The Law Society response to the updated merger assessment guidelines (CMA129) issued by Competition and Markets Authority (CMA)

January 2021

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On behalf of the profession, we influence the legislative and regulatory environment in the public interest. At home we promote the profession and the vital role legal services play in our economy. Around the world we promote England and Wales as a global legal centre, open new markets for our members and defend human rights.

The profession we represent

Solicitors earn their title through dedication and commitment to legal education, training and development. They meet high professional and ethical standards, hold comprehensive insurance and a practising certificate which allows them to provide a wide range of advice and services to their clients. The Law Society represents the interests of over 180,000 registered legal practitioners to government and regulatory bodies and has a public interest in the reform of the law.

Solicitors play an essential role helping people throughout their lives. Whether clients are buying a house or writing a will, recovering compensation for an injury or defending an allegation of wrongdoing, solicitors offer support, guidance and expert advice. Solicitors also support and advise businesses, from start-ups to major international companies, and from central and local government to charities. Solicitors deliver legal services through law firms or by working as a trusted employee within an organisation.

1. Introduction and summary

We welcome the opportunity to submit comments on the "Draft revised Merger Assessment Guidelines" ("**Draft Revised Guidelines**").

Our specific comments are below. Subject to those comments and requests for additional clarification, we consider that the Draft Revised Guidelines represent helpful clarification of the CMA's substantive framework for merger control.

We would be happy to discuss further our comments on any aspects of the consultation, as the CMA develops its proposals in this area.

2. Specific Responses to CMA129

In general, the format and presentation of the Draft Revised Guidelines is sufficiently clear. It would be helpful if the CMA could provide clarification on the following substantive points.

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Removal of benchmarks to determine substantial loss	**Para. 2.8**: **The CMA does not apply any thresholds to market share, number of remaining competitors or on any other measure to determine whether a loss of competition is substantia**l. The CMA will decide whether a loss of competition is substantial under the applicable legal standard.	We are concerned that the CMA has removed reference thresholds for combined market shares, the number of firms remaining in the market, and the HHI. Business and their advisors would welcome additional guidance on how to identify non-problematic deals.
Additional clarity on the definition of an SLC	**Para. 2.9:** Substantial in the context of an SLC does not necessarily mean 'large', 'considerable' or 'weighty' in absolute terms, and it is capable of meaning 'not trifling' at one extreme and 'nearly complete' at the other. A lessening of competition in a market (or in a particular segment of a market) may be considered substantial even if that segment or market is small in total size or value. A lessening of competition may also be considered substantial **where the lessening of competition is small, but the market to which it applies is large**	We would appreciate additional guidance on what (i) constitutes a "large" market, and (2) what constitutes a "market that is "important to UK customers." These are fairly general and abstract terms and may not be sufficiently precise for business.

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	or is otherwise important to UK customers, or if there is only limited competition in the market to begin with. **Para. 4.9**: Closeness of competition is a relative concept. Where there is a degree of differentiation between the merger firms' products, they may nevertheless still be close competitors if rivals' products are more differentiated, or if there are **few rivals**. The CMA will consider the overall closeness of competition between the merger firms in the context of the other constraints that would remain post-merger. For example, **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. 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.	We would also welcome guidance on how many firms would constitute competition between a "few" rivals or among a "few" firms.
Time horizon when assessing the counterfactual and competitive	**Para. 3.13: "**At Phase 2, the CMA has to make an overall judgement as to whether or not an SLC has occurred or is likely to occur. To help make this assessment the CMA will select the most likely conditions of competition as its counterfactual against which to assess the merger. In some instances, the CMA may need to consider multiple possible scenarios before identifying the relevant counterfactual (e.g. a merger firm being purchased by alternative acquirers). In doing this, the CMA will consider whether any of the possible scenarios make a significant	We would encourage the CMA to clarify in the guidelines that any assessment of alternative counterfactuals to the merger will be probability weighted. As the CMA knows and will appreciate, businesses regularly consider several strategic alternatives before entering into transactions. The fact that they have

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assessment	difference to the conditions of competition and, if any do, the CMA will find the most likely conditions of competition absent the merger as the counterfactual.[1] **Para. 3.14**: "Establishing the appropriate counterfactual to assess the merger against is an inherently uncertain exercise and evidence relating to future developments absent the merger may be difficult to obtain. Uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual. As part of its assessment, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger firms to pursue alternatives to the merger, which may include reviewing evidence of specific plans where available."	done so does not mean that all such possibilities are equally likely. We would also encourage the import of footnote 55 (that only the most likely counterfactual will be the one used for the purpose of the analysis) to be made patent and included in the text.
	Para. 3.15 suggests that the time horizon will be consistent with the CMA's competitive assessment, whereas **para. 5.15** suggests that "[t]he CMA will take into account entry or expansion by non-merging rivals over a similar time horizon as the merger firms' entry or expansion".	We would encourage the CMA to clarify that longer time horizons for counterfactuals are inherently less certain and that the CMA may not be likely to find an SLC where concerns are likely

[1] **Footnote 55**: "For example, in Rentokil Initial/Cannon Hygiene the CMA considered that absent the merger the target firm would have been sold to another purchaser but did not consider it necessary to specify which of the alternative bidders would have been most likely to acquire it since any of the alternative bidders would have resulted in pre-merger conditions of competition. In PayPal Holdings Inc/iZettle AB the CMA did not consider it necessary to assess the likelihood of each alternative scenario occurring since the most likely counterfactual was that PayPal would have sought to improve its offline payment service capabilities through one, or a mix of, the potential scenarios. In BT Group plc/EE Limited the merger took place when a parallel merger was being assessed by the European Commission. In that case the CMA considered a counterfactual of the prevailing conditions of competition was appropriate given the most likely scenario was that either the parallel transaction did not proceed or the European Commission would require remedies in clearing the merger."

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	Para. 3.5. The time horizon that the CMA considers when describing the counterfactual will depend on the context. In some markets, relevant developments may not take place for some years while in others the relevant time horizon for the counterfactual will be shorter. For example, when considering entry by a merger firm, **becoming successful can take longer than two years in digital markets.** In contrast, the time horizon over which a firm may exit the market could be **significantly shorter than two years**. The time horizon for considering the counterfactual will be consistent with the time horizon used in the CMA's competitive assessment.	only in later years.
Potential Entry	**Para. 5.15.** The impact of a potential entrant on competition is more likely to be significant when there are few strong existing competitive constraints on the other merger firm or where the other merger firm would already have market power absent the merger (with greater market power being associated with a greater likelihood of an entrant having a bigger impact on competition). As set out in paragraph 4.11(a), where 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. 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.	We would encourage the CMA to clarify that mergers involving potential competitors are only likely to give rise to concerns where *the entrant is likely to result in close competition* to the merger firm. Competition concerns in cases involving actual competitors are more likely where the merging firms are close competitors. There is no empirically proven basis for a different and lower standard for cases involving potential entrants, in particular where there is uncertainty as to the potential entrant's

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		impact.[2] In any event, we would welcome clarity on whether the CMA will assess varying degrees of "uncertainty".
Change to the exiting firm counterfactual analysis	In **Para. 3.22** the CMA proposes to adopt a two-step cumulative framework, amending the previous three limb test. The two step framework is: (a) is the firm likely to have exited (through failure or otherwise); and, if so (b) would there have been an alternative, less anti-competitive purchaser for the firm or its assets to the acquirer in question. The CMA proposes to disregard what might have happened to the sales of the firm in the event of its exit, specifically whether sales would have been redistributed among the companies remaining in the market and, if so, how and what impact this would have had on competition.	We would welcome more detail about the CMA's amended framework for assessing the exiting firm scenario. In particular, we would be grateful for confirmation that: a. The CMA would still consider how competition would develop if the failing firm exits (i.e., where market share and sales would be diverted to). b. Entering into bankruptcy, insolvency, or administration proceedings constitutes good

[2] The European Commission requires two basic conditions to show that a merger with a potential competitor would have significant anti-competitive effects: (i) First, the potential competitor must already exert a significant constraining influence or ***there must be a significant likelihood that it would grow into an effective competitive force***. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion (Commission Decision 2001/98/EC in Case IV/M.1439 — Telia/Telenor, OJ L 40, 9.2.2001, p. 1, points 330-331, and Case IV/M.1681 — Akzo Nobel/Hoechst Roussel Vet, point 64). Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger (Case IV/M.1630 — Air Liquide/BOC, point 219; Commission Decision 2002/164/EC in Case COMP/M.1853 — EDF/EnBW, OJ L 59, 28.2.2002, p. 1, points 54-64.). European Commission, "Guidelines on the assessment of horizontal under the Council Regulation on the control of concentrations between undertakings", OJ C31, 5 February 2004 para. 60.

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	In **Para. 3.29**: A merger firm may exit for strategic rather than financial reasons absent the merger. The CMA would need to be satisfied that the business would have ultimately exited for strategic reasons unrelated to the transaction in question.	evidence "that the business would have ultimately exited for strategic reasons unrelated to the transaction in question" (**para. 3.29**). c. We would also be grateful for other guidance as to what "strategic reasons unrelated to the transaction in question" means. d. The CMA will include COVID-19 and other exogenous factors in its failing firm assessments.
Removal of a separate section discussing countervailing buyer power.	The Draft Revised Guidelines do not include a separate section discussing the effectiveness of countervailing buyer power (section 5.9 of the Current Guidelines). The CMA's approach is included in the Draft Revised Guidelines in the discussion of Horizontal Unilateral Effects at paras. 4.18 and 4.19: **Para. 4.18**. Where a customer has the ability and incentive to trigger new entry, it may be able to restore competitive conditions to the levels that would have prevailed absent the merger. 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	The CMA has removed the section discussing countervailing buyer power and considers it unlikely that buyer power without associated new entry prevents an SLC. Although we understand that, in the CMA's experience, buyer power alone may not be sufficient to clear a transaction, the decisional practice and economic literature confirm that it is an important part of any competition analysis and it should not be rejected without

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	to other forms of countervailing entry and expansion (see paragraphs 8.41 to 8.43). **Para. 4.19**. Most other forms of buyer power that do not result in new entry– for example, buyer power based on a customer's size, sophistication, or ability to switch easily – are unlikely to prevent an SLC that would otherwise arise from the elimination of competition between the merger firms. This is 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. In that sense, market power and buyer power are two sides of the same coin, and an SLC can be interpreted as a substantial lessening of customers' buyer power.	consideration on an *ex ante* basis[3]. In addition, buyer power can prevent the exercise of new entry even if it does not result in new entry (e.g., the design of competitive procurements can lead to competitive prices). We would thus encourage the CMA to re-re-recognise countervailing buyer power as a "countervailing factor" in Chapter 8.

[3] European Commission, "*Guidelines on the assessment of horizontal under the Council Regulation on the control of concentrations between undertakings*", OJ C31, 5 February 2004, paragraphs 64-67. The CMA has undertaken an in depth analysis into the constraints of buyer power in its phase 2 investigation into . See also RBB Economics "*The Competitive Effects of Buyer Groups, Economic Discussion Paper, A Report prepared for the Office of Fair Trading*", (January 2007), and Oxera, "*Empirical analysis of buyer power*" *(December 2014).* See the CMA's Final Report of the completed acquisition by FNZ of GBST (November 5, 2020).

b. Are the Draft Revised Guidelines sufficiently comprehensive? Do they have any significant omissions?

Overall, the Draft Revised Guidelines are comprehensive. We note that the Draft Revised Guidelines no longer include sections on Public Interest Cases (Part 6), and Publications Relevant to the UK Merger Regime (Part 7), as is the case in the Current Guidelines. However, we understand that the former are included in the Guidance on the CMA's Jurisdiction and Procedure (CMA2revised). We would be grateful if the CMA could also provide a list of publications relevant to the UK Merger Regime in a separate or consolidated document.

We also note that the Draft Revised Guidelines do not reference the Digital Markets Taskforce or its advice to establish a Digital Markets Unit ("**DMU**") and an enforceable code of conduct for companies that have strategic market status ("**SMS**"). Although we understand the advice (CMA135) was published after the Consultation commenced, it would be helpful to understand how the CMA will interact during its merger assessment with a DMU and whether a regulatory framework would form part of the CMA's assessment.

We would encourage the CMA to recognise in the Draft Revised Guidelines how the CMA will interact with the EC going forward and given Brexit (in particular given the absence of such guidance in other documents).

c. Do you have any suggestions for additional or revised content that you would find helpful?

We understand and appreciate that the CMA is alive to the competitive issues that surround digital mergers. However, we would expect more robust empirical evidence to have informed the changes to the Draft Revised Guidelines, in particular measuring the harmful effects of over enforcement against the adverse effects of a failure to investigate. Absent such evidence, the changes may not be sound in policy or in economics.

d. Do you agree with the approaches set out in the Draft Revised Guidelines?

We welcome the CMA's decision not to replace the current SLC test with the "balance of harms" approach recommended in the Furman Report.

We also welcome the additional guidance on the CMA's approach to assessing fast-moving, digital markets and particularly the additional section on the CMA's assessment of two-sided platforms.

Finally, we agree with the approach to move away from a formal market definition test in line with the EC's analysis. The CMA clarifies the role of market definition, concluding that there is no need for the CMA's assessment of competitive effects to be based on a highly specific description of any particular market definition, and that the CMA may take a more simple approach to defining the market.

Our areas of divergence are listed above.

e. Do you have any other comments on the Draft Revised Guidelines?

We understand that, overall, the Draft Revised Guidelines have focused primarily on analytical frameworks rather than evidence-gathering tools developed following its assessment of recent transactions. We would welcome guidance on next steps that the CMA is planning to take for providing guidance in relation to its evidence-gathering tools.

Contact details and next steps

To discuss any of the points raised in this response further, please contact James Marshall, Competition Section Chair (jmarshall@cov.com); Competition Section members Keith Jones (keith.jones@bakermckenzie.com); Ruchit Patel (ruchit.patel@ropesgray.com); Anna Pugh (anna.pugh@ropesgray.com); or Catrin Lewis, Head of Commercial and Technology Law (catrin.lewis@lawsociety.org.uk)