Revised Merger Assessment Guidelines

Summary of responses to the consultation

18 March 2021
CMA129resp

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This publication is also available at www.gov.uk/cma.

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1. Introduction

1.1 The Competition and Markets Authority (**CMA)** is the UK's primary competition and consumer authority. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.

1.2 The CMA has responsibility for the review of mergers under the Enterprise Act 2002 (the **Act**) and has set out in published guidance general information for the business and legal communities and other interested parties, on its practices and processes in connection with its powers to investigate mergers. One such guidance publication, the Merger Assessment Guidelines, explains the substantive approach of the CMA to its analysis when investigating mergers. It is applicable to the CMA's Phase 1 investigations, when the CMA considers whether to refer a merger for further in-depth investigation, and its Phase 2 inquiries by independent groups of CMA panel members. It forms part of the advice and information published by the CMA under section 106 of the Act.

1.3 Following a public consultation, the CMA has now adopted new Merger Assessment Guidelines (the **Revised Guidelines**).

1.4 The original Merger Assessment Guidelines were published jointly by the Office of Fair Trading (**OFT**) and the Competition Commission (**CC**) in September 2010 (CC2 (Revised) / OFT 1254) and were adopted (unaltered) by the CMA board in 2014 (the **Current Guidelines**).[1]

1.5 These guidelines have been revised in order to bring them up to date with current best practice. The CMA will keep the revised guidelines under review and revisit them at an appropriate time if they need to be altered.

1.6 From 17 November 2020 to 8 January 2021 the CMA publicly consulted on proposed changes to the Current Guidelines (the **Draft Revised Guidelines**).

1.7 The consultation document that accompanied the Draft Revised Guidelines set out a series of topics on which respondents' views were sought. This document summarises the key issues raised by the responses, the CMA's views on these issues, and changes the CMA has made to the Draft Revised Guidelines as a result. This document is not intended to be a comprehensive record of all views expressed, nor to be a comprehensive response to all

[1] The OFT and CC were predecessor bodies to the CMA.

individual views. Non-confidential versions of all responses to the consultation are available on the consultation webpage.[2]

1.8 Having considered the consultation responses and made appropriate amendments to the Draft Revised Guidelines, the CMA has finalised and adopted the Revised Guidelines.

1.9 The CMA would like to thank all those who responded to the consultation.

[2] See the Updates to the CMA's Merger Assessment guidelines consultation page.

2. Issues raised in the consultation and our response

2.1 The CMA received 23 responses to the consultation. A full list of respondents can be found in Section 3.

Overarching comments

2.2 Responses were predominately from legal advisers, associations of legal advisers, and economic advisers, which are the types of organisations who deal most frequently with the CMA's merger control regime on behalf of businesses. In addition, a small number of academic and trade association responses were received. No responses were received from organisations who represent consumers. Overall, respondents agreed that the Current Guidelines are in need of updating and some highlighted particular proposed changes that they welcomed. These included placing greater emphasis on dynamic assessments of mergers, the CMA abolishing 'limb 3' of the exiting firm framework in the counterfactual, the greater clarity on the CMA taking into account non-price factors of competition, and the inclusion of guidance on when the CMA considers local areas and when it considers national approaches in its analysis in relevant cases. Some respondents also welcomed the inclusion of environmental sustainability as a possible relevant benefit of a merger or a non-price parameter of competition to be taken into account.

2.3 Several respondents made reference to the CMA's advice to government on the design and implementation of the UK's new pro-competition regime for digital markets, which was announced during the consultation period.[3] Some respondents suggested that the CMA should set out in the Revised Guidelines how it will approach its investigation of those mergers which may be caught by any new regime. However, it is premature to do so. The implementation of any new regime requires government consultation and legislation and as such the proposals are too uncertain at this time to be taken into account in the Revised Guidelines.

2.4 A number of respondents suggested that the Draft Revised Guidelines afforded the CMA increased discretion in its investigation of, and decision-making in, mergers. Some respondents were concerned that the Draft Revised Guidelines would lead to over-enforcement by the CMA, and indeed that the CMA's references to the risk of under-enforcement, as set out in the Furman and Lear reports for example, were unfounded. One respondent

[3] CMA advises government on new regulatory regime for tech giants - GOV.UK (www.gov.uk)

suggested that the practical impact of the Draft Revised Guidelines would be to push CMA decision groups towards intervention in mergers where no substantial lessening of competition (**SLC**) can be established on an objective assessment of the basis of the balance of probabilities.

2.5 The CMA notes that there has been no change to the legal thresholds that need to be met in order for the CMA to find that there has been an SLC. The CMA is required to take into account all relevant considerations and to explain why it believes that the relevant test is met on the basis of the probative evidence and despite any evidence to the contrary. In addition, the CMA does not consider that the changes to the Current Guidelines will result in over-enforcement of mergers by the CMA.

2.6 Instead, the updates to the Current Guidelines are designed to better reflect (i) the CMA's approach to reviewing mergers, which has evolved over the past 10 years, (ii) the relevant case law which has clarified some aspects of the applicable legislation during the past 10 years, and (iii) the ways in which the economy has evolved since the Current Guidelines were published. In order to provide the most clarity to merger firms and their advisers, the CMA has in some instances focused the language of the Revised Guidelines on those cases in which an SLC is more likely to arise, rather than on those cases in which a clearance is more likely. This does not mean that the legal tests that the CMA applies have changed, nor does it mean that the Revised Guidelines represent a shift away from the CMA's current practice. With this in mind, the CMA's intention therefore is that the Revised Guidelines should provide greater guidance and certainty on how mergers are assessed than the Current Guidelines.

2.7 Several respondents expressed concerns that the Draft Revised Guidelines had an asymmetric approach to assessing evidence; for example, that a tougher standard of evidence would be applied to merger firms than to third parties, or that a higher threshold would be applied to the counterfactual and countervailing constraints in comparison to the threshold applied to finding an SLC.

2.8 The CMA assesses all evidence objectively in the round when applying the statutory SLC test. The CMA does not apply thresholds at intermediate stages of the analysis. In assessing a merger, it can be appropriate to consider evidence differently in different contexts. For example:

(a) The CMA often operates under an information asymmetry and merger firms can be expected to provide detailed evidence to support, for example, exiting firm or efficiencies arguments. In some situations, the

most relevant evidence can be expected to be held by the firms seeking to rely on these arguments.

(b) In some situations, the decision by a merger firm to enter or expand through a merger may supplant any efforts or plans the firm would otherwise have made towards organic entry or expansion before it could extensively document its expansion or entry strategy, while this may not be the case for potential entry by third parties not involved in a merger.

(c) While the CMA's assessment will in all cases be evidence-based, it may be appropriate to be more sceptical towards possible third party entry or expansion than expansion by the merger firms in certain circumstances, for example: (i) at Phase 2, the counterfactual must be selected as the most likely alternative to the merger, which involves accepting that a hypothetical scenario would have occurred, and (ii) evidence of countervailing factors, such as how timely, likely or sufficient potential entry will be in response to a merger, will be weighed against the evidence of the strength, certainty and magnitude of the competitive harm identified as it will need to be sufficient to prevent or mitigate any SLC arising.

2.9 A number of respondents also requested further detailed guidance to be provided on certain aspects of the CMA's practice, particularly with regard to its use of certain evidence types.

2.10 In this regard, it is important to note that the Revised Guidelines are intended to set out principles and frameworks that can be applied on a case-by-case basis. It is not possible (and would not be appropriate, given that the process followed can vary depending on the particular facts and circumstances of each case) to provide an exhaustive description of the approach that the CMA will apply to all aspects of its work. As set out in the consultation document published with the Draft Revised Guidelines, the focus of the revisions to the Guidelines has been primarily on analytical frameworks rather than evidence-gathering tools. This is to reflect the flexibility of merger assessment to use the analytical techniques and gather the evidence that are most appropriate to the case and circumstances in question.

2.11 The CMA also notes that many of the requests for additional detail relate to specific submissions that the merger firms may make in the context of individual cases. Such submissions are not excluded by the Revised Guidelines.

2.12 Some respondents commented on the appropriateness of references to academic literature in the Revised Guidelines. The CMA has in some cases

repositioned the references to such articles in the Revised Guidelines and would emphasise that these are not intended to be an exhaustive list of the academic thinking on these topics. Nor are these articles driving the CMA's practice in the relevant areas in which they are referenced; they are instead intended only to provide examples of supporting literature.

2.13 Some respondents commented that the CMA's definition of digital markets was too broad to be helpful. Given this, and the fact that the applicability of the Revised Guidelines does not depend on such a definition, the CMA has deleted this definition.

2.14 Finally, some respondents requested that case law references in the Draft Revised Guidelines be updated and suggested the CMA should not refer to Provisional Findings in its guidance. Case law references have been updated in the Revised Guidelines where the position has developed. However, references to Provisional Findings remain where no final report is available because the merger firms abandoned the merger prior to final report, as the CMA considers that at the current time these can provide useful illustrative examples of the CMA's approach to reviewing mergers in practice.

2.15 Further detail on respondents' views on each Chapter of the Draft Revised Guidelines is set out below. A number of discrete points were made by respondents to various chapters in the Draft Revised Guidelines, some of which have been reflected in the Revised Guidelines but not all of which are detailed here.

Chapter 2: A substantial lessening of competition

Summary of responses

2.16 In regard to what is an SLC, several responses asked for greater clarity and precision when the CMA refers to judgments of the Competition Appeal Tribunal (**CAT**).

2.17 A number of respondents commented on the list of example scenarios in which the CMA may find an SLC. Some wanted specific thresholds or examples showing where the CMA would not find an SLC, while others thought that the examples provided were too general to be useful. Respondents in general wanted the CMA to provide further guidance on what it meant by an SLC may be found in markets that are 'small' or 'important'.

2.18 Several respondents wanted the CMA to be clear that its assessment of non-price factors of competition would be grounded in evidence that firms compete on these specific factors. Further, some warned the CMA not to make value

judgements of non-price factors (such as having advertising ‘pushed’ to consumers) and that some (eg environmental sustainability) are difficult to define and/or measure.

2.19 Finally, a number of respondents suggested that certain sentences in the Draft Revised Guidelines could be read in a way that was inconsistent with the standard of proof required to find an SLC or as suggesting that the CMA might make findings in the absence of any evidence.

The CMA’s views

2.20 The CMA has agreed with respondents that further clarity and precision in certain places in the Draft Revised Guidelines regarding what particular judgments from the CAT say about the meaning of SLC is desirable, and has amended the text accordingly.

2.21 Similarly, the CMA has clarified the text that whether a market is ‘‘small’ or ‘important’ are factors the CMA will take into account when deciding whether a lessening of competition is ‘substantial’. Text has also been added to make clear that, while uncertainty in how a market is likely to develop in future does not prevent an SLC finding, the relevant standard of proof will still need to be met.

2.22 The CMA does not, however, agree that examples of SLCs should provide safe harbours or thresholds for cases which will not result in an SLC finding. The Revised Guidelines make it clear that each case will be assessed on its merits and the CMA does not apply market share, fascia count or other ‘thresholds’ to determine whether it is likely that an SLC will be found, nor does the CMA consider that this reflects economic reality (see paragraph 2.8 of the Revised Guidelines). The CMA has made clear in the Revised Guidelines that the examples given of scenarios that may be more likely to give rise to an SLC finding are only examples, and do not constitute thresholds.

2.23 The CMA considers that its Revised Guidelines are clear that it will focus on those parameters for which there is evidence that firms compete (see paragraph 2.3 of the Revised Guidelines). The CMA agrees that it should not make value judgements about specific parameters of competition but should instead consider whether a particular parameter is a factor of competition and whether that factor might be worsened for customers as a result of a merger. The CMA notes that it is not obliged to conduct an assessment for each and every parameter of competition separately. The CMA does not agree that a parameter of competition needs to be precisely defined or measured in order to be considered in its analysis.

2.24 The CMA has made it clear that it will need to be satisfied that there is sufficient evidence in order to meet the relevant standard of proof, and that any uncertainty will be appropriately weighted in that assessment.

Chapter 3: The counterfactual

Summary of responses

2.25 Several respondents asked the CMA to make clear that the period over which it assesses the counterfactual is harmonised with other components of the CMA's assessment (eg entry and expansion by third parties and the realisation of efficiencies). One respondent suggested that this should also apply to situations of pipeline products which face a lengthy process of development, testing and regulatory approvals.

2.26 A number of respondents supported dropping 'limb 3' of the CMA's framework for assessing the exit of one of the merger firms (ie what would happen to sales of the exiting firm absent the merger). No respondent objected to this proposed change.

2.27 With respect to the CMA's assessment of the exit of one of the merger firms in the counterfactual, some respondents asked the CMA to make clear that even if the framework is not met in some instances the merger firm in question could nevertheless be assessed as a weaker competitor in the counterfactual. One suggested that in the event of financial failure of a subsidiary or business unit, the CMA should consider the incentive as well as the ability of the parent company to financially support the subsidiary or business unit.

The CMA's views

2.28 The CMA considers that it is appropriate for the counterfactual to provide a broad benchmark against which to assess the merger at hand, but any in-depth assessment of what the counterfactual means for competition is better examined in the competitive assessment. For example, although the counterfactual may involve stronger competition between the merger firms, it is the competitive assessment analysis, not the counterfactual analysis, that is better suited to assessing how much stronger that competition is likely to be and whether it is likely to be sufficiently strong to lead to an SLC finding.

2.29 The CMA agrees that, in general, the period over which it assesses the counterfactual should be harmonised with other components of the CMA's assessment. It has amended the text to make this clear.

2.30 The CMA has also made clear that the counterfactual will not involve the sale of the target company 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. In this scenario, the counterfactual will often be the prevailing or pre-merger conditions of competition.

2.31 The CMA has also amended the text to make clear that in some instances the counterfactual will involve weaker competition from one of the merger firms even if the exiting firm criteria are not met. Further, the CMA has included in the Revised Guidelines that it will consider the incentive as well as the ability of the parent company to financially support a failing subsidiary or business unit.

Chapter 4: Horizontal unilateral effects

Summary of responses

2.32 Several respondents welcomed changes to this chapter, including the discussion of two-sided platforms and clarifications on whether the CMA will take a local and/or national approach to retail mergers.

2.33 Several respondents asked the CMA to provide clear thresholds (safe harbours) or indications in circumstances in which it would not find an SLC in horizontal unilateral effects, both in general and in specific circumstances such as two-sided markets. One said that the Draft Revised Guidelines should refer to the CMA's Retail Mergers Commentary that says 'previous CMA decisions in mergers in markets where products are undifferentiated suggest that combined market shares of less than 40% will not often give the CMA cause for concern over unilateral effects'.[4]

2.34 Some respondents thought that the CMA was being too 'structural' in its approach and de-emphasising closeness of competition, which might lead to a distorted view of the closeness of competition between merger firms, especially in heterogenous markets. Another respondent made submissions to the contrary, namely that the CMA had downplayed market concentration as an indicator of competitive strength. A number of respondents noted that the text that 'less detailed analysis is necessary' could be misinterpreted when it followed 'when the smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors', or that it

[4] Retail mergers commentary CMA62

could suggest that the CMA would not take evidence on closeness of competition into account.

2.35 Some respondents said that there was a tension in the Draft Revised Guidelines between the CMA placing weight on market shares in its analysis and any less rigorous approach to defining markets.

2.36 One respondent asked that the CMA refer to 'incremental' rather than 'variable' profits. A second respondent said that price sensitivity ought to be a relevant factor in the CMA's assessments.

2.37 Some respondents suggested that pricing pressure models (eg GUPPI) are uncertain and/or should not be relied upon as the sole basis of an SLC finding or even as a screen, whereas another submitted that it considered that pricing pressure models had been downgraded in the Draft Revised Guidelines and should not have been.

2.38 Other views submitted to the CMA were that:

(a) The CMA should provide greater clarity about its approach to the application of price pressure models to provide greater predictability across cases.

(b) Statements regarding small increments being problematic where one merger firm already has market power were inconsistent with CAT's judgment in *Celesio v Office of Fair Trading*.[5]

(c) The statement that "where competition mainly takes place among few firms, any two would likely be sufficiently close competitors that the elimination of competition between them would raise competition concerns, absent evidence to the contrary" is at odds with the General Court's ruling of the European Commission's *Hutchinson/O2* case.[6]

(d) The CMA should provide more guidance on how it will assess the strength of network effects.

(e) The CMA should provide more guidance on how it will assess multi-homing.

(f) The CMA should codify the industry sectors in which the CMA will take a national (not local or regional) approach in its analysis.

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[5] *Celesio AG v Office of Fair Trading* [2006] CAT 9.
[6] Case T-399/16, *CK Telecoms UK Investments Ltd v European Commission*.

The CMA's views

2.39 As with other sections of the Revised Guidelines, the CMA does not agree that it should provide thresholds (safe harbours) beneath which it would not find an SLC under horizontal unilateral effects. References to thresholds may be misleading, given the CMA's experience is that it has both found SLCs arising at relatively low market shares, and cleared mergers when market shares have been relatively high. In the CMA's experience, the evidence to which a threshold may be applied (such as market share levels or fascia counts) will often be weighted in the context of other evidence in the round, and the possible levels at which concerns might arise will vary from case to case.

2.40 The CMA does not agree that it is being too 'structural' in its approach in a way that might lead to a distorted view of the closeness of competition between merger firms. The CMA considers that in some cases it will be reasonable to attach potentially significant weight to shares of supply or other measures of concentration as indicators of the likely strength of competitive constraint exerted by the merger firms.

2.41 Regarding any tension in the Revised Guidelines between the CMA placing weight on market shares in its analysis and any 'less rigorous' approach to defining markets, the CMA notes that the weight it attaches to shares of supply will depend on the extent to which it considers the shares of supply to be relevant evidence, and that this will be influenced by evidence on demand and supply-side substitution. The CMA does not consider that as a result its analysis will be less rigorous. Paragraphs 4.14 and 9.3 of the Revised Guidelines explain under what circumstances high shares of supply are likely to be relevant evidence and/or lead to the CMA considering the merger firms to be close competitors. The CMA has added explicit references in these paragraphs to the relevance of evidence on substitutability to the weighting of measures of concentration.

2.42 As regards submissions relating to the text in the Draft Revised Guidelines that 'less detailed analysis is necessary', it is not the CMA's position that persuasive evidence on closeness of competition should be discounted. Rather, the CMA's view is that where it has found high or low shares of supply, more persuasive evidence on closeness of competition will be required to counter that evidence. The CMA has clarified the text in paragraphs 2.19 and 4.10 of the Revised Guidelines to this effect.

2.43 The CMA also considers that it has not downplayed market concentration as an indicator of competitive strength. The Revised Guidelines make clear that

the CMA may attach significant weight to the degree of concentration when considering the scope for competition concerns.

2.44 The CMA does not agree that it needs to change its Draft Revised Guidelines in response to any of the points listed in paragraph 2.38. The Revised Guidelines already make clear that the CMA will not standardise evidence gathering or analytical approach in its merger assessments (in response to the points at paragraph 2.38(a), (d), (e) and (f)). However, the CMA has noted in paragraph 4.25(d) of the Revised Guidelines that multi-homing may increase the ability of new entrants to acquire new customers, while also noting that this may nevertheless be difficult in the context of network effects already enjoyed by existing platforms.

2.45 Moreover, the CMA disagrees that its Revised Guidelines are in any way inconsistent with CAT's judgment in *Celesio v Office of Fair Trading.* The relevant passage in the Revised Guidelines has a different context to the *Celesio* case and the CMA considers it would be reasonable for it to find an SLC in a market where one merger firm has a high market share and the other has a much lower market share. Finally, the judgment in *CK Telecoms* relates to a different jurisdiction with its different legal test to the one the CMA applies, and the CMA considers that case has limited read-across to the UK. In particular, where the CMA has considered evidence and believes that competition mainly takes place between few firms, the CMA considers it is reasonable to attach weight to the small number of competitors as an indicator of the likely potential for the merger firms to recapture sales from each other, and therefore is an indicator of the likely constraint between them, subject to evidence to the contrary.

2.46 The CMA does not agree that the CMA may not use pricing pressure tests as a means to screen mergers or decide on SLCs, especially in cases with large numbers of overlaps between the parties. Pricing pressure tests can themselves act as a means to aggregate a range of different pieces of evidence on closeness of competition, and their use to decide whether an SLC arises does not amount to deciding a case on the basis of a single piece of evidence. The CMA considers that limited discussion of price pressure tests does not equate to downgrading their potential for future use when assessing closeness of competition. More generally, the CMA's view is that the evidence necessary for the CMA to form its conclusions is something to consider in the context of each specific case.

2.47 The CMA agrees that 'incremental' profits are the relevant profits but does not agree that it should codify its analytical approach to calculating margins in the Revised Guidelines. The CMA considers that price sensitivity of customers is associated with the overall closeness of constraints on the merger firms and

therefore is captured in the wider discussion of the assessment of competitive constraints.

Chapter 5: Potential and dynamic competition

Summary of responses

2.48 Several respondents were supportive of the CMA's expanded guidance on potential and dynamic competition.

2.49 Some respondents submitted that the CMA should explicitly state that its assessment of potential competition must be evidence-based and cannot be speculative.

2.50 Some respondents submitted concerns that the Draft Revised Guidelines provided for the CMA to find SLCs even where there was uncertainty about whether hypothetical products or services may come to fruition, in some cases because such SLC findings would involve 'double uncertainty' – first about whether competition would arise in the counterfactual, and second about whether such competition would be close enough to constitute an SLC. The CMA also received the following specific submissions:

(a) One respondent submitted that paragraph 5.3 of the Draft Revised Guidelines suggested the CMA will give uncertain scenarios supported by little evidence similar weight to those backed by strong evidence.

(b) One respondent was concerned that the reference to "chance to benefit" in paragraph 5.20 would establish a low bar for CMA intervention.

(c) One respondent submitted that the statement in paragraph 5.15 that losses of competition from potential entrants may be concerning even though losses of competition were small was incongruous with the need for a lessening of competition to be substantial.

2.51 Some respondents raised concerns that the Draft Revised Guidelines risked elevating incentive analysis above actual documents or behaviour. Others submitted that a lack of documented plans to enter or expand should be sufficient to demonstrate that they would not have entered, and the current text asked the merger firms to 'prove a negative'.

2.52 Some respondents submitted that the CMA should clarify that the likelihood of successful entry by a dynamic competitor and the expected closeness of competition between a dynamic competitor and other firms are relevant to assessing the dynamic constraint exerted by dynamic competitors on other firms.

2.53 Other submissions received by the CMA included that the CMA should:

(a) provide more examples of dynamic competition;

(b) provide guidance on how the CMA would measure innovation;

(c) clarify that the CMA will not establish an SLC purely on the basis that the eventual harm would be large (ie on a 'balance of harms' basis);

(d) clarify that the CMA must demonstrate that dynamic constraints are perceived as such; and

(e) mention the 'appropriability' effect.

The CMA's views

2.54 The CMA does not agree that it needs to further state in the Revised Guidelines that its decisions must be based on evidence, which is implicit in the Act.

2.55 The CMA does not agree, in the context of losses of dynamic competition, that there is 'double uncertainty' in the manner described in some responses to the consultation. As is explained in the Revised Guidelines (see for example paragraph 5.3), losses of dynamic competition may consider effects of a merger on firms' incentives to continue making efforts towards eventual entry or expansion (or responding to such efforts). To the extent those efforts are already taking place and are a form of competitive rivalry, there may be limited or even no uncertainty about competition taking place in a dynamic sense, even when there is uncertainty about the outcome of those efforts.

2.56 The CMA disagrees that paragraph 5.23 of the Draft Revised Guidelines suggested that the CMA would give uncertain scenarios supported by little evidence similar weight to those backed by strong evidence. For the avoidance of doubt, the CMA has clarified that paragraph 5.23 of the Revised Guidelines relates to losses of competition from dynamic competitors where there is evidence that the competitor's entry or expansion would have a significant impact on the profits of other firms. The CMA considers that it is rational to expect firms to have an incentive to act to protect their profits against the threat of low-probability, high-impact potential entrants.

2.57 The reference to the loss of a "chance to benefit" in the Draft Revised Guidelines sought to clarify how a process of dynamic competition can benefit consumers in the present—even before efforts towards new entry or expansion eventually come to fruition—because they increase the likelihood of new products and innovations becoming available. The CMA has clarified

paragraph 5.20 of the Revised Guidelines to this effect. This does not alter the statutory test: the CMA will intervene in the context of dynamic competition only if a merger gives rise to a substantial lessening of dynamic competition, which the CMA considers is clear in Chapter 2 of the Revised Guidelines.

2.58 As is the case with existing competitors where one merger firm has a large share of supply and the other merger firm is much smaller (see also paragraph 2.44), the CMA has clarified in paragraph 5.15 of the Revised Guidelines that competition concerns may arise from the acquisition of potential entrants that are expected to be small.

2.59 The CMA considers it reasonable to consider ability and incentive when assessing potential future market outcomes, including relating to potential entry by the merger firms. The CMA considers that paragraph 2.29 of the Revised Guidelines explains why the CMA may conclude that a merger firm may have had the ability and incentive to enter, even in the absence of documents explicitly stating such plans. The CMA disagrees that the Draft Revised Guidelines ask the merger firms to 'prove a negative', as it is open to the merger firms to make submissions on a lack of ability or incentive to enter, which in the CMA's experience merger firms are able to do.

2.60 The CMA has clarified in paragraph 5.23 of the Revised Guidelines that the likelihood of entry by a dynamic competitor, and the expected closeness of competition between dynamic competitors and other firms, are relevant to the strength of constraint exerted by dynamic competitors on other firms.

2.61 The CMA has not accepted the proposed changes listed in paragraph 2.53. With respect to (a), the CMA has already provided expansive guidance on potential and dynamic competition. In relation to (b), there is no standard measure of innovation that the CMA thinks would be appropriate to codify in the Revised Guidelines. As regards (c), the discussion of dynamic competition relates to how firms balance the likelihood and impact of entry, and does not affect the legal standard the CMA must apply, on which the CMA provides guidance in Chapter 2. With respect to (d), the CMA would not consider it appropriate to establish a specific evidentiary threshold that requires evidence of the merger firms' perceptions, when a firm's documents may not contain evidence of those perceptions even when they exist. With respect to (e), the potential for positive impacts of a merger on innovation is reflected in paragraph 8.10 of the Revised Guidelines.

Chapter 6: Coordinated effects

Summary of responses

2.62 Several respondents commented on the appropriateness and consistency of the tests for coordinated effects set out in the guidance. Two respondents suggested that inconsistent tests were used in places while several suggested that the CMA should make explicit that all three conditions for coordination in paragraph 6.10 need to be met in order for coordination to take place. On the subject of pre-existing coordination, two respondents commented that the guidance should be clear that this is not sufficient for an SLC finding and that the merger should also strengthen pre-existing coordination.

2.63 A number of respondents made suggestions on the type of evidence the CMA should consider. Two respondents commented that an awareness of mutual interdependence is not enough to demonstrate pre-existing coordination and is the case in most oligopolistic industries. One respondent commented that evidence that competitive parameters are consistent with coordination may be hard to tell apart from competitive outcomes and that this does not constitute an appropriate evidentiary standard. Several respondents suggested that the CMA could mention buyer power as a factor which may make coordination less sustainable. One respondent suggested that under external sustainability, the CMA should consider whether a competitive fringe is able to impose a strong competitive constraint, not only where the fringe makes up a significant proportion of the market.

2.64 One respondent stated that the guidance is unclear in terms of whether the CMA will consider alternative “non-game theoretic” forms of coordination as it encompasses both tacit collusion based on punishment strategies and recognised interdependence.

The CMA’s views

2.65 With regard to the tests set out in the guidance for coordinated effects, the CMA has amended the text to ensure consistency throughout. The CMA’s view is that it is appropriate to consider the extent to which each of the conditions for coordination is met as, in the context of uncertainty and the potential for imperfect coordination, these are not binary questions but lend themselves instead to an in-the-round assessment of the evidence. The CMA considers that the wording on pre-existing coordination in the guidance is appropriate since a finding that there is evidence of pre-existing coordination suggests that the conditions for coordination have been met to a sufficient extent pre-merger for coordination to take place. In such a situation, a merger,

by virtue of reducing the number of firms in the market, is likely to strengthen that coordination absent any negative effect of the merger on the conditions for coordination.

2.66 With regard to the suggestions on type of evidence, the CMA is of the view that the examples given in the guidance are appropriate and notes that it considers all evidence objectively in the round such that a range of factors will be considered in determining, for example, whether pre-existing coordination is taking place. The CMA further notes that the examples given are not intended to be exhaustive. The CMA has amended the text to include that coordination will be less sustainable where the competitive fringe is able to impose a strong competitive constraint on the coordinating group.

2.67 The CMA considers that the guidance is sufficiently clear on what is encompassed by tacit coordination and gives a number of examples which, while non-exhaustive, help to clarify this further including the avoidance of competition. Similarly, the assessment framework clearly sets out how the CMA will assess firms' incentives and ability to reach and sustain coordination. Some amendments to the text have been made to give further examples of how tacit coordination will be considered in the assessment of the conditions for coordination.

Chapter 7: Vertical and conglomerate effects

Summary of responses

2.68 Several respondents said the CMA should include a statement that most non-horizontal mergers are benign. Relatedly, a number also submitted that the papers quoted warning of a risk of under-enforcement are not a fair summary of the academic literature.

2.69 A few respondents suggested that the CMA should add more on the potential pro-competitive benefits of non-horizontal mergers such as the elimination of double marginalisation.

2.70 Numerous respondents suggested the CMA should give more details on how it would investigate a specific issue. However, there was no consistent theme, with respondents variously highlighting non-price foreclosure, the foreclosure of potential competitors, foreclosure in digital markets, foreclosure in nascent markets, the role of the 'effect' limb, conglomerate theories of harm and confidential information concerns.

2.71 Some respondents said the CMA should place greater emphasis on the quantitative analysis of foreclosure incentives, submitting that qualitative evidence is not a substitute for a quantitative assessment.

2.72 A number of respondents stated that the CMA should give more weight to some factors that may limit the scope for anticompetitive effects to emerge from non-horizontal mergers, in particular contractual protections and buyer power.

2.73 One respondent suggested that the CMA should make clear that the guidance covers 'diagonal' mergers.

The CMA's views

2.74 The CMA considers that it is not appropriate to include a statement that most non-horizontal mergers are benign, and that it is appropriate to note that a number of commentators continue to warn of the substantial risks of under-enforcement. This is a reasonable summary of the academic literature, satisfies a recommendation of the Furman Review and reflects the CMA's view that non-horizontal mergers remain an important focus of its work.[7]

2.75 On the potential pro-competitive benefits of non-horizontal mergers, the CMA has not revised the text because this is already noted and is covered by the general discussion of efficiencies in Chapter 8 of the Revised Guidelines.

2.76 On the suggestion to provide more details on various issues, the CMA has considered each of these suggestions but has ultimately decided not to do so. The guidance is intended to set out principles that can be applied on a case-by-case basis, and it is not possible or appropriate to attempt to prescribe the approach that the CMA will take in all future cases. The lack of a common theme between respondents on where additional detail was needed suggests there is no specific area where the guidance is lacking.

2.77 On the role of quantitative assessments of foreclosure incentives, the CMA has declined to amend the text. The CMA's view is that it is appropriate to state that an incentives analysis involves a combination of quantitative and qualitative evidence and that the balance will vary between cases – there is no requirement to undertake a quantitative assessment.

2.78 In relation to factors that may limit competition concerns, the CMA's view is that the weight placed on them in the Revised Guidelines is appropriate and no changes are needed. The position on contractual protections is based on

[7] For example, see Marissa Beck and Fiona Scott Morton (2020), 'Evaluating the Evidence on Vertical Mergers'.

the CMA's case experience and is consistent with its approach to behavioural remedies. Buyer power is discussed in Chapter 4, where it is flagged that this may also be relevant to non-horizontal mergers, and in any event would be captured in the assessment of market power and entry.

2.79 In relation to so-called diagonal mergers, the CMA has clarified in the text that concerns can arise irrespective of whether the merger firms have a pre-existing commercial relationship.

Chapter 8: Countervailing factors

Summary of responses

2.80 Several respondents said that the CMA should signal less scepticism about countervailing factors, especially merger efficiencies, and be open to incorporating countervailing factors into its decisions. Some said that the level of CMA's scepticism should be reduced if it adopts a longer period of time in its counterfactual (thereby allowing third parties longer to enter or expand or the merger parties longer to realise merger efficiencies) and/or if the CMA accepts an increased level of uncertainty in its counterfactual or competitive assessment.

2.81 Some respondents said that the CMA's approach to assessing entry, expansion or exit by third parties ought to be consistent with its approach to assessing entry, expansion or exit by merger firms.

2.82 Many respondents said that the CMA's reference of the KPMG report on entry and expansion in UK merger cases was used out of context and that the proper context of that study was the cases involved were carefully selected to provide the CMA with salient lessons on entry and expansion and could not be representative of mergers in general.

2.83 Two respondents wanted the CMA to provide more examples or guidance on the specific types of efficiencies that the CMA would find persuasive. However, multiple respondents welcomed the inclusion of environmental sustainability as an example of a relevant customer benefit.

2.84 Several respondents noted that the Draft Revised Guidelines do not contain a section on countervailing buyer power.

The CMA's views

2.85 The CMA has amended the text of the Draft Revised Guidelines to make clearer that it will consider the evidence on countervailing factors but, as with

all evidence on which the CMA will place weight, it will test that evidence robustly. In the case of merger efficiencies, while this forms part of the SLC assessment and it is for the CMA to be satisfied that the relevant standard of proof is met, the evidence lies primarily with the merger firms and therefore it is incumbent on those firms to provide the relevant evidence to the CMA in good time for the CMA to assess it.

2.86 The CMA has also amended the text to make clear that its approach to assessing entry, expansion or exit by third parties is consistent with its approach to assessing entry, expansion or exit by merger firms.

2.87 Likewise, the CMA has amended the text to better reflect the context of the KPMG report on entry and expansion in UK merger cases. The CMA considers that the KPMG report provides salient lessons to properly test the evidence on entry and expansion before clearing a merger on this basis.

2.88 The CMA does not agree that providing further examples of specific types of efficiencies is helpful. The Revised Guidelines state that 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 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] Previous decisions of the CMA also provide an insight to the CMA's approach and the Revised Guidelines already draw attention to J Sainsbury's Plc/Asda Group Ltd in this regard (paragraph 8.8 of the Revised Guidelines).

2.89 In regard to countervailing buyer power, the Revised Guidelines (at paragraphs 4.16-4.19) explain that a customer's ability to offset or mitigate an SLC through countervailing buyer power are contingent on it having good alternatives to the merger firms or the ability to self-supply or sponsor entry. Self-supply and sponsored entry and expansion are discussed in paragraphs 8.44-8.46 of the Revised Guidelines.

[8] Paragraph 8.10

Chapter 9: The market in which an SLC arises

Summary of responses

2.90 Several respondents welcomed the reduction in prominence afforded to market definition or the move away from the shortcomings of an approach focused on strict market definitions.

2.91 Other respondents raised concerns about any deemphasis of, or greater flexibility in approach to, market definition. Related submissions included that:

(a) Market definition is an integral part of the assessment of mergers and therefore its importance should not be diminished.

(b) That the CMA has an obligation under the Act to identify the market within which an SLC exists.

(c) That the hypothetical monopolist test or 'SSNIP' test should be retained and/or that this was the only way to define markets.

(d) That the text in paragraph 9.7 referring to customers' responses to price increases should refer to price increases by all suppliers in the candidate market.

2.92 Some respondents submitted that any deemphasis of market definition would make merger assessment outcomes less predictable.

2.93 Several respondents submitted that the chapter covering market definition was considerably shorter and sought more guidance on how market definition would be conducted or on when the CMA make take a 'fuller' approach to market definition versus a more 'heuristic' approach.

2.94 Some respondents submitted that the standard for aggregating markets on the basis of supply-side substitution had become more onerous, and that this should be reversed. One respondent suggested that market definition was necessary to take into account supply-side dynamics. One respondent drew attention to the potentially different role of supply-side substitution or dynamic markets.

2.95 Some respondents sought further guidance on the CMA's approach to market definition in the context of two-sided markets.

2.96 Other submissions received by the CMA in relation to market definition included:

(a) that the CMA should provide further guidance on how it would in practice aggregate markets on the basis that the main parameters of competition are set uniformly across those markets;

(b) that the CMA should provide further guidance on geographic market definition; and

(c) that SLCs will not apply to segments of a market (rather than to the whole market) if it is defined properly.

The CMA's views

2.97 The CMA considers that a more flexible approach to market definition will be reasonable in some cases. Evidence considered in the CMA's competitive assessment, including evidence on the closeness of constraints on merger firms, is probative of market definition and in some cases will be sufficient to conclude on the market in which an SLC arises.

2.98 The CMA agrees that it must identify the market or markets in which an SLC arises, as stated in paragraph 9.1 of the Draft Revised Guidelines. However, the statute does not necessarily require the CMA to conduct a particular type of market definition exercise (including by reference to a SSNIP test or hypothetical monopolist test). The approach set out in the Revised Guidelines still enables the CMA to answer the relevant statutory questions on SLC (Revised Guidelines, paragraphs 2.33-2.36).

2.99 The CMA considers that evidence from demand-side substitution in response to price increases on the merger firms' products alone, as well as on the products of all firms in a candidate market, may both be relevant to understanding demand-side substitution and the main constraints on the merger firms. Therefore, the CMA has retained text in paragraph 9.7 of the Revised Guidelines, which is broad enough to capture both. Evidence from a SSNIP test, where available, may be considered by the CMA and this is not excluded by the Revised Guidelines.

2.100 The CMA considers that the approach to market definition that is outlined in the Revised Guidelines is appropriate, and that the Guidelines provide clarity on the CMA's approach which should aid in providing legal certainty on the CMA's approach.

2.101 In relation to submissions that the guidance on the technical approach to market definition was less detailed, the CMA considers that this in part reflects that many issues described in the Current Guidelines in the context of market definition will in practice be accounted for by the CMA in its competitive assessment. In general, the CMA has not sought to set out technical

approaches or analytical methods in its analysis since these will vary across cases (Revised Guidelines, paragraph 1.12).

2.102 In relation to further guidance on the circumstances in which the CMA may place significant weight on evidence from the competitive assessment when assessing market definition, the CMA considers that the Revised Guidelines provide clear guidance on this. In addition, the CMA's approach to market definition will depend on the evidence available, and the likely usefulness of market definition or measures of concentration as a tool, in any given case.

2.103 In relation to supply-side substitution, the CMA considers that the proposition that the merger firms are constrained by firms that are not routinely supplying a substitute product—and therefore must enter and/or expand in order to supply it, for example by making more significant or long-term investments—can reasonably be assessed as part of the CMA's assessment of entry and expansion as a countervailing factor (see paragraphs 8.28 to 8.46 of the Revised Guidelines), or as out-of-market constraints (see paragraph 9.4 of the Revised Guidelines) or, in the context of competition between the merger firms, under the heading of losses of dynamic competition (see paragraphs 5.17 to 5.24 of the Revised Guidelines).

2.104 The CMA has clarified in paragraph 9.12 of the Revised Guidelines that its approach to market definition in two-sided markets is likely to reflect its approach to conducting the competitive assessment. To the extent the CMA assesses the two sides separately, it may be more likely to define two separate markets. The Revised Guidelines give guidance on this in paragraph 4.24.

2.105 In relation to the further submissions summarised in paragraph 2.96, the CMA has not made further changes. In relation to (a) and (b), the CMA considers that the Revised Guidelines are sufficient and that more detailed analytical points can be considered in the context of individual cases. In relation to (c), the CMA notes that there is no statutory requirement for an SLC to apply uniformly across a market, and considers that it would not invalidate an SLC finding even if, for example, a small proportion of customers in the defined market were not affected by an SLC.

3. List of respondents

1. ABA Antitrust Law and International Law sections
2. Alexander Baker
3. AlixPartners and Addleshaw Goddard LLP joint submission
4. Baker & McKenzie LLP
5. Centre for Competition Policy at the University of East Anglia
6. City of London Law Society Competition Law Committee
7. Cleary Gottlieb Steen & Hamilton LLP
8. Clifford Chance LLP
9. CMS Cameron McKenna Nabarro Olswang LLP
10. Computer and Communications Industry Association
11. Eversheds Sutherland (International) LLP
12. Freshfields Bruckhaus Deringer LLP
13. Frontier Economics Limited
14. Hugh Mullan
15. In-house Competition Lawyers' Association
16. Joint Working Party of the Bars and Law Societies of the UK on Competition Law
17. KPMG Economics
18. The Law Society
19. Lawrence B Landman
20. Matthew Bennet and Simon Chisholm
21. Neil Dryden and Joe Perkins
22. RBB Economics LLP
23. Slaughter and May