

CMA Merger Efficiencies Review: Call for Evidence

Linklaters Response

1 Intro and executive summary

- (1) Linklaters welcomes the opportunity to respond to the Competition and Markets Authority's (CMA) call for evidence on its approach to rivalry-enhancing efficiencies. The CMA's review presents an important opportunity to ensure the CMA's approach to assessing merger efficiencies supports innovation, growth and business confidence consistent with its '4Ps' framework.
- (2) In our experience, historical reticence on the part of the CMA to give material weight to efficiency arguments combined with the high evidentiary burden placed on merging parties, can often discourage parties from raising efficiency claims in the first place. But predicted merger benefits are often key to the rationale for a transaction, and mergers can generate significant efficiencies to the benefit of consumers. In our view, what is key to the CMA's assessment is that there is equivalence between the evidential standard applied to the CMA's theories of harm on the one hand, and the parties' efficiency claims on the other.
- (3) This is an area where greater clarity through CMA guidance and case studies would be welcome by merging parties and their advisors alike – both as to the CMA's approach to assessing merger efficiencies and the types of evidence the CMA is likely to view as persuasive.

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

2.1 Theme 1(a): The CMA's framework for assessing efficiencies

Q1. 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.

Q2. Is the CMA taking an appropriate approach when assessing whether efficiencies are rivalry-enhancing, timely, likely and sufficient, merger-specific and benefit UK customers? For example:

a. What factors should the CMA consider when assessing the appropriate timeframe for efficiencies to be considered 'timely'?

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

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

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

Q3. Are there some transactions which due to their nature or the characteristics of

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products or markets, are more likely to create efficiencies (for example, whether a merger is horizontal or vertical)?

Q4. Are there circumstances in which efficiencies arising from a merger could create competition concerns, and/or circumstances where such concerns are unlikely to arise?

- (4) We think the CMA's current framework for assessing rivalry-enhancing efficiencies remains appropriate, but greater flexibility and realism is required in how the CMA applies that framework, particularly when considering dynamic efficiencies. Historically, the CMA has been sceptical of efficiency claims, with a high evidentiary burden placed on merging parties. This has had a chilling effect on merging parties raising efficiency arguments, which has in turn led to a lack of guidance on when and how efficiency arguments might succeed. As a basic starting point, the standard for accepting efficiencies must be one that is capable of being met in more than exceptional circumstances.
- (5) Our perception is that assessing and quantifying efficiencies has often been viewed as too imprecise and uncertain to be tangibly accepted by competition authorities. The CMA's Merger Assessment Guidelines (**MAGs**) expressly refer to the difficulties in accepting prospectively that a merger is likely to lead to efficiencies.¹ In *Sainsbury's/Asda*, the CMA also described predicting synergies as 'necessarily uncertain' given the exercise is forward-looking in nature.² However, the same is true of predicting competitive harm. All merger assessments are prospective, and the CMA is therefore well placed to engage with efficiency arguments. The scales should not be weighed against merging parties; it is crucial that the same standard of proof is applied to both the CMA's assessment of competitive harm and the merging parties' efficiency claims.
- (6) In respect of the individual criteria applied by the CMA, we raise the following points:
- (a) **'Timely'**: What is 'timely' should be assessed on a case-by-case basis and determined by reference to all the relevant circumstances including the market and sector at issue, and type of efficiency claimed. We think the CMA should be open to accepting a longer-term view in appropriate cases, particularly for dynamic efficiencies which typically take longer to realise. As a result, we would encourage the CMA to move away from the rule of thumb in its MAGs that *'the longer the time period necessary for efficiencies to be realised, the greater will be the level doubt that efficiencies will be realised at all'*.³ Further, consistent with the MAGs⁴, we think the CMA should assess claimed efficiencies against at least the same timeframe as the CMA has adopted for the rest of its analysis, and the CMA should be open to considering longer timeframes on a case-by-case basis.
 - (b) **Sufficient**: We agree with the general principle that *'the greater the expected adverse effect of a merger, the greater the expected efficiencies must be'*⁵. However, the balancing of potential competitive harms and efficiencies need not be an exact science. In many cases, it should be clear where the

¹ MAGs, para 8.4, [Merger Assessment Guidelines \(CMA129\)](#).

² *Sainsbury's/Asda*, Final Report, para 16.179, [Anticipated merger between J Sainsbury PLC and Asda Group Ltd final report](#), in which the CMA considered efficiencies might lead to an incentive to reduce some grocery prices but not fuel prices.

³ MAGs, para 8.12.

⁴ MAGs, para 8.12.

⁵ MAGs, para 8.14.

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magnitude of one outweighs the other. We further agree with the CMA's comments in *Vodafone/Three* that it is not required to precisely quantify the extent of likely rivalry-enhancing efficiencies, nor likely anti-competitive effects, as part of that balancing exercise.⁶

- (c) **Merger specific:** In our experience, there has been a disconnect between the standard applied to the merging parties' efficiency claims and the CMA's identified less anticompetitive alternatives. It is imperative that any less anticompetitive alternatives presented by the CMA are grounded in the real world and are appropriately evidenced. Purely hypothetical alternatives (which would not arise in the counterfactual) are not appropriate and must not outweigh credible and substantiated efficiency claims.
 - (d) **Likely and benefitting UK consumers:** We acknowledge that it may be more challenging for the CMA to verify to a high degree of confidence that efficiencies will be fully realised and benefits passed on to consumers. It is entirely right that the CMA carefully assesses whether benefits will accrue to consumers. However, we invite the CMA to outline in revised guidance and case studies practical and proportionate approaches to evidencing pass-through. We also note that behavioural remedies can be used by the CMA in appropriate cases to 'lock-in' efficiencies, as seen in *Vodafone/Three*.
- (7) Alongside a more flexible and pragmatic application of the CMA's existing framework for assessing efficiencies, we propose the assessment is embedded in the overall competitive assessment as standard. We discuss this further in our responses to Theme 2 below.
- (8) Finally, we invite the CMA to adopt a holistic approach to assessing efficiencies including consideration of efficiencies outside the market(s) where potential competition concerns arise. While the MAGs provide that a 'rivalry enhancing efficiency' must counteract what would otherwise be an SLC finding,⁷ a 'relevant customer benefit' is defined in statute more broadly.⁸ A 'relevant customer benefit' can relate to any market in the UK, whether or not a potential SLC arises. The statutory definition also refers expressly to benefits in the form of lower prices, higher quality, greater choice or greater innovation. Given that efficiencies, including dynamic efficiencies, for example, efficiencies relating to R&D, may affect multiple markets, we encourage the CMA to make full use of the RCB framework to assess the 'net effect' of efficiency claims on overall consumer welfare in appropriate cases. We think this broader approach would support the CMA's policy objectives to boost innovation, investment and ultimately growth.

2.2 Theme 1(b): The evidence base

Q1. 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?

Q2. 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

⁶ Vodafone/Three Final Report, para 14.236, [Final report](#).

⁷ MAGs, para 8.9.

⁸ Section 30, Enterprise Act 2002.

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factors should determine the extent to which this assessment is quantitative or qualitative in nature?

Q3. 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?

- (9) The CMA recognises in its MAGs that evidence relating to efficiencies lies predominantly in the hands of the merging parties.⁹ At the same time, the CMA has expressed caution on relying on evidence from merging parties, noting the risk of self-serving or unduly optimistic claims.¹⁰ Taken together, this leaves merging parties in an unenviable position in terms of seeking to substantiate efficiency claims.
- (10) The CMA already considers the merging parties submissions, internal documents and third-party feedback when considering the materiality and likelihood of claimed efficiencies. As noted in our response to the Merger Remedies Review Call for Evidence¹¹, we think these are the right sources of evidence for the CMA to review. Within these broad categories, we note there is however a very vast range of potentially responsive evidence. We would caution against the CMA adopting an overly prescriptive approach to the types of evidence it will accept or the extent to which its assessment should be quantitative or qualitative. Instead, what is most probative in terms of evidence should be determined on a case-by-case basis and may depend on a number of factors including the specifics of the efficiency or efficiencies claimed, market (or broader sector) dynamics, and the available sources of evidence. As we note above, the weighing of evidence of a potential SLC against evidence of claimed efficiencies is not, or should not be, an exact science and so to this extent, the assessment may be both quantitative and qualitative.
- (11) In respect of the merging parties' documents, the CMA may consider both pre-merger internal documents – eg business plans or R&D roadmaps – as well as documents produced in contemplation of the merger – both internal documents and statements eg on identified synergies, proposed investments etc. We recognise that the CMA may be minded to give greater weight to pre-merger internal documents given they will not have been prepared in contemplation of the deal. However, we would caution against over reliance on pre-merger internal documents (to the exclusion of other sources of evidence) as, for example, they may be out of date or may not accurately reflect market conditions. They may also have been produced for a number of reasons and subject to varying degrees of internal or external scrutiny.
- (12) We also note that documents produced in contemplation of a transaction, for example synergies assessments, by their nature deal with merger-specific efficiencies. Merging parties frequently invest significant resources (often supported by external advisers) into the assessment of available synergies as part of their general diligence and valuation assessments at the outset of a transaction. These analyses are commonly an important input into preliminary analysis by investors or other stakeholders, as well as future business / integration plans and often form a core part of the transaction rationale.
- (13) However, there are good reasons why the full benefits the parties might believe could be derived from a combination may not be included in deal approvals or public announcements. Merging parties, particularly in respect of public M&A, are subject to stringent requirements

⁹ MAGs, para 8.7.

¹⁰ Sainsburys/Asda, para 16.179.

¹¹ [Linklaters_LLQ_response.pdf](#).

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on what can be included in deal approvals and communicated to shareholders and the public. Directors are subject to statutory duties to promote the success of their company and to exercise reasonable care, skill and diligence. The Listing Rules, applicable to UK listed companies undertaking significant transactions, and the UK Takeover Code, in respect of public M&A, impose additional requirements. For example, the Takeover Code requires that all statements including in respect of synergies must be prepared with the highest standards of care and accuracy. The parties' advisers may equally be subject to professional obligations and will cater for 'downside' and 'upside' scenarios with carefully calibrated assumptions and sensitivities.

- (14) The cumulative impact of the above is that expected efficiencies are typically communicated on a highly conservative basis. More speculative, but potentially significant, dynamic efficiencies eg combination of R&D or innovation capabilities, are often excluded entirely from such announcements. In light of this, we encourage the CMA to give the merging parties' synergy assessments – both those found in internal documents, and deal approval documents or announcements – considerably more weight than it does at present.
- (15) In addition to the merging parties' documents, the CMA should be receptive to, but carefully consider the appropriate weight to be accorded to, other potentially responsive evidence which may come from sources including:
- (a) Economic or industry expert reports;
 - (b) Competitor, customer or supplier feedback;
 - (c) Third party market studies or survey evidence;
 - (d) Relevant prior transactions for example expected and realised efficiencies in prior mergers in the same or related sectors;
 - (e) The merging parties' past conduct for example past mergers or R&D spend;
 - (f) Econometric models and quantitative analysis used to assess the merging parties' incentives or impact of the merger on eg price; and
 - (g) evidence from sector regulators or bodies (as the CMA has recognised previously in the context of hospital mergers¹² and more recently in respect of telecoms in *Vodafone/Three*).
- (16) We would also welcome greater recognition from the CMA that both the merging parties and the CMA are often required to deal with 'imperfect' evidence. Assessing and quantifying efficiencies is, as the CMA has recognised¹³ necessarily uncertain as it is forward looking in nature (the same is true of the CMA's task in determining the prospect of an SLC). Models and forecasts will themselves necessarily be underpinned by certain assumptions and subject to certain caveats. That does not mean that such evidence should be dismissed out of hand. Applying a 'default value of zero'¹⁴ to efficiency claims which the CMA considers are not sufficiently robust is not appropriate. Rather, the CMA is tasked with assessing the evidence before it and the CMA's conclusions on the robustness of that evidence can then be taken into account in the weight given to it.

¹² Central Manchester University Hospitals/University Hospital of South Manchester, [Central Manchester University Hospitals / University Hospital of South Manchester merger inquiry - GOV.UK](#).

¹³ Sainsbury's/Asda, para 16.179.

¹⁴ Referred to at para 16.179 of the Sainsbury's/Asda Final Report as the CMA's 'normal' response to evidence on rivalry enhancing efficiencies which are 'insufficiently robust'.

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2.3 Theme 1(c): Dynamic efficiencies and innovation

Q1. *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?*

Q2. *What evidence should the CMA consider when assessing whether a merger will likely increase R&D and/or innovation in the relevant products/markets?*

Q3. *Are there circumstances in which mergers can foster innovation more broadly across a market or sector? Please provide evidence to support your answer.*

Q4. *To what extent, and how, should the CMA's approach differ between assessing static and dynamic efficiencies (eg with respect to the framework set out in paragraph 11 above)?*

Q5. *What are the challenges with assessing dynamic efficiencies as compared to static efficiencies? How can these challenges be overcome in practice?*

- (17) While dynamic efficiencies are typically harder to evidence and may involve greater uncertainty, they also offer the greatest potential to foster innovation and longer-term growth. Greater openness on the part of the CMA to dynamic efficiency claims is, in our view, entirely consistent with the (self-described) fundamentals of the CMA's role – 'to promote dynamic markets, support productivity and innovation, and to protect consumer interests'.¹⁵ It is equally consistent with the Government's pro-growth strategic steer, in light of the recognition that innovation is key to sustainable growth.¹⁶
- (18) We encourage the CMA to adopt a more flexible approach to assessing dynamic efficiencies in markets characterised by dynamic competition and innovation, including technology and digital markets, healthcare and life sciences, and advanced manufacturing and industry.
- (19) In such innovation-driven markets, we expect a forward-looking assessment of dynamic and future competition (rather than a static, price-based assessment) will more often than not be required. Importantly, however, this forward-looking assessment applies to the assessment of competitive harm arising from the merger, the potential competition that may be exerted from third parties and that of any countervailing efficiency claims. As we emphasise elsewhere, there must be equivalence in the evidential bar applied.
- (20) This, may in turn, calls for greater flexibility and pragmatism in the CMA's approach. The CMA should attach greater weight to the potential benefits of innovation, even where its effects are inherently speculative or less capable of precise quantification. When balancing anticompetitive effects and countervailing efficiencies, where the potential for innovation is substantial and the predicted harm is limited, efficiencies claims should prevail.
- (21) The application of the "timely" criterion should also be adapted. As noted above, the presumption that efficiencies are less likely to materialise the further they are in the future is not appropriate for dynamic efficiencies, which often arise incrementally and over a longer timeframe.

¹⁵ CMA press release, [CMA's Annual Plan to drive growth by promoting competition, protecting consumers and enhancing business and investor confidence - GOV.UK](#), 27 March 2025.

¹⁶ See, for example, former CMA Chair, Marcus Bokkerink's comments in the press release accompanying the CMA's 2025/2026 draft Annual Plan 13 January 2025., 'Achieving productive and sustainable economic growth – the kind that fosters opportunity and prosperity for all – depends on ensuring that the benefits are broad-based, long-lasting, and tangibly felt by people and businesses across the UK. The formula for achieving this type of growth is well-known. Spurring and sustaining broad-based economic growth requires three things to work together – a step up in innovation, investment, and productivity.' [Growth, opportunity, and prosperity for the UK at the heart of the CMA's next Annual Plan - GOV.UK](#).

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- (22) We recognise the challenge for the CMA in assessing and verifying dynamic efficiency claims, given the greater potential for uncertainty and longer timescales involved. However, the CMA can, use behavioural remedies in appropriate cases to secure delivery of efficiencies. We have seen this most recently in *Vodafone/Three* where the CMA secured commitments both to remedy identified short term competitive harm (through its price cap) and 'lock-in' longer term dynamic efficiencies, (through its investment remedy).
- (23) In assessing dynamic efficiencies, for example quality or innovation, which are typically more difficult to quantify, we expect that the CMA is likely to need to rely more heavily on qualitative evidence. As we note above, we think the CMA should be open to considering a wide ranging of potentially probative qualitative and quantitative evidence.

3 Theme 2: the CMA's process for assessing rivalry-enhancing efficiencies

Q1. How effectively does the CMA engage with merging parties on rivalry-enhancing efficiency claims? Are there any ways in which this could be improved?

Q2. 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?

Q3. Are there any learnings which the CMA can take from how efficiencies are considered in other jurisdictions or by other regulatory bodies?

Q4. 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?

- (24) In our experience, the CMA's consideration of efficiency claims often comes late in its assessment, and its analysis of such claims is relatively cursory compared to its assessment of anticompetitive effects. The CMA's MAGs¹⁷ state that the CMA will generally first consider whether there is scope for a SLC and, if there is, will then consider any efficiency claims from the merging parties. However, the MAGs also recognise that the CMA may consider efficiencies and the evidence for an SLC together. As noted, we propose that the CMA considers any efficiency claims as part of its overall competitive assessment as standard. We think this approach would have the dual benefit of (i) avoiding the perception that efficiency claims are dealt with as an 'afterthought' by the CMA, and (ii) encouraging companies to raise credible efficiency claims early in the process, without the concern that this may be viewed as 'tacit acceptance' of anticompetitive harm.
- (25) More generally, we would invite the CMA to engage with merging parties on efficiency claims earlier in the process, including during pre-notification in appropriate cases. This could, for example, include greater openness from the CMA and more iterative discussion on its emerging thinking on its competitive assessment (including efficiencies) and what further the CMA may require from an evidential standpoint to substantiate efficiency claims. Relatedly and as discussed above, we would welcome more willingness on the part of the CMA to proactively engage on all possible sources of evidence that could go to supporting efficiency claims.
- (26) We think the above suggestions, clearly articulated in revised guidelines would go some way to encouraging and inviting merging parties to bring forward credible and well-substantiated

¹⁷ MAGs, para 8.4.

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efficiency claims, which where realised, have significant potential to drive innovation and growth.