Digital Mergers Call for Information
Competition and Markets Authority

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Privacy International and Open Rights Group's submission to the CMA's call for information on digital mergers

Privacy International and Open Rights Group welcome the Competition and Market Authority (CMA)'s call for information on digital mergers.

Privacy International is a non-profit, non-governmental organisation based in London, the United Kingdom ("UK"), dedicated to defending the right to privacy around the world. Established in 1990, Privacy International undertakes research and investigations into government surveillance and data exploitation in the private sector with a focus on the technologies that enable these practices. To ensure universal respect for the right to privacy, Privacy International advocates for strong national, regional and international laws that protect privacy around the world. It has litigated or intervened in cases implicating the right to privacy in the courts of the United States, the UK, and Europe. It also strengthens the capacity of partner organisations in developing countries to identify and defend against threats to privacy.

Open Rights Group (ORG) is a UK-based digital campaigning organisation working to protect fundamental rights to privacy and free speech online. With over 3,000 active supporters, we are a grassroots organisation with local groups across the UK.

In the following sections, Privacy International and Open Rights Group provide their observations on some of the questions raised in this consultation.

1. **(a) What market features are likely to be relevant to the assessment of mergers in digital markets? For example:**
    1. **The way in which digital products or services are monetised (e.g. through advertising revenues).**

The ways in which digital products or services are monetized though user data and advertising are going to be highly relevant to the assessment of mergers in digital markets. This is because whether competition authorities should intervene or not will depend, among other things, on the types of digital platforms merging, along with their advertising revenue model.

There exist at least two relevant scenarios with respect to digital platforms making money through ads when it comes to a merger: when both platforms are monetized using data-driven

advertising revenues (Scenario 1) and when one platform is monetized and the other is not (Scenario 2).

Within the first scenario, there exist at least two sub-scenarios. One where the two platforms are competitors or close competitors/substitutable platforms (Scenario 1a) and one where they are not (Scenario 1b).

In each scenario which has the potential to create one dominant digital platform or strengthen an already existing digital platform to the extent that it becomes the dominant player in the field will need the intervention of competition authorities.

- Scenario 1a: Ad – Ad (close competitors/substitutable platforms = horizontal mergers)
- Scenario 1b: Ad – Ad (acquires dominant position whether substitutable or not = both horizontal and non-horizontal/vertical mergers)
- Scenario 2: Ad – No Ad (acquires dominant position whether substitutable or not = both horizontal and non-horizontal/vertical mergers)

Scenario 1a is straightforward to explain. When close competitors are in question, especially when only two exist, competition authorities will intervene when a relevant merger situation arises since the merger will more likely than not result in a substantial lessening of competition (SLC) situation. The SLC will take the form of unilateral effects by removing the rivalry between the two competing firms.[1]

Under scenario 1b and scenario 2, if either just one or both platform(s) are monetizing through advertising revenues and they are *not* substitutable platforms and a vertical merger situation arises,[2] the key question that should be considered is whether the acquiring platform gains a dominant position in the market and/or whether this results in an SLC because of the relevant merger situation having arisen and/or results in harm to consumers.

The following factors can help answer this question: will the acquiring platform be able to increase its ad revenue because of its acquisition? If so, will this revenue then go towards better ad targeting and/or new data acquisition? If so, will this result in an SLC situation or a situation where the platform becomes a dominant player in the market?

The same factors and analysis can be applied if the two *are* substitutable platforms because ultimately the inquiry needs to focus on digital platform dominance/harms caused. This is because there do exist situations where the two platforms are not substitutable in a perfect sense, yet when the two merge the acquiring platform gains a more dominant role in the market, i.e., because of coordinated effects or vertical/conglomerate effects.

Consider this example: two digital platforms, A and B, both of which derive profits from ad revenues. Let's further imagine that A was established in the early 2000's to connect people

[1] Competition Commission & The Office of Fair Trading, Merger Assessment Guidelines, CC2/OFT1254, page 19 [2010].

[2] Competition Commission & The Office of Fair Trading, Merger Assessment Guidelines, CC2/OFT1254, page 19 [2010] (There are two types of mergers. Horizontal mergers are mergers between firms that supply competing products and Non-horizontal mergers are mergers between firms that operate at different levels of the supply chain of an industry (vertical mergers) or mergers between firms supplying products at the same level in the supply chain which do not compete (conglomerate mergers).

and was a platform where people could message each other. However, today, in 2019, it has expanded in to other areas for consumers, such as selling things on the internet, getting one's daily news, and sharing pictures. On the other hand, B is a relatively new digital platform which was established in the early 2010's where all one can do is share pictures, videos, and messages.

Let's also envision three types of consumers. Amy is an avid platform A user yet has never used platform B. Frank has profiles on both platform A and B yet uses the latter predominantly. And, Ian, only has a platform B account.

In this situation, if platform A and B were to merge, platform A being the acquiring digital platform will be able to glean more information about Frank and Ian compared to what it could before the merger and thus be able use more data to target them. Its stronger dominance as a platform/messaging service will then allow platform A to dictate terms to its users. And its dominance in the advertising market could lead to a lack of competition for advertisers and even create barriers to entry for small/independent digital platforms to enter the market and thereby harm competition/innovation.

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

Privacy International and Open Rights Group question the assumption that users pay products or services with personal data.

First, users' personal data forms an integral part of who they are. This is especially true in the case of special categories of personal data as defined by the EU General Data Protection Regulation, Article 9, which could include health data, racial or ethnic origin, religious or philosophical beliefs, sexual orientation, political leanings, genetic data, etc. Increasingly, the data collected and inferred about us can form a comprehensive picture of individuals. Protecting that data in the form of securing an individual's privacy is fundamental, as recognised in Article 8 of the EU Charter of Fundamental Rights and the EU General Data Protection Regulation.

Second, the personal data that consumers share is only a small part (a tip of the iceberg) of the personal data obtained or inferred by companies, which support their targeting advertisement model. People's behaviour is being continuously monitored, both on platforms, "smart" products and services, and beyond (on other websites, apps or products) and all of this is linked and enriched with offline sources. A company that is able to know not just who their users are, or what they are interested in, but also where they are, where they have been, where they are going to, and whether they have actually walked into a physical shop after seeing an ad – this is a company that can charge higher prices for ads – even though these are not necessarily more effective.

Personal data is fundamental in the digital market. But it should not be seen as a proxy for the monetary price of a service. Rather it should be considered for the effects it has on the digital market in question.

3. The relevance of data assets for competition

Some of the questions that competition authorities should ask when a relevant merger situation arises revolve around the amount of personal data of users which passes from one platform to the other, especially if they are used to enrich an already existing dataset, the possible (new) purposes for which this data could be processed beyond the reasonable expectations of users (transparency, purpose limitation), as well as the safeguards put in place to ensure that processing remains limited to what is strictly necessary and proportionate (data minimisation, storage limitation).

User data is not only a static asset. An important element to consider is the access such a merger situation would grant to the 'real-time' data flows of existent users, which does not necessarily pertain to categories of personal data found in customer lists, such as names, surnames, addresses, payment information. Competition concerns should arise when a company acquires access to means through which it can continuously monitor users. For example, by buying Instagram, Facebook is not only gaining access to Instagram's user data, it is also acquiring the ability to track users of Instagram as a "first party tracker" whenever they have logged into Instagram. In the case of a merger of a social media platform and a search engine, there will be a constant flow of probably vast information relating to certain personal aspects of individuals, which, if combined together, could provide a rich and on-going analysis of their social life, personal habits and lifestyle, health, religious and political beliefs, sexual preferences etc. The informational wealth or at least the potential for such informational wealth would become richer on a day by day basis solely by the mere interactions of users with the service.

Therefore, data assets are more than simply the existing databases of merging companies. They include, for example, the potential of data processing of existing users that a new merger can increase.

While the European Commission concluded that Google/DoubleClick mergers would not create a competitive advantage which could not be replicated by competitors, it failed to fully consider that Google acquired DoubleClick not for its data assets, but for the tracking that DoubleClick can do on a continuous basis, since it's embedded in so many websites and apps.

In a recent case, although not a merger, the German competition authority considered some of the implications of the expanding the capacity to collect users' data. In February 2019, the German Federal Cartel Office (Bundeskartellamt) ordered Facebook to offer German users a data-unbundled version of its social network, which assigns to user accounts only data collected on the social network itself as opposed to data assigned to users Facebook profiles from other sources including WhatsApp and Instagram among others.[3] The Bundeskartellamt's order was based on the finding that Facebook was dominant in the

[3] Bundeskartellamt prohibits Facebook from combining user data from different sources, Bundeskartellamt (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2019/07_02_2019_Facebook.html;jsessionid=3107506695322B97F1E3B517335F2208.1_cid378.

German market for social networks and that Facebook constituted an abuse of market power because of the extent to which it collects, merges, and uses data in users' accounts.[4]

Important for the purposes of this consultation though is the fact that the Bundeskartellamt stated that the application of German abuse of dominance provisions were more suitable than Article 102 Treaty on the Functioning of the European Union in this case because so far only the case-law of the highest German Court had been established which can take into account constitutional or other legal principles (in this case, data protection) in assessing abusive practices of a dominant company.[5]

Therefore, it will be extremely beneficial for the CMA to establish ways to consider data aspects of mergers not only as a static asset but also in relation to the potential of data flows.

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

1. Loss of innovation – e.g. where the market is characterised by competition in "innovation spaces" or the target has a history of disruptive digital innovation.

In almost all digital platforms, innovation is a key parameter of competition. In fact, in today's day and age of short attention spans, constant innovation is a way for competing digital platforms to set themselves apart. Companies have, however, the ability to diminish innovation when they have strong market power.[6] The CMA expressly mentions innovation as one of the factors against which to assess the likely effects of a horizontal merger, specifically unilateral and/or coordinated anticompetitive effects where one of the firms is a 'maverick'.[7]

The focus under the 'maverick' firm theory of harm is on the acquisition or elimination of a firm that plays a 'disruptive role' in a market.[8] This is because the acquisition of a disruptive innovator will result in the loss of a unique value proposition for the consumer.[9] This will result in less innovation.[10] This is especially true in cases where a big player will acquire a small player which plays a 'disruptive role' in the market leading to potential anticompetitive effects.

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[4] Bundeskartellamt prohibits Facebook from combining user data from different sources, Bundeskartellamt (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591568.

[5] Bundeskartellamt prohibits Facebook from combining user data from different sources. Background information on the Bundeskartellamt's Facebook proceeding, Bundeskartellamt (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6, page 6.

[6] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), para. 8.

[7] Competition Commission & The Office of Fair Trading, Merger Assessment Guidelines, CC2/OFT1254, page 49 [2010], *see also* Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03), paras. 37-38.

[8] Taylor M. Owings, *Identifying a Maverick: When Antitrust Law should Protect a Low-Cost Competitor*, 66 Vand. L. Rev 323, 348 (2013), *see also* Courtney D. Lang, *The Maverick Theory: Creating Turbulence for Mergers*, 59 St. Louis ULJ 257, 265 (2014).

[9] Owings, *supra* at 348.

[10] *Id.*

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

Companies compete on price and quality as well as innovation as mentioned above. And, it is now widely accepted that data privacy also constitutes a key parameter of non-price competition. For example, in the Facebook/WhatsApp merger, the European Commission indicated that in markets for consumer communication services, data privacy and security constitute key parameters of non-price competition.[11] Furthermore, the European Commission reaffirmed its position in the Microsoft/LinkedIn merger when it stated that "data privacy was an important parameter of competition between professional social networks on the market."[12]

In addition to the scenario and cases mentioned above, personal data present a number of other competition issues. The European Commission has said that privacy/data protection related concerns do not fall within the scope of EU competition law, but they can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor.[13]

Users demand both confidentiality and security of their digital communications and protection of their personal data.[14] In a competitive market, it should be expected that the level of data protection offered to individuals would be subject to genuine competition, i.e. companies would compete to offer privacy friendly services. However, in a data-intensive digital market characterised by increased corporate concentration, companies in a dominant position have no incentive to adopt business models and practices that enhance individuals' privacy, and they may seek to exclude any privacy enhancing players from any of the markets where they can exert market power.

As an example, consider two platforms which operate in different spaces with company "A" holding a dominant position in the social media field in certain regions of the world and company "B" being popular in certain different (but also some of the same) regions of the world and acting like a money transferring platform. A merger situation has now arisen in which A is going to merge with B and after the merger B starts sharing its users' data with A. By sharing this data with A, not only has A gained more market power but B has also reduced the quality of privacy it offers its consumers by expanding who it shares the data with and because it is now using this data for newer purposes than initially promised. Additionally, A is now storing more people's data than before, and it could be that these people never wanted to sign onto A's services but now because of the merger have suddenly found themselves dealing with A.

Privacy International and Open Rights Group believe that privacy standards, including the protection of personal data and data security, should be a part of any assessment of the quality of a digital service for the purpose of determining competitiveness of a market and

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[11] Case M 7217 Facebook/WhatsApp [2014], para 87, *see also* Preliminary Opinion of the European Data Protection Supervisor (EDPS), 'Privacy and Competitiveness in the Age of Big Data' (2014).
[12] European Commission – Press Release, Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions (Dec. 6, 2016), http://europa.eu/rapid/press-release_IP-16-4284_en.htm.
[13] European Commission – Press Release, Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions (Dec. 6, 2016), http://europa.eu/rapid/press-release_IP-16-4284_en.htm.
[14] *See* European Commission, Eurobarometer on ePrivacy (Dec. 19, 2016), https://ec.europa.eu/digital-single-market/en/news/eurobarometer-eprivacy.

assessing the effect of a proposed merger. We encourage the CMA to develop explicit guidance on this point.

4. **When determining the counterfactual:**
    1. **Which types of evidence should we take into account and how should these be weighted?**

The CMA's merger assessment guidelines define the counterfactual as any impact on rivalry and expected harm to customers as compared with the situation likely to arise without the merger.[15] In other words, the counterfactual is an analytical tool used in answering the question of whether the merger gives rise to an SLC.[16]

The CMA should map the effects of a pre-merger situation versus a post-merger situation with respect to consumer privacy as a non-price parameter of competition and incorporate this into the already existing guidelines related to the counterfactual, i.e., the exiting firm scenario, the loss of potential entrant scenario, and competing bids and parallel transactions.[17]

- The Exiting Firm Scenario - When looking at the exiting firm scenario, the CMA should consider whether the firm would have exited and if so, whether there would have been an alternative purchaser for the firm or its assets to the acquirer under consideration which would have led to a lower price in terms of improved benefits (such as those associated with 'maverick' firms) or an increase in the level of privacy offered to consumers versus the prevailing conditions of competition. And also, what would happen to not just the sales of the firm but also to the innovation in the market where a maverick exists and/or its consumers' privacy in the event of its exit.
- The Loss of Potential Entrant Scenario - Similarly, the CMA should also consider whether the counterfactual situation should include the entry by one of the merger firms into the market of the other firm and what the effects on its consumers' privacy look like in that situation. Or if already within the market such as in the case of a maverick, whether the firm would have expanded and continued to offer a lower price in terms of improved benefits to its consumer base compared to the dominant players in the market had the merger not taken place and/or what the effect of this expansion would look like on its consumers' privacy? For example, if a merger situation arises where Google were to acquire DuckDuckGo, would DuckDuckGo have continued to improve its search results in the absence of the acquisition?
- Competing Bids and Parallel Transactions - Finally, where there is more than one bidder for a target business, the CMA should examine each competing bid separately and consider whether each proposed merger would create a realistic prospect of an SLC in terms of price and benefits in the case of a maverick and consumer privacy and retention of data assets as against prevailing conditions of competition.

In short, the CMA should assess whether there will be a reduction in consumers' privacy once the digital merger occurs or whether it would be better for the firms to remain separate

[15] Competition Commission & The Office of Fair Trading, Merger Assessment Guidelines, CC2/OFT1254, page 20 [2010].
[16] Competition Commission & The Office of Fair Trading, Merger Assessment Guidelines, CC2/OFT1254, page 21 [2010].
[17] Competition Commission & The Office of Fair Trading, Merger Assessment Guidelines, CC2/OFT1254, page 23 [2010].

so they can continue competing on privacy and increasing the level of privacy offered to consumers.