COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE UNITED KINGDOM COMPETITION & MARKETS AUTHORITY CONSULTATION "DRAFT REVISED GUIDANCE ON ASSESSING MERGER EFFICIENCIES"

July 2, 2026

The views expressed herein are being presented on behalf of the Antitrust Law Section and the International Law Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section and the International Law Section of the American Bar Association (the Sections) welcome the opportunity to comment on the Competition and Markets Authority's (CMA's) draft revised guidance on its approach to assessing merger efficiencies,[1] as requested in its consultation document published on June 3, 2026.[2] The draft revised guidance is intended to give more detail and clarity on the CMA's analytical approach and process in assessing rivalry-enhancing efficiencies. Comments were sought on whether the changes were sufficiently clear and useful, as well as whether the guidance is consistent with the CMA's 4P framework of "pace, predictability, proportionality, and process."[3] The Sections commend the CMA for conducting the consultation and are grateful for the opportunity to respond.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy as well as related aspects of economics. Section members, numbering over 12,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, and federal and state government agencies, as well as judges, professors, and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For more than 30

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[1] Competition & Mkts. Auth., *Draft Revised Guidance – Merger Efficiencies* (June 3, 2026), https://connect.cma.gov.uk/consultations/updating-approach-to-merger-efficiencies/supporting_documents/draft-revised-guidancepdf [hereinafter *Draft Revised Guidance*].

[2] Competition & Mkts. Auth., *Mergers: Draft Revised Merger Efficiencies Guidance – Consultation Document* (June 3, 2026), https://connect.cma.gov.uk/consultations/updating-approach-to-merger-efficiencies/supporting_documents/consultation-documentpdf-1.

[3] Sarah Cardell, *New CMA Proposals to Drive Growth, Investment and Business Confidence*, COMPETITION & MKTS. AUTH. (Feb. 13, 2025), https://competitionandmarkets.blog.gov.uk/2025/02/13/new-cma-proposals-to-drive-growth-investment-and-business-confidence/.

years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[4]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total over 12,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section's more than 50 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as regulatory compliance, mergers and acquisitions, and joint ventures. Throughout its century of existence, the International Law Section has provided input on debates relating to international legal policy.[5] The International Law Section has provided input on antitrust and competition law and policy for decades to authorities around the world.[6]

I. Introduction

Efficiencies can lower costs, enhance quality, enhance services, and further innovation and investment and, as such, they can be the very fruit of vigorous competition. They can play a critical role in improving prosperity and as such can be a key impetus for many mergers. The Sections applaud the CMA for recognizing at the outset of its guidance that mergers with potentially negative effects on competition may also generate benefits for UK customers which could outweigh those effects.

The Sections agree with the CMA that the recognition of efficiencies requires engagement with important and wide-ranging issues involving investment and innovation, as well as how to credit such efficiencies and how to reasonably ensure that such efficiencies will be delivered. The confirmation that offering evidence of efficiencies in no way implies that the parties accept the existence of competition concerns is valuable procedural assurance to encourage the parties to bring forward evidence of efficiencies at an early stage.

II. Retention of the Existing Framework

A. The Draft Revised Guidance's Approach

The draft revisions retain the four cumulative criteria that currently govern the CMA's assessment of efficiencies. The claimed efficiencies should (i) enhance rivalry; (ii) be timely, likely, and sufficient to prevent a substantial lessening of competition (SLC); (iii) be merger-specific; and (iv) benefit UK customers,[7] and must in each case be supported by verifiable

[4] *See Antitrust Comments, Reports & Amicus Briefs*, AM. BAR ASS'N, ANTITRUST L. SECTION, http://ambar.org/atcomments.

[5] *See About Section Policy*, AM. BAR ASS'N, INT'L L. SECTION, https://www.americanbar.org/groups/international_law/policy/about/.

[6] *See Blanket Authorities Initiatives*, AM. BAR ASS'N, INT'L L. SECTION, https://www.americanbar.org/groups/international_law/resources/policy/blanket-authorities/.

[7] *Draft Revised Guidance*, *supra* note 1, ¶ 13.

evidence.[8] The Sections agree with the retention of this standard, which is broadly consistent with the analytical frameworks applied in comparable jurisdictions.

B. Case-by-Case Assessment and Cognizable Efficiencies

It can be difficult to prove cognizable efficiencies, as illustrated by the consultation's examples of *Sabre/Farelogix*[9] and *Microsoft/Activision Blizzard*,[10] where the CMA found the efficiencies evidence insufficient, while other jurisdictions found greater potential for innovation or market expansion. Recognizing the fact-specific nature of the efficiencies assessment, the Sections welcome the draft revisions' non-exhaustive list of circumstances in which merger efficiencies may arise – including economies of scale, input cost reductions, knowledge transfers, complementary product pricing, the elimination of double marginalization in vertical mergers, and dynamic efficiencies from combining complementary R&D assets.[11] The Sections encourage the CMA to provide further guidance, particularly on the types of efficiencies it considers can fall within the framework.[12]

What constitutes an efficiency in this context can involve some subtle judgments that the CMA may wish to consider. For example, in *United States v. Anthem, Inc.*, the merging parties (Anthem and Cigna) argued that reducing reimbursement for providers is a cognizable efficiency even though the Department of Justice disagreed that this was an efficiency and more importantly that the merging parties had failed to show that the cost-savings would be passed on to consumers or that there would not be negative effects on quality and utilization. The majority opinion agreed that the merging parties had failed to show either pass-on or that there would not be negative effects on quality/utilization. The dissent disagreed. The concurring opinion further found that efficiencies that flow from the anticompetitive harm – the decrease in market competition from

[8] *Id.* ¶ 11.

[9] In *Sabre/Farelogix*, the CMA prohibited the transaction in April 2020. In the parallel U.S. proceeding, the U.S. District Court for the District of Delaware declined to enjoin the transaction, ruling against the Department of Justice, finding that in the context of the Department of Justice's failure to meet its burden of proof "the merger may well promote innovation." *See Sabre/Farelogix Merger Inquiry*, COMPETITION & MKTS. AUTH. (Apr. 9, 2020), https://www.gov.uk/cma-cases/sabre-farelogix-merger-inquiry; United States v. Sabre Corp., 452 F. Supp. 3d 97, 148 (D. Del. 2020), *vacated as moot,* No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

[10] In *Microsoft/Activision Blizzard*, the CMA initially prohibited the transaction in April 2023 (subsequent clearance in October 2023) while the European Commission cleared the transaction in May 2023 subject to a licensing remedy, concluding inter alia that the remedy would enhance competition in gaming through faster adoption of cloud gaming as a new video game delivery technology. *See Microsoft/Activision Blizzard Merger Inquiry*, COMPETITION & MKTS. AUTH. (2023), https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry; Case M.10646—Microsoft/Activision Blizzard, Comm'n Decision (May 15, 2023) (summary at 2023 O.J. (C 285) 8), https://ec.europa.eu/competition/mergers/cases1/202330/M_10646_9311516_7443_3.pdf.

[11] *Draft Revised Guidance*, *supra* note 1, ¶ 6.

[12] The Sections request that the CMA take into account that guidance drawing principally on examples of rejected claims risks creating a predisposition against efficiencies. *See* OECD, Efficiencies in Merger Control–Background Note, ¶¶ 65-66, DAF/COMP/WP3(2025)1, (Apr. 28, 2025), https://one.oecd.org/document/DAF/COMP/WP3(2025)1/en/pdf.

the merger – were not cognizable. The dissenting opinion disagreed, except if the merger would lead to a monopsony.[13]

In doing so, the Sections note the distinction between rivalry-enhancing efficiencies, considered in the context of this consultation, and Relevant Consumer Benefits (RCBs), which are defined under section 30 of the United Kingdom's Enterprise Act 2002.[14] The Sections consider it is appropriate to separate efficiencies from other public interest considerations (for example, loss of jobs untethered to an antitrust labor market analysis), which should be defined in specific legislation so that there is appropriate legislative input into weighing broader public interest goals within an antitrust framework (as seen, for example, in South Africa,[15] California,[16] and the UK's predecessor merger regime, under the Fair Trading Act 1973[17]). The Sections do not endorse consideration of non-antitrust public interest considerations in merger assessments, but where this is the approach taken by an authority, the criteria should be set out in legislation.

1. Standard of Proof

The Sections agree that the same standard of proof should apply to efficiencies as to theories of harm (i.e., the realistic-prospect test at Phase 1 and the balance-of-probabilities test at Phase 2).[18] Given that efficiencies and competitive harm are two sides of the same competitive inquiry, symmetry ensures coherence and even-handedness. As efficiencies benefit from less decisional practice than assessment of the effects on competition, guidance as to the practical framework for evaluation is welcome.[19]

2. Sources of Evidence

The draft revisions set out the evidence to assess efficiency claims (operational and financial data; strategy and merger-rationale documents; transaction materials, such as synergies analyses, deal valuations, and integration plans; and the parties' track record in realizing similar

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13 The appellate court rejected the claim on various grounds without deciding whether reducing reimbursements was an efficiency or a harm from lessening competition. United States v. Anthem, Inc., 855 F.3d 345, 360-61 (D.C. Cir. 2017).

14 *See* Enterprise Act 2002, c. 40, § 30(1)-(3) (UK), https://www.legislation.gov.uk/ukpga/2002/40/section/30.

15 Competition Act 89 of 1998, § 12A(3) (S. Afr.), https://www.saflii.org/za/legis/consol_act/ca1998149/. South Africa assesses the impact of a merger on factors including: (i) employment; (ii) a particular industrial sector or region; and (iii) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

16 CAL. CORP. CODE §§ 5914, 5920 (change of control of nonprofit healthcare facilities); CAL. CORP. CODE § 14700-14707 (acquisition of retail grocery store or retail pharmacy).

17 Fair Trading Act 1973, c. 41 (UK) (repealed), https://www.legislation.gov.uk/ukpga/1973/41/enacted.

18 *Draft Revised Guidance*, *supra* note 1, ¶ 12.

19 *See* OECD, *supra* note 12, ¶¶ 81, 25, 101 (noting that the criteria for a successful efficiency claim "follow the same objective, standards and considerations [as] when proving anticompetitive effects," that the uncertainties inherent in forward-looking assessments "apply to all aspects of the analysis," and that authorities are expected to apply "the same rigorous standards to efficiency claims as they do to anticompetitive effects").

benefits in previous mergers).[20] The draft gives greater weight to ordinary-course materials, while accepting that bespoke analysis – for example, on pass-through incentives – may be required, particularly for dynamic efficiencies, and properly states that the CMA may also seek evidence from third parties, industry experts, and sector regulators.[21]

The Sections would caution against establishing a hierarchy of efficiency evidence based on when or how a document was prepared. The probative value of any piece of evidence – whether generated in the ordinary course of business or in contemplation of the notified transaction – depends on the purpose for which it is offered. For example, ordinary-course documents may shed light on pre-existing strategic rationale, while transaction-specific materials such as synergy assessments, integration plans, and deal valuations may be the most informative evidence of the efficiencies the parties expect the merger to deliver. Assigning greater weight to one category over another risks excluding relevant and reliable evidence and may unnecessarily limit the assessment.

The Sections agree with the CMA that precise quantification may be neither possible nor necessary, provided the magnitude of the efficiencies can be understood. This will likely be true for more dynamic efficiencies, particularly those that may emerge over a longer time scale, for example the next R&D cycle. The disruptive potential may be clear even if precision is elusive.

III. <u>Timeliness</u>

Recognition that longer-term efficiencies may also be valuable, even if harder to assess, is welcome and consistent with the CMA's and Competition Appeal Tribunal's examination of dynamic theories of harm, which may also materialize over longer periods.[22] Longer time horizons are better suited to dynamic efficiencies, where potentially significant gains may occur over longer investment cycles or periods needed for the development and adoption of new technology. The CMA might add that it will be desirable to consider the period over which its theory of harm is expected to arise when assessing the relevant periods during which efficiencies are expected to emerge.

The discounting of expected future gains to compare costs and benefits arising over different periods on a consistent basis may enable the CMA to weed out weak claimed efficiencies. In situations where dynamic efficiencies generate benefits that are more difficult to quantify, such as increased R&D productivity, calculating a present value may prove difficult. Dynamic efficiencies tend to be more pronounced (for example, new technologies or industry

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[20] *Draft Revised Guidance*, *supra* note 1, ¶ 7.

[21] *Id.* ¶¶ 8-9.

[22] *See* Meta Platforms, Inc. v. Competition & Mkts. Auth. [2022] CAT 26, ¶ 110 ("[G]iven the fluid nature of dynamic competition and impairments to it, we consider that – where there is a conclusion that a merger gives rise to an expectation of a substantial lessening of dynamic competition, a cross-check should be carried out, where the competitive disbenefits of preventing or unwinding the merger are considered.").

transformations) but less readily quantifiable. However, the magnitude of the efficiencies may be evident, for example, if new investments or technologies bear fruit.[23]

IV. Likelihood and Use of Remedies to Secure Efficiencies

The proposed ability-and-incentive framework for assessing "likelihood" is well established in merger reviews (e.g., with the consideration of the risk of anticompetitive harms from vertical mergers), and can be a useful tool for assessing efficiency claims.[24] But its application to efficiency claims, as the CMA proposes, may require more nuance or else risk finding that the same merger may have the "means" (ability) to achieve an efficiency but also at the same time may lack the "incentive" actually to deliver it.

The Sections also welcome the CMA's openness to using short-term remedies to secure delivery of a longer-term efficiency that would otherwise be regarded as too uncertain. The use of remedies in the context of longer-term efficiencies relating to innovation and investment can help ensure that such efficiencies are actually realized. Well-designed remedies can also mitigate any short-term anticompetitive harms that may arise before such longer-term efficiencies are realized.[25]

The Sections note that fact patterns similar to *Vodafone/Three*[26] – where a commitment to invest in a next-generation technology unlikely to be deployed absent the merger should, once deployed, enhance rivalry – are likely to be comparatively rare, the more so as it depended on a

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23 *See, e.g.*, AGCM, Provvedimento No. 27172, C12138, *Cassa Centrale Raiffeisen Dell'Alto Adige/Gruppo Bancario Cooperativo Delle Casse Raiffeisen* (May 23, 2018), https://agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/F7275621023AB655C12582AA003B089E/$File/p27172.pdf (concluding that any savings from the rationalization of the merged-banks and their distribution network, as well as from the elimination of duplicative processes and the streamlining of others, would free resources that could be used in investments in innovation and enhancement of products and services offered to customers, driven by the digitalization process that the sector was going through).

24 *Draft Revised Guidance*, *supra* note 1, ¶¶ 23, 26, 30.

25 As noted in its May 2025 comments on the CMA's review of its approach to merger remedies, the Sections encourage "[g]reater engagement with potential remedy options . . . spanning the range between structural and behavioral remedies" in order to support "the CMA's efforts to be reasonable and proportionate and select the least costly remedy, or package of remedies, of those remedy options that the CMA considers will be effective." Am. Bar Ass'n, Joint Comments of the American Bar Association Antitrust Law Section and International Law Section on Review of Merger Remedies Approach 7 (May 2, 2025), https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2025/joint-comments-review-merger-remedies.pdf.

26 *See* OECD, *supra* note 12, ¶ 33 (in *Vodafone/Three*, the CMA found the parties "capable and likely to achieve the claimed efficiencies" but had concerns as to their commercial incentives to do so, and accordingly required "a legally binding commitment to undertake the necessary investments [to] ensure that the merged entity would follow through fully on the programme"). *See also* Competition & Mkts. Auth., Final Report, Anticipated Joint Venture between Vodafone Group plc and CK Hutchison Holdings Limited, ME/7064/23 (Dec. 5, 2024), https://assets.publishing.service.gov.uk/media/6751e18f6da7a3435fecbd87/1._Final_Report.pdf [hereinafter *Vodafone/CK Hutchinson Holdings*].

sector-specific regulator to ensure delivery. The CMA may wish to offer other examples of where such a short-term remedy may be suitable.

One example is the California Attorney General's approach in the review and conditional approval of transactions involving non-profit facilities. The conditional approval of the affiliation of Huntington Memorial Hospital and Cedars-Sinai Health System in December 2020[27] included conditions addressing short-term concerns about increased healthcare prices, while also enforcing operational and dynamic efficiencies through undertakings such as electronic health record integration and a long-range strategic capital plan backed by annual reporting requirements.[28]

The Sections observe that monitoring efficiency-delivering remedies may be a complex exercise, so that monitors with sufficient expertise (or where available sectoral regulators with suitable powers) may be required. The draft revised guidance would benefit from an elaboration of how that policing will take place, including a discussion of the use of monitors (as used by the CMA in the *Vodafone/CK Hutchison JV Merger Inquiry*[29] and the California Attorney General's Office in the Huntington Memorial Hospital and Cedars-Sinai Health System affiliation[30]).

The Sections agree with the CMA that instances of short-term efficiencies giving rise to longer-term anticompetitive harms are possible but will be rare in practice.

V. Sufficiency

The Sections welcome the CMA's openness to crediting both price and non-price efficiencies, including dynamic efficiencies, and in particular its recognition that an efficiency may be relevant even where the ultimate success of the underlying initiative is uncertain.[31] An R&D project is a useful illustration: even where its eventual commercial success cannot be assured, the existence of the project alone may stimulate rivalry. This ensures symmetry of analysis, particularly where the theory of harm is predicated on loss of innovation rivalry (even if the underlying innovation might ultimately have proved unsuccessful).

VI. Merger Specificity

The Sections welcome the CMA's openness to realistic and practical alternatives, sparing parties the need to postulate, and then disprove, forms of collaboration that are commercially

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27 Press Release, Cal. Dep't of Just., Off. of the Att'y Gen., Attorney General Becerra Conditionally Approves Affiliation Agreement Between Cedars-Sinai and Huntington Memorial Hospital, (Dec. 10, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-conditionally-approves-affiliation-agreement-between.

28 *See* Letter from Cal. Dep't of Just. to Jean Tom, Partner, Davis Wright Tremaine LLP, re Proposed Change in Control and Governance of Huntington Hospital (Dec. 10, 2020), https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/nonprofithosp/ag-decision-huntington-121020.pdf.

29 *Vodafone/CK Hutchinson Holdings*, *supra* note 26.

30 Press Release, *supra* note 27.

31 *Draft Revised Guidance*, *supra* note 1, ¶¶ 8, 11, 20-26, 28, 30, .

unrealistic.[32] The CMA may wish to add to its list of considerations the "commitment" problem, which frequently arises in the case of dynamic efficiencies. Independent firms may be reluctant to commit to a large, sunk, and uncertain investment (e.g., in a new technology that may ultimately fail) within the confines of a non-structural collaboration, precisely because each fears that the other may not follow through, may withdraw before the investment is realized, or may appropriate a disproportionate share of the benefits. Contractual and/or licensing arrangements are often inadequate to overcome this difficulty, while a full merger internalizes these risks.

VII. Process

A thorough assessment of efficiencies may require considerable time and resources. Such work may involve, for example, the evaluation and weighing of substantial additional evidence – potentially over longer time horizons than has typically been the case in the CMA's assessments, and across multiple markets. The CMA may wish to consider how the assessment of efficiencies will operate in practice in a manner consistent with the CMA's framework of pace, predictability, proportionality, and process (4Ps) and timetable key performance indicators.

The CMA could provide further clarity as to how parties' initial submissions on efficiencies might be framed to promote effective early engagement. This could involve parties identifying at the outset the key uncertainties, assumptions, and timelines underlying their submissions. The CMA may also consider tasking a specific case team member to assess efficiencies in appropriate cases.

The draft revised guidance recognizes that consideration of efficiencies forms part of the overall assessment of whether the merger gives rise to an SLC, without it being necessary for any identified efficiencies to impact the same parameter(s) as the SLC itself. It may therefore be an unnecessary constraint to require that parties explain claimed efficiencies by reference to specific parameters of competition, such as price, quality, or innovation (while the CMA's assessment of an SLC may proceed at a broader level). The guidance could make clear that the CMA will accept arguments explaining how claimed efficiencies would enhance the *overall* process of rivalry, without requiring them to be tied to a particular parameter of competition (as the draft acknowledges for dynamic efficiencies).

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The Sections appreciate the opportunity to comment and remain available to respond to any questions regarding these comments or to provide additional assistance to the Competition and Markets Authority as it may deem appropriate and helpful.

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[32] *Draft Revised Guidance*, *supra* note 1, ¶¶ 31-33.