Response to CMA merger efficiencies review: call for evidence

RBB Economics, 26 February 2026

1 Introduction and summary

Efficiency arguments have rarely proved decisive in CMA merger cases, and in the few cases where the CMA has accepted the presence of efficiencies, it has generally rejected estimates by the merging parties, instead replacing them with its own methodology.[1] In practice, this means that efficiency arguments made by merging parties have carried little weight, beyond supporting the case that deal rationale is not anti-competitive.

This review provides a welcome opportunity for the CMA to recalibrate its approach and give greater prominence, where appropriate, to efficiency arguments. In our view, the CMA's process for assessing efficiency arguments could be improved substantially by setting out guidance which establishes:

- **a wide-ranging description of the numerous efficiencies that may arise as a result of mergers** (with examples of how each of the various efficiencies could be established and how they may benefit consumers);
- **a more holistic approach to the assessment of efficiencies alongside potential anti-competitive effects**, accompanied by a discussion of how the CMA would weigh up offsetting effects in practice;

[1] e.g. *Sainsbury's/Asda*, *Vodafone/Three*.

- **a more realistic approach to merger-specificity**, i.e., one which states clearly that the CMA will not benchmark against speculative alternative routes to achieving the claimed efficiencies; and
- **a more balanced standard of proof**, which gives equal weight to inculpatory and exculpatory evidence.

We expand on these points in turn in the remainder of this submission, noting that our definition of "efficiency" encompasses what the economics literature would define to be a "synergy" (i.e., where the combination of complementary assets gives rise to greater productive capacity or enhanced scope to deliver consumer utility than either of the merging parties can achieve independently).

To be clear, we are not arguing that efficiencies should be presumed to arise. They must be assessed on a case-by-case basis and substantiated appropriately. Our main point is that the current merger control framework has tended to focus disproportionately on short-term price effects when assessing efficiencies.[2] This approach is ill-suited to capture the dynamic benefits (including generating competitive responses from rivals) that mergers can deliver, particularly in innovation- and/or capital-intensive industries. Merger control should explicitly recognise the value of longer-term consumer benefits, even where these are less certain than short-term effects. It should also pay greater attention to consumer benefits stemming from non-price parameters.

Finally, we note that many of the efficiencies arising from mergers, as well as being pro-competitive, may also be pro-growth. Indeed, this may be particularly the case for merger efficiencies that enhance investment and innovation. Such efficiencies are not simply a matter of marginal cost savings but may arise, *inter alia*, with mergers that drive investments in physical capital (e.g., in infrastructure or technology) or in human capital (e.g., through education or learning-by-doing) or which otherwise enable technological progress. A greater openness to considering these broader factors would therefore be well aligned with the CMA's strategy to pursue "*a clear end goal [for competition policy] – to drive economic growth and improve household prosperity*".[3]

2 Mergers can give rise to a broad range of rivalry-enhancing efficiencies well beyond those associated with marginal cost reductions

Mergers are an important part of the competitive process. *Inter alia*, they can (in some cases) provide the merged entity with an efficient means of:

- achieving scale economies on the supply-side that lead to marginal cost reductions that are passed-on, at least in part, through lower prices;
- permitting fixed cost reductions (either on a total or per unit basis) that lead to higher output;
- securing scale economies on the demand-side (i.e., network effects) that increase the quality of one or more of the merging parties' networks;
- accessing, building upon, and diffusing technological developments which benefit consumers directly via greater investment and innovation; and
- generating distribution and supply chain efficiencies, greater resilience and more effective responses to industry shocks.[4]

[2] *Vodafone/Three* is a notable exception that we discuss further below.
[3] CMA Strategy 2026 to 2029: Promoting Competition and Protecting Consumers to Drive Growth and Improve Household Prosperity.
[4] A merger may also change firm strategy and/or replace inefficient management with those more focused on delivering any of the efficiencies described above.

Each of the above types of efficiency can be rivalry enhancing. As the list above makes clear, the potential benefits of mergers are broad.[5] They reach far beyond marginal cost reductions on which efficiency assessment in merger control (and the economics literature) has tended to focus.[6] Although it is appropriate that the merger assessment is concerned with efficiency benefits that are likely to be passed on to consumers, such benefits are not limited to reductions in marginal cost but include improvements in quality and innovation.

The following discussion provides examples of how each of the above efficiencies can arise to enhance rivalry to the benefit of consumers.[7]

2.1 Achieving supply-side scale economies that lead to lower marginal costs or output-enhancing fixed cost reductions

Mergers that increase scale or scope (henceforth referred to as "scale" for convenience[8]) may give rise to efficiencies in many ways on the supply-side, with the potential to benefit consumers. These include reductions in (i) marginal costs and (ii) fixed costs/average costs – each of which can, under the right circumstances, benefit consumers.

2.1.1 Marginal cost reductions

A merger may lead to marginal cost savings in a number of ways. For example:

- **Production efficiencies.** In some cases, a merger permits the same outputs to be produced at lower unit cost via: (i) specialisation in production (e.g., devoting specific lines or factories to a single product when, pre-merger, this would not possible) or other economies of scale; (ii) easing capacity constraints; or (iii) enabling access to technological synergies.
- **Procurement unit cost reductions.** A merged firm may achieve lower procurement costs as a result of: (i) greater negotiation strength;[9] (ii) aligning terms of supply for each purchased input with the lowest cost supplier; and (iii) generating distribution or production efficiencies for its suppliers which are shared, in part, with the merged entity in the form of a lower input price.
- **Lower cost of capital.** A larger firm may be deemed more resilient from the perspective of lenders (or may gain access to a broader pool of investors), in which case it may benefit from a lower cost of capital such that "marginal" investment projects that would otherwise have been shelved become profitable and so proceed, reducing marginal costs and/or producing other benefits.

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5 Whilst it is understandable that the relevant focus is on rivalry-enhancing efficiencies in the same market where potential competition concerns arise (in assessing whether a merger will give rise to an SLC), the CMA should not lose sight of the wider potential benefits of merger efficiencies. For instance, a merger that brings about enhanced innovation may result not only in benefits for customers in overlap markets (i.e., where both merging parties compete) but also spillover effects that ultimately benefit a wider set of consumers. Even if these benefits do not fall within the definition of rivalry-enhancing efficiencies under the current legal framework, they should still be assessed as relevant customer benefits (RCBs). While we focus on efficiencies, many of our comments equally relate to RCBs; and the same merger benefit can be an efficiency in one market and an RCB in another, if it serves two markets but only one has an SLC finding absent efficiencies.

6 For example, the literature on upwards price pressure (UPP) is based on comparing a cannibalisation cost caused by a horizontal merger which, all else equal, causes UPP, with merger-specific marginal cost savings that may offset this. See, for example, Farrell, J. & Shapiro, C. (2010). "Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition." *The B.E. Journal of Theoretical Economics*, Policies and Perspectives, 10(1), Article 9.

7 It has sometimes been suggested that merger efficiencies can be so great in the short term that they provide the merging parties with advantages that diminish competitive rivalry in the long term. Broadly speaking, in such cases the concern is that the merged entity's offer becomes so attractive to customers as a result of the merger, that rivals lose scale and become weaker constraints on the merged firm over time. Eventually the weakening of competition dominates the efficiency gain, causing consumers to suffer in the long term. In our view, any consideration of "efficiency offence" theories of harm should include a weighing of effects, requiring compelling evidence that future harm is likely to more than offset the immediate efficiency gain.

8 Economies of scale reduce costs by increasing the production volume of a single product, while economies of scope reduce costs by producing a wider variety of related products using shared resources.

9 In general, strengthening buyer power will have pro-competitive consequences, outside some special cases where it may result in an exclusionary effect on actual or potential rivals. (See Chapter 12.4 of Parker & Majumdar: *UK Merger* Control (2nd ed., Bloomsbury, 2016), for example, for further appraisal of this issue, and footnote 7 above.)

The CMA recognises that reductions in the marginal cost of production are likely to be passed on to customers to some degree.[10] We agree with this point. We further note the existence of a broader range of output enhancing efficiencies, beyond marginal cost reductions, as we explain in the next subsections.[11]

2.1.2 Fixed cost reductions

Textbook economic theory indicates that reductions in fixed costs (either in absolute terms, or on a per unit basis, as a result of enhanced scale) are unlikely to be passed on in the form of lower prices. However, fixed cost reductions can be substantial and thus comprise a key part of the deal rationale. For example, a merger may permit the merging parties to remove fixed costs that would otherwise be duplicated (e.g., consolidating overlapping distribution networks, retiring redundant manufacturing capacity, or eliminating overheads relating to management, admin and regulatory compliance).

Moreover, in certain circumstances, such fixed cost savings can be likely to increase output or enhance investment in quality or innovation.[12]

- First, the distinction between cost savings that will affect pricing and those that will not is far more complex than a simple split between accounting costs that are fixed or variable. For example, firms may have to make transaction- or contract-specific fixed investments to serve a particular customer. In such cases, where a merger leads to a reduction in the customer-specific fixed costs, this amounts to a saving in the incremental costs (i.e., the additional costs required) to serve the customer, which is liable to be passed-on, at least in part.

- Second, fixed costs often feature in business decisions to invest, innovate, and enter or exit markets. Simply put, fixed costs can be a key determinant of market structure, which in turn can shape rivalry and determine competitive outcomes, including price effects. For example, suppose that a merger gives the new entity scope to build a new production plant at a lower capital cost than either party could have done beforehand.[13] Even though capital costs would typically be considered as "fixed" costs, the greater efficiency in this cost element could allow the post-merger firm to embark on investments in capacity and output expansion that would not otherwise have been viable. As such, these costs are "incremental" or "marginal" (i.e., output determinative) for the purposes of the assessment of the firms' pricing and output decisions.[14]

- Third, in an industry where margins are low, access to a larger user base may be critical to permit the recovery of a given investment. We provide an example in section 2.3 below in relation to innovation.

- Fourth, fixed cost savings can also be a route to (directly) improving non-price competitive parameters, such as quality and innovation.[15] For example, where a firm faces capital constraints, fixed cost savings may free up lower-priced funds that are likely to be deployed by the merged entity to compete in terms of better quality or greater investments in new products. While such a claim would need to be well substantiated (e.g., by documentary evidence plus a track record of having behaved this way[16]), if it

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10 CMA *Merger Assessment Guidelines* 2021, CMA 129 ("MAGs"), para. 8.10.

11 The CMA recognises that: "*[e]xamples of efficiencies might include 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.*" MAGs, para. 8.2. We note, however, that in its 2021 MAGs, the CMA devotes substantially less space to setting out types of pro-competitive efficiencies compared to its 2010 MAGs. As noted above, in our view the CMA should provide updated guidance which includes a much wider-ranging description of the numerous efficiencies that may arise as a result of mergers.

12 The CMA acknowledges this. See, for example, MAGs, para. 8.10.

13 This may arise from improved technical knowledge or the possibility that new production plants do not need to replicate certain functions (e.g., admin or sales) that are provided elsewhere in the combined entity's production network.

14 See RBB Brief 41, "Do Efficiencies Ever Deliver? Lessons from the UPS/TNT Case", March 2013, available at: https://www.rbbecon.com/publication/article/do-efficiencies-ever-deliver-lessons-from-the-ups-tnt-case/.

15 As the CMA recognises. See, for example, MAGs, para. 8.11.

16 We emphasise the importance of evidence. In reality, firms determine their prices by considering a wide range of factors, and so do not necessarily set prices in line with textbook economic models. Thus, even if a textbook model suggests that prices are determined by short-run marginal cost, in practice, a firm may price to cover its per unit fixed costs such that fixed cost savings would be perceived by management to create room for a price reduction. Similarly, firms do not have infinite access to capital such that they can pursue all theoretically profitable investments; in reality, they prioritise and select accordingly. A merger may allow more investments to be delivered.

was, fixed cost savings would be expected to translate into consumer gains via higher quality or more innovative products.

2.2 Achieving demand-side scale economies that increase the quality of one or more networks

Mergers that increase scale on the demand-side may allow firms to generate stronger, beneficial network effects. Where network quality is positively associated with network size, for example, a merger that brings together two formerly incompatible networks may substantially enhance network quality for participants on each of the merging parties' networks. In this way, a merger of smaller firms may allow the merged entity to challenge the market leader more effectively due to its greater (post-merger) network quality.[17]

2.3 Accessing, building upon, and diffusing technological developments which benefit consumers directly via greater investment and innovation

Mergers may bring together complementary assets that would not otherwise have been available. For example, each merging party may gain access to the other's knowledge, processes, intellectual property, and/or technical expertise, not only allowing for more efficient production but also providing scope to use the other merging party's innovation as a stepping stone for further R&D ("spillover effects").

In such circumstances, incentives to invest and innovate by one party may be facilitated by the combined size of the merged entity *inter alia* because an investment that may not have been profitable if deployed among one Party's customer base may become profitable when rolled out to both merging parties' customer bases.[18] For example, as noted above, in an industry where margins are low, access to a larger user base may be critical to permit the recovery of a given investment. Relatedly, a merger may permit a given technology owned by one party to be adapted for, and rolled out quickly across, the network of the other. It may also offer firms access to assets and financial resources which they would otherwise struggle to obtain, helping to drive investment.[19]

The latter points are acknowledged in the EU Special Advisors' report on competition policy for the digital era, which notes that "*in many cases*" acquisitions in digital markets will be "*pro-competitive*", and that: "*[i]n the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them*".[20]

These greater investments or innovations may enhance rivalry with other players, leading to a competitive response that further benefits consumers. For example, as the CMA found in *Vodafone/Three*, increased investment in network quality may spur others to enhance their own investments to catch up with (or at least avoid falling far behind) the market leader in this respect.[21]

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17 See, for example, *Vodafone/Three*, where the CMA found a "Day One" efficiency from shared use of the merging parties' networks (see, for example, para. 14.237 of the Phase 2 final decision). As further examples, in *Post Office/Payzone*, the CMA found that bringing together two networks of bill payment systems terminals meant that "*the merged entity will likely be better placed to compete effectively against [the market leader] than either of the Parties are at present*" (para. 4 of the Phase 1 clearance decision); and in *DPG/Zoopla*, the OFT found that "*increased rivalry to [the Parties' much larger rival] Rightmove… would be enhanced primarily through network effects, a type of supply side efficiency*" (Phase 1 clearance decision, footnote 22).

18 Again, this was part of the efficiency finding in *Vodafone/Three*: bringing together both customer bases makes further investment in network quality profitable where previously it was not.

19 As explained by the OECD: "*In several countries, a fat tail of low-productivity firms – composed in large part of small firms – coexists with large firms that are highly productive and exposed to international competition. […] Moreover, large firms tend to adopt new technologies more readily than small firms, although this is not necessarily the case for new or younger firms. Large firms also have easier access to finance and to foreign markets*", OECD (2025), "OECD Compendium of Productivity Indicators 2025", Paris: OECD Publishing.

20 Crémer, J., de Montoye, Y.-A., and Schweitzer, H., *Competition Policy for the Digital Era*, European Commission, April 2019, p.111.

21 It found that investment arising from the merger, including the Network Commitment, "*would likely elicit a competitive response from BTEE and VMO2 … for example by way of further network investment, lower pricing or improved customer service*" (para. 84 of the Phase 2 final decision) and that ultimately "*significant improvements in the Merged Entity's coverage, reliability and capacity would have been delivered and we would also expect to see competitive responses from BTEE and VMO2*" (*ibid*, para. 93).

2.4 Distribution/supply chain efficiencies, greater resilience and more effective responses to industry shocks

Mergers may give rise to a number of distribution and supply-chain efficiencies. For example, vertical mergers may generate efficiencies that benefit consumers via:

- access to scarce inputs and the elimination of double marginalisation leading to lower input costs for the downstream party;[22]
- more aligned production processes (e.g., better coordination of orders and/or deliveries and more integrated logistic networks) leading to lower production costs for both merging parties; and
- reduced scope for *ex post* opportunism, avoiding "hold-up" problems that would otherwise deter investment.[23]

Horizontal mergers may also give rise to efficiencies of this nature. For example, they may give smaller players access to:

- efficient distribution networks that can help them scale and increase the availability of products; and
- large sales teams that have access to a broad network of potential customers, increasing their prospects of growth.

A related point is that mergers may provide the merging parties greater production resilience, including by permitting more rapid reactions to political shocks or changes in technology and consumer preferences. For example:

- An upstream party to a vertical merger may provide a critical back-up source of supply in cases where the downstream party's main sources of supply are subject to growing perceived risks arising from increasing barriers to trade, disruptions due to war, or climate change.
- A downstream party to a vertical merger may have better knowledge of consumer requirements. As such, integration with an upstream firm may give rise to better targeted investments to meet changing consumer demands in light of technological or cultural change.

3 A more holistic approach to assessing claimed efficiencies alongside theories of harm

Having addressed the many forms of efficiencies that mergers can bring about, we now turn to how these are evaluated as part of the competitive assessment. Our main point is that a holistic approach is required.

The ultimate question is whether the merger will bring about an SLC. One can think of two aspects to this, pulling in opposing directions: (i) the theory of harm (the mechanism by which rivalry may be lessened); and (ii) rivalry enhancing efficiencies (REEs) which – as the name suggests – increase competitive intensity. Historically, the CMA has focused on (i), with limited regard to (ii), partly because detailed efficiency arguments have not often been made by merging parties. Moreover, these two aspects are "*generally*" addressed sequentially.[24] However, they are often two sides of the same coin and so are better assessed together as an integral part of the competitive assessment, as the following examples explain.

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22 For example, in *T-Mobile NL/Tele2 NL*, the Commission accepted that the roaming fee that Tele2 NL paid to TMNL for providing access to the 2G and 3G network to its customer base would be internalised by the merged entity, comparable to a variable cost saving.

23 The hold-up problem arises where a sunk investment made by Party A is specific to the use of Party B, such that, once made, Party A's position is vulnerable to opportunism on the part of Party B. In circumstances where hold-up problems cannot be resolved by *ex ante* contracting, a merger may be the most efficient way to secure such investments.

24 "*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.

First, as regards innovation theories of harm, economics does not support separating the analysis of innovation incentives into "harm" and "efficiencies". Cannibalisation and appropriability are notably two sides of the same innovation incentive calculus: firms will evaluate both, and at the same time, when considering the expected profitability of an investment in R&D. Conceptually, they enter a single expected return expression for an R&D project:

Innovation return = success probability x (per-success payoff – internalised losses) – cost

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A merger affects multiple components of this calculus. For example, cannibalisation increases the internalised losses (i.e., more own-sales diversion once rivals become affiliates), while appropriability enhancing effects (like internalising spillover and knowledge sharing) can increase the probability of success and/or the payoff from success. An analytically sound assessment must therefore weigh these impacts together.[25]

Second, and relatedly, in some cases, the source of the concern is the source of the efficiency and so it makes analytical sense to consider REEs and the theory of harm at the same time.

For example, consider the case of a large firm with a broad, efficient distribution network buying a smaller rival which faces challenges in scaling its own distribution network. The potential rationale for the deal (and efficiency to be considered) is that the larger firm may be able to apply its distribution capabilities to grow the sales of its smaller rival. This may ultimately benefit customers by making the smaller firm's products available on a wider basis, enhancing choice. At the same time, however, a competition authority may want to test whether: (i) absent the merger, the smaller firm would have grown its distribution network in any event; or (ii) as a result of the merger, the larger firm would deny access to its distribution network to rivals of the smaller firm. In these cases, efficiencies and competition concerns may require the assessment of the same or similar evidence, such that it makes little sense to bifurcate the analysis or the assessment.[26]

Finally, we note that the CMA routinely examines a broad range of issues as part of its competitive effects assessment. As a matter of process, there should therefore be no difficulty assessing potential efficiencies early on in the process to gauge their scope to be rivalry enhancing. Moreover, if the CMA provides guidance that REEs will be considered early and seriously, merging parties will be more confident that providing evidence on efficiencies is worth the effort.[27]

4 A more realistic approach to merger-specificity

It is important that the CMA commits to a realistic approach to assessing merger-specificity, i.e., one which establishes clearly that the CMA will not benchmark against speculative non-merger alternative routes to achieving the claimed efficiencies (or a version of them). This is important because, at present, the MAGs state that the CMA will ask "*whether [the efficiencies] would be brought about by other means*" and "*may*" investigate whether there are significant barriers to the merging parties achieving the same improvements without the merger.[28] In our view, the latter investigation is a critical part of the efficiency assessment

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25 This view is echoed in academic literature. For example, Shapiro (2012) notes that the forces of cannibalisation and appropriability "*work in concert, weaving together and integrating the Arrow and Schumpeter perspectives*" (pp. 363-364). Similarly, Jullien & Lefouili (2018) consider that: "*the potential positive effects of a merger on innovation are not of a fundamentally different nature from its potential negative effects*" and "*there should not be a hierarchical bias towards the diversion/ cannibalization aspect when analyzing the effect of mergers on innovation*" (p. 27).

26 In a similar vein, a vertical merger may give rise to both pro- and anti-competitive incentives, namely (i) to supply the downstream firm on better terms (an efficiency) and (ii) to supply rivals on worse terms (potentially anti-competitive). It does not make economic sense to focus only on (ii). Rather (i) and (ii) are best assessed together.

27 To date, the CMA's statements about "*…the difficulty involved in accepting prospectively that a merger is likely to lead to efficiencies*" (MAGs, para. 8.6) is an obvious deterrent to merging firms that might otherwise adduce detailed evidence on REEs.

28 MAGs, para. 8.16.

because it assists the CMA in establishing: (i) how realistically (if at all) other means can achieve similar efficiencies; and (ii) whether the efficiencies can be gained more quickly or with more certainty via a merger.

In this regard, we note the following. First, the theoretical possibility of gaining a similar efficiency absent the merger should not be deemed sufficient to find that a claimed efficiency is not merger-specific. It is notable that the MAGs state that: "*Examples of actions that may result in efficiencies without a merger might include a firm investing in innovation (eg by investing in staff or R&D capability), entering into a licensing agreement or using a buying group.*"[29] While such "actions" may be theoretically possible, unless internal documents show that they were considered as good alternatives to the merger, the CMA should investigate carefully why – if so achievable – the efficiencies in question have not already been realised. For example, it may be that certain investments have been considered but were rejected on the basis of too low an expected pre-merger return. However, with scope to roll the investment out over a broader customer base, the investment may be substantially more likely post-merger.

Second, alternative routes to securing efficiencies may be less effective than a merger. For example, knowledge spillovers plus the combination of complementary assets may mean that a merger enhances the speed, scale and/or quality of an investment relative to what would have taken place otherwise, generating REEs relative to the scenarios that would have materialised absent the merger.[30]

In summary, the merger-specificity test should carefully evaluate the likelihood of claimed efficiencies in the counterfactual. The CMA should not presume that alternative ways to achieve such efficiencies are realistically available simply because they are theoretically possible.[31] Requiring near certainty that efficiencies cannot be achieved by alternative means would set an unjustifiably high bar for crediting efficiency claims.

5 A more balanced approach to weighing inculpatory and exculpatory evidence

In our view, when it comes to the standard of proof, exculpatory evidence, such as that which speaks to REEs, should be afforded equal weight to that given to inculpatory evidence.[32] That is, even if the *burden* of proof lies with the merging parties to provide evidence on efficiencies, once adduced, that evidence should not be subject to a different *standard* of proof to that which supports the theory of harm.[33]

Put differently, an assessment of countervailing factors (not just REE but also evidence on entry and expansion) should avoid double standards. This point can be explained by reference to a hypothetical scenario of a "killer acquisition" theory of harm.

Suppose that Party A (the acquirer) seeks to merge with Party B (the target). The target does not currently compete with Party A but the CMA considers that there is a small probability (e.g., 20%) that such

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29 MAGs, para. 8.18.

30 We note the CMA statement that: "*For example, claims by merger firms that efficiencies will arise by one merger firm getting access to the cutting-edge technology or innovation of the other merger firm will not be accepted by the CMA if customers can get the benefit by switching to the other merger firm.*" MAGs, para. 8.19, emphasis added. However, this fails to recognise that by combining the technology of both firms, innovation may be enhanced over and above the level that would otherwise have arisen.

31 See Ignjatovic, B. & de Solà-Morales, J. (2023). "Efficiencies in Horizontal Mergers: The White Whale of EU Merger Control?", in "Research Handbook on Global Merger Control", Kokkoris, I. & Levy, N. (eds.), Northampton, MA: Edward Elgar Publishing, Chapter 8, pp. 190-215.

32 The same applies for countervailing evidence on entry and expansion. See, for example, section 3.2.3 of RBB's response to the EC's consultation on revised EU merger guidelines, available at https://www.rbbecon.com/publication/article/rbb-response-on-eu-merger-guidelines/.

33 It is reasonable for the CMA to place a large part of the burden of proof on the merging parties to substantiate efficiencies (given that much of the information needed for an REE assessment is likely only available to them and may be difficult to market test). That said, sometimes the CMA can access data that the merging parties cannot. For example, if the efficiency claims must be tested against the experience of others in the same industry (i.e., such that complementary evidence may come from competitors), then the CMA is best placed to obtain this information. In such cases, the CMA would presumably be alive to competitors' incentives when they provide relevant information.

competition would emerge in the future.[34] In this case, it seems wholly disproportionate to require exculpatory evidence on efficiencies to meet a far higher standard. Rather, the standard of proof should be aligned with that applied to the theory of harm.[35]

This balance should also be applied in relation to the evaluation of internal documents. For example, the CMA routinely reviews a broad range of documents within its initial analysis of deals. Where documents identify the merging parties as competitors, these frequently provide a key basis for concern. However, business plans which set out a pro-competitive rationale for transactions are often given less weight, despite being important documents.[36] For example, they may embody detailed analyses which directly feed into the decision to proceed or not with a merger. In many cases they explain to shareholders and investor groups why mergers will generate value and what the drivers of this value are (as well as justifying the prices offered for targets). These will often include carefully considered cost synergies and detailed plans for growing sales volumes post-merger.

In our view, the CMA should take these synergy estimates seriously. To be clear, this does not mean the analyses should be taken at face value. Neither does it mean that the CMA should avoid scrutinising the claimed efficiencies put forward by the merging parties. Rather, the logic underpinning deal rationale should be assessed by the CMA and (provided it stands up to reasonable economic scrutiny) should carry weight as part of the overall assessment.

[34] The CMA states, for example, that "*elimination of a dynamic competitor that is making efforts towards entry or expansion may lead to an SLC even where entry by that entrant is unlikely and may ultimately be unsuccessful*" (MAGs, para. 5.23).

[35] This hypothetical scenario provides another reason why efficiencies should be integrated within the competitive assessment as opposed to being considered as a second step. It is worth noting that in this example two types of efficiencies may arise. First, Party A may benefit from a technology spillover from Party B that permits Party A to operate more efficiently in the market in which the theory of harm would arise. Second, it may also be that Party A improves Party B's offer such that Party B becomes a more effective competitor in its current market. While that may technically amount to an RCB, it would nonetheless seem an important feature to weigh up as part of the overall assessment.

[36] Whilst such documents are, naturally, prepared with a merger in mind, they are often written within clear legal guardrails (notably, duties to shareholders for listed companies).