

The CMA's merger efficiencies review: call for evidence

Response by Freshfields LLP

26 February 2026

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1. Introduction

- 1.1 Freshfields (the **Firm**) welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**) call for evidence on its merger efficiencies review (the **Efficiencies Review**). This response is based on our significant experience in advising clients on CMA merger investigations, at both Phase 1 and Phase 2, as well as our experience of advising clients in cases involving efficiencies before other major competition regulators.
- 1.2 This response is submitted on behalf of the Firm and does not represent the views of any of the Firm's clients.

Theme 1: The CMA's analytical approach to rivalry-enhancing efficiencies

Theme 1(a): The CMA's framework for assessing rivalry-enhancing efficiencies

2. Theme 1(a): CMA Questions 1 and 2

Question 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.

Question 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?

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- 2.1 Efficiencies form an important part of the rationale for many transactions. The CMA acknowledges this reality in its Merger Assessment Guidelines (the **MAGs**),¹ pointing to cost savings, the elimination of double marginalisation through vertical integration, greater innovation or quality arising from the combination of unique assets, or better meeting customers' needs by enabling the integration or interoperability of complementary products, as examples of the types of efficiencies to which transactions can give rise.
- 2.2 Despite that, the CMA has only rarely acknowledged the existence of efficiencies or considered that efficiencies arising from a merger outweigh competition concerns. Ultimately, the key statutory question that the CMA is required to consider is whether a substantial lessening of competition arises as a result of a transaction. This requires a weighing of potential anti-competitive effects against the countervailing impact of merger efficiencies. In practice, while the CMA has broadened its approach to the assessment of anti-competitive effects in recent years (citing the flexible nature of the statutory test), there has been no equivalent recalibration of the assessment of merger efficiencies, which have come to be considered within a framework that is unduly rigid and formalistic. This has resulted

¹ Merger Assessment Guidelines (CMA129).

in the approach to the assessment of efficiencies being wholly out of balance with the assessment of potential anti-competitive effects (which is not in keeping with the purpose of the statutory test).

- 2.3 As a result, merger parties have been disincentivised to invest resources in developing evidence to support their efficiencies at a sufficiently early stage of the case for that evidence to be given material weight during the CMA's merger investigations. Over time, this has had a reinforcing effect by entrenching merger parties' perception that the CMA is unwilling to engage with efficiencies claims.
- 2.4 We therefore believe that the CMA should return to "first principles" and apply an approach to the assessment of efficiencies that mirrors its assessment of anti-competitive effects. In particular, this means that:
 - (a) The same approach should apply to the assessment of potential anti-competitive effects and rivalry-enhancing efficiencies (**REEs**) (e.g., in relation to the time period over which both sets of effects are assessed, as well as their likelihood and expected scale).
 - (b) In particular, the CMA should avoid formalistic rules that unduly limit the weight that should be given to evidence in relation to rivalry-enhancing efficiencies (e.g., by isolating and discounting individual items of evidence, rather than considering the totality of evidence, taking into account any limitations where appropriate, "in the round").
 - (c) The standard of assessment should be clear (with additional guidance on the CMA's intended approach likely to be particularly important given the absence of any detailed case law or case precedent in light of the CMA's approach to date).
- 2.5 To deliver a more predictable regulatory environment in the UK and in turn promote competition, spur innovation, investment, and productivity, the CMA should articulate a clear and practical standard for proving efficiencies, consistent with the statutory test, and subsequently adhere to that standard.
- 2.6 Within this context, in relation to each component of the CMA's efficiencies guidance, the CMA should take into account commercial realities across different industries and the practical limitations on certain types of evidence in developing a clear and implementable framework for assessing efficiencies and workable guidance for merger parties. In doing so, we encourage the CMA to consider the following:
 - (a) **Assessing future efficiencies over a two-year timeframe severely curtails the relevance and utility of the current framework for certain industries.** The CMA has traditionally applied a short timeframe of only two years to assess future efficiencies.² We recognise that this timeframe may be appropriate for assessing static cost savings, but it is fundamentally misaligned with the investment cycles of many sectors that are critical to UK growth such as life sciences, telecommunications, and energy. In infrastructure-heavy industries, the most significant dynamic

² MAGs, paragraph 8.33.

efficiencies legitimately require a longer time-horizon to materialise. A rigid adherence to a two-year period risks ignoring the most transformative benefits of certain transactions and creating a bias towards 'short-termism', which could inadvertently chill long-term capital investment in the UK's most critical growth sectors.

The CMA should therefore update its MAGs to clarify that "timely" will be assessed relative to the scale and nature of the claimed efficiencies (appropriately discounted for risk), including by reference to industry-specific innovation and investment cycles, or evidence provided by the merger parties demonstrating that by their nature the efficiencies will require more than two years to be realised. In doing so, we encourage the CMA to provide illustrative examples of how it might assess timeliness across different industries and clarify that efficiencies materialising over a longer horizon will be credited where supported by evidence such as approved investment plans, internal strategic documents, and financing arrangements.

By making such adaptations, the CMA would ensure methodological consistency with its approach to assessing potential anti-competitive effects and the relevant merger counterfactual. The CMA often looks beyond strict two-year time horizons when evaluating dynamic theories of harm or projecting future market developments absent the merger.

(b) **The CMA acknowledges that transactions can give rise to greater innovation and quality, but the extent to which non-price efficiencies are weighed in the CMA's balancing exercise is unclear.**

The CMA's current approach places a disproportionate evidentiary burden on merger parties to prove non-price efficiencies. In today's economy, innovation and quality are often the primary parameters of competition and the CMA's reluctance to accord them material weight absent precise quantification creates an imbalance in the merger review process. By over-indexing on price-based metrics in assessing efficiencies, the CMA risks missing the broader competitive picture where the primary risk to consumers is not a marginal price increase but a stagnation in product evolution or lower quality standards. The CMA has increasingly focused on non-price effects, including the loss of innovation and degradation of quality, when formulating theories of harm. A balanced approach, consistent with the statutory test, would therefore give equivalent consideration to non-price effects in assessing efficiencies.

The CMA should therefore clarify that qualitative evidence such as internal R&D roadmaps, past successful integration of IP, and strategic documents that demonstrate the complementary nature of the merging parties' assets, can be used to meet the CMA's "sufficiency" threshold. A refusal to weigh such evidence unless it can be converted into price-equivalent pass-through metrics risks a mechanistic assessment that ignores the factors that drive long-term efficiencies and customer benefits in innovation-led sectors. To this end, the MAGs should clarify that the CMA will accept reasonable, practical methodologies for assessing different kinds of non-price effects. Ultimately, as noted above, the CMA's only assessment should be whether

efficiencies are sufficient to offset potential anti-competitive effects, not whether efficiencies can be precisely quantified.

- (c) **Proving that efficiencies are merger-specific should not require merger parties to disprove the viability of every hypothetical counterfactual.** The “merger-specific” limb of the CMA’s test is often applied through the lens of hypothetical counterfactuals where the CMA asks whether merger parties could have achieved the same benefits through other contractual arrangements or a joint venture. While such alternatives may be theoretically possible, they often fail to account for commercial realities and misaligned incentives. In this respect the *Lear Report* highlighted a challenge that extends beyond digital markets: that any attempt to predict the precise outcome of complex commercial arrangements is necessarily a probabilistic exercise.³ It is therefore disproportionate to require merger parties to prove that a specific efficiency could not even theoretically be achieved via a loose contractual arrangement. This, in practice, creates an artificial theoretical hurdle which parties can rarely overcome in practical terms.

The CMA’s approach should therefore focus on assessing efficiencies against realistic alternatives that are commercially viable (on the balance of probabilities) and capable of delivering similar benefits in a comparable timeframe. The burden on merger parties should be to demonstrate why realistic alternatives are materially less effective, rather than the overly restrictive approach of requiring merger parties exhaustively to disprove every theoretical counterfactual. The CMA should also update its guidelines to acknowledge that commercially viable alternatives are particularly scarce in the context of capital-intensive, high-risk transactions, where investment might only be rational in circumstances where it enables the merger parties to internalise the benefits across a combined customer base.

- (d) **Dynamic efficiencies can shift competitive dynamics in ways that benefit customers beyond price reductions.** As noted above at paragraph 2.6(a), the CMA’s current approach to assessing efficiencies prioritises static, short-term price effects over long-term, transformative benefits that drive modern economic growth. This approach overlooks the fact that improvements in quality and innovation are themselves parameters that affect market-wide dynamics. This restrictive application of the current framework discourages merger parties from developing and submitting dynamic efficiencies claims.

The CMA should therefore adopt a more pragmatic and practical approach that recognises how dynamic efficiencies can structurally alter the competitive landscape. More specifically, the CMA should move beyond a price-centric view of pass-through and acknowledge that quality and innovation improvements are inherently rivalry-enhancing, creating natural incentives for firms to pass benefits to customers to gain market share. By codifying a clear framework for assessing dynamic pass-through that

³ Lear (2019), Ex-post Assessment of Merger Control Decisions in Digital Markets, Final Report for the Competition and Markets Authority, 9 May 2019.

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considers market structure, demand elasticity, and buyer power, the CMA would provide merger parties with a more predictable roadmap for their submissions, thereby aligning the efficiencies framework with the CMA's strategic objectives for growth and innovation.

- 2.7 In conclusion, to enhance the predictability and proportionality of the UK's regulatory environment, the CMA should more clearly articulate an achievable evidentiary standard that aligns with the legal standard of the balance of probabilities for proving anti-competitive effects, particularly insofar as it relates to dynamic and non-price efficiencies. The CMA's guidance should provide a pragmatic framework for merger parties to interpret timeliness, sufficiency, and merger-specificity in the specific context of their transactions, which will in turn encourage merger parties to invest in high-quality, early-stage submissions.

3. Theme 1(a): Question 3

Question 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)?

Freshfields response

- 3.1 Certain categories of transaction and market setting are, on economic grounds, more likely to generate REEs. Recognising these patterns explicitly in guidance and adopting a clear view on where efficiencies are most likely to arise would improve the predictability of the CMA's approach and enhance legal certainty, as well as support the broader objectives of fostering innovation and investment, while preserving a case-by-case assessment.
- 3.2 Different transaction structures can give rise to distinct but equally important types of efficiencies:
- (a) **Horizontal mergers:** In markets with significant fixed and common costs, horizontal combinations often yield sizeable static cost efficiencies through rationalisation and economies of scale. As the CMA's own decisions attest, such efficiencies can be cognisable and rivalry-enhancing where they reduce marginal or variable costs and underpin more aggressive pricing or higher output.
 - (b) **Vertical mergers:** Vertical integration can eliminate double marginalisation, improve coordination, and enhance incentives to invest throughout the supply chain. We consider that vertical mergers in many sectors should be treated as having a strong inherent potential for REEs, including improving resilience and supply chain security.
 - (c) **Mergers involving complementary assets or capabilities:** Transactions that combine complementary technologies, R&D capabilities, or distribution networks (for example, in digital, telecommunications, life sciences or energy sectors) are particularly conducive to dynamic efficiencies such as accelerated innovation, faster rollout of new infrastructure, improved interoperability or the realisation of a level of quality or type of product that could not be achieved by the merging parties

individually. We would encourage the CMA to highlight such settings as ones where it will actively consider well-substantiated dynamic efficiency claims.

- (d) **Market characteristics:** We agree that factors such as whether the industry is growing or mature, the importance of scale and scope, and the presence of substantial fixed and sunk costs, are all relevant factors that should be considered in the assessment of potential efficiencies claims.

3.3 We suggest the CMA signals that in these archetypal settings it is particularly open to properly evidenced efficiency submissions and will engage proactively with merger parties on the evidential requirements. This would support the CMA's stated objective of promoting investment, innovation and growth while maintaining robust scrutiny of potential competition concerns.

4. Theme 1(a): Question 4

Question 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?

Freshfields response

- 4.1 We recognise that there could be circumstances in which synergies associated with a merger give rise to competition concerns. However, this risk is most naturally framed within existing theories of harm, particularly vertical and conglomerate foreclosure (e.g., where a cross-selling synergy could be based on the foreclosure of the merged entity's rivals in one of the linked markets). It is important to avoid the perception that the mere fact that a merger makes the combined firm more efficient – and thus a stronger competitor – is itself problematic. A framework that casts suspicion on efficiencies risks deterring pro-competitive mergers and ultimately harms the consumers and the economy the CMA seeks to protect.
- 4.2 We suggest that the CMA's guidance sets out circumstances in which such concerns are less likely, for example where:
- (a) **Efficiencies are internal to the merged firm** (e.g. rationalisation of overlapping plants, integration of R&D teams, improved logistics) and do not depend on restricting rivals' access to key inputs or customers;
 - (b) **There are sufficient alternative routes for rivals** (other suppliers, platforms or distribution channels) such that the merged entity's efficiency gains merely intensify competition on the merits; and
 - (c) **The primary observable effect is enhanced rivalry** (lower prices, higher quality, more innovation), rather than the marginalisation or exit of rivals through exclusionary strategies.
- 4.3 Providing sufficient guidance and frequently updating that guidance will help merger parties understand when and how to frame their efficiency submissions without fear that they will be re-characterised as "efficiency offences". This would reduce the chilling effect that some stakeholders have reported and encourage more complete and candid efficiency submissions, which in turn will enable the CMA to reach more accurate and proportionate outcomes.

- 4.4 We further recommend that the CMA clarifies, in explicit terms, that it will not regard a merger as problematic merely because efficiencies place less efficient rivals under competitive pressure. A merger that makes the combined firm a more effective competitor — for example, by allowing it to offer a better product at a lower price — may place its rivals at a disadvantage. However, this outcome is the hallmark of “competition on the merits” and is the very essence of a dynamic competitive process. It is not, and should not be considered, a harm to competition. To treat such outcomes as such would be to protect competitors rather than competition, undermining consumer welfare and chilling incentives to innovate.
- 4.5 In its guidance, therefore, we would encourage the CMA’s focus to remain squarely on whether efficiencies are tied to conduct that harms the competitive process itself. The CMA’s assessment should focus exclusively on whether a merger facilitates genuine anticompetitive foreclosure or coordinated effects, not on whether a more efficient merged entity might outcompete its rivals.

Theme 1(b): The evidence base

5. Theme 1(b): Question 1

Question 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?

Freshfields response

- 5.1 The CMA should be open to considering a wide range of evidence when assessing REEs, and acknowledge that certain types of evidence may be more relevant for some types of efficiencies than others. The CMA’s guidance should not contain a presumption against certain types of evidence. When assessing evidence, rather than adopting an approach of binary decisions on individual items of evidence, the CMA should assess all of the evidence put forward “in the round” as it does for evidence of anti-competitive effects.
- 5.2 It would be helpful for the CMA’s guidance to provide concrete examples of the types of evidence that may be relevant in this assessment. These include:
- (a) Internal documents relating to the merging parties’ operations, including ordinary course business models and documents, and statements from management of the merging parties to the owners and financial markets about the expected efficiencies. While the CMA has often placed less weight on documents prepared while a merger was in contemplation, the content of these documents is ultimately governed by legal duties, such as directors’ duties (where misleading statements could give rise to significant risks, for example, in shareholder litigation), and should be given corresponding weight. There is no principled basis to disregard such evidence where it has been carefully prepared for senior management.
 - (b) Models relating to the merging parties’ operations in the ordinary course of business and relating to their merger plans. In engaging with analysis that involves economic modelling, the CMA should recognise that economic models are built on assumptions and can never be completely perfect.

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- (c) Implementation plans and governance, including project plans, budgets, KPIs, internal accountability structures, and risk assessments – these help substantiate that the merger parties have fully formed plans to deliver the efficiencies, and provide an indication as to the likelihood that the efficiencies will be delivered in the stated timeframe.
- (d) Operational and financial data, including historic cost and output data (e.g. plant, business unit or SKU-level), benchmarking exercises done across sites or countries, and data on prior integration projects. These are vital for validating static cost efficiencies.
- (e) Survey evidence demonstrating customer valuation of price and non-price factors.
- (f) Pre-merger external experts' studies on the type and size of efficiency gains, and on the extent to which competition is likely to be enhanced.
- (g) Quantitative analysis to assess the effects of the merger, the magnitude of synergies and efficiencies, and the impact on consumer welfare, and/or to illustrate the merger parties' commercial logic and incentives to deliver the efficiencies (i.e. analysis comparing the merger parties' gains and losses under their merger integration plan versus those in the absence of the merger).
- (h) Quantitative analysis (e.g. merger simulations) that consider the overall impact on consumer welfare and take into account both upward pricing pressure and efficiencies.
- (i) Historical data or examples of efficiencies being realised, such as from similar previous transactions, including from other jurisdictions. This type of evidence may be collected and submitted by the merger parties, or be available externally in the public domain.
- (j) Third-party and external evidence, including customer and supplier feedback, independent expert reports, industry benchmarks and academic studies – these can all help corroborate merger parties' claims, particularly regarding likely passthrough and innovation impacts.

6. Theme 1(b): Question 2

Question 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?

Freshfields response

- 6.1 The CMA's approach should be flexible and evidence-led, avoiding a "one-size-fits-all" requirement for quantification. CMA guidance can note when a quantitative or qualitative approach may be more likely to be used, but the evidence in each case will need to be considered in the round. In some cases (as with the analysis of incentives to foreclose), it may be appropriate to use both quantitative and qualitative approaches to carry out the overall balancing exercise.

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- 6.2 **Quantitative assessment:** Where both the competitive harm and the efficiencies lend themselves to reasonably robust quantification (such as in stable, data-rich markets), the CMA should use consistent quantitative frameworks for *both* harms and efficiencies. For example, if a merger simulation is used to model potential price increases, the same framework can be used to model the offsetting effects of cost efficiencies.
- 6.3 **Qualitative assessment:** In cases where efficiencies relate to innovation, R&D or long-term investment, precise quantification can be difficult. For example, efficiencies may arise in the form of non-price quality improvements, providing customers with better products or services that they value – an efficiencies assessment focused solely on costs/prices will fail to adequately assess the magnitude of these quality improvements. Quality improvement may be measurable quantitatively but not necessarily across the same metric as the competitive harm, which makes a purely quantitative comparison difficult. In such cases, the CMA should adopt a mixed quantitative/qualitative approach, that uses quantitative analysis where available (e.g. demonstrating the improved quality will be realised as capable of being measured), while also placing weight on qualitative evidence such as the credibility and robustness of the merger parties' internal documents, R&D or investment plans, previous track record, third-party evidence and sector-specific expert views.
- 6.4 When comparing the likely magnitude of claimed efficiencies against the potential adverse effects of a merger, the CMA should **adopt a consistent approach to assessing both potential adverse effects and claimed efficiencies.**
- 6.5 Adverse effects on competition and efficiencies can come in a variety of forms and different categories of adverse effects and efficiencies may not always be comparable. As noted above, the CMA should resist reducing the entire analysis down to a single-dimension metric such as costs/prices, and recognise that the assessment of the magnitude of adverse effects against efficiencies is going to be a multifaceted exercise.

7. Theme 1(b): Question 3

Question 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?

Freshfields response

- 7.1 While merging parties hold much of the most relevant evidence on potential REEs, they face practical constraints in producing certain types of material within the timeframes of CMA investigations. As such, we welcome the CMA's willingness to consider a broad range of sources of evidence, and later in this response set out some process points that would assist merging parties provide the evidence needed.
- 7.2 **Evidence held by merging parties:** Merging parties are typically the primary custodians of the data required to assess REEs - this includes data relating to the counterfactual to the merger (which helps demonstrate the magnitude of the efficiencies compared to the counterfactual). This internal evidence base includes:

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- (a) **Operational and financial data:** Granular data at the product, plant, or business-unit level, including cost and margin data. This is essential for validating static cost efficiencies, such as those arising from the consolidation of overlapping functions or facilities.
- (b) **Synergy models and integration plans:** Detailed models often developed for internal board approvals or external financial stakeholders as part of the deal-making process. These include project roadmaps, budgets, and KPIs that substantiate the merger parties' intent and capability to deliver claimed efficiencies. In certain mergers, the synergies and rivalry-enhancing efficiencies produced by the merger are a key part of the deal rationale, and the detailed modelling produced to assess these benefits should carry significant weight.
- (c) **R&D and investment documents:** Documents describing project roadmaps, resource allocation plans, and long-term forecasts.
- (d) **Internal strategy and board papers:** These may set out the merger parties' standalone strategy in the absence of the merger, as well as the overarching strategic rationale for the merger and describe how the parties expect efficiencies to translate into improved market performance.

7.3 **Evidence merger parties find difficult to produce:** While merger parties often hold significant financial and other management data, they often face difficulties in producing information: (i) within the CMA's stipulated timeframe; (ii) in the form required by the CMA (in light of the criteria that it is choosing to apply to assess efficiencies within a given case); or (iii) considered sufficiently robust to meet the CMA's currently high evidential bar. With regards to point (ii) the parties in the ordinary course of business will typically not consider efficiencies in a structured manner in line with the CMA's framework. This means that further sources of evidence, typically external evidence such as expert reports (see further paragraph 7.5(a) below), will inevitably be required to demonstrate REEs to the CMA's standard to bridge the gap between the contemporaneous evidence and that required by the CMA's framework. The CMA's approach should reflect and allow for these practical realities – both in terms of the limits of the merger parties' existing data and the need for external evidence to be prepared.

7.4 **Difficulties merger parties may encounter with data or document requests:** Merging parties often struggle to extract and reconcile data from **legacy or heterogeneous IT systems** within the timelines of a CMA investigation (particularly when such requests are likely to be additive to the significant amount of information that the CMA is already likely to require for the assessment of potential anti-competitive effects). This is particularly challenging when the CMA's requests go beyond standard management reporting formats, resulting in the need to reconcile data collected in different formats from different systems, or if data does not exist in the requested format.

- (a) **Metrics:** Each industry has its own standards and market practices for measuring costs, quality and other factors. Where merger parties are required to report using non-standard metrics, a conversion would be

required and this may not always be a straightforward exercise, potentially involving applying assumptions and further modelling.

- (b) **Evidence relating to merger-specificity:** While the merger parties' internal documents paint a realistic picture of the counterfactual where the parties do not merge, the parties may find it difficult to provide robust evidence for alternatives to the merger, such as a JV, strategic partnership, etc, especially where those alternatives were not previously explored as credible commercial options. The absence of detailed analysis of alternatives that merger parties did not consider credible options should not be used against merging parties.
- (c) **Dynamic efficiencies and uncertainty:** As set out above, producing quantified evidence for dynamic efficiencies (such as innovation, quality improvements, or long-term infrastructure investment) is inherently difficult because these outcomes are naturally uncertain.

7.5 **External sources of evidence to consider:** As mentioned above, external sources beyond the merger parties' own evidence can be useful and often necessary. Examples include:

- (a) **Expert reports:** e.g. providing further economic modelling.
- (b) **Customer and supplier input:** Structured questionnaires or surveys can test the plausibility of claimed efficiencies and the likelihood of pass-through to end-users.
- (c) **Sector-level data and benchmarks:** Utilising data from regulators (e.g., Ofcom in the telecommunications context), trade bodies, and independent analysts can provide an objective baseline for efficiency magnitudes in specific industries.
- (d) **Academic and policy research:** Empirical studies can provide a benchmark for typical efficiency gains in similar sectors.
- (e) **Parallel or analogous merger reviews in other jurisdictions:** Evidence from **parallel or analogous merger reviews** in other jurisdictions can provide valuable insights into how similar efficiencies have been assessed and realised in practice.

Theme 1(c): Dynamic efficiencies and innovation

8. Theme 1(c): Question 1

Question 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?

Freshfields response

8.1 Transactions can, in many circumstances, generate significant dynamic efficiencies by enhancing both the ability and the incentives of the merger firm to innovate and invest. While the CMA often focuses on the potential for mergers to reduce innovation by removing a competitor, it is equally important that the MAGs

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recognise the circumstances in which a transaction can act as a catalyst for R&D and innovation.

8.2 Positive impacts on innovation are most likely to materialise in the following circumstances:

- (a) **Integration of complementary assets:** Where merger parties possess complementary R&D assets, technologies, or technical capabilities, a merger can create a more effective innovation platform than either party could achieve independently. The combination of know-how, intellectual property, and human capital often allows for the cross-pollination of ideas, accelerating the development of new products or the evolution of existing technologies.
- (b) **Overcoming scale barriers:** Certain industries are characterised by high fixed and sunk R&D costs. In such industries, achieving a minimum efficient scale for meaningful innovation requires significant upfront investment. A merger can provide the necessary scale to sustain high-cost activities and therefore ensure that the merged entity has the resilience to maintain long-term R&D pipelines.
- (c) **Risk-sharing and product portfolio diversification:** Mergers enable more effective risk-sharing and resource allocation across a broader portfolio of products and R&D projects. By spreading the high risk of failure inherent in R&D across a wider asset base, the merged firm may have a greater incentive to fund innovation projects that would be too risky for a standalone firm to pursue.

8.3 To reflect these realities, we encourage the CMA to explicitly recognise in its guidance that mergers can legitimately enhance both the ability (through scale and resource pooling) and the incentive (through improved appropriability of returns) to innovate.

8.4 Such recognition would ensure the efficiencies framework is better aligned with the CMA's strategic objective of fostering dynamic, competitive markets that drive long-term investment and productivity.

9. Theme 1(c): Question 2

Question 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?

Freshfields response

9.1 As we note above, transactions frequently serve as a primary driver of dynamic efficiencies by enhancing both the ability and the incentive of the merged entity to accelerate innovation. While the CMA's assessment often prioritises the potential loss of innovation, this can overlook the broader pro-competitive reality that many R&D breakthroughs are contingent on the pooling of resources and the internalisation of incentives that only a merger can provide.

9.2 We recognise that dynamic efficiencies are inherently more challenging to evidence than static cost savings, but they are no less real in their impact on consumer

welfare. The CMA should therefore move away from an approach that is more rigid than the one it uses to assess competitive harm and ensure it grounds its assessment in a proportionate review of the types of documentation that businesses naturally produce prior to and during a transaction.

9.3 We therefore encourage the CMA to consider the following categories of evidence when assessing whether a merger will likely increase R&D or innovation:

- (a) **Internal R&D and strategic innovation plans:** In assessing potential efficiencies, the CMA should place the same weight on the parties' contemporaneous internal documents as it does in assessing potential competitive harm. The CMA should therefore look to project portfolios, R&D budgets, internal return-on-investment assessments, and capital allocation plans as evidence of how merger parties expect transactions to shift the focus, scale, or speed of innovation activity.
- (b) **The merger parties' innovation track record:** The CMA should consider a firm's ability to deliver on claimed efficiencies in the context of its historical performance in delivering innovation. Evidence of past successful product launches, R&D productivity, and the effective integration of past acquisitions should be viewed as credible indicators of future performance.
- (c) **Complementarity assessments:** The CMA should take into account any mapping of merger parties' respective technologies, IP portfolios, and specialised R&D. This evidence would demonstrate how the merger enables the parties to jointly overcome specific technical bottlenecks or undertake more ambitious innovation projects that neither firm has the requisite capabilities to pursue on a standalone basis.
- (d) **Third-party evidence:** Feedback from sophisticated customers who value innovation and product variety can provide an objective market-based perspective on the likely dynamic benefits of a transaction.

9.4 In summary, even if exact quantification of innovation benefits is not feasible at the time of the merger, the presence of strategic indicators should be taken into account and given appropriate weight against the CMA's "likely" and "sufficient" thresholds. A more pragmatic approach to evidence would encourage merger parties to engage with the CMA in a more meaningful way on efficiencies.

10. Theme 1(c): Question 3

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

Freshfields response

10.1 Beyond the direct synergies that are realised by the merged firm alone, transactions can act as a catalyst for sector-wide innovation. This occurs when the creation of a more efficient or technologically advanced competitor forces rivals to respond through increased investment and R&D. In particular, mergers can foster sectoral innovation in the following circumstances:

- (a) A transaction that combines a smaller, innovative player with the resources of a larger firm can lead to the creation of a more important competitor to entrenched incumbents, thereby prompting rivals to respond with increased investment in R&D and faster product development.
 - (b) A vibrant market for transactions also signals to smaller start-ups, particularly start-ups in the UK's tech and life sciences sectors, that there are viable exit opportunities. This is critical for incentivising entrepreneurs and finance providers to invest resources in high-risk, early-stage R&D.
- 10.2 CMA guidance should acknowledge that the creation of a more innovative competitor can prompt the merged entity's competitors to increase investment to levels higher than in the absence of a merger, and lead to a more innovative market. CMA guidance should recognise that such efficiencies may be difficult to quantify but that they will nonetheless be considered as REEs in the round.
- 10.3 It is vital that merger parties are able to better understand how the CMA weighs the positive externalities of a transaction against potential competitive concerns. A framework that acknowledges the innovation benefits that mergers can create would also better reflect the commercial reality of the UK's most dynamic sectors and the CMA's broader objective of fostering a high-growth, investment-led economy. We therefore encourage the CMA to set out illustrative scenarios where such sector-wide benefits might be considered and in turn adopt a balanced and forward-looking lens through which to evaluate transformative transactions.

11. Theme 1(c): Question 4

Question 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)?

Freshfields response

- 11.1 As noted in response to Theme 1, Question 1, we encourage the CMA to adopt a more flexible approach to assessing efficiencies to ensure that important dynamic efficiencies are better accounted for. A one-size-fits-all approach which prioritises cost savings risks a mechanistic assessment that fails to capture the primary drivers of consumer welfare in the modern economy. We therefore encourage the CMA to adapt its approach in the following key respects when assessing transactions which may lead to dynamic efficiencies:
- (a) **The CMA should appropriately calibrate the time-horizon on which it assesses efficiencies according to the specific circumstances of the transaction.** Specifically, the CMA should acknowledge that a standard two-year window is often fundamentally misaligned with the investment and R&D cycles of sectors such as life sciences, telecommunications, and energy. In these infrastructure-heavy or innovation-led industries, transformative efficiencies legitimately require a longer horizon to materialise. We encourage the CMA to adopt a more flexible approach to timeliness, where a longer period to realisation is considered in circumstances where efficiencies plans are supported by credible implementation plans or evidence of committed financing.

- (b) **The CMA should provide greater transparency as to the weight it will place on dynamic efficiencies that increase rivalry.** The CMA's guidance should move beyond a static focus on immediate price pass-through and recognise that dynamic efficiencies can fundamentally shift competitive dynamics. For example, a merger that enables a firm to challenge an incumbent through superior product quality or accelerated R&D acts as a powerful stimulus for sector-wide rivalry. The CMA should clarify that such effects are REEs to be considered as counteracting a substantial lessening of competition, even in the absence of quantifiable near-term price reductions, as they prevent stagnation and drive long-term sectoral productivity and growth.
- (c) **The CMA should explain what types of evidence it will take account of when assessing dynamic efficiencies.** To deliver a more predictable regime, the CMA should move away from requiring hypothetical or perfect quantitative data which is often unavailable for forward-looking innovation. Instead, the CMA should place greater weight on real-world indicators of strategic intent, such as R&D roadmaps, internal capital allocation priorities, and historical track records of successful technology integration. Providing illustrative examples of the qualitative evidence the CMA considers persuasive would significantly improve the predictability of the process and encourage merger parties to invest in high-quality efficiencies submissions at an earlier stage.

11.2 In summary, we urge the CMA to use this review to refine its guidance so that it accounts for the commercial realities of modern, innovation-led markets. By articulating an achievable standard for proving dynamic efficiencies the CMA can ensure its framework is better aligned with its own 4Ps agenda and the UK's strategic growth objectives.⁴

12. Theme 1(c): Question 5

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

Freshfields response

- 12.1 The primary challenge in assessing forward-looking dynamic efficiencies, similar to the challenge in assessing forward-looking anti-competitive harm, lies in their inherent uncertainty and longer time-horizons. While static efficiencies such as the elimination of double marginalisation or procurement synergies are typically quantifiable and occur shortly after closing, dynamic efficiencies involve shifts in innovation, quality, and infrastructure that evolve over years.
- 12.2 Crucially, the CMA's approach to assessing anti-competitive effects has evolved to accommodate exactly this type of uncertainty, yet the assessment of efficiencies has not kept pace. When evaluating the loss of dynamic competition, the CMA increasingly relies on qualitative and probabilistic evidence. For example, in

⁴ Department for Business and Trade, The Government's Strategic Steer to the Competition and Markets Authority (2024). See also Sarah Cardell, "Driving growth: how the CMA is rising to the challenge" (Speech, November 2024).

Meta/Giphy, the CMA found that the potential for Giphy’s nascent advertising product to compete – even if the product might ultimately fail – was sufficient to establish anti-competitive harm. The CMA rightly acknowledges that dynamic market evolution cannot be precisely quantified when assessing harm, yet it continues to apply a rigid and unbalanced approach when assessing dynamic efficiencies.

- 12.3 We identify three core challenges and propose practical ways for the CMA to overcome them:
- (a) Dynamic efficiencies are often qualitative and forward-looking, making them difficult to prove using the same econometric models applied to unit-cost savings. This creates an asymmetric burden where merger parties must provide data that verifies outcomes that are, by nature, probabilistic. The CMA should shift its approach of requiring precise quantification and placing more material weight on internal documents created in the ordinary course of business and in contemplation of transactions, such as R&D and innovation roadmaps and capital allocation frameworks.
 - (b) As noted, the CMA’s traditional two-year window is poorly suited for capital-intensive sectors such as life sciences, telecommunications, and energy where R&D cycles often span decades. The CMA should therefore acknowledge industry-specific aspects in its assessments that account for longer-term benefits.
 - (c) It is often much harder to prove that a dynamic efficiency will only arise as a result of a transaction, and conversely it is easier for the CMA to argue that merger parties could have innovated independently or via other forms of commercial cooperation. The CMA should only consider counterfactuals that are genuinely commercially viable. Overcoming this challenge requires the CMA to acknowledge that transactions often solve hold-up problems or misaligned incentives that other forms of commercial cooperation cannot.
- 12.4 To address these challenges, we encourage the CMA to move away from applying a default methodology to assessing efficiencies. By embedding greater flexibility into the MAGs, specifically by recognising that qualitative evidence can be sufficient and extending timeframes to assess efficiencies in transactions in innovation-heavy or infrastructure sectors, the CMA will move closer towards achieving its 4Ps-related objectives⁵ and ensuring that the UK’s merger control regime does not inadvertently stifle the innovation it seeks to protect.

Theme 2: The CMA’s process for assessing rivalry-enhancing efficiencies

13. Theme 2: Questions 1 & 2

Question 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?

⁵ CMA, Delivering the 4Ps under the digital markets competition regime (2025).

Question 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?

Freshfields response

- 13.1 Merging parties have historically faced high, sometimes insurmountable, barriers to making and substantiating rivalry-enhancing efficiency claims. At a high-level, overcoming these barriers requires the process to function as a collaborative engagement between the CMA, the merging parties, and any other relevant stakeholders, taking into account the relevant industry and products, and market practices.
- 13.2 To improve the clarity, timeliness and predictability of the process, we suggest the following improvements:
- (a) **More appropriate balancing:** Merging parties often face material barriers in how efficiency claims are weighed against potential theories of harm. Parts of merger parties' evidence may be used to identify and quantify potential adverse effects (often subject to a lower, probabilistic standard of proof), while the claimed efficiencies – particularly dynamic efficiencies – face a higher risk of being dismissed as uncertain and speculative due to their long-term and forward-looking nature. The CMA can address these barriers by rebalancing its approach and addressing the asymmetries identified earlier in this submission (see response above to Theme 1(c), Question 5).
 - (b) **Improved guidance:** There is currently a material gap in the CMA's guidance. The CMA can reduce uncertainty by publishing clearer guidance as to how efficiencies will be assessed, and updating that guidance frequently. Additional guidance could also include:
 - (i) **Providing a template information request for evidence:** It would be helpful for the CMA to publish a template information request for evidence typically required to support efficiencies claims. The request should set out the types of evidence required, the reporting format, expected levels of aggregation, etc. The CMA will continue to issue specific, tailored information requests on a case-by-case basis, but the published template will help inform the merger parties' approach to evidence collection while preparing for their initial engagement with the CMA, and help reduce delays to the CMA's inquiry resulting from difficulties in evidence collection.
 - (ii) **Providing anonymous case examples relating to evidence:** The CMA should consider publishing detailed guidance with anonymous case examples illustrating what evidence was accepted or rejected in the past cases.
 - (c) **Process improvements:**
 - (i) **Early signalling and proactive engagement:** The CMA should encourage merger parties to signal early on the likely importance of efficiencies to their case. This will help inform both the CMA case

team and the merging parties on their subsequent approach to conducting the case and resource allocation.

- (ii) **Provide more structured feedback on efficiency submissions:** The CMA should provide more structured feedback on the merger parties' efficiency submissions, including clear identification of evidential gaps assessed against the CMA's assessment criteria (i.e. rivalry-enhancing, timeliness, likelihood, sufficiency, and benefits to UK customers).
- (iii) **Establish early and constructive engagement on survey and simulation designs:** Where either the CMA or the merging parties intend to conduct customer surveys or merger simulations, the economist teams and legal advisers on both sides should establish contact early to discuss methodology, scope, and model calibration. This prevents wasted effort producing multiple models and reduces the tendency to find flaws in the opposing side's model.
- (iv) **Integrating rivalry-enhancing efficiencies into the remedies assessment:** While the merger parties' efficiencies claims are most relevant to the assessment of substantial lessening of competition, they often can be relevant to the CMA's consideration of remedies. For example, remedies may be designed specifically to make sure the merger parties' claimed efficiencies do materialise. Under the CMA's new Phase 2 process, engagement on remedies will begin much earlier on during the process than used to be the case, and it will be sensible for the CMA to start factoring in efficiencies as part of its engagement with the merging parties on remedies.
- (v) **Facilitate direct engagement with the Inquiry Group:** Where efficiencies are likely to be a key part of the merger parties' case, the CMA case team should facilitate the parties' direct engagement with the Inquiry Group at Phase 2, such as through teach-ins, standalone submissions and meetings.

13.3 We do not consider that these steps would compromise the CMA's independence or evidentiary rigor. Instead, they would improve the clarity, timeliness and predictability of the CMA's assessment of efficiencies, encouraging and helping merging parties to submit credible, high-quality efficiency submissions.

14. Theme 2: Question 3

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

Freshfields response

14.1 We consider that other jurisdictions and regulatory bodies provide helpful insights and learnings for the CMA on how it may consider efficiencies in the future. We set out below some examples:

- (a) **European Union:** The 2024 Draghi report on European competitiveness provides a strong policy signal in the EU context that merger control must

evolve to support industrial policy and technological sovereignty. The report calls for an “innovation defence”, and for greater weight to be given to scale, resilience and investments. Following the report, the European Commission launched a consultation in May 2025 to review its Merger Guidelines, with the explicit aim for “a positive impact on Europe’s competitiveness, innovation and productivity”.⁶ While the outcome of the consultation is pending, we consider a greater emphasis on investments, innovation, productivity and therefore a better assessment of dynamic efficiencies is highly relevant to the CMA’s assessment of efficiencies.

- (b) **United States:** The Department of Justice and the Federal Trade Commission’s 2023 Merger Guidelines⁷ contain an informative paragraph on econometric analysis and economic modelling, stating that “*When data is available, the Agencies recognize that the goal of economic modeling is **not to create a perfect representation of reality, but rather to inform an assessment of the likely change in firm incentives resulting from a merger***” (emphasis added). As discussed at paragraph 5.2(b) above, the CMA should likewise recognise that economic modelling requires assumptions and can never be completely perfect. As such, while it is important for the CMA to rigorously test any modelling presented to it, the CMA should avoid adopting an approach where its assessment is primarily driven by identifying flaws in the modelling technique and specification. Instead, it should test robustness, engage with the underlying economic principles that the models are constructed to convey, and weigh such evidence in the round with other evidence.
- (c) **International policy discussions:** The OECD has provided a consistent platform for benchmarking the treatment of efficiencies in merger control, with submissions made by member countries and stakeholders (such as Business at OECD)⁸ and the OECD’s own policy paper, which the CMA cites in its call for evidence.⁹ These discussions reveal a global tension between the desire to encourage pro-competitive efficiencies and the practical difficulties involved in their verification. We consider these submissions to be highly informative and encourage the CMA to take them into account.
- (d) **Sector regulators in the UK:** UK sector regulators (e.g., Ofcom or Ofwat) have extensive experience in assessing long-term investment, innovation and consumer welfare trade-offs in specific sectors. In the case of Ofcom, well before the Vodafone-Three merger was announced, Ofcom noted in a February 2022 discussion paper that “*competition in the mobile market could be weakened if one or more of the mobile network operators did not have sufficient scale with the others[, which] could reduce the smaller MNO’s ability or incentive to invest in their network, and also reduce the*

⁶ European Commission, Merger guidelines review, [call for evidence](#).

⁷ Department of Justice and Federal Trade Commission, 2023 [Merger Guidelines](#).

⁸ See [contributions from participating delegations](#) to the Efficiencies in Merger Control: Best Practice Roundtables on Competition on 17 June 2025.

⁹ OECD, Efficiencies in merger control: OECD Roundtables on Competition Policy Papers, [No. 321](#), page 10.

competitive pressure on other MNOs to invest".¹⁰ This view effectively recognises that competition is not simply about the number of competitors in the market. Vodafone and Three's subsequent merger reflects the CMA and Ofcom's recognition in practice of this view and that rivalry-enhancing efficiencies could arise from consolidation. The CMA should continue its engagement with sector regulators and consider the approaches taken by sector regulators in circumstances where efficiencies are a material consideration.

15. Theme 2: Question 4

Question 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?

Freshfields response

15.1 We set out below the key steps we recommend to improve the CMA's approach to embody the 4P principles, many of which have already been discussed above:

- (a) **Pace and process.** The CMA should introduce a more constructive, engaged approach to efficiencies, with clear published guidance on evidence, early engagement with the merger parties on efficiencies, early identification of key efficiency issues, and structured feedback on the merger parties' efficiency submissions. This will help merging parties prepare the necessary evidence to assist the CMA's assessment in a timely manner and avoid delays due to difficulties with evidence collection, data not being in the required formats, etc.
- (b) **Predictability.** Detailed published guidance on the CMA's standard to be applied when assessing efficiencies, approach to efficiencies and expectations / requirements on evidence, will help improve the predictability of the CMA's efficiencies assessment. Such guidance should include examples of specific types of efficiencies and the types of evidence that may be most relevant.
- (c) **Proportionality.** When issuing information requests to the merger parties relating to evidence on claimed efficiencies, the CMA should take into account the materiality of efficiencies to the overall case, the sufficiency of evidence already available to the CMA, the timeframe available, the likely difficulties involved in responding to the information requests, and the likely probity of the information being requested.
 - (i) Case teams should refrain from issuing information requests for every evidentiary gap that they have identified, given that the resources required to respond to such requests can often be disproportionate to the evidentiary value of the information collected

¹⁰ Ofcom, [Ofcom's future approach to mobile markets](#), as summarised by the House of Commons Library, Debate on proposed merger between [Three UK and Vodafone: Debate Pack](#), 13 December 2023.

– not every piece of missing information is likely to be valuable information.

- (ii) In the case of section 109 requests, the CMA already issues a draft request ahead of the actual request, and provides opportunities for the merging parties to propose changes to the requests. The CMA should continue this approach.

* * *

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26 February 2026