Mergers: Updates to the CMA's Mergers and Assessment Guidelines
Response of Cleary Gottlieb Steen & Hamilton LLP
To the Competition & Markets Authority's Consultation

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CLEARY GOTTLIEB STEEN & HAMILTON LLP

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1. Cleary Gottlieb Steen & Hamilton LLP welcomes the opportunity to comment on the CMA's draft revised merger assessment guidelines (**Revised MAGs**).[1]

2. We welcome the CMA's decision to update its substantive guidance. Technologies and markets have evolved since the CMA's 2010 guidelines were published, as have the case law and CMA's decisional practice. Updated guidance can therefore provide a valuable resource for businesses and their advisors to understand the CMA's substantive framework to assess transactions.

3. We do, though, have a number of concerns with the Revised MAGs. In particular, the removal of references to market shares and other concentration benchmarks may create greater – not less – uncertainty for businesses.[2] Also, in places, the Revised MAGs suggest that the CMA may apply a broader discretion to assessing evidence than is permitted under the case law. Similarly, when describing the substantial lessening of competition (**SLC**) test, the Guidance is in places inconsistent with the legal framework under the Enterprise Act 2002 (the **Act**).

4. Overall, we are concerned that the CMA could seek to rely on the Revised MAGs to identify an SLC in circumstances where the relevant legal threshold is not met, where there is no compelling evidence supporting such a finding, or on the basis of unreliable presumptions. This would be troubling given the CMA's broad approach to identifying jurisdiction (meaning there is little certainty or predictability as to which transactions qualify for review), and the limited judicial review grounds on which the CMA's merger decisions can be challenged.

5. Further, while the stated purpose of the Guidance is to allow the CMA to correct for perceived under-enforcement in the digital sector,[3] the changes proposed would apply to mergers in every sector, where there is no suggestion of under-enforcement. Even in digital, we are not aware of reliable evidence of past under-enforcement by the CMA.[4] Given that over-enforcement carries real costs – both in deterring procompetitive

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1 The comments in this submission are made on our own behalf. They are based on our experience representing clients in merger control proceedings before the CMA and other competition authorities. They do not necessarily represent the views of our clients. We confirm that this submission does not contain any confidential information and that it may be published on the CMA's website.

2 Under s. 106(5) of the Enterprise Act 2002, the CMA should publish guidance with a view to explaining the provisions of the Act and indicating how the CMA expects such provisions to operate. Guidance that makes the CMA's practice less clear for businesses does not serve this statutory goal.

3 Revised MAGs, ¶¶1.4-1.10; and Consultation Document for Revised MAGs (**Consultation**), ¶1.6.

4 While the Lear Report is sometimes cited as such evidence (Consultation, ¶1.6; Revised MAGs, ¶1.7), the Lear Report's retrospective examination of past CMA decisions did *not* conclude that these decisions were wrongly decided or produced negative outcomes (*see, e.g.,* N. Levy *et al*, *Reforming EU merger control to capture 'killer acquisitions' – the case for caution*, Volume 19, Issue 2 of the Competition Law Journal). The Furman report did not contain any retrospective examination of past decisions.

transactions and creating unnecessary administrative burdens for businesses – parts of the Revised MAGs therefore risk bringing about negative outcomes.

6. To address these concerns, we provide our comments under three headings. First, to provide businesses with greater certainty, we recommend that the CMA retain benchmarks as to concentration levels that would not normally give rise to competition concerns (**Section I**). Second, the Revised MAGs should clarify several aspects of the CMA's approach to assessing evidence, which do not appear to be consistent with the CMA's obligations set out in case law (**Section II**). Third, the description of the SLC test should be updated to be made consistent with the statutory scheme (**Section III**).

7. These recommendations would provide greater clarity and certainty for the benefit of business, consumers, and the CMA, while not impinging on the CMA's enforcement priorities.

I. The Revised MAGs should retain benchmarks that allow companies to know when a transaction would not normally give rise to competition concerns

8. At ¶2.8 of the Revised MAGs, the CMA states that it: "*does not apply any threshold to market share, number of remaining competitors or any other measure to determine whether a loss of competition is substantial*." Accordingly, the Revised MAGs contain no guidance indicating situations when competition concerns are unlikely to arise. This represents a significant departure from the current guidance, which – while noting that they will not be applied "*mechanistically*" – sets out useful benchmarks based on market shares, number of firms, and HHI levels for where the CMA would not "*often*" identify competition concerns.[5]

9. We acknowledge that the CMA cannot be prescriptive and that there may be instances where it may wish to intervene in mergers falling below certain benchmarks. In our view, however, removing entirely the references to these the benchmarks goes too far. It risks creating unworkable levels of uncertainty for businesses considering entering into transactions.[6] This is particularly concerning in the context of a voluntary merger regime, where parties need to self-assess whether their transaction raises competition concerns such as to warrant a notification to the CMA.[7] This may result in large numbers of benign mergers being notified to the CMA out of an abundance of caution, creating

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5 2010 Merger Assessment Guidelines (**2010 MAGs**), ¶5.3.5.

6 The Revised MAGs acknowledge elsewhere that presumptions based on numbers of competitors can be helpful in identifying when concerns are likely to arise. For example, ¶2.17 states that "*it may be that the CMA finds an SLC if, for example, the merger involves the market leader and the number of significant suppliers in a market is reduced from four to three.*" At ¶4.9, the Revised MAGs explain that "*where competition mainly takes place among few firms, any two would likely be sufficiently close competitors that the elimination of competition between them would raise competition concerns*." The natural corollary of this is that a presumption setting out when concerns are *unlikely* to arise can also be helpful.

7 The solution would not be simply to go ahead and file all transactions. This is because cases are often small, do not obviously qualify for review, and, where parties have a legitimate reason to think no filing is required, they cannot file, because doing so would mean conceding jurisdiction.

unnecessary burdens for both business and the CMA.[8] In other words, the combination of no reliable jurisdictional test with no reliable SLC test risks making the system unworkable.

10. We see no principled reason why the current benchmarks cannot be retained in the Revised MAGs, suitably caveated as they are under the 2010 MAGs. This would not prevent the CMA intervening in mergers that fall under the benchmarks, if exceptional circumstances exist that warrant such intervention. It would also provide greater certainty to businesses on the CMA's "*practices and processes*," which is the stated purpose of the Guidance.[9] We therefore recommend that the CMA retain benchmarks as to market shares, number of competitors, and HHI levels as set out in the 2010 MAGs.

II. The Revised MAGs should clarify certain aspects of the CMA's approach to assessing evidence

11. The CMA's analysis of how it assesses evidence in the Revised MAGs is, for the most part, useful. We are concerned, however, that in places the Revised MAGs seek to endow the CMA with a discretion to assess the evidence that goes beyond the standards set out in the case law.

12. We recognize that the CMA has a discretion as to how it evaluates evidence. This discretion, however, is not unlimited. The CMA must have a "*sufficient basis*" to reach its decision in light of the "*totality of the evidence available to it.*"[10] Accordingly, "*there must be evidence available to the [CMA] of some probative value on the basis of which the [CMA] could rationally reach the conclusion it did*."[11]

13. In more detail, the CMA must have evidence for the factual findings that "*underpin*" its conclusions. It is "*impermissible for the [CMA] to assume without proper investigation and consideration*" important factual matters.[12] Where the CMA's approach "*would in principle be capable of having profound, widespread and indefinite effects*," it is insufficient for the CMA simply to record its "*belief*" that certain effects will be produced.[13]

14. These considerations apply with particular force when the CMA requires divestment remedies. In such situations, the CMA must "*exercise[] particular care in its analysis*."[14] In particular, "*the more intrusive, uncertain in its effect, or wide-reaching a proposed*

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8 The CMA accepts that its ability to pursue its enforcement priorities is affected by work it is "*bound by law to undertake…such as merger control*" (CMA Annual Plan 2019/20, 14 February 2019). Unnecessary expansions to the CMA's work in merger control to review more unproblematic mergers would inevitably come with costs for other areas of the CMA's enforcement, where the CMA could address real competition issues.

9 Consultation, ¶1.

10 *BAA v Competition Commission* [2012] CAT 3, ¶20(4); and *Ecolab v CMA* [2020] CAT 12, ¶58.

11 *BAA Ltd v Competition Commission* [2012] CAT 3, ¶20(4). While the *BAA* case concerned a judicial review under s. 179 of the Act, the same considerations apply to mergers (*see* s. 179(4) and *Ecolab v CMA* [2020] CAT 12, ¶58).

12 *Tesco Plc v Competition Commission* [2009] CAT 6, ¶124.

13 *Ibid.*, ¶150.

14 *BAA Ltd v Competition Commission* [2012] CAT 3, ¶20(7).

remedy is likely to prove, the more detailed or deeper the investigation […] may need to be."[15] In some places, the Revised MAGs appear to suggest that something less than these standards would be sufficient to prove an SLC. We discuss five examples below:

15. **First, the Revised MAGs should not imply that the CMA can find an SLC based on the absence of evidence**. At ¶2.28(c), the Revised MAGs state that, when considering a theory of harm based on a theory that a merger firm may have entered or expanded absent the merger: "*a lack of evidence of efforts of explicit entry or expansion plans made available to the CMA will not be sufficient to demonstrate that the firm would not have entered absent the merger*." This passage risks suggesting that the CMA could find an SLC based on a prediction that a firm would have entered or expanded absent the merger, even if the CMA had no evidence to that effect. Any such finding would be inconsistent with the CMA's obligations to assess evidence and prove an SLC under the Act.

16. While we acknowledge the CMA's concerns around potential competition theories of harm, we do not believe that identifying an SLC based on a *lack* of evidence is the answer to those concerns. Rather, we would encourage the CMA to *broaden* its evidence base. For example, the CMA could make greater use of interview powers (as in *Amazon / Deliveroo*);[16] it could scrutinize transaction values (as in *Paypal / iZettle*);[17] it could probe internal documents from both the parties and third parties (as in *Experian / Credit Laser Holdings (ClearScore)*);[18] and it could review third-party analyst reports. This approach is already available to the CMA under the current rules and would be better than permitting the identification of an SLC based on an absence of evidence.[19]

17. **Second, the Revised MAGs should make clear that the CMA needs to prove an SLC based on the evidence.** At ¶¶2.10 and 2.26, the Revised MAGs stress that the presence of "*uncertainty will not in itself preclude the CMA from concluding that the SLC test is met.*" We recognize that merger assessments are necessarily prospective and involve an element of judgement. We are nonetheless concerned that these passages of the Revised MAGs go too far. They may be interpreted to allow the CMA to find an SLC even where the CMA has not proved one, on the balance of probabilities, based on the evidentiary

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15 *Tesco Plc v Competition Commission* [2009] CAT 6, ¶139.

16 See *CMA may hold more witness interviews in merger probes*, Global Competition Review (2 March 2020): the CMA interviewed senior management at Amazon in the course of its investigation into Amazon's acquisition of a minority shareholding in Deliveroo.

17 Completed acquisition by PayPal Holdings, Inc. of iZettle AB, Final report, 12 June 2019, ¶2.10.

18 Anticipated acquisition by Experian plc of Credit Laser Holdings Limited, Provisional findings report, 28 November 2018, Summary, ¶19.

19 *See, e.g., Google LLC / Looker Data Sciences Inc.*, 13 February 2020, ¶16 ("*The CMA reviewed a significant volume of Google's internal documents to test Google's submission that the rationale for the Merger was to strengthen its cloud business. Considered in the round, the CMA believes that Google's internal documents were consistent with Google's submitted rationale and did not suggest that Google was planning to engage in the foreclosure strategy envisaged under this theory of harm*").

requirements of the *BAA*[20] and *Tesco*[21] judgments.[22] We therefore suggest that these passages be removed from the Revised MAGs.

18. **Third, the Revised MAGs should confirm that a detailed analysis is always necessary to identify an SLC.** At ¶4.9, the Revised MAGs state, with regard to differentiated markets, that a "*less detailed analysis is necessary*" to identify an SLC in a market with "*few firms*."[23] We are concerned that this statement could be misinterpreted. It will always be necessary for the CMA to conduct a detailed analysis, especially if the CMA reaches a finding that may require divestments, as the CAT made clear in *Tesco.*[24]

19. In a differentiated market, in particular, a simple reduction in the number of firms may not create any prospect of anticompetitive effects, if the parties are not close competitors. The CMA must rigorously assess all available evidence to prove an SLC, based on the totality of the evidence. We therefore recommend removing the final two sentences of ¶4.9, or at the very least clarifying that no evidential presumption exists that companies competing in a market with few significant players will be close competitors.

20. **Fourth, the Revised MAGs should recognize that the greater uncertainty underlying a theory of harm, the better the quality of evidence that should be required to prove that theory of harm.** At ¶2.10, the Revised MAGs state that:

> *...The CAT has previously held that all mergers should be assessed on a case-by-case basis to the same evidential standard regardless of the theory of harm being considered. There is, therefore,* ***no special elevated evidential burden for particular theories of harm, including theories of harm that involve changes in future competitive conditions****. The fact that there may be some uncertainty*

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[20] *BAA Ltd v Competition Commission* [2012] CAT 3, ¶¶ 19-20. See, in particular, ¶20(3) ("*the CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it*") and ¶20(4) ("*There must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did"*).

[21] *Tesco Plc v Competition Commission* [2009] CAT 6, ¶¶124, 139, 150. The CAT found that it was "*impermissible*" for the Competition Commission to make an assumption as to the risk of welfare losses for consumers "*without proper investigation and consideration of the issue*" (¶124) and that the Competition Commission must "*do what is necessary to put itself into a position properly to decide the statutory questions*", including by "*examining and taking account of relevant considerations*" with regard to remedies (¶139).

[22] The balance of probabilities test cannot be satisfied if underlying uncertainties make an event inherently improbable. *See* p.956 of Lord Brandon's judgment in *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 W.L.R. 948 (1985), which states that: *"the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense*."

[23] The Revised MAGs also do not define what "*few*" means in this context, and do not explain what types of evidence would be necessary to overturn the evidential presumption. This creates additional uncertainty for business.

[24] *Tesco Plc v Competition Commission,* ¶139 ("*the more important a particular factor seems likely to be in the overall proportionality assessment, or the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to prove, the more detailed or deeper the investigation of the factor in question may need to be*").

in how the market is likely to develop in future does not, by itself, reduce the likelihood that a merger could give rise to competition concerns… (emphasis added).

21. We recognize that the CMA should assess mergers on a case-by-case basis. Part of that case-by-case assessment should, though, take into account that when there is greater underlying uncertainty to support a theory of harm, stronger evidence is required to be able to conclude that an SLC will arise.[25] Accordingly, we recommend that ¶2.10 be revised to reflect the legal requirement that the more speculative and uncertain the theory of harm, the stronger the evidence required for the CMA to be satisfied that a merger would result in an SLC.

22. **Fifth, the examples given in the Revised MAGs of when an SLC may arise are potentially misleading.** At ¶2.17, the Revised MAGs set out examples of situations where the CMA considers that an SLC may arise. We are concerned that these examples are incomplete and they thereby risk being misinterpreted. In particular, they risk creating presumptions that certain types of merger are anticompetitive, when no such presumption exists in the legal framework of the Act or well-established principles of economics.

23. For example, ¶2.17(a) risks suggesting that there is a presumption of an SLC if a merger involves a market leader and a reduction in the number of firms from four to three.[26] To establish an SLC, however, the CMA would still need to establish that: the parties are close competitors; sufficient competitive constraints would not remain post-merger; entry or expansion would not prevent an SLC; there is no countervailing buyer power; and the merger would not give rise efficiencies that outweigh the harm from the reduction in competition. The same considerations apply to the other examples set out at ¶2.17.

24. We suggest that the Revised MAGs either remove the examples set out at ¶2.17 or clarify the examples so as not to give the false impression that an SLC may arise purely based on presumptions. The suggested changes would also bring ¶2.17 into greater conformity

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25 For example, the EU General Court in *Tetra Laval* made clear it is necessary to adduce particularly clear and cogent evidence to support theories of harm where "*the chains of cause and effect are dimly discernible, uncertain and difficult to establish*," s*ee* Case C-12/03P *Tetra Laval* EU:T:2005:456, ¶44. *See also re H (Minors)* [1996] AC 563, p.586 ("*The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established*"); and *re B (Children) (FC)* [2008] UKHL 35; [2009] 1 A.C. 11 ("*There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities*").

26 In support, the Guidelines cite the CAT's judgment in *Tobii AB v. CMA*, where the CAT found that the parties were close competitors based on a wide body of evidence, including from customers, competitors, Tobii's internal documents, relative market shares, and diversion ratios from customer datasets (¶¶348, 350-352). The CAT then went on to state, obiter, that "*a finding that diversion ratios are consistent with relative shares […] would be enough to justify the CMA's SLC conclusion, since it is perfectly reasonable for a competition authority to find that a merger involving the market leader and a reduction in the number of significant players from four to three gives rise to an SLC*" (¶353). The CAT did not suggest that the fact the merger reduced the number of firms from four to three was sufficient, by itself, to give rise to an SLC.

with other parts of the Revised MAGs, which recognize the importance of countervailing factors.[27]

III. The Revised MAGs' description of an SLC should accurately reflect the existing legal framework

25. At ¶2.9, the Revised MAGs set out the CMA's interpretation of the meaning of "*substantial*" within the assessment of an SLC. The CMA makes two points, both of which arguably widen the scope of an SLC beyond that permitted by the statutory scheme:

    (1) The Revised MAGs state that an SLC may arise where the effect of the merger on competition is anywhere between "*not trifling*" and "*nearly complete*", citing the CAT's judgment in *Global Radio Holdings*.[28]

    (2) The Revised MAGs also state that a lessening of competition may be considered "*substantial*" where "*the lessening of competition is small, but the market to which it applies is large or otherwise important to UK customers, or there is only limited competition in the market to begin with*".

26. As to (1), the broad range of interpretation of the meaning of an SLC, in our view, mischaracterizes the CAT's judgment in *Global Radio Holdings*. The CAT found only that "*substantial*" does not necessarily mean "*large*", "*considerable*" or "*weighty*"; it did not conclude that "*substantial*" implies the effect of the merger on competition may be anything from "*not trifling*" to "*nearly complete*".[29] In fact, the *South Yorkshire* judgment discussed in *Global Radio Holdings* found that it was a "*radical misconception*" for the word "*substantial*" to mean "*more than trifling*."[30]

27. In *Global Radio Holdings*, the CAT went on to find that for an SLC to arise, there must be significant reduction in competition: "*Parliament might be anticipated to have intended that a significant lessening of competition should suffice, regardless of whether the lessening of competition was large in absolute terms.*"[31] Indeed, this interpretation would be consistent with Parliament's intention at the time of passing the Act, that "*The concept of a substantial lessening of competition … is concerned with whether there will*

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27 This is illustrated by ¶2.7 of the Revised MAGs, which states that *"Some mergers will lessen competition but not substantially so, because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms.*"

28 *Global Radio Holdings Limited v CC* [2013] CAT 26.

29 *Ibid*., ¶¶23-25. The reference to "*not trifling*" comes from Lord Mustill's comments in *R v Monopolies and Mergers Commission ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, where Lord Mustill discusses that "*substantial*" may be capable of "*wide range of meanings*" in the context of "*substantial part of the United Kingdom*" in section 64(3) of the Act. Lord Mustill did not conclude that "*substantial*" means "*not trifling*" but rather that the word substantial "*does indeed lie further up the spectrum*" than a *de minimis* amount for the purposes of section 64(3).

30 *R v Monopolies and Mergers Commission ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, per Lord Mustill.

31 *Global Radio Holdings Limited v CC* [2013] CAT 26, ¶24(4).

be ***a significant reduction of competitive pressure in a market as a result of a merger*** (emphasis added)."[32]

28. Accordingly, we recommend that the reference to "*not trifling*" be removed and the Revised MAGs affirm that an SLC requires a significant reduction in competitive pressure. This would bring the Revised MAGs in line with both the case law and Parliament's intention when passing the Act, and provide a more workable and understandable test.

29. As to (2), the Revised MAGs state that an SLC may arise even where the lessening of competition is "*small*" if a market is "*large*" or where a market is "*important*" (Revised MAGs, ¶29). The Revised MAGs do not elaborate on what these terms mean, how the CMA will interpret them, or why these new criteria would be justified under the Act. There is no indication in the Act or case law that an SLC could be identified where there is a "*small*" reduction of competition because the market is deemed "*important*".

30. The Revised MAGs cite *Sainsbury's /Asda* as a case involving an "*important*" market, because groceries were a non-discretionary expenditure accounting for a significant proportion of household spend (Revised MAGs, fn. 24). But the CMA in that case stressed in several places that for an SLC to arise, rivalry must be "*substantially less intense after a merger than would otherwise have been the case*."[33] The CMA did not find that an SLC could arise with only a "*small*" lessening of competition.

31. We are concerned that, as currently drafted, the Revised MAGs risk providing the CMA with an unlimited discretion to identify an SLC since any market could be defined as "*important*" depending on the definition the CMA chooses to adopt. Accordingly, we recommend that the CMA amend this explanation of "*substantial*" in the Revised MAGs so that the threshold for an SLC more accurately reflects case law and the CMA's prior practice. We also recommend that the CMA remove references to an SLC arising with a "*small*" lessening of competition because of "*large*" or "*important*" markets.

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32. We hope these comments are helpful and stand ready to discuss any of the observations raised in this submission should the CMA consider it helpful.

CLEARY GOTTLIEB STEEN & HAMILTON

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[32] In the course of passage of the Act, Melanie Johnson MP, then Under-Secretary to the Department of Trade and Industry, informed the House of Commons Standing Committee that: "*The concept of a substantial lessening of competition … is concerned with whether there will be a significant reduction of competitive pressure in a market as a result of a merger,* ***not a simple numerical assessment of the numbers of participants in a market****."* (emphasis added). *See* Enterprise Bill, 25 April 2002, col.292, available at https://publications.parliament.uk/pa/cm200102/cmstand/b/st020425/pm/20425s03.htm (Accessed: 11 January 2021).

[33] Anticipated merger between J Sainsbury PLC and Asda Group Ltd, Final Report, 25 April 2019, Executive Summary, ¶10; ¶¶1.3, 18.97.