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The CMA's new MAGs – Five things to bear in mind for your next deal

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The new Merger Assessment Guidelines are out. Revised guidelines are long overdue, as the outgoing MAGs have a Jurassic quality in dating back to September 2010. As even casual observers - let alone avid readers of Platypus – might have spotted, CMA merger policy and decisional practice (emphasis on closeness of competition and dynamic issues among other things) has evolved considerably since then. The consultation on the new Draft MAGs ran over November – January and as readers will have no doubt seen, led to a plethora of feedback (including this and this response, which some of our very own Platypus contributed to) and a lot of commentary from lawyers and economists alike.

While in many ways the content of the new MAGs simply codifies the approach to merger review seen in recent years - giving the CMA an (even) stronger position in any merger control judicial review going forward - the combined effect of the changes made is stark.

So, what are the top five things to be aware of going into your next deal now the new MAGs are here to rule the roost? Platypus is here to help.

> **Active in a "large or important market"? Extra caution required**. The Draft MAGs quite clearly suggested a lower bar for the 'substantial lessening of competition' (SLC) test for so called "large" markets, or markets which are "otherwise important to UK consumers", confirming that "(a) lessening of competition may also be considered substantial where the lessening of competition is small, but the market to which it applies is large or is otherwise important to UK consumers" (emphasis added). The new MAGs retreated somewhat from this position, instead stating that "(i)n considering whether a lessening of competition is substantial, the CMA may also take into account whether the market to which is applies is large or otherwise important to UK customers" (para. 2.9). While substantively this approach is not new (the CMA flirted with this approach in *SSE / nPower* and actually adopted it in blocking *Sainsbury's / Asda*), even the slightly less stark wording in the final version leaves room for ambiguity.

  As to how large is large, the new MAGs are pretty much free of any thresholds on this or any other topic. We can all agree that the UK groceries market at £180bn per year is very large indeed, while a predicted price increase as low as 63 basis points is quite small (see our Bonsai post). The sense from *Sainsbury's/Asda* is that "otherwise important" can mean essential as opposed to discretionary goods or services, and/or have a high vulnerable consumer component. Platypus assumes that retail markets such as energy, banking, and private healthcare (subject of market investigations) and telecoms among others are fair game as either large or important, as are tech markets that have been the focus of recent CMA policy even if their revenue is advertiser and not consumer-funded. If you're active in a retail or essential goods or services and/or serve "vulnerable" (e.g. elderly, ill or low-income) consumers, this will be an important development to keep in mind.

> **Potential entry? Wouldn't count on it (unless entry is by the merging parties)**. In many markets the threat of expansion from existing competitors or entry from new competitors is a real and meaningful consideration for market participants. Don't bank on this holding much sway with the CMA though. The new MAGs take the position that entry by a third party in a manner that could prevent an SLC will be "rare" (para. 8.29). A similar approach is seen in

the counterfactual, where third-party entry is “unlikely to be assessed in any depth”, instead being analysed as a countervailing factor (para. 3.10). But just because merging parties shouldn’t bank on entry or expansion by competitors saving them, they should not write off the possibility of the CMA probing *their* plans to enter or expand in new market. The new MAGs make clear the CMA will do this, even absent “direct” documentary evidence of such plans (para. 2.29(c)).

> **It is all about the documents (documents, documents).** That the CMA is a stickler for documents - what’s in them, have the right ones been submitted *etc*. – is well known. Expect this trend to continue. The new MAGs confirm the current CMA practice of focusing particularly closely on deal valuation documents (para. 2.24). Typically, it is true to say merging parties in CMA processes do not expect to get any credit for arguments “contextualising” otherwise unhelpful documents, or detailing bias and agenda on deal documents. However, the new MAGs helpfully confirm that the CMA will maintain an “open mind” when assessing internal documents (para. 2.29), and “consider the purpose and effect of the internal document” (para. 2.30). While this might be one to watch, a thorough understanding of the story told by your internal documents (or, not told by your internal documents – as above!) is likely to remain critical when gearing up for a CMA merger review.

> **Explicit recognition of the link between control and theories of harm.** Finally, in a change from the Draft MAGs, the new MAGs include an explicit recognition of the connection between the level of control being acquired and the applicable theories of harm (para. 2.13). The specific acknowledgment that theories of harm where control is acquired may be different to those involving a firm that is acquiring material influence is likely to be a welcome acknowledgement for all those analysing minority stakes.

> **Rely on market shares at your peril!** A review of potential market definitions and combined shares of the merging parties has long been the starting point in any feasibility analysis for antitrust lawyers and economists across the globe. But this is unlikely to continue to do the trick in the UK. The new MAGs demote market definition itself to last place (first making an appearance at page 78 of 82) and instead focus their sights firmly on an analysis of the closeness of competition between merger parties. Traditional measures of concentration dependent on market definition, e.g. shares of supply/HHI, are still maintained however (para. 4.1.). While it is up for debate whether this may lead to differing substantive conclusions on the impact of a potential transaction, it still has important practical consequences. When lining up global market shares to identify potential problem areas in a feasibility analysis, the UK picture is always going to need a bit of extra prodding. Moreover, previous iterations of the MAGs provided an indication of the market shares, competitor numbers and/or concentration measures that would normally be unlikely to give rise to competition concerns. While this has not applied as a true ‘safe harbour’ in CMA practice for a while, the new MAGs don’t have any sort of equivalent. Going much further than just demoting a market definition/market shares analysis, they rather take the position that "[t]he CMA does not apply any thresholds to market share, number of remaining competitors or on any other measure to determine whether a loss of competition is substantial" (para. 2.8).

All in all, the new MAGs seem to go some way in addressing the criticism which the Draft MAGs attracted. Some of the more contentious points have been addressed, such as the fact that a substantial lessening of competition can mean a small lessening of competition (see above), or the clarification that only a lack of “direct” evidence will fail to prevent the CMA from finding that a merger party had plans to enter a market, rather than a lack of any evidence at all (as was arguably suggested by the Draft MAGs at para. 2.28(c)). However, the new MAGs significantly expand the

discretion given to the CMA compared to previous iterations. The CMA does not believe that merger control safe harbours, even soft ones, are appropriate in 2021. The tension in relation to the clear demotion of market definition as a tool, while maintaining the relevance of traditional measures of concentration is a good example of this.

The Platypus, depending on the circumstances, can look like a bird (that duck-bill!), a beaver, a quadruped, or something altogether more rare and strange (see our first post). The MAGs take the same view of SLC: it is not just one thing but can be any number of things. The MAGs are therefore non-exhaustive and enumerative, rather than restrictive. They very aptly codify a policy belief in expanded agency discretion and flexibility to protect consumers, rather than updating limiting principles (such as safe harbour thresholds, or presumptions against intervention) that provide planning aids, predictability and comfort to business. As such, they are very much an amphibious, omnivorous creature of their time: *Platypus Zeitgeist*.