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Merger Control 2025

21st Edition

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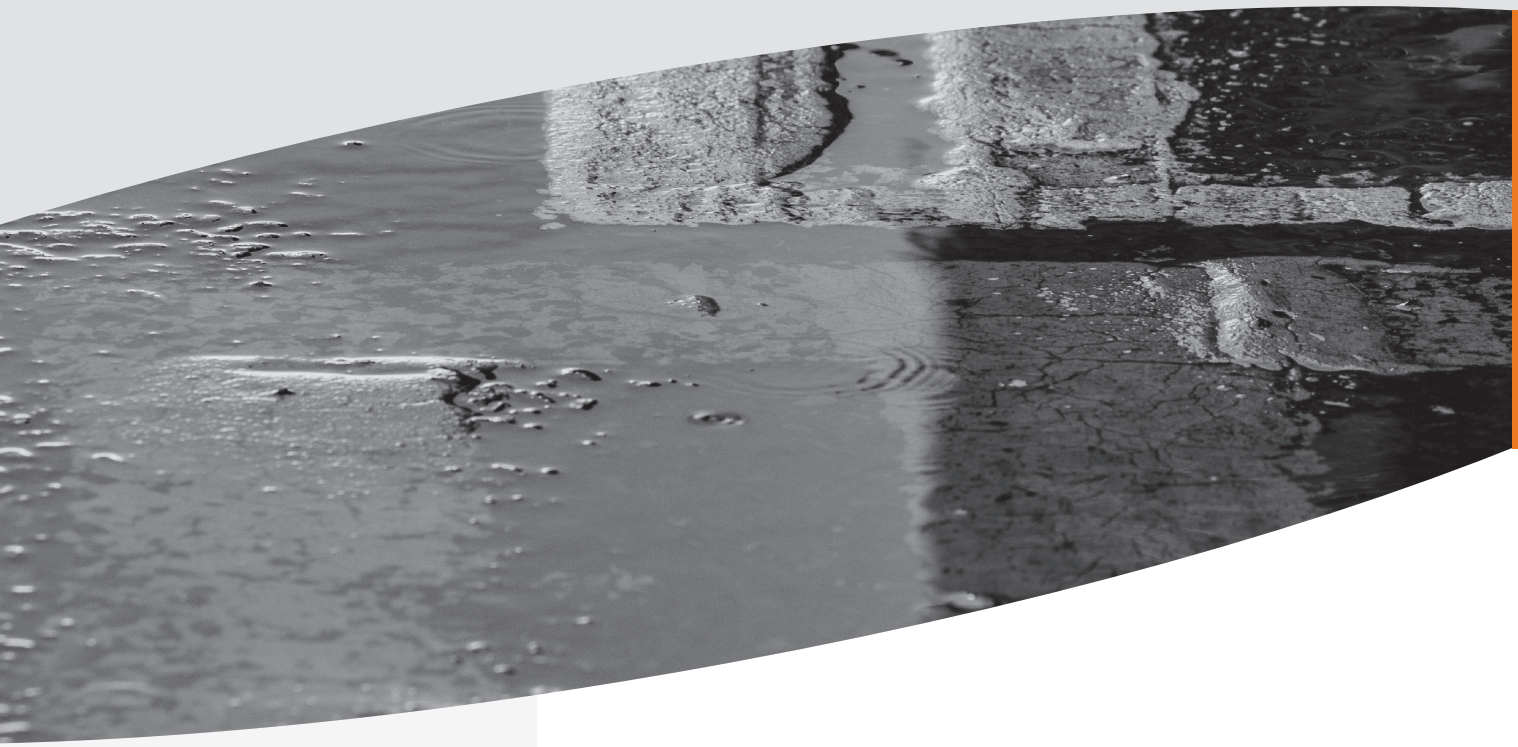

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Expert Analysis Chapters

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Q&A Chapters Continued

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From the Publisher

Welcome to the 21st edition of *ICLG – Merger Control*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to merger control laws and regulations around the world, and is also available at www.iclg.com.

The publication begins with three expert analysis chapters written by Ashurst LLP, AlixPartners, and CMS that provide further insight into merger control developments.

The question and answer chapters, which in this edition cover 33 jurisdictions, provide detailed answers to common questions raised by professionals dealing with merger control laws and regulations.

As always, this publication has been written by leading merger control lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Nigel Parr & Steven Vaz of Ashurst LLP for their leadership, support and expertise in bringing this project to fruition.

Jon Martin
Publisher
Global Legal Group

Loss of Potential Competition, Ecosystems, and AI – A New Frontier for EU and UK Merger Control


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1 Introduction

The last year has been eventful for merger control, with 2024 further highlighting the interventionist nature of merger control in both the UK and EU. This is part of a wider trend among the Organisation for Economic Co-operation and Development ("**OECD**") countries, with a 2024 OECD paper on competition trends noting that in 2022, "*there was a significant increase in the merger intervention rate – the proportion of transactions in which competition authorities intervened, either by imposing a remedy or by prohibiting a transaction*".[1] This underscores the importance of merging parties and their advisors proactively managing the risks posed by the UK and EU merger regimes (as discussed in last year's chapter).[2]

Notably, the last year saw further prohibitions involving potential competition/dynamic innovation concerns (e.g. *Adobe/Figma* – which we consider below), which remains a topic of interest for competition authorities globally. Large technology companies also continue their pursuit of potentially "killer" acquisitions, with Artificial Intelligence ("**AI**") mergers now starting to appear more frequently in the UK Competition and Markets Authority's ("**CMA**") case register. More competition authorities are also following the CMA's lead and revising their merger guidelines, with the latest US horizontal merger guidelines further emphasising the risks associated with a loss of potential competition. Australia is likely to follow suit in revising its merger guidelines.

We also observe the emergence of ecosystem-based theories of harm, evidenced by the European Commission's ("**EC**") prohibition of *Booking/Etraveli*. In this case, both the CMA and EC focused less on the traditional theory of foreclosure in a merger of complementary products, instead focusing on ecosystem effects leading to horizontal concerns and raising barriers to entry for other providers of accommodation online travel agent services (i.e. in Booking's core market).

Lastly, we reviewed 36 CMA/EC that were subject to parallel review since 2021 to identify points of divergence, including the *Booking/Etraveli* merger, where the CMA cleared the merger in Phase 1 and the EC prohibited the same merger at Phase 2.

This chapter is organised as follows:

(a) Section 2: Developments in how the EC and CMA are considering mergers that lead to a loss of potential and/or dynamic competition between the parties.
(b) Section 3: A review of several recent CMA cases involving loss of potential competition and dynamic theories of harm: *Adobe/Figma*, *Facebook/Giphy*, and *Uber/Autocab*.
(c) Section 4: An overview of the emerging ecosystems theory of harm and a case study on the CMA's clearance and EC's prohibition of *Booking/Etraveli*.
(d) Section 5: Considers whether the CMA and EC are diverging on the 36 parallel cases since 2021.
(e) Section 6: Draws some brief conclusions.

2 Loss of Potential/Dynamic Competition Remains a Key Theme of Blocked Mergers

The authors of this chapter have previously (in 2021) considered how the EC and UK have assessed mergers that may lead to a loss of potential and/or dynamic competition between the parties.[3] Since we wrote that article, several themes are still apparent.

First, large technology companies continue to pursue potential "killer" acquisitions from the perspectives of regulators. Concerns in relation to such acquisitions are particularly prevalent in digital platform markets given the number of acquisitions they have made. Between 2015 and 2023, the largest technology companies completed the following acquisitions: Amazon (54), Apple (61), Meta (45), *Alphabet/Google* (87) and Microsoft (99), with 34 acquisitions between 2022 and 2023 alone.[4] Recent acquisitions include *Amazon/Twitch*'s acquisition of Spirit.ai,[5] Microsoft's acquisition of Lumenisity,[6] Apple's acquisition of AI Music,[7] Alphabet's acquisition of Photomath,[8] and Meta's acquisition of Presize.[9]

Many of these mergers historically flew under the radar of merger control thresholds, and the few that were assessed were approved (such as *Google/Waze*, *Facebook/Instagram*, and *Microsoft/LinkedIn*, with the latter being cleared subject to commitments). However, this raises questions about whether turnover based merger jurisdiction tests are fit for purpose. As an example, Google acquired Waze (navigation software) for $966 million but Waze had effectively zero turnover, which the parties tried to argue the services are free and therefore there is no economic activity.[10] However, the UK Office of Fair Trading ("**OFT**") at the time said they had more than 25% of the turn-by-turn navigational applications for mobile devices (based on number of downloads).[11] Likewise, when Facebook purchased Instagram, Instagram also had zero revenue despite a deal value of $300 million in cash plus 23 million Facebook shares (but, the UK share of supply test was met based on more than 25% of virtual social networking services).[12]

The EC has sought to review mergers even where one of the parties has low turnover using Article 22 of the EC Merger Regulation, mostly notably leading to the prohibition of Illumina's acquisition of Grail. However, on 3 September 2024, that decision was quashed when the European Court of Justice concluded that the EC does not have jurisdiction to review mergers referred to the EC under Article 22 where the merger does not meet the thresholds for notification under the EC Merger Regulation and does not meet the criteria for

review under any national merger control rules of EU Member States. Also on 18 September 2024, the EC stated that it would not review Microsoft's acquisition of key personnel from Inflection AI after Member States withdrew their referrals after the European Court of Justice's judgment.

Second, and potentially as a result of the first point, more competition authorities (i.e. in addition to the UK) have added or expanded sections on potential competition to their guidelines. For example, in December 2023, the US Department of Justice and Federal Trade Commission released updated merger guidelines ("**US Merger Guidelines**").[13] Guideline 4 in the US Merger Guidelines states that "*mergers can violate the law when they eliminate a potential entrant in a concentrated market*".[14] Specifically, the US Merger Guidelines consider that to determine whether an acquisition eliminates a potential entrant, the Agencies examine: "*(1) whether one or both of the merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger, and (2) whether such entry offered a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects.*"[15] (This point was expressed in somewhat different terms in the previous version that indicated that the "*lessening of competition associated with a merger involving a potential entrant is more likely to be substantial, the larger the market share of the incumbent, the greater is the competitive significance of the potential entrant, and the greater the competitive threat posed by this potential entrant relative to others*".)[16]

The Australian Treasurer has also recently announced reforms to Australia's merger control rules, which are scheduled to be in force by January 2026. The Treasurer has specifically emphasised that "*certain kinds of acquisitions – serial acquisitions by large firms and acquisitions that entrench the power of market leaders – are not adequately captured by our competition laws*".[17] The proposed reforms include: having a single mandatory suspensory merger control system; a new legal test and substantive assessment to address "entrenched" market power, including the ability to review all mergers within the previous three years (to respond to concerns of creeping/roll up acquisitions); changes to notification thresholds; penalties for contravention; a public register of determinations; and appeal rights for merging partes (on a limited merits basis).[18] The Australian Competition and Consumer Commission has also recommended adopting new merger factors relating to "*the loss of actual or potential competitive rivalry, and/or increased access to or control of data, technology or other significant assets*", which addresses particular concerns relating to digital platform mergers.[19]

Third, the OECD recently published a paper on "*moat building*" and entrenchment strategies.[20] This paper suggests that firms may be employing these strategies to maintain their competitive advantage and discourage rivals from entering a market, to the detriment of consumers. However, the paper also notes the risk from overenforcement, where competition authorities are too aggressive with the enforcement of antitrust laws. This can lead to false positives, where firms are punished for lawful behaviour, which can deter innovation and investment.[21] This is consistent with a 2021 OECD competition trends paper that noted that "*an over-focus on dynamic effects creates risks for enforcement errors, and challenges for agencies in meeting requisite evidentiary burdens and standards*".[22]

Evaluating the loss of potential/dynamic competition presents challenges for competition authorities, as it involves appraising hypothetical future market scenarios. This requires making predictions about the likelihood and timing of potential entry, the potential entrant's capabilities *versus* those of other prospective entrants, and the impact of their absence and presence on the market. Relevant evidence will include internal documents, business forecasts, and valuations, as well as the characteristics of entry (i.e. is it attractive to customers/new and disruptive). Key questions also include whether the firm has the ability to enter (e.g. related products may provide the entrant with existing customer relationships that it can leverage or production/distribution synergies) and whether there have there been commercial responses of existing firms in anticipation of the rival entering. In markets characterised by innovation and investment (e.g. digital platforms, pharmaceuticals, and crop protection), authorities may also look for whether incumbents make investments and innovate to pre-empt entry and thereby protect their long-run profits. The focus of assessments is therefore incumbents' incentive to respond dynamically to threats of entry/expansion, including the extent of market contestability – i.e. the ability of entrants to win market share and affect market outcomes, which increases the threat of entry for incumbents – and the ability of firms to be able to appropriate or benefit from their investments, such as whether they can be protected by intellectual property rights.[23]

Finally, a very recent development in this space has been the substantial increase in the number of transactions involving AI as large digital companies seek to develop their AI offerings. One estimate indicates that there were 98 AI company acquisitions in 2023 alone, with Apple alone making 32 acquisitions.[24]

In April 2024, the CMA published an updated paper relating to its initial review of AI Foundation Models ("**FMs**") ("**CMA AI Report**").[25] This highlighted that FM capabilities have expanded significantly in the last year, with 120 new FMs released since September 2023. The CMA AI Report also highlights a distinct concentration of power among the largest tech firms mentioned above, controlling critical resources, such as compute power, data, and technical expertise. The CMA expressed concerns that their vertical integration and partnerships may hinder competition by reducing market diversity and choice, ultimately leading due to consumer harm due to price increases and reduced innovation. Further risks identified include market power in downstream markets (e.g. consumer products and search engines) limiting consumer choice and stifling competitors, and strategic partnerships between these dominant firms and FM developers, which may reinforce market power across the value chain. As at the date of finalising this chapter in early October 2024, the CMA has opened five investigations into AI mergers, with two completed and three ongoing:

(a) *Microsoft/OpenAI* was opened on 8 December 2023 and is currently considering comments (which closed on 3 January 2024).[26]

(b) *Microsoft/Mistral* was found not to qualify/cleared on 17 May 2024.[27] This was because the CMA found that Microsoft did not acquire material influence over Mistral, primarily because: (1) Microsoft's potential equity stake in Mistral, even if converted, would be less than 1%, giving it no significant voting rights or ability to block resolution; (2) Microsoft's commitments to providing compute infrastructure did not create any dependence on it by Mistral; and (3) the agreement was non-exclusive, with Mistral also distributing models via other platforms, such as Amazon Bedrock and Snowflake.

(c) *Microsoft/Inflection* was cleared on 4 September 2024.[28] In summary, the merger was cleared as the CMA concluded that the impact on competition would be limited (Inflection's chatbot was not a competitive constraint on Copilot and ChatGPT and faced challenges growing its user base), and Inflection's innovations (including its AI studio business for enterprise customers) were not deemed more attractive than other more established offerings.[29]

(d) *Amazon/Anthropic* was opened on 8 August 2024 but was closed in late September 2024 when the CMA concluded that the merger did not qualify, based on the turnover of Anthropic being less than £70 million, and the share of supply in the UK being less than 25%.[30]

(e) *Alphabet/Anthropic* was opened on 30 July 2024, with the CMA's invitation to comment closing on 13 August 2024.[31] At the time of writing (mid-October 2024), no decision has yet been announced in relation to this merger.

It will be interesting to see how the CMA views Anthropic's partnership with Google, and Microsoft's merger with Open AI. Based on *Microsoft/Inflection*, the CMA appears willing to consider arguments that certain AI innovators may not pose large competitive threats in the future (and the final decision may be more revealing about the CMA's weighting of the evidence, and in particular the potential benefits from the merger). The *Amazon/Anthropic* partnership also suggests that some of these mergers may still be successfully flying under the UK's existing merger control turnover and share of supply thresholds (but see below), albeit some (or indeed many) such mergers may well raise no substansive issues in any event.

The EC also appears interested in the competition implications of AI technology. A competition policy brief released in September 2024 noted that while AI and virtual world technologies can bring about positive change (including innovation, new business models, and new ways of doing things), they can also give rise to competition concerns.[32] In particular, AI mergers may reduce innovation, choice and quality, and may be prone to killer acquisitions, including by absorbing key employees or know-how. In addition, there are also wider concerns with exclusionary practices or other forms of foreclosure by dominant incumbents (e.g. exclusivity agreements, self-preferences, tying and bundling, refusal to supply, and predatory pricing).[33] We will be watching this space with interest in the coming months/years, particularly given that AI markets are some of the fastest-moving markets with significant potential upside for creating disruptive future competition.

Finally, ahead of the entry into force of the Digital Markets, Competition and Consumers Act 2024, on 1 August 2024 the CMA released a draft update to its guidance on jurisdiction and procedure. The proposed changes expand the CMA's jurisdiction to assess mergers under a new "hybrid test" if one of the parties has a market share of 33% in the UK or a substantial part thereof (such that no increment in market share is required), the same undertaking has UK turnover of over £350 million, and the other enterprise concerned has a UK nexus. In addition, digital firms that have been designated as having strategic market status will be required to report to the CMA mergers with a value of at least £25 million and with a UK connection. The CMA is currently collating responses to the consultation and intends to publish a final version of the guidance later in 2024.[34] The EC is also developing its decisional practice regarding digital and technology mergers, including the assessment of foreclosure risks resulting from conglomerate and vertical effects.[35] This included investigating data-related effects, in both horizontal (data combination) and vertical (data as an input) contexts.

Given the above developments, the next section considers several recent CMA decisions involving potential competition, including *Adobe/Figma*, which was prohibited based on dynamic competition concerns.

3 A Review of Recent Cases Involving Loss of Potential Competition

This next section reviews several recent CMA decisions involving a loss of potential competition, focusing on how the CMA has been weighing up the evidence in the round and assessing the potential for the merger to lead to future anti-competitive effects.

Adobe/Figma

The CMA's assessment of the acquisition by Adobe Inc. ("**Adobe**") of Figma Inc. ("**Figma**"), and how that merger may affect dynamic competition is an important case to illustrate how the CMA assesses how mergers may affect the parties' incentives to invest and innovate.[36] By way of background, the Parties are two major tech companies, both leaders in the design software space, but focussing on different products. The deal, valued at around $20 billion, was one of the largest in the software industry.[37] The rationale for the merger was to use Figma's product design capabilities to complement Adobe's core product line, and use Figma's web-based collaboration technology to innovate new products and solutions.[38]

The CMA focussed its assessment on five markets: vector editing; raster editing; product design; video editing; and motion design; and found that the merger would raise concerns in the markets for vector editing, raster editing and product design. The CMA's assessment is summarised as follows.

First, the CMA considered that the transaction would reduce potential competition in *vector editing and raster editing*. The former refers to the digital process of creating content, such as logos, icons, band graphics, marketing materials and illustrations.[39] Raster editing software is used for point-based image editing and compositing (e.g. adjusting or retouching photos).[40] Adobe is a market leader in these markets, with Adobe Illustrator having a 70% share of vector editing and Adobe Photoshop holding an 80% share in raster editing. The remaining competitors are much smaller, with the next largest competitor having a share of under 10% in vector editing and under 5% in raster editing. To date, Figma had developed limited vector editing functionality and very limited raster editing functionality.[41]

The evidence showed that there was a material degree of customer adjacency between Figma's product and both Illustrator and Photoshop. Furthermore, as demonstrated by Figma's product development and plans, Figma had been taking steps to expand in these markets and would have been able to address various entry challenges through a combination of investment and acquisitions in the near to medium term.[42]

Adobe's internal documents also indicated that it viewed Figma as representing a threat to its market positions, prompting Adobe to take actions to mitigate such a threat.[43] Further, the CMA considered competitors' market positions, product development plans and target use cases, which showed that Adobe faced limited other competitive constraints on its product development and innovation in these markets. The CMA also noted that Figma was particularly well placed to challenge Adobe in both markets (compared to other software providers).[44] On this basis, the CMA concluded that, absent the merger, Figma would represent a credible dynamic competitor to Adobe in vector editing and raster editing.

Second, the CMA considered that the transaction would reduce competition in innovation as regards "*product design*", namely the "*process of designing a digital product, such as an app or website that involves some degree of user interaction*".[45]

Figma Design was the leading product design software, accounting for over 80% of the market by revenue. Adobe had a 5-10% share. Together the Parties had over 90% of the market. The remaining competitors had significantly lower shares of 0-5% each and less than 10% in aggregate.[46] Evidence showed that the Parties were close competitors, and that there were

limited remaining constraints, including taking into account the product development plans of other market participants.[47] Hence, the CMA concluded that the merger would reduce competition in product design, which would result in higher prices and/or worse quality, and also reduce the Parties' incentives to innovate and develop their products.

Third, the CMA assessed the impact of the merger on video editing software, used for video assembling, and motion design software, used for creating motion graphics.[48] While Adobe was the leader in both markets, the evidence showed that there would continue to be other significant competitors, and that Figma was also not a material threat to Adobe. Hence, the CMA concluded that the merger was not likely to give rise to competition concerns in both of these markets.[49]

The Parties abandoned the merger after the CMA's provisional findings. However, the Parties were facing similar pressure from the EC as the EC had also issued a statement of objections.[50] In September 2024 the EC released a policy brief, reviewing the EC's Phase 1 process and statement of objections.[51] The EC also raised similar concerns about Figma's potential into Adobe's core markets of vector and raster editing tools (Illustrator and Photoshop). First, on eliminating dynamic competition, the EC noted that although Figma was not yet a direct competitor in these markets, it was a growing competitive threat. Its software was well-placed at the boundaries of Adobe's ecosystem and had the potential to expand its capabilities into vector and raster editing. The Commission evaluated whether Figma's gradual expansion would have allowed it to enter these markets more fully over time. Evidence pointed to Figma's potential to innovate and expand into new areas by improving its software or adding new functionalities.[52] This competitive threat could pressurise Adobe to continue innovating its own products.

Second, on the effect on Adobe's innovation efforts, the EC investigated whether Figma's anticipated entry into these markets had influenced Adobe's product development strategies.[53] The concern was that, absent the merger, Adobe would have invested further into its tools to fend off Figma's growing influence. The merger could result in Adobe's market dominance being strengthened by eliminating Figma as a future competitor, potentially reducing innovation in these markets.

Facebook/Giphy

It is worth contrasting *Adobe/Figma* with a slightly older case – the acquisition of Giphy by Facebook.[54] Facebook is the largest provider of social media and messaging services in the UK, and Giphy is the leading provider of free GIFs and GIF stickers. Both companies offer their products free of charge to users/companies.

The CMA's main theory of harm related to loss of potential competition in the two-sided market for display advertising and social media services. The key questions were whether GIPHY could have competed with Facebook in display advertising in the UK, and whether the merger could remove a firm that was competing/had the potential to compete with Facebook.

One of GIPHY's key innovations was its Paid Alignment advertising proposition, which it first offered in 2017 in the US. This service aligned "*their GIFs with popular search terms (so that users see them first when searching for a GIF), or to insert them into GIPHY's trending feed, in exchange for payment*".[55] The CMA also noted that "[i]*n the context of its acquisition of GIPHY, Facebook required GIPHY to stop all Paid Alignment activities, likely due to its interest in monetizing the same features*".[56] Internal documents showed that "*GIPHY hoped to develop its Paid Alignment product and expand its offering internationally, including into the UK*".[57] Most advertisers were also positive about their experience of working with GIPHY.

The CMA concluded that Facebook had significant market power in the market for display advertising, which had high barriers to entry (demonstrated by limited successful entry in the market since Facebook became market leader).[58] GIPHY also had market power in the supply of searchable GIF libraries. According to the CMA, successful expansion in a multi-sided market, such as display advertising, can also be magnified by network effects – if Facebook owns and controls GIPHY, it would likely be able to reinforce its strong position.[59] The CMA therefore concluded that the merger would lead to a substantial lessening of competition ("**SLC**") as a result of horizontal effects, in the form of a loss of potential competition in display advertising.[60]

Uber/Autocab

Next, we review the CMA's 2021 assessment of *Uber/Autocab*, which is an example of a technology merger involving potential competition that was cleared unconditionally at Phase 1.[61] At face value, this merger also presented similar characteristics to *Facebook/Giphy* – it was a high-profile merger involving a two-sided platform, where strong network effects could re-enforce a dominant position. The merger was also subject to significant third-party concerns, which are a relevant source of evidence in dynamic markets.

By way of background, Uber is a global ride-hailing company that develops and operates proprietary technological applications that connect passengers with drivers. Uber is active in most major cities in the UK where it provides taxi services to UK customers. Autocab is a supplier of software to taxi companies, including Booking & dispatch technology ("**BDT**") enabling taxi companies to provide trips to passengers, and iGo, a taxi company referral network connecting demand for trips (i.e. consumers) with supply for trips (i.e. taxi companies).[62]

The CMA's main theory of harm concerned horizontal unilateral effects in the current and future supply of BDT and network facilitating taxi services in the UK.[63] The CMA found that the parties competed indirectly, with Autocab in the supply of BDT and Uber in the supply of taxi services with Autocab's customer taxi companies, and that they both faced sufficient constraints in each market (Autocab by other BDT suppliers regarding software development, while Uber is constrained by various rival ride hailing apps such as Bolt and Ola).[64] The key question was therefore whether the Parties would compete more closely in the future as they both develop their products, and whether there would be an appreciable loss of rivalry.

Based on the evidence reviewed, the CMA found that Autocab were unlikely to enter in direct competition with Uber by significantly developing iGo, and even if iGo entered its impact was expected to be limited.[65] Therefore, the overall threat to Uber represented by Autocab would be low. This was based on three key pieces of evidence. First, iGo had not been growing sufficiently to date and there was limited evidence of it growing materially in the future.[66] Second, there was no sign in Uber's internal documents of Uber seeing Autocab as a threat and adopting strategies to respond to this. Third, the current other referral networks/ride hailing companies were expected to expand and increase their geographic availability in the future. On this basis, the CMA found no concerns, despite its views as to Uber's significant market power in the areas where it was active, the important network effects in the market and the material third party concerns.[67]

The CMA also investigated vertical effects arising from foreclosure of taxi companies and aggregators using Autocab's

offering. However, as BDT is only a small proportion of taxi companies' costs, the merged entity would not have the ability to harm Autocab's taxi company customers by raising their costs.[68] The CMA also considered whether the merged entity would have the ability to raise the price or reduce the quality of iGo, and foreclosing aggregators such as travel companies. However, there are several alternatives to iGo and many aggregators already connect to multiple referral networks.[69] Consequently, the CMA did not find an SLC as a result of vertical foreclosure effects.

Our takeaways from the CMA's recent assessments

These decisions highlight how the CMA assesses mergers where the parties are not direct competitors but have the potential to become rivals in the future (through either investment/innovation or expansion). The deciding factor in *Uber/Autocab* seemed to be the lack of direct competition between the two companies, either now or in the future, and the presence of direct rivals. The ability for Uber to leverage network effects were also not as strong as the other two mergers. Autocab's technology serves local taxi companies, and while Uber might use this to grow its business in smaller markets, it wasn't seen as dramatically increasing Uber's already dominant position. The indirect competition (Autocab enabling taxi companies to compete against Uber) was not seen as enough to substantially lessen competition in the ride-hailing space.

Regarding *Adobe/Figma* and *Facebook/Giphy*, in both cases, the network effects were viewed as being much more significant by the CMA. Adobe's acquisition of Figma would allow it to integrate Figma's collaborative design tool into its own ecosystem, thereby making it harder for any other competitor to challenge Adobe's dominance in the creative software market. Facebook's acquisition of Giphy raised concerns that Facebook would further strengthen its dominance in display advertising by controlling a widely used tool for sharing content, particularly on competing platforms like Snapchat or TikTok. Both mergers were seen as further entrenching dominant positions and increasing barriers to entry.

4 The Emerging Ecosystem Theory of Harm

This section considers another recent development in EU and UK merger control – the emerging ecosystem theory of harm. Below we consider what ecosystem effects are and why it is important to have a framework for assessment.

Introduction to ecosystems and network effects

Businesses creating ecosystems is not a new phenomenon. For example, since introducing the first iPhone in 2007, Apple has carefully built out its ecosystem of products and services to capture customers and enter adjacent markets (e.g. cloud storage and smart watches).[70] Many other technology companies, such as Google and Samsung, have followed suit.[71]

Ecosystems can be both business ecosystems, which are shaped by collaboration with other firms/institutions (e.g. Intel's CPUs derive value from the other products that make up a personal computer ("**PC**") – consumers purchase PCs, not CPUs in isolation), or platforms, where the value of the product/service is shaped by the number of users on that same platform. The core economics at the heart of ecosystems are network effects. Network effects can be both direct (e.g. you are more likely to use a social media platform if you can interact with more of your family/friends), and indirect (e.g. more drivers will want to drive for Uber when they know more customers are using Uber's platform, increasing their chance they are matched with a customer – and similarly customers will value Uber more highly the more drivers are available).[72] We focus in this chapter on indirect network effects, whereby more users allow that company to offer more appealing products and services, and benefit from economies of scale to acquire further customers, creating a positive feedback loop. However, the mere existence of network effects does not mean automatically that markets will tip to being served by one or a few providers, particularly where market participants can readily use multiple platforms (which is commonly referred to as "multi-homing") rather than users focusing on using one platform (which is commonly referred to as "single-homing").

Ecosystems can be beneficial for consumers welfare. They create value for users by integrating complementary products or services that we as consumers often find convenient and efficient. However, as competition authorities have recently been highlighting (and as we explore below), ecosystems can also create or enhance competition concerns when an already dominant platform leverages that customer base to enter adjacent markets and strengthen an already dominant position in its core market.

Do we need a framework for the competition effects of ecosystems?

The EC has emphasised the importance of considering ecosystem effects. For example, the EC Policy brief of December 2022 states that digital ecosystems involve "*relationships across multiple complementary services, led to new acquisition strategies and, therefore, novel competitive effects*", and that the "*acquirer may leverage market power from its core markets into a new market thereby expanding its ecosystem*", or alternatively "*the acquiring company may acquire a company in a defensive strategy to protect its core markets, for instance by increasing barriers to entry and expansion or by taking out a potential threat*".[73]

Representatives from DG COMP during a 2022 digital mergers workshop[74] noted that it is not a novel concern and referred to paragraph 36 the EC's horizontal merger guidelines that state:

> *"Some proposed mergers would, if allowed to proceed, significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete. In such a case, competitors may not, either individually or in the aggregate, be able to constrain the merged entity to such a degree that it would not increase prices or take other actions detrimental to competition."*[75]

However, beyond paragraph 36 in the EC's guidelines, authorities have yet to agree on a framework for measuring the competitive effects of mergers involving ecosystems. The starting point tends to leverage traditional economic principles of foreclosure in vertical and conglomerate mergers. However, two differences from these traditional principles stem from:

(a) the need to account for the whole network of products and services related to those provided by the merging parties, including those not directly affected and that might not even exist pre-merger; and

(b) how the merging parties can leverage their network of products and services across different markets, which

is different from a simple competitive assessment of the products/services of the merging parties from a vertical or conglomerate perspective.

The next section considers an example of two merger control assessments of ecosystem effects in the *Booking/Etraveli* case by the EC and CMA, who reached fundamentally different conclusions.

Booking/Etraveli – an example case involving ecosystems

The section above considered the basic premise behind the ecosystem theory of harm. In this section we consider the CMA[76] and EC[77] assessments in *Booking/Etraveli*, an important case that provides insight into how the competitive effects of ecosystems might be viewed in future mergers (particularly as authorities may diverge in their assessments, as the CMA and EC did here).

Introduction and theory of harm

Booking is the leading hotel online travel agent ("**OTA**") provider in the UK and EU.[78] Etraveli supplies flight OTA services (with brands including GoToGate and MyTrip), and also offers accommodation OTA services through a commercial affiliate arrangement with Booking.[79] The rationale for the merger was that Booking wanted to grow its position in more verticals via the 'Connected Trip', which aims to capture more of the customer's travel journey.[80] Normally, economists would consider this a classic conglomerate merger between suppliers of complementary (i.e. related) products, which would centre on foreclosure concerns. However, the theories of harm considered by both the CMA and EC were not traditional foreclosure theories of harm.

The CMA's theory of harm was that the merger would raise barriers to entry and expansion in the supply of accommodation OTA services in the UK.[81] Essentially, by adding flight OTA capabilities, Booking can capture more of customers' accommodation business, making it more difficult for current or future rival OTA suppliers to compete.[82] This would strengthen Booking's existing market power in accommodation OTA services and lessen competition over time. The CMA also noted that this theory of harm was in line with its thinking around digital platforms.[83] For example, in the context of the Online Platforms and Digital Advertising Market Study, the CMA noted that:

> *"[b]y surrounding its core service with a large number of complementary products and services, a platform will further insulate its most profitable service from competition. If a platform can manage to convince consumers to operate to a large degree within their ecosystem online, then a new entrant would need to compete on many fronts to displace them. […] By gaining control of these adjacent markets, the platforms are able to control the entry points to their core markets, and in doing so protect the primary source of their revenue."*[84]

The EC's theory of harm was that, by acquiring Etraveli and expanding its ecosystem of OTA services, Booking will gain a significant amount of traffic for its accommodation OTA service.[85] This would re-enforce its network effects and increase barriers to entry and expansion in the accommodation OTA market and strengthen Booking's market position where Booking is already dominant.[86] Consequently, the merger would increase costs for its customers (i.e. hotels using Booking's platform), and likely end customers who search for accommodation.[87]

Competitive assessment – similar facts but different views

As outlined above, both authorities' theories of harm coalesced around similar themes, but there were differences in their assessment, including of the underlying evidence.

Both the EC and CMA found Booking to be dominant in accommodation OTA services. The CMA considered that Booking had significant market power in the supply of accommodation OTA services in the UK.[88] The CMA's evidence included that the merged entity would have a high share of supply (50-60% with a 0-5% increment) and is substantially larger than the next largest competitors (Airbnb and Expedia). Booking also offered a broad array of accommodation types (whereas some competitors were more focused) and the online direct channel had a differentiated service proposition and was thus not a close substitute for OTA services.[89]

The EC's evidence included that Booking is leader in accommodation OTA services in the EEA, with a 50–60% market share, having grown rapidly over the last 10 years.[90] The evidence also suggests Booking can act independently from competitors – despite charging higher commission to hotels and ultimately higher prices to end consumers, Booking has increased its market share over time.[91] Booking is also particularly strong in online advertising (e.g. through Google), which exacerbates network effects.[92]

On whether there are barriers to entry and expansion in OTA accommodation services, the EC noted that OTAs need a wide portfolio of hotel properties to compete effectively, which needs to be attractive to end customers and generate traffic.[93] The OTA sector is also characterised by significant customer inertia, which combined suggests large barriers to entry for smaller OTAs.[94] The CMA also found that there are material barriers to entry and expansion, including barriers relating to Booking's incumbent position.[95]

Both regulators also considered the importance of a flight OTA offering to acquire and retain customers and (because of network effects) accommodation suppliers.

In the UK, the CMA reviewed survey evidence and internal documents, and found that travel is a discrete, infrequent, high-value purchase and that UK consumers were shopping around rather than purchasing travel services from one provider.[96] Booking and rivals are using several retention and acquisition channels to secure accommodation customers, not just flight OTA services. Etraveli also has a modest market position in the UK, with other providers having similar capabilities in a similar position, as most (87–89%) customers in the UK book flights directly from the airlines.[97]

The EC found that flights are the vertical representing the highest potential of cross sale into the hotel OTA market, without which the connected trip would lose its appeal.[98] The EC also noted that Etraveli was 'best in class', and held a 10–20% share of the flight OTA market, and would generate significant traffic. The transaction, according to the Parties also had significant upside with Booking expecting the merged entity to have 30–40% of the flight OTA market (and potentially up to 50–60%).[99]

Conclusions on the competitive assessment

The CMA concluded that while consumer demand was evolving (i.e. toward the connected trip), the evidence was not strong enough that consumer behaviour would change in the future, such that acquisition channels available to Booking's rivals of accommodation OTA services would reduce.[100] Therefore, the CMA concluded that "*the Transaction would not materially reduce the ability and incentive of rival suppliers of accommodation OTA services to attract UK consumers (and therefore UK accommodation providers) post-Transaction*" and that there is no SLC

"*as a result of higher barriers to entry and expansion in the supply of accommodation OTA services in the UK*".[101] The CMA subsequently cleared the merger unconditionally at Phase 1.

The EC, on the other hand, concluded that by capturing more customers earlier in their travel journey, Booking will grow its position in the hotel OTA market.[102] This will increase Booking's scale, and via network effects, strengthen its already dominant position on the hotel OTA market (although the EC notes the increment in market share is only 0–5%). This in turn makes it harder for rivals to build or scale their hotel OTA offering and affect their ability to compete.[103] The transaction will therefore increase Booking's dominant position, reducing competitive pressure to offer lower commissions to hotels, which results in end customers paying higher prices. The EC also found that the likely anti-competitive effects could not be mitigated by any efficiencies claimed by the Parties.[104] In contrast to the CMA, the EC therefore prohibited the merger.

A key question is whether the EC and CMA differed in their approach based on the weighting of the evidence, or were they faced with different facts. As detailed above, the merger was seen as less of a concern to the CMA where UK customers shopped around, were much more likely to book directly with the airlines, and where Etraveli's had a relatively small presence. Therefore, the CMA concluded that the merger would have limited impact on competition in the UK. In contrast, the EC focussed heavily on Booking's entrenched dominant position in the EEA (50–60% share in the EEA among consumers and growing), and was concerned the merger (through an enhanced ecosystem) would increase barriers to entry for rival OTAs. As mentioned earlier, this raises the question as to how (potentially relatively limited) anti-competitive effects should be balanced against the consumer benefits of Booking offering an integrated accommodation and flights OTA.

To us it did not seem that underlying facts presented to the EC were materially different from the CMA. However, despite the Parties' view that Etraveli is a minor source of accommodation traffic, the EC disagreed, concluding that "*a flight OTA product represents an important customer acquisition channel for hotel OTA providers and specifically for Booking*", and that "*Booking's acquisition of ETG will enable Booking to acquire a significant amount of additional customer traffic which will offer a significant number of new opportunities to cross-sell hotel rooms*".[105] It is difficult to comment without the redacted information, but we would like to understand how the (seemingly small) increment in traffic would adversely affect rivals, which needs to be balanced against the efficiency gains associated with offering a one-stop shop. This is particularly the case as there are other flight OTAs, such that accommodation OTAs could obtain traffic from these as well as from other channels. The merger has been appealed and it will be interesting to consider how the Court assesses these issues.

Conclusions on ecosystems – new theory of harm or old theories with a new coat of paint?

Our view is that *Booking/Etraveli* was really a conglomerate merger, but assessed in a non-standard way in the sense that it did not focus purely on foreclosure, perhaps particularly by the EC. The core theory of harm identified by both the CMA and EC was *not* Booking leveraging its position in accommodation OTA services into an adjacent market (flight OTA services), but the reverse. It was Booking leveraging Etraveli's relatively modest position in flight OTAs into accommodation OTAs. The purpose of making this point is not to indicate that there is no plausible theory of harm, but simply that it is more akin to customer foreclosure – namely whether rival accommodation OTAs would be denied access to an important referral source of customers. The CMA and EC also both characterised the theory of harm in relation to the merger as to whether it would lead to horizontal unilateral effects by raising barriers to entry in Booking's core market of accommodation OTAs, primarily due to the ecosystem of services and network effects re-enforcing Booking's already dominant position.

However, that is not to say authorities will always characterise ecosystem effects as horizontal unilateral effects involving raising barriers to entry in the acquirer's core market. The CMA's assessment in *Nvidia/Arm* assessed four separate theories of harm: vertical and conglomerate effects in data centres (CPUs and SmartNICs); vertical effects in the internet of things; vertical effects in automotive (suppliers of infotainment SOCs); and vertical effects in gaming consoles.[106] While the CMA found ability and incentive to engage in foreclosure regarding each theory of harm, the CMA also mentioned that they accounted for how the effects of individual foreclosure strategies would reinforce on another, due to interaction and inter-relatedness of the ecosystem dynamics of each market, which may lead to reduced competition and innovation.[107]

Both these cases highlight how advisors should not disregard our existing assessment tool kit, but may need to take a wider view of the potential effects of a merger, particularly when the transaction involves an ecosystem of products or services, and where network effects can strengthen an already dominant position in the acquirer's core market. However, what is evident from the above cases is that it would be helpful if authorities gave some more clarity on their framework for assessing ecosystem mergers, and the likely evidence and analysis they will use as a basis for their decision making. In this regard, the *Booking/Etraveli* merger has been appealed and the outcome of this appeal may provide further guidance.[108]

5 Are the CMA and EC Diverging in Their Decisions?

Ever since the CMA began investigating European-wide/global mergers post-Brexit, there was potential scope for the EC and CMA to deviate in their competitive assessments and approach to remedies.

We have reviewed the 36 mergers assessed by both the CMA and EC between January 2021 and September 2024.[109] This review shows that in 22 mergers (61%), the CMA and EC came to the same conclusion (with alignment on both the decision and stage of the process). These decisions include *Yokohama Rubber/Trelleborg Wheel Systems* (cleared at Phase 1), *Viasat/Inmarsat* (cleared at Phase 2), and *Nvidia/Arm* (abandoned/withdrawn). For a further six mergers (17%), there was alignment on the competitive assessment but at different stages of the process. Finally, for eight mergers (22%), there was disagreement on the competitive assessment.[110] There are several themes arising from the divergence in decisions.

First, it is perhaps not surprising that that the CMA and EC differ and their assessments given the facts may be different across different geographical regions. For example, in the *Amazon/iRobot* merger concerning robot vacuum cleaners ("**RVCs**"), the EC found that Amazon might have both the ability and incentive to foreclose iRobot's rivals by limiting access to Amazon's online marketplace (e.g. through delisting rivals, reducing visibility, or directly raising advertising costs).[111] This is because Amazon's marketplace is a particularly important channel to sell RVCs in several European countries in terms of product discovery and final purchase

decision. According to the EC, this suggested that foreclosing rivals would be in Amazon's interests as the gains in iRobot sales would offset the commission lost from sales of rival products via Amazon.[112] The CMA, faced with the same merger, also found an ability to harm rivals selling RVCs on Amazon's marketplace. However, the CMA found that the longer-term strategic benefits of disadvantaging RVC rivals are limited, based on the UK's small market for RVCs and limited future growth potential.[113] The CMA also noted specifically that the share of households who own an RVC is "*substantially lower in the UK than in some key other European countries given that RVCs account for only 5% of all vacuum cleaner sales in the UK*" (compared to some European countries with shares of 10-20%).[114] Although not mentioned by the CMA, this discrepancy is possibly due to the UK having a higher proportion of multi-story dwellings compared to many European countries (which RVCs are less suited to clean).

The EC also expanded on its *Amazon/iRobot* assessment in a September 2024 policy brief.[115] Notably, the EC said that it particularly relied on qualitative evidence, including evidence from past Amazon acquisitions, particularly the 2018 purchase of smart doorbell company Ring, which showed similar dynamics. In that case, Amazon's role as a marketplace and its ability to shape search visibility and product rankings were key to its market power. According to the policy brief, this helped the EC better understand how Amazon could employ various foreclosure strategies post-transaction, even though the nature of algorithmic tools made a fully quantitative assessment difficult. Ultimately, this qualitative evidence played a crucial role in raising concerns about the potential competitive harm.

Second, disagreements on process can often be a function of the required remedies. For example, in *Korean Air/Asiana*, the CMA cleared the deal at Phase 1 following acceptance of undertakings related to slots at London Heathrow Airport and Incheon Airport near Seoul, which would facilitate Virgin Atlantic's entry onto the routes (a relatively simple remedy to address a relatively minor competition concern).[116] However, the merger at the European level was more complex, with the EC requiring substantial commitments. This included Korean Air divesting Asiana's global cargo freighter business (including freighter aircraft, slots, traffic rights, flight crew, and other employees, as well as customer cargo contracts, among others) to an approved buyer.[117] In addition, Korean Air also had to make assets available to T'Way (a Korean rival) to start operating on four overlapping routes (including slots and traffic rights as well as access to the required aircraft).[118] Korean Air also agreed to not complete the merger until T'Way starts operating (a relatively novel approach aimed at ensuring that competition would not be lost in the interim).[119]

Third, disagreements can also be a function of the approach to remedies. *Microsoft/Activision* has been well documented; however, the CMA's approach to behavioural remedies meant the CMA was not satisfied that a 10-year licensing remedy for cloud gaming would alleviate the competition concerns (the CMA noted that both the customer benefits were uncertain and it would be difficult to monitor).[120] The CMA then required Microsoft to restructure the deal to sell the rights to Activision's games to Ubisoft.[121] This is despite the EC being satisfied with the "*hard evidence*" that Microsoft's commitments were fundamentally pro-competitive and would "*unlock significant benefits for competition and consumers*".[122]

6 Conclusion

In conclusion, recent trends in UK and EU merger control have underscored the growing focus on potential competition in dynamic markets, and the evolving role of ecosystems in merger assessments. The continued rise of acquisitions in the technology and AI sectors has brought increased scrutiny from competition authorities, particularly in cases involving large digital platforms and their expansion into adjacent markets. Competition authorities like the CMA and EC are proactively addressing the risks of entrenchment and the possible stifling of innovation, with a notable emphasis on mergers that eliminate future competitive threats or raise barriers to entry.

However, the divergence in decisions, such as those in the *Booking/Etraveli* and *Microsoft/Activision* cases, highlights the complexities faced by competition authorities in assessing the long-term effects of mergers, or in how to remedy to competition concerns. The evolving theories of harm, particularly those related to ecosystems, pose new challenges for competition practitioners. These require a nuanced understanding of how mergers may impact market structures in the future, with authorities needing to weigh preserving dynamic competition against the risks of overenforcement. Our review of the 36 parallel decisions suggests that differences can be a function of the different facts facing each authority (i.e. taking account of the idiosyncrasies of the individual geographical markets); however, it can also be a result of a different weighting on the evidence, or approaches (read scepticism) to different types of remedies (with the CMA's approach to behavioural remedies being noticeably more stringent than the EC's).

This changing landscape of merger control means practitioners need to remain alert to the interplay of network effects, potential competition, and market entry barriers in their assessments of competitive effects, and for parallel cases, how different authorities may view the specific facts.

Endnotes

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108 In its press release, Booking notes that "The Commission has fundamentally misconstrued the highly competitive travel markets for flights and accommodations, and its decision is an unexplainable departure from the Commission's own Non-Horizontal Merger Guidelines, which are legally binding on the Commission. The acquisition, which would have combined two separate but complementary Europe-based businesses operating within separate, highly competitive industries, would have delivered tremendous benefits for consumers and partners by bringing more options and competitive pricing". See, https://www.bookingholdings.com/press-releases/booking-holdings-intends-to-appeal-european-commission-decision-to-prohibit-the-companys-acquisition-of-etraveli-group/

109 This is based on final decision date. This excludes mergers that are still being considered as of 1 September 2024. This also includes both stages of the *Microsoft/Activision* deal that we resubmitted and went through the CMA's Phase 1 process twice.

110 The eight mergers are: *ALD/Leaseplan* (CMA Phase 1 Clearance, EC Phase 1 Remedies); *Facebook Kustomer* (CMA Phase 1 Clearance, EC Phase 2 Remedies); *Booking/Etraveli* (CMA Phase 1 Clearance, EC Prohibition); *Amazon/iRobot* (CMA Phase 1 Clearance, EC Withdrawal); *Broadcom/Vmware* (CMA Phase 2 Clearance, EC Phase 2 Remedies); *Cochlear/Oticon Medical* (CMA Phase 2 Remedies, EC Phase 1 Clearance); *Microsoft/Activision #1* (CMA Prohibition; EC Phase 2 Remedies); and *Cargotec/Konecranes* (CMA Prohibition, EC Phase 2 Remedies).

111 https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5990

112 https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5990

113 CMA, *Amazon/iRobot* Phase 1 Decision, paragraph 19. Available at: https://assets.publishing.service.gov.uk/media/64be31862059dc000d5d2851/Amazon_iRobot_decision_-_NON-CONFIDENTIAL_-_FOR_PUBLICATION.pdf

114 CMA, *Amazon/iRobot*, paragraph 77.

115 4e7dcad9-4787-4cef-885b-dcc5f8f1244c_en (europa.eu)

116 CMA, "Anticipated acquisition by Korean Air Lines Co., Ltd of Asiana Airlines Inc. - Decision on acceptance of undertakings in lieu of reference", ME/6924-21, paragraph

9. Available at: https://assets.publishing.service.gov.uk/media/6402074e8fa8f527f110a3a2/Final_Acceptance_of_UILs.pdf

117 https://ec.europa.eu/commission/presscorner/detail/eN/ip_24_761

118 https://ec.europa.eu/commission/presscorner/detail/eN/ip_24_761

119 https://ec.europa.eu/commission/presscorner/detail/eN/ip_24_761

120 CMA, *Microsoft/Activision* Phase 2 Final Report, paragraphs 5-8. Note that some behavioural remedies are accepted by the UK, even in horizontal mergers. Examples include Bauer Radio (2020), *Breedon/Cemex* (2020), several rail franchise mergers, and *Imerys/Goonvean* (2013). However, more often than not, the CMA requires structural remedies.

121 https://www.gov.uk/government/news/new-microsoft-activision-deal-addresses-previous-cma-concerns-in-cloud-gaming#:~:text=Under%20that%20new%20deal%2C%20Microsoft,before%20the%20deal%20is%20completed

122 EC Press Release, "Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions". Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705

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AlixPartners has a multi-disciplinary practice covering economics, forensic accounting, and information management services (such as e-discovery and applied data analytics). The firm also has post-merger integration experts who provide evidence on efficiencies in mergers, and restructuring experts who advise on "failing firm" viability issues. Combined with AlixPartners' industry expertise, this wide-ranging capability allows us to create robust evidence and analysis on the issues that matter most to the case. This included advising on *Liberty/Unite*, *Inspired/Novomatic*, *JD Sports/Go Outdoors*, cleared unconditionally by the CMA at Phase 1, *BT/EE*, which was cleared unconditionally by the CMA at Phase 2, and various Phase 2 EU mergers such as *H3G/O2* (acting for EE) and *Nynas/Shell* (which was cleared unconditionally on the basis of a combination of the exiting firm defence and merger efficiencies). The firm recently acted on four UK Phase 2 mergers, namely *Vodafone/Three*, *Bauer Radio*, *Hunter Douglas/247*, and *JD Sports/Footasylum*, and also mergers in Australia (acting for Optus in relation to *Telstra/TPG*, which was prohibited) and Ireland (*Q-Park/Tazbell*, cleared subject to limited divestments and a behaviour remedy).

AlixPartners' economics practice also engages in a range of other competition economics work. Members of the team have acted in relation to the European Commission investigations into Visa inter-regional interchange fees, credit default swaps and ebooks, and UK market investigations concerning house building, credit information, retail banking, payday lending and private motor insurance. They have also acted in relation to a range of matters involving competition litigation, such as acting for seven OEMs in relation to truck/car part cartels, power cables, *Global365 v PayPoint*, *RoyalMail v Whistl*, Amazon, interchange fees for Visa Inc., a rail ticketing collective action, a sewerage services collective action, the Forex and SSA bonds cartels, collective actions against Google and Apple relating to their App stores, *Network Rail/Achilles*, the envelopes cartel, the polyurethane foam cartel for multiple claimants, and pay-for-delay pharmaceutical litigation.

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