Draft revised merger efficiencies guidance

Response to CMA consultation

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1 July 2026

We welcome the steps taken through the consultation process and the Draft Revised Guidance to improve the approach towards assessment of efficiencies. As raised by some stakeholders through the consultation process, the current approach towards efficiencies risked a 'bad equilibrium' where the merging parties and their advisors did not put effort into arguing for efficiencies and therefore the CMA had no suitable evidentiary basis for examining potential efficiencies. We support many of the CMA's proposed changes detailed in the consultation document which attempts to move the situation towards a 'good equilibrium' where merger efficiencies are given full due attention in assessment.

We also welcome the several instances where the CMA's consultation document and the Draft Revised Guidance emphasise the non-exhaustive nature of the CMA's guidance on efficiencies and the case-by-case assessment that the CMA would undertake. A flexible approach for the Merger Assessment Guidelines in particular allows all stakeholders to develop methodologies suited to the specific facts of each merger, while overly prescriptive Guidelines risks locking in the CMA into analytical approaches that may quickly become unsuitable.

We would make one suggestion on the contents of the Draft Revised Guidance. In paragraph 7, the Draft Revised Guidance document places particular evidentiary weight on the merging parties' internal documents. There is a suggestion in paragraph 8 that bespoke evidence on ability and incentives may be a type of fall-back option, only to be used when evidence from internal documents fails. Our view is that this places an unwarranted divide between internal documentary evidence and bespoke analysis of ability and incentives. Internal documents are one source of evidence among others, all of which needs to be interpreted through a suitable framework in order to assess the merging parties' ability and incentives to act pro-competitively.

Internal documents themselves also vary widely. Some internal documents would discuss efficiencies merely as declarations of intentions or targets, while others may be exploratory in nature and intended as subjective views of specific people and groups within the firm. Many internal documents are also prepared subject to incomplete information, for example due to lack of confidential information concerning the other merging party. For these reasons, internal documentary evidence should be subject to rigorous assessment for credibility and consistency, *as would be the case for any other type of evidence including bespoke analysis*.

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As explained above, overly prescriptive Guidelines risks locking in the CMA into analytical approaches that quickly become unsuitable. Our concern is that elevating one type of evidence above others as part of the Merger Assessment Guidelines risks committing the CMA into undue reliance on internal documentary evidence in its assessments of efficiencies in the future.