# Draft revised Merger Assessment Guidelines

## Response to CMA's consultation


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## 1. Introduction and summary

We welcome the CMA's wide review of the Merger Assessment Guidelines (MAGs). For firms to make informed decisions, the merger regime must be transparent, consistent and ultimately predictable. The MAGs are an important tool in this respect. By outlining its approach to merger assessment, the MAGs help provide certainty to businesses and external advisers, as well as a guide to CMA staff on appropriate analytical frameworks, thus minimising the risk of inconsistent approaches between cases. This is particularly important in the UK framework given merging parties in UK merger control have limited rights of appeal on substantive grounds, which gives the CMA a significant degree of discretion in its assessment, the evidence it relies on and its decision-making. The more guidance that the CMA can provide on the use of its discretion, the greater the consistency between the review process and business risk assessment, which in turn helps create certainty for business investment. Any revisions should have as universal application as possible and not be dependent on the particular focus of competition policy at any given time. Guidance should aim to be durable and not driven by specific technology, firms or individual cases.

The draft MAGs are particularly timely given the shift in the CMA's approach to merger assessment over the last two to three years, with significantly greater number of Phase I referrals and Phase II cases being blocked. This shift is clear from recent statistics on the proportion of Phase I mergers being referred to Phase II and the number of mergers being prohibited compared to previous years. From January 2019 to late 2020, 25% of all Phase I mergers were referred to Phase II, compared to an average of around 15% of mergers over the previous 10 years. Similarly, over the same period, 72% of all mergers referred to Phase II were either blocked, unwound or abandoned. This compares to an average of 30% between the CMA formation and the end of 2017. The review of the MAGs therefore represents an opportunity for the CMA to reduce the uncertainty around this policy shift and outline how it now intends to assess mergers and the intervention thresholds it seeks to apply.

This response does not debate whether the policy shift is justified. Nonetheless we believe the evidence supporting any merger policy shift must be compelling as the risks and costs associated with both over- and under-intervention are high. Substantive assessment should reflect well-established economic principles and consensus based on economic theory, empirical studies, and merger retrospectives. In this respect, we consider that the evidence of under- or over-enforcement specifically in the UK is still

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limited. Much of evidence cited by the CMA in the draft MAGs is in fact mixed, pointing both to possible under-enforcement while also pointing to merger specific efficiencies arising, and acknowledging most mergers as competitively benign.[2] Extrapolating findings from the US (findings which themselves are mixed) to the UK is not appropriate.

Without entering this debate, the primary aim of this response is to assess, given the CMA's policy shift, whether the MAGs provide a clear and coherent description of how the CMA intends to review substantive areas of merger assessment. In this context, there are a significant number of positive steps forward that the draft MAGs propose, including greater elucidation of the CMA's approach to non-price competition, a focus on the CMA developing an understanding of the competitive parameters that are most important to the competitive process, details on the approach to the increasingly complex counterfactuals that characterise UK merger assessment, including a proposal to assess dynamic competition, and clarification of the CMA's views on exiting firm and relevant customer benefits.

However, we also have a number of concerns with the analytical frameworks being applied and the clarity of the draft MAGs. Therefore, in the spirit of constructive feedback this paper offers a number of areas where improvements could be made. The remainder of this section provides our high level comments before turning to more detailed comments on each of the Draft MAG sections.

### *MAGs should reflect that the vast majority of mergers have no impact on competition*

In our view the starting point for the MAGs should be to recognise that mergers are an important part of how markets function, providing discipline to existing management, and allowing firms to reduce costs, transfer technology and bring together complementary products. In this context, it is important for the MAGs to recognise that the vast majority of mergers in the UK economy are benign. Indeed, most do not involve any horizonal overlap and are not reviewed by the CMA. As such we believe that the deletion of the statement in the existing MAGs that many mergers are either pro-competitive or benign in their effect on rivalry is unnecessary and potentially sends inaccurate signals to business.

### *Additional flexibility in draft MAGs increases uncertainty*

Many of the new sections in the draft MAGs emphasise and reaffirm the extent of the CMA's discretion rather than providing guidance for business as to how it will assess cases within that discretion. This creates a risk that the additional flexibility prescribed by the draft MAGs, rather than create greater certainty for business, makes decisions harder to predict, leading to increasingly inconsistent approaches and outcomes.

For example, the draft MAGs emphasise that the CMA is not tied in any way to the approach outlined either in the MAGs themselves ("*The CMA will apply the* [MAGs] *flexibly, departing from them where it considers it appropriate to do so"*) or previous cases ("*past case references are included in the Merger Assessment Guidelines for illustrative purposes, decisional practice naturally evolves over time and the cases referenced will not constrain the approach of the CMA*". Rather than encouraging use of the MAGs and past cases as a guide (and only a guide) to how the CMA will substantively assess a merger, the CMA emphasises its discretion and flexibility to depart from them.

Similarly, whilst the draft MAGs have expanded on situations which may give rise to an SLC, there has been very little development on situations which *will not give rise* to an SLC. Furthermore as set out below in the context of structural presumptions, much of the advice on when an SLC is more likely to arise is difficult to implement. This risks inconsistent approaches between cases and therefore increased uncertainty for business investment. In this respect we would welcome more statements on

2 *Unlocking digital competition: Report of the Digital Competition Expert Panel*, March 2019. Alongside this, the CMA published merger retrospectives of a limited number of cases involving digital markets. See *Ex-post Assessment of Merger Control Decisions in Digital Markets*, May 2019.

the instances when an SLC is likely to arise, or unlikely to rise, rather than broad statements on when an SLC could possibly arise.

***New structural presumptions in draft MAGs may not be effective***

We are concerned that the draft MAGs appear to propose the use of structural presumptions that are designed to reduce the evidentiary threshold and burden of proof that the CMA has to meet in order to demonstrate an SLC. For example, the draft MAGs state that "*the smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors, and therefore the less detailed analysis is necessary to further assess closeness between them*" and "*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*". Similarly, important text from the existing MAGs stating that "*A merger that gives rise to an SLC will be expected to lead to an adverse effect for customers. Evidence on likely adverse effects will therefore play a key role in assessing mergers"* has been dropped.

These suggest the CMA is stepping away from direct empirical assessments on the loss of competition and the effects of the merger in favour of applying structural presumptions to certain mergers. The difficulty is that many of the structural presumptions that appear in the draft MAGs rely implicitly or explicitly on there being a clearly defined market but, at the same time, the CMA is not proposing to rigorously define markets, maintaining the view that market definition is of limited importance. Analysis that directly assesses the loss of competition precludes the need for judgements or analysis of what the relevant market is. The draft MAGs therefore propose not only to reverse the significant positive developments that have taken place in the application of economics to merger assessment over the last 10-20 years but go further and avoid even defining the market.

Our concern here is therefore that the proposed use of structural presumptions that rely on market definition, combined with only a limited view of the relevant market, creates a huge risk that the CMA will form an initial belief about the competitive effects of a merger based on an overly simple structural assessment of who it believes the 'main players' are and be unwilling to undertake any detailed analysis to test that belief.

***Significant benefits to harmonising approaches with other agencies***

Finally, we note that the draft MAGs depart in a number of areas from the approach taken by other authorities and thus risks divergent outcomes. This creates significant risks for multi-jurisdictional filings, which will be especially important following Brexit. While authorities can reach different outcomes based on differing competitive positions of merging firms across countries and different legal tests, it creates significant further uncertainty for outcomes to diverge as a result of different approaches taken to substantive assessment.

We urge the CMA to work more closely with other authorities to ensure any changes to the MAGs are consistent with the approach taken elsewhere. When the existing MAGs were published in 2010 to replace the substantive assessment guidance, this was the result of considerable collaboration with the US authorities, which updated their own horizontal merger guidelines at the same time.

## 2. Interpreting an SLC

The CMA has taken an expansive approach to interpreting the SLC test in recent cases and so we welcome the attempts in the draft MAGs to provide greater clarity on how the CMA will interpret and define a substantial lessening of competition

At the outset, we should outline that our view is that competition is a process of rivalry. A lessening of competition is therefore a lessening of that process of rivalry, and an SLC a substantial lessening of that

process of rivalry. The interpretation of substantial is therefore, in our view, a question of *magnitude* or *degree.*

In light of this, statements in the draft MAGs that *"an element of judgement is necessary in deciding whether any loss of competition is substantial rather than any quantitative measurement*",(para. 2.7) only increase the level of uncertainty as to how the test will be applied. Whilst we understand the importance of taking account of non-quantitative evidence, the greater the judgement the more difficult it will be to provide certainty on how that judgement will be exercised. This is particularly difficult given the CMA's statement that there are no specific measurement thresholds that can be provided with respect to what constitutes an SLC (para. 2.8).

We recognise the CMA takes a broader view of an SLC, yet even accepting this, we have a concern regarding the level of guidance that the draft MAGs gives on when the CMA is likely to find an SLC given the large number of caveats and the draft MAGs wide definition and interpretation of an SLC. Our view is that the overall effect may be to significantly reduce the level of uncertainty in how the CMA will apply the Guidelines in practice relative to the existing MAGs.

### Additional circumstances for an SLC

The combination of providing limited concrete guidance on when the CMA is likely to intervene in terms of thresholds, whilst at the same time expanding the circumstances in which it could intervene is particularly marked in para 2.9 where the Draft MAGs provide examples of what an SLC means.

First, the draft MAGs states in para 2.9 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 is otherwise important to UK customers"*. We have concerns over the potential unintended consequences for consumer welfare of this interpretation.

If the CMA is concerned about the size of potential merger impact on consumers, as the draft MAGs guidelines state.(para. 1.3) then it is not the size of the market, but the size of the merging parties in terms of their sales that is most relevant to assess this impact. For example, suppose that there is a merger in a market of £10bn sales, and the expected price increase of a merger between two parties is 3%. The fact that the market is large is not the primary determinant of the size of consumer detriment, as the impact of the merger between two parties with a total of £5bn of sales would be very different than the impact on two parties with a total of only £1bn in sales. As such the size of the market in any given merger is only a poor proxy for the level of consumer detriment from that merger – which relates more directly to the size of the firm sales.

The fact that there may be different impacts in different mergers due to magnitude of the merging parties' sales, does not justify the use of different SLC thresholds contingent on these sales. This is because there are many more mergers between companies with smaller sales versus very large sales. Applying a different standard risks a signal that, even though the aggregate level of consumer welfare loss may be the same, the harm to consumers in smaller mergers are somehow less important or warrant less protection than consumers of merging firms with large sales.

Returning to the example, suppose that in a single year, there is one merger in which the Parties have combined sales of £10bn, and 10 mergers in which the Parties have combined sales of £1bn. Assume that the individual consumer harm in each case was identical, (with an expected price increase of 3%), and hence the only difference was the size of their sales. Now assume that, following the draft MAGs, the decision criteria set the SLC threshold at a 2.5% price rise for the large sales merger but 5% for the smaller mergers, and hence only the large merger was defined as an SLC. This is despite the fact that the aggregate impact on society and consumers across the 10 smaller mergers is identical to that of the single large merger. Having an SLC standard which cleared the 10 smaller mergers, even if it blocked the larger merger, would be allowing the same level of detriment to consumers simply because the merging firms have smaller sales. In this respect the CMA would be under-enforcing smaller mergers

even though there is the same level of consumer detriment. As such we do not see a rationale to have different SLC standards simply due to the size of the merging parties sales (and even less of a rationale based on the size of the relevant market).

Second, with respect to the CMA's additional proviso that the market is 'otherwise important to UK customers' this could usefully explained further as it creates the scope for there to be substantial uncertainty regarding what is "*important to UK customers*" at any given time. It is unclear why certain sectors are considered important whilst other are not, despite the fact that they may face an identical increase in the cost. In this respect the CMA appears to be placing normative judgements on who is the customer of the product and whether those customers are worthy of greater protection than other customers despite the fact that the harm is identical. These type of normative judgements raise many issues, not the least of which is how businesses are expected to predict whether their industry is suitably '*important to UK customers*' to warrant a different SLC threshold from other industries.

Third, the draft MAGs now state that there may be an SLC even if it only applies to a few customers or segment of the market. In general we would not expect SLCs in only segments of the relevant market: if it was profitable for the merging parties to increase price in a particular segment of the market, but not other segments, then this suggests the market has been defined too widely and the segment is a separate relevant market.[3] As such we do not believe it is necessary to caveat the fact that a lessening of competition may only take place on a segment of the market.

### Prospective theories and the SLC test

In para 2.10, the draft MAGs states 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, and states that there is therefore no special elevated burden for particular theories of harm. We agree with this.

However, the draft MAGs go onto state that the fact that there may be more uncertainty in how some markets may develop than others, should not reduce the likelihood that merger could give rise to competition concerns. We think it would be helpful for the CMA to clarify precisely what it means by 'uncertainty', as it is unclear why greater uncertainty in outcomes should not have a bearing on the likelihood of an SLC.

### Examples of an SLC

The draft MAGs provide a new section on when a merger can result in an SLC. As previously stated, guidance that increases the level of certainty regarding when the CMA is likely to find an SLC is greatly valued. However, the usefulness of such guidance has been significantly diminished by the fact that CMA only states instances where it ***may*** find an SLC, rather than is likely to, or indeed is unlikely to (para 2.17). To the extent that the CMA considers that these are only possible instances, as opposed to likely instances of an SLC, it is difficult to place much value on the guidance being provided.

Indeed, the guidance is further confused by the fact that some of the instances appear to be de-facto definitions of an SLC. The risk of having a list of circumstances with such varied likelihoods of an SLC is that merging firms interpret them all instances in which an SLC will arise, which we understand was not the CMA's intention. As such we believe that it would be helpful for the CMA to clarify or separate these into the circumstances in which an SLC is likely, versus simply a possibility. The alternative would be to provide more details on the examples to state what are the circumstances in which each of the instances moves from a possible SLC to a likely SLC. For example:

3 We note that it is unhelpful that the Draft MAGs no longer refer to the fact that the ability to target consumer segments may imply separate markets for those segments.

- First, with respect to the merger involving a market leader and the number of signficant suppliers in a market being reduced from four to three, it would be helpful to clarify that an SLC is more likely if there are minimal outside constraints, the Parties offerings are not significantly differentiated, and entry by other firms is not expected. Absent these circumstances we do not believe it is correct to say that an SLC is likely based solely on the criteria set out.
- Second, with respect to the merger firms being close competitors in a differentiated market, we believe it should be qualified that in and of itself, this is not a sufficient condition to find an SLC. In an unconcentrated market with many different alternatives, the mere fact that the two merging parties are relatively the closest competitors, is not determinative of an SLC. This is particularly case if the other competitors are of similar, or only slightly lower, closeness to the Parties. As such it would be helpful to provide further clarification in indicating when an SLC is likely.
- Third, with respect to the *absent the merger, one of the merger firms… would have made efforts to enter or expand and thereby threatened the other firm",* once again we do not believe this is sufficient to be considered a likely SLC. Simply making efforts to enter or expand is too low a threshold and as the guidelines state elsewhere, such efforts must have a realistic and better than average chance of resulting in successful entry. As such it would be helpful to further qualify this.

## 3. Counterfactual

### Exiting firm scenario

The draft MAGs have simplified the CMA's approach to the counterfactual in the exiting firm scenario, removing the third limb: *what would have happened to the sales of the firm in the event of its exit?* We welcome this approach as in practice the third limb has been difficult to implement and, as a result, has been applied inconsistently across cases.

The inconsistency in its application is unsurprising given the fundamental tension between the third limb and the SLC finding in many circumstances. Where the merging firms are the only two suppliers – and the exiting firm's sales would be captured fully (and without risk of leakage) by the other merging firm – then it is clear the third limb would apply and so there would be no SLC. However, where the sector involves many firms, to the extent that the majority of sales would switch to providers other than the acquirer (and hence would not meet the exiting firm criteria) – this implies that the acquirer is unlikely to be a significant constraint in any event and therefore creates a tension as to whether the merger is an SLC. Given the CMA's approach is not to undertake a very detailed analysis at the counterfactual stage, applying the third limb can also be difficult in practice where there is more than one firm and uncertainty over where sales may divert to. We also note that, to the extent that a firm is exiting, and there are no other bidders, while there may be circumstances in which remaining market participants compete strongly to attract the exiting firms sales, it is often far from clear that allowing to fail with the costs associated with such a failure, is a better outcome for consumers than allowing it to be purchased by a single provider.

Finally, we note that there are some situations where even if the firm does not exit entirely, they may not exert a signficant constraint going forward which can be important to understand in the counterfactual. For example, where network effects are strong and the market has 'tipped' to a 'winner takes most' scenario, smaller 'losing' firms may seek to exit the market or become much weaker future constraints if they have limited prospects of future profitability. In some circumstances, the CMA may see benefit in allowing competition between the larger and smaller firm to play out. However, where the evidence allows it, there may be circumstances where a departure from the pre-merger conditions of competition to capture this weaker future competition is appropriate. This can occur even when those firms are still growing as they may be unable to expand sufficiently to guarantee them the role of 'winner'

(i.e. without significant investment in marketing they may not be able to 'catch-up'). Funding may not be available, particularly when it appears the firm is in a downward spiral or has 'lost the race'. Thus, it is not necessary for a firm to exit for it not to be considered a significant constraint going forward. While this could be captured either in the counterfactual or competitive assessment, the draft MAGs could usefully note this possibility.

### Competing bids scenario

With respect to the counterfactual in competing bids scenario, it is unclear whether the CMA is proposing to significantly change the circumstances in which it would consider alternative bidders as the counterfactual in Phase I.

In the current MAGs para 4.3.20 makes it clear that in Phase I it will consider whether "*each proposed merger would create a realistic prospect of an SLC as against prevailing conditions of competition*". However, in the Phase I scenario in para 3.34 in the Draft MAGs it states that the counterfactual will be *"the scenario in which competition between the merger firms is strongest"*. Currently it is unclear whether the CMA is stating that rather than use a counterfactual of the prevailing competitive conditions, it will consider a counterfactual of alternative bidders with more pro-competitive outcomes. We assume that this is not the CMA intention given it would contradict the subsequent sentence that "*It will not engage in a comparative analysis of multiple competing bids*". However, it would be helpful for the CMA to confirm this by replacing this final sentence with the wording *"Such scenarios will not include competing bids"* or something similar.

## 4. Unilateral effects

### 4.1 Differentiated products

The draft MAGs propose a number of changes to the way in which the CMA intends to assess differentiated products that overall point to a de-emphasis on direct empirical estimation on closeness of competition and a greater emphasis on 'rules of thumb' or structural presumptions that reduce the evidentiary threshold for demonstrating an SLC. Our concern is that, because these structural presumptions rely heavily on market definition to provide a robust assessment, yet the draft MAGs also seek to downplay the role of market definition, these 'rules of thumb' are unlikely to provide any predictive power. The result will lead to more frequent Type I and Type II errors and increased uncertainty as to how these rules will be implemented.

### De-emphasising empirical estimation of closeness of competition

The draft MAGs appear to suggest reliance on a number of structural presumptions:

(i) "*Where competition takes place among few firms, any two would likely be sufficiently close competitors that the elimination of competition between them would raise competition concerns*"

(ii) "*The smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors, and therefore the less detailed analysis is necessary to further assess closeness between them*." (both para. 4.9)

(iii) *Shares of supply can be useful evidence when assessing closeness of competition, particularly when the most important competitive constraints are clear-cut*" and "*Firms with higher shares of supply are more likely to be close competitors to their rivals" (*para. 4.13).

We have significant concerns with the draft MAGs apparent move away from stressing the importance of estimating the closeness of competition. In this respect, our view is that these mark a significant step backwards from the existing MAGs. In order to assess competition effectively, the structural presumptions put forward in the draft MAGs would require clearly defined markets. However, the MAGs also make it clear that market definition will not be considered in detail. It is not possible to consider

whether competition takes place between "*few*" firms, "*significant players*" and the "*most important competitive constraints*" are without fully understanding what "*few*" and "*significant*" refers to and how "*clear-cut*" would be determined.

This raises a number of questions and uncertainties. Our concern is that what is considered 'clear cut' risks being applied in an inconsistent way and based on an uninformed view of a *prima facie* and very static understanding of the main constraints on the merging firms.

For example, in many circumstances, particularly digital markets, the strongest competitive constraint may come from currently complementary products, products in different verticals, or new innovations. Indeed, we understand that capturing constraints from relatively new, nascent firms is precisely the reason behind the new drafting on potential competition concerns in the draft MAGs. Similarly, we note that in some instances, vertical quality differentiation may be more important than horizontal differentiation. For example, in digital markets with strong network effects low levels of differentiation between platforms may imply very limited degrees of competition when the platforms are asymmetric in size (as customer select the higher "quality" platform measured by the number of users on the other side of the platform) so assessment based on 'similarities of business models' leads to wrong outcomes.

This is particularly troubling given the draft MAGs statement that, in these situations "*less detailed analysis is necessary to further assess closeness between them*". In this respect we believe that direct empirical measures of competition, such as diversion ratios, are likely to be much more informative regarding the extent of constraint that the merging firms exert each other and hence their ability to raise prices post-merger than the CMA's structural presumptions.

### Use of structural presumptions create additional risks and are not easier to implement

The draft MAGs go onto say that *"even where the boundaries of the market are unclear, the CMA may use shares of supply to compare the relative popularity or scale of two or more firms, which may provide evidence on closeness."* (para 4.13). We have a concern with this statement as we do not believe this is likely to be a general proposition, highlighting the risks of using loosely defined structural parameters for assessing competition. Two products may both be very popular, but appeal to very different types of consumers, and hence may not be close substitutes. A simple share of supply will mask this. Similarly, two products may be less popular across the market, but may be highly substitutable amongst those consumers who buy them, in which case shares of supply will understate the potential for an SLC.

Even if the market is well defined, the draft MAGs still mark a potential return to the well-established potential errors of the binary fallacy of market definition, where anything that is not defined as within the market is given zero weight. The combination of these two issues (the binary fallacy and the need to correctly define a market) imply that the structural presumptions noted by the draft MAGs may have little predictive power regarding the existence of an SLC. As an example, consider a market in which there are many disparate constraints, with none being sufficiently strong individually to constitute being in the same relevant market, even though on aggregate these 'out of market' constraints may be highly significant in constraining the merging firms. The structural presumptions will ignore these constraints.

As such we believe that shares of supply, especially in the case where boundaries of the market are unclear, are only ever likely to be useful as first filters – and cannot be used as a substitute for an actual analysis of closeness of competition through estimates of substitution. Attempting to use shares of supply will merely increase the possibility of both Type I and Type II errors and increase uncertainty of merger outcomes. We believe this should be reflected in the MAGs.

## 4.2 Multi-sided platforms:

The draft MAGs could usefully outline how the CMA assesses both multi-homing on different sides of the platform and how it will take into account horizontal and vertical differentiation of different platforms.

These aspects are commonly found in platform mergers and the CMA has significant case precedent to rely on.

**Multi-homing**: it would be helpful for the MAGs to outline that the CMA will seek information on the extent of multi-homing on both sides of the platform and the reasons why customers on both sides multi-home to a greater or lesser degree. Where one set of customers multi-home on one side of the platform and customers single-home on the other side of the platform, this can point to those multi-homing using the platforms as *complements* rather than substitutes, in order to reach different sets of single-homing customers through each platform. This is important for assessing the impact of the merger as the CMA may separately assess a single-homing ('switching') constraint and/or a multi-homing constraint.[4]

**Differentiation**: it would be helpful for the MAGs to outline that it will assess the extent of horizontal and vertical differentiation of competing platforms. The draft MAGs note that where network effects are important "*larger platforms are more likely to exert strong constraint* [sic] *on rivals*" However, this is dependent on the degree of both horizontal and vertical differentiation between the platforms, particularly in the context of assessing a multi-homing constraint. These issues are relatively common in platform mergers. Where one firm is vertically differentiated to another firm (i.e. larger in the CMA's terms, offering higher "quality" in the form of access to more customers on the other side of the platform) for the smaller firm to compete it must differentiate itself horizontally. Small firms that are unable to differentiate themselves sufficiently to customers are likely to provide a weak constraint.

However, importantly, firms that are *more* differentiated horizontally may be stronger competitors to the large merging firm. This means that uninformed structural presumptions on the "clear cut" strongest constraints – i.e. the often used but fallacious rule of thumb that similar business models implies closeness of competition – risk misrepresenting the actual strongest competitors and lead to errors.

## 4.3 Local mergers

We welcome the CMA's inclusion of more specific guidelines regarding local mergers, which incorporates some of the retail merger guidelines, although we believe it would make sense to reference the more comprehensive retail merger guidelines within the draft MAGs.

With respect to flexing of parameters of competition, we strongly welcome the statement in the draft MAGs that, even if firms have uniform parameters of competition at a local level, the incentives to change those parameters will "*depend on the aggregate conditions of competition across the geographic areas in which its stores are active*" (para 4.27). However, we note that the CMA then states that in such situations "*the CMA will conduct its competitive assessment at the aggregate level, reflecting the aggregate effect of the loss in the competitive constraints on the merger firms across those different local areas"* (para 4.27). This statement is ambiguous, as it is unclear the extent of local analysis the CMA will undertake and if only a national analysis need be considered.

If the CMA is suggesting that that local analysis in not required in such circumstances, in our view this is incorrect. By definition, if the level of competition reflects the aggregate conditions of competition across all geographic areas, the only way that the aggregate loss of competition can be considered is aggregating an assessment of the loss of competition in each local geographic area. For example, if there are minimal local overlaps between two merging parties, or if those overlaps are only in areas with many other competitors, the loss of competition at an aggregate level will also be minimal, even though national or aggregate market shares may show otherwise. As such the MAGs should make it clear that even when the parameters of competition are set uniformly, an analysis of local overlaps will be needed to determine whether on aggregate there will be a significant loss of competition.

4 See *Just Eat / Hungryhouse*, Appendix E, table 1 for a simplified version of this assessment.

It would also be helpful if the draft MAGs were to make it clear what is meant means when it states that the CMA may conduct its assessment at the aggregate level, even where there is material variation in the merger firms local offerings, where there is evidence that "*such variation is not driven differences by differences in competitive conditions"* (para 4.28). For example, we would assume that differences in the identity or number of firms in different local areas would be considered as driving differences in competitive conditions. The exception to this would be if entry conditions were such that in every local area, entry was relatively easy, and therefore every local area had the potential for entry from every firm in the market – regardless of whether they are actually located in that market. It would be helpful for the MAGs to clarify this.

Second, with respect to the filtering and decision rules, the draft MAGs state that the CMA may apply a filter methodology when there is large number of local overlaps between the merging firms. and when filtering is not capable of reducing the number of local areas to a sufficiently small number to do a case by case assessment, the CMA may use a decision approach. While we see a rationale for pragmatically making the assessment of a large number of local areas more manageable, such a decision rule cannot be used as a reason to undertake analysis of only a limited number of areas (for example, a survey of only a small sample of overlaps or analyse the closure of one or two stores) and extrapolating the result across a large number of heterogenous areas. In such circumstances, the CMA will be unlikely to capture subtleties that will be important for assessing competition. For such an approach to be taken, the CMA must first satisfy itself that areas are sufficiently homogenous (beyond simply the number of pre-defined effective competitors in that area) and significant subsequent checks undertaken that the results are robust across different local areas. The CMA must be confident that there is an SLC in each local area. More details on the CMA's approach to "sampling" could usefully be provided in the MAGs.

### 4.3 Undifferentiated products

It would be helpful if the Draft MAGs could clarify that just because a product is undifferentiated, that does not mean that competition is not differentiated, or closeness of competition is not relevant. Competition may take place on a range of different parameters, including the physical attributes of the product – as discussed in the Draft MAGs, but also the service levels and contract terms of companies. To the extent that there are signficant differences in service quality, location, etc, then the markets may be better considered in the context of a differentiated market versus an undifferentiated. As such the number of instances in which competition is truly undifferentiated may be very limited.

## 5. Potential competition

We agree the MAGs should be updated to better reflect concerns arising from removal of potential competitors. However, the approach outlined in the draft MAGs creates significant confusion over the framework that will be used to assess potential competition with some drafting pointing to the CMA applying a lower threshold for concern yet other drafting pointing to a higher threshold for concern.

### Assessing likelihood of entry: the need for a consistent framework

The CMA has revised the wording of the two limbs used to assess potential entry (now 'future competition'.

| ***Previous version*** | ***New version*** |
|---|---|
| *(a) whether the potential entrant is likely to enter absent the merger* | *(a) Whether either merger firm would have entered or expanded absent the merger* |
| *(b) whether such entry would lead to greater competition.* | *(b) whether the loss of future competition brought about by the merger would give rise to an SLC taking into account other constraints and potential entrants* |

Both new limbs raise significant confusion over how potential competition will be assessed.

On the first limb, it is unclear what the newly introduced '*would have entered*' threshold means in practice. This revised drafting (would have) suggests that entry needs to be *certain*, which is inconsistent with the assessment of entry by rivals, which is subject to a 'likely' test.

This is further confused by the draft MAGs stating that entry by the merger firms will typically be considered as part of the counterfactual (para. 3.17). The counterfactual assessment at Phase 2 identifies "*the most likely conditions of competition*" (para. 3.13), i.e. the potential entrant has to be significantly more than merely likely to enter (as in the existing MAGs), it has to be the most likely and certain. Each of these point to the CMA *increasing* the threshold for intervention, which is the opposite of its desired goal to address alleged under-enforcement in the UK.

However, the draft MAGs in other areas suggest a *reduced* threshold for likelihood:

(a) "*The fact that there may be some uncertainty in how the market is likely to develop in future does not, by itself, reduced the likelihood that a merger could give rise to competition concerns*" (para. 2.10). While the presence of uncertainty does not reduce the likelihood of competition concerns, increased uncertainty, by its nature, will reduce the likelihood of entry, and thus the likelihood of that the merger will give rise to concerns.

(b) "*The CMA might assess, as part of the counterfactual, the likelihood that one of the merger firms would have entered or significantly expanded, but not the precise characteristics of the product or service it would have introduced or the level of sales it would have achieved*." (para. 3.11). Without identifying the product or service the merging firm 'would have' introduced, the CMA will be unable to determine if the merging parties would overlap following that entry. Similarly, without assessing the level of sales it would have achieved (i.e. its success as an entrant), the CMA cannot determine the extent to which entry or expansion would constraint the other merging firm. The result is an assessment based on speculation.

(c) "[W]*hen considering entry by a merger firm, becoming successful can take longer than two years in digital markets.*" (para. 3.15). While this seems sensible at first sight, (i) it is unclear why this applies only to digital markets, (ii) such an assessment should apply equally to entry by rivals, and (iii) to the extent becoming successful does take more than two years, the longer the time period required for success, the greater the uncertainty of that success likely to be, and thus the lower likelihood of successful entry.

Overall, the approach in the draft MAGs is unclear and confusing and we strongly suggest the text is clarified and a consistent framework applied.

In our view, the first limb should be '*whether either merging firm would be likely to enter or expand*.' This is consistent with assessing entry or expansion by a rival. In its approach to assessing likelihood, the CMA has also commonly followed the '*Air France KLM/City Jet/KLM approach*' (see OFT Decision of May 2008, paragraph 108 to 111) of assessing, first, the likelihood of entry (in absolute terms) and, second, whether the target is uniquely positioned or most likely to enter (i.e. relative to other possible entrants). This is consistent with the approach of the European Commission. We recommend such an approach continues as it avoids speculative theories of harm premised on assessing increasingly lower likelihoods for entry.

The second limb as currently drafted is also unclear as it makes the new first limb redundant: if the loss of future competition gives rise to an SLC, then implicitly entry is likely, or else there would be no SLC. In our view this limb should be much clearer given entry, what effect that entry would have on competition, e.g. '*whether such entry would lead to greater competition*'.

### Avoiding speculative theories of harm

The draft MAGs note that "w*here one merger firm has a strong position in the market, even small increments in market power may give rise to competition concerns and, therefore, the acquisition by any such firm of a potential entrant may be concerning even if its impact on competition is uncertain, or expected to be small.* "

While we agree in principle that the greater the market position of the incumbent, the greater the potential effect of entry on competition, this should not be used as a structural presumption that large firms cannot undertake acquisitions.

Nor should the threshold for assessing the likelihood of entry be lowered in such circumstances. The same likelihood test must still be applied to the potential entrant. We do not believe there is any justification for lowering the likelihood threshold in circumstances where the second limb is met, as this risks leading to speculative judgements by the CMA, practical difficulties assessing very low likelihoods, and thus increased uncertainty.

However, where one where one of the merging firms has significant market power, it would be reasonable for the CMA to take the position that the second limb is more likely to be met and thus the CMA will be particularly vigilant in assessing the likelihood of entry. We recommend a much clearer position is reflected in the MAGs.

## 6. Coordinated effects

We note that the changes that the draft MAGs have made to the existing guidelines on coordinated effects are more limited than those made with respect to unilateral effects. In general we agree with the changes that have been made, as they help to clarify the CMA's practice with respect to coordinated effects. However, we note that similar to unilateral effects, there are a few areas where it is not clear whether the CMA is intending to reduce the evidential burden needed to find coordinated effects to a level that creates substantial uncertainty in how the CMA will act.

First, the DRMAGs states that "*In those instances where there is evidence of pre-existing coordination, this will indicate that the necessary conditions for coordination are met pre-merger*" (para 6.6). Whilst we agree that in many instances mergers may make pre-existing coordination easier, this does not have to be the case. The CMA helpfully notes in Footnote 104, that the CMA will still investigate how the merger changes the ability. We believe this statement should be brought into the main text for clarity. Alternatively, when the CMA states in para 6.6 that: *"However, pre-existing coordination is not a necessary condition for a coordinated effects SLC finding"*, the CMA could usefully clarify that*, "pre-existing coordination is neither a necessary nor sufficient condition for a coordinated effects SLC finding*.

Second, in defining the pre-existence of coordination, paragraph 6.7 of the draft MAGs is unclear as to whether it is suggesting that actual evidence of coordination is not required, but that the merging firms being aware of their competitors and their mutual independence is sufficient to conclude pre-existing coordination. This is further confused by paragraph 6.9, which with footnote 105 seems to imply that whilst mutual dependence is not sufficient to show pre-existing coordination, it is sufficient to show that coordination was likely to emerge. It would be helpful if the draft MAGs could make it clear that mutual independence is not sufficient to show pre-existing coordination. Given that in nearly all oligopolies (which describes the vast majority of mergers before the CMA), there is an awareness of mutual independence, it cannot be right to suggest that there is pre-existing coordination across all these industries.

## 7. Vertical and conglomerate mergers

Similar to other areas of the draft MAGs, the approach proposed to assess non-horizontal mergers indicates a significant policy shift. The draft MAGs remove reference to the "*well-established principle that most [non-horizontal mergers] are benign and do not raise competition concerns*" (para. 5.6.1 existing MAGs) and replaces this with a reference to US commentary that warn of the risks of under-enforcement against vertical mergers.

While we recognise there is debate around the how vertical mergers should be enforced, particularly in the US, and such debate should be encouraged, we emphasise again that substantive assessment should reflect well-established economic principles and consensus based on economic theory, empirical studies, and merger retrospectives. As a reasoned, evidence-based competition authority, the CMA should not be relying on commentary that merely reflects this ongoing debate. In this respect, we consider that evidence of under- or over-enforcement in vertical or conglomerate mergers, specifically in the UK, is still limited.

Two specific changes to the draft as proposed would be helpful:

(a) **Identifying likely strategies for foreclosure:** The draft MAGs note that the CMA will not focus on predicting the precise actions that a merged firm would take to foreclose (para. 7.12). The CMA appears to default to the minimum requirement of it under recent case law with the perception that it seeks to reduce the evidentiary threshold it needs to meet to demonstrate foreclosure. Even if the CMA is not required to demonstrate the exact foreclosure mechanism, it should at least seek to demonstrate what strategies may be most likely to occur, what strategies are practically most likely, which the merging firm would have the ability and incentive to undertake, and what the effect on competition of these would be. Without such an assessment, suggestions of possible foreclosure are very difficult for the merging firms to provide relevant evidence on.

(b) **Foreclosure requires pre-existing market power**: the draft MAGs note that competition concerns may arise "*when one of the merger firms had a degree of pre-existing market power which it would be able to use to foreclose its rivals*" We believe the MAGs should go further than this, noting that existing (or expected future) market power upstream or downstream is a requirement for foreclosure to occur. To the extent the CMA disagrees with this being the case, it would be helpful for the CMA to outline the circumstances in which foreclosure absent market power is possible or likely.

## 8. Entry and expansion

The approach to assessing entry and expansion by rivals in the draft MAGs is spread across multiple different sections which makes it unclear what framework is applied to assessing different types of entry and different theories of harm. We suggest it is simplified, consolidated in a single section and the

framework to be applied made much clearer across different theories of harm. In particular, while we understand the importance of ensuring that potential competition between the merging firms is not missed, we are concerned that the draft MAGs moves to using a different standard with respect to potential competition from rivals. Specifically, we have the following main comments on entry and expansion:

(a) **Asymmetric approach to entry by rivals and entry by merging firms**: the draft MAGs appears to apply a different standard to entry by rivals, versus entry by merging firms, in a number of areas.

First, the draft MAGs note that the CMA "*will take into account entry or expansion by non-merging rivals over a similar time horizon as the merger firms' entry or expansion"* (paragraph 5.15, loss of future competition). Thus, for the 'timely' assessment of entry there is a symmetric approach between entry by rivals and entry by the merging firms. This should be made clear in the entry and expansion section. The draft MAGs should also make it clear that there will be a symmetric approach to assessing 'likelihood' and 'sufficiency' of entry. At phase 2, there is no justification on a balance of probabilities standard for applying a lower likelihood to assessing entry by the merging firms as that applied to rivals.

It would be useful for the CMA to make clear that at Phase 2 the entire assessment of the loss of future competition and dynamic competition will be the same for rivals as for the merging firms.

Second, the draft MAGs note in reference to entry by the merging firms: "*While in considering entry by a merger firm, becoming successful can take longer than years in digital markets*" (it's unclear why this applies only to digital markets) and "*The fact that there may be some uncertainty 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*" yet for entry by rivals the draft MAGs note that "*generally the further out in time that entry or expansion is expected to occur the less certainty the CMA can attach to it.*" The draft MAGs therefore appear to seek to lower the threshold for the 'likelihood' of entry by merging firms but apply a higher threshold for 'likelihood' of entry by rivals.

Third, in assessing entry by the merging firms, the CMA notes that the CMA may consider the ability and incentive of the merging firms to enter against each other *even if there is no intention to do so* (para. 3.14), yet in assessing entry by rivals, the draft MAGs note that: "*the CMA might expect to see evidence that the firm was actively planning to enter or expand pre-merger*."

Finally, the draft MAGs appear to shift the burden of proof away from the CMA to demonstrate an SLC, suggesting that it will only seek evidence of entry when confronted with claims from the merging firms (para. 8.27). Regardless of whether confronted with such claims, the CMA must assess the prospects for entry and expansion by rivals. This should include using information gathering powers to understand the plans of potential entrants, as well as their ability and incentive to enter.

In our view, the CMA must apply a similar approach and threshold to assessing entry and expansion by rivals as it does to entry and expansion by the merging firms. At Phase 2,

(b) **Unclear framework**: The *Unilateral effects* section (*differentiated products*, para. 4.15) outlines the distinction between entry and expansion that would occur absent the merger and that which is triggered by the merger. This distinction is noted in the existing MAGs (see para. 5.8.1). However, the draft revised MAGs propose that entry triggered by the merger is assessed as a countervailing constraint under the standard framework of entry and expansion (timely, likely, sufficient, para. 8.25 *et seq.*), while entry and expansion that occurs absent the merger is assessed as part of the competitive assessment but is not subject to the same analytical framework. The MAGs need to clarify how entry absent the merger will be assessed. In our view,

this should be subject to the same framework. Exceptions related to an altered counterfactual (footnote 80) do not change this underlying framework.

(c) **Disjointed approach**: in order to understand how the CMA intends to assess entry and expansion by rivals, five separate sections need to be read and it is unclear how each of them apply to different theories of harm. differentiated products (para.4.15) and in the section on entry and expansion (para. 8.25). In particular:

(i) Unilateral effects – differentiated products (para. 4.15): distinguishes between entry absent the merger and in response to the merger. As this is considered only in unilateral effects, this suggests that entry occurring absent the merger is not relevant to disrupting coordination and preventing coordinated effects; As a result of considering this as part of the unilateral effects section, the draft MAGs appear to suggest that

(ii) Entry and expansion (para.8.25), which appears to only outline the framework for assessing only entry triggered by the merger while the framework for entry absent the merger is unclear and not outlined. It should also be made clear that this section applies to both unilateral and coordinated effects

(iii) Loss of future competition (para. 5.15): noting that the timely assessment of entry by rivals is the same as that for the merging parties.

The result is confusing and makes the approach to be taken by the CMA unclear, the opposite of what the MAGs should aim to achieve, which is to set out clearly how the CMA intends to assess aspects of a case.

(d) **Product repositioning** has been omitted from the draft MAGs. Where a merger involves differentiated products, the merger firms and/or rivals may reposition post-merger. The merging firms may have an incentive to reposition bands post-merger while rivals may reposition in response. While these repositioning can be very difficult to assess – and can have both positive and negative effects on competition (and variety) – all the more reason to provide some context for how the CMA might assess such issues.

## 9. Buyer power

The draft MAGs make two significant changes with respect to buyer power.

First, countervailing buyer power is moved into the unilateral effects section with the implication that buyer power only applies to unilateral effects cases. We do not see any rationale for this. Countervailing buyer power can apply equally as much to coordinated effects cases (or indeed vertical cases). This may be through sponsoring entry, vertical integration, or the other routes described below. Indeed the strategies to break up coordination are different (and potentially more varied) than the strategies required to prevent a unilateral price increase, indicating the importance of providing guidance on this in the draft MAGs.

Second, the draft MAGs state that "*most other forms of buyer power that do not result in new entry… are unlikely to prevent an SLC…. because a customer's buyer power depends on the availability of good alternatives they can switch to, which in the context of an SLC will have been reduced*. (para 4.19). In effect, the draft MAGs believe that buyer power can only result from actual sponsored entry or vertical integration by customers.

In our view, these changes provide a very limited view of buyer power and do not capture the nature of negotiations that can commonly take place between customer and supplier. We consider that there are a number of other circumstances it would be helpful for the draft MAGs to outline can result in buyer power.

(a) **Threat of entry or vertical integration**. Buyer power does not need to "*result in new entry".* The threat of sponsored entry or vertical integration by customers can be sufficient to constraint the merging parties. To the extent this is a credible outside option, the fact that the merger reduces *other* outside options may not be relevant if the binding constraint is the threat of sponsored entry or vertical integration. Where the supplier is particularly dependent on a customer, this threat may be implicit and not regularly used as a tool in negotiations as it is especially credible. The draft MAGs indicate that such a threat will be assessed under the same framework as countervailing entry and expansion. However, the threat from a large customer in day to day negotiations is far more likely to be implicit and thus not supported by extensive plans or documentary evidence. Thus the ability and incentive for the customer to do so should be a core part of the assessment and reflected in the MAGs. While this threat may not be sufficient to protect all customers, in limited circumstances, one customer or a group of customers can constraint the merged firms prices to all customers The two main ways customers may be able to trigger new entry – sponsored entry and self-supply – are assessed under the same framework that the CMA applies to other forms of countervailing entry and expansion (see paragraphs 8.41 to 8.43).

(b) **Leveraging other products**: the draft MAGs focus only on the availability of good alternatives in the product in which the merger gives rise to competition concerns. This assumes that customers source from the merging parties only a single product, which is often not the case. Where the relationship spans multiple products, and other products have a wider range of alternatives, customers can threaten to switch across multiple products. The merger may have no impact on the alternatives available in other products (as there may be no overlap). If the revenue that the merging firms generate from these other contestable products is significant relative to the revenue generated from the product subject to few alternatives, the merger may have limited impact on the degree of buyer power and hence the merging firms will remain constrained.

    For example, if a buyer sources two products from the merged firm, one of which is subject to a limited set of alternative suppliers, two of which are the merging parties. However, for the other product the customer has a wide range of alternative suppliers to switch to (and for which the merging parties may not even overlap). Now consider a scenario where the first product accounts for only 5% of what the customer sources from the merged firm. The customer can easily threaten to switch away the other 95% to alternative suppliers if the merged firm attempts to increase prices on the 5% subject to a price increase.

    Importantly, the merger may actually increase this buyer power, as it may increase the amount of contestable revenue that the merging firms face for certain customers relative to revenue in the overlapping segments.

The existing MAGs outline these possibilities and omitting them from the MAGs represents a step backwards with the CMA signaling it will not consider any buyer power arguments outside of actual entry or sponsored entry by the customer. The European Commission also notes some of these tools available to buyers in its horizonal merger guidelines and thus the omission by the CMA risks divergent outcomes.

## 10. Efficiencies

### Rivalry-enhancing efficiencies

The efficiencies section of the draft MAGs reflects a significant shift in emphasis from the existing MAGs. The latter outlined the different types of efficiencies that could arise, providing guidance to firms over how evidence could be submitted to the CMA can be given weight in an area where such submissions can be especially challenging. However, the draft MAGs, by removing this helpful guidance, signals even further that efficiency arguments have little chance of succeeding, and strongly discouraging them from being made. This is based on two broad statements made by the draft MAGs:

(a) **An assumption that efficiencies are rarely achieved**. The draft MAGs note that "*firms often do not fully realise the expected synergies from their mergers, and even for the synergies they do realise, firms do not always pass on the benefits to their customers*. (para.8.6). We emphasise again the importance for mergers policy, policy changes, and substantive assessment to reflect well-established economic principles and consensus based on economic theory, empirical studies, and merger retrospectives. Policy shifts should be motivated by compelling evidence. Economics has long recognised the benefits from mergers of efficiencies. It is therefore disappointing that the CMA's evidence base for this is a single academic paper that relates to the US and which itself points to mixed evidence[5] while the Lear Report points to significant merger-specific efficiencies (albeit far from meeting the standard of a robust *ex-post* analysis).

(b) **The statement that merger efficiency arguments before the CMA rarely succeed**. The draft MAGs note that the CMA's *"experience to date is that it is unusual to find merger-specific efficiencies that would benefit consumers and rare for a merger to be cleared on the basis of efficiencies*" As the CMA is aware, efficiency arguments are rarely made in detail (with substantiating evidence) due the sceptical nature of the CMA, its readiness to dismiss efficiencies arguments, and the prioritised focus of the CMA on establishing the SLC rather than assessing efficiency arguments. In that context, the statement by the CMA only reinforces this, is self-fulfilling and unhelpful as guidance to firms.

In our view the guidance, rather than signalling efficiency submissions are futile, should seek to achieve the opposite. While recognising efficiency arguments are difficult, and the CMA will be healthily sceptical of these arguments, the draft MAGs should recognise that mergers can give rise to efficiencies, that such efficiencies, where they arise, can increase productivity and be hugely beneficial to customers. The MAGs should welcome and encourage submissions on efficiencies and provide helpful guidance on the types of efficiencies and how these can be given weight in the CMA's assessment.

In addition, we note that the draft MAGs miss two opportunities to elucidate the CMA's position on recent developments in efficiency assessments.

First, **multi-sided platforms with strong network effects potentially give rise to new types of efficiencies**. For example, the draft MAGs note the benefits to users of a platform being able to interact with a large base of other users actively using the same platform (para. 2.5). The same logic can be applied to efficiency arguments. Where multi-sided platforms are characterised by strong network effects, the combination of users on a single platform can, in some circumstances, give rise to customer benefits from accessing a greater network.

This can be especially important in the context of multi-sided platforms where commonly a larger platform is acquiring a smaller platform and the gains to customers of the smaller platform, particularly if the platforms are largely undifferentiated horizontally, can be significant. Similarly, larger platforms can be more attractive to advertisers by reducing the necessary transaction costs to reach a certain number of users and they remove inefficiencies that can derive from placing ads on two or more independent platforms with potentially overlapping users. These are efficiencies that can be relatively easily tested and verified, and the CMA is not reliant on (the asymmetry of) information from the merging firms.

Second, **clarifying the CMA's position with regard to marginal cost efficiencies** would be very helpful. Previously, the CMA (and its predecessor bodies) has taken the view that marginal cost efficiencies were likely to be passed on to customers. However, the CMA's assessment of pass-through

5 For example, the McKinsey report referenced indicated that over 80% of mergers achieve the stated percentage of expected cost savings and 36% achieve more than 100%.

has been dramatically inconsistent between cases with marginal costs savings assumed to be passed through and giving rise to rivalry-enhancing efficiencies in some case[6] while in other cases the CMA has assumed no pass-through at all, noting that, in the context of procurement savings, "'*pass-through' of input costs savings to savings for final customers is rarely expected to be 100%.. the Parties have not submitted any evidence on pass-through… we therefore do not consider that any customer benefits are likely to arise from the merger*." [7] These are two Phase 2 merger decisions only eight months apart take polar opposite approaches to assessing similar procurement savings with respects to pass-through. Such inconsistency leads to significant confusion amongst merging firms about the CMA's approach and the draft MAGs could usefully outline a consistent framework. This is especially important in digital markets where pass through can occur from one side of the platform to the other and impact the number of users using the platform.

### Relevant customer benefits

The draft MAGs attempt to provide much needed and welcomed additional clarity on the types of RCBs that might be taken into account and how these would be distinct from rivalry-enhancing efficiencies. As the CMA is aware, this is an area that has been subject to significant controversy and confusion in the past.

We agree that RCBs should capture both benefits that results from the merger not directly driven by increased competition, including investment, and where efficiencies arise in a different market from that of the SLC. Rivalry enhancing efficiencies generated by a merger should be given weight, regardless of what market they occur on. If the gains are significant, the overall effect of the merger may be to benefit consumers.

However, there are a number of areas where the draft MAGs could usefully provide greater clarification.

(a) **Sustainability goals**: We welcome proposals to capture wider benefits such as increased sustainability and reduced carbon emissions where it can be shown these result from the merger, are not taken into account in the competitive assessment, and are of clear benefit to consumers. However, it is unclear if the legislation allows this.[8] To clarify this, we recommend the CMA undertake a separate policy project to determine how sustainability can be taken into account across competition policy, including possibly relevant customer benefits. The draft MAGs could usefully clarify whether the CMA is distinguishing between sustainability and other wider policy and social goals not captured by the competitive process, such as employment.[9]

(b) **Increased confusion over what is an RCB and its application**: The CMA has allowed a number of recent hospital mergers that give rise to an SLC to proceed on the basis of RCBs. However, a number of the RCBs relied on could easily be described as rivalry-enhancing and could apply to a much wider range of sectors, for example where the merger allows for 24/7 levels of service to be provided. There is no discussion in the decisions as to why these are RCBs nor in the draft MAGs as to the applicability of these examples to other sectors. Such clarification could be usefully added.

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6 See *Sainsbury's / Asda*, Phase 2 Final Report, April 2019, paragraph 16.222: "*The large majority of synergies… are purchasing synergies… purchasing synergies represent variable cost savings which are likely to have a direct impact on the Parties' pricing incentives. Purchasing synergies were assumed to be passed through to consumers*."

7 See *Ausurus Group / Metal & Waste Recycling*, Phase 2 Final Report, August 2018, para. 7.9-7.10.

8 The Enterprise Act states that RCBs take the form of lower prices, higher quality or greater choice of goods or services, or greater innovation (s.30(a))

9 The CMA also risks getting drawn into making judgements about the correct goals for UK society.

(c) **The CMA's policy position on assessing hospital mergers needs clarified**: In the RCBs section, the CMA provides a number of references to hospital mergers, and these cases represent the bulk of RCB cases assessed by the CMA. However, the CMA has made clear that its policy position on hospital mergers has shifted, reflected by its recent reversal of the Poole/Bournemouth prohibition, noting that: "*there have been significant changes to policy within the NHS that have affected the role that competition plays in the provision of public healthcare services*." This justification is unclear as NHS England continues to state that its goal is to improve patient choice and there remains a mix of choice and coordination. However, to the extent the RCBs applied in hospitals have limited wider application to other cases, because the evidentiary standard to demonstrate, or the degree of benefit in such cases need not be significant given more limited competition, this could usefully be made clear in the MAGs.

## 11. Market definition

The extent of guidance on market definition in the draft MAGs is significantly reduced relative to the previous MAGs.[10] The draft MAGs state that the CMA anticipates that in future, merger assessments will place more emphasis on the competitive assessment as opposed to static market definition. While we agree with this approach in principle, the CMA is proposing to heavily rely on structural rules that rely on specific market definitions in order to understand the impact of a merger. The draft MAGs consistently reference use of market shares, shares of supply, and market power and recent cases have tended to still rely heavily on shares of supply and market shares. We therefore question whether it is beneficial to remove some of the previous guidance that the MAGs provided. Without a robust market definition exercise – or without detailed assessment of competitive constraints on merging parties – probative value of these limited

**Geographic markets**: the draft MAGs outline the CMA's approach to assessing mergers involving a large number of geographic markets yet the draft MAGs have removed references to the limitations of this approach and how it must be placed in context, recognising that geographic markets identified using the hypothetical monopolist test will typically be wider than a catchment area. This means that a competitive assessment based on catchment areas will typically over-enforce. This is critical as those areas that are 'marginal' SLCs should always be given the benefit of the doubt on the basis that the willingness of customers to travel following a SSNIP will be a greater distance than the catchment areas used by the CMA.

The draft MAGs also provide no guidance on (i) when geographic markets may be customer-centred or supplier-centred: even if geographic markets are not defined, this is an important starting point for establishing catchment area, or (ii) aggregating customer groups: the approach to bespoke markets where suppliers negotiate individually with customers is still highly relevant and should be outlined.

10 For example, the previous guidance was significantly more detailed on the evidence that the CMA may consider in deciding whether to aggregate markets, and how the CMA defines geographic markets.