Consultation on draft revised guidance on the CMA’s approach to assessing merger efficiencies

RESPONSE BY FRESHFIELDS LLP

July 2026

Freshfields response on draft revised guidance on the CMA's approach to assessing merger efficiencies

1. Introduction

1.1 Freshfields welcomes the opportunity to respond to the Competition and Markets Authority (***CMA***)'s consultation on its draft revised guidance on the treatment of merger efficiencies (***Draft Guidance***).

1.2 We have advised on many of the most complex UK and cross-border merger control matters of recent years, including in sectors — telecoms, life sciences, technology, energy, infrastructure and financial services — where efficiencies and innovation are central to the commercial rationale for transactions, even if they have rarely featured as decisive arguments in the CMA's merger control decision-making. This response reflects that practical experience.

1.3 This response is submitted on behalf of the Firm and does not necessarily present the position of any of our clients or any individual partners in the Firm. We would be willing to discuss any of our comments in more detail, to contribute to further thinking or analysis of the points raised and to comment on any further draft guidance/templates that the CMA publishes.

2. Executive summary

2.1 We strongly support the CMA's decision to revisit this area and provide increased guidance. The Draft Guidance contains a number of welcome developments. In particular:

(a) the removal of the previous presumption that efficiencies arising over a longer time horizon attract greater doubt, and the recognition that different efficiencies are realised over different timeframes;

(b) the statement of principle that the CMA will adopt a consistent approach to evidence supporting competitive harm and evidence supporting claimed benefits;

(c) the explicit recognition of dynamic efficiencies, and of the fact that a merger may strengthen the process of dynamic competition even where specific outcomes are uncertain;

(d) the clarification that the submission of efficiency evidence does not amount to an acceptance that the merger gives rise to a substantial lessening of competition;

(e) the recognition that remedies may, in appropriate cases, be used to secure efficiencies; and

(f) the CMA's commitment to developing a standardised information request to assist parties wishing to advance efficiency claims.

2.2 These are constructive steps, and we support the direction of travel. Our comments below are offered in that constructive spirit, with the shared objective of ensuring that the revised guidance achieves its intended purpose.

2.3 Our overarching observation, however, is that these constructive steps do not go far enough. The government has made clear its ambition to foster a pro-growth, pro-investment environment, and has asked the CMA — through its Strategic Steer — to support that ambition; the CMA has in turn identified its own end goal as being "*to drive economic growth and improve household prosperity*".[1] The treatment of merger efficiencies is one of the clearest opportunities the CMA has to move the dial on those as well as other government objectives including the strengthening of UK industry and maintenance of domestic supply — the willingness of an authority to engage seriously with the benefits of a transaction, and not only its risks, is precisely what investors and merging parties look to as evidence of a genuinely pro-growth regime. There are, of course, limits to what can be achieved without legislative change. But, in our view, the Draft Guidance does not make the most of the opportunity to facilitate growth that is available within the current legislative framework.

2.4 The shortfall is one of delivery rather than direction. In some important respects, the Draft Guidance states an intention without supplying the substance needed to make it operational. As a result, it improves predictability less than it could, leaving the most commercially important questions unanswered — how dynamic efficiencies and pass through are evidenced, how the burden of proof on merger specificity is allocated, and how the consistency-of-evidence principle is applied in practice. In a few places, most notably its footnotes, the drafting signals a residual scepticism towards efficiency claims that sits uneasily with the consistency principle the Draft Guidance itself proclaims. This is a missed opportunity, particularly for dynamic efficiencies, which — as the CMA acknowledges — "*can deliver substantial consumer benefits and contribute more broadly to greater productivity and economic growth*"[2].

2.5 There is a wider point: guidance is only as good as its application. The CMA's starting point on efficiencies has historically been one of scepticism, and efficiency arguments have rarely succeeded. Guidance that restates the framework in more open terms, without changing what merging parties must show, how their evidence is weighed, or how the CMA will engage, risks preserving that underlying approach. The value of this exercise will ultimately be judged not by the words on the page but by whether well-evidenced efficiency claims are engaged with positively.

2.6 Our response is therefore directed at closing the gap between stated intent and substantive delivery. We comment thematically and at the level of principle, focusing on the issues of greatest practical importance to merging parties, rather than offering line-by-line drafting suggestions. Our comments are grouped under five themes:

[1] Consultation Document, paragraph 1.1.

[2] Consultation Document, paragraph 3.38.

(a) delivering a consistent approach to the assessment of evidence;

(b) giving dynamic efficiencies the substantive treatment the policy objectives require;

(c) resolving the incoherence in the Draft Guidance's treatment of documentary evidence;

(d) correcting the residual bias against mergers in the merger-specificity analysis; and

(e) making the Draft Guidance more "usable" in practice.

3. A consistent approach to assessing evidence

3.1 We welcome the statement in paragraph 12 of the Draft Guidance that the CMA "*adopts a consistent approach in assessing evidence that supports the finding of competitive harms and evidence that supports claimed benefits of a merger*". Consistency of treatment between theories of harm and theories of benefit is the single most important principle in this area, and its inclusion is a positive signal. As presently drafted, however, the principle lacks sufficient detail to be operationalised in practice. The Draft Guidance does not explain what a "consistent approach" requires in practice, with a risk that this could be read as a commitment to do no more than look at the evidence on both sides (which, as a basic statement of what is required by due process, does not materially change the existing position).

3.2 We therefore invite the CMA to give this principle substance by confirming expressly that it will bring (in particular) the same analytical rigour, the same openness, and the same degree of engagement and evidence-testing to efficiency claims as is applied to potential theories of harm. The practical reality is that merging parties rarely advance efficiency arguments at all, precisely because doing so has been seen as an uphill struggle with limited prospects of affecting the outcome. A principle of consistency that is stated without sufficient detail to be operationalised will not change that.

3.3 Consistency of approach should also extend to the *standard of proof* applied to each side of the assessment. The CMA assesses competitive harm on the basis of what is "more likely than not" to occur, and routinely relies on forward-looking, probabilistic judgements about future market conduct in doing so. Efficiency claims — and dynamic efficiencies in particular — should be assessed against the same standard, and should not in practice be held to a higher, quasi-deterministic threshold under which only outcomes that can be demonstrated with near-certainty are credited. The same applies to the form the evidence takes: efficiency claims will often rest on a mix of quantitative, qualitative and probabilistic evidence, and the most significant efficiencies — particularly those relating to innovation and quality — may be the least susceptible to precise quantification. We invite the CMA to confirm that it will weigh the efficiency evidence in the round, according weight by reference to probative value rather than the form the evidence takes, and that qualitative or non-quantified evidence will not for that reason be treated as inherently less compelling.

3.4 Finally, we invite the CMA to move from describing its approach as one it will take on a *"case-by-case"*[3] basis to a positive commitment that, where a party advances an efficiency claim, the CMA will engage with that claim and address it — including, where the claim is rejected, by explaining why. Where merging parties put efficiencies forward, those arguments should be engaged with on their merits and the reasoning made transparent, including in cases where the CMA ultimately finds no SLC. We would go further. The CMA is often well placed, through its own information-gathering and market-investigation powers, to test and substantiate an efficiency claim — just as it deploys those powers to build its theory of harm. Where a credible efficiency claim has been raised, we encourage the CMA to take an active role in testing it using those tools, rather than treating efficiencies as a matter for the merging parties alone to establish. That would be a further, concrete expression of the consistency principle in paragraph 12.

4. Dynamic efficiencies

4.1 It is in relation to dynamic efficiencies that the gap between the Draft Guidance's stated intention and its practical effect is, in our view, widest — and it is also the area of greatest significance for the wider policy objectives described above. At a time when the government is seeking to drive investment into the UK and to support an innovation-led economy, the ability of the merger regime to engage credibly with the proposition that a transaction may accelerate innovation or strengthen the process of dynamic competition is of real importance. The Draft Guidance recognises dynamic efficiencies in principle, but as currently drafted offers merging parties and case teams almost no practical roadmap for how such claims are to be made, evidenced or assessed.

4.2 First, the Draft Guidance accepts that a merger may strengthen the process of dynamic competition, but says little about how the resulting benefits are to be assessed as reaching customers, other than through a price-based pass-through analysis that is poorly suited to dynamic efficiencies. We invite the CMA to recognise expressly that consumer benefit from dynamic efficiencies may take *non-price* forms — including faster innovation and product development, higher quality, expanded choice and range, and greater resilience — and to set out the factors it will weigh when assessing dynamic pass-through, including the mechanism by which the benefit reaches customers, the competitive conditions affecting it, and the relevant innovation cycle.

4.3 Second, the Draft Guidance frames efficiencies primarily by reference to reductions in variable or marginal cost, and treats fixed-cost savings as less likely to benefit customers. In the sectors where dynamic efficiencies matter most — life sciences, technology, energy and infrastructure — that emphasis is the wrong way round. Reductions in fixed costs, achieved through the rationalisation and elimination of duplication, are frequently the very savings that free up capital for investment and innovation, and so are often the mechanism through which a merger strengthens dynamic competition.

[3] See paragraphs 3 and 11 of the Draft Guidance.

This up-front dismissal of fixed-cost savings is inconsistent with the stated purpose of the guidance to facilitate welfare-enhancing efficiencies to the extent possible. We therefore invite the CMA to recognise expressly that fixed-cost efficiencies can generate significant benefits for customers, particularly through increased capacity for investment and innovation, and that they should be taken fully into account rather than discounted by reason of their nature.

4.4 Third, the treatment of timeliness should reflect the reality that dynamic efficiencies are realised over longer horizons than cost savings. We welcome the removal of the previous presumption that efficiencies arising over a longer period attract greater doubt. To give that change practical effect, we invite the CMA to confirm that timeliness will be assessed taking into account the nature of the efficiencies and the characteristics of the industry concerned — including its innovation and investment cycles — and that dynamic efficiencies will not be discounted merely because they will not materialise shortly after completion. Efficiencies realised over a multi-year period, consistent with the relevant innovation cycle, should be capable of satisfying the timeliness requirement.

4.5 Fourth, and more fundamentally, the Draft Guidance gives deal teams very little to work with when assembling a dynamic-efficiency case. Take a common example: a transaction that brings together two research teams with complementary capabilities, where the claim is that the combination materially increases the prospects of a product being successfully developed and brought to market, and that this benefit outweighs the loss of any rivalry between the two teams. The Draft Guidance offers no indication of what evidence the CMA would regard as probative of such a claim, or of how it would weigh the dynamic benefit against the reduction in rivalry. We appreciate the CMA's likely concern that an overly permissive approach risks creating a loophole — a generic assertion that "combining the teams improves the prospects of success" should not be capable of offsetting any SLC. But the answer to that concern is greater specificity, not silence.

4.6 We invite the CMA to include a dedicated treatment of dynamic efficiency evidence, identifying the categories of evidence it finds probative — for example, R&D roadmaps and pipeline records, patent and regulatory filings, complementarity assessments mapping the merging parties' respective technologies and capabilities, evidence of innovation outcomes in comparable transactions, and customer or expert evidence — together with an indication of the circumstances in which the CMA considers such claims more or less likely to succeed.

4.7 Finally, we note that the European Commission's draft EU merger guidelines[4] devote a dedicated section to dynamic efficiencies. Whatever the merits of the EU's substantive approach, the existence of a dedicated section signals a seriousness of engagement with the subject that the CMA's treatment — in which dynamic efficiencies feature as one aspect of a short, general

[4] Guidelines on the assessment of mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, draft for consultation, dated 30 April 2026 (***EU Draft Guidelines***).

discussion — does not. If the CMA's stated intention is genuinely to make well-founded efficiency claims easier to advance, this is the part of the Draft Guidance that most needs to be built out. A dedicated section, with the specificity described above, would be a clear and meaningful signal that the CMA is serious about engaging with innovation-based efficiency arguments.

5. The evidence base

5.1 The Draft Guidance's treatment of which documents the CMA will find persuasive is, in our view, internally incoherent, and in a way that operates against the evidence on which efficiency claims must be built. Paragraph 7 of the Draft Guidance indicates that the CMA is likely to place greater weight on materials generated in the *ordinary course* of business, while also listing transaction materials — synergy analyses, integration plans and the like — among the relevant categories of evidence.[5] The accompanying footnote (footnote 2) goes further and suggests a preference for documents *pre-dating* the contemplation of the merger. These propositions cannot comfortably be reconciled. By their nature, the documents that analyse the efficiencies expected from a transaction are generated because of that transaction; merging parties do not, in the ordinary course, assess merger synergies *before* any merger is in contemplation. A preference for pre-contemplation, ordinary-course documents therefore practically limits the weight given to precisely the evidence that any efficiency case must principally rely on.

5.2 We invite the CMA to resolve this tension by confirming that efficiency evidence will inevitably and legitimately include documents generated after the transaction is in contemplation, without that being a reason to discount such documents. We would go further and invite the CMA to recognise the particular reliability of carefully prepared transaction materials. Board-approved synergy and integration analyses are generally prepared with the input of independent advisers and under significant legal, regulatory and directors' duties constraints; the consequences of overstating synergies to a board or to public markets are serious, and such estimates therefore tend to be conservative rather than inflated. There is no principled basis for treating this category of evidence with greater default scepticism than the internal documents on which the CMA routinely relies when establishing harm.

5.3 A related difficulty arises from footnote 2, which we read as indicating that particular weight may attach to documents prepared for the board to take a decision. We make a simple point: parties do not analyse the efficiencies expected from a transaction before that transaction is in contemplation, and so a preference framed around pre-contemplation or ordinary course materials again points away from sources of evidence in which efficiencies are often most likely to be examined. Contemporaneous internal documents prepared in connection with the transaction — integration plans, operational forecasts, investment programmes and R&D pipelines — are typically the most direct and reliable evidence of the efficiencies a merger is expected to

[5] See in particular, points (b) and (c) of paragraph 7 of the Draft Guidance.

deliver. We invite the CMA to confirm that such evidence will not be discounted by reason of its direct relation to the transaction in question. A blanket presumption that merging businesses could have "cooked the books" when preparing transaction documents is inappropriate given the broader constraints that govern these documents.

5.4 Finally, while the EU Draft Guidelines similarly regard pre-merger, independently-prepared material as "more credible" (see paragraph 309 of the Draft EU Guidelines), they frame this as an inherent quality of the evidence rather than as a weighting rule the Commission commits to apply — and even that framing risks creating an implicit hierarchy of evidence that we have urged the Commission to avoid. The CMA's formulation goes further still, stating expressly that it "*is likely to place <u>greater evidentiary weight</u>"* on ordinary course materials. That difference in directness matters. Pre-merger studies by independent experts are, in practice, rarely (if ever) available, given the timing, cost and information constraints under which transactions are assessed; the most direct and reliable evidence of merger-specific efficiencies is usually the merging parties' own contemporaneous internal documentation, which should be accorded at least equal probative weight rather than treated as inherently less compelling. We invite the CMA to confirm that the weight given to any document turns on its probative value, assessed holistically and in the round, rather than on a pre-stated hierarchy of document type. That approach would also sit more comfortably with the consistency-of-evidence principle discussed above.

6. Merger specificity

6.1 We welcome the more structured treatment of merger specificity, and in particular the focus on whether a non-merger alternative would be "*commercially rational*". We are concerned, however, that the analysis as a whole still feels weighted against efficiency claims, and that one footnote in particular reveals an underlying scepticism that the body of the guidance is otherwise at pains to move beyond.

6.2 Footnote 6 states that efficiencies "*achieved without a merger may be expected to deliver greater benefits to consumers*". This proposition is asserted without qualification or evidential foundation. It asserts, in effect, a general presumption that non-merger routes are preferable for consumers — a presumption that is in direct tension with the more balanced, fact-sensitive "commercial rationality" analysis in the body of the Draft Guidance, and which risks undermining much of what that analysis is intended to achieve. We invite the CMA to delete this footnote, or at the least to qualify it expressly so that it does not apply where the evidence shows the non-merger alternative to be commercially unrealistic or structurally inferior.

6.3 More generally, while the structured factors for assessing alternatives are an improvement, the Draft Guidance does not allocate the burden of establishing that a realistic alternative exists. In practice, this leaves merging parties exposed to being asked to disprove a succession of hypothetical alternatives — organic growth, a joint venture, a licence, a contractual arrangement etc. — without the CMA first having to show that any of them is genuinely realistic. That open-ended obligation makes it very difficult for parties to know, at the outset of an investigation, what they need to establish. We invite the CMA to confirm that it will identify specific, credible alternatives before requiring merging parties to address them, and that the assessment will be grounded in the alternatives that the merging parties actually considered seriously in the ordinary course of evaluating the transaction, rather than in abstract or theoretical possibilities. Merging parties should not be expected to disprove every theoretically conceivable counterfactual.

6.4 The structured factors also do not address two well-established reasons why a contractual alternative may be commercially irrational even where it is technically feasible. The first is hold-up risk: where one party must make a relationship-specific investment before the other has committed, it is exposed to opportunistic renegotiation once that investment is sunk, and a contract cannot fully protect against this. The second is misaligned incentives: where two independent firms must cooperate over time, their diverging commercial interests will frequently prevent reliable cooperation, however the contract is drafted. Both are common features of vertical, technology, life-sciences and infrastructure transactions, and both are reasons why a merger may be the only realistic route to an efficiency. We invite the CMA to recognise expressly that mergers can resolve hold-up and incentive-alignment problems that contractual alternatives cannot.

6.5 Finally, we encourage the CMA to reinforce, rather than dilute, its focus on commercial rationality. This is a more realistic and analytically sound test than that proposed in the European Commission's Draft Guidelines (which treats the fact that a merger is the most profitable option as not, of itself, indicating that alternatives are unrealistic). In our view that approach does not fully reflect commercial decision-making: profitability is closely linked to the incentives, feasibility and likelihood of an alternative actually being implemented, and firms rationally choose higher-risk, higher-return strategies, particularly in innovation-driven sectors where expected returns justify the investment. The CMA's commercial-rationality test better captures this reality. Adopting the clarifications at paragraphs 6.3 and 6.4 above would strengthen it further and distinguish it favourably from the EU position.

7. Making the Draft Guidance usable in practice

7.1 Even where the principles in the Draft Guidance are sound, the guidance gives merging parties and their advisers too little to act on. One particularly valuable addition would be a set of concrete, worked examples illustrating how it approaches efficiency claims, conceptually and practically. The Draft Guidance currently illustrates its framework only in the abstract. We invite the CMA to publish anonymised examples covering both accepted and rejected claims, explaining what evidence was and was not found persuasive and why, and to treat these as a living resource updated as its practice develops.

7.2 To the same end, where efficiencies are raised, the CMA's final decisions should set out its assessment of those efficiency arguments in considerably greater detail than has typically been the case. Better-reasoned decisions would, over time, build the very body of accessible precedent that the Draft Guidance currently lacks, and would reinforce the commitments to consistency and engagement discussed above. There is a self-reinforcing problem here that the CMA is well placed to break: efficiency cases are presently rare, which is itself why no consistent body of practice has developed; transparent reasoning and structured engagement are the means by which that cycle can be broken.

7.3 We welcome the encouragement to engage early, and the CMA's commitment to develop a standardised information request. The engagement provisions are, however, thin. We invite the CMA to commit to substantive engagement at the pre-notification stage on the methodology and evidence it expects in relation to a given efficiency claim, and to publish the information request template alongside the final guidance — tailored, so far as possible, by efficiency type — so that merging parties can structure their evidence from the outset of a transaction.

8. Conclusion

8.1 We welcome the revised Draft Guidance and the constructive direction it represents. Our comments above are directed at a single objective: ensuring that the final guidance delivers, in substance and in practice, what it sets out in principle — so that it genuinely advances the pace, predictability, proportionality and process to which the CMA is committed through its 4Ps framework, and supports the investment and innovation objectives that the government has asked the competition regime to serve. As presently drafted, the Draft Guidance says many of the right things but, in too many places, does not go far enough to make them workable; in others, it undercuts its own stated aims. This is an important opportunity to set the CMA up as an authority that is genuinely willing to engage with the benefits of a transaction, and not only its risks, and we would encourage the CMA to take it. We would be pleased to discuss any of the above, or to assist with specific drafting.

July 2026

Freshfields LLP