Competition & Markets Authority consultation on
Draft revised guidance on our approach to assessing merger efficiencies

Response from the In-house Competition Lawyers' Association, UK
July 2026

The In-House Competition Lawyers' Association ("ICLA") is an informal association of in-house competition lawyers with more than 500 members across the globe. ICLA does not represent companies but is made up of individuals who are in-house experts in competition law. This paper represents the position of ICLA's UK branch (with circa 130 members) and does not necessarily represent the views of all its individual members.

ICLA UK welcomes the opportunity to respond to the CMA's consultation on the draft revised guidance on assessing merger efficiencies ("Draft Guidance"). As in-house advisers to businesses, predictability of enforcement and outcomes is a key driver in managing risk, particularly when considering investment in UK businesses. This also chimes well with the CMA's 4Ps: predictability, proportionality, process and pace. Therefore, the CMA's framework for analysing efficiencies, including dynamic efficiencies, is welcome.

We set out below ICLA UK's response to the CMA's consultation first two questions for consideration.

Question 1: Overall, are the changes introduced by the Draft Revised Guidance sufficiently clear and useful?

The following aspects of the CMA's changes are beneficial:

- The expanded guidance provides greater clarity on the CMA's approach than the existing merger assessment guidelines, which is welcome.
- The examples of situations where efficiencies may arise (paragraphs 6(a)-(f) of the Draft Guidance) provide a useful indication for merging parties of the types of situation that the CMA will consider.
- The confirmation that the CMA applies a consistent evidential standard to harms and benefits is welcomed.
- The treatment of dynamic efficiencies and the recognition of market-specific time horizons provide useful guidance on the relevant timeframe.

However ICLA UK has a number of concerns it wishes to highlight:

- Uncertainty: While the guidance is clearer in principle, the CMA's commitment to a case-by-case approach and the absence of presumptions, or screening criteria mean that outcomes remain difficult to predict.
- Evidential burdens: The emphasis on verifiable evidence sets a high bar for dynamic efficiencies that are inherently forward-looking and uncertain. Parties may struggle to provide sufficiently certain evidence for benefits that are expected to flow from post-merger integration activities not yet undertaken.
- Intervention risk: The reference to academic literature suggesting that efficiencies are often not realised in concentrated markets (paragraph 10 of the Draft Guidance) creates a negative perception that efficiencies claims will be treated with sceptism, even before the merits of their specific case are assessed.
- Discouraging efficiency claims: The complexity of the evidential requirements and the residual risk of efficiency offences (even if described as rare) may discourage parties from investing in robust efficiency submissions.
- Investment and innovation: The discounting approach for future gains may systematically undervalue long-term investment and innovation benefits, which is inconsistent with the Government's strategic objective of supporting growth.

As a result, ICLA UK recommends the following drafting changes:

- Predictability: Introduce worked examples or hypothetical case studies illustrating how the CMA would assess efficiency claims in different factual scenarios (e.g., cost synergies in a horizontal merger, innovation efficiencies in a technology merger, investment efficiencies in an infrastructure merger).
- Flexibility: Remove or substantially qualify the reference to academic literature in paragraph 10, which creates an inappropriate generalised presumption against efficiencies.
- Legal certainty: Add a clear statement that the CMA will not draw adverse inferences from the absence of ordinary course documentation addressing all aspects of the efficiency framework.
- Transparency: Commit to publishing reasoning on efficiency assessments in Phase 1 and Phase 2 decisions, whether efficiencies are accepted or rejected, to build a body of practice that aids predictability.

- Substantive symmetry: Add an express principle of substantive symmetry confirming that theories of benefit and theories of harm will be assessed under equivalent analytical standard, including the treatment of qualitative evidence, uncertainty, counterfactuals and forward-looking assumptions. The guidance should make clear that uncertainty is not treated asymmetrically. Where the CMA relies on qualitative, probabilistic or forward-looking evidence to support a theory of harm, it should be equally prepared to accept comparable evidence supporting a theory of benefit. Parties should not be expected to quantify efficiencies with greater precision than the CMA quantifies the alleged harm. The CMA should explicitly state that where the CMA's theory of harm is itself uncertain or based on limited evidence, a lower standard of proof should apply to efficiency claims. Where efficiency evidence is substantial and credible, the CMA should require a correspondingly robust theory of harm before concluding that the merger gives rise to an SLC.

Question 2: What, if any, aspects of the Draft Revised Guidance do you consider need further clarification or explanation, and why?

ICLA UK considers that the following areas would benefit from further clarification.

1. **Rivalry-enhancing efficiencies**

The CMA should clarify and expressly recognise that scale, resilience and international competitiveness may be relevant pro-competitive factors where for example they support investment or improve the resilience of supply.

2. **Discounting of Future Gains**

Paragraph 22 states that the CMA will apply appropriate discounting to expected future gains. Clarification would be welcome on:

- What discount rate or methodology the CMA will apply, and whether it be sector-specific.
- Confirmation that the CMA will discount harms and benefits symmetrically.
- How the CMA will treat efficiency gains that increase over time (i.e., where benefits grow rather than decay)?

3. **Interaction Between Timeliness and Sufficiency**

Paragraph 30 acknowledges that a merger may lead to short-term harm before longer-term benefits are realised. Clarification is needed on how the CMA will balance time-limited harm against enduring benefits, and whether it will apply a net present value approach or some other methodology.

4. **Commercial Rationality in Merger Specificity**

Paragraph 33 states that the CMA will consider feasibility of merger alternatives and commercial rationality. Clarification would be welcome on:

- What standard of commercial rationality the CMA intends to apply – ICLA would advocate for alternatives to be assessed against a reasonable business judgment standard.
- How much deference will the CMA give to management's assessment of commercial feasibility.

- That it is a relevant factor, when considering alternatives, that a merger materially increases the likelihood, scale, or speed of realising the efficiencies and this will be taken account. Alternatives do not always have to be proven to be impossible.

5. **Evidential Treatment of Bespoke and Forward-Looking Analysis**

The Draft Guidance should clarify that bespoke economic analysis is not inherently less probative than ordinary-course documents where it is based on reasonable, evidenced assumptions and robust methodology. This is particularly important for dynamic efficiencies, innovation benefits and investment-related efficiencies, which may not be fully captured in pre-existing board papers or synergy analyses.

6. **Credibility of Third-Party Evidence**

The CMA should provide a framework for assessing third-party evidence, including the commercial incentives and potential biases of complainants, competitors and customers. It should also commit to using its investigatory powers proactively to test claimed efficiencies, not only theories of harm, and should provide parties with a meaningful opportunity to respond to adverse third-party evidence.

7. **Efficiency Offences**

We welcome the clarification that efficiency offences are likely to be rare in practice, and we recommend that the CMA go further and:

- Define the circumstances in which an efficiency offence theory would be considered, with reference to specific market conditions.
- Confirm it will apply the same evidential standard to an efficiency offence theory as to any other theory of harm.

8. **Customer benefits and the recognition of Broader Economic Benefits**

The Draft Revised Guidance focuses relevant customer benefits but does not adequately address the broader economic benefits that mergers can generate, including:

- Contributions to UK economic growth and productivity.
- Enhancement of UK international competitiveness and strategic resilience.
- Support for the Government's industrial strategy objectives, including the transition to net zero.
- Creation of UK-based centres of excellence in innovation and R&D.

These benefits are relevant to the CMA's broader statutory objective and the Government's Strategic Steer. We recommend that the guidance acknowledge these factors and explain how they will be considered in the CMA's overall assessment.