



1600 Amphitheatre Parkway
Mountain View, California 94043

Tel: 650.253.0000
www.google.com

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BY EMAIL

Re **Call For Information: Digital Mergers**

This submission contains Google's response to the consultation by the Competition and Markets Authority (**CMA**) on amending and improving its merger assessment guidelines (**MAGs**) to provide better guidance on its assessment of mergers in digital markets.

On 3 June 2019, the CMA published Lear's 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (**Lear Report**). The CMA's Chief Executive noted at the time that the evidence from that report and elsewhere does not point to "*some fatal flaw or gap*" in UK merger control and that the "*CMA's merger control tools are and remain, in the main, fit-for-purpose.*" According to Dr Coscelli, rather than "*reinventing our entire approach,*" any changes should focus on "*evolution, not revolution, of merger assessment tools to deal effectively with mergers in the digital economy.*"¹

Google agrees with this assessment. The Digital Competition Expert Panel report on 'Unlocking Digital Competition' found that "*the large majority of the acquisitions by large digital companies in recent years have likely been benign or beneficial for consumers.*"² The European Commission (**EC**) special advisers' report on 'Competition Policy for the Digital Era' echoed that finding and noted the substantial efficiencies that digital acquisitions can bring about.³ And the Lear Report – while identifying additional theories of harm and factual questions that could have been investigated – did not conclude that the examined mergers should have been blocked (and noted that several of these mergers are likely to have generated efficiencies).

¹ Andrea Coscelli, Competition in the digital age: reflecting on digital merger investigations, OECD/G7 conference on competition and the digital economy, 3 June 2019.

² Digital Competition Expert Panel, Unlocking Digital Competition, March 2019, paragraph 3.48.

³ Crémer, de Montoye, and Schweitzer, Competition Policy For The Digital Era, April 2019, p.111 ("*In the digital field, mergers between established firms and start-ups may frequently bring about substantial synergies and efficiencies: while the start-up may contribute innovative ideas, products and services, the established firm may possess the skills, assets and financial resources needed to further deploy those products and commercialise them*").

Dr Coscelli's speech announcing the present 'call for information' outlined three areas of focus: (a) enriching the information set; (b) understanding digital markets; and (c) defining the counterfactual and the relevant time horizon. Google's perspective on these issues is as follows (and is discussed in greater detail below):

Enriching the information set. Google agrees that merger reviews could take account of a broader range of evidence than is currently typically considered in order to test relevant theories of harm. A richer information set could also enhance the CMA's assessment of merger-specific efficiencies in digital markets, which may relate to improvements in quality or innovation rather than cost, and might therefore be less readily quantifiable or certain.

Understanding digital markets. A more detailed understanding of the digital sector is likely to be beneficial to the assessment of mergers in digital markets. This includes an understanding of the dynamics and features of acquisitions in digital markets that have sometimes been overlooked or given insufficient weight: (a) digital platforms' ability to invest in, improve, and expand an acquired service can add significant value to users; (b) a merger between complementary products can bring the target's services (or features) to a wider user base;⁴ (c) a prospective buyout can incentivize entrepreneurs and engineers to develop new products and attract venture capital;⁵ (d) acquisitions of nascent services can free up the target's founders or senior personnel to work on new products or projects, either within the acquirer or independently; and (e) digital mergers can serve as 'acqui-hires' – in other words, they aim to hire a team of talented engineers, regardless of the target's business.⁶

Defining the counterfactual and the relevant time horizon. Google agrees with Dr Coscelli that predicting how markets and target firms would develop, absent a contemplated merger, is difficult. The further into the future one makes predictions, the greater the degree of uncertainty can become; in past cases, even predictions within the two-year reference

⁴ For example, the *Google/Waze* merger enabled Google Maps users to benefit from Waze's real time traffic data: See Lear, *Ex-post Assessment of Merger Control Decisions in Digital Markets*, May 2019, paragraph II.116 ("efficiencies that resulted in the improvement of Google Maps were realized to the benefit of all Google Maps users. Google Maps' high market penetration... means that a large number of users have benefitted from them, making efficiencies quite significant") and paragraph II.130 ("the merger has enabled Google Maps and Waze to exploit their complementarities and generate efficiencies. These efficiencies are clearly merger-specific and should be taken into account when assessing whether the decision has proved to be beneficial or detrimental to consumers").

⁵ See Silicon Valley Bank, *UK Startup Outlook 2019*, p.12 (in 2019, 43% of start-ups indicated that the realistic long-term goal for their company was acquisition, compared to 24% who answered 'stay private' and 22% who answered 'IPO').

⁶ For example, approximately 75% of Google's acquisitions have had 18 or fewer employees; 60% had 10 or fewer employees; and 25% had 3 or fewer employees.

period have proved incorrect.⁷ The CMA is not constrained to considering a two-year period. In Google's view, however, it is important that competition authorities provide a reasoned basis for deviating from the two-year standard in a given case and the MAGs should explain when the CMA may consider it appropriate to do so.

With these comments in mind, updating the MAGs is welcome for at least three reasons. First, it could help maintain public confidence in agencies' understanding of digital markets and their ability to intervene if concerns arise. Second, revising the MAGs could enhance the predictability of digital merger reviews by codifying the analytical framework from recent CMA and EC cases, in particular to evaluate concerns about a loss of potential competition. Third, discrete improvements could reinforce the existing regime (for example by expanding the range of evidence that the CMA will consider) without jeopardizing its emphasis on rigorous, economically sound assessments.

A fundamental redesign of the merger rules in digital markets could, however, risk doing more harm than good, including by: (a) introducing impractical distinctions between 'digital' and 'analogue' businesses;⁸ (b) discouraging pro-competitive mergers by applying a presumption in favour of intervention;⁹ (c) creating a more complex analytical framework that it is difficult to apply "*in a transparent and robust way*" and which could have "*unintended consequences*";¹⁰ and (d) depriving entrepreneurs of an important exit option and reducing venture capital funds' willingness to invest in start-ups.¹¹

⁷ See e.g., Case COMP/M.4854 *TomTom/Tele Atlas*, Commission decision of 14 May 2008, paragraph 158. (Although cleared at Phase 2, a factor counting against the merger was that "*New entry by firms offering internet-based map applications must also be regarded as unlikely... Neither Google, nor Microsoft has developed its own map database covering the EEA. The same time-lag would apply as for existing providers of navigable digital map databases, which makes timely entry by such firms unlikely.*" In the US, Google replaced TeleAtlas with its own maps database as early as 2009; see Search Engine Land, *No More TeleAtlas, Google Goes It Alone For Maps Data?*, 12 October 2009). See also Case COMP/M.4942 *Nokia/Navteq*, Commission decision of 2 July 2008, paragraph 259 ("*it seems unlikely that any new entrant could challenge the position of Nokia [in mobile handsets] in the short term*").

⁸ Many traditional industries are becoming increasingly digitized. For example, the automotive sector has seen the development of car-sharing (and ride-sharing) platforms, autonomous vehicles, and in-vehicle operating systems, which have challenged existing business models. See, e.g., Business Insider, *Ford is pouring billions into digital transformation*, 27 July 2018; and Business Insider, *Ford CEO Jim Hackett talks about his plans for reinventing the 115-year-old car company*, 17 June 2018.

⁹ Digital Competition Expert Panel, *Unlocking Digital Competition*, March 2019, p.12 ("*There is no need to ... implement a blanket presumption against digital mergers, many of which may benefit consumers. Instead, these issues need to be considered more consistently and effectively in practice*").

¹⁰ CMA, *Open Letter to the Department of Business, Energy and Industrial Strategy and Her Majesty's Treasury, Digital Competition Expert Panel recommendations – CMA view*, 21 March 2019.

¹¹ Crémer, de Montoye, and Schweitzer, *Shaping Competition Policy For The Digital Era*, April 2019, p.111 ("*the chance for start-ups to be acquired by larger companies is an important element of venture capital markets: it is among the main exit routes for investors and it provides an incentive for the private financing of high-risk innovation*").

A. Market Features

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.**

In Google's view, the MAGs should set out a framework for assessing how (and how far) these features may be relevant to the assessment of a merger. It is, however, worth highlighting that while these features can appear in digital markets, they do not do so universally or exclusively. Many non-digital markets are multi-sided, ad-funded, make use of customer data, and are characterized by network effects;¹² while some digital services are not.¹³ To a large extent, therefore, this involves codifying the approach already taken by the CMA and EC in recent cases, as well as the body of precedent that has developed since multi-sidedness, network effects, and data assets were addressed (for example) in the *Google/DoubleClick* merger, over a decade ago.

1. Multi-sidedness and network effects

Network effects that operate across multiple sides of a platform are called indirect network effects. Such indirect network effects mean that "*the value that one group of customers realizes from using the intermediary depends on the participation of customers from the other group.*"¹⁴ Positive 'feedback loops' can occur where the first multi-sided platform to grow a larger user base on one side of the market becomes more attractive to users on the other side. Similarly, losing customers on one side of the platform can precipitate a 'negative feedback loop'. These feedback loops can constrain a platform's ability to increase prices or degrade quality to one customer group in isolation.¹⁵

¹² Traditional radio and TV broadcasters operate in multi-sided markets and need to attract both listeners/viewers and advertisers in order to implement their ad-supported business models. They use data, such as the location, age and gender of their viewers to decide which ads to air.

¹³ For example, Microsoft's Windows operating system is monetized through license fees rather than ad revenues; and browsers are not subject to direct or indirect network effects.

¹⁴ *Just Eat/Hungryhouse*, CMA decision of 16 November 2017, paragraph 4.9.

¹⁵ *Ibid*, paragraph 6.82 ("*the ultimate effect of a price increase on one side of the market could be much greater if it led to further feedback loops with participants increasingly leaving both sides of the market as the platform becomes less valuable to each group of customers. The strength of these feedback loops may constrain the platform's market power, depending on its strength on each side of the platform, and, to the extent possible, should be taken into account in any assessment of competitive effects in multi-sided markets*").

Competition between multi-sided platforms has sometimes been characterized as competition *for* the market rather than competition *in* the market, with network effects said to create barriers to entry.¹⁶ Not all digital markets are the same, though. And multi-sidedness is not an exclusively digital issue (e.g., newspaper advertising or payment cards), even if the current focus is on digital markets. Google believes that it would be helpful for the MAGs to set out at least the following questions for individual assessment:

- **Have rival platforms grown in parallel?** The parallel growth of rival platforms suggests that ‘feedback loops’ do not exist in the market at issue (or exist only weakly), network effects have not created a material barrier to entry, and the market is not at risk of ‘tipping’. For example, multiple ride-sharing apps, online travel agents and financial product comparison sites have grown successfully in parallel.¹⁷
- **What type of network effects are present?** Network effects can be direct or indirect, and work in one direction only (e.g., social media, where advertisers are attracted by users, but not vice versa), both directions (e.g., food delivery platforms, where restaurants are attracted by the number of diners and *vice versa*), or somewhere in between. The different types of network effects at issue could affect the prospects of positive or negative ‘feedback loops’ and the extent of barriers to entry.
- **How strong are the network effects at issue?** The strength of network effects can vary from one case to the next. Determining the strength of these effects in any particular market requires evidence and careful economic analysis. In *Just Eat/Hungryhouse*, the CMA used a combination of survey evidence and statistical analysis to assess the strength of indirect network effects between restaurants and users.¹⁸

¹⁶ Digital Competition Expert Panel, *Unlocking Digital Competition*, March 2019, paragraph 1.81 (“*Network effects mean that platforms become more valuable to their users as they grow, which in turn makes them a more attractive proposition to further prospective users. The reverse of this is that if a platform’s user growth stagnates, or the number of users falls, then the quality of the service offered will fall. Many academics have concluded that ‘platform businesses typically need to attain critical mass when they are launched in order even to survive.’ These dynamics can naturally lead to a winner-takes-most environment and discourage market entry thereafter*”).

¹⁷ Competing ride-sharing services include Uber, Lyft, Kapten, and ViaVan; competing online travel agents include Booking.com, Opodo, Kayak; and competing financial product comparison sites include MoneySuperMarket, Compare The Market, Go Compare, and others. See also Case COMP/M.4741 *Google/DoubleClick*, Commission decision of 11 March 2008, paragraphs 304 and 307 (“*According to some complainants, the presence of indirect network effects provides additional incentives to engage in foreclosure strategies as rival networks are more likely to be weakened. While the presence of these network effects is theoretically compelling, the evidence gathered during the investigation suggests that these may not be as strong (or at least, not strong enough to lead to ‘tipping’)... many ad networks and ad exchanges have developed in parallel and are growing. The market investigation has revealed that a large number of ad networks have experienced significant growth in recent years (growth in net revenues has been more than 50% for a large number of ad networks). Both small and large networks have also seen the number of publishers and advertisers participating grow in recent years*”).

¹⁸ *Just Eat/Hungryhouse*, CMA decision of 16 November 2017, paragraphs. 6.61, 6.63, 6.80-6.84.

- ***To what extent do users multi-home?*** The possibility of multi-homing can counteract network effects and enable several platforms to compete in parallel.¹⁹ It may include multi-homing across different platforms or different routes to connect businesses and consumers directly.²⁰ Whether users are able and willing to multi-home will require an assessment of the data in each case,²¹ though recent EC merger reviews point to the ease of multi-homing in digital markets.²² In particular, Google considers that merger reviews should assess the cost to users of utilising an additional service (for example, whether the services at issue are free or require a subscription).
- ***Are the merger parties' products interoperable?*** Where the merger parties' products are interoperable with those of rivals (e.g., because they use open standards), users may find switching and multi-homing easier, thereby counteracting network effects.²³
- ***Are the merger parties (and other players) differentiated?*** In two sided markets, differentiation might better enable competing platforms to remain viable on the market in parallel, even where there are strong network effects and little or no multi-homing.²⁴
- ***Do single-sided firms impose competitive constraints?*** The current MAGs note that *"the constraints on the merger firms' products may come not only from other two-sided intermediaries but also from 'one-sided' firms serving one set of customers."*²⁵

¹⁹ See Digital Competition Expert Panel, *Unlocking Digital Competition*, March 2019, paragraph 1.82 (*"Network effects do not guarantee concentration, as they can be overcome where consumers and businesses have the freedom to either switch between services, or use multiple services simultaneously. The latter is commonly referred to as multi-homing"*).

²⁰ For example, Epic Games has decided to make its Fortnite game available for download from its website, rather than offering an app through Android app stores (see *The Verge*, *Fortnite for Android will ditch Google Play Store for Epic's website*, 3 August 2018). Just 21 days after Fortnite's beta release, it had been downloaded 15 million times on Android devices (see *ArsTechnica*, *Fortnite reaches 15 million Android downloads without Google Play*, 7 September 2018).

²¹ For example, the CMA's *Experian/Clearscore* Provisional Findings Report of 28 November 2018 described how the CMA reviewed user data to assess whether users tended to multi-home only between the merger parties' services or those of rivals too (paragraphs 10.51-10.55).

²² See e.g., Case COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014, paragraph 87 (*"consumer communications customers have a broad range of choices when it comes to selecting and using consumer communications apps. Many of them use more than one consumer communications app simultaneously depending on their specific needs"*).

²³ Case COMP/M.4731 *Google/DoubleClick*, Commission decision of 11 March 2008, paragraph 305 (*"Multi-homing is also enabled by the interoperability of the ad serving technology allowing publishers and advertisers to provide instructions across several networks"*).

²⁴ *Just Eat/Hungryhouse*, CMA decision of 16 November 2017, paragraph 6.62 (*"Where the two platforms are undifferentiated in terms of the services they offer and one platform provides access to a far smaller pool of customers, there may be a limit to the competitive constraint that the smaller platform places on the larger one"*).

²⁵ Merger Assessment Guidelines, OFT 1254, paragraph 5.2.20.

In Google's view, this is a relevant consideration in digital markets too.²⁶ It confirms the need to: (a) define markets that go beyond product characteristics and distinctions based on business models; and (b) take account of competitive constraints from outside the defined markets, particularly where a single 'platform' market is defined.²⁷

- **What is the nature of the charging model?** Cross-group externalities are weaker with per-transaction charges.²⁸ For example, search engine advertising is charged on a Cost Per Click (CPC) basis, determined dynamically on an auction-by-auction basis. Such a charging mechanism tends to favour multi-homing and competitive sampling.

2. Monetization and non-monetary payments

Many digital services adopt an ad-funded model that does not require users to pay a monetary fee. It is not accurate, though, to describe users of all ad-funded services as 'paying' with their data: ad-funded services can be used without providing personal data²⁹ and it cannot be assumed that all services rely on personal data or personalisation.³⁰ It can be more accurate to say that digital platforms provide users with valuable services in

²⁶ For example, Google Maps competes in the supply of mapping products to consumers as well as the supply of online ads. It faces competition both from other two-sided mapping products and one-sided products like TomTom that offer ad-free services.

²⁷ The CMA's decisional practice defines a single market where platforms facilitate cross-platform transactions; in other cases, separate (albeit related) markets are defined: As the CMA's provisional findings in the *Experian/Clearscore* merger stated: "It is common practice to define a single 'platform' market where, as in this case, the platform matches users on both sides. However, it is difficult to implement the hypothetical monopolist test in the context of two-sided markets, as there is no single price to both sets of customers to consider a SSNIP. We can nonetheless consider the relevant evidence on demand and supply-side substitution for each set of customers (lenders and consumers), in order to form a view about the market." See also *Just Eat/Hungryhouse*, CMA decision of 16 November 2017, paragraph 4.11 ("In some two-sided markets, which do not facilitate transactions between each side of the platform, the Parties may face very different competitive constraints on each side of the market"). What matters more than defining a single or related markets, though, is assessing competitive constraints, including competition from single-sided firms.

²⁸ Armstrong, M; "Competition in Two-Sided Markets", *The RAND Journal of Economics*, Vol. 37, No. 3 (Autumn, 2006), p.. 669 ("... cross-group externalities are weaker with per-transaction charges, since a fraction of the benefit of interacting with an extra agent on the other side is eroded by the extra payment incurred. If an agent pays a platform only in the event of a successful interaction, the agent does not need to worry about how well the platform does in its dealings with the other side. That is, to attract one side of the market, it is not so important that the platform first gets the other side 'on board'").

²⁹ For example, users can enter queries in Google Search without signing into a Google account.

³⁰ Search ads use little personal data, focusing instead on whether the user's query matches the merchant's chosen keywords. Display ads are often contextual; in other words, they use the contents on the page to target the ad (e.g., showing an ad for helmets on a bicycle website). Advertisers can also use reminder ads, i.e., show users ads for helmets if they visited a bicycle website the day before, though individual advertisers decide whether to utilise this option. There are other ad formats such as interest-based advertising and in-market advertising that use more data. [REDACTED]

exchange for their attention (e.g., by showing them ads) in the same way as free-to-air television or other services.³¹

The ad-funded business model is relevant to merger assessments in the following ways:

- **Non-price indications of competitive constraints.** Absent price-based competition for users, Google believes that the MAGs should guide the CMA to assess pre- and post-merger competition by reference to non-price indicia, such as innovation (e.g., the frequency and magnitude of new product releases or improvements) and quality. This is discussed in greater detail in Section D.
- **Multi-homing and ease of switching.** In markets where competition is driven by non-price factors such as quality, users may be able to switch between services – or change the amount of time they spend on competing services – quickly in response to quality improvements.³² Switching is likewise straightforward for most free digital services. By way of example, on 22 February 2014, WhatsApp suffered a service outage for just four hours; in the next 24 hours, Telegram and LINE gained 5 million and 2 million new users, respectively.³³
- **Attention markets.** Focusing on functional definitions (e.g., a particular type of smartphone app or service) on the user side risks being too narrow and may not capture how competition takes place in the context of ad-funded platforms.³⁴ In Google’s view, framing the issue around ‘attention markets’ and focusing on the user attention overlap across customer bases of the merger parties may resolve this issue, and allows for consideration of whether the overlapping customers multi-home.³⁵
- **Price effects on the ads side of the platform.** In addition to assessing non-price effects on the (free) user side, Google considers that there should be an assessment of the effects of the merger on prices on the monetizing side (i.e., ads). Reflecting the framework of attention markets, competition on the ads side may involve a broader range of services than narrow functional categories and specific types of products (e.g., search services or social networks).³⁶ Advertisers compare the rates

³¹ If a service provider has a user’s attention, it can sell advertising even if it has no data (consider an advert on the side of a bus). If the service does *not* have the user’s attention, it cannot sell advertising no matter how much data it has at its disposal.

³² See also Case COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014, paragraph 124.

³³ See The New Yorker, “A WhatsApp rival goes beyond messaging,” 26 February 2014.

³⁴ Prat and Valletti, *Attention Oligopoly*, May 2019, pp.1-2.

³⁵ Bruni and Parker, *Attention Oligopoly: Comments on the Paper by Prat & Valletti*, April 2019, p.5.

³⁶ For example, Alibaba, Amazon, Facebook, Google, Microsoft, Twitter, Verizon, and others operate a range of ad-funded services that compete for user attention: See eMarketer, *Digital Ad Spending 2019*, 28 March 2019.

of return on investing in ads across a range of different surfaces and platforms, and can shift spend irrespective of particular types of platform, functional categories, and so on.

3. Relevance of data assets for competition

Data is an input like labour, capital, know-how, and expertise. Concerns have been raised that “*big data may be an insurmountable competitive advantage that incumbents naturally enjoy as a by-product of their operations.*”³⁷ A series of EC cases have established a framework for assessing whether or not these concerns are valid in a particular case by reference to the relevance and role of data assets in the context of digital mergers. Google believes that the following framework would be helpful in assessing a particular data asset.

- **Usefulness of the data.** Different datasets have different degrees of usefulness. For example, in the *Apple/Shazam* merger, the EC assessed the usefulness of the data in question by considering its variety, velocity, volume and value. In other cases, the EC has considered whether the data at issue suffers diminishing returns to scale or becomes less useful the older it gets.³⁸ The importance of data should also be weighed against the importance of other factors, such as algorithm quality, creative experimentation, disciplined efficiency, infrastructure improvements and visual design.
- **Availability of similar data from other sources.** In the *Facebook/WhatsApp* case, the EC noted that “*there are currently a significant number of market participants that collect data alongside Facebook*” and “*there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook’s exclusive control.*”³⁹
- **Possibility of user-led data porting.** Insofar as a data asset is considered important in a given case, the merger assessment should take account of the possibility for users themselves to port data to rival services. These possibilities may

³⁷ Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019, pp.i-ii.

³⁸ See e.g., Case COMP/M.5727, *Microsoft/Yahoo! Search Business*, Commission decision of 18 February 2010, paragraph 174 (“*the value of incremental data decreases as the amount of data increases, something which is acknowledged by the notifying party*”); and Commissioner Vestager, Competition in a big data world, Munich, 17 January 2016 (“*It might not be easy to build a strong market position using data that quickly goes out of date. So we need to look at the type of data, to see if it stays valuable*”).

³⁹ Case COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014, paragraphs 188-189. See also Case COMP/M.8124, *Microsoft/LinkedIn*, Commission decision of 6 December 2016, paragraph 180 (“*There will continue to be a large amount of internet user data that are valuable for advertising purposes and that are not within Microsoft’s exclusive control*”).

arise from the General Data Protection Regulation (**GDPR**)⁴⁰ and industry initiatives.⁴¹

- **Restrictions on data use.** Restrictions may prevent the acquirer from using datasets held by the target because of contractual arrangements with users, policy or reputational reasons (e.g., maintaining a ‘privacy-based service’), or GDPR requirements (in particular Article 5(1)(b), which precludes data processing outside of specified, explicit and limited purposes).

B. Theories of Harm

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.**

Established theories of harm can be applied to horizontal and non-horizontal mergers in the digital sector, taking account of the relevant market features described in Section A. Google recommends that the MAGs set out the broad range of evidence that competition authorities can consider when assessing issues like a loss of potential competition, as described in Section C.

1. Loss of actual or potential competition: pipeline products

In pharmaceutical markets, the notion of mergers targeted at eliminating “*promising pipeline products*” is well understood. Agencies have intervened where an incumbent pharmaceutical company seeks to “*acquire an innovative target and terminate development*”

⁴⁰ Article 20(1) of the GDPR provides data subjects with the right to receive data concerning them “*in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller*” and Article 20(2) confers the right “*to have the personal data transmitted directly from one controller to another, where technically feasible.*”

⁴¹ For example, in 2011 we launched Google Takeout – a hub with instructions for users on how to review privacy settings, control what activity Google records, track and delete data, and transfer or download a copy of their data. In 2017, Google Takeout had approximately 21 million unique visitors, who had exported in total more than one Exabyte of data since launch. That’s the equivalent of 50,000 years’ worth of DVD-quality video. More recently, we launched the open source Data Transfer Project in collaboration with Microsoft, Twitter and Facebook, which makes data transfer between services even easier. It allows users to port their data between different companies directly without needing to download and upload it to the new service.

of the target's innovations to preempt future competition" for the buyer's own product.⁴² But in digital markets, acquisitions typically aim to integrate the acquired product rather than kill it off (often with a substantial increase in funding, resources and technical support). The Lear Report did not consider that any of the mergers it examined resulted in (or aimed to result in) work-in-progress products being discontinued. Indeed, some of the reviewed acquisitions were runaway successes.

The criteria for identifying a promising future product in digital markets are much less clear than in pharmaceuticals. Difficulties include: (a) gauging consumer demand for new digital services before launch; (b) uncertainty about whether users view the product as 'unique' or just one service among many; (c) uncertainty over the fees or ad revenues that the target product will be able to command;⁴³ and (d) the possibility for quickly-changing technologies or tastes to undermine the value of the service without warning. In Google's view, it is not straightforward to import this notion into digital merger reviews, given the different dynamics of digital and pharmaceutical markets.

2. Loss of competition in 'innovation spaces'

In cases concerning products that take a long time to come to market (especially in chemicals and biotech mergers), agencies have focused on competition in 'innovation spaces' that precede the development of the product. Innovation spaces typically require 8 to 10 years of discovery and development before a product becomes sufficiently advanced to qualify for regulatory approval. Competition concerns may exist where mergers reduce investment in this type of long-term innovation.

The notion of 'innovation spaces' is relevant only in industries (like pharmaceuticals) where taking a product to market requires heavy investment in R&D, large amounts of capital, many years of development, and managing burdensome regulatory processes. The cost of developing and taking to market a new prescription medicine is estimated to cost around

⁴² See Cunningham, Ederer and Ma, *Killer Acquisitions*, 2018, which cites the example of Questcor acquiring – and terminating development of – Synacthen. According to the FTC's complaint, Synacthen was viewed by clinicians, other pharmaceutical companies and Questcor itself as a potential rival to Questcor's Acthar product, having been used to treat patients in Europe, Canada, and elsewhere for the same conditions. If approved by the FDA, it would have threatened Questcor's monopoly position in the U.S. market. This was allegedly why Questcor decided to compete against three other bidders, despite the fact that it "*had only inchoate plans for Synacthen and conducted limited due diligence when it submitted its initial offer.*" A settlement with the US FTC resulted in a \$100m fine and a commitment to license the acquired product to rival firms: See *FTC v Mallinckrodt*, Civil Action No. 1:17-cv-00120, 25 January 2017; and *FTC Approves Sublicense for Synacthen Depot Submitted by Mallinckrodt ARD Inc.*, 14 July 2017.

⁴³ The OFT's decision to clear Amazon's acquisition of the Book Depository was in part based on the target's inconsistent and fluctuating turnover in the years preceding the merger rather than predictable year-on-year growth. This enabled the OFT to dismiss the notion that the target represented a credible threat to Amazon as a potential future competitor.

\$2.6 billion.⁴⁴ But in digital markets, set-up costs can be low,⁴⁵ with minimal infrastructure requirements⁴⁶ and typically short time frames from inception to product development.⁴⁷ As a result, in most areas of the digital sector, dozens of companies “*have the assets and capabilities to discover and develop new products.*”⁴⁸ The notion of innovation spaces tells us very little, therefore, about which digital mergers are likely to harm competition. In fact, digital mergers can positively incentivise innovation since the prospect of a buyout can encourage product development and attract early-stage venture capital funding.

3. Non-horizontal effects: controlling an important dataset

Vertical and conglomerate merger cases are concerned with possible strategies by merger parties to foreclose inputs or customers from rivals and/or to leverage power from one market into neighbouring markets. Any assumption that acquiring control of a dataset necessarily gives a competitive advantage risks creating an efficiency offence and inhibiting pro-competitive product improvements. As described in Section A, it is necessary to assess (a) the usefulness of the data at issue;⁴⁹ (b) the availability of similar data from other sources; (c) the possibility of user-led data porting; and (d) restrictions on data use. The less competitively significant the data, the less likely it is that non-horizontal effects will occur.⁵⁰

Using a dataset to improve the merger parties’ products does not in itself restrict user choice, unlike conduct that has given rise to conglomerate effects concerns in previous

⁴⁴ Forbes, The Cost Of Developing Drugs Is Insane. That Paper That Says Otherwise Is Insanely Bad, 16 October 2017.

⁴⁵ For example, in 1995, John Paleomylytes (the founder of BeatThatQuote, which Google acquired in 2011, following OFT approval) set up an internet security company financed using just his credit card, before selling it to Sun Microsystems in 2000 for £40m.

⁴⁶ Twenty years ago, a new entrant in online services may have needed to build their own data centres, hardware, software, and networking. Much of the software was proprietary, internal to the data centre operator, and needed to be re-developed for everyone who wanted to use the data centre. In 2019, new entrants can rely on cloud computing services provided by Google, Amazon, Microsoft, IBM, and others. In other words, everyone has access to technology that only the richest companies could afford two decades ago.

⁴⁷ See e.g., Case COMP/M.7217 *Facebook/WhatsApp*, Commission decision of 3 October 2014, paragraph 117 (“*there are no significant ‘traditional’ barriers for a new consumer communications app to enter the market*”).

⁴⁸ Case COMP/M.7932 *Dow/DuPont*, Commission decision of 23 March 2017, paragraph 349.

⁴⁹ For example, in the *Apple/Shazam* merger, the EC considered that “*the merged entity is likely to have the technical ability and the incentive to use the Shazam User Data to improve its digital music streaming.*” However, Shazam user data was not found to be “*an important input to improve existing functionalities, or offer additional functionalities, on digital music streaming apps*” and would not hand Apple a “*significant ‘data advantage’ to Apple*”, even if used by Apple exclusively. See Case COMP/M.8788 *Apple/Shazam*, Commission decision of 6 September 2018, paragraphs 313-317 .

⁵⁰ See e.g., Commission Guidelines on the Assessment of Non-Horizontal Mergers, (2008/C 265/07), paragraph 34 (“*input foreclosure may raise competition problems only if it concerns an important input for the downstream product*”).

cases.⁵¹ As the EC noted in *Microsoft/LinkedIn*, using LinkedIn data to improve Microsoft's products could have pro-competitive effects, since it would "allow for the possibility of new products, or improvements to existing products in the market, to the benefit of consumers."⁵²

Anticompetitive foreclosure may be more likely where rivals had access to the relevant data before the merger and there are reasons to believe they will be refused access afterwards. Even in such cases, it is relevant to consider whether the dataset is an important input to rivals, as well as balancing the likelihood of the procompetitive and anticompetitive effects. Google believes, therefore, that the MAGs should explain that the CMA will consider acquiring control of a dataset to give rise to theories of harm only where the CMA is able to demonstrate a credible likelihood of input foreclosure, taking into account the nature of the data and the other factors discussed above.

C. Complementary Markets

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?**

Conglomerate mergers can raise competition concerns only in highly specific circumstances.⁵³ In our view, the established test for conglomerate effects does not need to be substantially revised to be applied to digital markets, as the EC's review of the *Microsoft/LinkedIn* merger showed.

1. Efficiencies in merger control

Efficiencies play a clearly defined role in the assessment of a merger. First, the CMA establishes whether the merger is likely to give rise to incentives to increase prices (or

⁵¹ In *Microsoft/LinkedIn* the EC's concerns related to the possibility of Microsoft preinstalling or technically integrating LinkedIn with the Windows operating system, while at the same time denying similar levels of integration to competing providers. The focus of the analysis was, therefore, on the likelihood of foreclosure of competing services as a result of preinstallation and technical integration.

⁵² Case COMP/M.8124, *Microsoft/LinkedIn*, Commission decision of 6 December 2016, paragraph 249.

⁵³ These circumstances arise where the post-merger company has the ability and incentive to foreclose rivals, and that conduct has an adverse effect on competition. However, conglomerate mergers also offer substantial scope for producing efficiencies. See Commission Guidelines on the Assessment of Non-Horizontal Mergers, paragraphs 11-13 (non-horizontal mergers are "generally less likely to significantly impede effective competition than horizontal mergers" and "provide substantial scope for efficiencies"). In the technology context, for example, see Case COMP/M.6568 *Cisco Systems/NDS Group*, Commission decision of 23 July 2012, paragraphs 46 and 97-124 (the Commission did not identify conglomerate effects concerns relating to the combining of NDS' pay-TV software activities and Cisco's digital set-top boxes but noted that the combination may "actually lead to efficiencies").

degrade quality or innovation) as a result of a lessening of the competitive constraints on the merger firms.⁵⁴ Second, if there is a likely SLC, the CMA evaluates the possibility of countervailing efficiencies. There is a trade-off between the impact on price-cost margins (which become wider as rivalry is reduced) and the impact of efficiencies on marginal costs (which may decrease). The net result may be lower prices.

Put differently, merger analysis applies a ‘net price’ test. If the net effect of a merger on prices is likely to be significantly upward, the merger is deemed problematic. In principle, an analogous rule can be applied to non-price parameters of competition, although there may be measurement challenges; if the net effect on the merger firms’ quality or innovation incentives is likely to be significantly negative, the merger is problematic, whereas the merger should be viewed favourably if the net effect is positive.

There is no clear reason for changing this economically coherent approach. Treating efficiencies as a source of competitive harm would risk introducing an ‘efficiency offence’ that has, rightly, been categorically excluded from the merger control framework.⁵⁵

2. Depriving rivals of complementary assets

The Lear Report refers to circumstances “*when the incumbent acquires an entity that supplies a complementary product/service, thereby depriving its direct (actual or potential) competitors of the opportunity to improve their products and better challenge the incumbent.*”

The notion that another firm might purchase complementary assets to better challenge the incumbent should be grounded in evidence and detailed analysis; it should not operate effectively as a presumption against conglomerate mergers in digital markets. To test whether this theory of harm is credible in a particular case, a merger review would need to take account of questions such as:

- How scarce are complementary assets? In particular, if the target is just one of several services that could potentially be contracted with or acquired, or if the rival could develop its own complementary products in-house, the acquisition might not meaningfully restrict the rival’s options.

⁵⁴ As has long been recognised, non-horizontal mergers are less likely to reduce competitive constraints than horizontal mergers, since they do not reduce the number of competitors in any market. There are a more limited set of circumstances, however, where non-horizontal mergers can reduce competitive constraints, principally *via* foreclosure.

⁵⁵ See Mario Monti, Review of the EC Merger Regulation – Roadmap for the Reform Project, Conference on Reform of European Merger Control, British Chamber of Commerce, 4 June 2002 (Commission Press Release SPEECH/02/252) (“*I have said this before, but let me clarify it once and for all: there is no such thing as a so-called ‘efficiency offence’ in EU merger control law and practice. In other words, the Commission does not rely on the fact that efficiencies resulting from a merger are likely to have the effect of reducing or eliminating competition in the relevant market (for example, by enabling lower prices to be charged to customers), as a ground for opposing a proposed transaction*”).

- How important is the complementary service in creating demand for the primary services offered by the acquirer and its rivals?
- Would acquisition by a rival necessarily be better for competition? In particular, does the rival itself have market power in certain product areas, and could its acquisition deprive yet more rivals of the opportunity to purchase a complementary service?
- How likely is it that the rival would buy the target if given the opportunity? This is discussed in Section E.

D. Non-Price Parameters

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

Non-price parameters of competition are particularly relevant to digital markets, where many online products and services are provided to users for free. In our view, an effective assessment of non-price parameters should: (a) identify which non-price factors are relevant in a particular case; and (b) measure changes along these non-price parameters in a transparent and predictable way. Where quality (not price) is the primary (or sole) parameter of competition, it is important to understand exactly what quality means for consumers and ensure that the right analytical tools are applied to measure competitive effects.

1. Identifying non-price parameters

Various non-price parameters of competition could in principle be relevant to digital mergers. The challenge is to identify which of these factors are relevant to consumer choices in the relevant market. Whereas almost all consumers value cheaper prices, it is important to understand (rather than assume) which quality-related factors consumers actually value, and which factors are less important.

Since digital mergers and services vary widely, this requires a case-by-case assessment. When making choices, users might prioritize an attractive user interface, reliability, or other quality-based factors. In other cases, users may care more about how personal data is used.⁵⁶ In some circumstances, users might claim to place weight on a particular factor (e.g., privacy) but behave differently.⁵⁷ And different non-price factors might be more or less important to different types of consumers.

2. Measuring non-price parameters

When services are provided for free, the CMA could define the relevant markets by reference to the ability of a hypothetical monopolist to profitably apply a small but significant non-

⁵⁶ When Facebook revealed that 3 million users in Europe had abandoned the platform in the wake of the Cambridge Analytica scandal, its shares plummeted by 19% in just one day – the biggest ever one-day drop in a company’s market value, that equated to wiping more than \$119bn off its market value.

⁵⁷ Athey, Catalini, and Tucker, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk*, September 27, 2017 (“the effect small incentives have on disclosure may explain the privacy paradox: People say they care about privacy, but are willing to relinquish private data quite easily when incentivized to do so”).

transitory deterioration in quality (**SSNDQ**). In applying this test, competition authorities need to consider both the cost savings that may be achieved by a quality deterioration (e.g., development time, customer support and rolling out upgrades) and the loss of revenue from user switching.

There may be mechanisms to quantify the profitability of a given deterioration in quality, such as laboratory tests or natural experiments. Experiments have been devised that seek to determine users' willingness to pay for free services.⁵⁸ And academic research is attempting to measure users' willingness to pay for a product or service's non-price features, such as privacy.⁵⁹ In other cases, though, quantification may not be possible, in which case greater weight may need to be afforded to qualitative evidence, such as the parties' internal documents⁶⁰ and track record on innovation and quality improvements.

E. Counterfactual

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

The counterfactual analysis involves a comparison of the competitive situation with the merger against the likely competitive situation in its absence. Counterfactual analyses necessarily require predictions as to how the target company and the market are likely to develop in the 'merger' and 'no merger' scenarios. Predictions involve a degree of uncertainty, but the balance of probabilities standard has to be satisfied for a merger to be blocked.

These issues raise various questions, including: what timeframe should the CMA consider in assessing the counterfactual; when should the CMA consider alternatives to the pre-merger situation as the relevant counterfactual; and what sources of evidence should the CMA examine?

1. What timeframe should the CMA consider?

The CMA, like competition authorities around the world, typically considers likely developments over the two years subsequent to a merger in carrying out its competitive assessment. The CMA's current MAGs provide for an evaluation on a "*case-by-case basis*"

⁵⁸ Brynjolfsson, Collis, and Eggers, Using massive online choice experiments to measure changes in well-being (2019).

⁵⁹ Deutscher, How to Measure Privacy-Related Consumer Harm in Merger Analysis? (2018).

⁶⁰ OECD, Considering Non-Price Effects in Merger Control, Background Note by the Secretariat, 4 May 2018, paragraphs 104 and 106.

of what constitutes a ‘timely’ development.⁶¹ Nothing prevents the CMA from examining longer or shorter periods where appropriate.

We agree that the MAGs should retain the flexibility for the CMA to extend the assessment horizon beyond two years in appropriate cases. Any such extension, however, should be balanced against the inherent uncertainty involved in predicting the future and the impact that this has on legal certainty and on the procedural burdens on merger parties.

An assessment over a longer time horizon opens up a range of possible outcomes. One possibility may be that the target could emerge as a material competitor in, say, five years’ time. But many other possibilities would also need to be considered, such as (a) entry by other rivals; (b) new technologies or services that leapfrog the target and maybe also the acquirer; or (c) the target’s own exit because of, say, failure to gain traction with users, partners, or investors.

Extending the timeframe to more than the two-year standard does not absolve the CMA of its duty to explain its predictions. In Google’s view, it would be important to include reasoned explanations as to why: (a) the anticipated future developments are predictable despite the longer timeframe; and (b) any conclusion that (for example) the target would become a material competitor is more plausible than other possibilities, such as new entry by other companies, new technologies, or the target’s exit.⁶² The same standard of proof – and approach to evaluating the evidence – should apply to the various possible outcomes in a longer timeframe.

2. What are the possible alternative counterfactuals?

The Lear Report stated that, in segments of the digital markets characterised by network effects, incumbents might have a particular incentive to undertake ‘*pre-emptive buyouts*’ to reduce potential future competition.⁶³ In this context, the Lear Report suggested that, when defining the counterfactual, agencies “*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.*”⁶⁴

⁶¹ Merger Assessment Guidelines, OFT 1254, paragraph 5.8.10.

⁶² This could include, for example, compelling evidence that the target has secured high-value partnership deals or long-term contracts and sufficient funding to expand its competitive position.

⁶³ Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019, p.i (“*Certain features of digital markets create challenges for competition policy, starting with the prevalence of network effects. When the value that consumers derive from a product depends on the number of other consumers who use the same product, as is often the case in the digital sector, markets may have a tendency to take on a concentrated market structure. This implies that competition for the market, rather than in the market, is often the main mechanism to prevent incumbents of digital markets from exerting market power. In this context, the economic literature on innovation suggests that there may be an incentive for incumbents to carry out pre-emptive buyouts, that is buyouts of entrants with the goal of reducing potential future competition*”).

⁶⁴ Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019, p.44.

In considering the target's ability to remain independent or be acquired by a different party in the counterfactual, Google considers that questions such as the following might be addressed:

- Does the target have – or is it likely to attract – sufficient funding not just to remain on the market but to grow into a material competitor? This may require a review of its monetization strategies and earnings to date.
- Are the target's owners (and investors) willing to continue operating the target independently, or was the venture created specifically to secure a buyout?
- Have other possible buyers approached the target previously, and if so did they place bids? At what stage did they decide not to pursue a buyout?
- Would acquisition by an alternative buyer represent a more competitive counterfactual, and would alternative buyers be ready (and able) to invest in, promote, and improve the target's products to the same degree?

Ultimately, selecting the most likely counterfactual depends not just on identifying the various possibilities, but also a rigorous assessment of the evidence.

3. What evidence should the CMA consider?

It would be helpful for the MAGs to identify the types of evidence that the CMA will typically take into account to assess the counterfactual and the weight it will likely afford to different categories of evidence. This would enhance the legal certainty and predictability of merger control, and could enhance the CMA's ability to identify mergers that may result in a loss of potential competition. Three categories of evidence are discussed below.

Merger parties' internal documents. Merger parties' internal documents may provide insight into, among other things, how the parties consider the relevant markets will develop, as well as the anticipated future market position of the target, absent the merger.

It is important, though, to recognise that documentary evidence varies in type and reliability,⁶⁵ and some allowance needs to be made for distinguishing expressions of strategic aspiration (e.g., in terms of revenue and user number growth) and actual performance and behaviour. This calls for the assessment of internal documents 'in the round', taking account of their context, authorship, and representativeness, and cross-checking expectations against the accuracy of similar business performance predictions in the past. In Google's view, a robust

⁶⁵ ICN Investigative Techniques Handbook for Merger Review, June 2005, p.8 ("*[p]re-existing documents containing data are the most compelling*" because "[t]he information contained in ordinary-course-of-business documents provides the observations of the firm or the author at a time when there was reason to give accurate assessments").

approach to this type of evidence would also give parties the opportunity to respond to proposed interpretations of internal documents.

Basis for the deal valuation. The Digital Competition Expert Panel report proposes that the MAGs “[d]raw 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”.⁶⁶ Likewise, the Lear Report refers to deal values as a tool to screen deals that warrant close review.⁶⁷

The CMA could work with the merger parties to understand the basis of high deal valuations relative to the target’s current or expected future earnings. This exercise would aim to understand whether the high deal valuation reflects the acquirer ‘paying a premium’ to remove a potential rival, or whether it reflects anticipated future value that the merger is expected to produce. In practical terms, the MAGs could establish a framework or steps for engaging in discussions on deal valuations, including:

- Asking the merger parties to explain the basis of the deal valuation;
- Questioning the acquirer’s investment advisors and business people;
- Requiring underlying valuation calculations to be disclosed; and
- Consulting industry experts, such as venture capital firms, on their views of valuation.

The purpose of such an exercise would be to establish whether the acquirer has a good faith belief that the deal is motivated by synergies, improved monetization of the target business, or other factors. The purpose would not be to second-guess good faith belief that the deal valuation is justified by efficiencies, even if competition authorities consider the acquirer’s predictions too optimistic.⁶⁸ This approach is reflected in the CMA’s review of the *PayPal/iZettle* merger.⁶⁹

⁶⁶ Digital Competition Expert Panel, *Unlocking digital competition*, March 2019, p.96.

⁶⁷ Lear, *Ex-post Assessment of Merger Control Decisions in Digital Markets*, May 2019, p.xiv (“*The value of the transaction may help the Authorities screen among those transactions to identify those that may warrant a more in-depth analysis of the merger, since it represents the magnitude of the effects (both beneficial and detrimental) associated to the transaction*”).

⁶⁸ The General Court has taken the view that the Commission’s role is not to “*speculate on the price of an acquisition or to substitute its point of view on the value of a transaction for that of the parties concerned, particularly as the reasons underlying that transaction cannot always be explained by [a] purely economic rationale*” (*Cisco Systems v Commission*, Case T-79/12, EU:T:2013:635, para. 93).

⁶⁹ The *PayPal/iZettle* merger review examined the basis for a deal value that was double the anticipated valuation of iZettle’s shares in the event of a listing on Nasdaq Stockholm. The CMA investigated and ultimately found that the deal valuation could be justified by “*commercial valuation and calculation of synergies including increased sales volumes and cost savings*” and that there was “*no evidence that PayPal intended to shut iZettle or increase prices post-Merger*”. See CMA Final Report, *Completed acquisition by PayPal Holdings Inc. of iZettle AB*, 12 June 2019, paras 4.12-4.14.

In any event, deal valuations in and of themselves should not be taken as evidence of competition concerns. Valuations are necessarily speculative, all the more so in the notoriously fast-moving digital sector. And even valuations that are difficult to understand or seem inexplicably high can later transpire to be shrewd investments. Contemporaneous commentary suggested that Facebook had overpaid in its \$1 billion acquisition of Instagram. Today, the question is how Facebook managed to pay so little, with Instagram being valued at more than \$100 billion on a standalone basis.⁷⁰ One possibility is that Instagram would not have become so successful without Facebook's support.⁷¹ Other deals might turn out to be unexpectedly poor value, even if the motivations behind them were pro-competitive.⁷²

Accordingly, Google believes that the CMA should be cautious not to infer anti-competitive effects from a seemingly high deal valuation in and of itself.

Evidence of alternative buyers' interest in the target. The analysis of a merger (at least at Phase II) includes the possibility that a third party might have acquired the target in the counterfactual. This may be a credible counterfactual in circumstances where an alternative possible buyer carried out due diligence and submitted a credible proposal that the target would have been prepared to accept. Any lesser indications of interest should, though, be treated with significant caution.

Loose statements of interest are not probative of whether the alternative possible buyer is serious about acquiring the target. A rival bidder walking away after carrying out due diligence might imply that the target was *unattractive* to third parties or had problems that third parties felt unable to overcome. And submitting a low-ball or speculative bid also indicates a lack of seriousness and might not be accepted by the target.

Placing undue weight on third party indications of interest could also encourage strategic behaviour that undermines the merger assessment. For example, the acquirer's rival(s) might express an interest in acquiring the target merely to skew the counterfactual and thereby encourage the CMA to block the merger.

⁷⁰ Bloomberg, Instagram Is Estimated to Be Worth More than \$100 Billion, 25 June 2018.

⁷¹ As the Lear Report explained, "*there are reasons to believe that Instagram's growth has significantly benefited from the integration from Facebook*". See Lear, Ex-post Assessment of Merger Control Decisions in Digital Markets, May 2019, p.71.

⁷² For example, Mark Cuban's sale of Internet radio company Broadcast.com to Yahoo! in 1999 for \$5.7 billion was widely seen as one of the worst digital acquisitions of all time. Yahoo! discontinued much of its broadcast services soon after the acquisition: see Fortune, 5 worst Internet acquisitions of all time, 21 May 2013. Myspace was purchased for \$580 million in 2005, but was ultimately sold for \$35 million: See The Guardian, Myspace sold for \$35m in spectacular fall from \$12bn heyday, 30 June 2011. Also see CB Insights Research Briefs, Fools Rush In: 37 of the Worst Corporate M&A Flops, 30 October 2018.

F. Evidence

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?**

See the response to Section E.

G. Efficiencies

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

The CMA's guidelines and decisional practice establish that efficiencies can form the basis of a clearance decision only if they are timely, sufficient, likely, merger-specific, and incentivise the parties to improve their customer offer.

As explained above, efficiencies in cases concerning digital mergers may involve quality improvements or enhanced innovation rather than efficiencies based on cost and price reductions, particularly in 'zero-price' markets. As a result, efficiencies in digital markets may be less readily quantifiable or harder to prove to the same degree of certainty as efficiencies in non-digital cases (where the standard of proof is already considered strict).

For example, at the time of Google's acquisition of YouTube, third party analysts asked "*whether Google's \$1.65bn investment is a gargantuan folly*" and how Google could solve the problem that "*much of YouTube's content is not exactly advertiser friendly.*"⁷³ In fact, the deal has led to pro-competitive efficiencies that have contributed to YouTube's success.

These efficiencies and customer benefits – which must be attributed (at least in part) to YouTube's acquisition by Google – would have been difficult to demonstrate under the strict efficiencies standard on which merger control insists. Yet efficiencies arising from digital mergers have to be taken into account, even if they are harder to quantify or establish with certainty. Otherwise, there is a risk of prohibiting mergers that could deliver tremendous consumer benefits. As a recent OECD note points out:

"The normal analytical challenges associated with efficiencies, namely the degree to which they are quantifiable, substantial and timely, are compounded by the dynamic nature of potential non-price efficiencies. An efficiency that increases the rate of new

⁷³ Business Editor column, BBC, Now on YouTube: Google's gamble, 10 October 2006.

*product introduction, for example, is more difficult to assess than a one-time cost reduction – even if it is just as relevant from a consumer welfare perspective.*⁷⁴

There is no easy solution to this issue. In our view, at least four possibilities are worth considering.

First, the CMA could review the merger parties' internal documents to identify the types of efficiencies or customer benefits they envisage implementing as a result of the merger. This could include examining whether synergies have contributed to the deal valuation.

Second, the CMA could arrange meetings between the merger parties and experts engaged by the CMA to assess the technical credibility of any efficiencies and customer benefits relating to innovation or quality improvements. This could follow the template of expert meetings between CMA and merger parties' economists.

Third, the CMA could consider whether the acquirer has succeeded in achieving similar types of efficiencies following previous acquisitions. As the Digital Competition Expert Panel report notes, "*evidence on the behaviour of an acquiring firm following previous mergers may be pertinent.*"⁷⁵ It seems reasonable to test the credibility of a purchaser's efficiency rationale by reference to whether it achieved similar efficiencies in the past.

Fourth, competition authorities could consider the type and scale of efficiencies that other deals in the same or related markets have generated, even if they involved different merger parties. This is in line with the CMA's approach in the *Sainsbury's/Asda* case, where it noted that "*although the level of synergies for a particular transaction will depend on the specifics of the businesses involved, it is common to consider benchmarks from completed transactions between similar companies in the past.*"⁷⁶

Google believes that the CMA should apply the same overall framework in digital and non-digital cases, but take into account the fact that efficiencies may be harder to measure – albeit no less important – in digital markets. Only if concerns are provisionally identified need efficiencies be considered.

H. Other Aspects

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

N/A

⁷⁴ OECD, Considering non-price effects in merger control – Background note by the Secretariat, 6 June 2018, paragraph 162.

⁷⁵ Digital Competition Expert Panel, Unlocking Digital Competition, March 2019, p.96.

⁷⁶ CMA Final Report, Anticipated merger between J Sainsbury PLC and Asda Group Ltd, 15 April 2019, paragraph 16.75.