Call for information

Digital mergers

June 2019

CMA109con

Contents

Page

1. Introduction 1
2. Scope of the call for information.. 2
3. Key issues we want to explore 2
4. Responding to the call for information... 3
5. Next steps 4

1. Introduction

1.1. The digital economy has already brought significant benefits for consumers and the wider UK economy, increasing choice, lowering prices and driving innovative products and services. However, the scope for harm to consumers and competition in online markets, particularly in new, unfamiliar market contexts, means that competition authorities must be ready to act where such harm has the potential to arise. While we believe that the existing UK legislative framework provides the scope to fully assess concerns raised by mergers in digital markets,[1] we believe that it is important to actively consider further steps that could be taken to ensure the effectiveness of UK merger control in these markets.

1.2. As part of our ongoing work in this area, we appointed economic consultancy Lear to carry out a study of previous merger decisions in digital markets.[2] The objectives of the study were:

(a) to review the relevant economic literature and theories of harm typically pursued by competition authorities in relation to digital mergers;

(b) to assess previous decisions by the CMA's predecessor organisations,[3] and evaluate whether these decisions were reasonable, based on the evidence available at the time; and

(c) to evaluate the market evolution following these mergers to ascertain whether they have led to a detrimental outcome.

1.3. We are carefully considering the implications of the study's findings for our approach to the assessment of digital mergers. The study joins a number of other recently-published reports, including the Furman Review in the UK,[4] the EC digital experts report in the EU,[5] and the Stigler Center report in the US,[6] that raise important questions (or make recommendations) about the appropriate approach to merger control in the digital era.

1.4. We have already started to adapt our theories of harm in recent cases to take account of our better understanding of how digital markets function, including by taking greater account of dynamic counterfactuals and the impact on potential competition and innovation.

1.5. We are also proposing to update our Merger Assessment Guidelines (the **MAGs**)[7] to clarify and supplement the guidance provided on the substantive assessment of mergers in digital markets. These revisions will be intended to reflect the significant evolution in the understanding of digital markets since the MAGs were last revised in 2010, including both the latest research and our experience in relevant cases.

---

1 See letter from Andrea Coscelli to Alex Chisholm and Charles Roxburgh of 21 March 2019.

2 Lear, *Ex-post Assessment of Merger Control Decisions in Digital Markets* (June 2019).

3 The Office of Fair Trading and the Competition Commission.

4 Report of the Digital Competition Expert Panel, *Unlocking digital competition* (March 2019).

5 Crémer et al., *Competition policy for the digital era* (April 2019).

6 Stigler Center for the Study of the Economy and the State, *Report of the Committee for the Study of Digital Platforms* (May 2019).

7 CC2 Revised / OFT1254: Merger Assessment Guidelines.

2. Scope of the call for information

2.1. The purpose of this call for information is to invite interested parties to provide views on aspects of the MAGs that should be supplemented or revised to provide up-to-date guidance on the CMA's approach to the assessment of mergers in digital markets.

3. Key issues we want to explore

3.1. The CMA is seeking views on potential revisions to the MAGs to provide clarity on the CMA's approach to the assessment of mergers in digital markets in light of recent research and experience. We are particularly interested to hear views on the following questions:

(a) What **market features** are likely to be relevant to the assessment of mergers in digital markets? For example:

(i) The multi-sided nature of many digital markets (eg digital platform markets).

(ii) The way in which digital products or services are monetised (eg through advertising revenues).

(iii) The fact that users in certain digital markets pay for products or services through non-monetary means (eg provision of personal data).

(iv) The relevance of data assets for competition.

(v) The importance of network effects.

(b) How might these market features impact the possible **theories of harm**? For example:

(i) Loss of actual or perceived potential competition – eg where the target is still relatively young but has growth potential, has promising pipeline products that have not yet come to market, or is currently only active in a complementary market.

(ii) Loss of innovation – eg where the market is characterised by competition in "innovation spaces" or the target has a history of disruptive digital innovation.

(iii) Non-horizontal effects – eg where the combined entity will control an important dataset for competition in upstream/downstream or neighbouring markets.

(c) What other theories of harm might arise where the target is active in a **complementary market**? For example:

(i) Are there circumstances in which efficiency benefits arising from a merger could be considered to give rise to competition concerns?

(ii) To what extent is it important to consider the possibility that a merger could prevent another firm from buying complementary assets and, as a result, be better able to compete?

(d) How should we approach the assessment of **non-price parameters** of competition in digital markets?

(e) When determining the **counterfactual**:

(i) Which types of evidence should we take into account and how should these be weighted?

(ii) How should we assess:

(A) The growth prospects of the target?

(B) The availability of other routes for the target to grow (eg by attracting external financing)?

(C) The possibility of the target being acquired by an alternative party?

(f) What **evidential weight** should be attached to:

(i) Internal documents indicating that the purpose of the transaction is to eliminate a competitive threat?

(ii) A high transaction value relative to the market value or turnover of the target?

(g) Are there particular features of digital mergers that would be relevant to our assessment of **efficiencies** and **relevant customer benefits**?

(h) Are there any **other aspects** of the MAGs that should be supplemented or revised in relation to mergers in digital markets?

4. Responding to the call for information

4.2. We are seeking views from all interested parties (particularly where supported by relevant evidence and analysis).

4.3. The call for information opens on Monday 3 June 2019 and closes at **5pm on Friday 12 July 2019**.

4.4. To respond to this call for information, please send your submission either by:

(a) **Email to:** digitalmergers@cma.gov.uk

(b) **Post to:** Digital Mergers Call for Information
Competition and Markets Authority
7th floor
Victoria House
37 Southampton Row
London WC1B 4AD

4.5. In providing responses, please identify any material that you consider to be confidential, and provide a description of why this is the case. The disclosure of information which relates to the affairs of an individual or any business of an undertaking, and which comes to the CMA in the course of this call for information, is governed by the statutory gateways in Part 9 of the Enterprise Act 2002 and such information can only be released in particular circumstances set out in that Act.

5. Next steps

5.1. We will publish non-confidential versions of the responses to this call for information. These documents will be available on our webpages and respondents will be notified when they are available.

5.2. We will analyse the responses to this call for information and will take these into account when considering possible changes to the MAGs. In due course, we intend to publish a revised draft version of the MAGs (including revisions to aspects of the MAGs that are not connected to the assessment of digital mergers) and will consult on all proposed additions and changes.[8]

[8] The timing of the fuller revision of the MAGs remains contingent on the outcome of EU Exit negotiations.