Linklaters

Draft Revised Merger Efficiencies Guidance: CMA Consultation

Linklaters Response

1 Introduction

(1) Linklaters welcomes the opportunity to respond to the CMA's consultation on its draft revised merger efficiencies guidance. We refer the CMA to our earlier response to its call for evidence, which set out our detailed views on the CMA's analytical approach and process for assessing rivalry-enhancing efficiencies.

(2) We welcome the direction of travel in the draft guidance, which reflects several improvements we and other stakeholders asked for. As we set out below, we consider there are areas where the CMA could go further still to deliver an approach which is fully consistent with its 4Ps framework.

2 Positive developments in the draft guidance

(3) The draft guidance makes meaningful progress in several areas. We welcome in particular:

(a) **Equivalence of evidential standards**. The explicit commitment that the CMA will adopt a consistent approach to assessing evidence of competitive harms and evidence of claimed benefits (para 12 of the draft guidance).

(b) **Timeliness and dynamic efficiencies**. The acknowledgment that different types of efficiencies may be realised over different timeframes, and that the CMA will have regard to market-specific investment and innovation cycles (paras 20-21), as well as the explicit recognition that certain dynamic efficiencies may not be fully realised for several years (but that this should not preclude their assessment by the CMA).

(c) **Merger specificity**. The indication that the CMA will consider the feasibility of alternatives to the merger and assess whether it would be commercially rational for the merger parties to pursue those alternatives (para 33). In principle, this addresses the concern we raised that hypothetical alternatives could potentially be relied on to outweigh credible and substantiated efficiency claims.

(d) **Efficiencies as part of the overall competitive assessment**. The move to considering (rivalry-enhancing) efficiencies as part of the overall consideration of the competitive impact of a merger (para 4). This is in our view both analytically correct and consistent with the CMA's request for early engagement from merger parties on efficiency claims.

(e) **More granularity on sources of evidence**. The guidance on different categories of evidence and recognition that merger parties' own documents may not address all aspects of the CMA's efficiencies framework, meaning that supplementary bespoke analysis may be appropriate (paras 7 and 8).

(f) **No implied SLC concession**. The express clarification that submitting efficiency claims does not imply that merger parties accept the existence of an SLC (para 42).

(g) **Efficiency offences**. The recognition that efficiency offences are likely to be rare in practice (para 19).

3 Clarifications to strengthen the draft guidance

Sources and weight of evidence

(4) The draft guidance states that the CMA will place greater evidential weight on materials generated in the ordinary course of business (para 7). It also notes that the CMA may be likely to attach more weight to internal documents generated before the merger was in contemplation (fn 2). At the same time, it recognises that in some cases there may be scope for the merger parties to supplement their own evidence with bespoke analysis (para 8).

(5) While we understand the CMA's rationale, we are concerned that this formulation may, in practice, make it unduly difficult for merging parties to evidence efficiencies to the CMA's required standard. Pre-merger internal documents are unlikely to address all aspects of the CMA's efficiencies framework, for the simple reason that at the time they are generated the merger is not (yet) in contemplation. They may therefore provide an incomplete evidential picture of the efficiencies arising specifically from the merger itself.

(6) A stated preference for pre-merger ordinary-course documents may also downplay the importance of other categories of evidence including transaction materials. Transaction materials including synergies analysis, deal valuation and integration plans are necessarily only prepared once a merger is in contemplation. As noted in our earlier response (paras 12-14), synergies analyses are often subject to significant scrutiny, independently verified and communicated conservatively, particularly in a public M&A context. The same concern arises in relation to bespoke analysis prepared for the purpose of engaging with the CMA, eg economic or industry expert reports, third party market studies or survey evidence etc. which can play an important role in addressing evidential gaps.

(7) We therefore invite the CMA to:

(a) Move away from a stated preference for pre-merger internal documents, given the potential limitations of such documents in evidencing efficiencies that arise from the merger itself.

(b) Expressly recognise that other sources of evidence, including transaction materials and bespoke analyses, can carry meaningful evidential weight. In particular, we invite the CMA to recognise that bespoke analysis can play an important role in many cases, rather than only in "some" cases.

Efficiency offences

(8) As noted above, we welcome the CMA's recognition that the circumstances in which an efficiency offence could constitute a theory of harm are likely to be rare in practice. In our view, it would not be appropriate for the CMA to pursue an efficiency offence theory of harm other than in truly exceptional cases. In practice, the circumstances in which an efficiency gain brought about by a merger, and benefiting customers, could give rise to tangible competitive harm would be extremely rare.

(9) We invite the CMA to state more clearly that efficiency offences will be (rather than "are likely to be") rare in practice. The CMA should also clarify that, in those rare circumstances, the CMA will (i) carefully weigh the relevant efficiency gain against the potential future harm, and (ii) require clear evidence that such future harm is likely to materialise and will outweigh the identified efficiency gain. In doing so, the CMA should expressly acknowledge that, it will take account of relevant customer benefits, as well as rivalry-enhancing efficiencies.

4 Conclusion

(10) The draft guidance represents an important step forward in the CMA's approach to assessing and engaging with merger efficiency claims. To deliver on that progress, it will be important for the final guidance to translate into decisional practice. On process, we welcome the CMA's proposal to develop a merger efficiencies information request template. On substance, as the guidance beds in, we invite the CMA to develop illustrative case studies to provide further transparency on how the framework is being applied in practice. We would be pleased to discuss any of the points raised in this response further with the CMA.

Linklaters LLP

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