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CMA call for information – digital mergers

Response from DMG Media

Executive Summary

- This response to the CMA call for information on digital mergers is made on behalf of DMG Media, publishers of the Daily Mail, Mail on Sunday, MailOnline, Metro and Metro.co.uk, and the largest commercial publisher of news online in the UK. The editorial content of all our titles is regulated by the Independent Press Standards Organisation.

- This response addresses only certain aspects of the topics proposed for review in the CMA's call for information[1] relative to the Competition Commission's Merger Assessment Guidelines ("the Guidelines).[2]

- Specifically, this response addresses: (i) the jurisdictional test; (ii) the treatment of the counterfactuals; (iii) the balance of harms and consideration of two-sided markets; and (iv) killer acquisitions.

- MG Media is of the view that there is no such thing as risk-free merger control and that an appropriate balance has to be struck between competing interests. However, the current system has not served UK internet users, publishers and advertisers well and has to be reviewed.

- DMG Media considers the current approach is more likely to have led to under-enforcement rather than over-enforcement in the context of digital mergers, and that in markets characterized by strong network effects and high barriers to entry under-enforcement may be more harmful than over-enforcement. This has been detrimental to publishers such as DMG Media, which are heavily dependent on online platforms both as source of traffic and as intermediaries for the purpose of content monetisation.

[1] https://www.gov.uk/government/consultations/call-for-information-digital-mergers.

[2] https://www.gov.uk/government/publications/merger-assessment-guidelines.

- DMG Media is thus strongly of the view that the CMA **must** take a more proactive and precautionary approach to analysing mergers in those markets. Considering that a number of potentially harmful mergers were either cleared or never reviewed by the CMA, due to the current framework, the revision of these Guidelines must expand the competence of the CMA to undertake an in-depth review of mergers in the digital markets.

- The CMA must also strike a different balance on the substantive assessment. A balance of harms test may be one (but perhaps not the only) appropriate way of doing that.

Introduction to DMG Media and the news and advertisement sector

DMG Media is one of Britain's most successful news publishers. The Daily Mail and Mail on Sunday each hold about 25 percent of their respective national newspaper markets and Metro has the largest distribution of any free newspaper. Our main news website, MailOnline, is the largest English language newspaper website in the world, with 218 million monthly unique browsers. This position has been achieved by establishing full-scale editorial and commercial operations in both the USA and Australia, in addition to the UK. MailOnline is now the eighth largest news website in the USA (and largest foreign-owned),[3] and the fifth largest in Australia.[4]

The last few years have seen an extraordinary amount of market power being concentrated within the hands of a small number of large tech companies, most notably Google and Facebook. News publishers such as DMG Media are heavily dependent on these online platforms as sources of traffic, but also in the case of Google because it is the largest intermediary for online advertising. Online advertising is an essential source of revenue for DMG Media, yet almost the totality of the growth in online advertising has been captured by Google and Facebook, to the detriment of publishers. Together, these two have created a virtual duopoly in the online advertising market. DMG Media welcomes the fact that, following the urging of the market, the Cairncross Review[5] and the Furman Report,[6] and actions taken by a number of national competition authorities,[7] the CMA has now taken action to investigate the

[3] http://www.ebizmba.com/articles/news-websites.
[4] http://www.roymorgan.com/findings/7595-top-20-news-websites-march-2018-201805240521.

[5] https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism.

[6] Report of the Digital Competition Expert Panel, "Unlocking Digital Competition (March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[7] Australian Consumer & Competition Commission, Digital Platforms Inquiry (December 2018), https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf; French Autorite de la Concurrence, Opinion 18-A-03 of 6 March 2018, http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=18A03; German Bundeskartellamt, B6-22/16 Social Networks (6 February 2019),

online advertising market. Such action is needed to ensure that the online advertising intermediation market is sufficiently competitive and that publishers receive their fair share of the fees paid by advertisers to intermediaries, chief amongst them being Google, to have their ads shown on news media.

However news publishers have also suffered significantly from the laxity of merger control in the tech space. For instance, when Google decided to acquire DoubleClick in 2007, significant concerns were raised by third parties that the acquisition by Google of DoubleClick's leading ad server tools, DoubleClick for Publishers ("DFP") and DoubleClick for Advertisers ("DFA"), presented risks that the merged entity would engage in exclusionary strategies. For example, concerns were raised that the merged entity could bundle DoubleClick's leading ad server tools with Google's intermediation service (AdSense) or tweak the decision logic (referred to as "ad arbitration") contained in DFP to serve ads in favour of AdSense.[8]

The theories of harm presented by third-party complainants relied on the fact that online advertising is a two-sided market characterized by "network effects" and where scale and access to user data are important ingredients of success.[9] The concern was that "through the foreclosure strategies, the merged entity would deny sufficient scale and liquidity or, in other words, the ability to find easily and quickly a counterpart with which to trade, to competing networks which would consequently be weakened."[10] Thus, as the network of the merged entity would grow and become data-richer, it would attract more publishers and more advertisers up to the point where the market would "tip" in the merged entity's favor.[11] In turn, as a result of its larger scale and access to data, "the network of the new entity would be protected by high barriers to entry as no other network would be able to reach a similar size, in particular with the disadvantage of not having access to the same amount of data on users."[12]

In the end, the European Commission cleared the merger, rejecting the concerns expressed by third parties on the ground that the merged entity would not have the ability and the incentive to foreclose rival ad intermediaries. The Commission concluded that, post-merger, Google would not have the *ability to foreclose* as the market investigation had apparently revealed that DoubleClick faced competitive constraints and was thus unable to exercise any significant market power.[13] The Commission also considered that Google would not have the *incentives*

https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3600108.

8 European Commission, Decision of 11 March 2008, COMP/M.4731 *Google/DoubleClick*, para 289.

9 Id. para 290.

10 Ibid.

11 Ibid.

12 Ibid.

13 Id. para 295 et seq. The Commission identified a number of large and small ad serving competitors on both publisher- and advertiser-side. The evidence gathered during the investigation also suggested that switching costs were not insurmountable, and that to the extent that indirect network effects were present they were not strong enough to lead to "tipping".

to foreclose rival intermediaries.[14] Bundling would likely be unprofitable as it would induce publishers to switch to other ad servers.[15] Similarly, given that "neutrality" was "a key quality of the ad serving tool", it was unlikely that Google would have the incentive to tweak DFP's decision logic in favour of AdSense, as that could induce publishers to switch away from DFP or exclude AdSense from their list of intermediaries.[16]

While the purpose of this discussion is not to revisit the *Google / DoubleClick* merger, DMG Media offers this case as an example showing that the European Commission's assessment of this merger proved over-optimistic as the foreclosure concerns expressed by third parties have since materialised. In the decade that followed its acquisition of DoubleClick, Google engaged in a variety of practices designed to expand its grip on the "ad tech" ecosystem at the expense of its rivals. As a result, the market has "tipped" and most of the ad intermediaries which were expected to thrive, and by the same token constrain Google, have either left the market[17] or have been acquired for a fraction of their initial value.[18] Investment in ad tech has all but collapsed.[19]

Mergers allowing tech platforms, such as Facebook/WhatsApp and Facebook/Instagram, to further enhance their capability to extract data from their users, have also had deleterious effects on news publishers. The ability to aggregate user data – in particular behavioral data (e.g. interests of the user, as reflected in their browsing history, past purchases etc.) and demographic data (e.g. age and gender) – is increasingly important for ad targeting purposes, hence giving a critical advantage to companies like Facebook or Google over news publishers, which are unable to gather such data. Any merger that allows platforms to further enhance their data advantage has to be harmful to news publishers, as it reduces their ability to monetize their content, thereby reducing both choice and competition. Mergers allowing platforms to aggregate large quantities of user data may not only be harmful on the user side of the market, but may also be extremely detrimental by reducing monetization opportunities for third parties.

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[14] Id. para 311 et seq.

[15] Id. para 315.

[16] Id. para 323.

[17] See Part VII "Effects of Google's exclusionary conduct – the current state of the ad tech industry" at p. 70-75 of the Complaint.

[18] See for example M. Shields, "Ad tech company Rocket Fuel sold for a fraction of its peak $2 billion valuation, and it marks the end of an era", *Business Insider*, 18 July 2017, available at https://www.businessinsider.com/rocket-fuels-sale-to-sizmek-marks-the-end-of-an-era-in-ad-tech-2017-7?r=US&IR=T (observing that "[w]hen a company that pulled in over $450 million in revenue in 2016 and over $95 million during the first quarter of this year suddenly sells for just $125.5 million, it raises eyebrows.")

[19] C. Ballentine, "Investment in Ad Tech Grows Increasingly Scarce, With Forrester Predicting a 75% Drop in Venture Capital", *Adweek*, 7 November 2018, available at https://www.adweek.com/programmatic/investment-in-ad-tech-grows-increasingly-scarce-with-forrester-predicting-a-75-drop-in-venture-capital/; C. Ballentine, "Google-Facebook Dominance Hurts Ad Tech Firms, Speeding Consolidation", *The New York Times*, 12 August 2018, available at https://www.nytimes.com/2018/08/12/technology/google-facebook-dominance-hurts-ad-tech-firms-speeding-consolidation.html

DMG Media recognises that merger control in the digital space raises a series of complex challenges and thus risks of errors. As correctly pointed out in the Furman Report "[m]erger control is subject to two types of errors: false positives, when a merger that should have been allowed to go through is blocked, and false negatives when a merger that should have been blocked is allowed to go through." While there have certainly not been any false positives (over-enforcement) in mergers involving major digital platforms (because all of these mergers have been allowed), DMG Media is concerned that there may have been a number of false negatives (under-enforcement) whereby harmful mergers may have been allowed.

Against that background, DMG Media therefore wishes to highlight how a radical revision of the Guidelines could assist the CMA in ensuring effective regulation of these companies and promote competition in the digital advertising market and other related markets going forward.

(i) The jurisdictional test

Section 23 of the Enterprise Act 2002 ("**EA02**") defines relevant merger situations as "two or more enterprises have ceased to be distinct", meaning that the merger must satisfy either:

(i) the turnover test; or
(ii) the share of supply test.

The turnover test

The Furman Report[20] shone a bright light on the fact that the business model of many digital companies means that they often do not generate significant revenue for a number of years, as the focus is on user growth and not on generating turnover or turning a profit. For these reasons, applying a turnover-based test is entirely inappropriate in these cases, as this test does not capture the importance of a merger or indeed its scale. Low turnover does not discount the fact that the acquisition of a promising start-up by a large tech company has the capacity to "nip in the bud" a future potential rival which could have extensive and lasting anti-competitive effects.

For example in PayPal/iZettle,[21] iZettle was below the £70 million threshold when iZettle was rapidly growing as a successful payment services provider and had planned to proceed with an IPO if it had not been for the merger.[22]

The share of supply test

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[20] Report of the Digital Competition Expert Panel, "Unlocking Digital Competition (March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[21] PayPal/iZettle (2019), paras 4.20-4.24 https://assets.publishing.service.gov.uk/media/5cffa74440f0b609601d0ffc/PP_iZ_final_report.pdf.

[22] Ibid, paras 7.62-7.65.

Section 23(2) (b) of the EA02 provides, in the alternative, that a relevant merger situation is also created where the merged enterprises supply or acquire 25% or more of a particular description of goods or services in the UK (Sections 23(3)-(4) EA02). The Guidance (paras 4.53-4.62). The share of supply test requires an increment in the share of supply, no matter how small that increment may be (4.54). An obvious corollary of this is that the share of supply test does not apply to non-horizontal mergers and is therefore irrelevant to both vertical and conglomerate mergers, unless the definition of the "supply" can be widened to capture those situations, which is unlikely in most cases.

In Facebook/Instagram and Google/Waze, the share of supply test provided a jurisdictional basis for review, notwithstanding the parties' differentiated service offerings and the target businesses' minimal UK turnover. The CMA's recent enforcement practice (CMA reviews in Experian/ClearScore, Nielsen/Ebiquity, TopCashback/Quidco, and PayPal/iZettle, the latter of which was not originally notified but was called in for review) confirms its willingness and to assert jurisdiction over digital markets cases and, if necessary, proceed to an extended review. However, we are of the view that although the CMA's approach has to be commended, it is too little too late for digital markets.

Whilst the Furman Report also concluded that the share of supply test could be used by the CMA to assert jurisdiction in most digital mergers, it is easy to imagine that it also might fail in certain digital mergers and therefore pose a jurisdictional risk (and appeal risk) to the assessment of the merger. In addition to the vertical or conglomerate merger situations outlined above, the share of supply would also not be relevant to a situation where a new entrant is not (yet) supplying goods or services – or to an even more extreme situations where the incumbent has 100% of the relevant supply.

This unsatisfactory situation could only be remedied by the Furman proposal that certain digital companies might be designated as having "strategic market status", which would then result in the review of mergers or data acquisitions by these companies, regardless of thresholds. That way the CMA could guarantee oversight over all digital mergers by those platforms, regardless of jurisdiction.

Those companies which are to be considered to hold "strategic market status" would need to be clearly identified and properly informed of their obligations – but we would assume that this is relatively straightforward in that one would simply amend the statute to presume that one or other of the jursdictional thresholds is satisfied, rather than having to impose a statutory obligation to notify.

All that would then be required is to appropriately update the Guidelines to reflect how the CMA will review mergers in digital markets, e.g. examining the existence and the intensity of network effects and barriers to entry, as well as controlling for the potential of a deterioration in privacy controls, data protection and service quality.

It is the view of DMG Media that in addition to the statuory presumption on the jurisdictional threshold, interim orders to prevent pre-emptory steps should be used in all cases involving companies with strategic market status. This would give the CMA the power to stop both closing and integration, without the need for a statutory notification and waiting period.

(ii) The treatment of counterfactuals

The Guidelines provide that the CMA generally adopts the prevailing conditions of competition (or the pre-merger situation in the case of completed mergers) as the counterfactual against which to assess the impact of the merger.[23]

However, the CMA will assess the merger against an alternative counterfactual where it considers that the prospect of prevailing conditions continuing is not realistic, e.g. because the CMA believes that one of the merging firms would inevitably have exited from the market. A common scenario that involves a loss of future competition occurs when a large incumbent firm acquires a very capable disruptive firm that operates in a related or adjacent market and that is looking for potential buyers. This has happened in the technology sector, notably Google/Youtube in 2006 and Google/Doubleclick in 2007 and Microsoft/LinkedIn in 2016, and it begs the question as to how different the landscape would be if the relevant targets had been acquired by others.

In digital markets, the evidence and the assessment of the counterfactuals must be given unique consideration, particularly in light of the significant uncertainties of (i) the competitive conditions remaining stable, (ii) future innovation and (iii) entry or exit.

The restrospective review of CMA merger decisions in the Lear Report[24] highlights the Facebook/Instagram merger,[25] and scrutinises how Instagram might have evolved in the absence of the merger. In our view, Facebook/Instagram should have included an assessment of multiple counterfactuals, in particular, what the result might be if situations *other* than the pre-merger situation could be taken into account. What would the competitive landscape look like if instead of being bought by Facebook, Instagram had developed on its own with the assistance of investors or had been bought by Google or Microsoft or any other large digital platform. As the Lear Report concludes:

> "In markets as dynamic as digital markets, evolution may be the result of the target's independent decision to change its business model and/or investments

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[23] Guidelines 4.3.5.

[24] Lear, "Ex-post Assessment of Merger Control: Decisions in Digital Markets" (2019), http://www.learlab.com/publication/ex-post-assessment-of-merger-control-decisions-in-digital-markets/.

[25] Facebook/Instagram (2012), https://www.gov.uk/cma-cases/facebook-instagram-inc.

> made by venture capitalists and/or the decision of other entities in the industry to purchase the target and integrate it in their own operations. In other words, when defining the counterfactual to a merger, CAs ***may need to consider the ability of the target to develop, on its own or attracting outside resources, as well as the likelihood of an alternative buyer coming along.***" [emphasis added]

The Daily Mail notes that, from an advertising perspective, the Lear Report found that

> "Facebook's advertising revenue increased significantly despite the drop in time spent, and the gap between Facebook and other social networks has widened. … ***The advertising revenue per hour spent on Facebook and Instagram is significantly larger than that of their rivals, suggesting that the merged entity is able to command higher prices.*** This may be a result of the efficiencies achieved through the merger and/or of the exercise of market power by the merged entity." (emphasis added)

Indeed, the Facebook/Instagram merger increased the market power of the merged entity across many factors relevant to advertisers, including merging their data sets and removing competitive constraints that Instagram might have exerted on users who cross-visit the two platforms. In DMG Media's view, it is of critical importance that competition authorities pay close attention not only to the impact of a transaction on the user side of the market, but also to the monetization side, as online advertising is what fuels the Internet and all of the growth in the sector has been absorbed by the platforms.[26]

Even if the CMA were able to reinforce the instruments available to it, there is always a degree of uncertainty and speculation behind the counterfactual and an associated risk of appeal by the parties. The Furman Report acknowledged that in digital markets, competition authorities may need to accept *more* uncertainty in their counterfactual or perhaps adopt a different test (see below). Andrea Coscelli, speaking about the report, agreed that "[a]ny assessment of future developments, no matter how well informed, is likely to contain a significant degree of uncertainty. We should therefore be cautious in concluding that the absence of the same kind of compelling evidence we might have about near-term market developments should necessarily provide grounds for clearance."[27]

In conclusion on this point, the CMA should develop and use a much clearer framework (and perhaps some rebuttable presumptions) for looking beyond current market conditions to

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[26] This is in line with the findings of the Lear Report, which inter alia observes that: "In Facebook/Instagram, the Authorities may have placed excessive weight on the functionality offered by the parties' products on the users' side of the market but in a two-sided setting functionalities are not the only important feature: what is also important is the role they perform in platform's monetization strategy."

[27] Andrea Coscelli, Speech of 3 June "Competition in the digital age: reflecting on digital merger investigations", https://www.gov.uk/government/speeches/competition-in-the-digital-age-reflecting-on-digital-merger-investigations.

examine how the transaction might affect future innovation and alternative acquisitions in alternative counterfactuals. In order to take into account a more accurate reflection of the counterfactuals, increased use of data analysis and data science is clearly a must, but the dynamic nature of digital markets has to allow for a degree in uncertainty when the CMA considers the counterfactual. In such cases, the CMA needs to have the tools not only to assess mergers but to defend its decisions on appeal.

(iii) The balance of harms test

The CMA applies a balance of probabilities threshold to its analysis, namely whether it is more likely than not that a substantial lessening of competition ("**SLC**") will result.

The Furman Report again highlighted the Facebook/Instagram example in which it was possible that Instagram could have developed into an effective rival to Facebook. However, even if the merger had proceeded to an in-depth review, on a balance of probabilities it would have been difficult to show the likelihood of a SLC.[28]

The Furman Report proposed that a change should be made to the legislation to allow the CMA to use a "balance of harms" approach which takes into account the scale as well as the likelihood of harm in merger cases involving potential competition and harm to innovation. Evidence on the behaviour of an acquiring firm following previous mergers may also be pertinent to assessing that firm's acquisition strategy and the likely merger effects.

Some would argue that the balance of harms test risks introducing an unfortunate degree of uncertainty into the merger control process, by allowing the CMA a broad margin of discretion in deciding whether the expected harm is sufficient to warrant intervention in a given case. The CMA has acknowledged, that the introduction of this test would bring about a "fundamental shift in merger policy" that would create some difficulties in applying merger control analysis in a "transparent" and "robust" manner.[29] However, as we outlined above, these may be risks worth taking to ensure competitive markets for the future that are driven by technological innovation and disruption rather than incumbency. Moreover, as we have noted above, the current approach is more likely to have led to under-enforcement rather than over-enforcement, and in markets characterized by strong network effects and high barriers to entry, under-enforcement may be more harmful than over-enforcement.

One of the advantages of the balance of harms test is that it would better be able to address "lower likelihood but high impact concerns, in particular, related to the loss of potential future competition and the innovation it can bring." As correctly pointed out by Valetti and Zenger,

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[28] Furman Report, para 3.83-3.84.

[29] CMA Response to the Furman Report (21 March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788480/CMA_letter_to_BEIS_-_DCEP_report_and_recommendations__Redacted.pdf.

> "In order to accurately weigh the risks of under- and over-enforcement and maximize consumer welfare, it is therefore necessary to consider not only the likelihood of harm, but also its magnitude. Otherwise, competition law will miss many transactions with probability of entry below 50% whose expected competitive harm is severe." [30]

One relevant question is whether balance of harms would become the test for all mergers. The Furman Report discusses the balance of harms test in the context of digital mergers but the test could also be applied in other cases where similar issues of innovation and harm to future potential competition exist. This would ultimately be an issue for Parliament but DMG Media is of the view that the test is intended to address issues that are most pertinent to digital mergers. For other mergers the test should therefore remain unchanged.

Under the current balance of probabilities test, the CMA already reviews the impact of a merger on potential competition (see PayPal/iZettle and Experian/Clearscore, which was abandoned). In the CMA's response to the Furman Report, the CMA stated that: "addressing the[se] challenges [posed by mergers in digital markets] does not require fundamental changes to the existing legislative regime at this stage".[31] However, the response admits that the CMA's "predecessor organisations did not, in some cases (such as Facebook's acquisition of Instagram), fully consider important evidence that could have provided greater insight into how the markets…were likely to evolve in future". These issues have not gone away and need to be addressed.

(iv) Killer acquisitions

Finally, we would also like to comment on the concerns that are raised by so-called killer acquisitions. A killer acquisition is the term increasingly used where an established incumbent buys up a small rival which may have the potential to become a major threat at an early stage, in order to pre-empt a future challenge. Facebook's acquisitions of both Whatsapp and Instagram are often cited as examples where the purchase prices themselves should have raised competition law alarm bells.

The Furman Report argued that the scope of "false negatives" in merger review (i.e. clearances which should not have occurred) could be reduced by placing greater focus on the purchase price and underlying valuation methodologies for the acquisition. Facebook's purchases of both Whatsapp and Instagram (for $19bn and $1bn, respectively) can be cited as examples where the purchase price itself should have been considered evidence of competition concerns. The Daily Mail agrees with this proposition.

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[30] Tommaso Valletti and Hans Zenger, "Increasing Market Power and Merger Control", *Competition Law & Policy Debate*, Vol. 5, No. 1, pp. 26-35, 2019.

[31] CMA Response to the Furman Report, see above.

The CMA recently cleared the PayPal/iZettle merger.[32] It was able to determine that PayPal's interest in and valuation of iZettle was not contingent on iZettle being on the verge of becoming a threat to PayPal's core online business.[33]

The valuation analysis is usually based on "Discounted Cash Flow" analysis alongside a comparator analysis.[34] Beyond this, a competition authority could be looking for an unexplained factor which could account for a "market power premium", which is being paid to stifle an emerging competitor which threatens to risk the position of an incumbent, especially one with "strategic market status". A starting point, which was raised in the context of Facebook's acquisition of Whatsapp and Instagram) is whether the purchase price can be rationalised with regard to fundamentals – i.e. is the payment for the firm consistent with its standalone value and plausible synergies or with amounts paid for other comparable firms)? Analysis of discounted cash flow data can provide an answer to this in identifying whether a price that is perceived to be "too high" is unjustifiable by objective factors. If the price is unexplainable by economic analysis, it could be considered to reflect a "market power premium": that the incumbent is paying a share of its monopoly profits to deter or eliminate a potential entrant.[35]

Another relevant question is how the price paid compares to the price offered by other purchasers. If the buyer was willing to significantly outbid other potential acquirers, this could be seen as akin to cases dealing with a sharing of monopoly rents.

The valuation analysis approved by the CMA was crucial to inform the assessment of two potential counterfactuals: one in which iZettle was to develop significantly to threaten PayPal's core business, and one in which PayPal would in turn become a more effective competitor in offline payments and address the ongoing decline of its own product PayPal Here.

In the end, the CMA dismissed the "killer acquisition" concerns, based to a significant extent on the economic analysis of PayPal's valuation of iZettle, which took into consideration the factors stated above. This approach should be reflected in the revisions to the Guidelines.

The House of Lords Select Committee on Communications Report "Regulating in a digital world"[36] suggested that the Government should consider implementing a **public interest test** for data-driven mergers and acquisitions, i.e. the management of the accumulation of data,

[32] PayPal/iZettle (2019) https://assets.publishing.service.gov.uk/media/5cffa74440f0b609601d0ffc/PP_iZ_final_report.pdf.

[33] O. Latham, S. Chisolm & S. Lynch, CRA Competition Memo "Acquisition of Potential Rivals in Digital/Tech: Valuation Analysis as Key Economic Tool – PayPal/iZettle" (2019).

[34] Ibid.

[35] Ibid.

[36] House of Lords Select Committee on Communications, Report " Regulating in a Digital World", https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/299.pdf.

which would allow the CMA to intervene. This would, in the opinion of DMG Media be a retrograde step, as such a test used to feature in the Fair Trading Act 1973 and was repealed due to the difficulties in applying it.

Requiring those firms with **strategic market status** to accept CMA review for all mergers, and the imposition of interim orders, may strike the best balance between intervention and allowing markets to develop organically.

Conclusions and Recommendations

In conclusion, the Daily Mail makes the following recommendations for the revision of the CMA's Merger Assessment Guidelines:

- **The jurisdictional test** must be capable of capturing digital mergers that have the potential to cause harm to competition. Thus far it is assumed that the share of supply test would be sufficient to capture vertical conglomerate or other "special circumstance" mergers. A statutory presumption that companies which hold strategic market status always satisfy the jurisdictional threshold could assist in making sure that the test captures those mergers.

- **The assessment of the counterfactuals** must be given unique consideration, particularly in light of the significant uncertainties of (i) the competitive conditions remaining stable, (ii) future innovation and (iii) entry or exit. The CMA should develop and use a much clearer framework (and perhaps some rebuttable presumptions) for looking beyond current market conditions to examine how the transaction might affect future innovation and alternative acquisitions in alternative counterfactuals.

- **The balance of harms test** risks introducing more uncertainty into the merger control analysis. However, these may be risks worth taking to ensure competitive markets for the future that are driven by technological innovation and disruption rather than incumbency. The current approach is more likely to have led to under-enforcement rather than over-enforcement, and in markets characterized by strong network effects and high barriers to entry, under-enforcement may be more harmful than over-enforcement. The balance of harms test should only apply to digital mergers, and the test for other mergers should remain unchanged.

- The CMA can more easily identify and reduce the risk of so-called **"killer acquisitions"** by placing greater focus on the purchase price and underlying valuation methodologies for the acquisition and how the price paid compares to the price offered by other purchasers.

DMG Media
July 2019

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