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## RE: DRAFT REVISED MERGER ASSESSMENT GUIDELINES

Dear Competition and Markets Authority,

Below I set out some personal reflections on the proposed revisions to the Merger Assessment Guidelines<sup>1</sup>.

There is an unavoidable tendency in responding to such consultations to focus on areas of disagreement or perceived omission, rather than to focus on areas of agreement. However, the update of the previous set of guidelines is long overdue and, aided by the significant additional experience since 2010 of the CMA (and its predecessors organisations) as well as judgments by the CAT and the courts, the proposed revisions are in general a helpful statement of how the CMA's approach has evolved over time.

I focus my remarks only on a few areas where I believe additional thought and consideration by the CMA is merited.

### 1. Purpose of the Merger Assessment Guidelines

The underlying drivers motivating the CMA to update the Merger Assessment Guidelines are clear, with concerns around mergers in digital markets a particularly strong theme.

While it seems reasonable that such concerns raise the question of whether the CMA's guidance adequately articulates how the CMA might approach a merger in any given set of circumstances, the proposed changes appear to go further than that in a couple of respects.

First, in relation both to individual changes and to the cumulative effect of the changes, the document reads in places like a statement of the CMA's contemporaneous policy positions: a general concern with underenforcement in digital mergers; a desire to support broader climate change and sustainability aims; a desire to protect, in particular, so-called 'vulnerable customers'; and an interpretation of the CMA's statutory duties to consumers as involving business customers at upstream or intermediate levels of supply<sup>2</sup>.

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<sup>1</sup> CMA129 CON

<sup>2</sup> As a consequence of the UK exiting the European Union and its one-stop-shop, and absent proportionate increases in resources available to the CMA, the CMA's need to make active prioritisation decisions will grow as the number of merger cases it could review increases. The cases it will inherit

The emphasis or de-emphasis of particular types of consumers, or mergers, or business sectors involves the CMA making relative judgements about whose welfare matters. It may be better for the stakeholders affected by such decisions – including consumers – if the CMA did this in a more transparent manner in which the costs and consequences of such an approach were evaluated, rather than as a byproduct of updating what ought to be more neutral guidance documents.

In addition, in places it feels as the CMA veers from a positive statement of how the CMA might approach theory and evidence in a particular case to a more normative statement of which mergers it is likely to consider ‘good’ and which ‘bad’<sup>3</sup>.

As the guidelines are likely to be viewed as an enduring guide to the analytical approach of the CMA in merger cases, it may be more appropriate to house the CMA’s policy and prioritisation<sup>4</sup> objectives for the merger regime at any given point in time in a separate document.

Second, there is clearly a difference in weight that should be given to those parts of the guidelines that have been tested in cases (and affirmed in appeals involving judgments of the courts or the CAT) and those parts which reflect new or emerging thinking or which continue to evolve through case precedent.

In the existing Merger Assessment Guidelines, the introductory text contains the warning that “*the language in them is more definitive about some issues than about others, indicating that those areas of practice are more settled*”<sup>5</sup>. There is no similar caveat in the proposed revised Merger Assessment Guidelines, and it is not obvious the same sensitivity to language used has been applied to the additions and extensions to them

In particular, the CMA risks over-emphasising the importance of mergers in digital markets in its framing of the Merger Assessment Guidelines, both in their own right and also relative to mergers in more traditional markets. Dynamic competition is not only a feature of mergers in digital markets, for example. And the examples the CMA uses to illustrate its analytical framework feel heavily skewed towards mergers in digital markets, even where the underlying theoretical concepts have not been adequately tested<sup>6</sup>.

## 2. Market definition

The proposed ‘demotion’ of market definition as a tool within the CMA’s merger regime reflects contemporaneous practice, where the closeness of substitution or competition between the merger parties takes primacy in the CMA’s assessment.

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may simultaneously be larger, more resource-intensive and more remote from the consumers the CMA is ultimately meant to protect.

<sup>3</sup> An example is the final sentence of Paragraph 7.6, CMA129 CON and its associated footnote, which felt inconsistent with the tone of the rest of Section 7.

<sup>4</sup> Although the CMA has a statutory duty to remedy mergers which give rise to an SLC, in practice it adopts a prioritisation approach to mergers in much the same way as other enforcement activity, facilitated by the voluntary nature of the regime and its ability to select which cases it opens a file on via the work of the Mergers Intelligence Function.

<sup>5</sup> Paragraph 1.5, OFT1254

<sup>6</sup> For example, the CMA’s assertion in Footnote 17, CMA129 CON that “a price of zero may be higher than the price level that would prevail in the presence of greater competition if customers could plausibly be paid for access to their private data” relies on a number of assumptions that may never hold in reality, yet is given equivalence to insight the CMA has gained from cases it has actually undertaken.

However, in differentiated product markets, the process of using market definition as a framing device is an important intellectual process that helps shape the investigative process<sup>7</sup> and can assist the CMA in ensuring its evidence gathering is thorough.

De-emphasising it to the extent the CMA is proposing is risks introducing systematic bias into merger reviews. The CMA's view that "*the evidence gathered as part of the competitive assessment ... captures the competitive dynamics more fully than formal market definition*"<sup>8</sup> relies on a belief that the CMA consistently focuses its investigative efforts on the right things. Focusing on the right things at an early stage is particularly important given the CMA says it "*will expect to undertake less detailed analysis*" where "*the evidence supporting prima facie competition concerns is stronger*"<sup>9</sup>.

### 3. Dynamic competition

The proposed revisions to the Merger Assessment Guidelines rightly reflect the increased importance of dynamic competition from both a policy perspective and the perspective of the CMA's decisional practice.

However, there is a gap in logic between the CMA's desire to ensure that dynamic effects are adequately assessed on the one hand, and its proposed approach to the counterfactual and evidence gathering from third parties on the other hand.

The drivers of dynamic competition within a market might vary widely, for example because consumer preferences change, because suppliers in adjacent markets are building towards a new integrated consumer proposition, or because of regulatory changes (e.g., Brexit, or a commitment to net zero).

More immediately, there may be profound medium- and long-term impacts on demand and supply patterns which arise due to COVID and which require a more holistic assessment of the counterfactual.

Narrowly focusing the assessment of the counterfactual on the merger parties<sup>10</sup> risks missing important dynamic factors within the market, potentially over-emphasising the relevance of the dynamics between and within the merger parties at the expense of dynamics external to them.

In cases with dynamic competition concerns, the CMA has correctly recognised<sup>11</sup> the need to examine internal documents in greater detail to help it more accurately assess the parties' views on how the market and their products might evolve. However, it does not propose applying the same approach to third parties (which may themselves be relevant to the question of how a market develops).

The inherently prospective nature of dynamic competition means that the CMA will increasingly be required to triangulate competing speculative views about market dynamics. This implies treating third party evidence, particularly their internal documents, on a par with evidence submitted by merger parties.

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<sup>7</sup> The draft revised Merger Assessment Guidelines recognise the increased importance of market definition as a tool in markets where goods are homogenous.

<sup>8</sup> Paragraph 9.2, CMA129 CON

<sup>9</sup> Paragraph 2.18, CMA129 CON

<sup>10</sup> Paragraph 3.10, CMA129 CON

<sup>11</sup> Paragraph 2.27, CMA129 CON

Despite the greater emphasis on dynamic competition in the draft revised Merger Assessment Guidelines, the CMA appears to be discounting the very real possibility that changes that cause a market to be dynamic are driven by a source external to the merger parties. As such Section 5, and in particular the section on loss of dynamic competition, appears very narrow in focus. Again, this risks introducing systematic bias into the CMA's merger reviews.

#### 4. Entry

The draft revised Merger Assessment Guidelines refer to the fact that the CMA has cleared mergers in the past on the basis of entry or expansion by third parties, but in some cases this has not materialised in practice<sup>12</sup>. The document seems to suggest that the CMA will downplay the importance of entry/expansion in light of this.

This is asymmetric to its approach to entry or expansion by the merging parties, not least because the CMA suggests it could find that entry would have occurred by one of the merger parties absent any evidence<sup>13</sup>. It is unclear why the CMA will presume that no other party would be likely to enter and yet assume (even without evidence) that in the counterfactual one of the merging parties would enter.

In any event, the relevant question as to whether entry or expansion by third parties would address any SLC is not whether there are specific plans for entry or expansion that end up materialising (such that failure to do so suggests the CMA has taken an over-permissive approach to date), but whether there would be entry if, hypothetically, the merged entity were to increase fees, reduce quality, fail to innovate etc (i.e., creating a competitive gap for a new entrant to exploit). In the latter scenario, the fact that there has been less entry or expansion than expected does not really say much in and of itself about whether the CMA was right to clear the merger.

#### 5. Omissions

The consultation document asks explicitly whether there are any significant omissions in the draft revised Merger Assessment Guidelines. Two come to mind:

- a. First, the section on Two-Sided Platforms<sup>14</sup> could be expanded in two ways:
  - The revised Merger Assessment Guidelines should refer somewhere and in some way to single-homing and multi-homing, and in particular to the helpful framework the CMA adopted in its assessment of the anticipated acquisition by Just Eat of HungryHouse<sup>15</sup>.
  - In addition to the factors listed in Paragraph 4.23, the CMA should also consider whether feedback or interaction between the two sides of the platform might have the effect of disciplining the behaviour of the merger parties in those cases where indirect network effects operate in both directions and the CMA undertakes a separate assessment on each side of the market. This was explored to some degree in the OFT's Phase 1 review of the

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<sup>12</sup> Paragraph 8.26, CMA129 CON

<sup>13</sup> Paragraph 2.28(c), CMA129 CON

<sup>14</sup> From paragraph 4.20 onwards, CMA129 CON

<sup>15</sup> Appendix E, Final Report

Anticipated acquisition by Northcliffe Media Limited of Topper Newspapers Limited<sup>16</sup>.

- b. Second, there is no cross-reference to the CMA's Retail Mergers Commentary<sup>17</sup> anywhere in the document (which felt noticeable for its omission).

I hope these reflections are useful to the CMA in the context of its consultation, and very much appreciate the opportunity to comment on the proposed revisions to the Merger Assessment Guidelines.

Yours faithfully,

**Alexander Baker**

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<sup>16</sup> From Paragraph 124 onwards.

<sup>17</sup> CMA62