

The Competition and Markets Authority  
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By email: [mergerefficienciesreview@cma.gov.uk](mailto:mergerefficienciesreview@cma.gov.uk)

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### **Re: UK Private Capital response to the CMA Call for Evidence on merger efficiencies**

UK Private Capital is the association of the UK private capital industry. We represent 600 firms including the wider ecosystem of professional advisers and investors. Private capital consists of private equity and venture capital which make long-term investments to grow British businesses and build a better economy. Private credit and venture debt provide active and engaged debt finance to businesses.

The private capital industry backs 13,000 UK businesses, nine in 10 of which are small or medium-sized enterprises. Businesses backed by the industry employ 2.5 million people across the UK and contribute 7% to GDP. In 2024, £29.4bn was invested by private capital into UK businesses in sectors across the UK economy, ranging from consumer products to emerging technology. This increased investment has fuelled the growth of businesses across the UK, with six in ten (58%) of the businesses backed in 2024, located outside of the capital. These investments are long term, with an average investment period of six years, in contrast to less than a year in public markets.

UK-based private capital specialists have raised £190bn of funds, known as dry powder, which is expected to be invested over the next three to five years. The industry invests for a better future by backing some of the UK's best loved businesses, developing the companies of the future and delivering solutions to global problems.

UK Private Capital welcomes the opportunity to respond to this Call for Evidence and appreciates the CMA's willingness to engage with the private capital industry. Recent engagement has been positive, allowing for direct dialogue, and fostering a more constructive relationship between the regulator and the industry. We encourage the CMA to continue this and are confident that future collaboration will help create stronger foundations for UK growth and investment.

UK Private Capital supports the direction of travel for the CMA as set out in this Call for Evidence. We are supportive of the CMA's stated commitment to the 4Ps framework, allowing businesses to thrive and innovate, and for the UK economy to grow productively and sustainably. Achieving these will require competition regulation that takes a common-sense approach, is applied consistently, and effectively balances growth with upholding world-class standards. Therefore, the way the CMA engages with parties on merger efficiencies must be flexible, proportionate and clear enough to allow the investment to be deployed. We think it is also important that the CMA considers the wider positive impact that private capital investment can have on UK businesses as it scales and grows them through mergers and acquisitions.

### **UK Private Capital views on merger efficiencies**

UK Private Capital welcomes the CMA's recognition that mergers can create efficiencies, including through cost savings or greater innovation, as outlined in the Merger Assessment

Guidelines (MAG). However, the MAGs also note that many efficiency claims are not accepted by the CMA because the evidence supporting those claims is difficult to verify and substantiate.

In our view, the evidentiary bar for merger efficiencies is too high and there is a lack of clarity on what counts as an efficiency. The CMA's experience to date – that it has been rare for a merger to be cleared on the basis of a rivalry-enhancing efficiencies – demonstrates that the threshold is excessively restrictive and leaves little scope for parties to demonstrate efficiencies in practice. We have been informed of cases where members didn't progress as they thought the CMA would not clear the merger (despite the efficiencies we forecasted) and because the CMA has no ability to discuss potential transactions with investors so the parties in question never got to disprove the assessment that the CMA would not consider or approve it.

Generally, a substantial amount of information is required for the CMA to recognise efficiencies, and the burden of proof is set very high. Our members have noted that when evidence of efficiencies is put forward in general terms in a Merger Notice, they have rarely influenced outcomes as the CMA is not receptive to them. This has the effect of discouraging merging parties from submitting evidence and explanations regarding efficiency claims because there is a general impression that they are not considered properly. The merger efficiencies regime is therefore not working as it should.

In our response to the merger remedies consultation, we noted that we think the CMA has a narrow interpretation of rivalry enhancing efficiencies, and urged the CMA to confirm that objective, verifiable evidence will meet the CMA's evidentiary threshold where quantification is impractical. This has not yet been confirmed. The CMA should assess information provided by the parties that supports any claimed rivalry enhancing efficiencies and consider whether on the balance of probabilities such efficiencies will be realised. It is important for the CMA to keep in mind potential commercial incentives that impact the evidence the CMA receives from third parties.

We think that the merger efficiencies regime should be applied pragmatically so that all types of efficiencies and objective evidence are considered with increased engagement with parties to support efficiency claims. This would help the merging parties to present the most relevant evidence and allow the CMA to thoroughly assess claims without incurring excessive time and resource implications. This would also improve predictability and reduce unnecessary Phase 2 escalation, and ensure the CMA's approach supports innovation and investment while safeguarding competition.

We have set out below our members' views on the sections included in the Call for Evidence. If you have any questions or would like to discuss any of the above in more detail, please do not hesitate to contact Ciaran Harris [charris@ukprivatecapital.co.uk](mailto:charris@ukprivatecapital.co.uk) or Tom Taylor [ttaylor@ukprivatecapital.co.uk](mailto:ttaylor@ukprivatecapital.co.uk).

Yours sincerely,



Clare Gaskell  
Chair, UK Private Capital Legal Committee

## Call for Evidence questions

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

#### A. The CMA's framework for assessing rivalry-enhancing 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.**

Our members are concerned that an overly restrictive approach to rivalry-enhancing efficiencies risks discouraging transactions which may have generated significant efficiencies. This risks running counter to the government's pro-growth agenda (and its strategic steer to the CMA). Furthermore, the incentive for investors to invest in innovative start-ups is diminished if there is a perception that merger regulation will prevent them from selling their interest to a benign purchaser. The test should be assessed on the balance of probabilities and the bar should not be set too high. As such, we consider that the evidential threshold for meeting the test should be re-evaluated. The requirement that the efficiencies are 'merger-specific' should be considered in light of the commercial reality – something may be possible, in theory, but it does not mean the parties or their shareholders would necessarily go down that route. Overall, we would welcome greater clarity on how the CMA assesses efficiencies and reassurance that an overly narrow interpretation of rivalry enhancing efficiencies will not be taken.

**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?**

The current framework has at times created the impression that the CMA places limited weight on efficiencies that materialise over a longer timeframe. Our members would welcome revised guidelines that provide greater flexibility in assessing the appropriate timeframe for efficiencies, and an acknowledgement that the appropriate timeframe can vary significantly across sectors. The CMA's recognition in its Vodafone/Three decision that a longer-term outlook is appropriate for the mobile network sector was therefore encouraging. The guidelines should reflect that it is possible to offset short-term harms in circumstances where, in the long-term, there are significant efficiencies and that, in some cases, behavioural remedies may be used to cover the short period before the longer-term efficiencies materialise.

Our members consider that the burden of proof is set very high and this leaves little scope for parties to demonstrate efficiencies in practice. Generally, a substantial amount of information is required for the CMA to recognise efficiencies. The CMA should be pragmatic and open to a wide-range of evidence including internal documents, business/investment plans and expert reports. This is of particular importance where the benefits relate to qualitative or innovative improvements rather than the more standard fixed or marginal cost efficiencies. The guidelines currently give very limited examples of the types of evidence that the CMA would be willing to consider (namely evidence of efficiencies released from previous mergers and mergers in analogous markets). These types of evidence can be particularly challenging to produce in fast-developing or novel sectors of the market. Our members often invest in cutting edge businesses in sectors such as artificial intelligence or who are enabling the green-transition, support novel tech-enabled businesses or help support the growth journey of businesses that have identified gaps in existing markets. In all these instances, it is clear that the type of evidence that the CMA

indicates it will consider is very unlikely to be available. We would encourage the CMA to be more willing to accept evidence of business and investment plans of the parties, the investment cases or decision-making materials of their investors and experts' reports. Given the key role that the assessment and verification of efficiencies often plays in the decision making of our members, we feel that these materials should form an important part of the CMA's considerations (where relevant). We would also encourage the CMA to use the same standard of proof for efficiencies as it does to show if there is a substantial lessening of competition (ie on the balance of probabilities).

We would encourage the CMA to recognise, when assessing whether efficiencies are merger-specific, that whilst an alternative solution might in theory be possible, the practical realities may be very different for legitimate business reasons of the parties, for example, a licence may not be viewed as a credible option for investors/shareholders.

In evaluating the benefit to consumers, it would be pragmatic and proportionate to evaluate the net benefit to all consumers over time rather than taking an overly formulaic approach – it does not make sense to risk losing efficiencies on the basis that a small set of customers would not benefit to the same degree. Such benefits to consumers should include benefits outside the market in which the substantial lessening of competition (SLC) is envisaged, benefits to the wider sector, further R&D and innovation as well as price related benefits.

**Q3. Are there some transactions which due to their nature or the characteristics of products or markets, are more likely to create efficiencies?**

Each transaction should be assessed on its particular facts regardless of its nature or product/market characteristics. If an agnostic approach is not taken, there is a risk that certain types of transactions are perceived as more problematic by default (which may not be the reality).

**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?**

The CMA should be more open-minded and prepared to consider all efficiencies raised by the parties in context. On that basis it is not desirable to single out specific types of efficiencies that are or are not likely to create competition concerns, as this is very much a context specific assessment.

## **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?**

The CMA should not be overly hasty at dismissing evidence provided by the parties in support of efficiency claims. The CMA should assess all information provided by the parties that supports any claimed rivalry-enhancing efficiencies, including internal analysis and expert reports produced in contemplation of the merger, and consider whether on the balance of probabilities such efficiencies will be realised. The CMA should be pragmatic in its assessment

of the evidence and not set the bar at an unattainable level due to the difficulties in verifying and quantifying future benefits.

It is important for the CMA to keep in mind potential commercial incentives that impact the evidence the CMA receives from third parties.

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

The types of evidence that the CMA should use to compare the likely magnitude of claimed efficiencies against the potential adverse effects on competition arising from a merger will very much depend on the nature of the CMA's concerns and the efficiencies in that specific transaction. However, we would encourage the CMA to be more willing to accept qualitative evidence in relation to innovative/dynamic markets even if the static harm is more readily assessable in quantitative terms. In such circumstances, we would also welcome a recognition from the CMA that a longer-term view may be needed to assess whether the magnitude of any efficiencies offset any adverse effects as innovative/dynamic efficiencies tend to lag behind any anti-competitive effects.

For example, in Amazon's acquisition of Kiva Systems in 2012, the withdrawal of Kiva's robots from the open market created an immediate, easily identifiable competitive harm for rival retailers who suddenly lost access to a key automation supplier. The efficiencies, major advances in warehouse automation, faster fulfilment, and lower long-run logistics costs, only emerged years later, after Amazon redesigned its fulfilment network around robotics. It is a clear case where short-term harm appeared first, while dynamic efficiencies lagged but ultimately proved substantial.

**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?**

Typically merging parties will have internal documents, economic reports and industry reports but this may vary from case to case. In certain sectors, the CMA may be able to obtain evidence or opinions from sectoral regulators.

### 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?**

Mergers can be expected to have a positive impact on the ability and incentives of the merged company to undertake R&D and/or innovate where the firm's costs are lower or where new R&D capabilities are acquired thus enabling better exploitation of the parties' respective IP rights and enabling the merged entity to sustain a broader and deeper pipeline (as this spreads the risk where there is a high failure rate such as in pharmaceuticals). Where the rivalry-enhancing efficiencies do not materialise in relation to the same products as the CMA's competition concerns but still nonetheless produce significant benefits for consumers and the public interest more generally, these efficiencies should still be taken into account.

**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?**

The CMA should be willing to consider a wide-range of evidence beyond the past behaviour of the parties and the products about which the CMA has competition concerns. Evidence from the parties and experts on wider R&D capabilities, assets and facilities should be considered.

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

There are situations where mergers can foster innovation more broadly across a market or sector. For example, in sectors where the outcome of R&D is highly uncertain and there is a significant failure rate, to compete effectively (particularly at a global level) it is often necessary to have significant scale, financial resources, research capabilities and/or intellectual property to have a broad and/or deep enough pipeline to generate significant innovative gains. If the CMA limits its analysis to the particular product overlaps, benefits that may emerge more broadly are potentially missed. This is particularly the case in relation to novel areas of scientific or technological development where it may be less certain what the ultimate end-use case of the technology or product may be.

**Q4. To what extent, and how, should the CMA's approach differ between assessing static and dynamic efficiencies?**

As they are by their very nature, forward looking, dynamic efficiencies tend to be much less readily verifiable and can be challenging to quantify (particularly given the often very significant countervailing benefits may take a material amount of time to materialise). As such, the CMA should be willing to consider a longer timeline in assessing dynamic efficiencies.

Further, even if the CMA can identify potentially less anti-competitive ways of achieving particular innovative outcomes (e.g., licensing particular IPR), the CMA should robustly test that such counterfactuals are viable in the context of the relevant markets and should also be willing to weigh such alternatives against any wider R&D gains that could flow from the transaction.

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

Dynamic efficiencies will typically involve different types of evidence than static efficiencies, and we would encourage the CMA to take a broad approach in this regard, which should however not be seen as challenging.

## **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?**

We have noted that when efficiencies are put forward, it has rarely influenced outcomes. This has the effect of discouraging merging parties from submitting evidence and explanations

regarding efficiency claims because there is a general impression that they are not considered properly. The merger efficiencies regime is therefore not working as it should.

Greater engagement with parties to supporting efficiency claims would help the merging parties to present the most relevant evidence and allow the CMA to thoroughly assess claims. This would improve predictability and reduce unnecessary Phase 2 escalation, and ensure the CMA's approach supports innovation and investment while safeguarding competition.

**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?**

Early and pragmatic engagement with the CMA team to explore efficiencies would be welcomed. This may require the CMA to have separate sub-teams to work on the different workstreams in parallel so that issues can be fully discussed and explored.

We would also welcome more guidance from the CMA as to what evidence it would be willing to place weight on (in a similar way to the [EC Economic Best Practice Guide](#)).

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

We note that a number of jurisdictions are currently also reviewing their approach to efficiencies. We would welcome the CMA being at the forefront of changes to the approach rather than a follower to the extent that some jurisdictions are not as advanced in their consultations and/or thinking.

**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?**

Greater engagement with parties to supporting efficiency claims would help the merging parties to present the most relevant evidence and allow the CMA to thoroughly assess claims without incurring excessive time and resource implications. This would improve pace, predictability and proportionality by reducing unnecessary Phase 2 escalation, and ensure the CMA's approach supports innovation and investment while safeguarding competition.