider is 'how much if competition is lost?' rather than 'how much competition was there in the first place?'.

(67) The Draft Revised MAGs do not provide any reasoning why a perceived lack of competition in a particular market makes any further reduction from the merger more serious, and warrants greater scrutiny. The decision cited in footnote 25 (*Celesio/Sainsbury's*) is not in fact a case in point. As the footnote itself makes clear, that was a case in which the lessening of competition was substantial *despite* (not *because of)* the fact that regulation limited the possibilities for competition beforehand. In other words, there was still sufficient competition to restrict for the effects of the merger to be substantial.[18]

(c) Conclusion

(68) For these reasons, as well as those outlined in Section II above, the JWP does not support these changes. However, if the CMA persists with this approach then it must provide greater clarity on how: (i) it will determine whether a market is "*large or… otherwise important to UK customers*"; (ii) it will determine if there is only limited competition in the market; and (iii) what it means by a "*small*" lessening of competition and how the SLC test will be applied differently (i.e. how much lower is the SLC bar).

B. Analytical tools: counterfactual

1. Use of a counterfactual involving competition law violations

(69) The Draft Revised MAGs provide that the CMA will not use as a counterfactual a competitive dynamic that involves violations of competition law, providing the example of a cartel. The approach in the past has not been to pretend a cartel does not exist, but instead posit that, in the counterfactual, the cartel would have been broken down absent the merger, such that a merger could give still rise to co-ordinated effects concern by making co-ordination stronger, more durable or more complete.[19] While the JWP agrees with the logic that cartelists should not receive a credit for such conduct for purposes of merger control, it gives rise to the question of whether this position applies only to breach of competition law or also breach of other laws (e.g. unlawful smuggling of cigarettes). It would be helpful if the CMA would clarify this point in the final version of the Draft Revised MAGs.

2. Entry and expansion of merged firm

(70) The Draft Revised MAGs set out the circumstances under which the CMA will consider whether the counterfactual should include the entry of one of the firms into the market of the other, or the expansion of the firm in the absence of the merger. However, a question arises as to whether entry and expansion will be assessed differently by the CMA depending on whether they will be considered in the context of (a) the counterfactual; (b) the competitive assessment; or (c) countervailing factors. The CMA should clarify this in the final version of the Draft Revised MAGs, in order to align the tests and provide guidance on how they will be applied.

3. Exiting firm scenario

(71) The Draft Revised MAGs provide that where the (failing) firm is part of a larger corporate group, the CMA will consider "*the parent company's ability to provide continued financial support*". However, the CMA must also assess the parent company's *incentive* to provide continued financial support to the failing firm

[18] See in particular para. 7.160(a) of the decision, which makes clear that the limited scope of pre-merger competition was a factor pointing against a finding of SLC, rather than towards it.

[19] See e.g. OFT, *Dairy Crest/Arla* (2007), para. 46ff.

in order to assess whether the firm would have exited due to financial failure. Absent the incentive to continue to invest in the firm, the parent company will not do so even where it has the financial ability.

4. Alternative purchasers

(72) The Draft Revised MAGs take the position that the CMA will normally consider the most likely counterfactual to involve the target being under independent ownership that maintains or increases the competitive constraint of the exiting firm. The Draft Revised MAGs acknowledge that this could include a purchaser which is "*not active in the same market(s) as the exiting firm*". In contrast, the qualifications of potential purchasers in the context of divestiture remedies are considered very differently. The CMA's Merger Remedies Guidelines (CMA87) require that any purchaser must have "*access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets to enable the divested business to be an effective competitor in the market*". The final version of the Draft Revised MAGs ought to be aligned with those principles.

C. Analytical tools: market definition

(73) The Draft Revised MAGs significantly downplay the importance of market definition. This is not only reflected in the wording of the Draft Revised MAGs, which provides that where the CMA considers itself to sufficiently capture competitive dynamics as part of its competitive assessment, the CMA need not conduct a detailed market definition exercise, but also by the remarkable fact that market definition appears only at the end of the Draft Revised MAGs (when conceptually, market definition is an important tool which should sit near other tools such as the counterfactual). One is left with the impression that the CMA would prefer to avoid market definition altogether. However, under the Enterprise Act 2002 defining the relevant market or markets is a necessary legal precursor to an SLC finding: the CMA may only intervene where an SLC is identified in a "*market or markets*".

(74) While the JWP does not advocate an overly rigid approach to market definition, it is a tool that plays an important role in framing, and ensuring the rigour of, the analysis. It is at least one method for testing theories of harm and – as noted in Section II above – is crucial to predictability of outcomes across different cases and to ensuring merger control decisions proceed on an objective basis.

(75) The JWP supports the view that it may not always be necessary to come to a 'finely balanced judgement on what is 'inside' and 'outside' the market', but at the least, any theory of harm must be plausible under the market definition assumption or assumptions made by the CMA; certainly in Phase 2, but also in Phase 1. It is also crucial for predictability and to enable future merging parties to self-assess that the CMA clearly outline how it has approached the question of market definition in its decisions.

(76) We note that in the context of the under-enforcement debate discussed in Section II, numerous reports have noted the challenges of market definition in digital and innovative markets.[20] However, even if some relaxation of the approach to market definition is appropriate in the digital sector, there is no evidence to suggest it is justifiable more broadly. Moreover, to the extent the objective in relaxing the approach to market definition is to enable stricter enforcement in some or all sectors, this should be outlined transparently so that the merits and potential downsides of such an approach can be fully debated.

D. Theories of harm and countervailing constraints

1. The Draft Revised MAGs fail to provide sufficiently robust guidance on how the CMA will assess potential competition

(77) The Draft Revised MAGs distinguish between two theories of harm relating to potential competition: (i) a merger involving a potential entrant which may imply a loss of future competition between the merger firms after the potential entrant would have entered/expanded; and (ii) a merger leading to a loss of

[20] See for example, Furman Report, paragraph 3.27; *Competition Policy for the Digital Era*, pages 42-47.

dynamic competition where existing firms and potential competitors interact in an ongoing dynamic competitive process. Footnote 94 recognises that these concepts are interrelated "*as they both involve the constraint from potential entrants*" and therefore acknowledges that the assessment of each may to an extent rely on overlapping evidence.

(a) Future competition

(78) Future competition both between the parties and from third parties must to be taken into account – a proper counterfactual assessment requires that the pipeline products of the parties and their competitors be treated in a consistent manner. The CMA has statutory investigative powers which allow it to gather information from third parties, and these should be used where the CMA is pursuing a theory of harm based on future competition between the merging parties, or the CMA's assessment will be one-sided.

(b) Dynamic competition

(79) Para. 5.20 makes clear that uncertainty will not stop the CMA from assessing the impact of a merger as dynamic competition "*represents value to customers even where there is some uncertainty that these products of services will ever ultimately be made available to customers*". This is a more speculative theory of harm; it is by no means 'likely' early pipelines would in fact be successful. There are a number of serious difficulties with the assessment of innovation in dynamic markets, which should not be underplayed. The economic literature does not support any general presumption that mergers harm innovation and, therefore, the CMA should have to prove that the merger would be more likely than not to harm innovation. Just as mergers can have either anti-competitive or synergistic procompetitive effects on the pricing of goods and services, so they can have corresponding pro- or anti-competitive effects on innovation. As discussed above, innovation and pipeline products of competitors also need to be taken into account in a manner that is consistent with the analysis of the position for the merging parties.

(80) Para. 5.21 takes the position that, as well as entry and expansion into specific products, there may exist 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*". It then refers to specific examples focussing on "*competing programmes or strategies, rather than … individual future overlaps*". This is perhaps not surprising given the CMA's proposed move away from market definition (as to which we have commented above). But, whatever position is taken on the role of market definition, it is the view of the JWP that care must be taken to establish and evidence closeness of competition and the likelihood of SLC when undertaking this sort of analysis.

(c) The Draft Revised MAGs are unclear as to the standard of proof for co-ordinated effects

(81) Section 6 of the Draft Revised MAGs discusses at some length the conditions under which it is possible for economically rational collusion to emerge in a market. That analysis – of the ability to reach terms of co-ordination, internal sustainability and external sustainability – is relatively orthodox as far as it goes. The guidance is less clear, however, on what the CMA needs to prove about the effects of the merger. In para. 2.17(f), for example, the CMA says that one example of an SLC would be "*when some of the conditions for co-ordination are not met pre-merger, but all of them are expected to be met post-merger*". Para. 6.4 puts the test differently: "*[c]o-ordinated effects arise when a merger enables or strengthens co-ordination*". Para. 6.9 puts it differently again: "*[w]here the CMA has not found evidence of pre-existing co-ordination, it will consider to what extent the merger may make future co-ordination more likely*". Paras. 6.22 and 6.24 suggest that if the merger strengthens at least some conditions of co-ordination and all are met after the merger, then the CMA will find an SLC.

(82) The problem with these various formulations of the test is that the conditions for co-ordination are only *necessary* conditions for collusion to take place. It is not correct to conclude that in every situation, or even most situations in which all of the conditions are satisfied (such that co-ordination would be

sustainable if it took place), co-ordination takes place. And yet there cannot be any finding of an SLC (i.e. a substantial reduction in rivalry between competitors) unless the merger is likely to lead to co-ordination where previously there was none, or is likely to lead to more or more effective co-ordination taking place than would have been likely to occur in the absence of the merger.

(83) It is important that the Guidance should clarify the role that the conditions for co-ordination play in the CMA's analysis, and how it will approach the additional step of analysing whether, if the conditions are satisfied, co-ordination is likely to take place.

(d) The CMA's amendments to the assessment of vertical mergers could benefit from further clarification

(84) The Draft Revised MAGs largely follow the current guidelines' framework for examining input and customer foreclosure, apart from the CMA's approach to assessing the merged entity's ability to foreclose. Under the current guidelines the CMA considers three factors under the 'ability to foreclose' rubric: (i) the cost of the input relative to the final product; (ii) the extent to which rival manufactures can avoid a price increase by switching away from this input; and (iii) the pass-through of any cost increases to customers of the final product.

(85) Under the Draft Revised MAGs, the CMA has reframed the analysis of ability to foreclose so that it consists of two limbs: (i) a merged entity's market power upstream; and (ii) the importance of the input for downstream competition. As we understand it, the second limb (importance of the input) is intended to encompass both the cost of the input relative to the final product and the extent to which the adverse effects of foreclosure would be passed on to final customers, either in the form of higher prices (as per the current guidelines) or lower quality products or less innovation.

(86) If we have understood the position correctly, we consider that further clarification of the guidelines would be desirable. Otherwise, there is a risk that a reader might misunderstand the guidelines to indicate that an analysis of effects on final consumers is no longer needed. Moreover, in so far as the CMA intends to expand its analysis to encompass quality and innovation effects of foreclosure, it would be useful for the CMA to provide some insight into its framework for analysis. Rates of pass-through (which were critical to the analysis under the current guidelines) are relatively well understood, and methods for estimating them are well established. Users of the Draft Revised MAGs are now less likely to be able to predict how the CMA would investigate rates of pass-through of quality degradation or innovation effects, however. For the reasons given above, if this is to form an important part of the CMA's analysis, it is important that the CMA communicates to the market how that analysis is likely to be implemented.

(87) In similar vein, we note that para. 7.3 discusses how vertical mergers may allow the merged entity to "*gain access to commercially sensitive information*" ("**CSI**") e.g. "*data on specific sales and bids, overall pricing strategies and algorithms…*". The CMA says that it may assess this concern (i.e. access to CSI) as a separate theory of harm or as part of a broader foreclosure theory of harm. Again, some guidance as to how this separate theory of harm might be articulated or analysed would be welcome.

(88) Finally, the Draft Revised MAGs should acknowledge that vertical mergers can also promote innovation and efficiency.

2. Countervailing factors (i.e. buyer power, efficiencies, entry & expansion) have been given reduced importance

(89) A recurrent theme of section 8 of the Draft Revised MAGs is scepticism of countervailing factors. The section begins with the CMA noting that its "*experience is that it is rare for a merger to be cleared on the basis of countervailing factors*", without any enquiry into whether that is because its practice under the current guidelines was appropriate or excessively sceptical. Moreover, there is no acknowledgement in the section of the link between the theories of harm that the CMA discusses in earlier sections and its approach to potentially relevant countervailing factors. That is unfortunate; the CMA's task in identifying

any SLC is unitary in nature – it does not consist of separate assessments of theories of harm and countervailing factors. There is only one question: is the merger likely to result in an SLC.

(90) The example of 'counterfactual entry' (i.e. entry by the merging parties), 'theory of harm entry' (i.e. third party entry not induced by the merger) and 'countervailing factor entry' (third party entry induced by the merger) has already been discussed above. As explained there, the CMA is obliged to treat the two possibilities symmetrically. It cannot require more convincing or documented proof of merger-induced entry or more timely or larger scale entry as a countervailing factor than it does as a theory of harm. But the same applies to all aspects of the countervailing factor analysis: if the theory of harm only entails the possibility of harm at some point in the future and in some circumstances (e.g. through the removal of counterfactual entry or through the reduction of innovation), then synergies that are likely to be produced and manifest in prices in the short term ought to be given more weight. Moreover, evidence that the merger is genuinely motivated by efficiencies might cast doubt on a theory of harm (such as co-ordination, for example) that, viewed in isolation, might otherwise be concerning.

(91) Further, just as the CMA rightly explains at para. 2.15 that its burden of proving an SLC can be satisfied by identifying several possible theories of harm or counterfactuals, which cumulatively demonstrate a likelihood of harm but are each individually unlikely, so the CMA should also acknowledge that the same is true for countervailing factors. A merger that is likely either to generate synergies (in one form or another) or to promote innovation or to induce entry ought to be approved, even if it is not clear which one or more of those countervailing factors is likely to arise.

(92) In that regard, the CMA's suggestion at para. 8.4 that "*in some cases, the CMA may consider efficiencies and the evidence for an SLC together*" is welcome, but calls for further explanation. It would be helpful if the CMA would confirm that it understands its task to be unitary in nature, such that it will consider evidence of all countervailing factors in the round as part of its single conclusion on the question of an SLC.

(93) Section 8 also introduces unfortunate confusions in relation to the burden of proof. For example, at para. 8.6 it suggests that "*[t]he burden of proof is on the merger firms to prove efficiencies on the basis that most of the information relating to the synergies and cost reductions resulting from a transaction is held by the merger firms*". In so far as this is a reference to an evidential burden, in the sense that the merging parties must adduce the relevant evidence before the CMA is under any duty to consider it, that is unobjectionable and indeed a sensible investigative expedient. If it is suggested that the legal burden of proof is on the merging parties, however, that is incorrect as a matter of law. It is always for the CMA to establish that an SLC is more likely than not. If the merging parties adduce evidence of efficiencies, the CMA must conclude on the evidence in the round whether or not it is likely that the merger will reduce competition. It is not enough for the CMA to conclude that efficiencies are unproven (in the sense of arising with less than 50% probability) and that in the absence of efficiencies the merger would be likely to have anti-competitive effects.

(94) The CMA's general scepticism of merger-induced entry is also unwarranted. At para. 8.26 it says that "*the CMA's evaluation 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*". But that is to be expected if the CMA is applying a balance of probabilities standard. The study referred to was conducted by KPMG and considered just eight cases. In para. 8 of that report, KPMG says that in three of those eight cases, the entry predicted by the CMA did occur, and in a further case, although the predicted entry did not occur, an existing supplier expanded and that expansion was sufficient to constrain the merging firms, and in yet a further case, the CMA had predicted expansion by a particular firm, which did take place but the consequences of which were difficult to assess. KPMG only found three out of the eight cases in which

the predictions of entry/expansion did not materialise and prices appeared to have risen. That is not indicative of the CMA having applied an excessive standard of proof for a finding of SLC.[21]

(95) Ultimately, there is a limit to how far empirical studies can shed light on the question of whether the CMA's approach to entry is too lax or strict. Needless to say, there is no empirical evidence on whether in the set of cases in which the CMA dismissed the possibility of merger-induced entry and so required remedies or prohibited the transaction, it was right to do so. What is concerning, however, is that the CMA should simultaneously be proposing a stricter standard for a finding of merger-induced entry and a more lax standard for a finding of counterfactual entry by the merging parties. Both issues call for exactly the same form of analysis, which, as explained above, must be applied on a symmetric basis.

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[21] It is fair to say that the three cases in which prices seemed to have risen were all Phase 2 cases, whereas the five cases in which there was no evidence of harm were Phase 1 cases. But three Phase 2 cases in which the CMA over-estimated the likelihood of entry is no basis for a conclusion that the CMA was misapplying its "*balance of probabilities*" standard either.