

CITY OF LONDON LAW SOCIETY

RESPONSE TO CMA'S CALL FOR EVIDENCE ON ITS APPROACH TO ASSESSING RIVALRY-ENHANCING EFFICIENCIES IN MERGERS

1. INTRODUCTION

- 1.1 The views set out in this response have been prepared by the Competition Law Committee of the City of London Law Society ("CLLS").
- 1.2 The CLLS represents approximately 21,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients, from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees.
- 1.1 The members of the Competition specialist committee can be found at the CLLS website: <https://clis.org/committees.html>.

2. EXECUTIVE SUMMARY

- 2.1 The CMA's core framework – requiring rivalry-enhancement, timeliness, likelihood and sufficiency, merger-specificity, and UK consumer benefit – is conceptually sound. In practice, however, the cumulative hurdles, asymmetry of evidentiary scepticism versus the treatment of harm, and unduly narrow focus on short-run price effects, have led to limited traction for efficiencies even where economic logic suggests material pro-competitive gains are plausible.
- 2.2 The framework should be retained but applied differently: integrate rivalry-enhancing efficiencies directly into the competitive assessment on a symmetric evidentiary standard; calibrate timeliness and sufficiency to the time horizon and uncertainty of the relevant theory of harm; re-ground merger-specificity in real-world transaction costs and contracting frictions; and operationalise pass-through analysis with transparent, proportionate methods. The CMA's 2025 Remedies Guidance, which contemplates remedies that "secure" efficiencies to address timeliness and likelihood concerns, is a constructive evolution and should be embedded more systematically.
- 2.3 Our key recommendations are as follows:
 - (a) Treat efficiencies and harms on the same standard of proof and matching time horizons.
 - (b) Accept a wider range of rivalry-enhancing mechanisms, including dynamic and quality innovation effects, with commensurate tolerance for uncertainty and lags.



- (c) Assess merger-specificity pragmatically by testing credible non-merger alternatives against documented contracting, governance, and execution risks.
- (d) Expand and clarify evidentiary expectations, including acceptance of finance-grade synergy analyses, engineering studies, and structured customer evidence to demonstrate pass-through.
- (e) Deliver 4P-consistent process reforms – early “efficiencies teach-ins,” a named efficiencies lead on the case team, phased submissions, and template-driven, proportionate requests – to improve pace, predictability, proportionality, and process.

3. THEME 1(a): THE CMA’S FRAMEWORK FOR ASSESSING EFFICIENCIES

- (1) **Is the CMA’s current framework of requiring efficiencies to be rivalry-enhancing, timely, likely and sufficient, merger-specific, and benefit UK customers appropriate? If not, please explain why and how the CMA’s framework should change.**

3.1 The five-limb framework is appropriate in principle because it ties efficiencies to the CMA’s statutory SLC duty and keeps the analysis rooted in competitive outcomes for UK customers. The Merger Assessment Guidelines (**MAG**) also correctly emphasise that marginal cost reductions are more likely to produce immediate rivalry-enhancing effects than fixed cost savings, and they distinguish rivalry-enhancing efficiencies from relevant customer benefits.

3.2 However, practice shows a strong tilt against acceptance of efficiencies arguments. Across *CHC/Offshore Helicopter*, *TVS/3G*, *T&L Sugars/Tereos*, *NEC/SSS*, *FNZ/GBST*, *Lindab/HAS-Vent*, and *Illumina/PacBio*, the CMA either found that parties did not substantiate efficiencies with verifiable evidence or that any plausible efficiencies were not timely, likely, merger-specific, passed on, or sufficient to offset harm. Even in *Vodafone/CK Hutchison*, where the CMA accepted in principle that capacity-led rivalry-enhancing efficiencies could arise, it concluded they were unlikely to be fully delivered or sufficient without commitments.

3.3 In our view, three design choices have driven this skewed outcome.

- (a) First, the CMA frequently applies a higher standard of proof to efficiencies than to harm, especially in dynamic or innovation-driven settings, as illustrated in *Illumina/PacBio* where dynamic efficiencies claims were discounted for lack of “compelling” evidence about incentives, timing, and pass-through.
- (b) Second, timeliness and sufficiency are often assessed over a shorter horizon than the theory of harm, which biases the comparison.

- (c) Third, merger-specificity is approached as a search for any hypothetical less-restrictive alternative rather than a grounded assessment of whether alternatives are realistically capable of achieving similar outcomes given transaction costs and incomplete contracting.
- 3.4 We recommend the CMA keep the framework but change its application by integrating rivalry-enhancing efficiencies into the competitive assessment (if parties submit an efficiencies case), applying a symmetric standard of proof and matched time horizons; by adopting pragmatism on merger-specificity that accounts for documented execution and governance risks of alternatives; and by codifying evidentiary safe harbours for pass-through and dynamic benefits. The 2025 Remedies Guidance should be used proactively to secure efficiencies that are credible but uncertain in timing or implementation.
- (2) **Is the CMA taking an appropriate approach when assessing whether efficiencies are rivalry-enhancing, timely, likely and sufficient, merger-specific and benefit UK customers? For example:**
- (i) **What factors should the CMA consider when assessing the appropriate timeframe for efficiencies to be considered 'timely'?**
- 3.5 The MAGs state that efficiencies should be realised within the same timeframe as the CMA's analysis and that longer lags increase doubt. That link is right in principle but under-calibrated in practice.
- 3.6 In markets such as mobile networks, software platforms, or R&D-intensive sectors, rivalry-enhancing efficiencies often materialise over multi-year horizons through capacity build-outs, learning-curve effects, pipeline integration, and quality improvements.
- 3.7 In *Vodafone/CK Hutchison*, the CMA accepted that if the joint build plan were fully implemented, capacity would create incentives to offer better prices and quality over time, yet it gave limited credit ex ante to that trajectory. Similarly, *Illumina/PacBio* discounted accelerated innovation as too uncertain notwithstanding extensive industry evidence that innovation is non-linear and lumpy.
- 3.8 We recommend that the CMA explicitly ties the timeliness horizon for efficiencies to at least the theory of harm's horizon (but possibly also with some flexibility to allow efficiencies to be realised over a longer period than the theory of harm if there are good reasons to justify this in exceptional cases. Where the harm hypothesised unfolds over a multi-year period, equivalently paced efficiencies should be counted on a net present basis, with sensitivity checks. Where realisation risk exists but is reducible through observable milestones, the CMA should use the 2025 Remedies Guidance to secure the efficiencies, for example through enforceable investment, roll-out, interoperability, or

quality-of-service commitments that lock in timely delivery. This would translate the CMA's remedies policy into systematic practice.

(ii) In assessing sufficiency, how should the CMA balance competitive benefits and harms? In particular, how should the CMA balance competitive benefits and harms when they arise over different time periods or relate to different parameters of competition or groups of customers?

3.9 The current approach too often compares a stylised, near-term harm in price to uncertain, longer-horizon benefits in quality, range, or innovation, resulting in an apples-to-oranges discounting of efficiencies. Yet the MAGs contemplate quality and innovation as legitimate dimensions of rivalry, and the CMA's own case discussion recognises such mechanisms. *Illumina/PacBio* shows how focusing on immediate price without sufficiently crediting dynamic innovation rivalry can understate net consumer benefit. *Vodafone/CK Hutchison* likewise acknowledged capacity-driven quality rivalry but judged likely delivery insufficient; its remedies approach then secured part of the benefits.

3.10 We recommend that the CMA adopts an explicit net-effects framework within the competitive assessment. That framework would quantify and weigh benefits and harms over matched horizons and parameters, discounting for risk consistently across both sides. Where data allows, net present value comparisons of price, quality, and innovation effects, grounded in cost-to-serve, willingness-to-pay, and demand elasticity evidence, should be used. Where data does not allow robust quantification, a structured qualitative assessment should still integrate all parameters of competition and relevant customer groups, not default to near-term price alone. Relevant customer benefits should remain a separate legal category for remedies and exceptions to the duty to refer, but rivalry-enhancing efficiencies with quality or innovation impacts should be counted within the SLC assessment.

(iii) In considering merger specificity, how should the CMA assess whether there are less anticompetitive alternatives to the merger that could achieve the efficiencies in question?

3.11 The MAGs ask whether efficiencies could be achieved by other means, including contracts, licensing, or buying groups, but the MAGs are silent about the need for any evidence that such alternatives are realistic or likely etc absent the merger¹. In practice, this limb has too often required parties to negate any hypothetical alternative rather than demonstrate that the merger is the most credible and effective mechanism given

¹ This creates a tension because, whereas the parties are actively pursuing their merger, they might never pursue any, e.g. contract, licensing or buying group (regardless of the relevant barriers or incentives) that might achieve the same efficiencies – in which case only the merger will achieve the efficiencies.

transaction costs, incomplete contracts, incentive misalignment, and execution risk. *JD Sports/Footasylum* illustrates a highly demanding view of alternatives; *Illumina/PacBio* similarly discounted distribution and clinical scaling synergies on the basis that similar non-merger arrangements might be feasible.

- 3.12 We recommend re-grounding merger-specificity in modern organisational economics. Integration can reduce hold-up risk, align incentives where contracts are incomplete, and enable coordination that is prohibitively costly to replicate through arms-length deals – especially for complex, high-stakes, multi-year investments. RBB Economics' analysis of non-horizontal mergers explains why elimination of double marginalisation and other complementarities are intrinsic to vertical and conglomerate integrations; contractual two-part tariffs may be infeasible where prices are regulated, volumes are uncertain, or bilateral bargaining frictions persist. The CMA should explicitly invite parties to evidence the inferiority of alternatives through real-world attempts, board-level evaluations, and third-party corroboration of contracting frictions, rather than requiring categorical proof that no alternative exists.

(iv) How should the CMA assess the extent to which firms are likely to pass through the benefits of efficiencies to customers? In what circumstances is pass-through likely to occur?

- 3.13 The CMA has properly emphasised that marginal cost reductions are more likely to be passed on than fixed cost savings. Greater clarity is needed on how to evidence pass-through in real markets. In *CHC/Offshore Helicopter* and *TVS/3G*, the pass-through link was missing; in *T&L Sugars/Tereos* and *Lindab/HAS-Vent*, parties did not provide verifiable support for cost savings or pass-through claims; in *Vodafone/CK Hutchison*, the CMA accepted that added capacity would tend to be competed away over time, but questioned full implementation incentives.

- 3.14 Going forward, the CMA should set out transparent, proportionate approaches to pass-through. For price-cost claims, short-run pass-through can be supported by margin and elasticity evidence, procurement outcomes, and event studies of historical cost shocks. For quality and capacity claims, investment-to-incentive mapping should be tied to capacity utilisation modelling, competitive headroom, and customer choice drivers, supported by engineering and network planning evidence, as in *Vodafone/CK Hutchison*. Where pass-through depends on securing execution, “efficiencies-securing” commitments – investment milestones, coverage targets, API openness, or interoperability undertakings – should be used to bridge the gap between theory and delivery, consistent with the 2025 Remedies Guidance.

(3) Are there some transactions which due to their nature or the characteristics of products or markets, are more likely to create efficiencies (for example, whether a merger is horizontal or vertical)?



- 3.15 Certain transactions are intrinsically more likely to generate rivalry-enhancing efficiencies. Vertical and complementary-product integrations can eliminate double marginalisation, reduce transaction and coordination costs under incomplete contracts, and improve incentives to invest in quality, interoperability, and capacity.
- 3.16 Horizontal mergers may deliver material efficiencies where there are substantial economies of scale or scope in production, distribution, or R&D, particularly in high fixed-cost, learning-by-doing industries, or where combining complementary IP and talent pools accelerates innovation. *Vodafone/CK Hutchison* illustrates network capacity and quality efficiencies in a capital-intensive, scale-driven sector. *Microsoft/Activision* (ex-cloud) shows potential distribution and availability efficiencies when content and platforms are integrated and access is broadened through licensing and divestment structures. Conversely, in commodity distribution settings with limited economies of scale and low margins, as in *Lindab/HAS-Vent*, parties struggled to substantiate efficiencies likely to enhance rivalry.
- (4) Are there circumstances in which efficiencies arising from a merger could create competition concerns, and/or circumstances where such concerns are unlikely to arise?**
- 3.17 Stakeholders have flagged fears of “efficiency offences,” where efficiencies could strengthen the merged entity so much that rivals are weakened or markets tip. Such concerns are most plausible where there are strong network effects, high switching costs, or bottleneck control, and where efficiencies are not replicable and raise effective entry barriers.
- 3.18 *Illumina/PacBio* evidenced worries that integration would reorient innovation away from head-to-head rivalry and entrench IP positions, potentially reducing dynamic competition. Conversely, where markets are contestable, rivals can access inputs, switching costs are low, and efficiencies are principally marginal-cost reducing or quality-enhancing, concerns that efficiencies themselves harm competition are remote.
- 3.19 The CMA should clearly state that it will not treat making a firm a stronger competitor as a problem absent a coherent foreclosure or tipping theory supported by market features and evidence.

4. THEME 1(b): THE EVIDENCE BASE

- (1) What types and extent of evidence should the CMA consider when assessing potential rivalry-enhancing efficiencies? To what extent should this vary across different types of efficiencies?**
- 4.1 Experience shows parties often fail because evidence is late, thin, or not tied to incentives and pass-through. A clearer evidentiary roadmap would improve outcomes.



- 4.2 For price-cost efficiencies, the CMA should rely on finance-grade synergy books prepared for boards, cost-to-serve analyses, engineering and operations studies quantifying marginal cost changes, and benchmarking of realised synergies from analogous integrations.
- 4.3 For quality and capacity efficiencies, robust network or operations planning materials, learning-curve analyses, product roadmaps, and structured customer evidence linking quality to demand are critical.
- 4.4 For innovation efficiencies, credible R&D integration plans, pipeline mapping, resource reallocation evidence, patent and hiring trajectories, and case studies of prior innovation integrations are valuable.
- 4.5 The CMA should welcome independent expert reports from accountants, engineers, and sector specialists, with proportionate testing. This portfolio should be adapted to the efficiency type: quantitative emphasis where marginal costs and procurement data allow, and structured qualitative analysis where innovation and quality dominate.
- 4.6 Moreover, the CMA should not automatically dismiss efficiency assessments in the merging parties' internal documents as indicative evidence of expected efficiencies, given these often form the very basis of the parties' commercial decision to enter into a transaction and can incorporate analysis work conducted by third-party advisors.
 - (2) **What evidence should the CMA use to compare the likely magnitude of claimed efficiencies against the potential adverse effects on competition arising from a merger? What factors should determine the extent to which this assessment is quantitative or qualitative in nature?**
- 4.7 The CMA should adopt a net-effects approach that models the combined competitive impact, not a separate, after-the-fact assessment.
- 4.8 Where theories of harm and efficiencies are both quantifiable – for example, in homogeneous products with credible elasticity and margin data – quantification is appropriate.
- 4.9 Where innovation, quality, or capacity effects dominate and data are limited, structured qualitative assessment over matched horizons should be used, supplemented by scenario analysis and sensitivity checks. The CMA's approach in *Vodafone/CK Hutchison* – recognising capacity-driven rivalry while querying delivery incentives – points to a workable hybrid: assess the likely quantum, discount for risk, and then secure delivery through commitments where needed.
 - (3) **What types of relevant evidence are held by merging parties, and are there types of evidence they find more difficult to produce? What sources of evidence other than those held by merging parties should the CMA consider?**



4.10 Parties hold synergy models, board papers, integration blueprints, cost accounting, engineering assessments, customer-level sales and pricing data, and detailed R&D roadmaps. They may find it harder to provide credible, merger-specific pass-through estimates in fragmented or negotiated pricing markets, or to isolate marginal from fixed cost changes in legacy ERP systems.

4.11 The CMA should supplement party evidence with structured customer surveys on quality and choice drivers, competitor capacity and pricing data, tenders and procurement records, and independent expert opinions. In dynamic sectors, evidence from prior integrations and industry technical standards bodies can be probative. Confidentiality rings and data rooms should be used to enable the exchange of sensitive material without compromising process.

5. THEME 1(c): DYNAMIC EFFICIENCIES AND INNOVATION.

(1) In what circumstances can mergers positively impact the ability and incentives of the merged company to undertake R&D and/or innovate in the relevant products/markets?

5.1 Mergers can increase the ability and incentives to innovate by pooling complementary IP, know-how, and data; eliminating duplicative R&D; achieving scale economies that justify longer-horizon research; and solving coordination and hold-up problems that impede platform and interoperability investments.

5.2 The *Vodafone/CK Hutchison* case shows how scale and spectrum/site combination can enable higher quality, which itself feeds back into innovation incentives in retail and wholesale markets. *Microsoft/Activision* (ex-cloud) illustrates how integration can expand day-and-date availability in subscription models and support cloud gaming access through licensing, which can catalyse content and service innovation. These are precisely the kinds of dynamic gains the framework should accommodate, provided that incentives and likely pass-through are addressed and alternatives are credibly inferior.

(2) What evidence should the CMA consider when assessing whether a merger will likely increase R&D and/or innovation in the relevant products/markets?

5.3 Innovation claims should be tested against concrete R&D integration plans, pipeline maps showing complementary assets, budgeted resource shifts, time-to-market acceleration analyses, and evidence of de-risking critical path items through integration.

5.4 Patent analytics, hiring plans in key technical roles, and prior track records of post-merger commercialisation can help. Customer and developer ecosystem evidence – e.g., commitments to open APIs, interoperability roadmaps, and developer support investment – can link innovation to rivalry and pass-through. In *Illumina/PacBio*, parties asserted accelerated innovation but did not persuade the CMA on incentives, merger-specificity, or pass-through; more rigorous evidence of how integration would



reorient R&D toward head-to-head domains and how benefits would reach users could have strengthened the case.

(3) Are there circumstances in which mergers can foster innovation more broadly across a market or sector? Please provide evidence to support your answer.

5.5 Mergers can create sector-wide innovation spillovers by setting *de facto* standards, improving interoperability, and signalling credible, long-term investment in infrastructure that rivals match to keep up. In mobile, network investment and capacity upgrades tend to provoke competitive responses across operators and MVNOs, a dynamic the CMA partially credited in *Vodafone/CK Hutchison* before securing delivery via commitments. In gaming, Microsoft's cloud licensing coupled with a divestment of streaming rights aimed to broaden content availability and spur competition among cloud providers, with potential innovation benefits beyond the merged entity. Where integration improves the "platform" on which rivals also build – so long as access is not foreclosed – market-wide innovation can increase.

(4) To what extent, and how, should the CMA's approach differ between assessing static and dynamic efficiencies (e.g. with respect to the framework set out in paragraph 11 above)?

5.6 Static efficiencies in price and cost typically warrant short-horizon, more deterministic analysis with heavier quantitative emphasis. Dynamic efficiencies in innovation and quality require longer horizons, recognition of non-linearity, and tolerance for uncertainty commensurate with the CMA's own forward-looking harm analysis.

5.7 The evidentiary lens should shift toward incentives and capability to deliver, supported by milestones and remedies that secure promised benefits. The CMA should state that, where harms are inherently speculative, the acceptable degree of uncertainty for efficiencies will be aligned; and that when dynamic harms are posited over several years, dynamic benefits over the same horizon will be credited comparably.

(5) What are the challenges with assessing dynamic efficiencies as compared to static efficiencies? How can these challenges be overcome in practice?

5.8 Dynamic assessments confront uncertainty about technological trajectories, option value, and appropriation of benefits. These challenges can be managed through five techniques.

(a) First, match horizons and standards of proof across harms and benefits.

(b) Second, use scenario and milestone-based analysis to bracket plausible ranges and to identify leading indicators.



- (c) Third, lean on independent technical and financial expert evidence to validate feasibility and likely quantum.
- (d) Fourth, deploy “efficiencies-securing” remedies to address implementation risk, as the CMA’s 2025 Remedies Guidance contemplates and as applied in *Vodafone/CK Hutchison* to secure efficiency commitments.
- (e) Fifth, plan for ex-post monitoring tied to remedy milestones, allowing course corrections without reopening the full competitive assessment..

6. THEME 2: THE CMA’S EFFICIENCIES PROCESS

(1) How effectively does the CMA engage with merging parties on rivalry-enhancing efficiency claims? Are there any ways in which this could be improved?

6.1 Engagement has at times been hampered by late submissions and limited time for testing efficiencies, reducing the CMA’s ability to assign weight, as seen at Phase 1 in *Vodafone/CK Hutchison*.

6.2 Several Phase 2 decisions, including *NEC/SSS* and *Lindab/HAS-Vent*, reflect parties not offering robust efficiencies cases at all or not tying claims to rivalry and pass-through. The CMA’s Call for Evidence and its embrace of 4P principles open the door to a better process. We recommend early “efficiencies teach-ins” within weeks of case opening; a named efficiencies lead on the case team; iterative scoping notes that clarify the time horizon, evidentiary thresholds, and model specifications the CMA will apply; and proportionate, template-based information requests so parties can supply verifiable, testable analyses in time. Confidentiality rings and independent expert dialogues can speed testing without compromising process integrity.

(2) What barriers are there to merging parties making and substantiating rivalry enhancing efficiency claims through the different stages of a case? Are there practical steps the CMA could take to reduce or remove these barriers?

6.3 Barriers include fear that running an efficiencies case concedes an SLC; asymmetrical scepticism and a perceived higher evidentiary bar for efficiencies; compressed timelines that penalise complex modelling; and uncertainty about what evidence will be accepted.

6.4 The CMA can reduce these barriers by explicitly stating that efficiencies submissions do not imply concession on liability; by publishing worked examples and anonymised precedents of accepted analyses; by offering an efficiencies submission window and timetable aligned with the case plan; by welcoming finance-grade synergy and engineering analyses subject to proportionate validation; and by using the remedies toolkit to secure efficiencies where timeliness or likelihood is the only sticking point. Early clarity will encourage parties to invest in robust efficiencies cases.



(3) Are there any learnings which the CMA can take from how efficiencies are considered in other jurisdictions or by other regulatory bodies?

6.5 International practice can inform CMA refinements without compromising rigour. The European Commission applies three criteria similar to the CMA and accepts a range of efficiencies, including innovation and quality, where consumer detriment is avoided. EU guidance also articulates the benchmark that consumers should not be worse off in the affected markets, while recognising pro-competitive effects in related markets. The CMA can adopt clearer statements about accepting innovation and quality efficiencies and consider how out-of-market efficiencies might be weighed at the remedies stage where they are material to proportionality.

(4) Are there any other ways in which the CMA's approach to assessing rivalry enhancing efficiencies could be improved to embody the 4P principles of pace, predictability, proportionality and process?

6.6 The CMA should codify a front-loaded, transparent efficiencies process.

6.7 In the merger notice, move the question on merger-specific efficiencies earlier in the template structure to prompt more thoughtful engagement with efficiencies in the merger notice and signal their value in the merger process. At case opening (i.e. when the CMA is ready to publish a case-page on its website), publish an efficiencies scoping note that states the relevant theories of harm, time horizons, candidate rivalry-enhancing mechanisms the CMA is prepared to assess, and the evidentiary standards to be applied. Set a defined submission window, followed by a structured technical workshop to validate key assumptions and models. Offer template requests for pass-through evidence by market type – procurement versus retail; capacity-constrained versus unconstrained. Where credible efficiencies face timeliness or delivery risk, default to remedies that secure the benefits rather than discounting them entirely. And, at Phase 1, where late but credible submissions emerge, allow a short, targeted extension where proportionate, rather than pushing all credit to Phase 2.

6.8 These steps will speed review where possible, increase predictability through upfront clarity, keep burdens proportionate to claims, and improve process through constructive engagement.

Should you need any further information, please do not hesitate to contact Nicole Kar (nkar@paulweiss.com) or Kevin Hart (kevin.hart@clls.org) at the CLLS.

Nicole Kar
Chair, Competition Law Committee
City of London Law Society
www.clls.org