Response to the CMA's Call for Evidence on its approach to assessing merger efficiencies

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Introduction and summary

We welcome the Competition and Markets Authority's (**"CMA"**) Call for Evidence regarding its approach to rivalry-enhancing efficiencies (**"REEs"**).

As a preliminary observation, approximately 3,000 mergers took place in the UK in 2025,[1] the vast majority of which did not involve competitive overlaps between the merging parties. As such, one can presume that most mergers are entered into on the belief that they will create value through efficiencies and/or synergies rather than through the accumulation of market power.

REEs are, however, rarely discussed in CMA merger decisions, even in Phase II decisions. For example, of the 46 Phase II merger decisions since 2019 (29 of which found a Substantial Lessening of Competition (**"SLC"**)), only seven discussed REEs in detail[2] and REEs formed part of a conditional clearance in only one.[3] This incidence appears low considering that 23 Phase II decisions suggested efficiencies were part of the merger rationale, and in light of the broader economic importance of efficiencies in merger assessment. This suggests there is scope for refining the CMA's analytical and evidentiary approach.

This submission proposes suggestions for recalibrating the CMA's approach to REEs in a manner that could encourage more meaningful engagement by the merging parties. We propose that: REEs and competitive harm should be assessed simultaneously; there should be consistency in the assessment of harm, efficiencies and the counterfactual; the evidentiary standard should be realistic; and dynamic efficiencies and innovation effects should be considered as REEs.

REEs and competitive harm should be assessed simultaneously

We agree that rivalry-enhancing efficiencies can be distinguished from relevant customer benefits (**"RCBs"**). The former are direct competitive effects of the merger in markets where the merger may cause an SLC;[4] the latter can also include direct competitive effects but arising outside of potential SLC markets, as well as additional benefits to consumers generated by the transaction.[5]

In particular, we welcome the CMA leaving the door open for considering efficiencies accruing in markets other than those directly affected by a potential SLC.[6] However, in practice RCBs are rarely given explicit weight in

[1] PwC, *UK M&A stabilises as AI-driven investment and large-scale infrastructure deals support activity*, 2025, available at https://www.pwc.co.uk/press-room/press-releases/research-commentary/2024/uk-m-a-stabilises-as-ai-driven-investment-and-large-scale-infras.html.

[2] Vodafone / CK Hutchison JV; Hitachi / Thales; Microsoft / Activision Blizzard; JD Sports Fashion / Footasylum; Sabre / Farelogix; Tobii AB / Smartbox Assistive Technology Limited and Sensory Software International Ltd; J Sainsbury PLC / Asda Group Ltd.

[3] Vodafone / CK Hutchison JV.

[4] Merger Assessment Guidelines (**"MAGs"**), para. 8.3.a explains that rivalry-enhancing efficiencies "change the incentives of the merger firms and induce them to act as stronger competitors to their rivals". On para 8.9, the MAGs clarify that "efficiencies need to enhance rivalry in a way that counteracts the effects on competition identified in the SLC assessment. Efficiencies due to the merger must be likely to strengthen the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers." In footnote 129 the MAGs further clarify that "Efficiencies do not only need to affect the market which is the subject to the CMA's SLC assessment. For example, R&D efficiencies may affect multiple markets." The MAGs refer to marginal cost or variable cost reductions as examples (paras 8.3 and 8.9) but also some fixed cost savings: "Some fixed cost savings or other efficiencies from a merger may enhance the ability of firms profitably to innovate or invest in entry or expansion, although cost reductions from a reduction in output will not be considered as efficiencies" (MAGs, para 8.10); as well as improvements to product or service quality or innovation: "However, efficiencies are not restricted to price competition. It may be that some mergers result in efficiencies pertaining to (for example) product or service quality or innovation. For example, a merger might bring together complementary assets in research and development activities or otherwise reduce incremental costs in innovation." (MAGs, para 8.11).

[5] MAGs, para. 8.3.b explains that relevant customer benefits represent "Benefits to UK customers resulting from a merger, other than through improved competition in the market related to the SLC finding". The MAGs mention "greater levels of innovation resulting from the combination of unique assets of the merger firms applying to products other than those where the firms compete, or reduced carbon emissions (to the extent firms do not normally compete on sustainability)" as examples of RCBs.

[6] By contrast, the European Commission (EC) only considers efficiencies if they "benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur." (EC Merger Guidelines, para. 79, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)).

the CMA decisions. None of the 46 Phase II decisions since 2019 discussed RCBs, nor did RCBs influence the CMA's remedy design in any of the 29 Phase II decisions finding an SLC.[7]

As regards REEs, a neutral assessment of the competitive effects of a transaction should simultaneously assess the scope for harm and the scope for such efficiencies. The effect on competition of a merger is the net effect of the harm and the REEs. From an economic perspective, a lessening of competition occurs when the harm outweighs the efficiencies, not when harm has been assessed but efficiencies have not yet been taken into account.

- Assessing REEs and SLCs simultaneously minimises the risk of confirmation bias that may arise if one considers REEs in a second stage, only after finding an SLC.

- A simultaneous assessment facilitates a consistent approach to the collection, interpretation and weighing of evidence for harm and efficiencies, which is desirable in particular when assessing the likelihood of an SLC on the balance of probabilities (i.e. in Phase II).[8]

In practice, this means that the CMA would start collecting evidence of REEs from the start of its review process, actively encouraging further submissions on efficiencies. In Phase II in particular, this could involve RFIs that more systematically seek information relevant to efficiencies and merger benefits, alongside evidence relating to potential harm, from merging parties as well as customers and competitors. In our experience, many years of scepticism towards efficiencies makes parties reluctant to focus their efforts on REEs (or RCBs).[9]

A simultaneous assessment of REEs and SLCs is particularly important when both result from the same underlying incentive mechanism. For example, the elimination of double marginalisation (**"EDM"**)[10] in vertical or conglomerate mergers is a change in the parties' pricing incentives that arises as a direct result of the transaction. The same vertical/conglomerate relationship that is responsible for the potential incentive to foreclose rivals is also responsible for the potential incentive to reduce prices. The two effects should be assessed simultaneously rather than carving out EDM as a separate 'efficiency'.

Finally, in our view, theories of harm articulated as 'efficiency offences' are often imprecise and are unhelpful in that they discourage the parties from engaging in detailed discussions with the CMA on the expected efficiencies from the transaction.[11] We do not rule out that some transactions, in particular in those markets where network effects are prevalent, may increase barriers to entry and lead to entrenchment. However, these theories of harm need to be articulated precisely and carefully evidenced, with a high evidentiary bar given the benefits that they bring to customers.

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[7] It is possible that the merging parties did not deem it helpful to make any RCB submissions, or that the CMA dismissed their submissions without discussing their merits in the decision. Either way, this is evidence of limitations in the current system.

[8] The MAGs already allow for the simultaneous assessment of harm and REEs. They state that while "The CMA will generally first consider whether there is scope for an SLC and, if there is, it will consider rivalry-enhancing efficiency claims from the merger firms. In some cases, the CMA may consider efficiencies and the evidence for an SLC together". MAGs, para. 8.4.

[9] The decision record supports such reluctance: as explained above, of the seven Phase II decisions since 2019 which considered REEs in detail, in only one case did the REEs form part of a conditional clearance. In the other cases, the CMA found an SLC which resulted in a prohibition or divestment.

[10] The MAGs read: "In the case of vertical mergers, alternative means to achieve the reduction of double marginalisation include contractual agreement and non-merger expansion along the supply chain." (MAGs, para. 8.18). Efficiencies arising from the removal of double-marginalisation seem to be discounted on the ground that they might be attainable through contractual arrangements. We note that such arrangements (such as well calibrated two-part tariffs) are often impractical if at all possible to implement in practice. The CMA should have very strong evidence that the parties would have the ability and the incentive to enter into such arrangements absent the merger to discount these efficiencies (and the counterfactual should thus be one in which these arrangements take place, rather than the status quo).

[11] For example, the CMA pursued an efficiency offense theory of harm in BT Group/EE in relation to backhauling costs. The decision explains that "Merger-specific efficiencies are generally not viewed as a problem, as they lead to lower prices to final customers. They might give rise to competition issues only if the price reductions, while beneficial in the short term, have negative long-term effects by making rivals unable to compete and driving them out of the market. This is the possibility that we will consider in this section." (para 16.202). The Provisional Findings defined this theory of harm as an "efficiency offence" (para 16.177).

There should be consistency in the assessment of efficiencies, harm, and the counterfactual

We consider that the framework for assessing efficiencies – timely, likely, sufficient, benefitting UK customers and merger specific[12] – is sensible, so long as in practice the assessment is carried out in a way that is consistent with the assessment of harm and the counterfactual.

With respect to **timeliness**:[13]

- If the requirement for timeliness raises doubts about efficiencies,[14] it should equally call into question the expectation of harm if it arises at the same time. In other words, efficiency benefits and harm to competition should be discounted over time equally.

- Focussing too much on the short-run can risk dismissing significant dynamic or innovation-driven efficiencies, which can benefit consumers but may arise over a longer time horizon. This approach would be at odds with the CMA's objective of promoting economic growth. In other words, the CMA should adopt a lower time discount rate (all else equal) to properly account for dynamic effects.

- In any event, a time delay between expected harm and expected efficiencies arising from a transaction would be temporary and could be addressed through behavioural remedies.[15]

With respect to **likelihood**:[16]

- To be taken into account, efficiencies should not need to be more likely than not to occur. The statutory test is whether there is a greater than 50% chance of an SLC after accounting for efficiencies. Efficiencies only need to be sufficiently material to offset the SLC and bring the overall SLC probability below 50%. As an example, if large enough, even a 30% chance of efficiencies materialising could reduce a 60% SLC risk to below 50%.[17]

- The likelihood of an efficiency should be examined in the context of its magnitude. Larger efficiencies may outweigh the SLC even if they do not arise in full. A higher degree of uncertainty can thus be tolerated when efficiencies are demonstrably large. For example, innovation efficiencies can be very large but are inherently more uncertain than variable cost reductions; even if innovation efficiencies arose only in part, they may be enough to outweigh an SLC.

- This would be consistent with how the CMA assesses harm (i.e. considering its magnitude as well as its likelihood).[18]

[12] MAGs, para. 8.8.
[13] MAGs, para. 8.12, states that "The CMA will assess whether the claimed efficiencies are to be realised (and the resultant rivalry-enhancing effects felt) within the same timeframe as the CMA has adopted in the rest of its analysis."
[14] MAGs, para. 8.12 states that efficiencies and evidence for an SLC need to be assessed on a similar timeframe. However, the same paragraph then caveats that efficiencies emerging later are subject to a greater level of doubt, leaving it unclear whether the same caveat applies to SLC evidence (as we believe it should): "However, usually the longer the time period necessary for efficiencies to be realised, the greater will be the level [of] doubt that efficiencies will be realised at all."
[15] We note that the CMA adopted this approach in the Vodafone/Three merger inquiry where it mitigated the short-term SLCs in the retail and wholesale market with time-limited behavioural remedies. See Vodafone / CK Hutchison JV Final Report, para. 2.
[16] MAGs, para. 8.3, requires that "The merger efficiencies must be likely to be realised. This means that the evidence supporting efficiencies needs to be verifiable. Merger firms may, for example, wish to submit evidence of efficiencies realised from previous mergers or mergers in analogous markets."
[17] If the SLC occurs with 60% probability and in 30% of these cases the efficiencies will neutralise it (assuming for simplicity SLC and efficiencies are independent), then there is a 40% chance of no SLC and an additional 18% chance that efficiencies will be sufficient to neutralise the SLC (=70%*30%), giving 58% chance of no SLC and 42% (i.e., less than 50%) chance of SLC once efficiencies have been accounted for.
[18] MAGs, para. 2.7 explains that "Some mergers will lessen competition but not substantially so", which reflects an assessment of the magnitude of competitive harm. In addition, paras. 2.33–2.36 explain that the CMA applies a 'realistic prospect' threshold at Phase 1 and a 'balance of probabilities' threshold at Phase 2, which reflects an assessment of the likelihood of an SLC.

With respect to **merger-specificity**:[19]

- This is clearly an essential criterion, however, it should be examined consistently with the no-merger counterfactual. If efficiency claims are disregarded on the grounds that they would be attainable absent the merger, there should be sufficient evidence to conclude that the counterfactual is one in which these efficiencies are realised.

- Absent such consistency, the competitive assessment risks overstating harm relative to the true counterfactual, which in turn may affect not only the magnitude of any SLC finding but, in some cases, the existence of an SLC or the scope of any required remedies.

- For example, if network efficiencies arising from telecoms mergers are given little weight because they are deemed attainable through network-sharing agreements, the counterfactual should be one in which there is a network-sharing agreement (rather than the status quo).

The evidentiary standard should be realistic

The evidence required for efficiencies should be consistent with the type of evidence that firms would routinely produce.

In our experience, the standard of evidence that the CMA expects from the parties has tended to be unrealistically high. Often it has required analysis not produced in the ordinary course of business (e.g. detailed quantification or modelling) or that is not capable of being produced by the merging parties pre-transaction (e.g. because of the limited extent of information sharing permitted or because the market is dynamic and the available data cannot accurately model efficiencies). At the same time, any analysis produced after the announcement of the merger has been discounted as tainted, drastically limiting the scope of evidence available to satisfy the CMA.

For example, in Vodafone/Three the parties submitted detailed business plans outlining their plans for a combined network rollout and submitted detailed modelling of their incentives, but the CMA deemed this evidence insufficient to meet the likelihood criterion.[20]

We believe the CMA's standard of evidence should reflect the type of evidence that companies which in good faith expect REEs to arise would generally produce in their course of business. One could look at the documents that were produced in previous transactions that did not involve competitive overlaps as a benchmark for what type of evidence to expect.

Dynamic efficiencies and innovation effects should be considered as REEs

We agree the economic literature finds that mergers can have both positive and negative effects on innovation.[21] In particular, a merger can reduce the parties' incentives to innovate as the combined entity internalises the impact of each party's innovation on the other party's sales.[22] It should not however be assumed that innovation will necessarily be lower post-merger. We outline below a (non-exhaustive) list of factors that can increase

[19] MAGs, para. 8.16, explains that "The CMA will assess whether the merger efficiencies are reliant on the merger in question or whether they would be brought about by other means. The CMA may, for example, investigate whether there are significant barriers to the merger firms achieving the same improvements without the merger."
[20] See Vodafone / CK Hutchison JV Final Report, para. 14.232.
[21] We focus on product innovation, rather than process innovation, and on the effects of horizontal mergers between established innovators i.e., firms with existing product portfolios that are conducting R&D to create other products, as opposed to nascent innovators without existing product portfolios (e.g., startups) or established players that are not conducting R&D to create new products. Vertical mergers may also impact innovation. Here we focus on horizontal mergers.
[22] And/or if it increases pre-innovation profits more than post-innovation profits.

innovation. We believe the CMA should consider them as REEs, and therefore examine them at the outset, as part of the SLC assessment.

First, mergers can increase the parties' **ability to innovate**. Mergers can remove roadblocks to innovation, for example, limited scale, financial constraints, or a lack of key assets such as technology, know-how, or IP rights.[23] These efficiencies are contemplated among REEs in the MAGs.[24] Increasing the parties' ability to innovate can lead to greater innovation even where their incentives to innovate decline.

To quantify the effect of a change in the ability to innovate, the CMA could examine the extent to which the parties' innovation activities are constrained pre-merger, for example by reviewing their financial positions and (previous and current) R&D project and development plans. The CMA should also assess whether the merger removes such barriers, including by granting access to patents, technology, or other critical resources.

Second, mergers can increase **incentives to innovate** and/or lead to **greater innovation** if:[25]

- The merger increases post-innovation profits more than pre-innovation profits, thereby increasing the incentive to innovate.

- The merger enables the parties to access each other's knowledge and innovation advances and to combine their lines of research into more effective and efficient ones, thereby increasing their chance of success and the speed of innovation.

- Innovations give rise to market expansions, i.e., increase market demand. Advances in areas like generative AI not only shift demand between suppliers but also increase total adoption. So, by innovating, a firm may not only increase its chance of stealing sales from others, but also increase the size of the pie. Market expansion increases post-innovation profits both with and without the merger. However, to the extent that sharing knowledge and innovation advances among the parties increases the probability of innovating, then the market expansion is greater with the merger.

- There were knowledge spillovers that dampened incentives to innovate pre-merger.[26] Firms may be unable to fully appropriate the results of their innovations if there are spillovers to competitors (e.g., if they can easily copy without legal repercussions). A merger internalises knowledge spillovers between the parties, thereby helping them capture more of the benefits of their R&D, which strengthens their incentives to innovate.

To assess the overall effect of a change in incentives to innovate, the CMA could rely on several pieces of evidence, including the number and track records of active innovators, the impact of each firm's past innovations on the other's sales and on growing the overall market size; how both the merging parties and competitors have responded to each other's innovations over time; the presence of knowledge spillovers; complementarities between the parties' innovation capabilities (e.g., complementary equipment, skills, or IP). Internal documents and data on pipeline products, as well as R&D investments, are crucial to gauge the magnitude and success prospect of innovation efforts. Both price and innovation diversion ratios[27] can also be informative of the effects of a merger.[28]

[23] It is also possible that a merger might reduce the ability for a firm to innovate in very specific circumstances, for example, if it exhausts the acquirer's financial resources at the expense of innovation.
[24] MAGs, para. 8.10-8.11.
[25] See also Gianmarco Calanchi and Josep Peya. "Mergers and Innovation, an Emerging Framework." *TL4 Competition Magazine,* Issue 11, 2025, pp. 49-51. Also available at https://econicpartners.com/newsroom/ideas/mergers-and-innovation-an-emerging-framework/.
[26] Ángel L. López and Xavier Vives. "Overlapping Ownership, R&D Spillovers, and Antitrust Policy." *Journal of Political Economy*, vol. 127, no. 5, 2019, pp. 2394-2437. See also, for example, An and Zhao, 2019, finding that learning through doing through knowledge spillovers were a plausible explanation for decreased costs following the Boeing-McDonnell Douglas merger.
[27] "The innovation diversion ratio to Firm A from Firm B is the fraction […] of the extra gross profits earned by Firm A when it devotes more resources to innovation that come at the expense of Firm B". Joseph Farrell and Carl Shapiro. "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition". *The B.E. Journal of Theoretical Economics, Policies and Perspectives*, vol. 10, issue 1, article 9, 2010, p.33.
[28] Bourreau et al., 2024 state the following: "the mere comparison of two diversion ratios [price and innovation diversion ratios] can help screen mergers in industries where innovation plays a key role. In particular, this comparison allows us to identify scenarios where the impact of the merger on prices (for given innovation levels) can inform about the impact of the merger on innovation"

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