

Response: Draft Revised Guidance on the CMA's Approach to Assessing Merger Efficiencies

Introduction

We welcome the CMA's guidance in providing greater clarity and detail on (i) situations when efficiencies can arise, (ii) the types of evidence the CMA will consider, and (iii) when and how merger firms should engage with the CMA on efficiencies. We further support the CMA's case-by-case approach supported by verifiable evidence.

We would, however, caution that the application of such guidance may carry particular risks in the context of digital markets, in light of: their inherent network effects; the pace at which they are capable of evolving; and the degree of control currently exercised by large technology incumbents over the open web (which has knock-on effects on adjacent markets, such as GenAI).

The structural realities of digital markets

The CMA's Lear Report¹ highlighted how authorities have historically lacked sufficient understanding of digital markets. The Facebook/Instagram merger is a notable example – regulators appeared to have failed to adequately analyse the factors driving advertiser behaviour, how the merging parties compared across those factors, and how their combination could have produced competitive harm.

What is required is a deeper understanding of how digital markets actually operate – particularly the role of data, network effects, and advertising. The conventional efficiencies framework, in which synergies can generate cost savings that are then passed on to the consumer, does not map neatly onto digital markets: many digital services are offered for free, and the "price" paid by consumers is their data.

Paragraph 16 of the CMA's draft efficiencies guidance states that reductions in variable or marginal costs are more likely than reductions in fixed costs to translate into lower prices or short-run quality improvements. This logic breaks down for a free service like Google Search, where price is already zero and "quality" is not disciplined by a market price signal in the conventional sense. If Google were to acquire a smaller search rival, the resulting efficiencies would not necessarily manifest as lower prices or better quality for consumers. Instead, the more meaningful effect is on data accumulation and ecosystem lock-in: consumers pay not in money but in data, and the merger's real competitive harm lies in deepening switching costs and extending Google's data advantage.

As digital markets currently stand, incumbents' data, user bases, and resulting revenue streams create barriers that are near-impossible to replicate, often leaving firms with no viable growth path other than merging with a major tech player. In this context, efficiency claims may be invoked to shield conduct that is, in fact, anticompetitive.

¹ [Ex-post Assessment of Merger Control Decisions in Digital Markets](#), 9 May 2019.

Paragraph 6 of the CMA's draft revised guidance lists non-exhaustive situations in which merger efficiencies can arise, including lower variable costs, the elimination of double marginalisation in vertical mergers, and dynamic efficiencies. Network effects – common in digital markets – may indeed lower costs of production, but a merger built on them can still produce anticompetitive effects. Consider a large technology incumbent acquiring an AI start-up: such a deal may be presented as generating dynamic efficiencies, on the basis that the start-up's technical expertise, combined with the incumbent's data, capital, and distribution, will drive improvements in AI over time. Yet the longer-term effect may be to distort the AI market – entrenching a dominant player and allowing the incumbent to capture an adjacent market before competition has had the chance to develop.

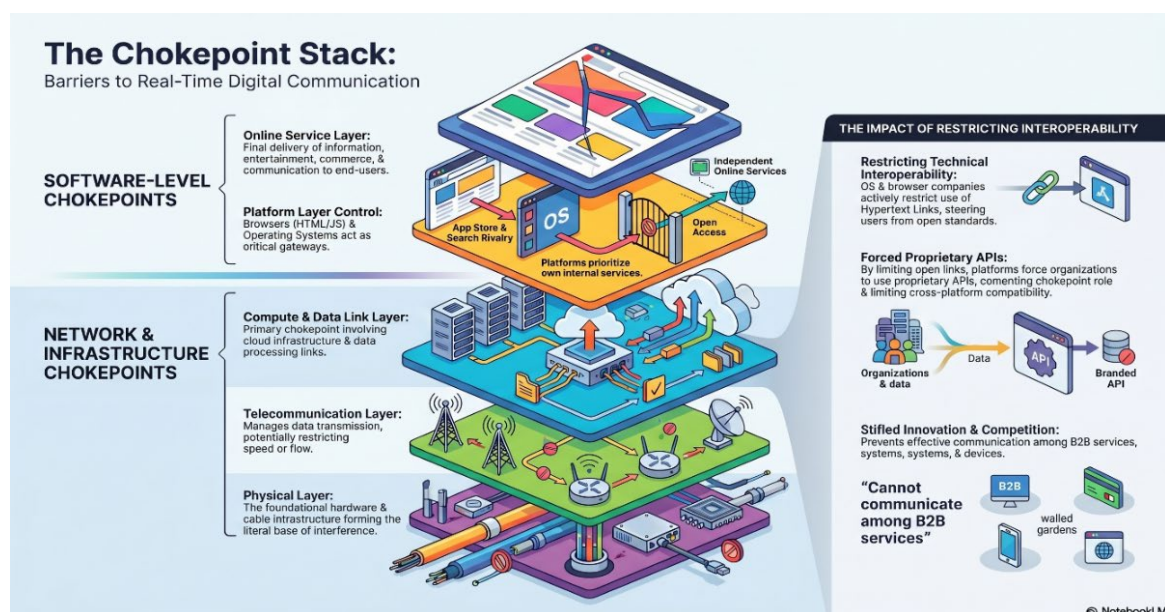
Amazon/Anthropic illustrates this: Claude's development will be shaped by AWS infrastructure, trained on datasets unavailable to rivals, and distributed through Amazon's unrivalled commercial ecosystem. The incumbent appropriates the innovation without generating it. This is important in relation to paragraph 19 of the CMA's draft guidance which recognises the effects of tipping of a market towards a single or a small number of suppliers. This is precisely what has happened in digital markets and must be considered when any large tech incumbent is merging with another entity.

By comparison with the much-repeated Frank Easterbrook statement that we need to avoid both type I and type II errors,² in digital markets there is a need to recognise the type III error of not intervening quickly enough and allowing too much consolidation that destroys open market structure and adversely impacts innovation. Certain technologies will inevitably generate monopoly as a consequence of efficiency. This means that platform businesses with very high fixed costs and very low variable costs will only get inexorably bigger and accrue more and more market power if they acquire smaller rivals using efficiency as a rationale: important information about market inputs can be enclosed and rivals' ability to compete impaired. As the work of Tommaso Valletti and others has shown, the major risk is to innovation which should be the guiding light in merger control.

In this context, the CMA's discussion on mergers enhancing the process of dynamic competition – particularly enhancing the ability or incentive of firms to innovate – is key. Two conditions must be satisfied for innovation to take centre stage in digital market merger control. First, the open web must be demonopolised through mandated interoperability and decentralisation. Second, the advantages of the existing digital monopolies must be addressed.

When considering the first, the below diagram is key in understanding the chokepoints that occur across the technology stack:

² Frank H. Easterbrook, "The Limits of Antitrust," *Texas Law Review*, Vol. 63, No. 1 (1984). Accessible at [easterbrook_limits_antitrust1984.pdf](https://www.texaslawreview.org/wp-content/uploads/1984/01/easterbrook_limits_antitrust1984.pdf).



The second factor is currently being addressed by both the US and EC, where mandatory search index data access is a key remedy to Google's search monopoly.

In *United States v Google*, Judge Mehta's remedy order on Google's search monopoly includes mandatory data sharing designed to "narrow the scale advantage" – enabling rival search engines to compete on quality, including for generative AI products.

In the EU, DMA Article 6(11) imposes a gatekeeper obligation requiring Google to grant third-party search engines access to anonymised ranking, query, click, and view data on FRAND terms. In January 2026, the Commission opened specification proceedings to define the scope, anonymisation methodology, and conditions of access. This is a good start, but it does not address the core issue of access to interaction data, the monopolisation of high-frequency refresh data, and browser and search data, within the Google/Apple joint venture.³

Lastly, we welcome the CMA's statement that in assessing whether the claimed merger efficiencies are likely to be realised, the CMA will consider whether the merged firm will have the ability and incentive to deliver them. In the context of digital markets, we urge the CMA to engage with industry on their lived experiences rather than relying solely on the incumbent's internal documents and communications.

Please let us know if you would be interested in a further discussion.

³ In which Apple receives 36% of Google search revenue: see [CMA Mobile Browsers and Cloud Gaming Final Report](#) (12 March 2025), para. 9.89 on page 494 stating that "Apple receives revenues from Google when either Safari or Chrome are used for web searches on Google Search (ie 'qualifying searches') on Apple mobile devices.²¹¹⁵ It receives: (i) 36% of Google's advertising revenue derived from Safari search traffic; and (ii) [a lower but similarly significant proportion] [%]³ of Google's search advertising revenue derived from Chrome [%]."

Also in *USA v Google (Search)* [2020], Judge Mehta [Memorandum of Opinion](#) (5 August 2024), para. 290 and the DOJ [trial exhibit](#), slide 58, citing that "in 2022, Google's ISA payment" was \$20B.

The 36% share was leaked by a witness in the *DOJ v Google (Search)* trial in 2023 (Kevin Murphy, a University of Chicago professor). See page 111 of the [witness transcript](#) stating that "they agreed to a rev share of 36 or something".