Response to the CMA's consultation on updates to the MAGs

This note provides a response to the CMA's consultation on updates to the Merger Assessment Guidelines (MAGs).[1] In the main body of the paper I consider non-horizontal mergers and countervailing factors. In the annex I provide views on Potential Competition and The Counterfactual, which I have submitted to a previous CMA consultation.[2] The views in this paper are my own.[3]

Non-horizontal mergers

The 2010 MAGs stated that "Non-horizontal mergers do not involve a direct loss of competition between firms in the same market, and it is a well-established principle that most are benign and do not raise competition concerns. Nevertheless, some can weaken competition and may result in an SLC."

The revised draft guidelines take a much harder line. There is no recognition that most non-horizontal mergers are benign. Although the CMA has taken a number of non-horizontal (mainly vertical) merger cases to phase II and ultimately found SLCs in a few, it remains the case that potential competition concerns will arise in a very small minority of non-horizontal mergers.

It is also the case that it is common for competitors to raise concerns that a non-horizontal merger in their sector will harm them. It is important for the CMA to be able to identify quickly whether genuine harm to competition, and ultimately to consumers, will arise.

In addition, the CMA should be able to dismiss foreclosure concerns without needing to provide a lot of detailed evidence and analysis. Gathering evidence on foreclosure concerns is often burdensome on the CMA and market participants (customers, competitors, and merging parties). The CMA has a duty to refer mergers which satisfy the SLC test and this test has been set as a low bar. The CMA may also find its decisions not to refer appealed and successfully challenged.[4] There is, then, a risk that a far less permissive approach to non-horizontal mergers leads to an unsustainable level of merger assessments (due to increased notifications, or mergers being called in), including the intensity of analysis in assessing these mergers.

Put simply, the CMA still needs to be able to put together a coherent and robust clearance story together for most non-horizontal mergers and the updated MAGs may make it harder to do this.

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[1] https://www.gov.uk/government/consultations/updates-to-the-cmas-merger-assessment-guidelines-cma129

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920178/Hugh_Mallan_-_response_to_CMA_call_for_informaiton_on_digital_mergers.pdf

[3] Contact: Hugh Mullan at [✂]

[4] For example, AC Nielsen v CMA https://www.catribunal.org.uk/cases/122741214-ac-nielsen-company-limited

There is also the risk of discouraging procompetitive mergers due to the increased regulatory burden.

When non-horizontal mergers do not give rise to an SLC

It is appropriate that the CMA should give appropriate scrutiny to those non-horizontal mergers which may give rise to anticompetitive harm. For this, a less permissive approach to such mergers, particularly in certain sectors is appropriate (principally those featuring digital platforms).[5]

However, the CMA should also do more to indicate when foreclosure concerns are more likely to arise and, importantly, when they are less likely to arise. In particular, the CMA should note that foreclosure concerns are most likely to arise in certain market structures. The ability, incentive, effect framework can be more than an analytical framework which the CMA intends to follow to organise its analysis – it also identifies mergers which are more/less likely to be problematic. The CMA should state that a non-horizontal merger is unlikely to give rise to competition concerns where:

- there is no material market power upstream;[6]
- the input supplied to downstream competitors is not particularly important;
- the merging firms' downstream product would not attract much additional sales in the event of foreclosure; or
- even if one or more competitors were potentially disadvantaged due to the merger, there would continue to be effective competition in the downstream market such that consumer welfare was not harmed.

Harm to competition and consumers or harm to certain competitors

The CMA should provide more explanation of what is meant by an assessment of whether the identified harm to competitors will result in harm to overall competition in the downstream market (para 7.19). The final bullet in the paragraph above describes this. Along these lines, the CMA should consider identifying anticompetitive foreclosure (harm to end consumers) as a different concept to input foreclosure (raising rivals' costs), as the European Commission does in its non-horizontal merger guidelines.[7]

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[5] It may be that the CMA is particularly concerned about non-horizontal mergers in sectors characterised by network effects, innovation, high levels of concentration, and tipping. A heightened scrutiny of such markets is warranted. Nevertheless, the section of the updated MAGs considering non-horizontal mergers is far broader in its increased wariness of such mergers.

[6] I recognise that in some markets featuring digital platforms it may not be very clear which of the merging firms should be considered as upstream and which should be considered as downstream. Testing for market power for each of the merging firms, regardless of whether it could be characterised as upstream or downstream, is an appropriate response.

[7] See paragraph 18, 31 and 48.
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:en:PDF
This also recognises how the non-horizontal merger may increase the intensity of competition in the downstream market, which may benefit consumers even if there is upward pressure on input costs faced by competitors.

It is important that the CMA signals that it is not necessarily concerned with the potential impact of the merger on a subset of competitors if competition remains effective. The updated MAGs point in the opposite direction at times. For example, at paragraph 7.14, the CMA says that it is unlikely to place material weight on contractual protections to continue to supply an input because certain rivals may not be covered by these contracts.[8] The focus on certain rivals is only appropriate if these rivals are likely to play an important role in ensuring effective competition in the downstream market. If there are other downstream competitors that will continue to compete effectively despite the non-horizontal merger, then a lack of strong contractual protections to certain rivals should not raise concerns.[9]

On a related point, the CMA should be explicit that, in the assessment of non-horizontal mergers, it is concerned about the impact on end consumers. This may be approximated by the impact of the merger on downstream markets but they are not synonymous.

The CMA has felt constrained previously to consider the effect of a merger on 'customers'. This is unproblematic when looking at horizontal mergers. However, customers will also be competitors in vertical mergers. The merger may lead to a worsening of terms for some of these customers (particularly relative to the terms of the downstream firm in the merger). However, harm to these customers does not necessarily imply harm to consumers. The CMA's focus on consumer welfare, as stated at paragraph 1.3 of the updated MAGs, should also be reflected in the discussion of non-horizontal mergers – stating that the CMA will look at the impact of the merger on the downstream market, but its competition concerns will be rooted in the expected impact of the merger on consumers.

Quantitative foreclosure analysis

The revised MAGs indicate that the CMA will use a mix of qualitative and quantitative evidence, undertaking more quantitative analysis in simpler markets and more qualitative analysis in more complex and dynamic markets. It is appropriate for the CMA to flex its approach depending on the evidence available and not to take a static approach in highly dynamic markets. Qualitative evidence has always been important in merger analysis, including the views of customers and competitors, particularly in Phase I.

Nevertheless, qualitative evidence, such as internal documents can be more open to interpretation than some quantitative analysis. Further, competitors of the merging firms (who are also customers of the upstream firm) are often not

[8] The CMA should be wary of precluding certain types of evidence, including the constraints that long term contracts can apply. It is reasonable for the CMA to indicate that it may place little weight on these constraints when, for example, contracts can be amended unilaterally. However, there may be mergers in which the CMA relies on contracts as being an important source of constraints. The CMA should not fetter its discretion on the weight it will apply to evidence in the circumstances of a particular case; and may want to place weight on long-term contracts when deciding to clear a merger.

[9] Similarly, paragraph 7.18 (c) makes reference to specific rivals being hindered when competing for customers with the downstream division of the merging firm.

keen on non-horizontal mergers and frequently complain of anticompetitive effects even when such effects are unlikely to arise.[10]

In such situations, a more quantitative approach may be appropriate, particularly where reasonable (always imperfect) data is available. In particular, the CMA should seek to undertake a full 'vertical arithmetic' incentives analysis where data is available and there is a degree of predictability about the development of the market (ie perhaps excluding certain tech markets).

This approach has been adopted by the European Commission. There may also be an expectation that the CMA applies this analysis when considering larger mergers which previously would have been considered by the Commission. Nevertheless, it is notable that the CMA has very rarely undertaken a full analysis of the incentives to foreclose (the trade-off of the upstream revenues foregone against the gain in downstream revenues).[11] The absence of examples of such foreclosure analysis makes it harder for merging businesses to know if the CMA would adopt this approach and how it would apply the analysis. This, in turn, means that prospective merging firms may be less likely to undertake this analysis themselves as part of their self-assessment and/or merger notification.

The updated MAGs provide an opportunity for the CMA to identify when it would apply this analysis and how; and when it would not and why not.

The commitment problem

It is also notable that the draft revised guidelines make no mention of commitment problems which may arise in the upstream merging firm's ability to engage in effective foreclosure of downstream rivals. This is despite this issue being recognised in the economics literature; in the European Commission's Guidance (paragraph 44); and in the European Commission's decisional practice.[12] The CMA should consider addressing this issue.

Countervailing factors

The revised MAGs state that "The CMA's experience is that it is rare for a merger to be cleared on the basis of countervailing factors" (para 8.1). While this is the case, it does not provide the full picture.

The structure of clearance decisions mean that an SLC must be found on the basis of the competitive assessment, before countervailing factors may then provide a sufficient counter-weight, such that the merger is ultimately not found to lead to a loss of competition. This places a burden on the CMA to set out the evidence and arguments for an SLC and then being able to show that the countervailing factors are equal or greater than this SLC, with the burden of

[10] Indeed, if the merger leads to the vertically integrated firm competing more intensely, this would be against the interests of its competitors. Therefore, there will often be reason for competitors to complain, even if the merger would not lead to any foreclosure.

[11] The CMA undertook a simple vertical arithmetic analysis in the BT/EE merger assessment in 2016.

[12] For example, in the TomTom/TeleAtlas and Nokia/Navteq decisions. For a theoretical treatment, see The impact of vertical and conglomerate mergers on competition, Jeffrey Church for DG Competition.

proof generally falling to the merging parties to show that the countervailing factors outweigh the SLC.[13]

It is highly unattractive to write-up any clearance decision in this way. It can make the decision incoherent, weak, and open to challenge.

For this reason, practice at the CMA has been largely to consider countervailing factors within the competitive assessment, particularly when clearing a merger. This explains why mergers are not cleared on the basis of countervailing factors, more than these factors not being relevant to merger assessments.

The revised MAGs reflect this by treating countervailing buyer power within the competitive assessment, allowing the constraints from buyer power to be considered alongside other constraints, and not requiring an SLC to be identified before assessing buyer power constraints.

However, it is not clear why the other countervailing factors (merger efficiencies and entry/expansion in response to the merger) should not be treated similarly. The CMA has previously considered these in merger assessments without needing first to identify an SLC in the competitive assessment.[14] The revision of the MAGs provides an opportunity to codify this approach. This would still allow for structured decision-making and written decisions. There is also no reason why this should alter the burdens of proof between the CMA and the merging parties. The difference is only in the need to identify an SLC first, before assessing countervailing factors, rather than considering all factors together in-the-round.

A merger will often lead to a competitive response from rivals and it is natural to think of such responses within the assessment of competitive effects. This is particularly important given that the revised MAGs emphasise the need for merger analysis to be forward looking and to take into account dynamic effects in the market, rather than only undertaking a static analysis of pre-merger competitive constraints.

There are also good reasons to consider efficiencies within the competitive assessment and before identifying an SLC. This is particularly the case in relation to pricing efficiencies and merger-related benefits arising for the same group of customers for whom the SLC is identified.[15]

The revised MAGs discuss how higher profit margins may be make unilateral effects in differentiated product markets more likely because the value of the sales recaptured due to the merger will be greater, making it less costly to raise prices.[16] Similar logic applies to the potential efficiencies arising in relation to the

[13] As the revised MAGs note, the CMA will not normally quantify the expected loss of competition or detriment to customers (paragraph 2.21). Therefore, it is bound to be challenging to identify the extent to which entry or expansion must take place, or the required level of efficiencies, to overcome the SLC.

[14] https://assets.publishing.service.gov.uk/media/57ab357940f0b608ab000074/aah-sangers-full-text-decision.pdf

[15] By the same token, this argument may not be quite as strong for non-price efficiencies or for benefits which arise for a customer group which is different to the customers for whom the SLC is identified.

[16] Paragraph 4.11(b).

elimination of double marginalisation in vertical mergers and the Cournot effect in mergers with complementary products. All these effects are about how a merger may internalise pricing externalities. While there may be differences in the burden of proof arising between the CMA and the merging parties, this does not imply that they should not similarly be considered within the competitive effects, and before the identification of an SLC.

Annex

I have previously submitted views in relation to potential competition and the counterfactual in response to the CMA's Call for Information on digital mergers.[17] The updates to the MAGs appear largely to have dealt with the issues and recommendations I made, particularly in relation to potential competition. However, I have submitted these views again here to indicate support and additional reasoning for the changes proposed by the CMA. These views may also build upon the proposed revisions to the MAGs.

Potential competition

The 2010 MAGs describe two ways in which mergers may lead to an important loss of potential competition – "There are two ways in which the removal of a potential entrant could lessen competition by weakening the competitive constraint on an incumbent supplier".[18]

The first is called 'actual potential' competition and arises "where the merger involves a potential entrant that could have increased competition. Such 'actual potential competition' is a constraint only if and when entry occurs".[19]

The second is called 'perceived potential competition'. It arises when a firm is not in the market but the threat of entry, as perceived by the incumbents, prevents the incumbents from increasing their prices. The CMA notes that this form of competitive constraint may arise even though the CMA does not believe that entry would actually occur.

'Actual potential competition' seems to indicate a scenario in which entry is currently contemplated, by one of the merging firms, into a market where the other merging firm is currently operating. Therefore, it is expected that these two firms will compete in future in a market where one of them is currently competing.

As drafted in the 2010 MAGs, 'actual potential competition', may not reflect another potential way in which harm to potential future competition may arise. This additional scenario is not one in which the incumbents (including one of the merging firms) are currently constrained by the threat of entry of the other merging firm, whether the threat of entry is actual or perceived. Rather, this is a scenario in which entry may take place by both firms into markets where neither firm is currently operating. Although this may be captured currently in the MAGs,

[17] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920178/Hugh_Mallan_-_response_to_CMA_call_for_informaiton_on_digital_mergers.pdf

[18] See paragraph 5.4.14 and following of MAGs. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf

[19] The CMA says that questions it would consider include: (a) Would the potential entrant be likely to enter in the absence of the merger? (b) Would such entry lead to greater competition? The Authorities will also consider whether there are other potential entrants before reaching a conclusion on the SLC test.

they could clarify this further and point to cases in which such concerns have been explored.

Recommendation:

- The CMA should update the MAGs to reflect more clearly that they capture scenarios where overlaps may arise in markets in which neither of the merging parties currently operates.
- More generally, the CMA should ensure consistency throughout the MAGs by indicating that concerns about potential competition are a standard part of merger assessment and that this includes assessing the likelihood of overlaps in products, services or markets where there are not currently overlaps.[20]

This appears to be a theory of harm which the CMA has considered on a number of occasions in previous mergers.[21] This indicates that the potential concern may arise in a variety of sectors, not just technology. Nevertheless, it may be in technology sectors where this concern is most likely to be pertinent. This may be because technology markets are particularly prone to changes in offerings over a relatively short period. Therefore, even if two firms are not currently competing, they may (absent a merger) become important competitors to each other within a number of years as technology and customer preferences evolve.

One particular challenge that may arise is the ability of the CMA to identify where exactly the overlap may arise in future. For example, in *The Gym/Pure Gym*, the Phase I decision considered that the merging parties may overlap in geographical areas in future, but that it may not be possible to identify all of those areas. Similarly, in *VTech/Leapfrog*, there was a potential concern that the merging parties may overlap with certain toys in future, but it may not be possible to identify on which toys exactly they may overlap. One may expect these types of challenges to be exacerbated in digital technology sectors.

In assessing theories of harm related to potential competition, the CMA relies heavily on internal documents of the merging parties. It is likely that key evidence in assessing 'actual potential competition' will be found in the internal documents of the merging parties. These documents may be expected to be probative of future entry and expansion plans and the competitive threats faced following such entry and expansion.

Similarly, when assessing the likelihood and impact of entry and expansion from competitors to the merging parties, the CMA is likely to rely on the views and internal documents of competitors. The MAGs could provide more clarity on the evidence that is likely to be useful in assessing concerns about 'actual potential competition'. This may be important for the CMA to indicate to the courts the special reliance that is likely to be placed on internal documents in such merger assessments.

[20] For example, this might be reflected at paragraph 4.1.15.

[21] For example, the CMA has considered this type of theory of harm, whether in relation to entry into product/service markets or new geographic markets, in *The Gym/Pure Gym, VTech/Leapfrog* (at Phase I), *Menzies/Airline Services*, *Paypal/iZettle*, and currently in *Illumina/PacBio*.

Moreover, it may also be important to signal to competitors of the merging parties that the CMA is likely to seek their views, and perhaps also internal documents, on their own entry and expansion plans. Competitors are likely to see these views and documents as highly confidential and may not wish to share these with the CMA.[22] Highlighting the importance of these in the MAGs may strengthen the CMA's position in demanding internal documents from competitors and explaining why these are necessary.

There are also a number of practical difficulties that the CMA faces in operationalising a more intensive assessment of 'actual potential competition' in a greater number of mergers. There will also be challenges in reviewing a large volume of documents from the merging parties and from potential competitors. There are significant challenges in the CMA's 'put back' process in Phase II mergers, which deals with accuracy, confidentiality and redactions. It is not clear that this burdensome process is fit for purpose if the CMA is to explore concerns about potential competition in more depth and more frequently. At the same time, the CMA is likely to face greater legal and procedural challenges from the merging parties about their ability to defend the merger if they are unable to see all the available evidence, including the future plans of competitors.

Moreover, the evidence that may be gleaned from internal documents may be of a somewhat different nature to the type of evidence which may arise when assessing existing overlaps. When assessing potential competition, there may be no mention, in the internal documents of one firm, of the other firm; or if there is, it is not identified as a competitive threat. Rather, the competition authority may need to look at additional sources of evidence, such as:

- the similarity of the business models of the two firms, relative to other providers;
- the future strategies, product developments, and geographical target areas of the firms to consider whether they are likely to overlap in future;
- what the acquirer has done previously with assets its has previously acquired in similar industries;
- a history of copy-cat behaviour on product innovations, or cross-licensing of technologies, in the sector;
- the price being paid by the acquirer and what justifies this price.

It may be that the development of artificial intelligence, or decentralised ledger technology, or other technological developments, provide a threat to incumbent technology companies in the many activities in which they are engaged and in how they monetise them. The likelihood of an overlap will necessarily be uncertain, perhaps highly uncertain. Nevertheless, it may be from unexpected sources where the greatest challenge to incumbents is likely to come. Concerns about potential competition are necessarily going to be more speculative than those based on current overlaps, and will need to be weighed against the

[22] The CMA already requests views and internal documents from alternative purchasers of the target, particularly when considering the counterfactual. However, detailed requests for internal documents may go well beyond alternative purchasers of the target, to competitors and potential competitors of the merging parties, when assessing 'actual potential competition'.

potential of the merger to lead to complementarities and innovations which would not otherwise take place.

Given the recent experience of the CMA in exploring potential competition, and the recent focus on how this may be assessed, the CMA could provide greater guidance on when such concerns are more likely to arise and what types of evidence are likely to be probative.

Recommendation:

- The CMA should highlight the key sources of evidence in assessing potential competition, particularly the role of internal documents of the merging parties and potential competitors;
- The CMA should consider how to tackle the practical challenges it faces in operationalising more in-depth and/or more frequent analyses of potential competition.
- The CMA should develop further the guidance provided currently at paragraph 5.4.15 in the light of the CMA's recent experience and thinking. The guidance should seek to identify evidence that is consistent with concerns about potential competition and how the CMA would consider alternative inferences from this evidence.
- Concerns about potential competition might arise in any industry. However, the MAGs might also explain that certain types of industries – particularly those where product/service innovation is a strong trait and which are prone to having small numbers of players and high levels of concentration – have characteristics which are consistent with concerns about potential competition.

The 2010 MAGs note (at paragraph 5.4.15) that, in assessing whether a merger leads to unilateral effects from a loss of 'actual potential competition', the CMA will consider (i) the likelihood of entry in the absence of the merger; (ii) would such entry lead to greater competition; and (iii) potential entry by competitors.

The 2010 MAGs may benefit from some small amendments in their explanation of the analytical framework. First, it could indicate that he CMA will consider both entry and expansion of the merging parties in the absence of the merger.

Second, the CMA could explain more about how the framework applies to potential entry by competitors to the merging parties, and how this would apply in practice. The 2010 MAGs refer the reader to Section 5.8 of the guidelines, where barriers to entry and expansion are discussed. There is merit in including some of the concepts explained in the barriers to entry and expansion section in the discussion of the framework for 'actual potential competition'. While this risks repetition, it should also provide greater clarity in an area of merger assessment which is particularly complex and has seen evolving practice.

In particular, the CMA should highlight that it will consider whether entry and expansion by other potential competitors would be timely, likely and sufficient, taking into account the capabilities and incentives of these players, to prevent any realistic prospect of an SLC that would otherwise arise due to the merger.

The CMA might also provide greater clarity on whether the 'timely, likely and sufficient' standard effectively applies also to the assessment of the likelihood and closeness of competition between the merging parties. One might expect the CMA to take a symmetric approach for both the merging parties and competitors in assessing the likelihood and closeness of competition. On the other hand, concerns have been raised about underenforcement of merger control in the area of digital technologies and it may be easier to build up an understanding of the internal documents and strategies of the merging parties rather than their competitors. This may justify weighing more heavily evidence of the likelihood of future overlaps between the merging parties than evidence of the likelihood of entry by rivals, at least at Phase I. Either way, more clarity could be provided on whether the assessment of the merging parties and competitors is the same or somehow different.

Recommendation:

- The CMA should amend the MAGs to indicate the role of 'expansion' in assessing 'actual potential competition';
- The CMA should explain in the 'Potential Competition' section of the MAGs, how it applies the 'timely, likely and sufficient' framework for potential entry and expansion from competitors, and clarify how its approach differs, if at all, in the assessment of the merging parties;

Counterfactual

The application of the SLC test involves a comparison of the prospects for competition following the merger against the competitive situation without the merger. The latter is called the 'counterfactual'.[23]

The 2010 MAGs explain that, in the Phase I assessment, the effect of the merger is compared with the most competitive counterfactual providing always that it considers that situation to be a realistic prospect. Therefore, the Phase I counterfactual is not required to be the most likely counterfactual, but is required to be realistic. While the Phase I counterfactual is usually the prevailing conditions of competition, it may alternatively be a more competitive counterfactual than prevailing conditions.[24] This alternative counterfactual does not need to be the most likely counterfactual to arise in the absence of the merger. This appears to accord with the requirement at Phase I to assess whether there is a 'realistic prospect' of an SLC.[25]

In the Phase II assessment, the counterfactual may also be more competitive than the prevailing conditions of competition. However, the Phase II counterfactual is not necessarily the most competitive counterfactual. Although several possible future scenarios may be considered at Phase II, ultimately only the most likely scenario will be selected as the counterfactual.[26] This appears to accord with the requirement on the Phase II assessment to apply a 'balance of

[23] 2010 MAGs, paragraph 4.3.1.
[24] 2010 MAGs, paragraph 4.3.5.
[25] 2010 MAGs, paragraph 4.3.5.
[26] 2010 MAGs, paragraph 4.3.6.

probabilities' threshold to its analysis. At Phase II, the CMA must answer whether it is more likely than not (ie with an expectation of there being more than a 50 per cent chance) that an SLC will result from the merger. This is a higher level of probability than that required to make an SLC finding at Phase I.[27]

The CMA will generally seek to do most of the analytical 'heavy lifting' in its assessment of the likely effects of the merger, while seeking to keep the counterfactual simple. This is a sensible and effective approach. Nevertheless, the CMA may find itself considering mergers where, in a given market, (i) there is a current overlap and the merger is assessed against prevailing conditions of competition; and (ii) there is a potential stronger overlap in future, due to one or both merging parties investing heavily in expansion, and the merger needs also to be assessed against this alternative counterfactual. This appears to necessitate considering multiple counterfactuals. Moreover, as explained further below, in assessing future overlaps, there may be more than one reasonable alternative counterfactual against which the merger could be assessed.

The Furman review has called for the "a more economic approach to assessing mergers [which] would be to weigh up both the likelihood and the magnitude of the impact of the merger. This would mean mergers being blocked when they are expected to do more harm than good. The Panel calls this a 'balance of harms' approach".[28] "The balance of harms test would have similarities with the government's recognised approach for making regulatory decisions, which draws on the principles of cost-benefit analysis. This can combine qualitative and quantitative analysis and judgements, with various techniques for addressing the challenges of uncertainty. This approach is frequently used for significant and complex government decisions, for example for public health proposals, environmental protection, or major infrastructure investment.[29]

The Furman review also notes that a range of sources have supported an approach along these lines, including The Centre for Competition Policy, which proposed in response to the panel's call for evidence that: "it would be wise to amend the standard 'more likely than not' merger test to allow greater harms, which are at least "realistic prospects", to weigh more heavily in the merger decision".[30]

The CMA will need to give careful thought to how the recommendation of the Furman review could be operationalised and whether this can be achieved while maintaining a single counterfactual in the Phase II assessment. It is hard to understand how the Phase II process can effectively consider different realistic prospects and assign likely levels of competitive harm to these different prospects without simultaneously entertaining a number of counterfactuals.

For example, in the context of 'actual potential competition', these counterfactuals might include the following, with different likelihoods attached to

[27] 2010 MAGs, paragraph 2.12.

[28] 'Unlocking Digital Competition', Report of the Digital Competition Expert Panel, March 2019, (Furman review), paragraph 3.88

[29] Furman review, footnote 18.

[30] Furman review, paragraph 3.90.

each: (i) the acquirer entering into a new market and the target also entering into a new market through its own investments; (ii) the acquirer entering into a new market and the target entering with a strong likelihood if it was instead purchased by alternative purchaser X; (iii) the acquirer entering into a new market and the target entering with a weaker likelihood if it was instead purchased by alternative purchaser Y; (iv) one or both of the acquirer and target not entering the same new market.

If we presume here that the CMA will keep a number of counterfactuals under consideration and not necessarily conclude which is the most likely, then it can apply weight to each indicating the level of competitive harm. For example, the most likely counterfactual may lead to a merger for which there is no SLC (say, the target was unlikely to enter a new market independently in the absence of the merger), but a slightly less likely counterfactual may lead to an SLC with a high level of consumer detriment (say, the target was likely to enter a new market if purchased by the most likely alternative purchaser). The Furman review suggests that a cost-benefit type of analysis is used to evaluate in aggregate the likely outcome of the merger across these different possibilities. It is not clear how the Furman recommendation would work while maintaining a single counterfactual at Phase II.

Recommendation:

- The CMA should clarify whether it is necessary to choose a single counterfactual in the Phase II process and, if not, clarify how it would consider multiple counterfactuals.
- The CMA should explain whether, and how, the implementation of 'recommended action 10' of the Furman review can be implemented without maintaining multiple counterfactuals.

Submitted by Hugh Mullan