GLI GLOBAL LEGAL INSIGHTS

Merger Control 2021

10th Edition

Contributing Editors: **Nigel Parr & Steven Vaz**

glg global legal group

CONTENTS

Preface	Nigel Parr & Steven Vaz, *Ashurst LLP*	
Expert analysis chapter	*Assessing the loss of potential and dynamic competition under UK and EC merger control: Prediction is difficult – especially if it's about the future* Ben Forbes, Mat Hughes & Camelia O'Brien, *AlixPartners UK LLP*	1

Jurisdiction chapters

Belgium	Hendrik Viaene & Karolien Van der Putten, *McDermott Will & Emery*	21
Brazil	Lucas Spadano, Bruno Herwig Rocha Augustin & Bruna Prado de Carvalho, *Fialho Salles Advogados*	30
Canada	Micah Wood, Kevin H. MacDonald & Chris Dickinson, *Blake, Cassels & Graydon LLP*	37
China	Zhan Hao & Song Ying, *AnJie Law Firm*	49
Denmark	Olaf Koktvedgaard, Søren Zinck & Frederik André Bork, *Bruun & Hjejle Advokatpartnerselskab*	60
Finland	Ilkka Aalto-Setälä & Henrik Koivuniemi, *Borenius Attorneys Ltd*	69
France	Helen Coulibaly-Le Gac & Marie Doisy, *HLG Avocats*	76
Germany	Dr. Christian Bürger & Dr. Tobias Teichner, *GÖRG Partnerschaft von Rechtsanwälten mbB*	87
Greece	Efthymios Bourtzalas, *MSB Associates*	96
Japan	Tomoya Fujita & Hiromu Suemasa, *Mori Hamada & Matsumoto*	108
Korea	Joo Hyoung Jang, Ye Rin Seo & Caroline Yoon, *Barun Law LLC*	119
Russia	German Zakharov, Daniil Lozovsky & Olga Gorokhova, *ALRUD Law Firm*	128
South Africa	Marianne Wagener & Julia Sham-Guild, *Norton Rose Fulbright*	138
Switzerland	Michael Tschudin, Frank Scherrer & Urs Weber-Stecher, *Wenger & Vieli Ltd.*	151
Turkey	Gönenç Gürkaynak & Öznur İnanılır, *ELIG Gürkaynak Attorneys-at-Law*	158
United Kingdom	Bruce Kilpatrick & Elizabeth Turner, *Addleshaw Goddard LLP*	166
USA	Ilene Knable Gotts & Franco Castelli, *Wachtell, Lipton, Rosen & Katz*	178

Digital edition chapter

Israel	Dr. David E. Tadmor & Shai Bakal, *Tadmor Levy & Co.*	191

Assessing the loss of potential and dynamic competition under UK and EC merger control: Prediction is difficult – especially if it's about the future

Ben Forbes, Mat Hughes & Camelia O'Brien
AlixPartners UK LLP

Introduction

This chapter considers developments in how the European Commission (EC) and UK Competition and Markets Authority (CMA) assess mergers that may lead to a loss of potential and/or dynamic competition between the parties.

These issues are topical globally, with the Organisation for Economic Co-operation and Development's (OECD) 2021 report on global merger control trends highlighting an increased focus on how to protect potential and dynamic competition,[1] and the CMA adding an entirely new section on dynamic competition to its revised Merger Assessment Guidelines (the CMA Guidelines) of 2021.[2] In addition, in April 2021, the CMA, the Australian Competition and Consumer Commission, and the German Bundeskartellamt issued a joint statement on merger control, which emphasised the importance of effective merger control, including specifically as regards mergers "*where incumbents seek to protect their market position by acquiring potential competitors in the form of smaller firms or potential entrants in adjacent markets*".[3]

These issues are consequentially highly topical for firms (and their advisors) contemplating mergers. In short, not only do they need to consider whether the parties are important existing competitors pre-merger – which may be highly visible – but also whether they might become important rivals or competitive threats in the future, which may be much harder to ascertain.

The OECD's report focuses on two key theories of harm associated with so-called "killer acquisitions" and protecting potential competition more generally. First, killer acquisitions concern the loss of potential competition through the acquisition by a currently dominant firm of an emerging or start-up firm, which might have otherwise developed into an important rival. Moreover, the acquisition of a start-up firm may lead to the loss of not just a competitive constraint, but also of an innovative new product.[4] Second, there may also be "reverse" killer acquisitions where an incumbent forgoes its own innovation (i.e. organic growth) to pursue a start-up, thereby lowering overall innovation in the market. Such a strategy can also weaken an incumbent's innovation incentives prior to entry occurring if the impeding threat of entry dynamically incentivises it to make investments and innovate.

These concerns also raise wider issues as to the design of merger control thresholds (to ensure that competition authorities have the legal power to intervene in situations where an incumbent acquires a start-up with little or no turnover), and the standard and burden of proof to find that a merger is anti-competitive.

Whilst these issues are of general relevance, certain sectors are a particular focus for authorities given the number of acquisitions made by incumbents. For example, in the digital sector, between 2015 and 2020, Amazon made 42 acquisitions, Apple 33, Facebook

© Published and reproduced with kind permission by Global Legal Group Ltd, London

21, Google (Alphabet) 48 and Microsoft 53. Many of these have flown under the "radar" of merger control thresholds, and the few that were assessed have been approved (e.g. *Google/Waze*, *Facebook/Instagram*, and *Microsoft/LinkedIn*, with the latter being cleared subject to commitments).[5] Similar issues have arisen in the pharmaceutical sector, reflecting that in these markets firms compete in innovating to develop new drugs.

However, applying these theories of harm poses some obvious issues. First, if they relate to future competitive harm, they are inherently based on predictions. To quote Niels Bohr, a Nobel laureate in Physics and the inspiration for this chapter's title, "*Prediction is very difficult, especially if it's about the future!*"[6] Indeed, the OECD notes that "*an over-focus on dynamic effects creates risks for enforcement errors, and challenges for agencies in meeting requisite evidentiary burdens and standards*".[7] Second, the tools and evidence required to assess the loss of potential and dynamic competition are not the same as those applied to assess existing rivalry between the parties (although analogous evidential issues should be considered). We consider that all theories of harm – whether in merger control or antitrust more generally – should be tested carefully against evidence and the focus should be on assessing harm to consumers.

This chapter assesses these issues in three main sections. Section 2 outlines a simple economic model presented by Motta and Peitz (2020)[8] to assess the competitive effects of a monopolist incumbent acquiring a potential entrant. This model usefully highlights why such mergers may be anti-competitive. Section 3 then considers the merger policy issues raised, and the evidence required to assess specific mergers. Section 4 comments on three cases where the CMA and EC assessed theories of harm in which the elimination of potential or dynamic competition was central, namely *Bauer Media* (2020), *Amazon/Deliveroo* (2020) and *Novartis/GlaxoSmithKline Oncology* (2015). Section 5 concludes.

An economic theory of harm

Motta and Peitz (2020) present a model in which an incumbent monopolist buys a potential entrant. This model helps bring alive the concerns competition authorities have and the key evidential factors that are important to distinguish between pro- and anti-competitive mergers. The key elements of this model are as follows:

- A start-up faces entry costs of K and its probability of success is P. For entry to be profitable, the expected profits (its expected duopoly profits with only two firms post-entry, allowing for the probability of success) must be greater than the cost K. (Motta and Peitz assume that the incumbent's and start-up's entry costs would be identical, but acknowledge that the incumbent's may be lower if it benefits from efficiencies/synergies or higher if its costs are greater.)
- The start-up must have the necessary resources (R) in order for the project to be successful. These could be financial resources, but Motta and Peitz envisage the resources required more widely, such as including data or expertise in terms of human capital or marketing. The start-up may have insufficient resources, particularly as finance providers or key staff may be reluctant to commit to projects where there is uncertainty as to whether they will be successful.
- In deciding whether to purchase the start-up, there are two possible sources of profit to the monopolist incumbent. First, if the start-up enters, the increase in competition will cut the incumbent's profits – this gives the incumbent a strong incentive to purchase the start-up to preserve its monopoly profits. This source of profit is unique to incumbents – it is not a benefit for other prospective, non-incumbent purchasers of the start-up. Second, the incumbent may upgrade its own product range with help from the entrant. However, this would only happen if this would increase the incumbent's overall profits post-merger.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Applying this model, Motta and Peitz present four possible outcomes from the acquisition, with the outcome observed depending on what would happen absent the merger (i.e. the counterfactual) and following the merger:

(a) ***Dead project*** – This arises where, absent the merger, the start-up's expected costs of entry outweigh the expected profits and it has insufficient resources. In this scenario, any acquisition will be competitively neutral and consumers would not be harmed, as in the counterfactual the start-up would not have entered.

(b) ***Killer acquisition*** – Absent the merger, the start-up would have had sufficient resources to profitably develop the project and enter, yet, following the merger, the incumbent is not incentivised to develop the product. In this scenario, the expected addition to the monopolist's total profits from developing the new product (i.e. taking account of the cannibalisation of its existing sales) is insufficient to cover the costs of doing so. This is clearly anti-competitive and the worst outcome for consumers of the four considered, because the start-up would otherwise have entered and competed by offering the new product.

(c) ***Monopolist upgrade but suppressed competition*** – In this scenario, the start-up had the necessary resources and would have profitably entered, but the incumbent purchases the start-up and upgrades its existing product with the start-up's help. This outcome is still anti-competitive, because, absent the merger, the start-up would have increased competition to the benefit of consumers by competing directly with the incumbent.

(d) ***Efficient upgrade*** – Absent the merger, the start-up would not have developed the project and entered as it lacked sufficient resources. However, the acquisition allows the incumbent to upgrade its own product, enhancing efficiency and increasing consumer welfare. This is an efficient outcome.

This model highlights the key evidence to assess the effects of start-up acquisitions, but it is appropriate to address first the wider policy issues.

Implications for merger policy

Merger control thresholds

From the previous section, there is a clear theory of harm based on incumbents having a strategic incentive to prevent entry that would undermine their monopoly profits. More generally, the threat of such entry might incentivise dominant firms to invest and innovate.

In these circumstances, merger control thresholds that are purely turnover-based risk under-enforcement as start-ups may have little or no turnover. Several solutions have been advanced to address this.

First, Motta & Peitz suggest that notification thresholds based on deal value can be a useful complementary screening device, and several countries have adopted such thresholds (such as Austria and Germany).[9] These could be particularly focused at big tech mergers, where deal valuations for start-up companies have often borne little relation to revenues. The CMA itself notes that Facebook's acquisition of Instagram (purchased for US$300 million cash plus 23 million shares of Facebook common stock) may have been a signal for projected expansion in the future.[10] The Furman review also suggested: "*[D]rawing attention to the evidential relevance of the transaction value relative to the market value and company turnover, and the importance of understanding the rationale for valuations which appear exceptionally high.*"[11] A high start-up valuation might reflect expected fast growth and a dominant firm might be willing to pay a substantial sum to preserve its profits by eliminating this threat.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Second, competition authorities could have the discretion to investigate mergers, even if they do not meet standard turnover thresholds. Indeed, on 21 March 2021, the EC announced a new policy that it will encourage and accept more referrals under Article 22 of the EC Merger Regulation where the turnover of one of the parties does not reflect its actual or future competitive potential. Crucially, this policy applies even where the transaction does not meet the Member State's national merger control thresholds. Referrals are expected to include mergers involving nascent competitors and innovative companies, including in (but not limited to) the digital, pharma, biotech, and certain industrial sectors. The EC's press release suggested that such discretion could be applied in a targeted way and that "*[w]hile informative, the value of the transaction may not always be sufficiently correlated with the transaction's potential competitive significance*".[12]

However, the EC's guidance suggests this discretion could be applied widely, and not just where the mergers involve recent or new entrants, including:

> "*[T]he creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices.*"[13]

Moreover, this policy change creates legal uncertainty as to whether a merger will be investigated, and M&A merger control conditions may need to address the possibility of such reviews.

The third alternative could be to require certain firms to notify their proposed mergers prior to completion, with the Furman report and the CMA's Digital Markets Taskforce recommending this for designated digital firms.[14,15]

A fourth alternative would be to have jurisdictional thresholds based on shares of supply, rather than solely based on turnover. In the UK, the CMA can review mergers involving a target business with low or even no revenues if the "share of supply" test is satisfied, which merely requires that a share of supply or acquisition of goods or services of a particular description of 25% or more is created and enhanced in the UK as a whole or a substantial part thereof. The CMA emphasises that it "*could define the share of supply using metrics such as: value, cost, price, quantity, capacity, number of workers employed, or any other appropriate criterion to determine whether the 25% threshold is reached*".[16] Indeed, the flexibility of this test is emphasised in its publication of December 2020, "*Mergers: Guidance on the CMA's jurisdiction and procedure*".[17]

This permits the CMA to investigate mergers involving companies at an early stage in their lifecycle,[18] but the CMA adds that the share of supply test does not enable it to look at mergers where there is no increment in market share on any "*reasonable*" measure, such as in relation to purely vertical mergers.[19]

The extent of the CMA's discretion to apply the share of supply test has been considered by the Competition Appeal Tribunal (CAT) in the appeal of the CMA's prohibition decision in *Sabre/Farelogix* (2020),[20] with Sabre disputing the CMA's approach to capturing mergers with little direct connection to the UK.

The CAT dismissed the appeal based on the specific facts of the case, but the judgment emphasised the CMA's discretion to define a relevant description of goods and services and the criteria applied to quantify whether a share of 25% is created or enhanced.[21] The CAT

© Published and reproduced with kind permission by Global Legal Group Ltd, London

indicated that the purpose of the share of supply test was to identify those smaller mergers which are "*worthy of consideration*", i.e. warrant the devotion of time and resources by the CMA and the parties.[22] The judgment also affords the CMA considerable discretion in identifying whether the parties "*do a sufficiently similar thing*" or have "*common functionality*" (and regardless of whether one party provides a wider range of services/goods), and that there is no requirement for the description of goods/services to be commercially recognisable.[23] In addition, the CAT accepted that Farelogix's contractual right to payment can be treated as value (despite BA making no payment) for the purpose of assessing whether there was some (very small) increment in share to over 25%.[24]

While merger control is important to prevent anti-competitive mergers that harm consumers, administrative efficiency is also important. Merger control regimes should be business friendly, providing firms and their advisors with as much legal certainty as possible as regards the risks they face.

The standard and burden of proof and efficiencies

The above discussion naturally leads to questions of the standard of proof required to find that a merger is anti-competitive following a detailed Phase 2 review.

In the UK, at Phase 2, the CMA needs to establish that a SLC is expected – i.e. it is more likely than not.[25] The position is more complex under the EC Merger Regulation, with the General Court's 2020 judgment in *CK Telecoms v Commission*, which quashed the EC's prohibition decision, emphasising that "*the more a theory of harm advanced in support of a significant impediment to effective competition put forward with regard to a concentration is complex or uncertain, or stems from a cause-and-effect relationship which is difficult to establish, the more demanding the Courts of the European Union must be as regards the specific examination of the evidence submitted by the Commission in this respect*". The General Court also considered that, in the case in question, that "*the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration*". The General Court thus concluded that the standard of proof is higher than "*more likely than not*" (as argued by the EC), but lower than "*beyond all reasonable doubts*".[26] One of the EC's grounds of appeal relates to whether it must show that there is a "*strong probability*" of a significant impediment to effective competition, which the EC considers is a stricter test than that set by case law and in the EC Merger Regulation, which merely require the EC to identify the "*most likely*" outcome.

Accordingly, legal standards focus on the expectation that the merger would cause harm. However, Motta and Peitz's model seeks to capture *expected* anti-competitive harm from an incumbent acquiring a start-up, even if the probability of harm arising is low. The magnitude of the expected harm depends on both the probability that successful entry by the start-up would otherwise occur *and* the extent to which consumer welfare increases in this event. Following the logic of this approach, Motta and Peitz argue that the burden of proof should be reversed for all horizontal mergers between competitors. In other words, rather than the onus being on the competition authority to prove that a merger is anti-competitive, instead the parties should be required to demonstrate that there are pro-competitive efficiencies that offset any anti-competitive effects. In short, they are in favour of adopting a "balance of harms" approach, as advocated in the Furman report in connection with powerful digital platforms, such that "*the relevant criterion should be that the expected gains in consumer welfare from competition are larger than the gains that would come from the upgraded offer of the merging firm*".[27] Motta and Peitz further argue that this should be the standard applied for dominant firms' mergers, particularly as there may be a lack of documentary evidence as to the future competitive plans of start-ups.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In our view, these debates are all questions of balance. The first is querying whether this is still a material enforcement gap given the jurisdictional developments described above and the policy focus on mergers leading to a loss of potential and dynamic competition. Indeed, such mergers have been a particular focus of a number of recent UK Phase 2 references, including *Facebook/Giphy* (2021), *Sabre/Farelogix* (2020), *Amazon/Deliveroo* (2020), *Bauer Radio* (2020), and *PayPal/iZettle* (2019).

Second, does uncertainty preclude an adverse finding being reached? The CMA's revised Guidelines emphasise that uncertainty is an inherent feature of dynamic markets but that this will not preclude it from reaching adverse findings, even where certain evidence does not and cannot be expected to exist:

> "*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*."[28]

In particular, as regards the counterfactual, the Guidelines state that:

> "*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, which may include reviewing evidence of specific plans where available.*"[29]

In addition, the Guidelines add that uncertainty as to the outcome of a dynamic competitive process in terms of what services/products will ultimately be available to consumers does not prevent the CMA from assessing the impact of the merger.[30] In making this point the CMA also refers to the EC's decision in *Novartis/GlaxoSmithKline Oncology* (2015), which is one of the case studies discussed below. Nonetheless, in our view, it is important that adverse findings are not based on unevidenced speculation.

Third, there are two important premises behind Motta and Peitz's model: the merger involves a monopolist (1) acquiring the only credible potential entrant (2). On the first premise, they observe that killer acquisitions are less likely if there is more competition among incumbents. This is intuitive because the smaller the market share of the incumbent acquirer, the less likely the acquisition will be motivated by the threat of the start-up cannibalising its market share and profits (as opposed to that of rivals). To put the point differently, one might expect the greatest competitive threats to incumbent firms to come from other incumbents with track records of success. This rather suggests that merger control should focus on mergers between important *existing* rivals. On the second premise, a specific start-up may be the only credible or important entrant, but at least this begs the question of why.

Fourth, over-enforcement risks some unintended consequences and foregone efficiencies. Mergers between firms offering complementary products/services may yield material efficiencies. Efficient gains from an improvement in an incumbent's offering may justify an acquisition of a potential competitor, particularly when the probability of the potential entrant becoming an effective competitor is small.

In addition, such acquisitions may also allow entrepreneurs to exit and grow their businesses with additional resources, and competition from incumbent firms to acquire start-ups may increase their exit value and thus the start-up's initial investment incentives.

Lastly, rather than revising overall merger control, a more proportionate approach might be to focus on markets where it is most important to preserve potential and dynamic competition. The CMA's Digital Markets Taskforce has recommended that in UK Phase 2 merger cases involving designated digital firms, a substantial lessening of competition may

© Published and reproduced with kind permission by Global Legal Group Ltd, London

be found where this is a "*realistic prospect*", rather than expected. However, this would be a low bar for intervention, and it is far from clear how this would be applied in practice such that an adverse finding at Phase 2 is not a foregone conclusion (since the CMA's Phase 1 reference decision must have already reached this conclusion).

The key economic evidence

The Guidelines indicate that mergers involving potential competitors can have two anti-competitive effects. First, they can reduce future competition, as the CMA describes: "*[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.*"[31] Second, they can reduce dynamic competition, where "*existing firms and potential competitors can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic competition*".[32]

This sub-section considers the key evidence to assess these issues, drawing on Motta and Peitz's model, the Guidelines, and an interesting article by a number of CMA staff entitled "*Merger control in dynamic markets*" (which is based on the UK's submission to the OECD in its roundtable on Merger Control in Dynamic Markets).[33] In our view, the key evidence required can be distilled down to covering four key issues.

How competitive is the market pre-merger?

A natural starting point is to consider actual competition pre-merger. This is because – as emphasised above – a core premise of such theories of harm is either that pre-merger competition is not effective, and/or that the threat of entry by one of the merging parties is already an important competitive constraint or would become so.

Accordingly, any assessment of whether the elimination of such competition is appreciable thus needs to start from understanding existing competitive rivalry and how firms compete pre-merger. As the CMA observes: "*[I]t may be that in a heavily fragmented and competitive market, and/or a market with low barriers to entry, the loss of a potential competitor is not a competition concern, whereas in a highly concentrated market with high barriers to entry, it may be considered problematic.*"[34] The Guidelines make the point in similar terms, namely that the loss of a potential entrant is likely to be more significant where there are fewer strong existing competitive constraints on the other merger firm or if it otherwise already has market power. Similarly, if the theory of harm is that the potential entrant is already constraining an incumbent merger party, it would be relevant to assess any direct response by that firm to threatened entry or its incentives to do so.[35]

The merger counterfactual – would one of the parties become an important competitive constraint?

The second key point, which naturally follows from the four very different outcomes to start-up acquisitions identified by Motta and Peitz, is that the merger counterfactual is vitally important. If a potential entrant would not have entered or would have been too small to have any appreciable competitive impact, then the transaction is at worse competitively neutral and could be welfare enhancing.

Motta and Peitz rightly observe that qualitative information may include internal documents, business plans, financial analysis, and an analysis of likely scenarios if the merger were not to go ahead (including the sufficiency of the start-ups resources and whether there would be other purchasers). Consistent with this, the Guidelines make extensive reference to internal documents as being key evidence. However, as we observed in our joint comments with Addleshaw Goddard on the CMA's draft Guidelines,[36] caution should be applied in relying on a microscopic focus on the parties' documents for a number of reasons. In particular,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

it is important to understand the context of such documents (including their authors, their specific purpose, and whether they were acted on), third parties' views should be tested as well (for example, the parties may be unaware of rivals' competitive plans), and internal documents may not be an accurate guide to the underlying facts (for example, a start-up's plans may be unrealistic or over-optimistic, and so may valuations).

Given the importance of the counterfactual, the Guidelines consider entry or expansion by one of the merger firms as an explicit counterfactual scenario, noting specifically that this could include an acquisition of a start-up company, or where an established firm enters a new market by acquisition (where it may have developed its own product and entered organically).[37] The Guidelines indicate that the CMA may consider:[38]

(a) Direct evidence of intentions to enter or expand, but noting that such plans may have been supplanted by the merger.
(b) History of entry in closely related markets.
(c) Responses by existing competitors to the threat of entry or expansion by the merging parties.
(d) The ability and incentive of the parties to enter/expand and compete with each other. In our view, any such assessments should be carried out with care. As the law firm CMS observes in its feedback on the draft updated Guidelines: "*The technical ability to enter a market (even if such an opportunity might prove profitable) is not a sufficient basis to conclude that a firm 'would' enter. Businesses may theoretically be able (and even incentivised) to enter a great number of markets, but ultimately not do so for any number of commercial or strategic reasons. It appears tenuous to infer that a merger party "would" do something in the complete absence of any actual evidence suggesting that it had explored or even contemplated such entry.*"[39]
(e) The timeliness, likelihood and strength of any entry or expansion (including accounting for any markets with lengthy but prescribed processes to develop new products). In this regard, the CMA indicates that it may consider the likely nature of the future product/service, or any reasons why it might be particularly well placed as a rival.[40]

The CMA's article on merger control in dynamic markets highlights a number of points from recent cases assessing dynamic counterfactuals.[41] In particular, in *eBay/motors.co.uk*, the CMA considered whether eBay was expanding into online vehicle advertising, but ultimately decided against a more competitive counterfactual because eBay's proposed investment was not over and above what was needed to compete. Similarly, in *PayPal/iZettle*, the CMA examined PayPal's internal documents to determine whether they would invest in an "*offline product*" to complement its online payments product. The CMA found that: "*PayPal had a very strong incentive to develop its offline payment service and enhance its omni-channel offer and was satisfied that it could and would have achieved this through one or more measures.*" The CMA balanced this against the time it would have taken to achieve, ultimately deciding that PayPal would have been a stronger competitor absent the merger (but with some limitations in the short term).

In addition, the acquirer's rationale for the acquisition and the factors driving deal valuation may be highly relevant. On the one hand, these documents might highlight the potential for rivalry-enhancing efficiencies if the merger leads to a better overall customer proposition. On the other, if the acquirer has no plans to use the start-up to develop new offerings or enhance their own, then this may raise killer acquisition flags. The acquirer's deal rationale and valuation of a start-up may provide evidence on its likelihood of success absent the merger. High deal prices may indicate that the entrant's funding is sufficiently large and therefore the entrant is well positioned for entry. However, and alternatively, it may reflect the scope for synergies between the merger parties.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The CMA Guidelines indicate that it may need to investigate a wider timeframe for the relevant counterfactual when considering mergers with dynamic markets, depending on the characteristics of the market in question. For example, in *PayPal/iZettle*, the CMA concluded that nascent omni-channel services were at a very early stage of development with rapid growth and significant product development and innovation. Therefore, a point-in-time "snapshot" may not capture the competitive constraints posed by the firm in question, which forced the CMA to gather evidence on the likely competitive constraints over several years.[42]

Are there other viable entrants?

When analysing what would happen absent the merger, the authorities should consider not just whether existing rivalry is limited and the target would enter or expand materially (such that the loss of potential or dynamic competition is a concern). They should also consider whether other viable and credible entrants would likely emerge, such that there would, in any case, be significant competition to the merged entity. However, it is striking that the Guidelines downplay the role of entry and expansion as a countervailing constraint, noting: "*The CMA considers that entry and/or expansion preventing an SLC from arising would be rare.*"[43] This view reflects an *ex post* evaluation of a selection of its own merger decisions, which found that in some cases where it had relied on entry/expansion to clear the merger, such entry/expansion did not in fact materialise. However, by the same measure, unexpected entry may have occurred in other cases.

Moreover, the CMA applies no such presumption to entry/expansion by one of the merging parties. If the ability of a third party's entry/expansion to mitigate a SLC is assumed rare, why should a different standard apply to the entry/expansion of the merger parties? The American Bar Association makes a valid point in relation to "*why the acquisition of a small potential entrant by a large incumbent firm would give rise to an SLC, but the continued existence of a small potential entrant after a merger is not also a similar potent competitive constraint*".[44]

In this regard, it is welcome that the CMA's article on merger control in dynamic markets emphasises that it may also request documents from the parties' current and future competitors in order to assess their plans, according to "*how developed the plans are, how likely these plans are to succeed, and how ambitious they are relative to the merging parties and to other competitors in the market*".[45]

Merger efficiencies and innovation incentives

As discussed above, mergers involving start-ups may lead to various efficiencies, and one additional point is worthy of emphasis. When discussing the loss of dynamic competition from potential entrants, the CMA's Guidelines fail to identify the "appropriability" effect. Appropriability relates to the extent an innovator can protect the competitive advantage from that innovation, and thus higher appropriability creates greater incentives to innovate. In other words, a firm will only invest in innovation if its expected reward exceeds the cost. Therefore, mergers that enhance appropriability (e.g. by preventing knowledge spill-overs) may encourage or increase innovation.[46] The CMA's analysis of innovation should therefore not merely presume that innovation reduces post-merger, but instead that such assessments require a detailed understanding of the key drivers of innovation, including the process in which it takes place (i.e. timing/lifecycle/whether innovation can be protected effectively by patents), the size of any impact, the certainty of such impact, and the underlying market structure that could itself affect the prospect for entry.[47]

In the next section, we discuss three recent cases in which the analysis of potential or dynamic competition was central to the authorities' findings of theories of harm, including our views on the key issues and takeaway lessons from these cases.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Case studies

<u>*Bauer Media*</u>

This case related to the acquisitions by Heinrich Bauer Verlag KG (Bauer) of a number of local radio stations across the UK (the Acquired Stations) (*Bauer Media*). The CMA's reference decision was based on several theories of harm, and all but one were dismissed at Phase 2. By way of background, besides Bauer and its main competitor Global (who together represented 83% of the UK radio market in terms of pre-merger listening share[48]), there are a number of small independent local radio stations with a very low share of listening (including the Acquired Stations and other Third-Party Stations) who need representation in order to sell national advertising. Pre-merger, these independent radio stations mainly used a sales agency called First Radio Sales (FRS) to sell to national advertising to media buying agencies (MBAs).

The CMA found that the merger would lead to substantial lessening of competition in the market for representation of independent local radio stations to national advertisers, because the CMA considered that, absent the merger, FRS would have remained in the market and Bauer would have entered for reasons discussed below.[49]

The CMA's assessment

Pre-acquisition, the Acquired Stations and Third-Party Stations were mainly represented by FRS, and some were represented by Global. Bauer did not represent any of these stations pre-merger so was not an actual competitor in this market – the CMA largely agreed with this.[50]

Post-acquisition, it was clear that once the Acquired Stations left FRS to be represented by Bauer, FRS's financial viability would be jeopardised, and FRS would exit the market. Post-acquisition, Bauer would have started representing Third-Party Stations. This is because, having bought the Acquired Stations, Bauer would be able to gain the step change in listening it needed in order to get better deals with MBAs. This was the rationale for its simultaneous acquisition of all the Acquired Stations in the first place, as demonstrated by internal strategy documents. Accordingly, post-acquisition, the Third-Party Stations would be limited to being represented by Bauer or Global.[51]

However, the CMA and Bauer disagreed on the counterfactual. In Bauer's view,[52] absent the merger, it had no intention of representing the Third-Party Stations. The Acquired Stations would likely have been acquired by another radio group in the counterfactual and they would have left FRS, threatening its viability. Even if the Acquired Stations did not leave FRS, in Bauer's view, FRS would have exited the market in the counterfactual.[53] Bauer submitted financial modelling to support its view on FRS' viability – FRS' revenues were declining and further decline was likely, as FRS had been unable to keep up with recent trends in radio, such as changing listener habits (including IP listening).[54] Bauer's view about FRS struggling to retain clients was also shared by third parties interviewed by the CMA.[55] Therefore, in Bauer's view, in the counterfactual Third-Party Stations' only representation option would be Global, which would have been a less competitive counterfactual than pre-merger.

Nonetheless, the CMA considered that absent the Acquisitions, FRS would remain in the market. This was because FRS was profitable at the time and the CMA could not conclude with sufficient certainty if any of FRS' customers would leave FRS in the counterfactual.[56] Moreover, the CMA concluded that Bauer would actually start representing the Third-Party Stations in the counterfactual, such that the representation options for the Third-Party Stations would have been FRS, Global and Bauer – a more competitive situation than the pre-merger scenario.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The CMA reached its conclusion notwithstanding Bauer not providing representation at the time and refusing to do so in the past when it was approached by some independent stations.[57] Third-party evidence corroborated this.[58] Bauer also submitted internal documents to show that representation was not in line with Bauer's commercial strategy, since representation does not provide certainty that Bauer could increase its audience share and thereby secure better MBA deals.[59] In addition, Bauer emphasised that piecemeal representation of small radio stations would not make commercial sense but for the acquisition, as it would not give Bauer the step change it needed to achieve better deals with MBAs. There was no point having just a little more share of listening if Bauer could not secure better deals and sell that inventory. It was only after the acquisition that representing the Third-Party Stations would make commercial sense, since the acquisition would give Bauer the critical mass it needed to renegotiate its MBA deals.[60]

The CMA disagreed, despite the absence of any evidence in internal documents that Bauer would start representing the independent radio stations in the future but for the acquisition.[61] However, similar to *Amazon/Deliveroo* (discussed below), the CMA considered that Bauer's pre-merger position was not reflective of its future intentions.[62]

To reach its conclusions, the CMA conducted a largely theoretical assessment of Bauer's ability and incentive to start representing the Third-Party Stations but for the acquisition. The CMA referred to the lack of significant barriers to representation and the fact that some Third-Party Stations were open to being represented by Bauer as evidence of Bauer's ability to represent.[63] Moreover, the CMA considered that absent the acquisitions, Bauer would still have the incentive to increase its scale and representation would contribute to this goal.[64] This was notwithstanding the fact that Bauer had not engaged in representation pre-acquisition despite having the same overarching goal of increasing scale, as discussed above.

As a result, the CMA concluded that the acquisition would reduce the choice for national representation of the Third-Party Stations from three in the counterfactual (Bauer, FRS and Global) to two in the post-merger scenario (Bauer and Global).

The CMA was concerned that post-acquisition, Bauer, after causing the exit of FRS, could harm the Third-Party Stations through higher commission rates and/or worsening other terms. The merger was cleared with behavioural remedies[65] requiring Bauer to provide representation services for 10 years to independent radio stations on at least the same or better terms than they currently have with FRS.[66]

This case highlights the potential risks of a competition authority finding that one of the merging parties was likely to enter a market even where there was no evidence that this was planned or even considered.

Amazon/Deliveroo

This case related to Amazon.com NV Investment Holdings LLC (Amazon) acquiring certain rights and a 16% minority shareholding in Roofoods Ltd (Deliveroo). The CMA took the view in Phase 1 that the transaction could reduce the likelihood of Amazon re-entering the online restaurant platform market[67] and might adversely affect competition in the supply of online convenience grocery platforms in the UK. This case study focuses on the online restaurant platform market where the concerns about the loss of potential competition were greatest.

The CMA's Phase 2 assessment also considered the application of the failing firm defence in the context of the impact of the COVID-19 pandemic on the UK online restaurant platform market. On 17 April 2020, the CMA provisionally cleared the merger in light of a significant deterioration in Deliveroo's financial position as a result of COVID-19. However, the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

CMA subsequently concluded that the defence did not apply since a detailed assessment of Deliveroo's finances showed considerable improvement in its financial position, which had not been anticipated in the early stages of the pandemic.

In Phase 2, the CMA considered Amazon's potential re-entry into the online restaurant platforms market. In considering the counterfactual, the CMA went beyond looking at Amazon's existing plans to considering Amazon's incentive and ability to re-enter based on internal strategy documents and evidence from third parties.

The parties' arguments and the CMA's assessment

The parties submitted that restaurant delivery was not part of Amazon UK's commercial strategy, with Amazon's failed entry being key evidence. Amazon launched a restaurant delivery business in the UK, Amazon Restaurants, in 2016, but it was closed in 2018 before Amazon embarked on the Deliveroo investment round in May 2019.[68] The parties observed that there are material entry barriers, including significant technological and logistical barriers and investment needed to develop a three-sided network by attracting restaurants, couriers and consumers. The parties submitted that Amazon was not well placed to overcome these barriers.[69] One example of such as barrier was the need to develop a point-to-point logistics network where the driver delivers from the restaurant to the customer and gets paid per delivery. This is very different to the logistics for its other businesses that are generally point-to-multipoint, with drivers paid per block of time. Its inability to develop such a logistics network was a reason for Amazon Restaurants' failure.[70] The parties also submitted that Amazon's general interest in online food delivery does not support the conclusion that Amazon would have re-entered in the UK and there was no actual documentary evidence of its intention to re-enter.

However, the CMA's view was that it was not necessary for it to have internal documentary evidence setting out an "*explicit, concrete intention to enter within a defined timeframe*".[71] Rather, it was sufficient to undertake an "*in-the-round assessment*" that reflected all of the available evidence with respect to a party's intention, incentive and ability to enter.[72] The CMA also reviewed a financial model that was prepared by Amazon as part of its due diligence exercise when investing in Deliveroo. This was a "*build vs. buy*" analysis that compared the net present value (NPV) of building an equivalent footprint to Deliveroo's UK/EU business to the returns from investing in that business over a number of years. Amazon attempted to show that building a restaurant delivery platform would have lower NPV than buying and thus that it had no intention to re-enter organically, but the CMA concluded that the model had inconsistencies and was too simplistic, and therefore gave it no weight.

Apart from reviewing a wide range of Amazon's internal documents,[73] the CMA also gathered evidence from numerous third parties including restaurants, competitors both in the UK and overseas and professional analysts to support its findings.

Counterfactual assessment

The CMA found that growing Prime was an important aspect of Amazon's commercial strategy. The ability to offer Prime across more categories was important – consumers looking across broader categories shop more as they feel like they are getting better value for their Prime membership – "*it really is a flywheel*".[74] Internal strategy documents showed that food is an area Amazon sees of value to its Prime customers and restaurant delivery is seen as a useful benefit for Prime.[75] Much of these documents related to Amazon's expectations from Amazon Restaurants, but they were considered to be representative of Amazon's general commercial interest in this market. The CMA also relied on the fact that the UK is an important geography for Amazon Prime and it is also an attractive country for online restaurant platforms.[76]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

According to the CMA, the fact that Amazon Restaurants had been closed was not evidence that Amazon was no longer interested in this market. The CMA found that there were specific reasons for the failure of Amazon Restaurants since it was not well or fully executed in the UK,[77] and agreed with third parties that Amazon would likely use this as a learning experience to re-enter. This was in line with Amazon's business model in which "*Amazon regularly tests propositions, learns from these and innovates in this manner*".[78]

However, a counterview would be that Amazon would have to win back the customers lost, which would not be simple given that there are already three operators (Just Eat being the market leader), and persuade restaurants and logistics providers that they should invest in supporting Amazon's re-entry when Amazon did not prove to be committed to the market in the past.

Further, the CMA relied on internal strategy documents and emails discussing the rationale for the Deliveroo investment, which set out Amazon's view on the attraction and benefit of the restaurant delivery business. In the CMA's view, "*by investing significantly in Deliveroo ... Amazon has clearly revealed an interest in restaurant delivery in the UK*".[79] The difficulty with this CMA statement is that it will always apply (no firm will invest in another if it has no interest in the underlying market it serves) and it does not reveal whether the firm would instead have entered organically.

The CMA considered that its conclusion was also supported by Amazon launching an online restaurant platform business in India (Prime Food India). Amazon argued that the regulatory and commercial situation in India was very different, which the CMA accepted. However, the CMA considered that this was nevertheless relevant evidence in assessing Amazon's broader global strategy around growing Prime membership and its intention to expand its position in the online restaurant platforms market, including in the UK.[80]

Although the CMA did not find explicit discussion about restaurant delivery in the UK in Amazon's global food strategy documents, it did find references to restaurant delivery in its grocery strategy.[81] It also found several internal emails from within its food strategy division that referred to the importance of offering restaurant delivery as part of Amazon's food strategy. The evidence showed that Amazon's food strategy division, including the most senior executives, was interested in the restaurant delivery market.

The CMA considered that the barriers to entering this market were lower for Amazon compared to overseas competitors who had submitted that it would be hard to enter the UK market. This was because Amazon could benefit from having existing relationships with millions of customers in the UK, including engaged customers through Prime. It therefore had one of the three sides of the market well developed. Moreover, Amazon is also a patient operator and investor and so it may have a different time horizon for profitability compared to other potential entrants, which makes its entry more plausible.[82]

The CMA found that there were multiple possible routes for entry by Amazon, including organic entry, acquisitions, and partnerships. There was evidence of interest in alternative providers as targets or partners, which could facilitate Amazon's entry into the UK market in the short to medium term (i.e., within five years). Amazon has done this in other markets, such as partnering with Morrison's in the grocery market in the UK. There exist a number of potential partners and/or targets, including non-UK restaurant platforms as well as UK-based logistics specialists, that could help Amazon overcome the barriers to entry to supplying a restaurant platform in the UK, including those that hampered its previous attempt in this market (such as developing a point-to-point logistics network). Evidence from third parties showed that companies are interested in partnering with Amazon.[83]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The CMA briefly considered the impact of COVID-19 on Amazon's ability to enter the market and concluded that the impact was uncertain.[84] In fact, it noted that COVID-19 may even have increased Amazon's ability to re-enter as struggling businesses may need a large investor like Amazon or look to partner with someone.[85] Even if COVID-19 did have a negative impact on Amazon's ability to enter this market, the CMA concluded that such an impact would be quite short term. In the medium to long term, Amazon was likely to re-enter the market for restaurant delivery.[86]

Ultimately, the CMA cleared the merger, because Amazon only had a 16% minority shareholding. In this regard, it concluded that a minority shareholding would have a limited impact on Amazon's incentives to re-enter this market. Similarly, Amazon's ability to influence Deliveroo to compete less strongly against it would be relatively limited (compared to, for example, a scenario in which Amazon acquired a controlling interest).

There are similarities and differences between *Amazon/Deliveroo* and *Bauer Media*. As regards similarities, in both cases there was no actual evidence of plans to enter (or re-enter) the relevant market. As regards differences, the CMA attached much weight to Amazon's strategic interest in expansion (based on Amazon Prime and the interest of Amazon management in restaurant deliveries), its entry in another geographic market (India, despite market differences), and that future re-entry could be more successful. In *Bauer Media*, the CMA's counterfactual assessment rested on both entry by Bauer and no exit by FRS. If in the counterfactual, Bauer would have entered but FRS would have exited in any event, then there would only have been two suppliers of representation services with and without the merger, namely Bauer and Global.

Novartis/GlaxoSmithKline Oncology business

In 2014, Novartis AG (Novartis) acquired a portfolio of oncology products from GlaxoSmithKline plc (GSK).[87] The portfolio consisted of 10 marketed products and two pipeline products (which are in clinical development for cancer treatment). This case focused on the impact of a merger on potential future competition in developing particular types of drugs, and assessments of how the merger will impact on the parties' incentives to invest/innovate. The EC reached three different adverse findings, and it is clear that these reflected extensive market testing with physicians, competitors, and a market expert.

First, the EC considered that the transaction would reduce potential competition for the market for B-Raf and MEK inhibitors for the treatment of advanced melanoma by reducing the number of competitors in the future from three to two, with Roche being the only existing competitor. Novartis only had products in Phase III trials, but no other competitor had products in Phase III trials as rivals' products were at earlier stages of development. The EC considered that Novartis would be likely to abandon its products to the benefit of GSK's products that were at a more advanced stage in the Phase III trials.[88]

Second, the EC considered that the transaction would also reduce potential competition in relation to the treatment of low-grade serous carcinoma (LGSC), where they both have products in Phase III trials. There are no other actual competitors, and AstraZeneca was the only other competitor with a pipeline product, but it was only in Phase II. The EC also concluded that Novartis would have reduced incentives to incur the costs of launching two products with similar characteristics.[89]

Third, the EC concluded that the transaction would reduce competition in innovation as regards the clinical development of B-Raf and MEK inhibitors aimed at treating other cancers, where the parties represented two of only three clinal programmes aimed at serving the same unmet needs (Roche was the only competitor identified, which had only a single Phase II trial).[90]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The EC considered evidence on products at an early stage of their lifecycle, to understand incentives to innovate. In particular, the EC noted that these early-stage products should be assessed by reference to "*the products' characteristics and intended therapeutic use, in particular by reference to their mechanism of action and to the cancer types for which they are being investigated*"[91] (emphasis added). The EC found that the parties would have two MEK and B-Raf inhibitors that are based on the same mechanism of action, would address similar unmet demand and are at similar stages of development.[92]

The EC concluded that: "*Pre-transaction each party's incentive to invest in its clinical research program was driven by the future sales that the programme was expected to generate, without consideration of the fact that it could also be expected to reduce future sales of competing clinical research programs. Post-transaction, the Notifying Party will internalise that investing in one of the clinical research programs can be expected to cannibalise future sales of its other clinical research program*."[93] Thus, the EC concluded that, with few other competing research programmes, the parties would have less of an incentive to continue investing in R&D on both the MEK and B-Raf programmes; and, in particular, Novartis is likely to deprioritise its programme as this is less advanced than GSK's.[94] The EC added that the abandonment of Novartis' programme was likely to adversely affect areas where the parties do not compete.[95]

The key takeaway from this case is that the merger parties and their advisers need to consider carefully how a merger affects incentives to invest and innovate, and whether they might be blunted (due to cannibalisation effects, which may be reduced if the parties' R&D programmes also generate non-overlapping products) or sharpened (due to R&D efficiencies, or the appropriability effect that increase incentives to innovate).

Conclusions

It is right that competition authorities consider carefully the risk of mergers adversely affecting consumers by eliminating potential and dynamic competition. Merging parties and their advisors should consider the issues that competition authorities could raise regarding: (i) how the market would develop absent the merger; and (ii) the nature of innovation in these markets and how incentives to innovate are impacted by the merger. With this in mind, they should consider the evidence base regarding market developments and the nature of innovation processes in those markets. This will help the merger parties to consider the theories of harm that competition authorities may put forward regarding the elimination of potential and dynamic competition.

All three of the case studies highlight the challenges associated with assessing these risks, particularly given the contradictory evidence in *Bauer Media* of Bauer declining to represent independent radio stations and Amazon's recent closure of its UK restaurants business. Assessments of the parties' intentions, ability and incentives to enter markets where they have no actual plans to do so are inherently difficult, whereas in pharma mergers, the issue is more whether clinical trials will be successful (particularly early-stage clinical trials). In these cases, the parties' internal documents will often be key – and the breadth of the documents reviewed in *Amazon/Deliveroo* is also noteworthy (including US documents, Indian entry, and other business lines).

In any event, the merger counterfactual is only one element in assessing whether such mergers are anti-competitive. The intensity of rivalry from other existing competitors and other potential competitors is also of crucial importance. The CMA notably cleared the *PayPal/iZettle* merger because iZettle's planned expansion in omni-channel payments would not lead to greater competition given its small scale, the existence of significant competitors, and the likelihood of future entry.[96]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Acknowledgment

The authors are grateful for the comments of Matt Hunt, Managing Director and Head of the EMEA economics practice at AlixPartners.

* * *

Endnotes

1. *Global Merger Control (2021) – OECD Competition Trends*, Volume II, section 4.3.2.
2. Nonetheless, it should be noted that the EC's Horizontal Merger Guidelines (despite dating back to 2004) also contain the key elements of these theories of harm:
   "*60. For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger*." (Emphasis added.)
3. https://www.gov.uk/government/publications/joint-statement-by-the-competition-and-markets-authority-bundeskartellamt-and-australian-competition-and-consumer-commission-on-merger-control/joint-statement-on-merger-control-enforcement.
4. Caffarra, C., G. Crawford and T. Valletti (2020), "'How Tech Rolls': Potential competition and 'reverse' killer acquisitions", https://voxeu.org/print/65628.
5. Motta and Peitz (2020), "Big tech mergers", *Information Economics and Policy 54 (2021) 100868.*
6. https://blogs.cranfield.ac.uk/leadership-management/cbp/forecasting-prediction-is-very-difficult-especially-if-its-about-the-future#:~:text=Niels%20Bohr%2C%20the%20Nobel%20laureate,model%20out%2Dof%2Dsample.
7. *Global Merger Control (2021) – OECD Competition Trends*, Volume II, page 27.
8. Motta and Peitz (2020).
9. Motta and Peitz (2020), page 13.
10. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 38.
11. Furman Report (fn 3), Box 3.A.
12. https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1384.
13. https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf, paragraph 15.
14. Furman Report, page 9.
15. https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.
16. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 34.
17. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977486/Mergers_-_Guidance_on_the_CMA_s_jurisdiction_and_procedure__2020_-_revised_-_guidance__--.pdf, paragraphs 4.62–4.63.
18. Examples emphasised by the CMA include:
    - *Google/Waze* (2013) – The parties argued that as turn-by-turn navigational services are free, there is no economic activity and thus the UK Office of Fair Trading (OFT) did not have jurisdiction. However, based on application downloads on mobile devices, the OFT found that the parties had a share of supply greater than 25%.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- *Facebook/Instagram* (2012) – At the time of the transaction, Instagram had no revenue and did not satisfy the UK turnover test. However, the OFT found that the parties' share of supply of virtual social networking services was greater than 25%.
- *PayPal/iZettle* (2019) – Despite a deal value of US$2.2 billion, iZettle's UK turnover was less than UK's £70 million turnover test. However, the parties' share of supply of mPOS (point of sale) on the basis of total payment volumes and number of customers meant that the share of supply test was met.
- *Roche Holdings/Spark Therapeutics* (2020) – The CMA relied on the number of patents procured by the parties and also the number of UK employees to satisfy the share of supply test. This was despite the fact that Spark has no UK revenues and would not have for many years to come.
- *Mastercard/Nets* (2020) – The CMA considered that the share of supply test would be met based on the number of suppliers bidding to supply certain services, despite the target having no assets or business activities in the UK.

19. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977486/Mergers_-_Guidance_on_the_CMA_s_jurisdiction_and_procedure__2020_-_revised_-_guidance__--.pdf, paragraph 4.63(e).
20. https://www.catribunal.org.uk/sites/default/files/2021-05/1345_Sabre_Judgment_210521.pdf (the CAT judgment).
21. CAT judgment, paragraphs 139–145.
22. CAT judgment, paragraph 143.
23. CAT judgment, paragraphs 150–155.
24. CAT judgment, paragraphs 310–311.
25. CMA Merger Assessment Guidelines (CMA129), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986475/MAGs_for_publication_2021_-.pdf (CMA Guidelines), paragraph 2.36. At Phase 1, the CMA merely assesses whether there is a realistic prospect of a SLC (CMA Guidelines, paragraphs 2.33–2.34).
26. *CK Telecoms UK Investments v Commission*, [2020] EUECJ T-399/16 (28 May 2020), paragraphs 106–118.
27. Motta & Peitz (2020), page 14.
28. CMA Guidelines, paragraph 2.28.
29. CMA Guidelines, paragraph 3.14.
30. CMA Guidelines, paragraph 5.20.
31. CMA Guidelines, paragraph 5.2.
32. CMA Guidelines, paragraph 5.3.
33. CMA (2020), "Merger control in dynamic markets", CMA Focus.
34. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 36.
35. CMA Guidelines, paragraph 5.2.
36. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/969878/Addleshaw_Goddard_LLP_and_AlixPartners.pdf.
37. CMA Guidelines, paragraph 3.17.
38. CMA Guidelines, paragraph 3.18.
39. CMS Response to the CMA's Draft Merger Assessment Guidelines, paragraph 3.3.
40. CMA Guidelines, paragraphs 5.10, 5.11, and 5.15.
41. CMA (2020), "Merger control in dynamic markets", CMA Focus, pages 35–36.
42. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 36.
43. CMA Guidelines, paragraph 8.29.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

44. American Bar Association's response to the CMA's Draft Merger Assessment Guidelines, page 18.
45. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 39.
46. See also RBB's response to the CMA's Draft Merger Guidelines, page 21.
47. See also KPMG's response to the CMA's Draft Merger Guidelines, paragraph 2.16.
48. This can be thought of as a measure of market share in the radio market. CMA Final Report on completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited, Wireless Group Limited, and the entire business of UKRD Group (Bauer Media), Figure 1. AlixPartners acted for Bauer Media.
49. *Bauer Media*, paragraph 32.
50. The CMA considered that Bauer was perceived as a potential competitor by FRS but recognised that any constraint exercised was limited. *Bauer Media*, paragraph 34.
51. *Bauer Media*, paragraphs 32–33.
52. *Bauer Media*, paragraph 6.64.
53. *Bauer Media*, paragraph 6.67.
54. *Bauer Media*, paragraph 6.71.
55. *Bauer Media*, paragraph 6.72.
56. Bauer had previously represented a station called Orion between 2014 and 2016, but it took that station on from its main competitor Global and eventually acquired it.
57. *Bauer Media*, paragraph 8.13.
58. *Bauer Media*, paragraph 8.11.
59. *Bauer Media*, paragraph 8.29.
60. *Bauer Media*, paragraph 8.20.
61. *Bauer Media*, paragraphs 8.19–8.20.
62. *Bauer Media*, paragraph 36.
63. *Bauer Media*, paragraph 38.
64. *Bauer Media*, paragraph 42.
65. The CMA considered full divesture but concluded that full divesture would not be able to remedy the substantial lessening of competition and adverse effects arising out of it. This was because there was inherent uncertainty regarding the incentives, likely appetite, and strategic focus of any alternative purchaser in relation to maintaining FRS as an active competitor to represent independent stations.
66. Details of the remedy are set out in *Bauer Media*, paragraph 14.82.
67. This includes logistics-enabled marketplaces (such as Deliveroo and Uber Eats) and food ordering marketplaces, that do not primarily provide logistics (such as Just Eat). See CMA Final Report on the anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo, dated 4 August 2010 (*Amazon/Deliveroo (2020)*), paragraph 5.105.
68. *Amazon/Deliveroo* (2020), paragraph 6.83.
69. *Amazon/Deliveroo* (2020), paragraph 6.85.
70. *Amazon/Deliveroo* (2020), paragraph 6.135.
71. *Amazon/Deliveroo* (2020), paragraph 33.
72. *Amazon/Deliveroo* (2020), paragraph 33.
73. *Amazon/Deliveroo* (2020), paragraph 6.95.
74. *Amazon/Deliveroo* (2020), paragraph 6.89.
75. *Amazon/Deliveroo* (2020), paragraph 6.96.
76. *Amazon/Deliveroo* (2020), paragraph 6.102.
77. *Amazon/Deliveroo* (2020), paragraphs 6.101 and 6.139.
78. *Amazon/Deliveroo* (2020), paragraph 6.97.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

79. *Amazon/Deliveroo* (2020), paragraph 6.165.
80. *Amazon/Deliveroo* (2020), paragraph 6.108.
81. *Amazon/Deliveroo* (2020), paragraph 6.115.
82. *Amazon/Deliveroo* (2020), paragraph 6.103.
83. *Amazon/Deliveroo* (2020), paragraph 6.193.
84. *Amazon/Deliveroo* (2020), paragraph 6.187.
85. *Amazon/Deliveroo* (2020), paragraphs 6.187 and 6.193.
86. *Amazon/Deliveroo* (2020), paragraph 6.202.
87. *Novartis/GSK* (2015), paragraph 1.
88. *Novartis/GSK* (2015), paragraphs 47–58.
89. *Novartis/GSK* (2015), paragraphs 76–83.
90. *Novartis/GSK* (2015), paragraphs 101–114.
91. *Novartis/GSK* (2015), paragraph 90.
92. *Novartis/GSK* (2015), paragraph 91.
93. *Novartis/GSK* (2015), paragraph 104.
94. *Novartis/GSK* (2015), paragraph 106.
95. *Novartis/GSK* (2015), paragraphs 111–113.
96. CMA (2020), "Merger control in dynamic markets", CMA Focus, page 36.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Ben Forbes
Tel: +44 20 7098 7457 / Email: bforbes@alixpartners.com
Ben Forbes is a Senior Vice President in AlixPartners' European competition practice, which is part of a broader litigation practice. He has over 12 years of experience as an economist advising on a range of competition and regulatory matters. He has particular experience in relation to market investigations and mergers, including acting for HSBC in relation to both the CMA and FCA investigations into retail banking and in advising on various mergers (including two recent Phase 2 mergers – *Hunter Douglas/247* and *JD Sports/Footasylum*). He has written widely on the economics of merger control including co-authoring two chapters in the Third Edition of *UK Merger Control: Law and Practice*, November 2016. He has also worked more generally on competition and litigation matters relating to financial services, transport, and telecoms.

Mat Hughes
Tel: +44 7920 156 915 / Email: mhughes@alixpartners.com
Mat Hughes is a Managing Director in AlixPartners' European competition practice, which is part of a broader litigation practice. *Who's Who Legal* 2020 ranks Mat as a Competition Economist Thought Leader and describes him as "very attentive and bright" and that its sources say "he knows how to zero in effectively on what will make a difference in a case".
Mat has acted on over 30 Phase 2 merger and market investigations in the UK and a very large number of UK Phase 1 investigations, as well as before the European Commission and the competition authorities of other Member States. He has 30 years of experience as an antitrust economist and in dealing with competition authorities, courts and specialist utility regulators in relation to all aspects of competition law. Mat has written widely on the economics of merger control, including the Third Edition of *UK Merger Control: Law and Practice*, 2016.

Camelia O'Brien
Tel: +44 20 7098 7680 / Email: cobrien@alixpartners.com
Camelia O'Brien is a Senior Vice President in AlixPartners' European antitrust and competition practice. Camelia has over five years of experience as an economist, advising on a range of competition and regulatory matters. She has particular experience in the technology, media and telecommunications sector and has worked on a recent Phase 2 merger in the media industry (*Bauer Media*). She also worked on the CMA's investigation into *Hunter Douglas/247* as well as *Unite Group plc/Liberty Living Group plc*. She has also worked more generally on competition litigation cases across a variety of sectors including financial services, retail and digital.

AlixPartners UK LLP

6 New Street Square, London, EC4A 3BF, United Kingdom
Tel: +44 20 7098 7420 / URL: www.alixpartners.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

AI, Machine Learning & Big Data
Banking Regulation
Blockchain & Cryptocurrency
Bribery & Corruption
Cartels
Corporate Tax
Employment & Labour Law
Energy
Fintech
Fund Finance
Initial Public Offerings
International Arbitration
Litigation & Dispute Resolution
Mergers & Acquisitions
Pricing & Reimbursement

GLI GLOBAL LEGAL INSIGHTS