The CMA's Revised Merger Assessment Guidelines – Reading Between the Lines


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Introduction

In March 2021, the Competition and Market's Authority (the "CMA") published a revision to its Merger Assessment Guidelines (the "Revised Guidelines"), which were last issued in 2010. Updated mergers guidance from competition authorities always establish a new landmark, since they signal the authority's direction of the travel as regards merger control policy, the theories of harm that they wish to investigate and the assessment of the relevant evidence to assess these theories. As discussed in this chapter, the Revised Guidelines are no exception.

It is also striking that, only a few months after the CMA published the Revised Guidelines and also revised guidance on the CMA's mergers jurisdiction and procedure in December 2020, the Government published a consultation on Reforming Competition and Consumer Policy (the "Consultation"), which included a raft of potential changes to UK merger control.[1] This included raising the UK "turnover" jurisdictional test from £70m to £100m and creating a safe harbour for mergers where each of the parties have worldwide turnover of under £10m, which are both aimed at reducing the burden on businesses.

The CMA's response to the Consultation expressed support for the increase in the turnover threshold for the turnover test, but expressed concern that a threshold of £10m could allow anti-competitive mergers to occur by, for example, permitting a reduction in the number of competitors from four to three in reasonably sizeable markets. As a result, were such a safe harbour provision to be introduced, the CMA's preference would be for it to be based on a lower combined UK turnover of no more than £10m.

However, in line with the CMA's concerns in its Revised Guidelines about mergers that lead to a loss of dynamic or potential competition and also to address a perceived gap that exists under the current regime in relation to vertical and conglomerate mergers in particular, the Government is also consulting on adding a new jurisdictional test so that the CMA can assess *all* mergers where any party to the merger has a 25% share of supply in the UK, or a substantial part of the UK, and has a UK turnover of over £100m.[2] In other words, this test may apply even if there is no increase in market share, such that the current "share of supply" jurisdictional test is not triggered. Unsurprisingly, the CMA's Consultation response supports this change, with the CMA being concerned with a number of mergers involving potential competitors in recent years.

This chapter considers the Revised Guidelines from the perspective of advisors guiding UK businesses through the UK merger control process, focusing on the CMA's substantive assessment of economic evidence. However, there are many nuanced statements and some noteworthy omissions, such that advisors will still have to read between the lines. We break down our comments into three broad headings.[3]

First, the Revised Guidelines are more interventionist in a number of respects, with this reflecting existing intervention trends in the CMA's merger control decisions.

Second, the Revised Guidelines make extensive references to the CMA relying on the parties' internal documents. Consequently, from an advisor perspective, it is essential to review internal documents before undertaking any merger control risk assessment. Internal documents may not only shed light on the importance of current rivalry between the parties, but also particular dynamic theories of harm and whether absent the merger one of the parties may have entered or expanded into a market where the other party is a leading supplier.

Finally, whilst the Guidelines are comprehensive in many respects, there are some noteworthy topics that are not covered in any detail. Absent topics include any commentary on the appropriate basis to calculate market shares, mergers involving minority shareholdings, customer markets/price discrimination (where the concerns relate to specific customers, or groups of customers, suffering anti-competitive harm), and excessive buyer power. Merging parties should still be aware of theories of harm based on "roads less travelled", so that they factor in these risks when making decisions.

The Revised Guidelines are More Interventionist

Merger control policy and intervention trends

In our view, a number of aspects of the Revised Guidelines are more interventionist. However, before addressing these, it is perhaps helpful to place these issues in the context of wider policy issues and merger control intervention trends.

The CMA framed its background to the Revised Guidelines by suggesting that there has been underenforcement of merger control in a number of respects.[4] This was raised particularly in relation to digital markets, specifically noting that the five largest digital firms have made over 400 acquisitions in the last 10 years.[5] However, the CMA also expressed wider concerns as certain US economists have suggested that there may have been underenforcement as regards coordinated effects[6] and that there are risks of underenforcement as regards vertical mergers (and the CMA's Digital Advertising market study expressed concerns about certain vertical acquisitions by Google).[7]

Similarly, the Consultation refers to various research suggesting a decline in the competitiveness of UK markets, including rising market concentration and profit margins (mark-ups), and with similar trends being observed in the US and other countries.

These findings naturally play into debates with regard to mergers policy.

As regards digital markets, the focus of investigations globally and in the UK has been on the largest digital companies. As a result, in July 2021, the Government announced plans to adopt a new merger control regime for companies that have been designated by the CMA as having Strategic Market Status, including that all their mergers will be required to be pre-notified, changes to jurisdictional tests (including introducing a test based on transaction size where there is a UK nexus), mandatory merger reviews for their larger transactions, and it is consulting on whether such mergers should be assessed at Phase 2 based on whether there is "a realistic prospect" of significant lessening of competition (an "SLC") (which is a low bar for intervention).[8]

However, even before the Revised Guidelines were published, as shown in the table below, there has been a clear general trend for the CMA to review a higher proportion of qualifying mergers at a Case Review Meeting (a "CRM"), increasing from generally sub-40% of qualifying mergers between 2010/11 and 2014/15 (the year following the CMA's formation) to generally above 40% thereafter. Some of this may be attributable to the CMA exercising its discretion more frequently in later years not to investigate substantively unproblematic qualifying mergers (on the basis of briefing papers from the parties); however, it is clear that the CMA is now reaching an SLC finding in a high proportion of cases considered at a CRM. In particular, it is striking that, in 2020/21, 53% of qualifying cases were considered at a CRM, and an SLC was found in nearly 80% of these.

Trends in CMA Phase 1 decisions in relation to qualifying mergers

Date	Number of decisions	Cases with a CRM (%)	Cases referred (%)	Cases referred + UIL (%)
2010/11	59	36%	14%	20%
2011/12	79	38%	11%	18%
2012/13	77	42%	18%	31%
2013/14	53	36%	15%	15%
2014/15	72	33%	8%	13%
2015/16	60	40%	18%	33%
2016/17	56	50%	9%	25%
2017/18	62	48%	15%	34%
2018/19	54	46%	20%	24%
2019/20	58	40%	22%	33%
2020/21	36	53%	25%	42%

Source: CMA Merger Outcome Statistics.
UIL = undertakings *in lieu*.

Moreover, these intervention trends are mirrored at Phase 2, with the table below showing that only 20% of Phase 2 cases were cleared unconditionally over the least three years (2018/19–2020/21) compared with over 50% over the preceding seven years (2011/12–2017/18). It is also striking that a higher proportion of mergers are now abandoned at Phase 2, which is likely to be influenced by the parties' assessment of the poorer prospects for a successful outcome at Phase 2, including whether remedies may be agreed that preserve the commercial rationale for the merger.

UK Phase 2 outcomes

Phase 2 Outcomes	2011/12–2017/18		2018/19–2020/21	
	Number	%	Number	%
Cleared	32	51.6%	7	20.0%
Prohibited	5	8.1%	6	17.1%
Remedies (Behavioural)	3	4.8%	4	11.4%
Remedies (Divestiture)	13	21.0%	7	20.0%
Cancelled/ abandoned	9	14.5%	11	31.4%
Total outcomes	62	100%	35	100.0%

Source: CMA Merger Outcome Statistics.

The absence of any safe harbours

In its Revised Guidelines, the CMA expressly states that it applies no thresholds to assess whether a merger leads to an SLC, such as market shares or the number of competitors.[9]

The CMA has also chosen to delete all similar guidance that was set out in the 2010 Guidelines as to whether competition concerns are likely based on market structure or the nature of the competition concerns. For example, it has deleted the references to competition concerns being less likely to arise in undifferentiated markets where market shares are below 40%, or that input foreclosure will "not often" be an issue if market shares in the input are below 30%, and to most non-horizontal mergers being "benign". The CMA has also deleted the statement that: "*In relation to the number of firms, previous OFT decisions in mergers involving retailers suggest that the OFT has not usually been concerned about mergers that reduce the number of firms in the market from five to four (or above).*"[10]

At the same time, the Revised Guidelines also flag that *prima facie* competition concerns may arise based on market shares and the number of significant rivals. However, it is perhaps also helpful to highlight the change in tone from the draft Revised Guidelines[11] to the final version of the Revised Guidelines. For example, in the context of assessing unilateral effects in differentiated goods markets, the draft Revised Guidelines stated that "*[t]he smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors, and therefore the* ***less detailed analysis*** *is necessary to further assess closeness between them*" (emphasis added).[12]

However, this was amended in the Revised Guidelines to: "*The smaller the number of significant players, the stronger the prima facie expectation that any two firms are close competitors. In such a scenario,* ***the CMA will require persuasive evidence*** *that the merger firms are not close competitors in order to allay any competition concerns*" (emphasis added).[13]

This highlights that the parties' advisors need to both recognise the nature of such competition concerns and the need to gather compelling counterevidence.

Not only are there no safe harbours in the Revised Guidelines, the CMA has also become increasingly concerned with mergers that reduce dynamic or potential competition – i.e. where the parties are not currently competitors. This reflects concerns with "killer acquisitions", where market-leading companies acquire potential rivals to eliminate competitive threats.[14]

What is the role of merger guidelines and their treatment of economic evidence?

In the absence of any safe harbours, advisors are consequently left with considering the wide-ranging theories of harm set out in the Revised Guidelines.

Nonetheless, there are two overarching themes to merger control assessments. First, the Revised Guidelines rightly emphasise that the fundamental purpose of UK merger control is to safeguard the interests of consumers – and customers more generally.[15] This focus on consumers also underpins the CMA's assessment of theories of harm across various types of mergers, which should explain *how* mergers may reduce rivalry by creating or enhancing market power and *how* exercising this market power will harm consumers in some tangible way, whether in terms of price or any other dimension of competition.

There may also be circumstances in which these theories of harm apply to only one part of the relevant market. For example, in its final report on the remittal (as at November 2021), the CMA's adverse finding in *JD Sports/Footasylum* now relates only to the removal of the constraint imposed by JD Sports on Footasylum and not the loss of constraint from Footasylum on JD Sports. This is a striking finding given that Footasylum's market share is reported as being only 0–5% and the CMA accepted that market developments had led to Footasylum becoming a weaker constraint and other competitors becoming stronger constraints on JD Sports. However, the CMA nevertheless concluded that "*these market developments have not weakened Footasylum to such an extent that the merger does not result in an SLC in the market*".[16]

Second, in order to arrive at balanced decisions there needs to be a thorough factual investigation, so that competing economic theories can be accepted or rejected to the requisite legal standard. The CMA is well placed to do this. It is a large and sophisticated competition authority that employs many economists, and it carries out lengthy Phase 1 and Phase 2 investigations that require the merging parties to provide extensive information.[17]

In this regard, the Revised Guidelines emphasise three points as to the economic evidence necessary to sustain an SLC finding or refute such a finding.

First, there is no need for the CMA to engage in an exact measurement of an SLC.[18] At one level, this is a reasonable statement. However, it would still seem sensible for the parties' advisors to consider whether there is a risk of some tangible harm to consumers and quantitative techniques may be required where the data is available, particularly where this may help weigh up competing arguments and offsetting factors. This would seem particularly appropriate in detailed Phase 2 investigations.

Second, the CMA states that there is no higher evidential burden for specific theories of harm.[19] Again, this a reasonable statement. However, it would still be sensible to have regard to whether the underlying theory of harm is complex *and* the extent of any uncertainty as to whether each of the various conditions are satisfied for this theory of harm to apply. This is because it may then be appropriate to have regard to whether "*the probability of all of the necessary elements being present would be lower than the probability of each element individually*".[20] The quoted statement was made by the CMA in the context of its Phase 2 investigation of *BT/EE*, where the main theories of harm were vertical. (It is not suggested that this means that complex theories of harm cannot apply, but simply that the CMA must weigh up the evidence carefully.)

Third, where the *prima facie* evidence of competition concerns is "*strong at an early stage, especially if there is little evidence to the contrary, the CMA will expect to undertake less detailed further analysis in deciding whether there is an SLC*".[21] In a similar vein, the Revised Guidelines emphasise that, in the context of appeal of CMA merger decisions, the Competition Appeal Tribunal (the "CAT") has stated "*that it will not intervene merely because it considers that further inquiries would have been desirable or sensible*".[22] These statements highlight two points:

- First, if the CMA finds strong evidence of anti-competitive effects from the outset, the parties will likely need particularly strong counterevidence to change its mind.
- Second, appeals of merger control decisions are to a limited judicial review standard. However, that does not mean that the CMA has unfettered discretion. For example, in the recent appeal of *JD Sports/Footasylum*, JD Sports argued that the CMA had failed to fully consider the impact of COVID-19 on Footasylum. The CAT concluded that: "*[B]oth in relation to the failure to follow up inquiries with suppliers and the failure to make direct inquiries of Footasylum's primary lender, the CMA acted irrationally in that it came to conclusions as to the likely effects of the COVID-19 pandemic, that were of material importance to its overall decision, without having the necessary evidence from which it could properly draw those conclusion*".[23] The CAT remitted the merger to the CMA for further investigation on this basis.

Countervailing factors

A further theme from the Revised Guidelines is that significant caution should be applied as regards exculpatory evidence of countervailing factors that might otherwise mean that there is not an SLC.

In general terms, five countervailing factors might be identified, namely if one of the parties may exit the market in the absence of the merger in any event (the so-called failing or exiting firm defence), merger efficiencies, countervailing buyer power, entry and expansion of rivals, and existing, long-term contracts. Key points as regards these factors are considered in turn below.

It is outside the scope of the chapter to consider the failing firm defence in detail;[24] however, one particular paragraph of the Revised Guidelines is worthy of particular note:

> "*Where there are multiple alternative purchasers, including one or more which is not active in the same markets as the exiting firm, the CMA will normally consider the most likely counterfactual to involve the target being under independent ownership that maintains (or, in some instances, increases) the competitive constraint of the exiting firm.*"[25]

In other words, it is not sufficient that the target business is no longer viable – there might be other less anti-competitive purchasers. This may not be visible to the purchaser *prior* to acquisition, not least as the target might wish to maximise the purchase price for the business or its assets by downplaying the lack of credible, alternative purchasers.

In assessing whether there are alternative, less anti-competitive purchasers, the CMA's Revised Guidelines indicate that such purchasers only need to be willing to pay more than the liquidation value, namely the value of the underlying assets if they were to be sold for use outside the relevant market.[26]

However, in some cases, the underlying assets may be valuable in other uses, such that the liquidation value may be material. For example, in its Phase 1 decision in *East Coast Buses/First Scotland East*, the CMA found that internal documents showed that, before any prospect of a sale to East Coast Buses, First Scotland East had planned to close the target business, and it had taken active steps to close and progress the sale of the bus depots used to a property developer. The CMA further accepted that although there was no formal marketing of the business, its proposed closure was actively publicised, such that any less anti-competitive purchasers could have emerged. One other bus operator had made an offer; however, this was well below the liquidation value of the acquired assets. The CMA also noted that another operator had indicated it was not aware of the possibility of buying the business or its assets and it might have made a partial offer, but the CMA concluded that there was not a realistic prospect of such an offer above liquidation value for the use of the assets outside the relevant market.

Merger efficiencies may, in principle, be relevant to merger assessments, both in terms of permitting an otherwise anti-competitive merger to proceed or if there are relevant customer benefits that affect the scope of the remedies. However, the Revised Guidelines note that there have been few cases where efficiencies affected the outcome, and the majority of these related to NHS hospital mergers where the adverse effects of the SLC were limited.[27]

The CMA has deleted the section on countervailing buyer power. In the context of commenting on countervailing buyer power, the Revised Guidelines state that:

> "*Most other forms of buyer power that do not result in new entry – for example, buyer power based on a customer's size, sophistication, or ability to switch easily – are unlikely to prevent an SLC that would otherwise arise from the elimination of competition between the merger firms. This is because a customer's buyer power depends on the availability of good alternatives they can switch to, which in the context of an SLC will have been reduced. In that sense, market power and buyer power are two sides of the same coin, and an SLC can be interpreted as a substantial lessening of customers' buyer power.*"[28]

In this context, a merger may reduce the number of existing suppliers to various customers, but this may not answer the relevant question of whether that customer has outside options to which it can switch easily. If it can, a reduction in the number of "*good alternatives they can switch to*" may make no difference to its buyer power, such that there is no SLC.

Moreover, even large suppliers' outside options may be very poor where they are dependent on large customers, because finding alternative customers or sales channels may be impossible.

The sophistication of buyers is similarly highly relevant as this can affect their actual incentives and ability to switch to alternatives. Dynamic competition, which the Revised Guidelines reasonably emphasise more strongly than in the past, is just as relevant in considering the extent and existence of buyer power.

Finally, there are potentially other ways in which buyers can constrain suppliers, even if limited outside options exist. A key issue is how large customers secure competitive prices and terms pre-merger. On the one hand, customers' negotiations with suppliers might focus on playing off suppliers against one another in order to secure the best prices. On the other, customers' negotiations with suppliers might focus more on whether they grant shelf space to the overall product category, or whether a supplier has more or less favourable product placement, or whether they stock the full range of a suppliers' products or only some (including "must-stock" products and those where there are competitive alternatives).

In the context of commenting on barriers to entry and expansion, the Revised Guidelines state that:

> "*The CMA considers that entry and/or expansion preventing an SLC from arising would be rare. The CMA's evaluation of its past cases has shown that in some instances, when it has relied on entry or expansion to clear mergers, that entry or expansion did not in fact materialise.*"[29]

In our view, the CMA should not prejudge this issue; however, advisors should be aware that compelling evidence may be required.

Finally, contracts may prevent firms changing their prices and terms of supply, at least until contracts come up for renewal and, by then, customers may well have been able to develop alternative sources of supply. However, in the context of commenting on the risk of anti-competitive input foreclosure, the Revised Guidelines state that:

> "*The CMA's assessment of the ability of the merged entity to foreclose its rivals is unlikely to place material weight on contractual protections, for example, to continue supplying both the current version and future upgrades of the input. In practice, such contracts may not completely remove a firm's ability to harm its rivals, given that certain rivals might not be covered by these contracts, the contracts might not protect all ways in which the competitiveness of rivals could be harmed, and the contracts may be of limited duration. Moreover, over time contracts may be renegotiated or terminated, and firms may waive their rights to enforce any breaches in light of their overall bargaining position (reflecting the change in market structure brought about by a merger). However, the CMA may consider any financial or reputational costs of terminating contracts in its assessment of foreclosure incentives.*"[30]

It is clearly legitimate for the CMA to consider whether, on the facts, existing contracts are incomplete and do not perfectly protect customers. However, it may be appropriate to consider the terms of the contracts, such as whether they include arbitration/mediation clauses and incentives for performance. In addition, within the scope of the contract, poor performance by the supplier of an input might lead to retaliatory poor performance by the customer. As the CMA notes, reputational issues are also of crucial importance: other customers, including in unrelated markets, are likely to be deterred from entering into long-term contracts with input suppliers that do not adhere to the spirit of long-term agreements.

Moreover, even if contracts are imperfect, it would be appropriate to assess whether the input supplier would have the ability to engage in appreciable input foreclosure within the constraints of an imperfect contract, and then whether the merging parties would have incentives to adopt such a policy and whether this would have appreciable anti-competitive effects.

Internal Documents

The Revised Guidelines make very extensive references to relying on the parties' internal documents to assess whether there is an SLC. For example, the Revised Guidelines note that:

> "*…the CMA has increasingly interrogated the merger firms' internal documents as a part of its merger investigations and has more closely scrutinised evidence on deal valuation, for example when considering losses of actual and potential competition or when seeking to understand the rationale for and synergies arising from mergers.*"[31]

Accordingly, it is now essential that advisors understand the parties' own internal documents. However, there are a number of points about internal documents that should temper over reliance on such documents in isolation.

The context to internal documents is of crucial importance

It is worth starting by repeating an overarching comment made in AlixPartners' and Addleshaw Goddard's response to the updates to the CMA's mergers procedural guidelines, which emphasises that the parties' views should be sought on such documents:

> *"The CMA rightly focuses on merger parties' internal documents in its investigations but whilst these can be strong evidence of merger parties' thinking, these must be viewed in their proper context. Often they have a specific purpose and at other times have been drafted without the depth of thought (or supporting evidence) that the CMA credits them with. Whilst the CMA does treat these as only one strand of evidence, merger parties can be frustrated that the process does not allow them to assist the CMA in understanding these documents fully or to produce other evidence of action that explain why the statements in the documents are misleading or should not be interpreted out of context (including by reference to whet her they were used for decision making and by reference to other documents that may be contradictory). In both Phase 1 and Phase 2 investigations, the conclusions drawn from internal documents are presented at a late stage providing merger parties with very limited time to assist the CMA further."*[32]

In addition, part of understanding the context of documents is understanding how businesses record or consider competitive or market intelligence, who produces these documents and who in management teams receives (or received) these documents. (This should also inform whose documents are reviewed to consider who is likely to hold responsive internal documents.) In this regard, the Revised Guidelines make the good point that the absence of certain documents – such as on rivalry between firms – may not be probative if these are not produced in the ordinary course of business or have been deleted.[33] However, the importance of understanding context applies equally to the documents that are produced.

A further key context point is understanding whether and how internal documents either properly record actual decision making or have actually been implemented in practice. In short, actions speak louder than words. In our experience, internal documents often set out decisions or policy statements, indicating that a particular course of conduct will be followed (such as increasing prices), but then no such actions may be implemented in practice. Accordingly, internal documents may often need to be linked to factual structured information as to what actually happens (e.g. transactional records), since there can be a real gap between such statements and actual business decision-making.

Third parties' views should be tested as well

We do not dispute that internal documents often set out views on the market or rivalry that can provide a valuable counterpoint to test alternative views expressed by the merging parties in their submissions to the CMA. The same point applies to third party submissions, and thus the CMA should closely scrutinise the evidential base for their views as well. The substantive point as regards the parties' and third parties' views is the existence or absence of supporting factual evidence. For example, customers' stated views on competitive alternatives to the parties' products or services might not tally with their recent purchasing decisions or reflect their perceptions when they last revisited their choice of suppliers, rather than the current competitive position.

Further, in seeking to understand likely counterfactuals for the market as a whole, there are inherent biases in looking at the perspective of the merging parties as set out in internal documents, without also considering what the contemporaneous plans of others might be.[34]

Internal documents may not be an accurate guide to the underlying facts

In considering the evidential value of internal documents, advisors and the CMA should consider that internal documents are often based on an incomplete knowledge of the market, including firms' monitoring of their rivals. Firms often have limited visibility on rivals' conduct, large rivals tend to be more visible as they have more customers, larger facilities and may report more information (such as on their websites or in financial and management reports), and market intelligence tends to be backward looking and incrementally added to over time. Consequently, internal documents might be a poor guide to the competitive importance of new or growing rivals, and over index on larger rivals.

In addition, firms' business plans and valuations often suffer from optimism bias. For example, a high proportion of merger-related business plans that we see assume rising revenues (including successful product launches), falling unit costs and thus growing profits over time. The commercial reality may be very different, not least as rivals or customer pressure might require a firm to cut prices or incur greater costs. This may mean that deal valuations are not always a good guide to future competitive conditions. Indeed, even outside the context of mergers, certain companies may have market valuations that are very high relative to their earnings, and it is widely accepted that there may be speculative bubbles in firms' valuations.

It is clearly right that the CMA may take account of specific post-merger intentions that would be consistent with an SLC, such as increasing prices, less innovation, foreclosure of rivals or entry/expansion.[35] However, these documents still need to be tested for context and realism – i.e. are they consistent with the overall body of evidence? Accordingly, we would caution against the CMA *relying primarily* on business strategy and deal rationale, including documents showing that anti-competitive input or customer foreclosure or conglomerate strategies would be implemented.[36] However, such unhelpful documents clearly need to be reviewed and understood.

In considering the exiting firm counterfactual, the CMA emphasises that it will consider contemporaneous internal documents.[37] This is sensible; however:

- firms' suffering financial difficulties often have poor management information systems and controls such that their true financial state may not be highlighted by contemporaneous documents;
- the merger itself may reduce the commercial pressure to address these issues, leading to fewer supporting documents or even an absence of documents; and
- the management of a failing target may wish to present an optimistic view of a business' prospects in the absence of the merger, rather than necessarily the most realistic assessment, so as not to compromise the sale process and any purchase price agreed.

Notable Omissions from the Revised Guidelines

The Revised Guidelines are commendable in their coverage; however, it is worth highlighting where commentary is notably absent.

First, the Revised Guidelines do not comment on the appropriate way to calculate market shares, despite attaching considerable weight to them. For example, it would have been helpful if the Revised Guidelines considered the factors that are relevant to the CMA's choices between various bases on which market shares are assessed, such as any installed base (which might reflect historical sales, rather than current sales), revenues from new sales (which may be complex if some competitors sell equipment outright and some lease), and whether market shares should, in some cases, be based on average sales over a number of years (so as to average out large "lumpy" sales orders). These issues are addressed by the CMA, for example, in its Phase 1 decision in *Inspired/Novomatic*.[38]

Second, the Revised Guidelines do not consider the assessment of mergers in bidding and negotiation markets. These mergers raise different issues to mergers in differentiated goods/services markets or in purely homogeneous goods markets, such as whether there are other credible bidders for the product/service in question. The key question is not what the shares are for previous contracts, rather it's the rivalry and intensity of the competition for those contracts (where the past is often not a good guide to the future – particularly when bids are infrequent). See, for example, *Tradebe/Sita*, *Alpha Flight Group/Lufthansa*, and *Xchanging/Agencyport*.

Third, the Revised Guidelines do not consider customer markets and price discrimination, where the adverse effects may relate to specific customers being discriminated against. For example, there may be customer-specific markets where the effects of the merger vary across different customer groups, because it is possible to price discriminate between different customers.[39] For example, in *Unite/Liberty*, the CMA considered the competitive effects of the merger centred around individual higher education institutions (i.e. sources of customer demand, with the CMA considering that students value living nearby).[40]

Fourth, the 2010 Guidelines do not consider excessive buyer power; for example, as considered in *Tesco/Booker* and *European Metal Recycling/Metal & Waste Recycling*.

In contrast, excessive buyer power is discussed in the Revised Guidelines at paragraphs 5.4.19–5.4.21. It would have been helpful if the CMA were clear about why they no longer consider this text to be relevant.

Finally, the Revised Guidelines do not cover the competitive effects of minority shareholdings and successive acquisitions of further control from material influence. This is despite this issue often cropping up – for example, as considered by the CMA in *Hunter Douglas/247 Blinds* and *Amazon/Deliveroo*. These are cases where the extent of shareholding was very relevant to the assessment change in the parties' competitive incentives due to the merger.

Endnotes

1. "Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers", presented to Parliament by the Secretary of State for Business, Energy and Industrial Strategy by Command of Her Majesty, July 2021, CP 488. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf.
2. The Consultation also envisages a range of other changes, including whether clarity could be offered as regards the share of supply test (which has been used flexibly by the CMA to capture mergers, including where one of the party has limited or no UK sales), changes to rules relating to timetable extensions, allowing the CMA to accept binding commitments earlier during Phase 2, and changes to CMA Panels.
3. The authors and colleagues at AlixPartners and Addleshaw Goddard submitted a response to the CMA's consultation on the proposed revisions to the Revised Guidelines, which forms the basis for this chapter. This can be found here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/969878/Addleshaw_Goddard_LLP_and_AlixPartners.pdf.
4. Paragraph 1.7 of the Revised Guidelines.
5. Paragraphs 1.7–1.8 of the Revised Guidelines. The Lear report is a well written document that makes a range of important points, and this report is critical of the CMA's analysis in some cases (particularly *Facebook/Instagram* and *Google/Waze*). However, this review of cases does not establish that the same issues would have arisen in all digital markets, particularly given the market positions of Facebook and Google.
6. Paragraph 6.5 of the Revised Guidelines, with footnote 110 referring to two articles.
7. Paragraph 7.7 of the Revised Guidelines, with footnote 118 referring to two articles.
8. "A new pro-competition regime for digital markets", July 2021, CP 489. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.
9. Paragraph 2.8 of the Revised Guidelines.
10. Paragraph 5.3.5 of the 2010 Merger Assessment Guidelines.
11. Draft Revised Guidelines for consultation, available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935593/Revised_MAGs_Nov_2020.pdf.
12. Paragraph 4.9 of the Draft Revised Guidelines.
13. Revised Guidelines, paragraph 4.10.
14. See further: "Assessing the loss of potential and dynamic competition under UK and EC merger control: Prediction is difficult – especially if it's about the future", Mat Hughes, Camelia O'Brien, and Ben Forbes at AlixPartners, *Global Legal Insights – Merger Control Laws and Regulations 2021*. Available at https://www.globallegalinsights.com/practice-areas/merger-control-laws-and-regulations/assessing-the-loss-of-potential-and-dynamic-competition-under-uk-and-ec-merger-control-prediction-is-difficult-especially-if-it-s-about-the-future.
15. Paragraph 1.3 of the Revised Guidelines.
16. *JD Sports/Footasylum*, Summary of final decision, November 2021, paragraph 54.
17. For example, the CMA's Annual Report and Account for 2020/21 indicated that its income amounted to £95.7m and it levied merger fees of £3.1m.
18. Paragraph 2.7 of the Revised Guidelines.
19. Paragraph 2.10 of the Revised Guidelines.
20. *BT/EE*, paragraph 13.
21. Paragraph 2.19 of the Revised Guidelines.
22. Paragraph 2.20 of the Revised Guidelines.
23. https://www.catribunal.org.uk/judgments/135441220-jd-sports-fashion-plc-v-competition-and-markets-authority-judgment-2020-cat-24.
24. See further: "COVID-19: Avoiding the failure of the failing firm defence", John Bruce & Mat Hughes, *Global Legal Insights – Merger Control Laws and Regulations 2020*.
25. Paragraph 3.32 of the Revised Guidelines.
26. Paragraph 3.30 of the Revised Guidelines.
27. Revised Guidelines, paragraphs 8.2–8.27.
28. Revised Guidelines, paragraph 4.20.
29. Paragraph 8.29 of the Revised Guidelines.
30. Paragraph 7.15 of the Revised Guidelines. Similar considerations may apply to long-term contracts with customers more generally and thus whether such contracts protect customers supplied under these contracts from adverse unilateral or coordinated effects.
31. Paragraph 2.24 of the Revised Guidelines.
32. See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947303/Addleshaw_CMA2_consultation_-__response_of_Addleshaw_Goddard_and_AlixPartners.pdf.

33. Paragraph 2.29(d) of the Revised Guidelines.
34. That is not to say that the answer is to generally extend the requirement for document production to third parties in a merger, but in assessing the weight to give to internal documents and to the submissions of third parties these potential biases should be considered.
35. Paragraph 2.26 of the Revised Guidelines.
36. Paragraphs 7.19(a), 7.27(a) and 7.34(a) of the Revised Guidelines.
37. Paragraph 3.28 of the Revised Guidelines.
38. See: https://assets.publishing.service.gov.uk/media/5db17e-a2e5274a0920a53611/inspired_entertainment_novomatic_full_text_decision.pdf.
39. In contrast, this is discussed in the 2010 Guidelines at paragraphs 5.2.28–5.2.31.
40. See: https://assets.publishing.service.gov.uk/media/5df275-87ed915d09360e5457/unite_liberty_final_decision.pdf.

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AlixPartners has a multi-disciplinary practice covering economics, forensic accounting, and information management services (such as e-discovery and applied data analytics). The firm also has post-merger integration experts who provide evidence on efficiencies in mergers, and restructuring experts who advise on "failing firm" viability issues. Combined with AlixPartners' industry expertise, this wide-ranging capability enables us to create robust evidence and analysis on the issues that matter most to the case.

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