The CMA's consultation on
Draft revised Merger Assessment Guidelines

November 2020

Response by Freshfields Bruckhaus Deringer LLP

8 January 2021

Freshfields Bruckhaus Deringer

RESPONSE TO THE CMA'S CONSULTATION ON ITS DRAFT REVISED MERGER ASSESSMENT GUIDELINES

of November 2020

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the Competition and Markets Authority's (***CMA***) public consultation on its draft revised '*Merger Assessment Guidelines*' (***Draft Revised MAGs***).

1.2 We welcome that the CMA has updated its guidelines to take account of legal developments over the last decade. Clear and relevant guidance on the CMA's substantive approach is crucial for parties considering a merger and their advisers, as well as third parties who might be affected by a merger.

1.3 However, we are concerned that some of the proposed amendments will create less, rather that more, clarity on the CMA's approach to merger assessment in practice. There is therefore scope for the Draft Revised MAGs to be improved in these respects – to the benefit of the CMA and merging parties. An overarching concern is that in relation to a number of issues, the CMA has simplified or removed existing guidance without providing any clear guidance in replacement. This is of particular concern in relation to mergers in digital or dynamic markets, and the corollary is that the proposed amendments significantly reduce legal certainty and seek to extend the CMA's margin of appreciation compared with the current position. This approach to reducing the practical utility of the CMA's guidance may have a chilling effect on investment with fewer mergers proceeding, as well as having an impact on the efficiency of the CMA's own merger investigations. We have set out our comments in further detail in the following sections regarding: market concentration; substantial lessening of competition (***SLC***); the counterfactual; horizontal unilateral effects; potential competition; coordinated effects; vertical and conglomerate effects; countervailing factors; and market definition.

2. No guidance on market concentration

2.1 The Draft Revised MAGs refer in multiple places to 'concentration' or 'concentrated' markets, for example, in relation to horizontal unilateral effects, coordinated effects, entry and expansion and market definition. However, unlike Section 5.3 (Measures of concentration) in the *Merger Assessment Guidelines* dated September 2010 (***2010 MAGs***), the Draft Revised MAGs provide no specific guidance on the CMA's approach to market concentration. The 2010 MAGs provided guidance on:

(a) the types of data that could be used to measure concentration e.g. sales revenue, production volume, capacity or reserves;

(b) the several ways in which concentration can be measured e.g. market shares, the number of firms, concentration ratios, the Herfindahl-Hirschman Index (***HHI***); and

(c) the thresholds that the CMA may have regard to, although these would not be applied mechanistically.

2.2 Paragraph 2.8 of the Draft Revised MAGs provides that the CMA '*does not apply any thresholds to market share, number of remaining competitors or any other measure*'

when determining whether a loss of competition is substantial. While the CMA may not wish to set out mechanistic thresholds, it is not sufficient to refer to an important concept (concentration) but remove all reference to previously understood approaches and relevant evidence without providing any replacement guidance on the types of data that the CMA will use to measure concentration and the ways in which concentration can be assessed. Without clear guidance, merging parties and their advisers will find it difficult to assess potential mergers. We therefore believe that further information is necessary in this area to set out a clearer indication of the CMA's approach which could include providing illustrative examples or discussion of the circumstances in which the CMA may, or may not, consider a market to be concentrated.

3. Substantial lessening of competition

An SLC and how it might arise

3.1 The concept of 'substantial lessening of competition' is a key legal test in the Enterprise Act 2002 which the CMA must apply when assessing mergers. The Draft Revised MAGs in paragraph 2.9 provide that 'substantial' can mean '*not trifling*' at one extreme and '*nearly complete*' at the other. This reflects comments in judgments of the Competition Appeal Tribunal, but on its own this is too broad to be of practical value to merging parties and their advisers. For example, it would be useful if the guidance could include examples where the CMA has determined that there was a realistic prospect of a lessening of competition but decided that it would not be 'substantial', and the reasons for this determination.

3.2 Paragraph 2.9 should also be reframed to state more clearly the factors that the CMA will take into account when assessing substantiality. For example, the CMA could expand on the types of factors that would be relevant to its consideration of a market that was '*large or is otherwise important to UK customers*'.

3.3 In paragraph 2.10 the CMA states that the presence of some uncertainty in how a market is likely to develop in future does not, by itself, reduce the likelihood that a merger could give rise to competition concerns and that the presence of uncertainty does not in itself preclude the CMA from finding competition concerns on the basis of all the available evidence. However, just as uncertainty may not preclude the finding of concerns nor is uncertainty, by itself, a legitimate indicator of competition concerns. All merger assessments involve some degree of uncertainty to a greater or lesser extent and the presence of uncertainty cannot reasonably be the basis to give undue weight to fanciful or remote possibilities of potential 'competition concerns'. The CMA must find, at Phase 1, that there is at least a realistic prospect of an SLC based on a reasonable belief objectively justified by relevant facts. In that context, the uncontroversial formulation that the CMA's decision should be based on a reasonable belief objectively justified by relevant facts that previously appeared in paragraph 2.5 of the 2010 MAGs has been removed in the proposed amendments. This should be reinstated and it is important to avoid any impression in the revised guidelines that potential theories of harm can be advanced on an overly speculative basis.

3.4 Further, paragraph 2.15 provides that the CMA may find that the SLC test is met based on several theories of harm affecting the same market and footnote 29 provides

that the combined likelihood of an SLC arising under multiple theories of harm may be sufficient to meet the SLC test. In this context, it is also important that each theory of harm is plausible: it would not be appropriate to reach the conclusion that the SLC test is met on the basis of the aggregate of a number of individually improbable theories of harm. We suggest that an express note to this effect be included in the Draft Revised MAGs.

Examples of when a merger can result in an SLC

3.5 The CMA has provided in paragraph 2.17 a non-exhaustive list of scenarios when the CMA may find an SLC. In relation to some of these examples:

(a) The scenario in subparagraph (b) of 'close competitors in a differentiated market' is too broad and ignores the position of the merging parties in relation to other competitors. Closeness of competition is a relative concept and inherently requires comparison of the degree of closeness of the merging parties with other market participants. This example should therefore refer to the 'closest' competitor or to the relative closeness between the merging parties as compared with the rest of their competitors. That closeness is a relative concept is acknowledged in paragraphs 4.7-4.9, where there is also a reference to unilateral effects arising where the merging parties are close competitors and the remaining competitive constraints are not sufficient to offset the loss of competition between the merging parties. This is an important qualification.

(b) The scenario in subparagraph (e) of preventing effective competition emerging in other markets or services even where they are new or nascent at the time is very broad and vague and currently does not provide useful guidance on the circumstances in which this concept will be considered to be relevant. This requires much greater explanation preferably with examples.

(c) The scenario in subparagraph (f), which relates to conditions for coordination being met post-merger, should specify that the change must be linked to the merger. There should be a causal connection arising from the merger.

Price and non-price competition

3.6 The Draft Revised MAGs provide at paragraphs 2.4 and 2.5 greater detail on non-price factors and this is welcome. While the CMA does not seek to limit the markets in which non-price factors will be relevant to its assessment, almost all the examples given relate to the digital sector and a broader range of examples would be useful.

3.7 While non-price aspects of competition can be relevant or even central to competitive assessments in some markets, it would be helpful for the CMA to note that such factors may play little role in markets involving homogenous products, which are almost exclusively focused on price. To the extent that the CMA sees a role for non-price factors in markets involving homogenous products, further guidance on this point would be useful.

3.8 We welcome the inclusion of the sustainability of a product or service as a non-price aspect of competition. Specific examples of what the CMA would consider in terms of sustainability would be helpful as this is an emerging parameter of competition that should be encouraged (see also paragraph 9.3 below). This parameter is also likely to

be central in consumer-facing markets, but it would be helpful to understand the extent to which the CMA sees it playing a role in other markets as well.

How the CMA assesses evidence

3.9 When considering whether a merger firm may have entered or expanded absent the merger, the Draft Revised MAGs state at paragraph 2.28(c) that a lack of evidence of efforts or explicit entry or expansion plans will not be sufficient to demonstrate that the firm would not have entered absent the merger. This suggests a presumption that the firm would have entered or expanded unless evidence can be adduced to the contrary. In this context, it is important that the guidelines set out a balanced approach to assessment of potential entry when considering potential theories of harm. Potential entry or expansion is a factor that is taken into account to mitigate or remove a potential SLC as well as, in some circumstances, the basis of a potential SLC. It would not be appropriate to adopt entirely different evidential standards to the assessment of potential entry or expansion in these situations. Moreover, seeking to base an SLC finding on an absence of evidence from the merging parties is also not appropriate. Merging firms which have not explicitly considered but rejected potential entry/expansion cannot fairly be presumed to be competitors on that basis alone. This approach should therefore be amended.

4. The counterfactual

Flexibility in the counterfactual time horizon

4.1 Although we agree that the time horizon used for the counterfactual will depend on the context, the guidance should acknowledge that the further out the time horizon, the less certainty there will generally be.

4.2 Paragraph 3.12 provides that at Phase 1 '*if the CMA must consider multiple potential counterfactual scenarios where each of those scenarios is realistic, it will choose the one where the merger firms exert the most important competitive constraint on each other, and where third parties exert the weakest competitive constraints on the merger firms.*' In line with paragraph 4.3.5 of the 2010 MAGs, we suggest that this be subject to the following caveat: '*provided always that the CMA considers that situation to be a realistic prospect and not materially less realistic than alternative potential counterfactuals*' and noting that the default position in Phase 1 will be the existing conditions of competition.

4.3 The guidance should also include a qualification either in paragraphs 3.3-3.4 or in paragraph 3.13, that the CMA '*will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it and the extent of its ability to foresee future developments; it seeks to avoid importing into its assessment any spurious claims to accurate prediction or foresight*' similar to paragraph 4.3.6 in the 2010 MAGs. Such a statement should be uncontroversial and would not unduly limit the CMA's discretion.

Entry or expansion by one of the merger firms

4.4 At paragraph 3.18, the Draft Revised MAGs provide that responses by existing competitors to the threat of entry or expansion by the merger firms may be relevant to the likelihood that it will occur. The consideration of evidence from third parties

should be qualified in the guidance to acknowledge that competitors will have a vested interest in arguing that entry of the target/purchaser was inevitable; and they will not be privy to the merging parties' respective plans. Further to the concerns expressed above at 3.9, the views of competitors should not be given undue weight and the evidence in support of such views should be tested equally rigorously as the evidence of the merging parties. The mere fact that a competitor expresses adverse views on a merger transaction should not be combined with theoretical assessments of ability and incentive of entry/expansion to outweigh the absence of evidence of entry or expansion by the merger parties.

Exiting firm scenario

4.5 We agree with the removal of the third limb of the exiting firm scenario. However, some detail from paragraph 4.3.15 on the CMA's approach to a failing firm which is part of a larger corporate group has been removed. Guidance of the CMA's approach in such a scenario e.g. where a subsidiary is failing, would be useful.

Parallel transactions

4.6 Similarly, the Draft Revised MAGs do not contain express guidance on the CMA's approach in relation to parallel transactions. This can be an important issue in practice and it would therefore be helpful for the CMA to provide guidance on its approach in these circumstances.

5. Horizontal unilateral effects

Differentiated products

5.1 Paragraph 4.9 of the Draft Revised MAGs states that '*where competition mainly takes place among few firms, any two would likely be sufficiently close competitors that the elimination of competition between them would raise competition concerns, absent evidence to the contrary*' and that the '*smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors*'. This raises the following issues:

(a) The guidance does not give any indication of what 'few firms' or 'significant player' means in practice.

(b) The practical effect of the revised guidance seeks to reverse the burden of proof in uncertain circumstances by indicating that merging parties would be required to adduce 'evidence to the contrary' in respect of closeness of competition in some cases rather than the CMA establishing that a closeness of competition theory is established on the evidence.

5.2 As noted above in Section 3, closeness of competition is a relative concept and inherently requires comparison of the degree of closeness of the merging parties with other market participants. The mere fact that there may be 'few firms' in the market does not remove the requirement to conduct a *relative* assessment of closeness of competition or change the CMA's burden of proof.[1] The guidance should therefore

[1] See, in that context, when considering the practical application of the closeness of competition concept in a concentrated market, Case T-399/16, *CK Telecoms UK Investments Ltd v Commission,* para 242.

be revised to clarify that the legal standard which the CMA is required to meet is not affected by any change in the guidance.

5.3 Furthermore, notwithstanding our comments above on the inappropriateness of seeking to use revised guidance to introduce a legal presumption in these circumstances, the guidance does not explain the types of contrary evidence or the standard that would be required to rebut the presumption of competition concerns in these circumstances.

5.4 The price sensitivity of customers should be a relevant factor to include in paragraph 4.11 regarding factors that may make horizontal unilateral effects more or less likely in a differentiated market.

5.5 The CMA has included in footnote 78 a reference to pricing pressure indices, which may be derived from diversion ratios together with other evidence. The guidance should note that pricing pressure indices, which were devised as screening tools rather than evidential tests relevant to the SLC test, have material limitations, may not be appropriate to use even as a screening test in all circumstances and cannot be relied on solely as the basis of an SLC finding.

5.6 The Draft Revised MAGs at paragraphs 4.13-4.14 refer to using shares of supply in the context of assessing closeness of competition. Given the role of 'shares of supply' in jurisdictional questions, and that the share of supply test may not align with the relevant market for the substantive assessment, we suggest replacing 'share of supply' in this context with 'market share estimates'. While shares of supply/market shares may provide some information as a starting point for a closeness analysis, clearly an assessment of closeness of competition requires a much more sophisticated analysis and no definitive conclusions could be reached in relation to closeness of competition on this basis. In that context, we note that the CMA is at pains to point out the limited reliance it will place on shares of supply/market shares as a potential indicator of market concentration levels or in determining whether a merged entity could be constrained by competitors. Given this, it would be inconsistent, in this context, to give greater prominence to shares of supply/market shares in an assessment of closeness of competition.

Two-sided platforms

5.7 The Draft Revised MAGs refer to instances where network effects are strong. It would be helpful if the guidance could include further detail on the approach the CMA will use in:

(a) assessing the strength of network effects including the types of data it will expect to examine and in what circumstances the presence of network effects may be significant for the analysis; and

(b) determining tipping effects or the point at which a market will 'tip'.

5.8 In particular, given that many transactions involving two-sided platforms are unproblematic, it would be useful for the CMA to set out more clearly the

circumstances in which it is unlikely to consider that an SLC arises in transactions involving two-sided platforms.

5.9 The Draft Revised MAGs contain a new section discussing the circumstances in which the CMA may seek to concentrate its analysis on one side of a two-sided platform. In that context, it would be useful for the revised guidance to set out further detail on how effects on the other side of the platform will be taken into account, even if more focus is given to one side of the platform, given that it will rarely, if ever, be appropriate to exclude consideration of that element of the analysis entirely.

5.10 Although the revised guidance discusses the potential relevance of 'tipping effects' this concept, and its relevance to the SLC assessment, is not yet well explained or developed in the draft. Further information is required to explain the circumstances in which the CMA will seek to apply this concept, the evidence that it will take into account in that regard and what circumstances will and will not be an indicator of an SLC.

6. Potential competition

6.1 Chapter 5 on potential competition should note at the outset that although a degree of judgement is involved in assessing potential competition, the approach taken must be evidence-based, balanced and cannot be speculative.

6.2 In line with the comments in paragraph 3.9 above, the CMA's proposed approach in paragraphs 5.11-5.12 of the Draft Revised MAGs raises significant concerns and risks indicating that theoretical economic analysis will be elevated above an assessment of evidence in the form of internal documents and actual market behaviour. This would be inappropriate. For example, the example given in paragraph 5.12 is very vague and appears to give a significant amount of latitude to the CMA to base its conclusions on potential entry prospects on speculation rather than evidence that supports it. In line with the comments above in paragraph 3.9, paragraphs 5.11 and 5.12 of the Draft Revised MAGs should be amended to provide a more balanced approach.

6.3 Similarly, the guidance on the loss of dynamic competition is very broad and allows a significant level of speculation. For example, in paragraph 5.20 the Draft Revised MAGs provide that the CMA can find a loss of dynamic competition even where there is some uncertainty about whether hypothetical products or services (which would be the result of investments and innovation efforts) will ever ultimately be made available to customers. This could appear to indicate that an SLC finding could be based on speculation built on speculation, for example, by analysing the merger firms' theoretical incentives without any sufficient basis in documentary evidence or past behaviour or events in the sector.

6.4 Paragraph 5.23 provides that the elimination of an entrant as a potential competitor may lead to an SLC even where entry by that entrant is unlikely and may ultimately be unsuccessful, because of the threat they provided. As drafted, this again appears speculative and unbalanced. This paragraph should be amended to note that there will need to be evidence that the threat of entry is perceived to be credible, realistic and meaningful i.e. that there is clear evidence that such entry is perceived to be more likely than not to succeed and that purported innovation or efforts of other market participants are directly related to that perceived threat.

7. Coordinated effects

7.1 The guidance should state that all three of the conditions in paragraph 6.10 should be satisfied for coordination to be possible. Although paragraph 6.24 states that the merger does not need to strengthen all three conditions, it does not state that all three conditions must nevertheless be met post-merger. As currently drafted, this chapter of the Draft Revised MAGs appears to suggest that the significant strengthening of one condition as a result of the merger may lead to a finding of coordinated effects, without specifying that all three conditions should be satisfied (as is currently noted in paragraph 5.5.9 of the 2010 MAGs).

7.2 Factors such as buyer power and barriers to entry should also be taken into account when considering external sustainability in paragraph 6.21, as these are important features of the market in which the CMA would allege that coordination can occur.

7.3 In paragraph 6.21(a) the guidance states that coordination will be less sustainable where the competitive 'fringe' makes up a significant proportion of the market. This is too narrow as it relies solely on the proportion of the market and ignores the ability of competitors to impose a strong competitive constraint despite their size. We suggest that this be amended to include '*or are able to impose a strong competitive constraint*'.

8. Vertical and conglomerate effects

8.1 In relation to assessing competitor foreclosure, there is reference to considering factors in aggregate or combined when assessing ability (e.g. in paragraphs 7.12-7.13 of the Draft Revised MAGs) and the assessment of incentives as either a common assessment or part of several related assessments. As set out in paragraph 3.4 above in relation to aggregating improbable theories of harm, this section of the guidance should make clear that individually improbable factors that support ability or incentive cannot be aggregated to support a finding of a likely SLC.

8.2 The CMA states that, when considering the effect on competition, it will consider the impact of foreclosure on potential competitors through raising barriers to entry in paragraphs 7.19, 7.28 and 7.35. The CMA should specify whether the time horizon for considering these effects will differ in any way from the time horizon used in other parts of the competitive assessment and what evidence it will take into account in this context.

8.3 In relation to conglomerate effects, paragraph 7.32(b) of the Draft Revised MAGs provides that when considering the feasibility of a combined offering, the CMA may have regard to how the market, products and business models may evolve in future. Once again, this should not allow broad speculation and the consideration of future developments must be limited to what is reasonably likely based on the available evidence.

8.4 Paragraph 7.36 of the Draft Revised MAGs repeats that a degree of uncertainty will not itself preclude the CMA from concluding that the SLC test is met in relation to conglomerate effects concerns in nascent and digital markets, where the anti-competitive effects may not emerge in full until after the market has reached maturity. We reiterate our comments set out above in paragraph 3.3. It is important that the UK merger regime retains its reputation as an evidence-based system which takes

decisions on the basis of robust evidence rather than speculation. Taken as a whole, the changes to this section of the revised guidance risk giving an impression that decision-making in future will be based more heavily on speculative analysis of economic incentives rather than evidence.

8.5 The CMA has removed guidance from the 2010 MAGs about diagonal mergers. It would be useful if the CMA could indicate which guidance would now apply to the scenario contemplated by paragraph 5.6.13 in the 2010 MAGs.

9. Countervailing factors

Removal of buyer power as a separate countervailing factor

9.1 Buyer power has been removed as a separate countervailing factor, with paragraphs 4.18-4.19 focusing only on buyer power which results in new entry. The Draft Revised MAGs provide that other forms of buyer power are unlikely to prevent an SLC that would otherwise arise from the elimination of competition between the merger firms, because a customer's buyer power depends on the availability of good alternatives they can switch to, which will have been reduced. The ability of a customer to switch to an alternative existing supplier to constrain the merged entity should carry as much weight as their ability to sponsor new entry or to self-supply. Paragraph 4.19 ignores the possibility that remaining competitors can provide sufficient alternatives and constraint to the merged firm where there are sufficiently large customers in the market who can exercise buyer power.

Efficiencies

9.2 Given the apparently greater scope for intervention, and the lower evidential standards that are being suggested for finding an SLC in the revised draft, more balance would be provided to the revised guidelines if further consideration could be given to an approach which results in efficiencies being taken into account in decision-making more often than is the case to date. Furthermore, some of the detailed guidance about demand-side and supply-side efficiencies in section 5.7 of the 2010 MAGs has been removed e.g. regarding Cournot effects, network effects, and product repositioning. It would be useful if the CMA could clarify whether these examples were removed because they are no longer seen as potential efficiencies, or because they are less common and the guidance is not intended to be an exhaustive list of the types of efficiencies that might be considered.

9.3 We welcome the inclusion of environmental sustainability-related factors as examples of relevant customer benefits. The Draft Revised MAGs include reduced carbon emissions (to the extent firms do not normally compete on sustainability) as an example of a relevant customer benefit. Benefits in the form of environmental sustainability, supporting moves towards a low carbon economy or a lower carbon footprint can be taken into account since these efficiencies can bring benefits to consumers and society more generally. We have the following comments, which are aimed at making the most of the existing statutory framework:

(a) Climate change and supporting the transition to a low carbon economy were listed in the CMA's strategic objectives for 2020/21. Given this priority, we consider that the provisions relating to sustainability should be given more prominence and a greater level of detail should be provided in relation to

sustainability. Clear guidance on how sustainability benefits can be assessed as part of the CMA's merger regime is necessary to encourage businesses to explore transactions that promote these outcomes.

(b) Greater guidance on how environmental benefits will be assessed would be useful e.g. guidance on the types of evidence the CMA would require, the extent to which sustainability efficiencies will need to be substantiated, and the likelihood and timeframe over which the efficiencies might be realised (acknowledging that environmental efficiencies may be more likely to be realised in the medium to long term).

(c) We question whether the relevant customer benefits must benefit customers in the UK as the Draft Revised MAGs state, or whether benefits to customers located outside the UK may be considered as well. We appreciate that the CMA may be constrained to some extent by the Enterprise Act 2002 (the ***Act***) but section 30(4), which defines 'relevant customers', does not have a geographical limitation. Section 30(1) of the Act requires that the benefit must be in the form of '*lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom*' but it does not require that the customer be located in the UK. The CMA should take as expansive a view as possible so that benefits for society more broadly can be considered, beyond immediate customers.

(d) The guidance should clarify whether other sustainable outcomes outside of environmental outcomes will be taken into account. For example, whether the CMA would accept that a merger which resulted in the promotion of human rights meant that products would be considered as 'higher quality' and capable of being considered as relevant customer benefits.

Entry or expansion

9.4 The approach to assessing entry or expansion as a countervailing factor is unbalanced when considering the approach to potential entry as a theory of harm (for example in Chapter 3 of the Draft Revised MAGs). The standard being applied to assessing essentially the same question of fact should not be different.

9.5 The CMA states at paragraph 8.26 that it considers that entry/expansion preventing an SLC from arising would be rare, citing a 2017 study by KPMG which showed that in some instances entry or expansion did not in fact materialise. We consider that the experience in those prior cases, which were examined retrospectively, should not be used to cast doubt on entry or expansion in future mergers.

9.6 The amendments to the guidance on entry and expansion raise the bar too high, including as follows:

(a) Paragraph 8.30 provides that it is not only the entry or expansion that must occur in a timely manner, but that the effectiveness of that entry/expansion on market outcomes must also be timely. Paragraph 8.31 goes on to say that the further out in time the entry or expansion is expected to occur, the less certainty can be attached to it. This is potentially a very high bar as new entrants may take some time to establish themselves and have an effect on market outcomes because of the lengthy steps that may be required in certain

markets. Therefore, the remainder of the guidance in paragraph 8.31 which provides this caveat in markets with lengthy prescribed steps should also apply to the effectiveness of the entry/expansion and not only the entry/expansion itself.

(b) In paragraph 8.34, the entry/expansion is required to be of sufficient scope and effectiveness to defeat 'any adverse effect' arising as a result of the merger. 'Any adverse effect' is too broad and should be amended to refer to sufficient scope and effectiveness to constrain the exploitation of any SLC.

(c) Small-scale entry not comparable to the constraint eliminated by the merger is now considered unlikely to prevent an SLC in paragraph 8.36. This ignores the effect that smaller competitors can have.

9.7 Detailed guidance on the types of information the CMA will examine when assessing entry/expansion, similar to that in paragraph 5.8.12 of the 2010 MAGs would be useful.

9.8 The Draft Revised MAGs do not include guidance on the constraints posed by the threat of potential entry (in paragraph 5.8.14-5.8.15 of the 2010 MAGs). It would be helpful to have guidance on this or to understand if the CMA has excluded it because it views such a threat as unlikely to act as a sufficient competitive constraint.

10. Market definition

10.1 The chapter on market definition has been significantly shortened compared with the 2010 MAGs. Most notably, the hypothetical monopolist test and the SSNIP test have been excluded. Further, detailed guidance on the following aspects has been removed or reduced: relevant customer markets, geographic markets, two-sided products, secondary products, indirect competition, self-supply, and asymmetric constraints.

10.2 As a result, the chapter on market definition is vague, and seeks to shift the focus onto the competitive assessment. Although we agree that the boundaries of a market may be difficult to draw, the CMA must still identify a market within which to find an SLC, as is acknowledged in paragraph 9.1. We are concerned that the removal of well-known tools or techniques and detailed guidance may result in increasingly vague market definitions. This will make it more difficult for merging parties and their advisors to determine what may or may not be inside the market, which will in turn affect the competition assessment.

10.3 In relation to the types of evidence that the CMA might consider when assessing closeness of substitution, paragraph 9.7 refers to guidance in paragraph 4.12 on closeness of competition in horizontal unilateral effects. However, there is a difference between these two steps and referring to paragraph 4.12 in the context of market definition risks conflating the two. The guidance in paragraph 4.12 does not include some of the types of evidence included in paragraph 5.2.15(a) of the 2010 MAGs, which would be useful for determining the relevant market including price levels, price correlations, price and sales volumes over time.

10.4 The test for aggregating markets on the basis of supply-side factors has been made more onerous in paragraph 9.8. The ability and incentive to shift capacity is no longer sufficient, with the test now requiring firms to 'routinely use' existing production

assets to supply a range of different products that are not demand-side substitutes. The test now also requires evidence that firms in practice shift their existing capacity between different products depending on demand. This approach assumes that a firm's current practice of not switching between products is indicative of its response to a hypothetical price increase. This approach may exclude competitors who should be considered part of the market, with the CMA providing no guidance on the timeframe across which the evidence of routine use should be shown. We suggest returning to the previous test where ability and incentive can be taken into account, although we accept that the evidence under the existing test in the 2010 MAGs would need to be strong. The list of evidence that may be considered when deciding whether to aggregate markets on the basis of supply-side substitution (at paragraph 5.2.19 in the 2010 MAGs) was also useful and should be included.

10.5 Although the CMA has included detailed guidance on digital markets in other sections of the Draft Revised MAGs, there is little additional detail in the chapter on market definition. It would be useful to have specific guidance on the CMA's approach to digital platform multi-sided markets.

11. Concluding remarks

11.1 We appreciate the opportunity to respond to this consultation. We would be happy to discuss with the CMA any of the issues raised in this response if that would assist.

Freshfields Bruckhaus Deringer

8 January 2021