COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE UNITED KINGDOM COMPETITION AND MARKETS AUTHORITY'S DRAFT REVISED MERGER ASSESSMENT GUIDELINES CONSULTATION DOCUMENT

January 8, 2021

The views stated in this submission are presented on behalf of the Antitrust Law and International Law Sections; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Antitrust Law and International Law Sections (the Sections) of the American Bar Association (ABA) respectfully submit these comments in response to the United Kingdom Competition and Markets Authority's (CMA) Draft Revised Merger Assessment Guidelines Consultation Document ("Consultation Document").[1] The Sections are available to provide additional comments or assistance in any other way that the CMA may deem appropriate. These comments are based upon the extensive experience of the Sections' members in competition law around the world.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 17,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's 56 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has

[1] Competition & Markets Authority, Draft Revised Merger Assessment Guidelines – Consultation Document [hereinafter Consultation Document], *available at* https:// assets.publishing.service.gov.uk/government/uploads /system/uploads/attachment_data/file/935598/Consultation_Document_-.pdf.

[2] Past comments can be accessed on the Antitrust Law Section's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

provided input to debates relating to international legal policy.[3] With respect to competition law and policy specifically, the International Law Section has provided input for decades to authorities around the world.[4]

I. Executive Summary

The Sections commend the CMA for seeking public comments on the proposed revision to its Merger Assessment Guidelines. In particular, the Sections fully endorse the Consultation Document's statement "that the [proposed] amendments to the Current Guidelines will provide greater clarity and guidance in . . . [CMA] merger work in future."[5] The Sections also applaud the CMA's decision to focus the Draft Revised Merger Guidelines ("DRMG") primarily "on analytical frameworks rather than evidence-gathering tools[,] . . . to reflect the flexibility of merger assessment to use the analytical techniques and gather the evidence that is most appropriate to the case and circumstances in question."[6] In short, the DRMG are a commendable step forward in clarifying the CMA's approach to merger analysis – one that reflects current economic learning and international best practices.

The Sections do have a number of specific comments on the Consultation Document that are aimed at further enhancing the quality of an already impressive set of DRMG. Specifically, the Sections have focused on nine key DRMG changes summarized in the first part of the Consultation Document,[7] and these comments address each point in detail in the sections below.

The Sections observe that "(a) the inclusion of a list of examples of scenarios which may be considered an SLC [substantial lessening of competition]," is very useful, but make several suggestions to help ensure that the examples do not create archetypes or presumptions that are unintended and/or are at odds with accepted principles.

For "(b) additional detail on the role of price and non-price competition," the Sections support highlighting the importance of both types of competition. The CMA may want to provide a clearer statement of when the threat of reduced innovation and non-price competition will and will not result in a challenge, and add discussions of non-price and innovation effects in the DRMG's sections on coordinated effects and market definition.

The Sections clearly support the "(c) additional clarity on how the CMA assesses evidence" and offers a number of comments. These include the importance of making a case by case assessment rather than creating general rules which can be applied imprecisely; adopting a cautious approach to adopting a lower evidentiary threshold for merger challenges in digital markets; considering the origin and context of a document in determining how much weight, if any, to accord to it; and providing principles that explain how and when the CMA considers evidence to be reliable.

In regard to "(d) greater flexibility in the Counterfactual time horizon and removal of limb 3 of the exiting firm scenario," while antitrust review is an inherently predictive exercise, the Sections submit that a decision to block a merger—regardless of the industry—ought to be based on the totality of the

[3] American Bar Association, International Law Section Policy, *available at* https://www.americanbar.org/groups/international_law/policy/about/.
[4] Past comments can be accessed on the International Law Section's website at: https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.
[5] Consultation Document, *supra* note 1, ¶ 1.7.
[6] *Id.* ¶ 1.19.
[7] *Id.* ¶ 1.17.

quantitative and qualitative evidence and not presumptions. For example, any predictions about the future are likely to be *less* accurate in digital markets than in markets that are not as fast moving or characterized by evolving competitive conditions.

A new section in the DRMG provides "(e) additional detail on the CMA's assessment of two-sided platforms," and the Sections agree these markets deserve an explicit discussion of how they will be evaluated. The Sections believe this part of the DRMG would be improved by not only highlighting the potential anticompetitive concerns, but also by explaining how the CMA will weigh these potential competition concerns against other competitive market forces and potential efficiencies from a merger. The Sections agree that whether competitive actions on one side of a market are independent of the other side of the market or whether the competitive situations are decidedly different should be considered in a decision to focus only on one side of a market. However, the DRMG should clearly indicate that both sides of the market will be included in the analysis depending on the nature of network effects.

The "(f) additional detail on the CMA's assessment of potential competition and innovation" is very helpful. There appears to be an incongruity in the DRMG's proposed framework for evaluating the competitive impact of potential competition in which the elimination of potential competition gives rise to an SLC, as opposed to when the existence of potential competition prevents an SLC. The CMA may want to standardize the discussion in Sections 5 and 8 as both a basis for and counterweight to an SLC.

The Sections applaud the CMA's "(g) re-framing of the focus of the CMA's assessment of a merger firm's ability to foreclose." The Sections suggest that the CMA more explicitly acknowledge the potential for elimination of double marginalization in the vertical merger context and the ways merger-induced benefits may be different between horizontal and non-horizontal mergers. The Sections also suggest defining the concepts of "focal" and "adjacent" further to clarify which "conglomerate" mergers are applicable, and providing some limitations so competitively benign "conglomerate" mergers are not discouraged.

The Sections take no issue with the "(h) removal of a separate section on buyer power as a countervailing factor" given the close relationship between analysis of unilateral effects and countervailing factors. The Sections, however, observe that the CMA limits its consideration of buyer power in the DRMG primarily to instances in which strong customers can sponsor entry, and buyer power should also be considered in other situations.

The "(i) additional clarity regarding the CMA's approach to market definition as an analytical tool" is consistent with the reduced emphasis on formal market definition and greater emphasis on direct analysis of the potential impact of merger on competition, which has been on-going in the United States and elsewhere. The DRMG also indicate the CMA may aggregate narrow relevant markets based on supply-side substitution or potential supply-side substitution. The CMA should consider clarifying its supply-side analysis, since the DRMG may depart from accepted market definition principles and analyses of direct effects of a merger.

II. Comments on Specific Topics

A. Examples of SLCs

The Sections applaud the CMA for endeavoring to provide examples that might be illustrative of SLCs and, thus, mergers that would draw heightened scrutiny. And the Sections note that, for many of the examples, the CMA has cited exemplar cases as further illustration. Like numerical screens (e.g., market

share thresholds), examples can be helpful guidance to the public, particularly for explaining complex economic topics to non-technical audiences and courts.[8] That said, the Sections observe that a careful balance must be struck where examples are used. Every example is undoubtedly "wrong" in some sense when compared to a specific merger in a specific context.[9] And over-use of or over-emphasis on certain examples can also be harmful to the economy insofar as they mistakenly create archetypes or presumptions that are unintended and/or they are at odds with accepted principles.[10] To that end, the Sections respectfully suggest the following clarifications be provided in discussing the examples of SLCs.

First, examples are most beneficial when illustrating a practical application of a general principle. The Sections suggest adding additional discussion identifying the general economic and legal principles illustrated by each example. For example, the example mentioning a merger of "close competitors in a differentiated market" is perhaps too terse. Is this example to show that most or all mergers in "differentiated" markets are problematic? If so, what are "differentiated" markets and what makes them problematic relative to "undifferentiated" markets? And how should practitioners determine whether merging companies will be deemed "close competitors" similar to the example provided? Consider, in contrast, the examples offered in the U.S. 2010 Horizontal Merger Guidelines ("US-HMG"), which are all offered as clarification directly following a discussion of a general concept.[11] Some further discussion might provide additional valuable guidance to practitioners bringing mergers before the CMA.

Second, examples may be mistaken as legal presumptions absent further discussion of frequency and severity. The Sections suggest adding additional clarification on the frequency with which the cited examples present SLCs and the severity of those exemplar SLCs. For example, are all "four to three" mergers involving the market leader problematic in the view of the CMA? Surely not all, but how frequently are four to three mergers benign and cleared: only in the rarest circumstances, many, most? And are "four to three" mergers more frequently problematic and more harmful than mergers involving "innovation" or "coordination" mentioned as other examples? Absent clarification, the CMA may risk overwhelming its own resources with excessive and unnecessary merger reporting *and* the CMA may risk discouraging otherwise beneficial mergers to the detriment of society.[12]

Third, undoubtedly counterexamples exist that run contrary to the proffered examples. For instance, there are many mergers that involve "start-ups" in new and emerging markets that are beneficial and are allowed by the CMA and other agencies around the world. The Sections suggest adding additional clarification to demarcate the boundaries where these examples are likely to be analogized. For example,

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[8] See, e.g., "The Section applauds the Agencies' efforts to draft guidance in the form of a screen to assist companies in evaluating this risk … Screens can be very valuable tools." Comments on the Draft Vertical Merger Guidelines Issued by the Department of Justice and the Federal Trade Commission Comments, 4 (February 24, 2020), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/february-2020/comment-22420-ftc-doj.pdf.

[9] The Sections acknowledge the CMA introduces the examples with caveats noting, "the CMA will consider the characteristics of each merger on a case-by-case basis," and "[g]iven the case-specific nature of the competitive dynamics and evidence, it is not possible to provide a comprehensive list of scenarios of when the CMA will find an SLC." DRMG, ¶¶ 2.16-17.

[10] The risks run in both directions where examples are misconstrued and contorted. Contorted examples could lead to loopholes and ultimately under-enforcement. Or contorted examples could lead to overly restrictive presumptions and over-enforcement. For the costs of under- and over-enforcement, see, generally, Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1 (1984); Joshua D. Wright, Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust, 78 ANTITRUST L. J 241 (2012).

[11] *See generally* U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines (Aug. 10, 2010), *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-08192010, *passim*.

[12] *See supra* note 10.

what are some of the features, however general, that identify where "innovation" might be "threatened" by a merger? Or, how does one determine whether possible foreclosure is of an "important" rival firm? Again, absent clarification, the examples may create unintended harms.[13]

In sum, the Sections applaud the CMA for identifying past mergers that illustrate the CMA's approach to merger review. But in their current form, the discussion of the examples is too brief and too divorced from discussion of general principles elsewhere in the Revised Guidelines. The Sections respectfully recommend further discussion be added to the proffered examples to better clarify and contextualize them.

B. Additional detail on the role of price and non-price competition

The DRMG highlight non-price competition and innovation (one aspect of non-price competition) in all sections of the DRMG except the Introduction (Section 1), Coordinated Effects (Section 6), and the Market in Which SLC Occurs (Section 9). In particular, paragraphs 2.4 and 2.5 of the DRMG express concerns of reduced non-price competition and innovation, explicitly mentioning digital platform mergers that may involve zero pricing and privacy considerations as embodying some form of non-price competition.

In general, non-price competition and innovation have been recognized as important parts of evaluating the competitive effects in many mergers, and the increased recognition of their importance is consistent with competition enforcement in other jurisdictions, including the U.S. For example, U.S. competition agencies acknowledged the importance of non-price competition in merger reviews (US-HMG §1.0, §6.4, and §10). When the non-price aspect of competition is "possible to conceptualize," some measure of "quality-adjusted price" has been used in applying "the usual price-centric analytical framework" in the US-HMG.[14] However, innovation can be particularly difficult to predict, and the DRMG addresses that.

According to the DRMG, "[a]lthough merger assessments are inherently prospective, in assessing the evidence, the CMA is not required to make precise predictions about the future such as whether any particular innovations will take place or whether a specific price rise or particular degrading of service quality will take place after a merger."[15]

In the U.S., challenges to mergers based on concerns about price competition have not required proof of a "specific price rise." If this is also true in the U.K., then it is unclear whether the DRMG signals a reduced standard of proof for challenging a merger based on loss of innovation and non-price competition compared to concerns over reduced price competition. The CMA may want to provide additional guidance regarding when the threat of reduced innovation and non-price competition will and will not result in a challenge, such as more specific discussions of evidence that the CMA will consider and more examples of when a merger will and will not be challenged.

In addition, the absence of explicit mention of non-price and innovation effects in the DRMG's sections on coordinated effects and market definition may raise questions about the importance of innovation and non-price competition in the analyses discussed in those sections. The US-HMG recognize

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[13] *Id*.

[14] *See*, *e.g.*, Non-price Effects of Mergers - Note by the United States (6 June 2018), OECD DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, DAF/COMP/WD(2018)45, at 3, *available at* https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/non-price_effects_united_states.pdf.

[15] DRMG ¶ 2.20.

that non-price competition is likely to be more important in unilateral effects cases where there are differentiated products that drive competition, and less so in unilateral effects cases that involve homogeneous products.[16] But they do not address non-price competition in the context of coordinated effects. However, there is an acknowledgement in the DRMG that a loss of innovation may be an important aspect of coordinated effects concerns,[17] so the DRMG should clarify what is meant by that.

Non-price and innovation competition may also be important in market definition, especially if the CMA wishes to focus on more direct measures of competition than structural analyses based on market definition. Although often more difficult to quantify than the impact of price competition, the U.S. has found non-price competition between merging parties can rely on the "same evidence . . . to determine customer substation relevant to the hypothetical monopolist test."[18] Evidence of direct competition on non-price characteristics of a product is usually a relevant factor in determining consumers' substitution.[19] Again, the CMA may wish to consider explicitly mentioning how it approaches non-price competition and innovation in its discussion of market definition.

C. Additional clarity on how the CMA assesses evidence

1. Assessment of evidence in 'fast-moving markets'

The Sections welcome the additional detail in the DRMG about how different types of evidence influence the CMA's decision making, including clarifying its approach to "fast-changing and evolving markets," such as digital markets. While distinct evidence may be compelling in different markets or investigations, the Sections submit that the CMA should not adopt a different, lower evidentiary standard in digital markets.

Focus on and application of general concepts facilitates more uniform and equitable enforcement of antitrust laws across the economy as a whole. In an ever-changing world, focusing the DRMG on generally applicable concepts helps inoculate them against obsolescence, while reducing undue administrative burden on the CMA. Finally, sector-specific rules risk asymmetric treatment and overregulation of the sector or issue in question, potentially discouraging investment and R&D and leading to decreased consumer welfare over time.[20] This effect may be particularly acute in the tech sector where investors (e.g., venture capitalists) see M&A as a chief strategy for receiving a positive return on their investment. The Sections therefore encourage the CMA to consider how sectoral-specific rules may

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[16] *See, e.g.*, US-HMG § 6.4.

[17] *See* DRMG, footnote 27.

[18] *See* Non-price Effects of Mergers-Note by the United States, *supra* note 14, at 4.

[19] *See*, *e.g.*, FTC v. Sysco Corp., 113 F.Supp. 3d 1 (D.D.C. 2015) (broadline foodservice distribution is a relevant market for national customers that prefer suppliers with a wide selection of products, distinct facilities, timely and reliable delivery, national pricing, and value-add services such as menu planning.)

[20] For example, former U.S. Department of Justice, Deputy Assistant Attorney General, Barry Nigro noted in recent remarks, "If we stretch antitrust law to create competition within the market, we risk undermining the incentive to compete for the market. It is exactly this incentive that leads firms to create newer, better products. In his book, *Capitalism, Socialism, and Democracy*, economist Joseph Schumpeter observed that high profits serve as 'baits that lure capital on to untried trails,' thereby producing a 'perennial gale of creative destruction' that results in newer, better products and services." Bernard (Barry) A. Nigro, Remarks as Prepared for Delivery at The Capitol Forum and CQ: Fourth Annual Tech, Media & Telecom Competition Conference (Dec. 13, 2017), *available at* https://www.justice.gov/opa/speech/file/1017701/download. *See also* Joshua D. Wright, Fed. Trade Comm'n, Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC, Remarks at the Big Ideas about Information Lecture 9 (Apr. 2, 2015), *available at* https://www.ftc.gov/system/files/documents/ public_statements/ 634631/150402clemson.pdf; Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1, 1-22 (1969).

discourage investment and the benefits of M&A in the tech sector, including efforts to improve corporate management (decreasing the risk of failure),[21] and encourage investment and innovation.[22]

In addition, the Sections note that dynamic markets are by definition more capable of self-correcting than more static markets, so to the extent that the available evidence leads to uncertainty as to the competitive effects of a merger, it is not clear what justification there might be to resolve such uncertainty in a manner that suggests the sector is more prone to mergers resulting in anticompetitive effects.

Thus, it is important to make a case by case assessment as to whether the nature of the sector and the merging parties warrant attaching more weight to specific pieces of evidence, rather than creating general rules which can be applied imprecisely.

The Sections submit that the CMA should take a cautious approach to adopting a lower evidentiary threshold for merger challenges in digital markets. Antitrust policymakers should consider the relative risks and costs associated with Type I ("false positive") and Type II ("false negative") enforcement errors, given the well-established link between innovation and economic growth. In their treatise on U.S. antitrust law, Areeda and Hovenkamp advised: "[I]n the long run, technological progress contributes far more to consumer welfare than does the elimination of noncompetitive prices."[23] As a result, some argue that "successful antitrust challenges of business or product innovations will likely dampen innovation across the economy, whereas Type II errors are at least mitigated in part by entry and other competition."[24] While the Sections recognize that reasonable antitrust policymakers may disagree about the relative risks of over- or under-enforcement, the Sections submit antitrust merger enforcement decisions should be based on the totality of the qualitative and quantitative facts available in a specific case, consistent with best available economic evidence that policy choices lead to the best outcomes for consumers. The Sections suggest that the CMA consider the potential trade-offs and unintended consequences that might result from a lower

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[21] Noah J. Phillips, FTC Commissioner, Competing for Companies: How M&A Drives Competition and Consumer Welfare (May 31, 2019), *available at* https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf. ("The vast majority of startups fail, and leading explanations include various managerial failings. Acquisition is a critical exit path for many or most that do not, the chilling of which will deter not only innovation but the investment pipeline on which that innovation depends. To preserve the innovation that has been critical to our economy's growth over the last several decades, we need to be cognizant of these kinds of potential tradeoffs, and avoid chilling incentives innovate unnecessarily or unintentionally.").

[22] Patricia Nakache, General Partner, Trinity Ventures, Testimony before the U.S. Senate Committee on the Judiciary Subcommittee on Antitrust Competition Policy, and Consumer Rights (Sept. 25, 2019), *available at* https://www.judiciary.senate.gov/imo/media/doc/Nakache%20Testimony.pdf. ("M&A activity has become more important to the health of the startup ecosystem and the predominant venture-backed exit, with 779 M&As last year and the median M&A deal value reaching a 15-year high of $105 million."); Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice Antitrust Div., Transcript of the Proceedings at the Public Workshop Held by the Antitrust Division of the U.S. Dep't of Justice, Venture Capital and Antitrust (Feb. 12, 2020), *available at* https://www.justice.gov/atr/page/file/1255851/download ("Venture capital . . . also drives our innovation economy. It ensures that a good idea leads to an even better mousetrap. Incentivizing and rewarding this type of innovation is essential to spurring competition and disrupting monopolies, because even a single bet can uproot an entire industry. Antitrust enforcers and venture capitalists both depend on making sure that these types of bets and good ideas, and in good entrepreneurs, are encouraged and rewarded. Of course, the ability to take advantage of investment, such as through better innovation or development of intellectual property, is the essence of a strong market economy, and that result is not frowned upon by the antitrust laws").

[23] IIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 407a (4th Ed. Aug. 2019).

[24] Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J. L. & PUB. POL'Y 171, 186 (2010), https://techliberation.com/wp-content/uploads/2012/11/ManneFinal.pdf.

evidentiary threshold or more speculative counterfactual time horizon in the digital sector. Indeed, while no antitrust authority, including the CMA, can correct its Type I errors, the Sections understand that CMA has authority to correct any anticompetitive conduct that occurs following a transaction.

2. Limitations of internal documents

The Sections note the CMA's observation that it has made increasing use of the parties' internal, ordinary course business documents.[25] While internal documents are one of many sources of evidence in a merger investigation, the CMA must consider the origin and context of a document in determining how much weight, if any, to accord to it. In the Sections' experience, documents must be considered holistically and in context with other evidence such as economic analysis, third-party information, witness testimony, etc.[26] In isolation, and in a world with millions of emails, it is far too easy to selectively single out documents that support one's case that are not in fact probative of anything.

For example, in *U.S. v H&R Block, Inc.*[27] (H&R Block's proposed acquisition of TaxACT), the court noted that the government overemphasized the importance and relevance of documents produced by a company data analyst who had no decision making role or authority, and that such evidence should not be given weight in reaching a view on the company's intentions, but instead was mere informal speculation. Likewise, in *U.S. v. AT & T, Inc.* (AT&T's acquisition of Time Warner), the government argued that certain documents represented AT&T's "core belief," but at trial the court learned the documents were drafted by a low-level employee who had nothing to do with the transaction and AT&T's decision to acquire Time Warner.[28] The court also found that the statements were contained in a preliminary draft and subsequently removed or changed.[29] The court ultimately found that "the Government frequently 'overemphasized the importance and relevance' of the excerpts from defendants' documents, given that many of them, the testimony revealed, contained 'informal speculation' about 'rationales for the merger' or were generated by individuals 'who had no decision-making role or authority in relation to the merger.'"[30]

As the CMA is aware, the U.S. Second Request process has long relied on voluminous document productions to inform merger investigations. In light of that experience, the Sections encourage the CMA to consider the following issues when assessing the weight that ought to be attached to documents:

- Was the person who prepared the document a decision maker within the company?

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[25] DRMG, ¶ 2.23 ("Increasingly interrogated the merger firms' internal documents as a part of its merger investigations and has more closely scrutinised evidence on deal valuation, for example when considering losses of actual and potential competition or when seeking to understand the rationale for and synergies arising from mergers.").

[26] U.S. v. AT & T, Inc., 310 F. Supp. 3d, 161, 204 (D.D.C. 2018) ("But as with any other piece of documentary evidence, assessing the probative value of defendants' own documents and statements requires an examination of the context, circumstances, and foundation of the proffered evidence. As such, with few exceptions, the Court denied the Government's requests to admit into evidence and cite in post-trial briefing a number of company documents for which there was no accompanying background or foundation testimony. With the benefit of foundational testimony, I have considered all of the documentary and testimonial evidence from defendants' files and witnesses upon which the Government relied at trial. Having done so, I nonetheless conclude that the proffered statements and documents admitted are of such marginal probative value that they cannot bear the weight the Government seeks to place on them.").

[27] U.S. v H&R Block, Inc., 833 F. Supp. 2d 36, 77, n. 30 (D.D.C. 2011)

[28] U.S. v. AT&T, 310 F. Supp. 3d, at 208 ("As became clear at trial, when live witnesses take the stand a trial by slide deck leaves much to be desired.").

[29] *Id*.

[30] *Id*. at 209.

- Did the person who prepared the document have the requisite experience to be opining on the issue? For example, an unprompted market analysis by an IT employee trying to impress someone in an effort to get a new job in the company might have little significance.
- Did the senior executives rely on the document when making strategic decisions?
- Was the document the product of a thoughtful or thorough analysis (or an email fired-off without consideration)?
- Is the document a draft? Was language later rejected or changed?
- Even if the document appears in the files of senior executives, was the strategy pursued or rejected?
- Does the CMA have proper context? For example, a pricing strategy document might say "Market Power / Raise Prices." That alone may suggest a company's strategy or instead a considered idea that ultimately failed or was rejected.
- Business people sometimes use terms such as market, market share, leverage, network effects, dominance, entry barrier, or monopoly in a casual way that does not have the same legal or economic meaning that the CMA might attach to it.

The CMA might consider addressing this issue in a similar manner to the US-HMG, which observe that "the Agencies give careful consideration to the views of individuals whose responsibilities, expertise, and experience relating to the issues in question provide particular indicia of reliability."[31]

The Sections also caution against placing undue weight on "deal valuation" with respect to the CMA's evaluation of competitive effects. Valuation in a particular transaction is highly fact intensive and may be based on a number of factors unrelated to competition, including whether there were other potential bidders, unique synergy value to the buyer, the buyer's opportunity costs with respect to its capital and expected return on investment, the industry, precedential transactions, the target and asset business, tax, impact on credit, deal structure, risk/liabilities assumed, and numerous subjective judgments related to valuation of both tangible and intangible assets.[32]

3. Allocating weight to evidence

The Sections note the CMA's statement that "there is no set hierarchy between quantitative evidence, such as consumer surveys or statistical or econometric analysis, and qualitative evidence, such as internal documents or the statements or conduct of market participants." While this may be correct as a matter of law,[33] the Sections encourage the CMA to adopt principles that explain how and when it considers evidence to be reliable.

In addition to the comments above related to documentary evidence, the Sections encourage the CMA to indicate how it evaluates the evidence that it gathers, including economic evidence, documentary evidence, and evidence from third parties. For example, the US-HMG acknowledge that customers may have divergent views, and note that the U.S. agencies evaluate the likely reasons for those divergent views.[34]

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[31] US-HMG, § 2.2.1.

[32] Richard D. Harroch, et al., What You Need to Know About Mergers & Acquisitions: 12 Key Considerations When Selling Your Company, FORBES (Aug. 27, 2018), *available at* https://www.forbes.com/sites/allbusiness/2018/08/27/mergers-and-acquisitions-key-considerations-when-selling-your-company/?sh=937697c41020. For example, in the DOJ's recently released remedies manual, the DOJ normally does not consider relevant the purchase price paid for divested assets, citing some of the reasons above. DOJ, Merger Remedies Manual, at 2 (Sept. 2020), *available at* https://www.justice.gov/atr/page/file/1312416/download.

[33] Aberdeen Journals v OFT [2003] CAT 11, paragraphs 126-127.

[34] US-HMG, § 2.2.2 (emphasis added).

In gathering customer evidence, the U.S. agencies are "mindful that customers may oppose, or favor, a merger for reasons unrelated to the antitrust issues raised by that merger."[35] The US-HMG also note that U.S. agencies credit the "conclusions of *well-informed and sophisticated* customers,"[36] acknowledging that some customer views might not be well-informed. This approach is consistent with the approach of the U.S. courts, particularly as it relates to market definition. Although customers might have "preferences" for one product over another, preferences do not necessarily inform interchangeability, and the relevant question under the hypothetical monopolist test is how customers could respond in the event of an anticompetitive price increase.[37] For example, in the case of a market involving long-term contracts or relationships, a top customer might not have shopped recently for products, and therefore might not be well-informed about alternatives.[38] In other cases, some customers might have not have access to imported products for regulatory reasons.[39]

With respect to the views of competitors, the US-HMG note that while information from rivals may be illustrative about marketplace conditions generally, the interests of competitors might diverge from those of consumers.[40] Moreover, a rival company might have an incentive to foment opposition to a merger if it believes that its rival might be a more efficient or effective competitor post-transaction. In other cases, a rival might believe it will have an opportunity to acquire the target if the antitrust authorities successfully block a transaction.

4. Assessing post-consummation behavior

In paragraph 2.28(b) of the DRMG, the CMA reports that it may not attach weight to evidence that the merged entity has not changed behavior post-completion as merged firms may have an incentive to delay changes until the CMA has completed its investigation or is no longer able to investigate. In cases where the CMA has opened an investigation, parties may not integrate their operations and adopt commercial strategies not because they are "waiting out" the CMA, but instead because they are concerned they will be subject to an unwind order. In cases where the CMA has not opened an investigation, while it is possible that such conduct occurs, it is inconsistent with both the economic theory of profit maximizing firms and the Sections' experience. Even if a company were to consider such a strategy, it also would consider the expected value of the outcome. The vast majority of transactions—even those involving some competitive overlap—result in no CMA investigation, and even fewer result in enforcement. In many companies, a "wait out the CMA" strategy also would be contrary to the individual economic interest of sales staff paid on commission, and would likely involve substantial intracompany coordination. The Sections therefore encourage the CMA not to adopt such a presumption. Instead, such a view should only be adopted where there is specific evidence which supports such a view in a given case.

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[35] *Id*.
[36] *Id*.
[37] U.S. v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); U.S. v. Sungard Data Sys., 172 F. Supp. 2d 172 (D.D.C. 2001) ("What is significant is not whether the companies that currently use internal solutions have the capacity to enter the market as vendors for others, but whether the customers that currently use shared hotsites would switch to an internal hotsite in response to a SSNIP.")
[38] *See e.g.*, Ken Heyer, Predicting Competitive Effects of Mergers by Listening to Customers, EAG Discussion Paper 06-11 (Sept. 2006), https://www.justice.gov/sites/default/files/atr/legacy/2007/09/28/221883.pdf ("The cost to customers of becoming fully informed about their marketplace alternatives (and the terms on which these alternatives can be obtained) is nonzero. At some point, rational economic agents will likely find that the expected benefits of obtaining additional information exceeds the cost.").
[39] US-HMG, § 2.2.2.
[40] *Id*. at § 2.2.3.

D. Greater flexibility in the counterfactual time horizon

The Sections understand that the CMA is seeking to address recommendations from the Lear Report that suggested that it must be "willing to accept more uncertainty in [its] counterfactual" [41] and that "it may be necessary to test the boundaries of the legal tests"[42] in terms of the burden of proof required to be satisfied to block a merger.

While antitrust review is an inherently predictive exercise, the Sections submit that a decision to block a merger—regardless of the industry—ought to be based on a conclusion by an antitrust authority that the totality of the quantitative and qualitative evidence warrants such a challenge. While a decision to challenge a merger need not be based on certainties, it cannot be based on mere speculation or possibilities under U.S. law (nor should it be).[43] U.S. courts have explained that the U.S. agencies' merger predictions must be based on some reasonable temporal estimate,[44] reasoning that at some point, future market conditions become "so inherently unpredictable that the entire predictive enterprise should be abandoned."[45] For example, the U.S. Federal Trade Commission (FTC) has said that it must show that entry is likely to occur in the "reasonably near future."[46]

In 2015, the FTC failed in its attempt to block Steris Corporation's acquisition of Synergy Health plc, arguing that Synergy was poised to enter several local U.S. markets to compete head-to-head with Steris. The court rejected the FTC's attempt to block the deal because there was insufficient evidence that Synergy would have entered but for the merger.[47] The FTC largely relied on customer testimony about the demand for such services and Synergy's internal documents.[48] The court concluded that Synergy's entry was not likely because Synergy's plans had not received requisite board approvals and there were too many hurdles to overcome before entering.[49] In reflecting upon the *Steris* case, at least one FTC commissioner who voted in favor of the challenge subsequently encouraged adoption of a more rigorous standard in potential competition cases to address "one of the greatest shortcomings of some earlier potential competition cases brought by the antitrust agencies: the tendency to second-guess business judgment."[50] In short, the Sections encourage the CMA to apply a rigorous approach to its evaluation of counterfactual evidence, recognize the limits of its ability to predict the future, and not substitute its judgment for that of business executives with respect to a company's future plans.

The CMA notes that it will consider a time frame of longer than two years in digital markets because it can take longer than that time to become successful. While the Sections do not express an opinion about whether two or more years is the appropriate time frame, it observes that the longer the time frame, the more speculative the prediction becomes. Indeed, given the dynamic and fast-moving nature of digital

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[41] Lear Report, at 46.
[42] *Id*., at xiv.
[43] U.S. v. Baker Hughes, Inc. 908 F.2d 981, 984 (D.C. Cir. 1990).
[44] BOC Int'l Ltd. v. FTC, 557 F.2d 24, 29 (2d Cir. 1977).
[45] Mercantile Tex. Corp. v. Bd. of Governors of Fed. Reserve Sys., 638 F.2d 1255, 1271 (5th Cir. 1981).
[46] In re Brunswick Corp., 94 F.T.C. 1174, 1269, Opinion of the Commission, decided Nov. 9, 1979 (*citing* BOC Int'l Ltd., 557 F.2d at 29).
[47] FTC v. Steris Corp., 133 F. Supp. 3d 962, 977-982 (2015).
[48] Marueen K. Ohlhausen, Commissioner, FTC, Antitrust Tales in the Tech Sector: Goldilocks and the Three Mergers and Into the Muir Woods, 7-8 (Jan. 26, 2016), *available at* https://www.ftc.gov/system/files/documents/public_statements/910843/160126skaddenkeynote.pdf.
[49] *Id*.; FTC v. Steris Corp., 133 Supp. 3d, at 977-982.
[50] Marueen K. Ohlhausen, Commissioner, FTC, Antitrust Tales in the Tech Sector: Goldilocks and the Three Mergers and Into the Muir Woods, 7-8 (Jan. 26, 2016), *available at* https://www.ftc.gov/system/files/documents/public_statements/910843/160126skaddenkeynote.pdf.

markets, one could make a credible case that the time frame for assessment might need to be shorter than for more mature, less digitized markets. This is because markets change, companies enter and exit, innovation occurs, and exogenous shocks reshape the world. The Sections observe that in December 2019, few would have predicted a global pandemic, or in June 2015, the results of the United Kingdom European Union membership referendum one year later.

The DRMG describes digital markets as "fast moving" and characterized by "dynamic effects that are particularly dependent on the evolution of competitive conditions." If this is indeed true, it may mean that any predictions about the future are likely to be *less* accurate in digital markets than in markets that are not so fast moving or characterized by evolving competitive conditions. There are many examples of unforeseen technological developments that have uprooted what once were thought to be dominant companies. For example, in the 1990s Kodak was largely considered to have an unassailable position in the film and camera market, holding a 70% market share in 1996,[51] but by 2012 Kodak was filing for bankruptcy.[52] Similarly, MySpace was the most visited social networking site in the world from 2005 to 2008, but by 2011 was only a minor competitor in social networking.[53] Other examples include the emergence of streaming video services that have disrupted video rentals[54] and the television and movie industries. Indeed, in March 2005, Blockbuster dropped its bid to acquire rival Hollywood Video, citing the likelihood that the FTC planned to challenge the acquisition in court.[55] By 2010, Blockbuster ceased operations, having closed more than 9,000 stores. Hollywood Video also ceased operations in 2010 when its parent company declared bankruptcy. The Sections submit that these and many other examples counsel in favor of rigorous antitrust analysis tethered to observable facts and economic analysis that do not stray beyond reasonable temporal estimates.[56]

E. Additional detail on the CMA's assessment of two-sided platforms

One focus of the DRMG is platforms that involve two (or more) sided markets, as the DRMG has a new section devoted to how the CMA will analyze them.[57] The DRMG defines platforms as intermediaries between customer groups where network effects are important.[58] As a general proposition, the Sections do not believe that competition analysis should be different for different industries, but recognizes the increased importance of platform industries and the recent developments in economics and law that indicate aspects of platforms can affect the evaluation of the competitive effects of a merger. As such, the Sections

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[51] Finnerty, Thomas C. "Kodak vs. Fuji: the battle for global market share." case study written under the supervision of Warren J. Keegan, Lubin School of Business, New York, Pace University (2000): 10.
[52] Henry C. Lucas, Jie Mein Goh, *Disruptive technology: How Kodak missed the digital photography revolution,* 18 J. STRATEGIC INFO. SYSTEMS 46 (2009).
[53] Appleton, MySpace: What Happened and Where is it Now?, *available at* https://www.appletoncreative.com/blog/myspace-what-happened-and-where-is-it-now/#:~:text=From%202005%20to%202008%2C%20MySpace,was%20valued%20at%20%2412%20billion.
[54] Davis, Todd and Higgins, John, "A Blockbuster Failure: How an Outdated Business Model Destroyed a Giant" (2013). Chapter 11 Bankruptcy Case Studies. The article explores how Blockbuster failed with the onset of the internet and disruptors to the video rental industry such as Netflix.
[55] Tom Zeller, Jr., Blockbuster Ends Bid for Rival, N.Y. TIMES, Mar. 26, 2005, *available at* https://www.nytimes.com/2005/03/26/business/media/blockbuster-ends-bid-for-rival.html.
[56] Dr. Joseph Grundfest, The William A. Franke Professor of Law and Business, Stanford Law School, Transcript of the Proceedings at the Public Workshop Held by the Antitrust Division of the U.S. Dep't of Justice, Venture Capital and Antitrust (Feb. 12, 2020), *available at* https://www.justice.gov/atr/page/file/1255851/download ("[H]istory suggests that there's a lot of truth in what you're saying, is that today's dominant firm is tomorrow's distant memory.").
[57] DRMG, ¶¶ 4.20- 4.24.
[58] DRMG, ¶¶ 4.20- 4.21.

agree with the DRMG's recognition in ¶ 4.20 that platform markets exist in many industries, and not just digital platforms, and the CMA will apply a consistent approach analyzing all platform industries.

The section on platforms highlights (1) the importance of network effects; (2) when one or two sides of a market need to be taken into account in the evaluation of competition effects; and (3) competitive concerns specific to platforms. The comments in this section address these three areas, and end with questions about how the CMA approaches market definition for platforms.

The DRMG indicate that mergers can be more likely to cause competitive concerns because of network effects.[59] Network effects, typical in platforms, are an important consideration when analyzing potential market power and competitive effects. Recent academic studies, however, suggest that network effects are not the guarantor of substantial market power that had been initially feared by antitrust authorities.[60]

First, the literature suggests that, due to rapid changes in technology, and the fact that platform businesses may compete without relying on any one type of hardware, users may have low switching costs. The history of social networks suggests that size is not necessarily a guarantee of market dominance and entrenchment. As mentioned earlier, MySpace, which surpassed Google in terms of number of website visits in 2006, was quickly replaced by Facebook and subsequently declined.[61] However, among other allegations of anticompetitive behavior, the Federal Trade Commission and a group of 47 U.S. states plus the District of Columbia recently sued Facebook for a variety of acquisitions of smaller firms not in the same "personal social networking services" as Facebook but allegedly threatened Facebook's market power through their potential entry.[62] These complaints illustrate the existence of network effects as one precursor for potential competitive concerns from a merger, but they go beyond that to describe specific acquisitions and acts that the plaintiffs believe have resulted in reduced competition.

Second, the instability of network effects frequently leads users to choose multiple platforms instead of sticking to a single platform. For example, it is common for riders and drivers to use both Uber and Lyft. Such "multihoming" increases competitive pressures on platforms. Finally, platform congestion may lead users to switch to other less congested platforms.

The DRMG's discussion of lost competition in paragraph 4.24 does not suggest the CMA would consider offsetting benefits of a merger potentially resulting in consumer benefits derived from beneficial network effects. The Sections are of the view, however, that even if there are substantial network effects, other aspects of the market need to be carefully considered in evaluating the competitive effects of mergers involving platforms. The Sections believe this part of the DRMG would be improved by not only

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[59] DRMG, ¶ 4.24.

[60] *See* Catherine E. Tucker, *What Have We Learned in the Last Decade? Network Effects and Market Power*, ANTITRUST, Spring 2018, at 30, *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/anti-spring18-3-23.pdf.

[61] *Id*. at 78 ("Launched in 2002, Friendster is often considered the first real social network. However, it was quickly replaced by MySpace, and by 2006, MySpace surpassed Google as the most visited website in the United States. The subsequent decline of MySpace, and the speed with which users switched to Facebook, was also startling, and has attracted much academic inquiry.").

[62] *See* Complaint, Federal Trade Commission v. Facebook, Inc., D.D.C., Dec. 9, 2020, *available at* https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf; *see also* Complaint, State of New York et al v. Facebook, Inc., D.D.C., Dec. 9, 2020, *available at* https://ag.ny.gov/sites/default/files/facebook_complaint_12.9.2020.pdf.

highlighting the potential anticompetitive concerns, but also by explaining how the CMA will weigh these potential competition concerns against other competitive market forces and potential efficiencies from a merger. As such, the Sections' view is that the CMA should make it very clear that network effects alone are not a guarantor of substantial market power. In this sense, factors to consider include, among others: (i) the number of competitors, (ii) similarity of products in different platforms, (iii) the possibility of using similar platforms by different sides ("multihoming"), (iv) whether there are low switching costs, and (v) whether platform congestion will lead users to switch to other platforms.

For example, paragraph 4.24 (a) of the DRMG correctly points out that platform mergers may reduce competition by "tipping" the market towards the merging platform earlier than would occur through continued competition. The DRMG indicate reaching an earlier tipping points is likely to strongly affect a merged firm's incentives, result in large platforms exerting significant competitive constraints on rivals, and create additional barriers to entry.[63] In particular, the DRMG rightly focuses on the scale effect in two-sided platforms[64] in considerations for analyzing the competitive effect of a merger. While the concern about a "tipping effect" is relevant, the tipping point is often unknown at the time of a merger (it is only known when it is reached). Accordingly, the DRMG may want to indicate more clearly that the CMA considers a variety of sources of evidence to estimate the likelihood that a merger will enable a platform to reach a tipping point. Specifically, the CMA might consider discussing evidence on different technologies underlying the platforms at issue, past experience with the same or similar platforms, and other types of evidence that it would be likely take into account.

The explanation in paragraph 4.24 (b) is not entirely clear, and may benefit from some revision. While the last sentence of the paragraph indicates recapture of sales may be larger in a platform merger due to the merger affecting two sides of the platform, it is unclear what the DRMG are intending to convey in the first part of this paragraph.

Paragraph 4.24 (c) of the DRMG states that "larger platforms are more likely to exert strong constraint on rivals." The statement is correct, but may require some clarification. As an "attractive option for users," a large platform is not inherently an anticompetitive outcome. The economic literature cautions against antitrust enforcement actions applied to platforms based solely on their relative size and user base, since platforms can greatly improve consumer welfare.[65] As a general matter, multi-sided platforms create value by coordinating groups of users in at least two important ways: 1) minimizing transactions costs, thereby making the interactions of groups of consumers possible; and 2) providing a structure (e.g., pricing schedule and participation incentives) to attract enough participants.

Paragraph 4.24 (d) of the DRMG explains that network effects may potentially be harmful for new entry since a new entrant may need to be a successful two-sided platform. In a later section of the DRMG, the CMA warns that network effects may be a barrier to entry alongside other factors on each side of the platform, such as intellectual property rights, interoperability requirements, and data obtained via early mover advantages.[66] While the revised CMA acknowledges "limiting interoperability with rival platforms" as an example of how a large platform may increase barriers to entry, the DRMG makes it clear that it also

[63] DRMG, ¶ 4.24.
[64] *Id*.
[65] *See* Tucker, *supra* note 60, at 80 ("in general, platform markets may still be competitive even if larger firms in these industries exhibit both sizable user bases and competitive dynamics, which are driven by network effects. This implies a tempering of antitrust enforcement actions surrounding market dominance of digital platforms predicated simply on their relative size of user base.").
[66] DRMG, ¶ 8.38.

gives significant weight to the dynamics of competition in the market and evidence of how technological changes may affect the market dynamics when the technology underlying platforms is evolving rapidly.

Paragraph 4.23 of the DRMG observes that (i) the strength of network effects may influence whether a single assessment can be performed of a multi-sided market, (ii) aspects of competition may affect one or both sides of a platform, and (iii) competitive conditions may differ on different sides of the platform.[67] The DRMG indicates that in deciding whether one or two sides of merging platforms should be considered the CMA's approach will depend on three factors: "(a) How competition works . . . (b) Competitive conditions . . . [and] (c) Network effects." [68] In part of factor (a) the CMA seems to suggest that if a platform's competitive behavior only affects "charges applied or service levels offered to users on one side" that side of the platform and does not directly affect the other side of the platform, then "the CMA may assess each side separately."

The DRMG appropriately recognizes the importance of determining when both sides of a platform need to be evaluated, rather than just one side. An analysis of the impact of both sides will in general result in more complex analysis of market structure and competition than focusing on one side of a market. The Sections agree that whether competitive actions on one side of a market are independent of the other side of the market or whether the competitive situations are decidedly different should be considered in a decision to focus only on one side of a market. However, these considerations may be outweighed by the nature of network effects, and in particular "indirect network effects."

Users value the services provided by a two-sided platform more as the platform attracts more users. When the value of the platform to one user group increases with additional participation from another user group, indirect network effects exist. Indirect network effects are an important consideration when making pricing decisions for each side of the market. Pricing decisions for each side of the market must consider the effect on the other side. Pricing one side too high may deter users and, in turn, reduce utilization of the other side, creating a negative feedback loop. Where each side's indirect network effects are of similar strength, the threat of a feedback loop is potentially greater as the platform's value to each side is more closely tied to the size of the other side. In some cases, the optimal price charged by one side of the market may be zero or lower than the marginal cost in one market, and it would be incomplete to focus only on one side of the market. In two-sided platforms, a price increase on one side might be offset by increased benefits to the other, an effect that would be missed if the CMA only focuses on harm to one side of the market.[69]

The U.S. Supreme Court's June 2018 decision in *Amex*[70] illustrates the problems caused by considering the anticompetitive effects on one side of a multi-sided market only. The majority of the *Amex* Court determined that there were sufficiently substantial indirect network effects in that case to require an analysis of both sides of the market. The basis for this determination was that credit card networks are "transaction" platforms "because credit-card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services."[71] As such, "they exhibit more pronounced indirect network

[67] *Id*. ¶ 4.23.
[68] *Id*.
[69] For a general discussion of indirect and other network effects, *see* International Developments and Comments Task Force, Common Issues Relating to the Digital Economy and Competition, February 27, 2020, Chapters 1 and 3, *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/sal-report-on-common-issues-relating-to-the-digital-economy-and-competition-final-4162020.pdf.
[70] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).
[71] *Id*. at 2278.

effects and interconnected pricing and demand."[72] "The Court also made clear that its ruling does not apply where network effects are weak or one-sided, [although it] did not attempt to classify any platform other than the credit-card network at issue in the case."[73]

Finally, the DRMG deemphasizes the importance of market definition in Section 9, but recognizes that the CMA still needs to define markets. The DRMG does not mention platforms or how it would define platform markets in its Section 9. The analysis of multi-sided markets can pose challenges for competition law. In particular, traditional competition law tools used in market definition and market power analysis can be more difficult to apply in these markets and may require modifications or the introduction of new methods of analysis.[74] Market definition for platforms cannot be fully understood or analyzed without a clear understanding of the interaction between the different sides. Moreover, when firms set a zero price on one side of the market, or there are substantial changes to non-price factors (e.g., degradation of product quality), standard approaches to market definition will often require some modification, and a SSNIP test may be less helpful to determine whether products compete. Given these potential complications for market definition analysis, the CMA should consider some explicit mention of how it will approach market definition for platforms in Section 9.

F. Additional detail on the CMA's assessment of potential entry and innovation

The DRMG contain a significantly expanded discussion of the CMA's assessment of potential competition and innovation throughout the guidelines. As the Consultation Document notes:

> The CMA is reviewing an increasing number of mergers involving dynamic markets. In the CMA's recent experience of merger control casework, such mergers have been more likely to raise concerns about a loss of potential competition, arising out of the acquisition of a target company which may be a new entrant, or which may be active in an adjacent market, and which may either provide an important competitive constraint in the future, or which may result in the acquirer terminating its own entry or expansion strategy following the merger.[75]

The Sections recognize that similar concerns exist in the U.S. As noted above, the U.S. Federal Trade Commission and many U.S. states have recently filed complaints against Facebook alleging Facebook's acquisition of WhatsApp and other firms eliminated potential competitors.[76]

The DRMG point to several studies that raise "killer acquisitions" and other potential competition mergers by large digital platforms as likely having anticompetitive consequences, but they do not discuss other research that questions these conclusions.[77] The expanded discussion of potential competition in Section 5 and elsewhere – which is at its core a discussion of entry, expansion, and innovation – is noteworthy when compared to the DRMG's Section 8. Section 8 discusses entry and expansion as a

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[72] *Id.*
[73] *Id.*
[74] *See* David S. Evans, *The Antitrust Economics of Multi-sided Platform Markets*, 20 YALE J. ON REG. 325, 325 (2003) ("For example, market definition and market power analyses that focus on a single side will lead to analytical errors; since pricing and production decisions are based on coordinating demand among interdependent customer groups, one must consider the multiple market sides in analyzing competitive effects and strategies."). *See also* Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293, 301, 315-19 (2014).
[75] *See* DRMG ¶ 1.42.
[76] *See supra* note 60.
[77] *See*, *e.g.*, Koren W. Wong-Ervin & James Moore*, Acquisitions of Potential Competitors: The U.S. Approach and Calls for Reform*, Forthcoming, Competition Law and Policy Debate, Fall 2020.

countervailing factor to a potential SLC and remains analytically similar to its predecessor in the CMA's 2010 Guidelines. For instance, both the DRMG and the 2010 Guidelines suggest entry and expansion is a "rare" deterrent to an SLC.[78] Both also dictate that entry be "timely, likely, and sufficient" to be a cognizable counterweight to an SLC. The same timely, likely, and sufficient framework is consistent with the parallel analysis of the US-HMG,[79] and is generally consistent with the Sections' perspective on the level of rigor that should underlie a hypothesis about prospective competitive outcomes based on potential entry.

There appears, however, to be an incongruity in the DRMG's proposed framework for evaluating the competitive impact of potential competition in cases in which the elimination of potential competition (through entry, expansion, and/or innovation) gives rise to an SLC, as opposed to cases in which the existence of potential competition prevents an SLC. For instance, paragraph 5.15 states "where one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns, and therefore the acquisition by any such firm of a potential entrant may be concerning even if its impact on competition is uncertain, or expect to be small." Paragraph 8.36, however, states "[s]mall-scale entry that is not comparable to the constraint eliminated by the merger is unlikely to prevent an SLC." The DRMG could be improved by explaining in more detail why the acquisition of a small potential entrant by a large incumbent firm would give rise to an SLC, but the continued existence of a small potential entrant after a merger is not also a similar potent competitive constraint. In general, the discussions in Sections 5 and 8 would benefit from more clarification and balance in treating the impact of potential entrants on a merger between two firms competing in the same market, as compared to the evaluation of the competitive impact of a firm merging with a potential competitor.

One way to ensure clarity and balance could be to standardize the discussion in Sections 5 and 8, either in one standalone section or by cross-referencing across sections into a complete discussion of the competitive significance of potential competition as both a basis for and counterweight to an SLC. In addition to some clarifying language, there are three points on which DRMG could provide further guidance regarding the evidence the CMA will consider when evaluating potential competition:

- First, what has the CMA observed in past mergers (consummated and prevented) about the impact of potential competition on an incumbent and/or merged firm? Paragraph 8.26 of the DRMG observes that "[t]he 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 materialize. Therefore, evidence in relation to entry and expansion should be considered in this context." It may be helpful for the CMA to clarify what sorts of evidence it would find most helpful by providing a series of examples or factors that merging parties should consider when thinking about the role potential competition may play in the review of their transaction.

- Second, must potential competition be timely, likely, and sufficient to be a competitive constraint on the incumbent firm in order for an acquisition to form the basis for an SLC? In other words, would a "realistic prospect" (in Phase 1) and "balance of the probabilities" (in Phase 2) be informed by whether potential competition is timely, likely and sufficient?[80] If

[78] *See* DRMG ¶ 8.26 ("The CMA considers that entry and/or expansion preventing an SLC from arising would be rare."; *see also* 2010 Guidelines ¶5.8.2 ("But, in some cases, the fear of entry might deter the merged firm from exploiting any market power resulting from the merger. In such cases, the Authorities need not expect the entry would actually take place. However, the Authorities consider this circumstance to be rare . . . ."
[79] *See* US-HMG, § 9.
[80] *See* DRMG, footnote 21.

not, what standard will the CMA apply to assess whether there is in fact a realistic prospect and/or balance of the probabilities in favor of potential competition materializing to such an extent that its elimination would give rise to an SLC?

- Third, to what extent will the CMA credit features of technology markets – e.g., dynamic competitive processes – when evaluating whether potential competition will be timely, likely, and sufficient to counteract an SLC? Paragraph 5.18 observes "[w]here investment and innovation efforts represent an important part of the competitive process itself, this can lead to dynamic competitive interactions between existing competitors and potential entrants." And Paragraph 5.20 explains, "where dynamic competition gives customers the chance to benefit from a wider variety of products or a future increase in competition, this represents value to customers even where there is some uncertainty that these products or services will ever ultimately be made available to customers." Would similar industry features and dynamics make it more likely that the remaining firms in an industry could prevent an SLC by the merged firm? It would be helpful for the guidelines to identify the degree to which changing market condition in technology industries could make SLCs more likely in some instances and less likely in others.

G. Focus on foreclosure in non-horizontal mergers

The Sections applaud the CMA's attention to vertical and other non-horizontal mergers and the CMA's efforts to update and re-frame the discussion of a merger's potential to foreclose rivals. The Sections observe that, generally, the DRMG take a similar approach to that outlined in the recent U.S. Vertical Merger Guidelines.[81] The Sections, however, suggest two areas where the DRMG deviate from the U.S. Vertical Merger Guidelines and discussion might be added to make the DRMG more consistent with current economic consensus.

First, the DRMG only briefly recognize that vertical and other non-horizontal mergers may result in efficiencies and other benefits to the public.[82] This treatment is perhaps too terse and does not adequately differentiate between horizontal and non-horizontal mergers. There is far more consensus within the legal and economic communities concerning horizontal mergers, and the economic literature continues to find that that many – perhaps even most – vertical mergers are beneficial.[83] And vertical mergers are unique in

[81] U.S. Dep't of Justice & Fed. Trade Comm'n, Vertical Merger Guidelines (2020) [hereinafter U.S. Vertical Merger Guidelines], *available at* https://www.justice.gov/atr/page/file/1290686/download.

[82] DRMG ¶¶ 7.5 ("Non-horizontal mergers may also result in efficiencies, such as reduced prices or better product integration.") and 8.2 ("In some instances, mergers can give rise to efficiencies. Examples of efficiencies might include cost savings; the elimination of double marginalisation through vertical integration; greater innovation or quality arising from the combination of unique assets; or better meeting customers' needs by enabling the integration or interoperability of complementary products.").

[83] *See, e.g.*, Comments on the Draft Vertical Merger Guidelines Issued by the Department of Justice and the Federal Trade Commission Comments, 3 (February 24, 2020) ("Vertical mergers can also engender many competitive and consumer benefits. There is a rich economic literature on the 'theory of the firm' as it concerns the determinants of vertical firm structures, and vertically merged firms may benefit end consumers through reduced pricing (via EDM), streamlined operations, and enhanced scale and scope. Literature suggests these benefits from vertical mergers can potentially offer significant and direct increases to consumer welfare, which can potentially outweigh the harmful foreclosure effects of vertical mergers."), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/february-2020/comment-22420-ftc-doj.pdf.

at least one regard in their ability to eliminate double marginalization.[84] The Sections suggest the CMA more explicitly acknowledge the potential for elimination of double marginalization in the vertical merger context and the ways in which the frequency and nature of merger-induced benefits may be different between horizontal and non-horizontal mergers.

Second, the DRMG explicitly identify "conglomerate" mergers of "focal" and "adjacent" markets as another category of non-horizontal mergers subject to the "vertical" framework.[85] The U.S. Vertical Merger Guidelines likewise acknowledge that certain mergers that are not "strictly vertical" may fall within the "vertical" framework.[86] That said, the Sections respectfully caution against over-expansion of the vertical framework to all forms of "conglomerate" mergers. Many – again, perhaps most – "conglomerate" mergers are competitively benign and allow companies to realize benefits of greater scale and scope.[87] The Sections suggest further defining the concepts of "focal" and "adjacent" to clarify which "conglomerate" mergers are applicable under the framework, and if those concepts are broad, providing some limitations such that the many competitively benign "conglomerate" mergers are not overly discouraged to the detriment of the public.

H. Buyer power

The Sections acknowledge that the CMA has removed separate discussion of "buyer power" as a countervailing factor and integrated the discussion into that of unilateral effects.[88] The Sections take no significant issue with the movement of this discussion from one section to another, given the close relationship between analysis of unilateral effects and countervailing factors.

The Sections, however, further observe that the CMA limits its consideration of buyer power in the DRMG primarily to instances in which strong customers can sponsor entry.[89] The CMA observes that buyer power may be "unlikely to prevent an SLC that would otherwise arise."[90] This is perhaps an overly restrictive view of where buyer power may be factored into analysis of a merger. The Sections observe that numerous economic models acknowledge that buyer power may affect the magnitude of a merger's effect, even if it does not affect the end likelihood of an effect.[91] The Sections recommend that the CMA acknowledge this fact: beyond sponsored entry, buyer power may factor into determination and/or quantification of an SLC as one of many possible inputs into the unilateral effects analysis.

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[84] *See id.* at § 6; U.S. Vertical Merger Guidelines, *supra* note 81, § 6 ("Due to the elimination of double marginalization, mergers of vertically related firms will often result in the merged firm's incurring lower costs for the upstream input than the downstream firm would have paid absent the merger.").
[85] DRMG, ¶ 7.29.
[86] U.S. Vertical Merger Guidelines, *supra* note 81, § 1.
[87] Comments Regarding JFTC Merger Guideline and Policies, § 3 (November 4, 2019), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/nov-2019/comments-japan-11419-englishversion.pdf.
[88] Consultation Document, *supra* note 1, § 1.50.
[89] DRMG, ¶¶ 4.18-19.
[90] *Id.*
[91] See, e.g., bargaining models in which the power of the buyer affects the size of the overall merger effect and, possibly, whether the effect would be deemed significant. Cory Capps, et al., Competition and Market Power in Option Demand Markets, 34 RAND JOURNAL OF ECONOMICS 737 (2003).

I. Additional clarity regarding the CMA's approach to market definition as an analytic tool

The DRMG note that the CMA is "required to identify the market or markets within which an SLC exists."[92] According to the Consultation Document, the DRMG provide "additional clarity regarding the CMA's approach to market definition as an analytical tool."[93] In particular, the Document states, "In many cases, the evidence assessed in the CMA's competitive assessment that leads the CMA to make an SLC finding could have been interpreted in the same way without having defined the market . . . The DRMG therefore make clear that there is no need for the CMA's assessment of competitive effects to be based on a highly specific description of any particular market definition, and that the CMA may take a more simple approach to defining the market."[94] Specifically, the CMA may analyze "closeness of competition" using internal documents, views of market participants, and bidding, diversion, or win/loss information, while not necessarily formally defining a relevant market.[95]

This aspect of the DRMG appears to be a substantial change from the current 2010 Guidelines. This change shows a substantial movement away from relying on formalistic market definition and relying on market shares, and is reflected in the DRMG's movement of the discussion of market definition and SLC from the front to the end.[96]

The reduced emphasis on formal market definition is in keeping with greater emphasis on more direct analysis of the potential impact of merger on competition that has been ongoing in the United States and elsewhere. For example, the US-HMG also make clear that the agencies no longer rely solely on market shares to predict whether a firm possesses durable market power or is likely to be able to sustain significant non-transitory price increases.[97] The US-HMG also identify the concept of "closeness of competition" as a key aspect of determining the competitive effects of a merger, and point to similar analyses to evaluate it.[98] Additionally, analyses involving natural experiments that fit the facts of a case and employ sound economic methodologies have become increasingly common.[99] This shift in antitrust analysis is consistent with modern economics.[100] The move away from strong reliance on market definition and shares can be particularly important in sectors reliant on innovative and rapidly evolving technology, where the lines between markets may not be as clearly delineated (such as in the markets in which online platforms compete). Moreover, the Sections agree with the CMA's approach of evaluating potential SLCs on a case-by-case basis, and not relying on formalistic market definition analysis to cover all circumstances. U.S. authorities have taken a similar approach. For example, while not a merger case, in the U.S. Federal Trade Commission's case against 1-800-CONTACTS, it found a restriction on paid search advertising competition through trademark litigation settlements to be anticompetitive based on direct evidence of

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[92] DRMG, ¶ 9.1.
[93] Consultation Document, *supra* note 1, ¶ 1.17(i).
[94] *Id*. ¶¶ 1.52-1.53; *see also* DRMG, ¶ 9.5.
[95] DRMG, ¶ 9.3.
[96] Market definition has been moved from Part 5 in the 2010 Guidelines to Section 9 in the DRMG.
[97] *See*, *e.g.*, US-HMG, § 4.
[98] *Id.*, §§ 2.1.4, 6.1.
[99] Mary Coleman & James Langenfeld, *Natural Experiments,* ISSUES IN COMPETITION LAW AND POLICY, American Bar Association Section of Antitrust Law, Volume 1, Chapter 31, 2008, at 743-772.
[100] Joseph Farrell & Carl Shapiro, *Improving Critical Loss*, ANTITRUST SOURCE, Feb. 2008, *available at* https://faculty.haas.berkeley.edu/shapiro/critical2008.pdf, at 1-2 and 16-17; Michael Katz & Carl Shapiro, *Critical Loss Let's Tell the Whole Story*, 17 ANTITRUST L.J. 49 (2003), at 54-55; Michael L. Katz & Carl Shapiro, Further Thoughts on Critical Loss Analysis, ANTITRUST SOURCE, Mar. 2004 at pp. 1-2, *available at* https://faculty.haas.berkeley.edu/shapiro/critical2.pdf,.

agreements that (1) restricted truthful advertising and (2) resulted in an increase in contact lens prices sold online.[101] Accordingly, these changes are consistent with best practices based on the Sections' experience in the U.S.

In addition, the DRMG continue to primarily consider demand-side substitution when defining a relevant product and geographic markets, as do the US-HMG.[102] However, the CMA may also aggregate narrow relevant markets into a broader market based on supply-side substitution or potential supply-side substitution.[103] To provide an example of when this supply-side considerations may override demand, the DRMG provides the following in Section 9.9 (c):

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

This approach appears to be a departure from traditional market definition principles, and it is not clear that it follows other analyses of the direct effects of merger. Having a similar group of customers for two distinctly different services does not necessarily suggest an anticompetitive outcome from a merger, regardless of whether "competitive conditions are very similar on both sides" and "both platforms are similarly competitive for both groups." The Sections believe the example needs to articulate a more specific theory of competitive harm, or drop this example of supply-side substitution.

III. Conclusion

The Sections appreciate this opportunity to provide their views on the Consultation Document and is available for any further consultation the CMA may deem appropriate.

[101] Opinion of the Commission, In the Matter of 1-800-CONTACTS, Docket N. 9372 (Nov. 7, 2018), at 42-47, *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf.
[102] DRMG, ¶ 9.7.
[103] *Id*. ¶¶ 9.8-9.10, 9.12-9.15.