Baker McKenzie.

5 January 2021

# CMA Consultation on the Draft revised Merger Assessment Guidelines (CMA129)

## Baker & McKenzie LLP Response

Baker McKenzie[1] welcomes the opportunity to comment on the CMA's draft revised Merger Assessment Guidelines ("the Guidelines"). We comment in our capacity as an international law firm, on behalf of the firm and no individual client.

Our team has extensive experience advising clients on mergers that undergo the CMA's review process, as well as international mergers with a UK dimension (previously subsumed into EU filings) and on UK public interest reviews. We have been monitoring closely competition law and institutional changes expected from 1 January and have responded separately to the consultation on proposed draft guidance on jurisdiction and procedure (CMA2).

The proposed Guidelines were published on the eve of the end of the Transition Period, following which the CMA's approach to the substantive assessment of mergers will be applied to an increasing number of cases, including many cross-border, international mergers that would have previously fallen within the EU Merger Regulation "one-stop shop". We look forward to working with the CMA during this pivotal time and have every respect for the CMA's expertise and professionalism as an international regulator. However, we are concerned that a number of recent enforcement trends, as well as the outcome statistics for mergers in recent years, are not adequately reflected in the Guidelines. This is necessary to help explain to clients used to dealing with the EU Commission that the CMA process and likely outcome is different.[2].

In particular, the Guidelines state that they are intended to be a response to the changes to the way goods and services are provided to consumers (e.g., growing digitalisation), under-enforcement claims made by recent expert reports and case retrospectives[3] and the experience of other competition authorities. It is emphasised that neither the legal tests nor the theories of harm employed by the CMA have changed (paragraphs 1.4, 1.7). This implies that there has been no change in approach.

However, our analysis suggests that, whilst the letter of the law may not have changed, the way in which the CMA exercises its investigative powers has altered, and visibly so. The CMA's case outcome statistics[4] indicate that, in the last five years, there has been an increase in the proportion of cases that are referred by the CMA for a Phase 2 investigation, and those that require remedies/UILs (see also Guidelines, paragraph 1.10). According to our own analyses, between 2019 and 2020, 69% of Phase 2 deals were subject to prohibition or remedies or were abandoned by the Parties, whereas in the preceding two years, the same proportion was 44%. Businesses are, understandably, becoming increasingly

[1] Baker & McKenzie LLP is the UK registered entity of Baker McKenzie, a Swiss Verein.

[2] We recognise that the Guidelines are, in substance, a rejection of the approach adopted by the General Court in Case T-399/16 *CK Telecoms UK Investments v Commission* and, given this is on appeal, this ruling is not cited.

[3] In particular, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019 (Lear report); KPMG, Entry and expansion in UK merger cases, April 2017; Unlocking Digital Competition: Report of the Digital Competition Expert Panel, March 2019 (Furman report).

[4] https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes

concerned about the high prospects of "deal mortality" following a complex CMA Phase 1 or referral to Phase 2.

This trend has been reflected in our own experience of recent cases, where (far from evidence of under-enforcement) we see that even evidence presented for routine, no-issue transactions is subject to intense scrutiny as a matter of course.

Against this background, and alongside the increasingly wide approach the CMA has taken to establishing jurisdiction,[5] it is especially important that the Guidelines provide a clear pathway for merger parties to predict *ex ante* if a contemplated transaction is likely to give rise to an SLC finding and require a remedy in the UK.

In our view, the Guidelines fall short of what is required to give business the necessary degree of legal certainty. Broadly speaking, in our view, the draft proposes an approach where the CMA has a large amount of discretion – for example, setting out lists of relevant factors without also providing an indication of how the weighting of those factors will take place and making references to elements that are close to “subjective” in nature.[6] More specifically, we are concerned that the Guidelines reflect (and cement) the following enforcement practices:

- a more speculative approach by the CMA to the assessment of mergers (particularly those taking place in the innovation-heavy markets, such as the digital and technology industries), favouring the application of untested and complex theories of harm based on an unprecedented degree of forward-looking analysis;
- an asymmetric approach to assessing evidence:
    - a tougher assessment standard that the parties have to meet to prove a lack of substantive concern;
    - the CMA's ability to draw often negative inferences from certain kinds of evidence (such as internal documents, deal valuation, share of supply and third party evidence);
    - a discrepancy in the treatment of potential entry and expansion, depending on the identity of the purported entrant (i.e., one of the merging parties *vs*. a competitor).

We welcome the Guidelines in their attempt to update and provide transparency on the CMA’s emerging thinking. However, in terms of the goal, stated at paragraph 1.3, of enabling the merging parties to help predict the CMA’s assessment, in our view, the Guidelines fall short, because in many instances, the CMA is essentially saying to the merging parties that “it all depends”. We would encourage the CMA to seek to outline, for example, the general methodology it will use when giving weight to evidence and how its “in the round” approach is likely to be applied in practice.

If the Guidelines remain largely unchanged, there is a greater risk of inefficiency being built into the system – whereby the merging parties assess the evidence and take the view that no or no material SLC is likely (and hence close) only for the CMA to decide subsequently that, for example, the sector is important to consumers in the UK and the merger must be investigated.[7]

References to paragraph numbers below are to the proposed revised CMA129 draft revised Merger Assessment Guidelines (the Guidelines, as defined above) unless specified otherwise.

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[5] See our response to the CMA's consultation on the proposed changes to CMA2, in that regard.

[6] e.g., paragraph 2.17

[7] Overall, we would note that this potential inefficiency points to a mandatory notification regime. We would support a move to such a regime.

# 1. Untested and complex theories of harm

## a. Preliminary comments

We fully recognise that, particularly where transactions take place in a highly innovative, fast-moving context, there may be a higher degree of uncertainty about how competitive conditions might develop in the future (para 2.10, 2.26). That should not be an impediment to the CMA finding an SLC if, overall, this is established on the balance of probabilities at Phase 2 (and as a "realistic prospect" at Phase 1). At the same time, firms must also be in a position to reasonably assess (in advance) whether there is a realistic prospect of an SLC / an SLC on the balance of probabilities and to anticipate the necessary evidence required for their defence, regardless of the industry or sector within which they operate. However, the Guidelines do not put companies in a position to be able to do this, because they introduce novel, untested and difficult to verify theories of harm into the CMA's assessment toolkit, which (as explained below) risk being interpreted by CMA case teams, at least, as setting a low bar for the CMA's finding of competitive harm, and a high bar for the parties in terms of persuading the CMA that no such harm exists.

The theories of harm in question are: (i) horizontal effects stemming from the loss of innovation or dynamic competition (paragraphs 2.17(d), 5.17-24) and (ii) conglomerate effects preventing effective competition emerging in an unrelated market or service, particularly where such markets/services are new or nascent (paragraphs 2.17(e), 7.36)).

## b. Novel conceptual framework

As the Guidelines acknowledge (paragraph 5.19), a concern based around the loss of dynamic competition is, fundamentally, a horizontal effects concern. Despite the theory being fundamentally concerned with overlaps, the theory looks at overlaps in an entirely novel manner. Under the Guidelines, the CMA is not required to actually identify any overlaps. It is sufficient for the CMA to consider something akin to a direction of travel ("broader patterns of dynamic competition in which the specific overlaps may not be identified easily at the point in time of the CMA's assessment", para 5.21) and establish the mere loss of a "chance to benefit" from a wider variety of products or a future increase in competition (para 5.20).

A similar approach is taken to the assessment of conglomerate harm affecting a new or nascent market. The CMA is not required to be specific about how the new or nascent market might develop into maturity (paragraph 7.36).

It is of course, appropriate for the CMA to look at innovation harm and the impact on competition in the future. It must be recognised, however, that if there is no existing competition and no clear evidence of current competitive overlap, there must be robust evidence of the "dynamic competition" that is taking place or will take place in the future for there to be an SLC on the "balance or probabilities". The CMA should clarify that it is not now interpreting the legislation to allow it to establish an SLC merely because the resulting harm, if it did occur, would be large. That would require a legislative change of the substantive test at Phase 2 at least.

## c. Low bar for the CMA to establish competitive harm

These theories of harm risk relying on the CMA making predictions regarding the development of the markets and possible effects of the transaction stretching far ahead into the future, beyond the standards applied to potential entry. The Guidelines place no restriction on the CMA's discretion in how it should

approach the finding of harm in fundamentally uncertain circumstances. Although there is a reference to future overlaps being "likely" (paragraph 5.21), it is not clear where the dividing line between "likely" and "unlikely" should be drawn and at which point the efforts of the parties represent merely an ambitious vision, rather than a tangible "chance" for consumers to benefit. To illustrate, it is not clear if a pharmaceutical research programme with a 1% chance of success would be considered by the CMA to be "likely" to result in treating a given illness or whether merely integrating a previously non-commercialised technology into an existing platform is "likely" to result in entry into new, overlapping services. Some examples of how the CMA intends to apply the Guidelines to these types of situations would help.

## d. Difficult (if not impossible) for the merger parties to prepare arguments supporting the merger

The ability of the CMA to base its concern on distant possible outcomes of early technologies or R&D efforts means that the merger parties cannot predict with any reasonable certainty whether there are likely to be potential substantive concerns with their transaction.

Even if pre-signing due diligence enabled the purchaser access to all aspects of the target's pipeline and strategic planning (which in practice, is not common), to conduct a comprehensive *ex ante* assessment under these theories of harm, the purchaser would need to: (i) assess all possible applications for a particular research programme or technology (regardless of whether such end-uses have even been considered or documented by the target company) and (ii) assess whether any of the possible steps that might be taken by the acquirer post-merger (regardless of whether they have been intended or documented by the purchaser) might prevent such applications from materialising. This is clearly an impossible task.

Moreover, as discussed in section 2a below, the Guidelines require the parties to prove and quantify any expected R&D or technology synergies or any enhanced ability of the merged entity to develop entirely new products and speed up time to market as well as other (often unknown) efficiencies. Surely, a similar degree of precision and certainty should be required for the CMA's finding of the competitive harm such efficiencies are meant to offset?

## e. Untested principles

So far, the CMA has assessed the loss of future innovation incentives on a provisional basis only and the CMA's approach remains to a large degree untested by the CAT or the Courts. Both *Experian/ClearScore*[8] and *Illumina/Pacific Biosciences*[9] were abandoned prior to the conclusion of the CMA's Phase 2 investigation. Notably, whilst generating much debate in academic circles, the theory of conglomerate effects preventing competition in a new or nascent market has (as far as we are aware) not previously been examined by the CMA, despite the CMA's experience in reviewing recent transactions in "fast-moving" internet-based sectors.[10]

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[8] *Experian Limited / Credit Laser Holdings* (Clearscore) (ME/6743/18)
[9] *Illumina, Inc. / Pacific Biosciences of California, Inc.*( ME/6795/18)
[10] e.g., *Google LLC/Looker Data Sciences, Inc* (ME/6839/19), *Salesforce.com, Inc. / Tableau Software Inc* (ME/6841/19)

## f. Focus on enforcement in technology / digital sectors

As a preliminary point, we note that the Guidelines (particular when discussing these novel theories of harm) appear to target predominantly "digital", "fast-moving" and "dynamic" sectors (e.g., paragraphs 1.4, 2.27, 5.4, 7.36). However, the working definitions of digital and dynamic markets (footnotes 5 and 6) are very broad and capable of capturing almost any transaction. Digitalisation and the use of novel technologies has in recent years affected even established industries such as farming and energy, such that there are very few areas of modern industry where an "intensive use of technology" is not central to the business model or where competition does not "revolve around bringing new and innovative products to market". If the Guidelines are intended to highlight specific sectors where the CMA expects to invoke a more forward-looking approach to merger assessment, more precise definitions, illustrated by reference to prior cases in the relevant sectors where possible, would be helpful.

Assuming that the CMA intends to apply the novel theories of harm discussed above to digital, internet-based technology services (e.g. the kinds of transactions cited in the Lear report), the often voiced concern is that the acquirer will prevent the development of a not fully actualised nascent competitor by re-directing its efforts within the incumbent's existing ecosystem (or potentially, even shutting down such efforts completely).[11] In our experience, however, there is little incentive for a party to invest in a technology only to prevent its development in this way. First, it is common in technology transactions that the target technology may actually help fill "holes" in the acquirer's current offerings or broaden the number of offerings that can be made available to new and existing customers. Second, technology innovation more often than not involves *adapting* existing technologies to create novel solutions (rather than creating entirely new technologies). Given the multitude of potential uses of an acquired technology, crippling it would only be self-limiting for the acquirer (this is why the typical model in the digital sector is for the acquirer to invest heavily in the target and integrate it directly into the incumbent's own framework or ecosystem). Third, it is very common in the tech sector for what appears as an acquisition of a nascent competitor to in fact be an acqui-hire – where highly valued teams continue work on their ideas but with access to the resources available to the more established firm, which are not available to start-ups. Accordingly, the fundamental logic for pursuing these theories of harm does not seem to us to match with the commercial reality of the industries the CMA hopes to regulate.

[11] e.g., see Lear Report, section I.2.3.

## 2. Asymmetrical approach to the assessment of evidence

### a. Too high a bar required to prove a lack of concern

The Guidelines (consistent with our experience) treat information that supports the claims made by the parties with scepticism as a matter of standard practice. For example, the Guidelines state that in general, at early stages of the investigation, where the evidence supporting *prima facie* competition concerns is stronger, and especially if there is little evidence to the contrary, the CMA will expect to undertake less detailed analysis in deciding whether there is an SLC (para 2.18). Yet there is no converse statement - i.e., where the evidence prima facie strongly supports *the lack* of competition concerns, it will also be taken at face value.

Cases cleared in Phase 1 without proceeding to a Case Review Meeting still comprise the majority of the transactions reviewed by the CMA. Of these, many are transactions where it is very clear from the outset that no substantive competition issues arise, but where the parties make a strategic decision to file voluntarily, based on factors such as a prior filing history or appetite for risk. In our experience, it is now commonplace in such "no issue" transactions to receive multiple detailed requests for information and internal documents from the CMA. The requests are lengthy (running to several pages and tens of questions), complex (requiring detailed input from the business and often including formal document search and collection protocols) and more likely than not, come in the form of s. 109 notices issued as standard even in the context of a voluntary pre-notification. In such *prima facie* "no issues" cases, the (already very comprehensive) information and documents that are required to be provided as part of the Merger Notice, supplemented by limited follow-up questions, should be sufficient to rule out a competition concern.

Establishing a lack of concern becomes particularly difficult in cases involving potential entry or a greater degree of uncertainty as to the future development of the market. A party wishing to argue that it is not a potential entrant in a market considered by the CMA to be "fast-moving", "dynamic" or "nascent" or that it is not a unique potential entrant will struggle to present evidence that is likely to be considered conclusive by the CMA. The Guidelines state that the *absence of evidence* of efforts or explicit entry/expansion plans will not itself be sufficient to demonstrate a party would not have entered absent the merger (para 2.28(c)). Importantly, this is not limited to cases where there are concrete, justified concerns about the availability or reliability of documentary evidence (e.g., due to document destruction policies or where strategic planning is not formally recorded). At the same time, *positive evidence* of the parties' intentions not to enter (e.g., as reflected in strategic business plans) (para 2.25, 3.18,) or examples of competitive conditions and interactions in the pre-merger period (paragraph 2.27) may also be found to be inconclusive. Businesses will wonder what precise and finely balanced "mix" of evidence will be required to prove the low likelihood of credible entry or expansion plans. The approach in the Guidelines effectively makes it difficult for the parties to prove that a merger is benign and introduces a great deal of uncertainty even with respect to the reliability of reasonable prior assessments of the evidence available by the merging parties.

The Guidelines also impose an incredibly high bar across the board for establishing merger efficiencies, including the requirement for timeliness (para 8.11), citing concerns that in many cases the anticipated synergies are not fully realised, or their benefits not passed on to consumers (paragraph 8.6). Given that the CMA accepts a certain level of uncertainty is inevitable particularly when examining the effects on dynamic competition (paragraphs 2.26, 5.20), then by the same token the CMA should permit a similar degree of uncertainty when it comes to establishing the likely merger efficiencies in the same context.

## b. Interpretation of certain kinds of evidence

As acknowledged in the Guidelines (paragraphs 2.23, 5.16) and confirmed by our recent experience, the CMA is increasingly requesting parties' internal documents as well as evidence on deal valuation (particularly when assessing the loss of future competition between the parties or the expected deal synergies). These types of evidence, together with third party views, form the most common evidential backbone of an SLC decision. However, in our experience, the CMA can place undue weight on such evidence to the detriment of the merger parties.

***Deal valuation***

Placing significant weight on deal valuation figures and calculations as evidence that the parties are actual or potential competitors or of the likely future competitive potential of the target (paragraph 2.23) is not, in our view, appropriate. These calculations are not only based on the acquirer's assessment of the target's growth potential, but more importantly, reflect the EBIDTA multiples offered in recent industry deals that act as appropriate benchmarks in commercial negotiations. The fact that a valuation exceeds prior precedents is also not in itself remarkable, particularly in the context of auction deals, when there is significant commercial pressure to value the business at higher EBIDTA multiples than its true value.

The size and nature of the expected synergies is another factor that feeds into the overall valuation according to the Guidelines. This will often differ from case to case, depending on the acquirer. Importantly, large synergies or cost-savings do not necessarily imply reductions in investment or commercial direction undertaken by the target (e.g., strategic buyers may be able to generate substantial synergies through duplication in the number of suppliers or premises).

***Internal documents***

The Guidelines discuss the CMA's approach to assessing evidence (paragraph 2.18-2.28). A document's purpose, audience, author and frequency are factors that, in our experience, are given insufficient consideration by the CMA in the assessment of documentary evidence.

To illustrate, many internal documents created in the ordinary course of business are "working" drafts prepared by more junior staff with few accuracy and verification checks. Such documents are routinely produced to the CMA on account of being technically responsive to the wide scope of the CMA's information requests, but should be given less weight than centrally prepared, periodic strategic planning documents presented to senior management or key decision-making bodies (which are smaller in number). Where the number of documents supporting the CMA's concerns is comparatively few in an otherwise voluminous production, this fact should be taken into account when weighing up the probative value of such evidence.

Even when interpreting board-level documents, an appreciation of context is necessary. For example, the initial information memorandum presented to the Board is drafted with the particular aim of increasing the attractiveness of the target and the claims made should be viewed through the lens of the purpose for which it was created.

Post-acquisition documents are, understandably, given less evidentiary weight where they support claims made by the merger firms (paragraph 2.28(a)). However, to maintain procedural fairness, the same principle should be applied to post-acquisition documents that support the CMA's provisional concerns. For example, integration planning documents should not be taken as conclusive proof of the

accuracy or veracity of any synergy forecasts (given that the integration planning process tends to accept the projected synergies in order to facilitate commercial planning) or of the post-acquisition intentions of the acquirer.

***Shares of supply***

We broadly welcome the move in the Guidelines away from static market definition (e.g., paragraph 9.2), which is particularly artificial when it comes to fast-changing digital or technology industries, but agree that shares of supply are nevertheless a useful metric to consider as part of the overall assessment (paragraph 9.3). Where shares of supply are relied on as part of the overall evidence, these should be calculated by the CMA based on a reasonable description or sub-set of goods or services.[12] Yet the Guidelines currently envisage the CMA calculating concentration measures on any basis the CMA desires- e.g., including and excluding different firms depending on which companies the CMA wishes to compare (paragraph 9.3). This means the CMA could experiment with a limitless number of unduly narrow approaches to segmenting the market, inevitably leading to high shares of supply in some of these variations, which is not conducive to robust hypothesis testing (but rather, risks being a form of "cherry picking").

A further, related concern is the CMA's suggestion in paragraph 4.19 that a smaller number of competitors in the market creates a prima facie expectation that any two firms are close competitors. The CMA goes on to say that less detailed analysis of closeness of competition is necessary in such circumstances. This effectively introduces an evidential presumption based on the mere number of players active (and without considering other factors, such as their relative size, market power, specialisation and ability to meet differentiated demand), seemingly going against the ruling of the General Court in *CK Telecoms*.[13] The Guidelines do not make clear whether the presumption would be rebuttable. Even if so, the burden appears to be on the parties, in such circumstances, to demonstrate they are distant competitors, not on the CMA to demonstrate (on the basis of evidence) that they are close competitors. This would seem to be contrary to the CMA's standard of proof at Phase 2 to demonstrate an SLC on the balance of probabilities.

***Third party evidence and countervailing buyer power arguments***

Finally, the Guidelines do not explain how the CMA intends approach (and attribute weight to) evidence received from third party market participants, such as competitors and customers. The CMA will be aware that third parties may have commercial incentives to raise concerns about a transaction. Competitors often use the merger review process strategically, acting either as active interlopers or quite the opposite - keeping their input minimal to reserve their position in relation to their own planned M&A strategy. Sophisticated industry customers will also be aware of the influence their responses have on the fortunes of their suppliers and can use their feedback to the CMA as commercial leverage against the parties. The CMA's revised draft guidance on jurisdiction and procedure recognises this (albeit only in passing) and notes that the CMA must scrutinise these views and evidence carefully (paragraph 9.13).

The Guidelines lack any detail as to how third party evidence will be assessed and tested by the CMA, with the CMA having a wide margin of discretion as to the weight it chooses to attribute to such evidence (paragraph 2.24). For example, it would be helpful to understand whether (and in what circumstances) third parties can expect to be subject to document collection requests designed to "stress-

[12] See section 1b of our response to the CMA's consultation on the revised CMA2 guidelines
[13] Case T-399/16 *CK Telecoms UK Investments v Commission*

test" their initial responses and whether third party documents will be subject to the same scrutiny as the parties' internal documents. It would also be useful to understand the weight attributed by the CMA to different types of third party evidence - e.g. general questionnaire responses compared to internal documents or proactive analyses commissioned by interested third parties. In our experience representing both merger parties and third party respondents, "stress-testing" of third party evidence appears to be quite limited, at least in Phase 1, with questionnaire responses seemingly taken by the CMA at face value and quoted extensively in any SLC decision. This is particularly concerning given statements in the Guidelines, which suggest that more weight may be placed on such evidence in nascent markets where there is already a higher degree of uncertainty (paragraph 2.27).

The lack of a commitment to scrutinise customer feedback is particularly concerning given the position taken in the Guidelines on countervailing buyer power. The Guidelines significantly downplay the role of buyer power outside of cases of sponsored new entry (paragraph 4.19), limiting the ability of merger parties to rely on real-life case studies in order to demonstrate the transaction would not lead to an SLC. The kinds of buyer power given less weight in the Guidelines (e.g., customer's size, sophistication, and most crucially, the ability of the customer to switch or delist) are in reality a frequent occurrence in consumer and service-oriented sectors. The Guidelines also appear to go against the CMA's decisional practice in a number of recent retail cases where evidence of buyer power in the form of customer sophistication, negotiation tactics, resistance to price increases and customer switching was accepted.[14]

### c. Inconsistent approach to assessing "uncertainty" of entry/expansion

In situations where there is a degree of uncertainty about how competitive conditions might develop (para 2.10), it is particularly important that the CMA's assessment of anti-competitive effects is underpinned by accurate and robust evidence rather than tentative assumptions about possible future outcomes being taken for factual evidence. This is particularly given that existing economic tools are generally much more adept at measuring potential harm to static efficiency than dynamic efficiency,[15] and therefore quantitative, empirical evidence of such effects is likely to be more limited.

Our reading of the Guidelines suggests that the CMA is unlikely to apply uniform standards, particularly in relation to more forward-looking theories of harm. In particular, the assessment of evidence of entry and expansion appears to differ depending on the identity of the alleged entrant, with parties wishing to argue for entry/expansion by third parties or existing competitors being required to meet a higher standard. This is problematic, as potential entry and expansion are uniform concepts, which, should in principle be measured by reference to a common standard of evidence. The following examples illustrate this:

- When third party entry is put forward as a countervailing measure, parties are expected to demonstrate such entry will be timely (typically within 2 years) and the more distant the entry the less certain it will be considered by the CMA (paragraphs 8.30-1). However, similar timing constraints are not applied to the CMA's investigation of whether the parties themselves are likely to enter in the future. The CMA is free to consider the parties' ability and incentive to

[14] e.g., *Pork Farms Caspian / Kerry Foods* (ME/6472/14), *Tayto Group Limited / The Real Pork Crackling Company Limited* (ME/6767/18). Moreover, the CMA assessed in depth the impact of the *J Sainsbury Plc / ASDA Group Ltd* (ME/6752-18) merger on increasing negotiating power at the buyer level (though ultimately concluding no such concerns arose)

[15] Walker, M. and Curzon Price, T. (2016) Incentives to Innovate v Short-term Price Effects in Antitrust Analysis, *J EurComp Law & Practice (Vol. 7, No.7)* pp.475-481.

enter several years into the future (para 2.26) and even in the absence of well-developed plans to enter (paragraphs 5.10-11).

- The Guidelines presuppose that it is rare for third party entry or expansion to prevent an SLC and cite as a concern the fact that in past cases the examples invoked by the parties did not in fact materialise (paragraph 8.26). Any third party entry claimed by the parties must therefore also be effective within the "timely" timeframe (paragraph 8.29). By contrast, in the CMA's assessment of dynamic competition, whether entry or expansion by the parties would ultimately occur or be successful is not considered relevant to either the counterfactual (paragraph 3.20) or the competitive assessment (paragraph 5.20). The CMA will consider the loss of efforts to enter/expand as in itself representing intrinsic value to customers (paragraph 5.20).

- It will be necessary for the parties to specify the scope of third party entry (i.e., what products, what segments of the market), in order to demonstrate such entry would be sufficient to prevent the SLC identified by the (paragraph 8.34-6). In contrast,  it is not necessary for the CMA to determine the precise characteristics of the alleged launch product (paragraph 5.12), when it is the prospect of entry by the merging parties which is being assessed.

## 3. Miscellaneous

As a final point, we welcome the inclusion in the Guidelines of a section dedicated to the CMA's approach to two-sided platforms, given the increasing interest in two-sided markets evident in the CMA's recent cases. When assessing network effects, it will be important to consider carefully both sides of the platform, particularly in cases where only one side provides payment for the service. Particularly in technology-driven industries, the CMA should carefully consider non-price benefits - for example, a better quality service can be achieved by reducing the range or quantity of services provided such that the latter does not necessarily represent a reduction in competition.

## 4. Final comments

Baker McKenzie thanks the CMA again, both for the CMA's updating of its Guidelines and also for the opportunity we have been given to comment on the Guidelines as they evolve.

We are happy to engage with the CMA further on any of the points discussed above. Please feel free to contact any of the following should that be helpful:

Baker & McKenzie LLP

5 January 2021