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**Theories of Harm for Digital Mergers – Note by the United Kingdom**

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More documents related to this discussion can be found at  
<https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm>

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### 1. Introduction

1. Merger control is not static: as markets evolve, so too must competition authorities' assessment of competition. The growing prominence of digital firms has brought about substantial benefits for society but also novel challenges that require competition authorities to adapt their analytical approach and evidence gathering.

2. Merger control plays a crucial role in ensuring that digital markets work for consumers. Features such as dynamic competition, network effects from two-sided markets, economies of scale and scope, data advantages to incumbents and the development of ecosystems can, in certain circumstances, give rise to entrenched market power and a resulting lack of effective competition. The CMA's experience suggests that rather than attempting to rewrite the analytical approach for digital mergers, incorporating an understanding of these characteristics into a flexible approach around existing, well-understood analytical principles provides for a consistent and balanced merger control regime.

3. In 2021, the CMA updated its Merger Assessment Guidelines (the **Guidelines**) to reflect the CMA's approach to assessing digital mergers. The revised guidelines describe a set of tools that can be applied flexibly to reflect the competitive reality of the market under consideration. The updates made do not signal the introduction of new theories of harm or economic principles, but rather developments in the application of existing theories and principles, including in digital markets.

4. This paper discusses the CMA's approach to reviewing digital mergers and is structured as follows:

- Section 2 provides background on the CMA's process for merger assessment and the CMA's revised Guidelines, including the findings of the key research into digital markets in the UK;
- Section 3 outlines the CMA's approach to theories of harm for digital mergers;
- Section 4 describes how the CMA carries out its assessment of digital mergers;
- Section 5 provides case summaries of several digital mergers considered by the CMA;
- Section 6 discusses broader changes that have been made within the CMA to ensure it can identify and investigate potentially problematic digital mergers, this includes the introduction of specialist units within the CMA focused on digital markets and the expected implementation of new statutory powers specific to digital markets.

### 2. Background

#### 2.1. The CMA's merger review function

5. The CMA may come to review a merger if either (i) the parties voluntarily notify a merger to the CMA; or (ii) the CMA opens an investigation on its own initiative. Within the CMA, the Mergers Intelligence Committee reviews information about anticipated and completed mergers from a range of sources, including short briefings from the parties. The

CMA will take a decision to investigate if it believes that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met.<sup>1</sup>

6. The CMA examines whether a merger gives rise to a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services. The CMA does not apply any thresholds to market shares, number of remaining competitors or on any other measure to determine whether a loss of competition is substantial.<sup>2</sup> Rather, it will determine what constitutes *substantial* in the context of an SLC depending on the facts of the case.<sup>3</sup>

7. At phase 1, the CMA determines whether it believes that the merger results in a *realistic prospect* of an SLC. At phase 2, an inquiry group conducts an in-depth investigation to assess if a merger is expected to result in an SLC *on the balance of probabilities*.<sup>4</sup>

8. The phase 2 inquiry group is made up of at least three members of a panel of independent experts appointed by the Secretary of State.<sup>5</sup>

9. The CMA's approach to substantive merger assessment is described in its Guidelines.<sup>6</sup>

## 2.2. Updates to the Merger Assessment Guidelines

10. Since the previous Merger Assessment Guidelines were published in 2010, there have been significant changes both in the UK economy and in the types of mergers the CMA reviews. In particular, digital technologies have significantly changed the way goods and services are sold, delivered, and used by consumers and the way that businesses compete. In light of these changes, a growing consensus emerged from expert reports and in the academic literature of historic under-enforcement, particularly in relation to digital markets. A number of published papers from around the world, including the European Commission's digital experts report in the EU, and the Stigler Center report in the US, examined the nature of competition and made recommendations on the approach to merger control in the digital sector.<sup>7</sup>

11. In the UK, two studies were published on competition in digital markets: the report of the Digital Competition Expert Panel (the Furman Report) and the Ex-post Assessment of Merger Control Decisions in Digital Markets (the Lear Report), both published in 2019.

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<sup>1</sup> [Guidance on the CMA's mergers intelligence function \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/mergers-intelligence-function), paragraph 1.2.

<sup>2</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/merger-assessment-guidelines-cma129), paragraph 2.8.

<sup>3</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/merger-assessment-guidelines-cma129), paragraph 2.9.

<sup>4</sup> [Mergers: Guidance on the CMA's jurisdiction and procedure \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/mergers-guidance-on-the-cma-jurisdiction-and-procedure), paragraph 3.8.

<sup>5</sup> The CMA's panel members come from a variety of backgrounds and expertise in different areas including law, economics, business and consumer policy: See [Mergers: Guidance on the CMA's jurisdiction and procedure \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/mergers-guidance-on-the-cma-jurisdiction-and-procedure).

<sup>6</sup> The CMA's procedural approach to merger assessment is described in [Mergers: Guidance on the CMA's jurisdiction and procedure \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/guidance/mergers-guidance-on-the-cma-jurisdiction-and-procedure).

<sup>7</sup> Special Advisers Report to the European Commission, 'Competition Policy for the Digital Era' (2019); Stigler Centre, 'Stigler Committee on Digital Platform – Final Report' 2019.

12. The Digital Competition Expert Panel – chaired by Professor Jason Furman and composed of experts in economics, competition policy, law, and science – was set up by the UK Government to investigate the UK’s competition regime in the context of the digital economy. The terms of reference included questioning the appropriate approach to mergers in digital markets.

13. The Furman Report<sup>8</sup>, found that:

*Assessing mergers always involves making a best attempt to predict the future... Assessment of mergers involving digital companies is made more complex by... their fast-moving dynamic nature... digital mergers are also more likely to involve theories of harm which relate to elimination of potential competitors or harming innovation... the economic tools do exist for the CMA to develop and use for more innovation-focused, forward-looking enforcement.*

14. The Expert Panel ultimately recommended that the Guidelines be updated to ‘reflect the features and dynamics of modern digital markets, to improve effectiveness and address underenforcement in the sector’<sup>9</sup> and that ‘the CMA should further prioritise scrutiny of mergers in digital markets and closely consider harm to innovation and impacts of potential competition in its case selection and in its assessment of such cases’.<sup>10</sup>

15. Concurrently, the CMA commissioned economic consultancy firm, Lear, to carry out a review of approaches to assessing potential competition theories of harm and to evaluate past merger decisions in the technology sector. The Lear Report<sup>11</sup> included an ex-post assessment of four digital merger clearance decisions, focusing on the methodology of the substantive assessment, including the completeness of theories of harm pursued, and the ultimate market outcomes following the mergers. From this review, and a survey of the economic literature, the Lear Report concluded that certain features of digital markets may justify some changes in the way mergers in the sector are typically assessed. The Lear Report set out a number of recommendations for best practice when considering these issues in future.

16. The Lear Report did not recommend the CMA to adopt new or novel theories of harm specific to the digital sector but did suggest a number of ‘reinforcements’ to the CMA’s existing tools by improving the information relied on in evaluating mergers; extending the time horizon for assessing market developments; and accepting the inherent uncertainty of counterfactuals particularly in dynamic markets.

17. The 2021 revised Guidelines reflect an evolution in the CMA’s application of existing theories of harm and economic principles. The updates are underpinned by the findings of the Furman and Lear Reports, alongside learnings from our recent experience and case law, and the experience of other competition authorities around the world in relation to digital mergers.

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<sup>8</sup> [Unlocking digital competition: Report from the Digital Competition Expert Panel \(publishing.service.gov.uk\)](https://publishing.service.gov.uk), March 2019 (the **Furman Report**).

<sup>9</sup> Recommendation 9, the Furman Report.

<sup>10</sup> Recommendation 7, the Furman Report.

<sup>11</sup> [Ex-post Assessment of Merger Control Decisions in Digital Markets \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

### 3. CMA's approach to theories of harm

18. The CMA assesses the potential competitive effects of mergers by reference to 'theories of harm'. Theories of harm provide a framework for assessing the effects of a merger and whether or not it could lead to an SLC relative to the counterfactual.<sup>12</sup> The theories of harm will depend on the levels of the supply chain at which the merger firms operate, the relationships between the merger firms and their rivals; the nature of competition and how firms go about winning customers from each other; and any long-run dynamics in the relevant sectors.<sup>13</sup>

19. While the Guidelines provide the CMA with a broad 'toolbox' of theories of harm, including on potential and dynamic competition, the theories of harm discussed in the Guidelines are not an exhaustive list – the CMA is not precluded from considering any theory of harm involving a potential SLC that could arise as a result of the merger.<sup>14</sup>

#### 3.1. Potential and dynamic competition

20. The revised Guidelines set out expressly that the loss of potential competition may constitute an SLC where, absent the merger, entry or expansion by either or both merger firms may have resulted in new or increased competition between them.<sup>15</sup>

21. Mergers involving a potential entrant can lessen competition in different ways:

- a merger involving a potential entrant may imply a **loss of the future competition** between the merger firms after the potential entrant would have entered or expanded;<sup>16</sup>
- existing firms and potential competitors can interact in an ongoing dynamic competitive process, and the merger could lead to a **loss of dynamic competition**. Firms that are making efforts or investments that may eventually lead to their entry or expansion will do so based on the opportunity to win new sales and profits, which may in part be 'stolen' from the other merger firm. Incumbent firms that are making efforts to improve their own competitive offering may do so to mitigate the risk of losing future profits to potential entrants. In this sense, potential entrants can be thought of as dynamic competitors, even before they effectively enter and begin supplying customers. A merger may reduce the incentives of dynamic competitors to continue with efforts to enter or expand, or the incentive of incumbent firms to mitigate the threat of future rival entry or expansion. The impact of such a reduction in efforts would affect customers in the present, rather than solely from the future point in time when entry or expansion has occurred.<sup>17</sup>

22. The loss of future competition is frequently identified as a key concern in digital mergers. There are plentiful, and well documented, examples of large digital firms acquiring potential entrants. This strategy is not necessarily problematic – indeed many of these acquisitions are benign or even beneficial to consumers and provide exit options for

<sup>12</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 2.11.

<sup>13</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 2.12.

<sup>14</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 2.18(e).

<sup>15</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 5.1.

<sup>16</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 5.2.

<sup>17</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 5.3.

start-ups that ensure incentives for innovation remain. The concern arises where such mergers may forestall the entry and growth of would-be competitors to insulate the acquirer from a future competitive threat.

23. Losses of dynamic competition are also particularly relevant in digital markets, where the investments involved in entering or expanding can represent an important part of the competitive process. For example in the case of digital platforms, the costs and time required to build up a significant user base and achieve network efficiencies might involve years of losses (with ongoing uncertainty about whether the platform would eventually be successful).<sup>18</sup>

24. Dampened dynamic competitive interaction may arise from mergers between an existing supplier and a dynamic competitor, or between two dynamic competitors.<sup>19</sup>

- A merger involving an existing supplier and a dynamic competitor may lead the existing supplier to reduce its efforts in the present to protect against the possible impact of the dynamic competitor, as any future loss of sales to the dynamic competitor would not reduce the profits of the merged entity (sometimes referred to as a reverse-killer acquisition).<sup>20</sup>
- A merger involving a dynamic competitor making efforts towards entry or expansion may lead the merged entity to reduce those efforts.<sup>21</sup> After a merger, any profits that the dynamic competitor would expect to ‘steal’ from the other merger firm would no longer contribute to an incentive to enter, as these profits would already be captured by the merged entity.<sup>22</sup>

25. Importantly, the elimination of a dynamic competitor that is making efforts towards entry or expansion may lead to an SLC even where entry by that entrant is unlikely and may ultimately be unsuccessful. This may be the case if, for example, there is evidence that the competitor’s entry or expansion would have a significant impact on other firms’ future profits. In such circumstances, the removal of the threat of entry may lead to a significant reduction in innovation or efforts by other firms to protect those future profits.<sup>23</sup>

### 3.2. Horizontal unilateral effects

26. Generally speaking, the CMA’s approach to reviewing standard, static horizontal mergers has not changed. But one notable update on horizontal unilateral effects that is particularly relevant to digital mergers, is a new section in the Guidelines addressing the characteristics of two-sided markets that are prevalent in the digital sector such as social

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<sup>18</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 5.4.

<sup>19</sup> As clarified at footnote 102 of the Merger Assessment Guidelines, losses of future competition and losses of dynamic competition are interrelated, as they both involve the constraint from potential entrants. As both depend on the likelihood of entry or expansion by a potential entrant, and the impact of such entry or expansion on competition, the CMA’s assessment of each may to an extent rely on overlapping evidence. The CMA may therefore consider them together or separately.

<sup>20</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 5.19(a).

<sup>21</sup> As entry by a merger firm is typically considered as part of the CMA’s counterfactual, there may be overlaps between the assessment of the counterfactual and substantive assessment: [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 5.9.

<sup>22</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 5.19(b).

<sup>23</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 5.23.

media platforms.<sup>24</sup> The Guidelines identify several considerations relevant to common theories of harm in digital mergers including: (i) how that these markets may exhibit strong network effects that may ultimately lead to the market tipping which may be accelerated by mergers;<sup>25</sup> (ii) platform mergers are more likely to have a strong effect on incentives; (iii) larger platforms are more likely to exert a strong constraint on rivals; and (iv) barriers to entry are likely to be high. Furthermore, the emphasis of the two-sided nature of digital markets highlights the importance to our assessment of considering harm that may arise not just on the user side.<sup>26</sup>

### 3.3. Vertical and conglomerate effects

27. Non-horizontal mergers were traditionally viewed as benign in many contexts. However, the rising prominence of digital mergers taking place in adjacent markets or with complementary products has highlighted the need to undertake a broad assessment of potential competitive harms. For example, the CMA’s 2020 market study into digital advertising found that Google had undertaken a number of vertical mergers with firms throughout the digital advertising value chain, most notably acquiring DoubleClick, and has subsequently been able to leverage its wider ecosystem to preference its own activities and further reinforce its market power.

28. The Guidelines recognise the various competitive harms that may arise from non-horizontal mergers. The common concern is that a firm with market power in one market can leverage that power into adjacent markets or protect its power to foreclose current or potential rivals.

29. The CMA continues to use the well-established ‘ability, incentive, and effect’ framework to assess non-horizontal mergers in relation to input foreclosure, customer foreclosure, and conglomerate effect theories of harm. Notable considerations under each limb include the following:

- **Ability** – The CMA may consider a wide range of mechanisms through which the merged entity could potentially harm its rivals. With regard to input foreclosure – where the merged entity uses its control of an important input to harm its downstream rivals’ competitiveness – mechanisms for harm may include deteriorating product interoperability, restricting licensing of intellectual property, shutting down APIs or limiting access to data.<sup>27</sup>

The starting point for the assessment of ability for vertical input foreclosure or conglomerate effects is identifying market power in the upstream or adjacent markets, respectively. In digital markets, the CMA may consider features that limit the constraint from upstream rivals such as economies of scale, network effects, control of intellectual property, access to data or integration into wider ecosystems.<sup>28</sup>

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<sup>24</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 4.21-4.25.

<sup>25</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 4.23 and 4.25(a).

<sup>26</sup> See also, Lear Report, page 19.

<sup>27</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#) para 7.13.

<sup>28</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#) para 7.14(a).

- **Incentive** – While incentive analysis can sometimes focus on a quantitative margin analysis, in digital mergers it may be more appropriate to take into account other costs and benefits. Particularly in complex and dynamic markets, firms may not focus on short term margins but may pursue other objectives to maximise their long-run profitability, which we may consider. This may include eliminating a possible long-term threat, increasing the stickiness of existing customers, positioning themselves strongly in high-growth markets, gaining customers to obtain direct or indirect network effects, obtaining access to customer data, or enabling cross-selling within a broader ecosystem.<sup>29</sup>
- **Effect** – the CMA will consider whether the harm to competitors will result in substantial harm to overall competition in the vertically affected or adjacent market. This will include considering the impact of foreclosure on potential competitors through raising barriers to entry, where the negative impact on customers may take some time to materialise.<sup>30</sup>

30. Conglomerate theories of harm reflect the concern that a merged entity may restrict its rivals in one ‘focal’ market from accessing customers using its strong position in an ‘adjacent’ market.<sup>31</sup> Conglomerate effect concerns may be greatest in nascent and digital markets, as new customers may be more easily diverted between firms, scaling particularly critical, competitors more easily marginalised, and the future benefits of controlling these markets especially large. However, these anticompetitive effects may not emerge in full until after the market has reached maturity, so in assessing these mergers the CMA may focus on their impact on the structure of the market and competition over the longer term.<sup>32</sup>

31. The Guidelines highlight the impact of wider ecosystems in mergers when looking at questions of conglomerate effects, foreclosure of competitors or market strength.<sup>33</sup> These are increasingly questions we are called to consider in our merger cases.

## 4. CMA’s approach to merger assessment in digital cases

### 4.1. Dealing with uncertainty

32. The Guidelines recognise that while all merger assessments are prospective, there can be a higher degree of uncertainty in some markets, particularly those that are emerging or undergoing transformational change. That uncertainty will be weighed in the CMA’s assessment of whether the relevant standard of proof is met. The fact that there may be some uncertainty does not, by itself, reduce the likelihood that a merger could give rise to

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<sup>29</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#) para 7.19.

<sup>30</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#) para 7.20.

<sup>31</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 7.30.

<sup>32</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#) para 7.37.

<sup>33</sup> Outside merger control, the CMA has extensively considered how market power can be derived from the construction of an ecosystem of products. The Mobile ecosystem market study<sup>33</sup> found that ‘Apple and Google have cemented their powerful position as the two main gatekeepers that hold the ‘keys’ to these increasingly vital mobile ecosystems. Both firms are well placed to leverage their power into other markets linked to their ecosystems, including new emerging ones. It is extremely difficult for other firms to enter, expand and compete meaningfully’.

competition concerns, and the presence of some uncertainty will not in itself preclude the CMA from concluding that the legal test is met on the basis of all the available evidence.<sup>34</sup>

33. In sectors characterised by fast-moving technological and commercial developments or assessments of potential or dynamic effects that are particularly dependent on the evolution of competitive conditions, the types of evidence that are available to the CMA may be more restricted (for example, in many instances recent evidence from the pre-merger period will be a good indicator of future competitive conditions without the merger, however this is unlikely to be the case in nascent markets with dynamic effects). In such cases, the CMA may place particular weight on evidence such as internal documents, the expected number of competitors after the merger, similarities between the characteristics of the products or services that are under development, and the views and expansion plans of market participants. As with uncertainty, the absence of certain types of evidence such as historical data will not in itself preclude the CMA from concluding that the SLC test is met on the basis of all the available evidence assessed in the round.<sup>35</sup>

## 4.2. Alternative counterfactuals

34. While mergers are generally assessed against prevailing conditions of competition, the Guidelines identify that in some circumstances an alternative more competitive counterfactual will be appropriate. Establishing the appropriate counterfactual to assess the merger against is an inherently uncertain exercise and evidence relating to future developments absent the merger may be difficult to obtain. However, uncertainty about the future will not in itself lead the CMA to assume the pre-merger situation to be the appropriate counterfactual. As part of its assessment, the CMA may consider the ability and incentive (including but not limited to evidence of intention) of the merger firms to pursue alternatives to the merger.<sup>36</sup>

35. Alternative counterfactuals may include the entry or expansion by one of the merger firms in the market of the other firm. This may be relevant where one merger firm is a start-up company or newly active in a market. Another example is where an established firm decides to enter a new market through acquisition, where it would otherwise have invested in organic entry by developing its own product or service.<sup>37</sup>

36. The time horizon that the CMA considers when describing the counterfactual will depend on the context. The Guidelines recognise that in some instances, when considering entry by a merger firm, becoming successful can take longer than two years.<sup>38</sup>

## 4.3. Approach to market definition

37. The revised Guidelines contain a new chapter on the role of market definition in our merger assessments. The revised Guidelines recognise that market definition is not an

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<sup>34</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraphs 2.10 and 2.27.

<sup>35</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraphs 2.28.

<sup>36</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 3.14.

<sup>37</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 3.17.

<sup>38</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 3.15. This reflects the observation from the Lear Report that the ‘default’ time frame of two years for considering entry in the 2010 Guidelines ‘may be somewhat limiting and could be extended when dealing with mergers in digital markets: even in the fast-moving digital landscape, becoming successful can take longer than two years’ (Lear Report, Recommendations, page xiv).

end in itself.<sup>39</sup> The CMA's experience is that in most mergers the evidence gathered as part of the competitive assessment, which will assess the potentially significant constraints on the merger firms' behaviour, captures the competitive dynamics more fully than formal market definition.

38. The outcome of any market definition exercise does not determine the outcome of the CMA's analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.

39. In many cases there is no 'bright line' that can or should be drawn.<sup>40</sup> This is often the case in digital markets where: (i) specific markets can be difficult to identify where there are significant inter-relationships between products, for example within digital ecosystems or where data is a secondary product; (ii) typical market definition exercises involve considering customer responses to changes in price while often digital markets have zero-pricing (or even negative pricing); and (iii) products are often highly differentiated. Instead, the CMA may take a simple approach to defining the market – for example, by describing the market as comprising the most important constraints on the merger firms that have been identified in the CMA's assessment of competitive effects.

#### 4.4. Non-price parameters of competition

40. The Guidelines identify that in some cases, non-price competition may be the primary focus, for example, when customers do not pay a monetary price for consuming digital services or content or where firms compete mainly by innovating.<sup>41</sup> Instead, the assessment of harm may well be concerned with other parameters of competition, such as privacy implications or the impact on innovation to which a merger gives rise.

41. In addition, the role of data held by merger firms is becoming an increasingly relevant factor in the CMA's assessment, especially in cases that have vertical or conglomerate considerations. For example, in relation to the ability to foreclose rivals, the CMA will consider the mechanism of limiting access to data or obtaining access to confidential data. Where competitors are precluded from accessing or aggregating equivalent data, this may raise barriers to entry and/or expansion to the extent that competition is substantially lessened.

### 5. Examples of the CMA's consideration of digital mergers

42. This section sets out a summary of recent CMA merger investigations in the digital sector, including cases that either shortly precede or post-date the publication of the revised Guidelines.

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<sup>39</sup> The CMA must identify a market or markets within which an SLC arises – within that context, the assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of the mergers and should not be viewed as a separate exercise: [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 9.1.

<sup>40</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 9.4.

<sup>41</sup> [Merger Assessment Guidelines \(CMA129\) \(publishing.service.gov.uk\)](#), paragraph 2.4.

### 5.1. Sabre/Farelogix (2020)

43. Following an in-depth phase 2 investigation, the CMA found that Sabre’s purchase of Farelogix may be expected to result in an SLC within the supply of merchandising and distribution services worldwide, including in the UK. The CMA found that the merger could result in less innovation in services, leading to fewer new features that may be released more slowly.

44. Farelogix had developed technology that allows airlines to offer more choice to passengers who purchase tickets from travel agents by way of customising their flight experience. Sabre did not yet offer this new technology but was investing in developing it. If Sabre were to buy Farelogix it would be unlikely to develop the technology itself. Airlines, and ultimately their passengers would lose out from this lack of innovation.

45. The CMA inquiry group found that ‘while the nature of innovation means that these effects may take some time to emerge in full, it also means they are likely to have a particular substantial and long-lasting detrimental impact on customers. Moreover, there would be a much more rapid and immediate impact on the competitive process – namely the ongoing rivalry between firms driving each other’s day-to-day investment decisions’.<sup>42</sup>

46. The CMA inquiry group decided to prohibit the merger in its entirety.

47. Within a matter of months following prohibition of the merger, Sabre publicly announced the development of a product that the CEO referred to as ‘essentially a Farelogix replacement’.<sup>43</sup>

### 5.2. Amazon/Roofoods (Deliveroo) (2020)

48. Following an in-depth phase 2 investigation, the CMA found that Amazon’s acquisition of certain rights including board representation and a 16% minority shareholding in Roofoods (Deliveroo) may not be expected to result in an SLC. Deliveroo’s main activity is restaurant food delivery.

49. A key issue for the inquiry group was whether the most likely scenario, absent the merger, was that Amazon would choose to re-enter the supply of online restaurant platforms in the UK, following its exit in 2018.

50. The CMA found that Amazon had a strong and continued interest in online restaurant platforms and an incentive to offer this service to Prime customers in order to differentiate its offering, realise flywheel benefits and develop useful logistical capabilities that would be deployed elsewhere in its business.<sup>44</sup> While entry into the UK market by Amazon may not have occurred imminently the inquiry group found that, absent the investment in Deliveroo, the most likely scenario would involve Amazon choosing to re-enter in the short to medium term (defined as being within five years). The inquiry group concluded that, in the counterfactual, Amazon was likely to re-enter the supply of online restaurant platforms in the UK – and as such, that the appropriate counterfactual was more competitive than the prevailing conditions of competition.

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<sup>42</sup> Sabre/Farelogix (2020), Final Report, paragraph 126.

<sup>43</sup> Sabre (Sean Menke, CEO), Q3 2020 results, Earnings Call Transcript, 6 November 2020.

<sup>44</sup> Amazon/Roofoods (2020), Final Report paragraph 59.

51. Despite finding a more competitive counterfactual, the CMA ultimately concluded that Amazon's 16% shareholding would not sufficiently affect Amazon's incentives to compete independently with Deliveroo such as to give rise to an SLC.

### 5.3. NVIDIA/Arm (2021)

52. The CMA provided a report to the Secretary of State (SoS) for the Department of Digital, Culture, Media and Sport after the SoS issued a public interest intervention notice in relation to the anticipated acquisition of the Intellectual Property Group of Arm by NVIDIA. NVIDIA and Arm are active at different levels of the global semiconductor technology industry. The CMA's theories of harm in this case focused around access to and interoperability with Arm's semiconductor IP and software.

53. In its phase 1 decision, the CMA found that the merged entity would be able to implement a total and/or partial vertical input foreclosure strategy regarding NVIDIA's rivals in the supply of datacentre CPUs and SmartNICs.<sup>45</sup> This could include targeting NVIDIA's rivals to restrict or downgrade future access to Arm's intellectual property (IP), and/or develop or roll-out Arm's IP in a way that favours NVIDIA.<sup>46</sup>

54. Similarly, with regard to a conglomerate theory of harm, the CMA found that the merged entity could modify the interoperability between datacentre GPUs and Arm-based datacentre CPUs and/or SmartNICs to enhance NVIDIA's products and undermine the operability of rivals' products, so as to *de facto* bundle the supply of these products. The CMA found that, given the importance of these products, customers would be incentivised to buy such product combinations.<sup>47</sup>

55. In its phase 2 investigation, the CMA inquiry group indicated that it expected to consider evidence on the ability and incentive of the merged entity to pursue such foreclosure strategies and the impact that this could have on competition.<sup>48</sup> However, the deal was ultimately abandoned shortly after the inquiry group published its Issues Statement.

### 5.4. Facebook/Kustomer (2021)

56. The CMA's phase 1 investigation found that Facebook's anticipated acquisition of Kustomer would not give rise to a realistic prospect of an SLC. Kustomer offered customer relationship management (CRM) software designed to help agents in a company's customer service function to manage communications with customers.

57. The CMA assessed four theories of harm as part of its investigation. First, the CMA considered whether the merger could raise barriers to entry and expansion by further increasing Facebook's data advantage in online display advertising. The CMA drew on its Online Platforms and Digital Advertising Market Study which had found that Facebook enjoyed significant market power in online display advertising and that its superior access to data affords it a significant competitive advantage in advertising targeting, acting as a

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<sup>45</sup> CPUs refer to central processing units. SmartNICs refer to enhanced network-interface controllers enabling the transfer of data in datacentres.

<sup>46</sup> NVIDIA/Arm, Summary of the CMA's report to the SoS, paragraph 1.20.

<sup>47</sup> NVIDIA/Arm, Summary of the CMA's report to the SoS, paragraph 1.23.

<sup>48</sup> NVIDIA/Arm, Issues Statement, paragraph 35.

barrier to entry and expansion to actual or potential rivals.<sup>49</sup> However, the CMA ultimately found that, given the small size of Kustomer (even considering its future potential growth), rivals' ability to access similar data, and the lack of concern from advertising competitors, the incremental data Facebook would obtain would not materially raise barriers to entry in online display advertising.

58. The second and third theories of harm concerned input foreclosure of Kustomer's customer service and CRM software rivals by restricting or degrading their API access to Facebook's messaging channels, and customer foreclosure of Facebook's B2C messaging rivals by restricting access to Kustomer's customer services and support CRM software. In relation to both foreclosure theories of harm, the CMA applied its standard ability, incentive, effect framework and, in each instance, found that the merger would not give rise to a realistic prospect of an SLC.

59. Finally, the CMA considered whether Facebook would have the incentive to rely on cross-subsidisation from its online display advertising business to offer Kustomer on a free or freemium basis, thereby making it difficult for other suppliers of customer services and support CRM software to compete.

60. For this strategy to reduce competition, the CMA considered that rival CRM providers would need to be placed at such a disadvantage that their ability to compete would be substantially limited. Furthermore, the reduction in competition would need to be significant enough that the long-term impact on price, quality and innovation in customer service and support CRM services would more than offset the short-term customer benefits from the lower price of Kustomer software. The CMA concluded that this would not be the case due to the presence of large and established competitors, some of which may be in a position to adopt a free or freemium model or a basic low-price CRM product that could rival Facebook's strategy. The CMA also considered that while price was an important dimension of competition, there were several other dimensions on which both large CRM providers and more niche suppliers could be expected to remain competitive.

## 5.5. Meta (Facebook)/Giphy (2021)

61. Following an in-depth phase 2 investigation, the CMA found in November 2021 that Meta's completed acquisition of Giphy would reduce competition between social media platforms and that the deal had already removed Giphy as a potential challenger in the display advertising market. The CMA found that the merger resulted or would result in an SLC and that the only effective way to address the competition issues was for Facebook to sell Giphy in its entirety.

62. The phase 2 inquiry group found that the merger was more likely than not to give rise to an SLC on two theories of harm related to the two-sided market for social media services and display advertising:

- horizontal unilateral effects resulting from the loss of potential competition in display advertising; and
- vertical effects on competition in the supply of social media arising from input foreclosure.<sup>50</sup>

63. The inquiry group assessed these theories of harm against a counterfactual in which Giphy would have continued to supply GIFs, innovate, develop its products and services,

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<sup>49</sup> Facebook/Kustomer (2021), paragraph 140.

<sup>50</sup> Facebook/Giphy (2021), Final Report, paragraph 17.

generate revenue and explore various options to further monetise its products, and Facebook would have continued to procure GIFs from Giphy, at least in the short to medium term.<sup>51</sup>

64. The inquiry group found that the loss of Giphy as a dynamic competitor in display advertising would be substantial in light of, among other factors:

- Facebook’s significant market power in display advertising;
- Giphy’s efforts in recent years to monetise its services, using an innovative advertising model, which had the potential to compete against Facebook for display advertising revenues;
- the fact that successful expansion into a multi-sided market such as display advertising can be magnified by network effects; and
- the high barriers to entry in display advertising, demonstrated by very limited successful entry in the market since Facebook became market leader.<sup>52</sup>

65. In addition, the inquiry group found that Facebook would be able to increase its already significant market power in relation to other social media platforms by denying or limiting other platforms’ access to Giphy GIFs, driving more traffic to Facebook-owned sites, or changing the terms of access (by, for example, requiring TikTok, Twitter and Snapchat to provide more user data in order to access Giphy GIFs).

66. Meta appealed the phase 2 decision to the Competition Appeal Tribunal (**CAT**). In July 2022, the CAT upheld the CMA’s decision on all substantive grounds of appeal, endorsing the CMA’s framework for analysis of dynamic competition.<sup>53</sup>

67. The CAT found in Meta’s favour only on a procedural ground relating to the sharing of third-party confidential information, which resulted in the case being remitted to the CMA for re-assessment. The CMA announced its remittal decision in November 2022, finding an SLC in relation to both the dynamic competition and foreclosure theories of harm and concluding that Giphy would need to be sold off in its entirety to an approved buyer.

## 5.6. Booking/eTraveli (2022)

68. The CMA’s phase 1 investigation found that Booking’s anticipated acquisition of eTraveli would not give rise to a realistic prospect of an SLC. Both parties operate online travel agent (**OTA**) businesses in the UK and worldwide. OTAs are two-sided platforms, providing search, compare and booking services to consumers, and marketing and booking functionality to travel service providers.

69. In the UK, Booking is primarily active in the supply of accommodation OTA services via proprietary capabilities, while eTraveli focuses on the supply of flight OTA services. Both parties used their proprietary capabilities to supply their core service, but also had commercial affiliate arrangements with each other, enabling Booking to provide flight OTA services, and eTraveli to provide accommodation services, respectively.

70. The CMA considered whether the merger may give rise to an SLC by raising barriers to entry and expansion in the supply of accommodation OTA services in the UK.

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<sup>51</sup> Facebook/Giphy (2021), Final Report, paragraph 35.

<sup>52</sup> Facebook/Giphy (2021), Final Report, paragraph 44.

<sup>53</sup> *Meta Platforms Inc v CMA* [2022] CAT 26, paragraph 105.

The CMA focused on the impact of the potential loss of eTraveli as a customer retention and/or acquisition channel for rival suppliers of accommodation OTA services.

71. The CMA found that Booking has significant market power in the supply of accommodation OTA services in the UK and that there are material barriers to entry and expansion into that market, including as a result of indirect network effects.<sup>54</sup>

72. However, the CMA did not find eTraveli to be a particularly significant customer retention and/or acquisition channel for rival suppliers of accommodation OTA services. The CMA took into account that UK customers currently ‘shop around’ rather than purchasing multiple travel services from the same provider; Booking and its rivals use several customer retention and acquisition channels that would be unaffected by the merger; and that eTraveli had a modest market position within the supply of flight OTA services.

73. The CMA also considered, looking forward, that while there was some evidence that consumer behaviour in purchasing travel online could change, this could not be expected to materially reduce the significance of the alternative customer retention and acquisition channels available to Booking’s rivals.

## 6. Broader changes within the CMA relevant to digital markets

### 6.1. Data, Technology and Analytics Unit

74. In 2018, the CMA established the Data, Technology and Analytics (**DaTA**) unit with the aim of providing departments within the CMA with the skills needed to effectively detect, understand and, where necessary, remedy evolutions within digital markets. The DaTA unit can assist case teams to understand markets or specific products including by auditing data flows in organisations and understanding how algorithms are developed.

75. For example, in the phase 2 investigation of Facebook/Giphy discussed above, the DaTA unit assessed the types of user-level and overall data that Giphy could access to determine whether this would enable Facebook to track individuals across different social media sites and augment Facebook’s existing user profiles and monitor usage trends on competitor apps in real time.

### 6.2. The Digital Markets, Competition and Consumer Bill and Digital Markets Unit

76. The UK Parliament is currently considering changes to the CMA’s legal powers, as contained in the Digital Markets, Competition and Consumers (**DMCC**) Bill.<sup>55</sup> One of the key changes the Bill seeks to introduce is the new digital markets regime, a pro-competition regime for digital markets, that will be operated by the CMA’s Digital Markets Unit (**DMU**). Whilst merger control and the new digital markets regime share the same objective, to ensure effective competition, they are intended to operate in complementary

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<sup>54</sup> The CMA found that the greater the number of consumers using a certain website/app providing OTA services, the more attractive it will be for travel service providers to list their travel services with that website/app providing OTA services. Similarly, the greater the number of travel service providers using a website/app providing OTA services, the more attractive it will be for consumers to use that website/app providing OTA services.

<sup>55</sup> The DMCC Bill was published by His Majesty’s Government on 25 April 2023. Before the DMCC Bill becomes law it must be subject to parliamentary scrutiny, meaning these proposals are subject to ongoing debate. The CMA will continue to provide support to inform Government and legislators.

ways for digital markets. Merger control acts as a one-off intervention to ensure that pre-existing conditions of effective competition continue to drive the evolution of dynamic markets. In contrast, the new digital markets regime recognises that, in circumstances where entrenched market power already exists, ongoing but targeted regulatory oversight is required.

77. The digital markets regime will apply to firms with substantial and entrenched market power, that gives them a strategic position in at least one digital activity in the UK. Firms meeting the threshold will be designated as having Strategic Market Status (SMS). The threshold for SMS will include having a global turnover of £25bn or a UK turnover of £1bn. The new powers will allow the CMA to set targeted and proportionate conduct requirements to ensure other businesses are not at risk of being exploited and excluded, and to safeguard users against unfair terms and constrained choices. They will also allow the CMA to go further, where necessary, through targeted interventions to address the root causes of market power in these markets by, for example, mandating firms to share certain kinds of data, or instructing firms to operate data silos.

78. The DMCC Bill also seeks to strengthen the CMA’s merger control regime. This includes introducing a new hybrid threshold to the CMA’s jurisdictional tests, based on the acquirer’s UK turnover and share of supply, which will more clearly capture vertical and conglomerate mergers than the current rules. In addition, the new digital markets regime will require a subset of an SMS firm’s larger acquisitions to be reported before they occur. This applies to those mergers which give an SMS firm at least 15% shares or voting rights in the target business, where their stake is worth at least £25m, and where the target has a UK connection. Both of these changes can be expected to help the CMA’s Mergers Intelligence Committee identify and, if necessary, call in for review mergers that could harm competition in digital markets.

## 7. Conclusion

79. In the UK, the CMA has evolved its approach to assessing mergers in digital markets to take account of the particular features of competition in those markets. As confirmed in the updated Guidelines, the CMA’s approach seeks to be evidence-based and forward-looking, using in-depth analysis to assess how competition is likely to evolve over time – something that, given the characteristics outlined above, is particularly important with respect to digital mergers. The UK’s system of merger control also ensures that the vast majority of deals can proceed, whilst requiring the CMA to step in to prevent the handful of problematic deals that we identify.<sup>56</sup>

80. The CMA is cognisant that its approach to digital merger assessment will need to continue to evolve – at pace with, if not ahead of, the continued evolution of digital markets. A number of the changes to be introduced by the DMCC Bill will complement the CMA’s merger control regime in relation to digital mergers as well as strengthen its ability to identify and investigate digital mergers that are potentially problematic. Looking forward, the CMA is committed to providing as much transparency as possible about its approach, including further updates to guidance as required; and to continue close engagement with other competition authorities internationally.

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<sup>56</sup> Of the thousands of mergers that take place each year, the CMA will typically consider around 750 deals and take 12-14 to an in-depth phase 2 investigation. Of those 12-14, many are cleared or resolved through remedies and only a few are prohibited.