Assessment of proposals for an SMS merger regime in the UK

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Contents

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Executive summary

The UK Government is seeking feedback on proposals for what it describes as 'a new pro-competition regime for digital markets'.[1] While not currently part of its preferred option, the Government has stated that it is supportive of a dedicated merger regime for firms with Strategic Market Status (SMS) and is therefore seeking views on a series of measures that it is minded to take forward, which can be broadly classified in two groups.

1. Enhancing the reporting and notification requirements for SMS firms (all mergers to be reported to the Competition and Markets Authority (CMA); broader jurisdiction for the CMA to review mergers; and the largest transactions to undergo mandatory merger reviews).

2. Lowering the Phase 2 threshold for intervention in mergers involving firms designated with SMS from a 'balance of probabilities' to a 'realistic prospect' of a substantial lessening of competition (SLC).

The proposals closely follow the recommendations of the Digital Markets Taskforce (DMT) in proposing a distinct merger control regime for SMS firms.[2]

The DMT acknowledged that its recommendations constitute 'a significant change to the existing system of merger control in the UK'.[3] Given the far-reaching implications for markets that represent an important and growing part of the UK economy, such a change must be supported by strong evidence that it is both 'proportionate and efficient'.[4]

Amazon commissioned Oxera to examine whether the DMT's proposals are an appropriate and proportionate response to the concerns that have been raised. In particular, the focus of this study is on the second of the DMT's proposals: a lower evidential standard at Phase 2 that would lead to more mergers being blocked, abandoned, or subject to remedies.

In this report, we demonstrate that the evidence presented by the DMT, which the UK Government relies on heavily in its consultation, does not support the conclusion that a lower evidential standard for intervention at Phase 2 is required. On the contrary, this proposal would result in significant unintended consequences, the harmful impact of which has been underestimated.

The evidence does not support a lowering of the standard of proof for mergers involving firms designated as having SMS

Three main arguments are made by the DMT. First, the DMT argues that given the 'characteristics of digital markets' and the reasons why potential SMS candidate firms acquire other firms, acquisitions by those firms can cause 'potential harm to competition and consumers' and give rise to 'particularly acute risks in the event of regulatory under-enforcement'.[5]

In this report, we explain how the DMT fails to properly account for the mechanisms through which firms in the digital sector create value and deliver benefits for consumers, including through M&A activity by large players. This omission undermines the DMT's conclusion that mergers involving large firms

[1] UK Government (2021), Consultation on a new pro-competition regime for digital markets, available at: https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets.
[2] DMT (2020), 'A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce', December. Henceforth, 'DMT'. We note that no firms have yet been designated as having SMS.
[3] DMT, Appendix F, para. 9.
[4] DMT, para. 1.11.
[5] DMT, Appendix F, paras 6, 12.

with digital activities should be presumed to be more problematic than mergers in the rest of the economy. We also explain that the DMT's recommendation to lower the evidential standard for an SLC finding, without a corresponding acknowledgement of the benefits of digital M&A activity, is a blunt tool that takes a one-sided approach to the reforms proposed by the Furman Review, giving rise to a considerable risk of over-enforcement.

Second, the DMT alleges 'widely-held concerns about historic under-enforcement against digital mergers in the UK and around the world',[6] citing statistics showing that over 400 acquisitions have been made by large firms globally over the last 10 years, none has been blocked, and many have not been scrutinised by competition authorities.

These concerns about under-enforcement are not supported by robust evidence. While some firms with digital activities have made significant numbers of acquisitions in the last decade, this fact alone does not demonstrate anticompetitive harm or evidence of under-enforcement. As noted by the Furman review, since 2013 the CMA's Mergers Intelligence Committee has considered whether close to 30 acquisitions by Amazon, Apple, Facebook, Google, and Microsoft should be called in for review, but determined that none of them warranted closer scrutiny.[7] Over the same period, the CMA has investigated—and, in some cases, blocked—other mergers involving firms with digital activities and novel/uncertain theories of harm.

Third, the DMT argues that there are '[p]otential limitations of the existing UK merger control regime' due to the uncertainty of forward-looking assessments in the types of markets where potential SMS candidates operate.[8]

Uncertainty in forward-looking assessments is not a good reason to lower the standard of proof in merger assessments. In fact, as explained in recent judgments by both the European Court of Justice and General Court, uncertainty would, if anything, call for a stricter rather than weaker standard of proof and much higher quality of evidence.[9]

Further, from an economic policy perspective, merger control as a policy tool cannot be seen in isolation from other policy tools that are available to a regulator or competition enforcer. Indeed, the CMA already has the power to conduct market investigations and impose far-reaching remedies if competition problems are found, based on proven evidence of an adverse effect on competition. Furthermore, the Government's proposals include a bespoke regulatory framework for SMS-designated firms. It is therefore unclear why lowering the evidential standards required for intervention in a Phase 2 merger is the appropriate way to deal with the inherent uncertainty that arises when making forward-looking assessments in fast-moving markets.

The DMT's proposals would result in unintended consequences

Lowering the evidential threshold at Phase 2 would result in the CMA clearing fewer mergers. This will likely lead to over-enforcement, denying mergers that are more likely than not to be benign or even pro-competitive. This may also

[6] DMT, para. 4.121.
[7] Report of the Digital Competition Expert Panel (2019), 'Unlocking digital competition', March, para. 3.46. Henceforth, 'Furman Review'.
[8] DMT, Appendix F, para. 16.
[9] Judgment of 15 February 2005, Commission v Tetra Laval, C-12/03 P, EU:C:2005:87; and Judgement of 28 May 2020, CK Telecoms UK Investment Ltd v European Commission (Case T-399/16).

have a 'chilling effect' on M&A involving digital activities, reducing investment and a jeopardising a key 'exit strategy' for investors in start-ups.

In section 4, we present two in-depth case studies where, based on a review of the evidence used by the CMA to make its original Phase 2 clearance decision, the new (and lower) evidential threshold would have likely resulted in the beneficial merger not being cleared. These case studies were picked because the parties were engaged in digital activities, and the acquiring party had a significantly larger turnover than the acquired party.

- **PayPal / iZettle (2019).** This case was referred to Phase 2 by the CMA and ultimately cleared without remedies under the current 'balance of probabilities' evidential standard. The CMA examined theories of harm regarding two markets: offline payments and omni-channel payments. In the case of offline payments markets, the evidence presented at Phase 2 strongly suggests that under the proposed SMS merger regime the CMA would have found a realistic prospect of SLC, which would have led to the merger being blocked, abandoned, or subject to remedies. The evidence on the omni-channel theory of harm is more mixed, but it is possible that a realistic prospect of SLC would have been found at Phase 2. Intervention at Phase 2 may have reduced or eliminated significant 'synergies including increased sales volumes and cost savings', which the CMA acknowledged in its assessment of the valuation of the transaction.[10]

- **Amazon / Deliveroo (2020).** This case was also referred to Phase 2 and then cleared under the current evidential standard. The evidence strongly suggests that the CMA would have intervened at Phase 2 under the proposed SMS merger regime. If the transaction was blocked or abandoned, this may well have limited Deliveroo's ability to compete more effectively in future with the two main players in what the CMA found to be a relatively concentrated market. Amazon was considered by the CMA to be a patient, long-term investor compared to Deliveroo's other shareholders. The CMA also noted, 'We consider that Amazon has significant direct operational experience in areas that are highly likely to be relevant to Deliveroo's business'.[11] Deliveroo's management is likely to have benefited from this knowledge, as Amazon has had the opportunity to participate in business decisions through its board member, allowing Deliveroo to compete more effectively. These benefits may be reduced or eliminated if the CMA intervened at Phase 2 under the proposed regime.

We also carried out smaller-case studies of Just Eat / Hungryhouse (2017) and Nielsen / Ebiquity (2018). In both instances, we found that if it were applied to these cases, the proposed SMS merger regime would lead to harmful unintended consequences—for example, by removing cost synergies and efficiencies.

The CMA can achieve its stated aims through a combination of its existing powers and the new ex ante regulatory regime

The CMA's current powers are already sufficiently powerful and flexible to address concerns that it may have about mergers involving large firms with digital activities.

Existing jurisdiction and procedural powers already enable the CMA to intervene decisively in mergers involving global firms, with strong information-

[10] CMA (2019), PayPal/iZettle Final Report, para. 11.
[11] Amazon / Deliveroo Phase 2 decision, footnote 131.

gathering powers and the power to freeze and even unwind completed deals. The CMA has also shown in recent years that the existing Phase 2 regime can take into account the specific economic context when tackling the substantive issues in a case,[12] and that it can assesses and—where necessary—block mergers when the theories of harm are complex or forward-looking.[13]

Combined with the CMA's existing market investigation powers and the Government's proposals for a bespoke regulatory framework, the CMA would have sufficiently powerful and flexible tools to address potential competition concerns that could materialise in the future.

[12] For example, see Sainsbury / ASDA (2019).
[13] For example, see, Intercontinental Exchange / Trayport (2017).

1 Introduction

The UK Government is seeking feedback on proposals for a new pro-competition regime for digital markets. This includes proposals for a dedicated merger regime for firms with Strategic Market Status (SMS). The proposals can be broadly classified in two groups.

1. Enhancing the reporting and notification requirements for SMS firms (all mergers to be reported to the CMA; broader jurisdiction for the CMA to review mergers; and the largest transactions to undergo mandatory merger reviews).

2. Lowering the Phase 2 threshold for intervention in mergers involving firms designated with SMS from a 'balance of probabilities' to a 'realistic prospect' of a substantial lessening of competition (SLC).

Both of these proposals, and particularly the second, closely follow the recommendations of the Digital Markets Taskforce (DMT) for a distinct merger control regime for SMS firms. Indeed, in December 2020 the Digital Markets Taskforce (DMT) proposed several amendments to the UK's existing merger regime. Recommendation 10 of the DMT is to have a distinct merger control regime for SMS-designated firms. Recommendation 11 details what this merger control regime should look like.

This includes, for notified transactions involving firms that have been designated with SMS, a lower and more cautions standard of proof to be applied in Phase 2, meaning that mergers where there is a 'realistic prospect' of an SLC could be blocked.

Amazon commissioned Oxera to examine the rationale and evidence presented by the DMT in support of a lower standard of proof, and to assess whether the proposal is an appropriate and proportionate response to the concerns that have been raised.

This report will demonstrate that the case for a more cautious standard of proof at Phase 2 has not been made. On the contrary, the DMT's proposals for an SMS merger regime may lead to unintended consequences, the harm of which has been underestimated.

Structure of this report

This report is structured as follows:

- **section 2** summarises the DMT's proposals and rationale;
- **section 3** critically reviews the rationale and evidence presented by the DMT to justify its proposal, and concludes that the DMT's proposal is not sufficiently evidence-based;
- **section 4** outlines the unintended consequences of the proposals;
- **section 5** argues that the CMA can achieve its stated aims through a combination of its existing powers and the new ex ante regulatory regime.

2 Summary of the DMT's proposals and rationale

In this section, we summarise the DMT's proposals and outline the DMT's rationale for them, which the UK Government relies on heavily in its consultation. Our critique of the DMT's proposals and rationale can be found in the remainder of this report.

2.1 The DMT's proposals

The DMT proposed several amendments to the existing merger regime. Recommendation 10 of the DMT is to 'establish the SMS regime such that SMS firms are subject to additional merger control requirements'.[14]

This regime would have three new elements compared with the merger control regime applicable to all other firms in the economy, as described in Recommendation 11:[15]

> The government should establish the SMS merger control regime such that SMS firms are required to report all transactions to the CMA. In addition, transactions that meet clear-cut thresholds should be subject to mandatory notification, with completion prohibited prior to clearance. Competition concerns should be assessed using the existing substantive test but a lower and more cautious standard of proof.

Thus the DMT proposals regarding a new SMS merger regime are:

- enhanced reporting and notification, such that all merger and acquisition (M&A) activity by SMS-designated firms would need to be reported to the CMA;
- transactions meeting certain value thresholds subject would be subject to mandatory notification and a prohibition on closing;
- for notified transactions, a lower and more cautious standard of proof would be applied in Phase 2, meaning that mergers where there is a 'realistic prospect' of an SLC would be blocked.

The proposal for a 'realistic prospect' standard of proof is a lower (i.e. more cautious) standard than the current standard of proof, which requires showing that an SLC is 'more likely than not' (also known as the 'balance of probabilities' standard). We outline the change to the standard of proof in more detail in Box 2.1 below.

[14] DMT, p. 55.
[15] DMT (2020), 'A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce', December, p. 58.

Box 2.1 Summary of the DMT's proposal for a lower standard of proof

Currently, the CMA tests whether a merger will cause an SLC—the 'substantive test'. In assessing this test, the CMA must reach a certain standard of proof (also known as the 'evidential threshold').

Following a Phase 1 investigation, if the CMA believes that there is a 'realistic prospect' of an SLC, then it has a duty refer the merger for a Phase 2 investigation.[16] Realistic prospect has been clarified to mean 'a greater than fanciful chance' of an SLC occurring (as stated in the CMA's Merger Assessment Guidelines). The purpose of Phase 1 is to 'screen' whether the merger should undergo a more thorough Phase 2 investigation.

At Phase 2, the standard of proof is higher—for the CMA to intervene, the chances of an SLC occurring must be 'more likely than not' (i.e. on the 'balance of probabilities').

In this context, recommendation 11 of the DMT is as follows.

> The government should establish the SMS merger control regime such that SMS firms are required to report all transactions to the CMA. In addition, transactions that meet clear-cut thresholds should be subject to mandatory notification, with completion prohibited prior to clearance. **Competition concerns should be assessed using the existing substantive test but a lower and more cautious standard of proof**. [emphasis added]

Specifically, the DMT's proposal is that where one of the merging parties has SMS, the CMA would be required to intervene at Phase 2 if there is a 'realistic prospect' of an SLC. This would be a 'lower and more cautious standard of proof' than currently required at Phase 2 (i.e. 'more likely than not').

Source: DMT (2020), 'A new pro-competition regime for digital markets: Advice of the Digital Markets Taskforce', December. CMA (2021), 'Merger assessment guidelines', March.

2.2 The rationale for the DMT's proposals

The DMT's rationale for the proposals for the lower standard of proof is underpinned by a number of different points.[17] Indeed, the DMT outlines its case several times (in the main report and in Appendix F), with different ordering, emphasis and language.

Our summary below—in three main points—is intended as an objective reflection of the DMT's main arguments, distilled from throughout the DMT's report.

First, the DMT argues that given the 'characteristics of digital markets' and the reasons why large firms with digital activities acquire other firms, such acquisitions can cause 'potential harm to competition and consumers'.[18]

The DMT starts by arguing that:[19]

> […] acquisitions by the most powerful digital firms are likely to hold particular risks for consumers, and give rise to particularly acute risks of regulatory under-enforcement.

The DMT describes certain 'characteristics of digital markets' to lay the groundwork for this argument. According to the DMT, these characteristics can lead to barriers to entry, due to:[20]

[16] Subject to certain exceptions, such as markets of insufficient importance, and cases where relevant customer benefits outweigh the adverse effects of the SLC.
[17] The DMT's arguments can be found in paras 4.120–4.159, and Appendix F.
[18] DMT, Appendix F, paras 6, 10, 12.
[19] DMT, Appendix F, para. 6.
[20] DMT, Appendix F, para. 8.

> […] specific market features such as network effects and economies of scale, consumer decision-making and the power of defaults, unequal access to user data and lack of transparency.

In the context of these alleged barriers to entry, the DMT argues that 'the most powerful digital firms' are vertically integrated and have 'large ecosystems' around their core offering; ecosystems which may be created by such a firm to 'insulate it from competition'.[21] The DMT also argues that these markets are often 'subject to tipping, with a winner taking most of the market'.[22]

Given these market characteristics, the DMT argues that one of the main reasons why large firms with digital activities acquire other firms is to hinder competition. The DMT discusses two mechanisms for how this could occur.

1. The DMT states that strategic M&A activity by 'the most powerful digital firms' is used to 'build and strengthen their ecosystems'.[23] It argues that 'large digital firms' use ecosystems to protect their 'core service from competition'.[24]

2. The DMT also states that 'acquisition targets are often at an early stage of their development', raising concerns about the loss of 'dynamic or potential competition'.[25] It cites the Stigler Report in stating its concerns that acquisitions of 'very small entrants' by a 'dominant platform' can damage competition.[26] The Furman Review calls these 'killer acquisitions'.[27]

The DMT then makes the link from market characteristics and the purpose of acquisitions by these large firms to 'potential harm to competition and consumers', as a result of M&A activity by such firms.[28]

The DMT argues that this harm could materialise as: 'lower levels of innovation and choice, lower service quality, as well as higher-priced goods and services across the economy'.[29] The DMT also argues that '[h]arms to innovation from mergers can result in potentially large losses to consumers', and that M&A activity by large firms with digital activities 'can also affect quality in choice in adjacent markets, leading to further losses for consumers'.[30]

Therefore, the DMT argues that there are 'particularly acute risks in the event of regulatory under-enforcement'.[31]

Second, the DMT alleges 'widely-held concerns about historic under-enforcement against digital mergers in the UK and around the world'.[32]

As evidence, the DMT cites the Stigler Report and the Furman Review.[33] The Furman Review found that:[34]

> Over the last 10 years the 5 largest firms have made over 400 acquisitions globally. None has been blocked and very few have had conditions attached to

[21] DMT, Appendix F, para. 9. DMT, para. 4.122.
[22] DMT, Appendix F, para. 9.
[23] DMT, Appendix F, para. 10.
[24] DMT, para. 2.6.
[25] DMT, para. 2.6. DMT, Appendix F, para. 14
[26] DMT, Appendix F, para. 15.
[27] Furman Review, para. 1.137.
[28] DMT, Appendix F, para. 12.
[29] DMT, Appendix F, para. 13.
[30] DMT, Appendix F, para. 15.
[31] DMT, Appendix F, para. 12.
[32] DMT, para. 4.121.
[33] DMT, para. 4.121.
[34] Furman Review, p. 12.

> approval, in the UK or elsewhere, or even been scrutinised by competition authorities.

Further, according to the DMT, an important factor explaining the under-enforcement is the fact that there is uncertainty in how acquired firms may develop in future (absent the merger):[35]

> Firms are acquiring targets that are at an early stage of their development, making it difficult for competition authorities to assess whether (and how) the acquired firm is likely to develop into a competitor.

This point is expanded on by the DMT when it discusses the limitations of the existing merger regime in the UK.

Third, the DMT argues that there are '[p]otential limitations of the existing UK merger control regime',[36] in particular due to the uncertainty of forward-looking assessments in the types of markets where potential SMS candidates operate.

Given the focus of this report, we will concentrate here on (only) one alleged limitation identified by the DMT: that it can be difficult to establish an SLC at the current standard of proof ('balance of probabilities'), 'even if the potential harm is very large'.[37] The DMT argues that this is because of the uncertainty around forward-looking assessments in the types of markets where potential SMS candidates operate:[38]

> In each case, a forward-looking assessment is required. This can be particularly challenging where a merger involves the acquisition of a target business at an early stage of its development of where markets are rapidly evolving. In such circumstances, the competitive significance of the target can be difficult to assess, and there can be significant uncertainty about how the target, and the market more generally, is likely to develop in future.

The DMT argues that this gives rise to under-enforcement ('false negatives').[39]

The DMT also argues that the CMA would typically consider 'historic evidence such as market shares or switching data', but that '[t]his type of evidence will typically be less informative when assessing theories of harm based on future developments'.[40] The DMT states that the CMA has therefore 'increasingly interrogated merging parties' internal documents'.[41] However, it argues that this approach 'raises risks that merging parties may take the possibility of merger review into account in their internal documents and communications, limiting the weight that can be attached to them'.[42]

The following sections of this report focus on our assessment of the DMT's rationale. In particular, we find that the case for a lower evidential standard at Phase 2 has not been made. On the contrary, the DMT's proposals for an SMS merger regime may lead to unintended consequences, the harm of which has been underestimated.

[35] DMT, Appendix F, para. 11.
[36] DMT, Appendix F, para. 16.
[37] DMT, Appendix F, para. 21.
[38] DMT, Appendix F, para. 23.
[39] DMT, Appendix F, para. 25.
[40] DMT, Appendix F, para. 26.
[41] DMT, Appendix F, para. 26.
[42] DMT, Appendix F, para. 26.

3 The evidence does not support a lowering of the standard of proof for mergers involving firms designated with SMS

In section 2.2 we summarised the DMT's rationale for the proposals in three main points. Here, we critically review each point in turn.

Section 3.1 critiques the DMT's argument that the characteristics of large firms with digital activities and their M&A activity give rise to acute risks of harm to competition and consumers. We find significant evidence of value creation and benefits to consumers that have been overlooked, undermining the DMT's conclusion that mergers involving large firms with digital activities should be presumed to be more problematic than mergers in the rest of the economy.

Section 3.2 challenges the view that the statistics showing large numbers of unchallenged M&A activity constitutes evidence of historic under-enforcement.

Section 3.3 rebuts the idea that uncertainty in predicting how markets with digital activities might evolve in the future is a good reason to lower the standard of proof.

Overall, we find that the evidence presented by the DMT does not support the conclusion that a lower evidential standard for intervention at Phase 2 is required.

3.1 The evidence does not support the contention that mergers involving large firms with digital activities are a priori more problematic than others

In this section we critically assess the DMT's argument that the characteristics of large firms with digital activities and their M&A activity gives rise to acute risks of harm to competition and consumers.

We start in section 3.1.1 by noting that not all potential SMS candidates have the characteristics described by the DMT. even when they the characteristics are present, they are not all equally relevant to each firm's business model. It is therefore not obvious why an SMS designation should automatically result in a lower standard of proof under merger control, irrespective of the firm involved.

In section 3.1.2, we explain that by focusing primarily on the potential for large firms with digital activities to cause harm, the DMT fails to properly account for how such firms' activities can create value and benefits for consumers and business users, including when undertaking M&A activity. A more rounded assessment of the evidence leads us to conclude that there should be no a priori presumption that mergers involving large firms with digital activities are more problematic than others.

Finally, in section 3.1.3, we explain that the DMT's proposal to lower the standard of proof for harms, without a corresponding acknowledgement of the benefits, will give rise to a considerable risk of 'false positives' (over-enforcement). We illustrate this by showing how the DMT's proposal takes a very one-sided approach to what the Furman review panel was proposing.

3.1.1 Not all potential SMS candidate firms are the same

The DMT argues that digital activities are characterised by certain features, such as 'barriers to entry', 'network effects' and 'economies of scale', and are

'subject to tipping', while also noting that the largest firms have 'large ecosystems'.[43]

However, the DMT does not appear to recognise that firms with digital activities are not homogeneous. The extent of any direct or indirect network effects will differ from business to business. In some markets consumers have a higher propensity to multi-home than in others. In some of these sectors, direct network effects are not core to the business model, and thus are unlikely to exhibit the potential harms identified by the DMT, such as tipping.

Indeed, extensive multi-homing across providers and low costs of switching between firms reduce concerns around markets 'tipping'. The point that competitive concerns about markets vary based on multi-homing and switching behaviour is well-supported by the literature, as explained by Cabral et al. (2021):[44]

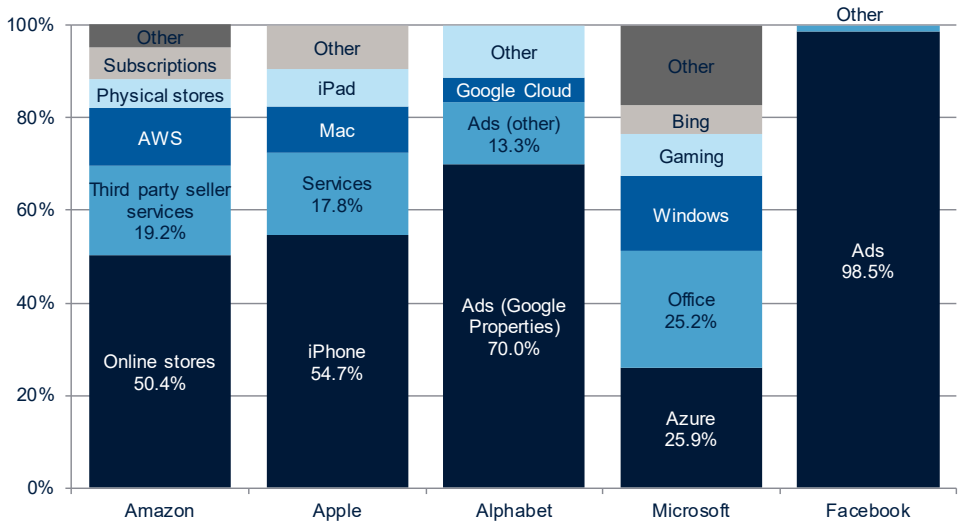
> We add that, in the platform economics literature, entrenched market power is often measured by the extent and cost of multi-homing. More competition and substitution on one side of the platform market can reduce its market power on that side. […] For example, consumers can often easily multi-home between competing e-commerce or ride-sharing platforms. Switching costs for sellers on these platforms are also relatively low. By contrast, multi-homing between smartphone operating systems is costly for consumers (implies buying a new phone), while user benefits are low since most popular apps are available in the leading app stores of both operating systems.

It therefore does not naturally follow that all sectors with digital activities are 'subject to tipping'. Similarly, the importance of consumer data varies by sector. Some digital activities (such as cloud computing) do not rely on the monetisation of consumer data (e.g. for advertising).

Equally, the proposed SMS merger regime does not recognise that large firms with digital activities are heterogeneous. For similar reasons as set out above, such firms are active in a variety of diverse sectors, operating different business models. For example , firms differ in respect of their monetisation strategy, as shown in Figure 3.1 below. Whereas Apple relies heavily on the sale of physical devices (iPhones, iPads and Mac laptops and computers), Google (Alphabet) and in particular Facebook are primarily funded by advertisements. In the case of Amazon, a large source of its revenue comes from the sale of both physical and digital products through amazon.com,[45] including sales by third-party sellers. Microsoft's revenues, on the other hand, are diversified into a mix of hardware, software and services.

[43] DMT, Appendix F, paras 8-9. DMT, para. 4.122.
[44] Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., and Van Alstyne, M. (2021), 'The EU Digital Markets Act: A Report from a Panel of Economic Experts', a report by the Joint Research Centre, p.9.
[45] And other Amazon sites such as amazon.co.uk and amazon.de.

Figure 3.1 Revenues of Amazon, Apple, Alphabet, Microsoft, and Facebook, split by activity



Source: Visual Capitalist (2020) https://www.visualcapitalist.com/how-big-tech-makes-their-billions-2020/

Note: The data in the chart is based on 2019 SEC filings but the revenue percentages have not been confirmed by the five firms listed.

Large firms with digital activities will also differ in respect to their degree of openness to third parties. Firms operating multi-sided platforms will adopt a level of openness that balances the trade-off between encouraging complementary innovations to be made on the platform against the potential loss of control over quality and reliability. This gives rise to differences in the way, for example, that Google makes its Android OS available for third-party manufacturers to integrate into their mobile phones, whereas Apple restricts the use of the iOS exclusively to its iPhones. However, both Google and Apple rely heavily on third-party app developers to bring content directly to users through their respective app stores (Google Play and the Apple App Store).

These differences in business model can give rise to very different incentives and mechanisms through which both harms and benefits can materialise. It is therefore not obvious why, if a firm is designated as having SMS in a particular activity, a different merger standard of proof should automatically be applied to them, without taking into account the specific characteristics and features which led the DMU to designate them.

Indeed, the CMA Chief Economist Mike Walker has said publicly that the UK proposals for a 'bespoke' code of conduct for each firm that is designated as having SMS is a more appropriate way to regulate than the EU Digital Markets Act, which proposes 'one size fits all' black lists and grey lists of problematic conduct.[46] Given that the differences between large firms with digital activities justify a tailored approach to the proposed code of conduct, then we would expect a similar approach to merger policy.

[46] GCR (2020), 'CMA chief economist: DMA will capture more platforms than UK proposals', https://globalcompetitionreview.com/digital-markets/cma-chief-economist-dma-will-capture-more-platforms-uk-proposals

3.1.2 An understanding of how large firms with digital activities create value for their users, including via M&A activity, has not been properly taken into account

The DMT's assessment of the characteristics of digital activities focuses primarily on the potential for large firms with digital activities to cause harm. However, significantly less attention has been paid to how the activities of these firms, including M&A, can create considerable benefits for consumers and business users.

This was the subject of a recent study by Oxera which examined the academic literature (including economics, management science, and information technology) to shed light on the practices that digital firms use to help create this value for their users.[47]

As explained in more detail in that study, to differing extents, reflecting their different business models, firms with digital activities make use of direct and indirect network effects to unlock scale for businesses while reducing transaction costs; they bring together complementary features through bundling and product integration to realise economies of scope; and they foster innovation by opening up parts of their ecosystem to third parties.

Similarly, firms with digital activities that operate platform businesses can create value in a range of ways: from providing better matching between consumers and business to creating a core infrastructure on which developers can build software, and/or enabling social interactions.

Overall, the study found that such firms are more than just neutral intermediaries helping users reach and/or interact with each other; rather, they also take an active role in the creation, design and governance of the markets in which they operate. This intervention is sometimes seen by regulators as raising concerns; however, it can be a means by which firms are able to stimulate competition and create value for users.[48]

The DMT has furthermore argued that there is 'potential harm to competition and consumers' as a result of M&A activity by large firms with digital activities.[49]

However, as we explain below, a vast body of literature and empirical evidence exists suggesting that M&A activity between larger firms and smaller entrants can also create significant value for consumers. The DMT has not appropriately accounted for this in its analysis.

Mergers and acquisitions can stimulate innovative entry

When innovative firms enter the market, early investors and entrepreneurs naturally expect returns on their (often very risky) capital investments. Broadly,

[47] See Oxera (2021), 'How platforms create value for their users: implications for the Digital Markets Act', commissioned by the Computer and Communications Industry Association (CCIA).
[48] Often platform architecture is characterised by a set of 'core' components with low variety (i.e. the platform itself) and a set of 'peripheral' components or features with higher variety (often products or services provided by contributors). By coordinating across the various parties, platforms bring together complementary features and services for the end-consumer, which increases the overall value of the platform to the user. This inherent modularity enables one platform to adapt a broad range of changing consumer tastes. See discussion in Baldwin and Woodward 2009. Platforms have an important role in promoting quality and trust in their ecosystem. This enhances their brand reputation, while providing value and convenience for consumers. See Evans, 2011. This often entails platforms having a governance role in order to control the levels of access provided to third parties.
[49] DMT, Appendix F, para. 12.

early investors can look for returns in two ways: firstly, through profits driven from organic growth; and secondly through an 'exit strategy', whereby owners sell their shares in a merger, IPO, or alternative. The Furman Review recognises that being acquired by another firm can be an important exit strategy for entrants and thus create an incentive for innovative start-ups to enter the market:[50]

> Being acquired is also an important exit strategy for technology start-ups, providing significant incentive for investors to provide funding to risky projects and support market entry.

Early investors will actively consider the potential for exit strategies before investing in start-ups. They will assess whether these strategies enable sufficient returns, while keeping their investment horizons (reasonably) short and liquid.[51] Indeed, the most popular exit strategy for venture capital funds (a particular type of early investor) is mergers and acquisitions.[52] Thus, if the most common exit strategy is severely limited by competition authorities applying stringent merger controls, then early investors and entrepreneurs could be less willing to pursue risky projects, as indicated by a recent survey of VC investors.[53] This may have serious implications on start-ups and innovators.[54]

A more lenient merger policy can stimulate entry by facilitating exit strategies and thus raising the value of entry.[55] In this context, even horizontal mergers that appear anticompetitive in the short run can stimulate entry sufficiently such that consumer welfare is increased overall. Empirical evidence also supports these findings. For example, in industries with high levels of acquisition activity, entrants invest more in innovative R&D.[56] This suggests that mergers and acquisitions boost innovative entry.

This phenomenon of acquisitions stimulating innovative entry can be observed in the growth of start-ups focusing on machine vision or other general purpose technologies that can be integrated into products such as driverless cars.[57] For example, Aurora (Uber's self-driving subsidiary) has recently acquired a number of lidar start-ups.[58] This technology uses pulses of light outside the visual spectrum to build a 3D snapshot of everything within range of a sensor. Similarly, Tesla has acquired a number of machine vision start-ups, most recently DeepScale in 2019.[59] These start-ups may never have entered the market, nor received funding, were it not for the possibility of being acquired. This is because such back-end technologies are not particularly valuable unless they can be integrated into a larger product.

In addition to stimulating the *levels* of innovation and entry, mergers are likely to impact the *type* of innovations that are pursued. Specifically, mergers are

[50] Furman Review, para. 1.102.
[51] For example, see, discussion of venture capital funds in Gau et al. (2015): 'there is a strong link between the decisions concerning investment and duration and the exit route finally chosen by the start-up.'
[52] According to KPMG's Venture Pulse 2021Q2 Report, p. 15.
[53] See Coadec survey results, summarised by Butcher, M. (2021) in TechCrunch.
[54] We note that there is a caveat to this argument: Kamepalli et al. 2020 find that, under certain specific conditions, third-parties may not join a new entrant's platform if they think that the entrant will be acquired by an incumbent platform (due to high switching costs and strong network effects).
[55] Mason and Weeds (2013)
[56] Phillips and Zhdanov (2013)
[57] https://www.forbes.com/sites/robtoews/2021/02/28/a-wave-of-billion-dollar-computer-vision-startups-is-coming/
[58] https://techcrunch.com/2021/02/26/aurora-acquires-a-second-lidar-company-in-push-to-bring-self-driving-trucks-to-the-road/
[59] https://techcrunch.com/2019/10/01/tesla-acquires-computer-vision-startup-deepscale-in-push-towards-autonomy/

likely to encourage more radical (yet riskier) innovations.[60] This is because the incumbent will typically only acquire the most innovative firms, and thus entrants have an incentive to pursue more ambitious projects.[61]

Last, as outlined in section 2.2, one of the concerns raised by the Furman Review is that of 'killer acquisitions', and the DMT is also concerned about the acquisition of 'very small new entrants' by a 'dominant platform'.[62] These concerns are not supported by the academic literature. For example, Gautier and Lamesch (2020) analyse 175 acquisitions by Google, Apple, Facebook, Amazon and Microsoft over a three-year period looking for so-called 'killer acquisitions', and find that only one of those acquisitions could potentially be called a 'killer acquisition' (Facebook / Masquerade, 2016).[63]

Mergers and acquisitions can encourage the development and roll-out of innovations

The economics and management literature highlights the beneficial impact of mergers in the development and roll-out of innovations. In particular, mergers of complementary firms in the digital sector are effective at bringing innovations to market. Under the DMT's proposals, the merger review process would have a much higher risk of prohibition at the end of the process. This could have a chilling effect on benign or even pro-competitive acquisitions that would have taken a new and innovative product to market.

The Furman Review recognises this argument:[64]

> New innovations may be brought to market more quickly and effectively by a firm that has the capacity, financial means, and the experience to do so. Many acquisitions may result in products being brought successfully to a mass market that would otherwise have failed or achieved only a niche market position.

Mergers allow innovations to be integrated with pre-existing products, adding value for consumers. As discussed above, some of the firms likely to be covered by the SMS regime are characterised by a high level of modularity. While it does not apply to all, some of these firms could act as diverse multi-product ecosystems. This structure lends itself particularly well to bringing new innovations to market as it introduces strong synergies between complementary products.

Mergers, including those involving large firms with digital activities, can generate strong 'demand side synergies' (i.e. synergies that boost demand from consumers). This happens when integration enables linkages between two complementary technologies, boosting usability or lowering transaction costs.[65] For example, the integration of the Siri voice assistant into Apple's existing iPhone ecosystem adds value over and above a standalone voice assistant product. We explore the Apple/Siri merger further in Box 3.1 below.

Such mergers can also enable knowledge transfers between the two merging firms. This sharing of knowledge may enable greater innovation than would be

[60] Henkel et al. 2014.
[61] We note that there is some uncertainty around this finding. Others (for example Bryan and Hovenkamp 2019, Gilbert and Katz 2021) find that mergers encourage entrants to pursue innovations that complement the incumbent firm and overlook more radical innovations.
[62] DMT, Appendix F, para. 15.
[63] Gautier, A. and Lamesch, J. (2020), 'Mergers in the digital economy', CESifo Working Paper No. 8056.
[64] Furman Review, para. 3.38.
[65] Bourreau and de Streel, 2019, section 2.1.2(ii).

possible in two separate firms. Economists call these 'supply side synergies'.[66] These supply side synergies are particularly strong in relation to new product development.[67] For example, if a firm accumulates (or acquires) knowledge on artificial intelligence, this knowledge could be used across a wide variety of products and services. By way of another example, firms that operate platforms may acquire other firms in order to increase trust in their platform.

The magnitude of these supply-side synergies can be large. A number of empirical studies have shown that mergers between firms with technological linkages tend to boost expenditure in R&D and the number of innovative patents that are filed.[68]

The acquirer (which may have complementary digital activities) may also have more incentives to develop innovations than the firm being acquired.[69] For example, an innovation may be more valuable if it can be bundled with a service where there may be existing economies of scale and network effects.[70]

Box 3.1 Case study: Apple acquisition of Siri demonstrates how mergers can roll out innovation

Siri, the voice-activated virtual assistant on Apple devices, represents how large firms with digital activities are able to develop and scale new technologies, and bring them to a large consumer market.

Siri began as a research project at SRI in Menlo Park, California, with funding from the US Federal Government's DARPA. In the early 2000s, SRI was awarded a grant to develop an intelligent computer assistant under DARPA's Perceptive Assistants that Learn program. This project was spun out of SRI in 2008 under the name Siri, and sought funding which brought in $24 million, allowing them to work on an app that could be taken to a mass market. With the advent of the iPhone, 3G mobile data, and voice recognition technology, Siri was released in early 2010 on Apple's App Store, and less than three months later Apple purchased Siri and brought it in-house. While Apple never publicly stated the transaction value, some estimates range between $150m-$250m. Within the next year, Apple and Siri's founders integrated Siri with iOS 5 and brought it to millions of consumers worldwide.

Apple was able to bring the Siri function to a large market by integrating it with iOS, allowing users to take full advantage of the voice recognition function, as Siri could be used instantly without the user having to unlock their device. The user's ability to speak into their phone, looking for information or to undertake a task, and receive an intelligent answer complemented the increasing utility of iPhones in consumers' lives. Over the last decade, Siri has been rolled out to millions of Apple's smartphones, tablets, smart watches and laptops. Furthermore, Apple established a market that Microsoft, Google and Amazon have entered and established themselves as strong competitors.

The incentives present in the development of Siri highlight the possible benign effects of mergers involving large firms with digital activities. After it was spun out of SRI, Siri attracted $24 million in funding from private venture capital. These funds were put to use improving the product, especially applying the technology to a user-friendly app in the nascent smartphone market. Siri's developers specifically targeted a place in this new smartphone ecosystem, and with this in mind both the developers and investors could seek a buyout exit from a larger tech firm. Within three months of being listed on the App Store in 2010, Apple had bought the firm for a figure estimated by some to be between $150 and $250 million, yielding a return for those investors of between 6x and 10x their initial investment. The ability of Apple to make such a purchase quickly and efficiently could have initially incentivised the investors to fund and develop Siri, and subsequently Apple, as an established firm, was possibly able to bring these benefits to consumers faster and on a larger scale than if Siri had expanded via the standalone app. The case of Siri and Apple stand as an example as to how acquisitions might generate the incentives to innovate and invest, improve the roll-out of a technology, and lead to large consumer benefit.

[66] These exist due to the presence of sharable inputs in the production process, i.e. inputs that can be used to produce one output, and can also be re-used to produce other (potentially unrelated) outputs.
[67] Bourreau and de Streel, 2019, section 2.1.2(i).
[68] Bena and Li (2014), Sevilir and Tian (2014).
[69] Gautier and Lamesch (2020)
[70] Bourreau and de Streel 2020, for CERRE

Source: Xconomy (2010), 'The Story of Siri, from Birth at SRI to Acquisition by Apple—Virtual Personal Assistants Go Mobile', 14 June. SRI International (2020) '75 Years of Innovation: Siri', 30 April. TechCrunch (2010), 'Silicon Valley Buzz: Apple Paid More Than $200 Million For Siri To Get Into Mobile Search', 28 April. TechRepublic (2021), 'Apple's Siri: A cheat sheet', 9 June. Futuresource Consulting (2020).

Acquisitions allow for more efficient investment in innovative firms

An established problem in finance and economics is information asymmetry between investors and entrepreneurs: entrepreneurs know more about their prospects for success, so external investors may not always pick projects wisely. Mergers can overcome this information asymmetry, allowing the investor (i.e. the acquiring firm) to better evaluate the success prospects for each project as the target firm continues to develop. This structure provides funding to innovations that might otherwise never reach the market.[71]

3.1.3 The DMT is proposing the use of a blunt tool that will result in a significant risk of 'false positives' (over-enforcement)

The DMT's proposal will make it easier to find an SLC but remains entirely silent on how an assessment of the benefits of a merger will play a role in the new framework. In light of the vast body of literature and evidence presented above on how large firms with digital activities can generate benefits for their users through M&A activity, the proposal is a blunt tool that takes a one-sided approach to the reforms proposed by the Furman Review and can therefore cause more harm than good through over-enforcement.

It is noticeable in this regard that the DMT rejects the Furman Review's proposal of a 'balance of harms' approach on the basis that it would 'go further than is necessary to address the particular concerns that arise from SMS mergers [as it] ignores that many transactions entered into by SMS firms are likely to be competitively benign'.[72]

However, as we show below, the opposite is actually true—it is the DMT's proposal that goes further than necessary. Whereas we agree with the DMT that there can be considerable practicable challenges with the implementation of a 'balance of harms' approach—not least the need to assess and quantify the harms and benefits of multiple different scenarios—that approach did explicitly incorporate the benefits of a merger in the substantive assessment of the transaction. As described in the Furman Review: [73]

> **The magnitude and likelihood of potential benefits of the merger would also in principle be taken into account.** To the extent that these will be passed through to consumers, and especially to the extent they involve enhancements to valuable innovation, **these should be set against any harm from the merger**. [emphasis added]

The Furman Review furthermore noted that this type of analysis is familiar, as it follows the methodology of tried-and-tested cost–benefit analysis (CBA), which is widely used within government:[74]

> The balance of harms test would have similarities with the government's recognised approach for making regulatory decisions, which draws on the principles of cost-benefit analysis. This can combine qualitative and quantitative analysis and judgements, with various techniques for addressing the challenges

[71] See Fumagalli, Motta and Tarantino (2019), Borreau and de Streel (2019).
[72] DMT, Appendix F, para. 104.
[73] Furman Review, para. 3.91.
[74] Furman Review, footnote 18.

> of uncertainty. This approach is frequently used for significant and complex government decisions, for example for public health proposals, environmental protection, or major infrastructure investment.

By contrast, the DMT proposal lowers the standard of proof applicable exclusively to the assessment of harm, without a corresponding balancing of effects against the benefits of a merger. Of course, it may still be possible for the parties to adduce merger efficiencies; however, the standard of proof for establishing such efficiencies is often very high and clearance on the basis of efficiencies is extremely rare.[75] The DMT is not proposing any changes to that aspect of merger control.

Furthermore, unlike the proposal made in the Furman Review, the DMT proposal does not envisage a role for the quantification of harm, especially when the probability of such harm is expected to be low. Hence, there is a considerable risk that mergers where an SLC is found to be a 'realistic prospect' under the DMT's standard of proof, but where the quantum of the harm is not particularly large, could still be subject to intense scrutiny and potentially blocked. Indeed, as the Furman Review notes,[76]

> **Being alert to the threat of killer acquisitions does not mean assuming all purchases of small firms by big firms pose a special threat, even in digital markets**. The point is that the CMA should develop and use a clearer framework for looking beyond current market conditions to examine how the transaction might affect future innovation and consumer welfare. This requires understanding the kinds of facts that indicate a transaction poses risks. It involves articulating the conditions under which those risks will lead to action against the merger, and putting this into practice in cases. [emphasis added]

In sum, the DMT appears to have taken a position (without supporting evidence) that the harm from mergers by large firms with digital activities will in general be large, and hence, that a lower standard is required to make sure these mergers are blocked. No corresponding acknowledgement of the benefits of these mergers is provided.

This creates a significant risk of over-enforcement ('false positives') and harmful unintended consequences and goes much further than what the Furman Review proposed as shown in Table 3.1 below. This is notwithstanding the fact that, as we argued above and in the rest of this report, the overall body of evidence does not support a change in the standard of proof for mergers involving potential SMS candidates.

[75] According to the Merger Assessment Guidelines, 'Merger efficiencies must be timely, likely and sufficient to prevent an SLC'. According to Linklaters, 'the CMA (and before it the OFT) has not cleared a merger on this basis since the current legislation came into force in 2003.' https://www.linklaters.com/pdfs/mkt/london/LIN_Law_and_Practice_Merger_Control_Brochure_FINAL.pdf

[76] Furman Review, para. 3.54.

Table 3.1 Misalignment between the Furman Review and the advice of the DMT

		Benefits to consumers	
		Low expected benefits arising from the merger*	**High expected benefits arising from the merger***
Harms to competition	**'Realistic prospect' of an SLC arising from the merger**	Furman Review: unclear, depends on expected quantum of harm vs. benefits. DMT proposals: do not clear merger. ? Proposals may or may not be aligned: the decision is finely balanced.	Furman Review: likely to clear merger, unless quantum of harm is significant. DMT proposals: unlikely to clear merger, unless benefits can meet efficiencies defence threshold. ✘ Proposals are misaligned: the Furman Review would likely clear the merger; but the DMT would not, which would result in consumers missing out on the high expected benefits of the merger (i.e. over-enforcement).
	SLC arising from the merger is 'more likely than not'	Furman Review: likely to not clear merger, unless quantum of harm is negligible. DMT proposals: do not clear merger. ✓ Proposals are aligned: a harmful merger with limited expected benefits is correctly blocked.	Furman Review: unclear, depends on expected quantum of harm vs. benefits. DMT proposals: unlikely to clear merger, unless benefits can meet efficiencies defence threshold. ? Proposals may or may not be aligned: the decision is finely balanced. However, if quantum of harm is small, the DMT proposal to block the merger would lead to over-enforcement since consumers would miss out on the expected benefits of the merger.

Note *As in a low/high magnitude of probability-weighted benefits.

Source: Oxera.

3.2 Concerns about under-enforcement are not supported by robust evidence

As outlined in section 2.2, the DMT cites the Furman Review when it states that:[77]

> Over the last 10 years the 5 largest firms have made over 400 acquisitions globally. None has been blocked and very few have had conditions attached to approval, in the UK or elsewhere, or even been scrutinised by competition authorities.

[77] Furman Review, p. 12.

While some large firms with digital activities have made a substantial number of acquisitions in the last decade, this fact alone does not demonstrate anticompetitive harm or evidence of under-enforcement.

For example, many of these mergers may refer to mergers that were unproblematic or even pro-competitive (e.g. they may have involved acquisitions that allowed the target business to compete more effectively with larger rivals, or enabled the roll-out of a new technology in a way that would not have otherwise occurred) and would not have generated a 'realistic prospect' of an SLC. Indeed, many of these mergers are likely to have generated significant consumer benefits, of the type discussed in section 3.1 above.

As such, these statistics do not show that the standard of proof should be amended to be more cautious. Demonstrating that the merger regime has been permitting harmful mergers (i.e. that there has indeed been under-enforcement) requires a careful case-by-case analysis.

As noted by the Furman review, since 2013 the CMA's Mergers Intelligence Committee has considered whether close to 30 acquisitions by Amazon, Apple, Facebook, Google, and Microsoft should be called in for review, but determined that none of them warranted closer scrutiny.[78] We do not know the details of how these cases were selected by CMA for initial consideration, or the extent to which they are a representative sample of acquisitions by firms with digital activities. However, the fact that not a single one of the almost 30 cases was considered worthy of even a Phase 1 review is notable and does not support the idea of large numbers of harmful mergers slipping under the CMA's radar.

The Facebook / Instagram (2012) merger is cited by the Furman Review as evidence of possible under-enforcement.[79]

However, it is important to note that the Office for Fair Trading (OFT) cleared the Facebook / Instagram merger under the Phase 1 'realistic prospect' standard of proof and thus did not proceed to Phase 2 at all. As the OFT noted at the time during its Phase 1 decision:[80]

> The OFT therefore does not believe that the transaction gives rise to a realistic prospect of a substantial lessening of competition in the supply of photo apps.
>
> […] For these reasons, the OFT believes that there is no realistic prospect that the merger may result in a substantial lessening of competition in the supply of display advertising.

Therefore, the DMT's proposal to lower the standard of proof at Phase 2 would not have changed the outcome of this merger.

It is of course possible that, presented with a different set of facts, the OFT would have referred the merger to Phase 2.[81] However, this is a different argument and does not represent evidence of under-enforcement or problems with the current standard of proof.

Ultimately, there are two main points that the Furman Review makes when citing the Facebook/Instagram merger as evidence of possible under-

[78] Furman Review (2019) para. 3.46
[79] Furman Review, paras 383-387.
[80] Office of Fair Trading (2012), 'Anticipated acquisition by Facebook Inc of Instagram Inc', ME/5525/12, paras 21, 29.
[81] Furman Review (2019) para. 3.83

enforcement: first, that competition authorities are currently unable to challenge mergers where the probability of an SLC is small but the harm caused by such mergers is potentially large;[82] second, even if the merger had met the 'realistic prospect' standard and been referred to Phase 2, the CMA would have struggled to make the case that an SLC is more likely than not to occur because at the time, 'the scope for Instagram to grow into a rival to Facebook as a social network was uncertain'.[83]

This highlights a key point. Given the high degree of uncertainty about how this market would develop in the future, with and without the acquisition, it is not clear that the solution is to lower the standard for ex ante intervention at Phase 2. This links to a more general argument that extends beyond the Facebook/Instagram merger. This is in fact the third argument that the DMT makes in support of its proposal to lower the standard of proof, which we critique in section 3.3 below.

3.3 The difficulty of forward-looking analysis under uncertainty does not justify lowering the evidential standard

The third reason that the DMT relies on to justify its proposal to lower the standard of proof for mergers involving firms with SMS is the considerable uncertainty about how the affected markets might develop in the future, which makes it hard to establish that an SLC will arise on the balance of probabilities. This is said to give rise to a heightened risk of 'false negatives' (under-enforcement) given the particularly acute risk of harms that these mergers are said to cause.

We have already addressed the claims that such mergers are more likely to cause harms in section 3.1 above. There, we found that in fact these mergers can lead to considerable benefits, and hence that there is no justification for an a priori presumption that mergers involving large firms with digital activities are more problematic than mergers in the rest of the economy. In this section, we therefore focus specifically on the claim that greater uncertainty in markets with digital activities is a reason to adopt a lower standard of proof.

Due to the need to make forward-looking analysis of the market(s) under different hypothetical scenarios, uncertainty is an inherent factor of any merger assessment across all sectors of the economy. However, we would in general agree with the DMT that the level of uncertainty in the case of mergers in sectors with digital activities can, in some cases, be considerably greater. This is because mergers in these sectors can often involve the acquisition of firms with intangible assets whose value and future prospects can be hard to ascertain, as well as the rapid change in technology and consumer preferences which can significantly alter competitive dynamics, sometimes mid-way through an investigation.[84]

How should competition authorities respond when faced with the challenge of assessing developments in fast-moving markets that are uncertain and unpredictable?

[82] Furman Review, para. 3.87.
[83] Furman Review, para. 3.84.
[84] For example, during the 'Movies on Pay TV' market investigation conducted by the Competition Commission (CC), the CC had provisionally concluded in August 2011 that several features of the market were causing adverse effects on competition. However, following the publication of the provisional conclusions, several market developments took place, including the launch of Netflix and enhancements by LoveFilm to its OTT service which the CC noted "were far from clear at the time". As a result, its final report reversed its preliminary conclusions and it no longer found there was strong enough evidence of an AEC.

In judgments by both the European Court of Justice (ECJ) and General Court (GC), the courts have provided clear reasons why, when decisions involve a prospective analysis that is subject to considerable uncertainty, the quality of the evidence produced by the competition authority must be high and convincing, and furthermore may call for an even stricter standard of proof compared to a 'balance of probabilities'.[85]

These carefully considered legal positions make it clear that when faced with uncertainty, far from requiring a lowering of the standard of proof, the opposite may in fact be the appropriate response. In any case, they certainly provide no support for a lowering of the standard of proof in the present case.

From an economic policy perspective, merger control as a policy tool cannot be seen in isolation from other policy tools that are already available (or may be in future) to a regulator or competition enforcer. Indeed, greater uncertainty about future outcomes increases the likelihood that the authority will make the wrong decision at the merger enforcement stage. In these circumstances, society would benefit from allowing mergers which can be beneficial unless there is compelling evidence of an SLC under the existing 'balance of probabilities' standard.

The CMA already has strong jurisdiction and procedural powers enabling it to intervene decisively in mergers involving global firms, as we explain in section 5.1 below. In addition, the CMA also has the power to conduct market studies and in-depth market investigations, and impose far-reaching remedies if competition problems are found. Furthermore, the Government's proposals include a bespoke regulatory framework for SMS-designated firms. Overall, this suite of powers provides the CMA with a powerful and highly flexible toolkit allowing it to address concerns that could materialise in the future. Thus, it is not clear why lowering the evidential standards required for intervention in a Phase 2 merger is the appropriate way to deal with the inherent uncertainty and difficulty that arises when making forward-looking predictions in fast-moving markets.

[85] For example, see the judgment of 15 February 2005, Commission v Tetra Laval, C-12/03 P, EU:C:2005:87, para. 44; CASE C-12/03 P OPINION OF ADVOCATE GENERAL TIZZANO delivered 25 May 2004, paras 76-77; as well as the judgement of 28 May 2020 CK Telecoms UK Investment Ltd v European Commission (Case T-399/16), para. 118.

4 The DMT's proposals would result in unintended consequences

The structure of this section is as follows:

- **section 4.1** explains how the proposal would result in over-enforcement and therefore reduce consumer welfare.
- **section 4.2** describes how there are significant concerns over how the proposed regime would operate in practice.

4.1 The proposal would result in over-enforcement and therefore reduce consumer welfare

Lowering the evidential threshold at Phase 2 would result in the CMA not clearing mergers that it previously would have cleared. This will lead to over-enforcement, denying mergers that are more likely than not to be benign and in some cases consumer welfare-enhancing.

To illustrate this point, we analyse case studies where, based on a review of the evidence, the proposed lower evidential threshold would have likely resulted in the merger not being cleared at Phase 2.

In order to inform our selection of case studies, we analysed data on mergers since 2013 (when the CMA was formed). Not all these cases are directly relevant for the current debate, given the focus on digital sectors, acquisitions of small entrants by incumbent firms, and non-horizontal theories of harm.

In the period 2013-21, there have been 29 cleared Phase 2 mergers, six of which arguably involved digital sectors.[86] Of the 29 Phase 2 cleared mergers, the CMA focused on: only horizontal theories of harm in 14 cases; only vertical theories of harm in one case; and multiple types of theories of harm (e.g. horizontal and vertical) in 14 cases.[87]

We also analysed a proxy for the relative size of the parties: the relative turnover of the merging parties. While this does not fully reveal the relative economic size of the merging parties, it can indicate if the acquiring party is significantly larger than the acquired party (one of the types of acquisition that the DMT is especially concerned about, as outlined in section 2.2).

When looking at these cases in detail, we see that there were several cases where (a) the parties were engaged in digital activities, and (b) the acquiring party had a significantly larger turnover than the acquired party. We also considered whether the merger involved more than just horizontal theories of harm (although this was not always possible).

Based on this criteria for selecting case studies, we chose two deep-dive case studies: **PayPal / iZettle** (section 4.1.1); and **Amazon / Deliveroo** (section 4.1.2).

[86] A full list of cases and categorisation can be found in Appendix A5. The six cases which arguably involved digital sectors are: Xchanging / Agencyport Software Europe (2015), Just Eat / Hungryhouse (2017), Nielsen / Ebiquity (2018), PayPal Holdings, Inc / iZettle AB (2019), Bottomline Technologies (de), Inc / Experian Limited (2020), and Amazon / Deliveroo (2020). We recognise that other mergers could have been considered as being in the digital sectors; we selected cases that are clearly in the digital sector so as to directly address the DMT's proposals.
[87] A full list of cases and categorisation can be found in Appendix A5.

We also draw out key lessons from a further two mini-case studies from mergers in the digital sector: **Just Eat / Hungryhouse** and **Nielsen / Ebiquity** (section 4.1.1).[88]

While any case study exercise is naturally limited by the sample size, the depth of analysis undertaken demonstrates the robustness of the assessment. The case studies demonstrate that the proposals could lead to over-enforcement, to the detriment of consumers.[89]

4.1.1 Case study 1: PayPal / iZettle (2019)

In December 2018, the CMA referred the acquisition by PayPal Holdings, Inc. ('PayPal') of iZettle AB ('iZettle') for a Phase 2 investigation. The merger was cleared in June 2019. Full analysis of the case can be found in Appendix A1.

The CMA examined theories of harm regarding two markets: offline payments, and omni-channel payments.

In terms of the offline payments market, the evidence presented at Phase 2 strongly suggests that under an SMS merger regime the CMA would have found a realistic prospect of SLC, which would have led to the merger being blocked, abandoned, or subject to remedies. The evidence on the omni-channel market is more mixed, but it is possible that a realistic prospect of an SLC would have been found at Phase 2 in this case as well.

Blocking this merger would have denied substantial efficiencies, some of which would have been passed on to consumers. The synergies would, in large part, have arisen from the merged entity cross-selling iZettle's offline services to PayPal's online customers.[90] Indeed, one of the aims of the merger was to provide omni-channel payment services.[91] Synergies included increased sales volumes and cost savings' which the CMA acknowledged in its assessment of the valuation of the transaction.[92]

In addition to cost savings, combining complementary products through a merger can benefit customers directly by lowering prices, expanding output and serving customers who would not otherwise be served. In this case, by combining PayPal's online capability and customer base with iZettle's offline capabilities, the merged entity would have an incentive to lower prices compared to the counterfactual.

Since the merger took place in 2018, the merged entity combined PayPal's online services and iZettle's offline services to launch an omni-channel offering in the US, known as 'PayPal Zettle'.[93] In the UK, PayPal launched 'Zettle by PayPal', which offers 'e-commerce integrations' and syncs in-store and online inventory automatically.[94] Further, the offline Zettle payment service has been

[88] We did not select Xchanging / Agencyport Software Europe (2015) for a case study as it is now more dated than the other cases. We did not select Bottomline Technologies (de), Inc / Experian Limited (2020) for a case study as it is involves the smaller party buying part of the larger party (and so cannot be characterised as falling within the DMT's main concerns).
[89] To the extent that there are other case studies which would not result in a different outcome at Phase 2 under the proposals, we would note that such case studies would not justify the requirement to change the evidential threshold.
[90] Final Report, para. 7.18.
[91] Final Report, para. 4.6.
[92] Final Report, para. 11.
[93] PayPal (2021), 'PayPal Brings PayPal Zettle to the U.S. -- Its Digital In-Person and Omnichannel Solution', June.
[94] https://www.zettle.com/gb/integrations/e-commerce

reinforced by integrating PayPal's QR Code technology, in order to allow merchants to accept mobile payments.[95]

4.1.2 Case study 2: Amazon / Deliveroo (2020)

The CMA announced its Phase 1 inquiry into Amazon / Deliveroo in October 2019, and cleared the transaction in August 2020 at Phase 2. Full analysis of the case can be found in Appendix A2.

Overall, the evidence from the CMA's published documents relating to the case strongly suggests that it would have intervened to block or impose remedies on Amazon's 16% investment in Deliveroo at Phase 2 under the proposed SMS merger regime, based on a 'realistic prospect' of an SLC.

If the transaction was blocked or abandoned this may well have limited Deliveroo's ability to compete more effectively in future with Just Eat and Uber Eats, the other two main players, in what the CMA found to be a relatively concentrated market. This is for three main reasons:

First, the Parties argued that the transaction allowed Deliveroo to, among other things, expand its delivery reach and roll out new innovations.[96] Therefore, Deliveroo's proposition is likely to have improved, increasing competition with larger players. Generally, this can be expected to have positive welfare effects on consumers e.g. through lower prices or shorter delivery times, especially in geographic areas where only JustEat was active prior to the transaction.

Second, in its assessment of Amazon's 'material influence' over Deliveroo, the CMA referred to 'Amazon's knowledge and experience that is relevant to Deliveroo's business', in particular in the 'operation of online platforms [and] an ultrafast grocery delivery service'.[97] Deliveroo's management is likely to have benefited from this knowledge. Therefore, Deliveroo could be expected to compete more effectively, enabling further consumer benefits.

Third, Deliveroo submitted to the CMA that it considered Amazon to be a desirable partner, as the company had a reputation of being a patient investor.[98] As Deliveroo relied on external funding to continue competing, Amazon's investment could be seen as a secure, and long-term option, mitigating the risk of the exit of a main competitor in the long run.

4.1.3 Mini-case studies

We also carried out two mini-case studies. Both Just Eat / Hungryhouse (2017) and Nielsen / Ebiquity (2018) illustrate how the 'realistic prospect' standard of proof would have resulted in over-enforcement.

Just Eat / Hungryhouse (2017)

The acquisition by JUST EAT Plc ('Just Eat') of Hungryhouse Holding Limited ('Hungryhouse') was investigated by the CMA at Phase 1 from March 2017, referred to Phase 2 in May 2017, and cleared in November 2017. Full analysis of the case can be found in Appendix A3.

The consistency of the CMA's analysis between Phase 1 and Phase 2, including the relevant counterfactual, theories of harm and market share data, as well as the reference to evidence on both sides of the conclusion, strongly

[95] See https://www.zettle.com/gb/payments/qr-code
[96] Press release Deliveroo: https://uk.deliveroo.news/news/amazon-leads-series-g.html.
[97] Phase 2 decision: 4.34 & 4.47. Phase 2 decision: footnote 131.
[98] Phase 2 decision: 3.54

indicate that the CMA would have concluded that there was a 'realistic prospect' of an SLC at Phase 2.

Recent evidence shows that Just Eat's high market share has fallen since the merger, reflecting the increasing strength of rival food delivery companies.[99] Thus, despite the clearance of a merger where the merging parties had high market shares, the UK's food delivery market appears to have become more rather than less competitive. CMA CEO Andrea Coscelli noted the dynamic and evolving nature of the market in a 2018 speech.[100] Just Eat / Hungryhouse is therefore an example of how setting a lower standard of proof in mergers in dynamic markets might well have prevented a benign or potentially even pro-competitive merger from taking place, and is not a suitable tool for intervening in such markets.

Nielsen / Ebiquity (2018)

The acquisition by Nielsen Holdings PLC ('Nielsen') of the advertising intelligence ('AdIntel') division of Ebiquity PLC ('Ebiquity') was investigated by the CMA at Phase 1 from April 2018, referred to Phase 2 in June 2018, and cleared in November 2018. Full analysis of the case can be found in Appendix A4.

Overall, there is evidence that the 'realistic prospect' test would have been met at Phase 2 under the proposed merger regime. The CMA found a consistent market definition, market shares, and some customer views, at Phase 1 and Phase 2, and thus it is possible there was a 'realistic prospect' of an SLC at Phase 2.

In the event that the merger had been blocked under the lower evidential threshold, it is likely that the two parties would have continued to operate as separate entities, as per the counterfactual. In the short term this would have removed the possibility of cost synergies and efficiencies that Nielsen cited in its deal rationale.

Additionally, in the long run, it may have made it harder for both firms to compete with expanding entrants focusing on the digital advertising. The 'very significant changes' to the advertising industry over recent years have meant providers of internet advertising have also become providers of AdIntel. These trends have continued since the investigation, with the digital share of advertising expenditure increasing from 59% in 2018 to 69% in 2020. Both Ebiquity and the CMA cited the rapidly changing market as challenges for their business, and Ebiquity argued that the merger would grant the Parties the resources to invest and compete effectively in this new market.

4.2 There are significant concerns over how the proposed regime would operate in practice

There are practical concerns about the implementation of the proposed regime. The outcome is likely to be a chilling effect on acquisition decisions by firms designated with SMS.

[99] Statista (2021), 'Which of these online providers of restaurant and food delivery have you used in the past 12 months?', 25 January, https://www.statista.com/forecasts/997812/online-food-delivery-bookings-by-brand-in-the-uk.
[100] https://www.gov.uk/government/speeches/fordham-competition-law-institute-annual-conference-2018-keynote-speech

First, the minimum threshold for determining change of control under the SMS merger regime (de facto control rather than material influence) will create additional uncertainty on the issue of the CMA's jurisdiction. The CMA's own guidance makes clear that:[101]

> [T]here is no 'bright line' between factors which might give rise to material influence and those giving rise to de facto control.

Therefore, introducing an SMS merger regime that applies to acquisitions of de facto control and higher, is likely to cause significant uncertainty in some cases about which regime would apply.[102] Restricting any SMS merger regime to acquisitions of a controlling interest would reduce this uncertainty.

Second, just because the DMT is concerned about M&A by firms with digital activities, does not mean that distorting the market for corporate control in favour of firms not designated with SMS will be welfare enhancing. The proposed ban on completing acquisitions during a CMA investigation, combined with the lower evidential threshold at Phase 2 would put firms designated with SMS at a disadvantage in competitive bidding situations that also involve firms without SMS. This could lead in some cases to alternative acquisitions by firms without SMS that have a great risk of harm to competition and/or have fewer benefits for consumers.

For example, an acquisition by a firm designated with SMS of an innovative electric car manufacturer would face greater delays to the deal closing and a lower evidential threshold than a rival bid from a large global car manufacturer, even if the SMS firm had no presence at all in the relevant market(s).

Third, the low legal threshold for blocking SMS mergers creates a risk of appeals by third parties if the CMA investigates a deal and ultimately decides not to block it. There could be gaming of the system by third parties who would like to see deals blocked for their own commercial ends. There are examples of third parties successfully appealing merger clearance decisions on the basis of the realistic prospect standard:

For example, Nielsen successfully appealed the OFT's Phase 1 clearance of Information Resources / Aztec.[103] The case was remitted by the Competition Appeal Tribunal (CAT) to the newly formed CMA, which proceeded to clear the merger at Phase 1 (after a delay).[104]

Another example can be found in iSOFT / Torex, which was initially cleared by the OFT at Phase 1. IBA Healthcare appealed to the CAT, which quashed the OFT's decision. The OFT and the merging parties appealed the CAT decision to the Court of Appeal, which dismissed the appeal and so remitted the case back to the OFT.[105] Upon remittal, the OFT found that the realistic prospect standard of proof had indeed been met, but Phase 2 was avoided because the parties agreed to remedies.[106]

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[101] CMA (2020), 'Mergers: Guidance on the CMA's jurisdiction and procedure', para. 4.37.
[102] The DMT proposes at paragraph 4.145 of the recommendations a 'safety net' that would also allow it to review acquisitions of material influence by SMS-designated firms, but does not specify how this would be applied.
[103] OFT (2014), 'Completed acquisition by Information Resources Inc. of Aztec Group ME/6211/2013'.
[104] CAT (2014), 'A.C. Nielsen Company Limited - Reasoned Order (Quashing decision)', Case No. 1227/4/12/14.
CMA (2014), 'Completed acquisition by Information Resources, Inc. of Aztec Group', Final report, ME/6469-14.
[105] Court of Appeal (2004), '1023/4/1/03 IBA Health Limited - Court of Appeal Judgment', Case No: C1/2003/2771, C1/2004/0036, C1/2003/2755, February.
[106] OFT (2004), 'Completed acquisition by iSOFT Group Plc of Torex Plc The OFT's Decision on reference under section 22 given on 24 March 2004'.

The lower standard of proof at Phase 2 could encourage objections by third parties, because they would only need to show limited evidence that a theory of harm is credible. Ultimately, this risk of gaming by third parties will be taken into account by firms designated with SMS and their advisers and would make it less likely that these firms will attempt acquisitions, even where the outcome would have been pro-competitive.

5 The CMA can achieve its stated aims through a combination of its existing powers and the new ex ante regulatory regime

The structure of this section is as follows:

- **section 5.1** explains how the CMA's current jurisdiction and procedural powers are already sufficiently flexible to enable it to intervene in mergers involving firms with digital activities;
- **section 5.2** describes how the CMA currently adjusts the assessment of the 'balance of probabilities' test to take into account the specific economic context of a case;
- **section 5.3** explains that the CMA currently tackles cases where the theory of harm is complex or forward-looking;
- **section 5.4** explains that existing CMA powers and the proposed ex ante regulatory regime for SMS firms are sufficient to deal with uncertainty

5.1 The CMA's current jurisdiction and procedural powers are already sufficiently flexible to enable it to intervene in mergers involving large firms with digital activities

The DMT often refers to 'powerful digital firms' in the context of alleged under-enforcement, but these firms (like all firms) are already subject the CMA's wide-ranging power of investigation regarding M&A.

- The CMA regularly issues 'freeze orders' to pause mergers and has recently used its powers to unwind a completed merger.[107] The powers apply globally.[108] The existence of these strong and flexible powers calls into question why the DMT has recommended that for acquisitions by SMS firms, any mandatory notification would be accompanied by a ban on completing the transaction until the CMA process has finished, which can take over a year in some cases.
- The CMA can block global transactions, even between parties with limited UK presence. For example, in Sabre / Farelogix, the merging parties only provided services to one UK-based customer (British Airways).[109, 110]
- The CMA can request detailed information from the merging parties and impose fines if the parties fail to provide that information or provide incomplete information. The CMA can also impose fines on merging parties for missing an information request deadline (such as in the Just Eat / Hungryhouse merger).[111]

[107] CMA (2019), 'Acquisition By Bottomline Technologies (De), Inc Of Experian Limited's Experian Payments Gateway Business And Related Assets. Unwinding Order made by the Competition and Markets Authority pursuant to section 72(3B) of the Enterprise Act 2002 (the Act)'.
[108] CMA (2020), 'Initial Enforcement Order on Facebook, Inc, Tabby Acquisition Sub, Inc, Facebook UK Limited and Giphy, Inc in relation to the completed acquisition by Facebook, Inc of Giphy, Inc'.
[109] CMA (2020), 'Anticipated acquisition by Sabre Corporation of Farelogix Inc.', Final report, April.
[110] This was confirmed following an appeal by Sabre to the Competition Appeal Tribunal on the question of the CMA's jurisdiction.
[111] CMA (2017), 'Penalty notice under section 110 of the Enterprise Act 2002 – Addressed to Hungryhouse Holdings Limited ', November.

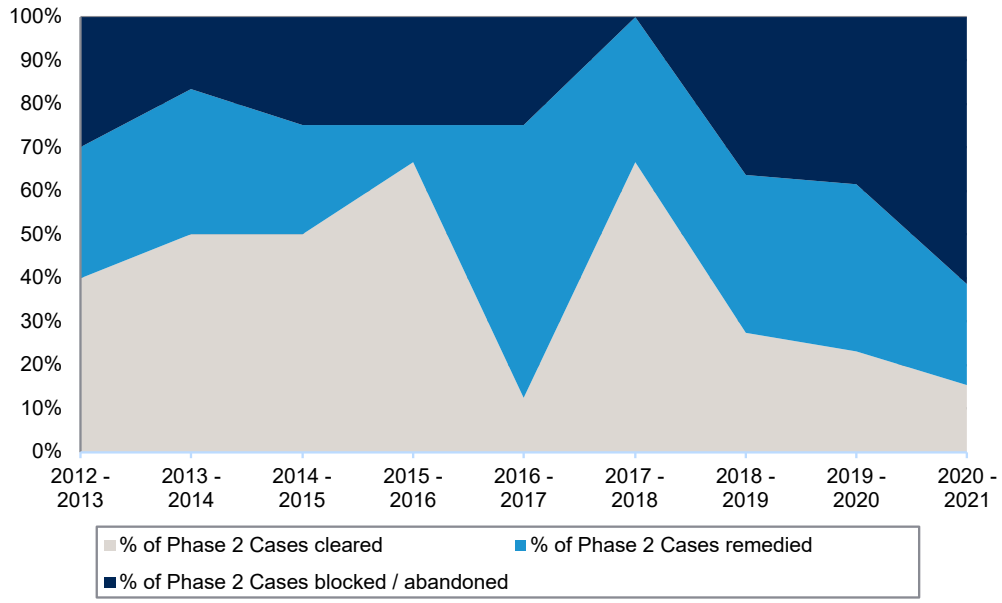
5.2 The current phase 2 mergers regime is sufficiently flexible to take into account the specific economic context of a case

Although subject to ongoing debate, commentators have argued that the CMA has become more aggressive over time in blocking mergers. The decline in the number of clearances at Phase 2 has been widely noted.[112]

Analysis of the CMA's data on merger outcomes reveals that on average, 37% of mergers have been cleared at Phase 2 from the start of FY2012 to 30 June 2021 (the CMA was formed in October 2013 and started taking casework in April 2014). This means that the CMA intervened, or the parties abandoned the merger, in 63% of Phase 2 mergers since it was formed. It has been noted that most abandoned CMA Phase 2 mergers are abandoned directly due to CMA scrutiny (or proposed remedies), and so can reasonably be considered part of the CMA's merger 'mortality' rate.[113]

The trend in clearances at Phase 2 is shown in Figure 5.1. Of those cases that it referred to Phase 2, the CMA cleared 46% of mergers from its launch in FY2012-13 to FY2016-17, but has only cleared 28% of mergers from FY2017-18 onwards.

Figure 5.1 Proportion of Phase 2 cases cleared by the CMA



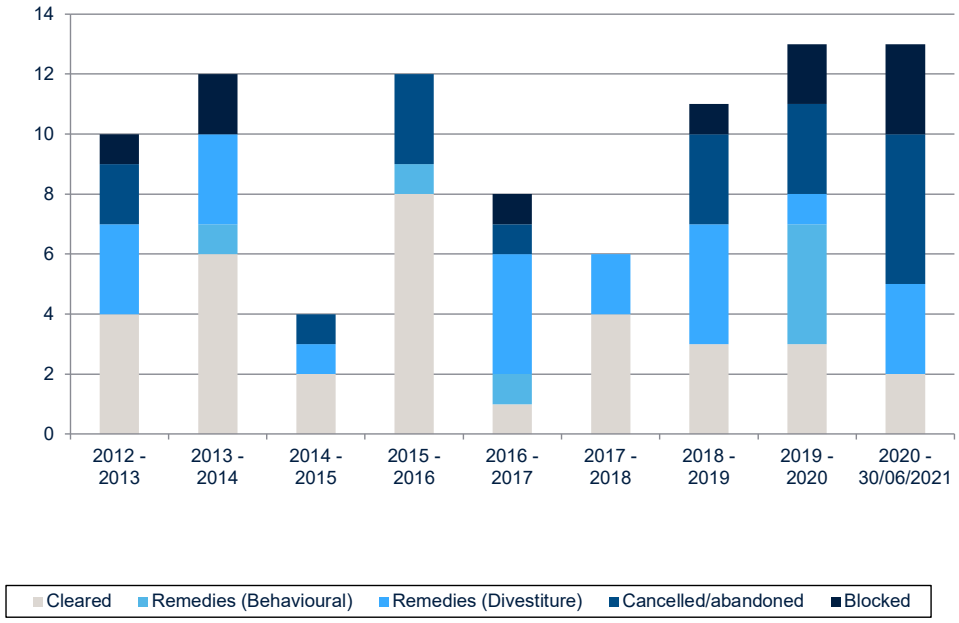
Note: Phase 2 cases not cleared incudes: prohibited, behavioural and structural remedies and cancelled/abandoned. Phase 2 outcome date recorded in year that the final decision was made. Figures for 2020-2021 are until 30 June 2021.

Source: Oxera analysis of CMA (2021), 'Merger inquiry outcome statistics', last updated 2 July 2021.

When we look at the absolute numbers (rather than percentages), we see that since the CMA was formed, it has completed between 4 and 13 Phase 2 investigations each year. As shown in Figure 5.2, there does not appear to be a trend in the number of Phase 2 investigations. In FY 2020-21 (to end June 2021) the CMA cleared only two of the 13 Phase 2 mergers.

[112] For example, see Linklaters (2021), 'Platypus: UK Merger Control Analysis'.
[113] Linklaters (2020), 'The Phase 2 deal mortality meter: there's more to death than prohibition', 25 September.

Figure 5.2 Phase 2 cases by outcome



Source: Oxera analysis of CMA (2021), 'Merger inquiry outcome statistics', last updated 7 April 2021.

The Sainsbury's / Asda merger is an example of how the current Phase 2 regime can flex to take into account the specific economic context of the case. In that case the CMA set a threshold for upward price pressure due to the merger at 2.75%.[114] This threshold is lower than the CMA had used in other horizontal merger cases (typically around 5-10% at phase 2, although there is no 'bright-line').[115] Setting a low threshold in Sainsbury's / Asda meant that a smaller potential impact on prices due to the merger would be interpreted by the CMA as evidence of an SLC.

The CMA justified its approach using the following logic:[116]

> In assessing what may constitute 'substantial' for the purposes of our local assessment of in-store groceries, we have had regard to the fact that groceries are a non-discretionary expenditure that accounts for a significant share of household spend, proportionally more so for low income households. Government estimates are that UK households' expenditure share on food and non-alcoholic drinks is around 11%, increasing to over 14% for those on lower incomes (households with incomes in the lowest 20%). As a result, even a small percentage increase in the price of groceries (or equivalent worsening of [non price aspects]) would have a significant adverse impact on UK consumers.

This example demonstrates that under the current Phase 2 regime the CMA believes that it has flexibility to lower the threshold for intervention in markets where the harm to consumers is potentially large.

[114] CMA (2019), 'Anticipated merger between J Sainsbury PLC and Asda Group Ltd', Final report, para. 46. GUPPI is the gross upward pricing pressure index, which is used to assess the level of upward price pressure resulting from a merger. The CMA found that a GUPPI of 1.50% would have sufficient to show an SLC without efficiencies. Taking account of downward GUPPI from efficiencies of 1.25%, the CMA concluded that 1.50% + 1.25% = 2.75% would be the appropriate threshold.
[115] CMA (2017), 'Tesco and Booker: A report on the anticipated acquisition by Tesco PLC of Booker Group plc', Final report, para. 9.46.
[116] CMA (2019), 'Anticipated merger between J Sainsbury PLC and Asda Group Ltd', Final report, para. 8.283.

5.3 The CMA already tackles cases where the theory of harm is complex or forward-looking

The evidence does not suggest that the CMA is ill-equipped with its current powers to block mergers where the theory of harm is complex or forward-looking. Past cases illustrate that the CMA has used its powers to block mergers where the theory of harm is more complex and/or uncertain than a classic horizontal merger.

This is confirmed in the letter from Andrea Coscelli to BEIS in 2019:[117]

> The UK regime has shown itself, including in a number of past cases involving fast-moving and dynamic markets, to be "fit for purpose" in capturing and effectively assessing a range of factors of competition, including product development and innovation, and a range of theories of harm – including potential and dynamic competition concerns.

These include vertical theories of harm, such as Intercontinental Exchange / Trayport (2017), a vertical merger where the main theory of harm focused on reduced innovation as a result of the merger.

Innovation theories of harm also featured in VTech / LeapFrog (2017), where there was a concern about the impact of the merger on the development of innovative new toys, and Sainsbury / Asda (2019) where one of the theories of harm was that increased buyer power by the merged entity could reduce suppliers' incentives to innovate.

5.4 Existing CMA powers and the proposed ex ante regulatory regime for SMS firms are sufficient to deal with uncertainty

As explained in section 3.3 above, when faced with uncertainty and unpredictability about future market outcomes, the evidentiary standard required to intervene to block a merger should not be lowered.

Rather than this being evidence of a potential weakness in the regime leading to under-enforcement, the CMA's existing merger powers should be seen as part of a broad suite of powerful and flexible tools that would allow the CMA to effectively address competition concerns that might exist now or in the future. This includes the power to conduct market studies and in-depth market investigations, and impose far-reaching remedies if competition problems are found, as well as a bespoke regulatory framework for SMS-designated firms.

[117] Andrea Coscelli letter to BEIS (2019), 'Digital Competition Expert Panel recommendations – CMA view', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890013/CMA_letter_to_BEIS_-_DCEP_report_and_recommendations__Redacted_.pdf

A1 Case study: PayPal / iZettle

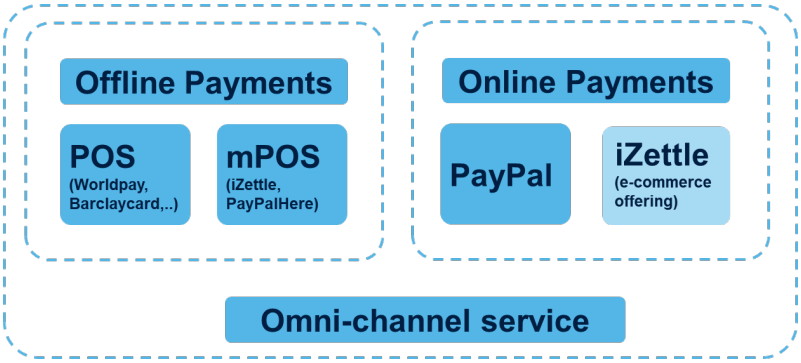
In December 2018, the CMA referred the acquisition by PayPal Holdings, Inc. ('PayPal') of iZettle AB ('iZettle') for a Phase 2 investigation. The merger was cleared in June 2019.[118]

PayPal provides payment services allowing merchants to accept online and offline card payments from end-customers.[119] Offline services ('PayPal Here') were provided in-store, where the customer is face-to-face with the merchant. In 2018, PayPal's global turnover was $15.4bn ($1.7bn in the UK).[120]

iZettle provided payment services with a focus on small businesses, allowing merchants to accept offline card payments from customers. iZettle also provided an e-commerce tool, enabling merchants to set up an online store, sell from an existing website or through social media.[121] iZettle's global turnover was £85.8m in 2017.[122]

The markets defined by the CMA are represented in the figure below. Omni-channel services combine offline and online payments in a single service. Both mobile point-of-sale devices ('mPOS') and traditional point-of-sale devices ('POS) are a means of accepting offline card payments. mPOS providers are typically not acquirers of the payment transaction, but are payment facilitators sitting between the merchant and the acquirer. In contrast, POS providers typically coincide with the acquiring bank. One difference regarding the underlying technology is that traditional POS connects directly the merchant to the acquirer either via the merchant's fixed telephone line or broadband, or by using an inbuilt SIM card and connecting via the mobile telephone network.[123] mPOS connects to the merchant's smartphone or tablet via Bluetooth, and an app on the phone or tablet then connects to the acquirer.[124]

Figure A1.1 Offline and online card payment services



Source: Oxera.

[118] CMA (2019), 'Completed acquisition by PayPal Holdings, Inc. of iZettle AB', Final report.
[119] PayPal also provided digital wallet and other payment, financial and ancillary services.
[120] Final Report, Para. 3.9
[121] iZettle also provided other payment, financial and ancillary services, including the provision of short-term loans to merchants, software to manage invoices, merchant-to-merchant e-money services and POS hardware.
[122] Final Report, Para. 3.17
[123] Final Report, Para. 2.30
[124] Final Report, Para. 2.30

A1.1 Core facts of the CMA investigation—Phase 1

The stated rationale of the deal was to combine PayPal's global scale, strong brand reputation and online leadership with iZettle's in-store expertise.[125] The aim was to offer an omni-channel service—an integrated offline and online payment service—to their customers.[126]

A1.1.1 Supply of offline payment services via mobile point of sale (mPOS)

The first theory of harm regarded unilateral horizontal effects stemming from the reduction of competition in the provision of offline payment services.

Counterfactual

The CMA looked at whether, absent the merger, PayPal would have been a stronger competitor in offline payments than it was at the time of the merger. It came to the conclusion that the realistic counterfactual was a more competitive scenario than the pre-merger status quo:[127]

> there is a realistic prospect that, absent the Merger, PayPal would (in light of its stated commitment to maintaining a strong presence within this segment) have (i) significantly invested into PayPal Here, or (ii) acquired another mPOS offline payment services supplier in the UK.

Moreover, the CMA acknowledged the importance of offline payments for the development of an omni-channel payment service:[128]

> having a strong presence within the UK offline payment services sector, through the supply of mPOS devices, as an important driver of customer demand for omni-channel payment services

The CMA concluded that in the shorter term counterfactual, PayPal would have implemented minor improvements (in terms of pricing, marketing or product hardware) , and in the longer term, a substantial improvement or replacement of PayPal Here.[129]

Market shares

During Phase 1, the relevant product market was defined as the supply of mPOS devices for small merchants. The Parties had a high combined market share of 80-90% (PayPal with 20-30%, and iZettle with 50-60%). The next largest competitor (SumUp) had 5-10% market share.[130]

In the competitive assessment, the CMA looked at the broader market for offline card payments, including traditional POS providers, and found they did not exert sufficient competitive constraint on mPOS providers to be considered in the same market.[131]

[125] Final Report, Para. 4.6 (a), (b)
[126] Final Report, Para. 4.6, (c)
[127] Phase 1 Decision, para.48 (f)
[128] Phase 1 Decision, para. 43
[129] For this, besides the market shares, the CMA relied mainly on evidence in relation to the closeness of competition between the Parties, and evidence in relation to the competitive constraints provided by other suppliers, which mainly consisted on internal documents, parties' submissions, third parties' views, and Parties' data on switching behaviour.
[130] Phase 1 Decision, table 1, p. 21
[131] Phase 1 Decision, para. 52-70

Closeness of competition

The CMA found that the Parties were close competitors in offline payments. This was because: 'iZettle was a particularly strong constraint on PayPal'; 'PayPal was a credible competitor to iZettle'; and post-merger, there would have been insufficient competition to constrain the merged entity either from other suppliers of mPOS devices or from other suppliers of traditional POS devices.[132]

The CMA came to the latter conclusion because of the differentiation between mPOS and POS offerings. This was because of differences in:

- the pricing structure (mPOS had a more simple and flexible structure):[133]
- the structure of contracts and costs;[134]
- the target market (mPOS typically focused on smaller merchants); and
- the product. As explained above, merchants require a fixed telephone line or broadband in order to use a traditional POS, whereas mPOS connects to the merchant's smartphone or tablet via Bluetooth, and an app on the phone or tablet then connects to the acquirer (via mobile signal or WiFi).[135]

At the end of Phase 1 the CMA concluded that there was a realistic prospect of an SLC in offline payments via mPOS:[136]

A1.1.2 The supply of omni-channel services to smaller merchants

The CMA's second theory of harm regarded the unilateral effects arising from the elimination of potential competition in the supply of omni-channel services to smaller merchants.

Counterfactual

PayPal had already taken clear steps to provide an omni-channel service. The question was whether, absent the merger, iZettle would have developed an omni-channel offer, and if so, whether the loss of competition due to the merger would lead to an SLC.[137] As iZettle had—to a very limited degree—already taken steps to enter the market by offering an e-commerce solution, the CMA considered whether it would have been likely to expand in omni-channel services absent the Merger.[138] The CMA also looked at the competitive constraints provided by other suppliers of omni-channel services.

The CMA concluded at the end of Phase 1 that PayPal was already a well-established supplier of omni-channel payment services and that there was a realistic prospect that it would have expanded its capabilities absent the Merger. It also concluded that iZettle would have been likely to enter and expand into the market for omni-channel payment services absent the Merger,

[132] Phase 1 Decision, para.111, 133
[133] Phase 1 Decision, para. 4
[134] Phase 1 Decision, para. 58
[135] Final Report, para. 2.30
[136] Phase 1 Decision, para.9
[137] Note that iZettle had already launched its e-commerce service which enabled merchants to create a basic ecommerce website or make sales through an existing website. However, given that at the time of the Notification iZettle had only very recently launched this service, the CMA considered it appropriate to use the framework for the assessment of potential competition.
[138] Just before the merger was announced, iZettle had announced its intention to list all of its shares on Nasdaq Stockholm. Therefore, one of pieces of evidence analysed by the CMA was the post-IPO prospectus. The CMA also relied on other internal documents and Parties' submissions.

and would have been a significant competitive force within this segment and an important competitive constraint on PayPal. This conclusion was largely based on internal iZettle documents, where it apparently stated its willingness to expand its existing e-commerce tool, which iZettle defined as omni-channel.

An important piece of evidence for the CMA appears to be the draft prospectus prepared for the IPO that iZettle had been planning to launch prior to the merger. At Phase 1 the CMA came to the conclusion that:[139]

> iZettle's strategy absent the Merger would have involved it taking steps to consolidate and grow its competitive presence as a payment services provider, including by expanding its provision of omnichannel payment services to small, micro and nano customers

Therefore, at the end of Phase 1 the CMA concluded that the IPO Prospectus appeared to refer to growing the omni-channel service, given that iZettle had already launched the e-commerce platform and was already a well-established player in the offline market.

Competitive effects

The CMA concluded that the ability and incentive of other actual or potential competitors to enter and expand in the market for omni-channel payment services, and to constrain PayPal effectively, appeared limited. Only Square was considered able to compete effectively with PayPal.[140] The CMA therefore considered that there was a realistic prospect that the Merger would result in the elimination of iZettle as a potential significant competitive force:[141]

> The CMA therefore considers that there is a realistic prospect that the Merger results in the elimination of iZettle as a potential significant competitive force for the supply of omni-channel payment services to small, micro and nano customers in the UK and that, in the round, the remaining competitors that appear likely to enter or expand within this segment would not be sufficient to constrain PayPal post-Merger.

A1.2 Core facts of the CMA investigation—Phase 2

A1.2.1 Supply of offline payment services via mobile point of sale (mPOS)

At Phase 2, two significant new pieces of evidence came to light in relation to the offline payments theory of harm.

New evidence at Phase 2: the counterfactual

New evidence highlighted the importance of PayPal Here for its global omni-channel strategy and confirmed the CMA's Phase 1 view that the counterfactual would have involved stronger competition from PayPal in the supply of mPOS than in the pre-merger status quo.[142]

> In light of PayPal's incentives with regard to its omnichannel offering, […], we consider it likely that PayPal would, to support its global, long-term strategy, also have taken short-term measures to improve PayPal Here in the UK, for example through incremental adjustments and improvements to its pricing, marketing, or product hardware.

[139] Phase 1 Decision, para. 50-51
[140] Phase 1 Decision, para. 185-186
[141] Phase 1 Decision, para. 15
[142] Final Report, para. 7.39

However, the CMA came to the conclusion that, while the improvements would be implemented, the timing and magnitude would be highly dependent on the means by which they would have been implemented:[143]

> Our view is that PayPal would have substantially improved or replaced PayPal Here. However, this would have taken time with the timing and impact of such an improvement in the UK dependent upon the means by which it was achieved, i.e. the profile of any acquisition or partnership targets.

Thus this additional evidence strengthened the Phase 1 conclusion of a realistic prospect of an SLC because it confirmed a more competitive counterfactual in offline payments.

New evidence at Phase 2: diversion ratios

The second significant piece of new evidence regarded the closeness of competition between mPOS and POS providers. In particular, the CMA conducted a survey of the Parties' customers which calculated diversion ratios from mPOS to traditional POS.[144] The main finding of the diversion analysis was that:[145]

> over 30% of their customers would switch to a POS offering if PayPal or iZettle were to increase their prices (compared to 60% switching to alternative mPOS offerings)

Based on this evidence, the CMA concluded that POS providers exerted a competitive pressure on mPOS providers.

Phase 2 conclusion on the offline payments theory of harm

The CMA concluded that it was unlikely that the Merger would substantially lessen competition in the provision of offline payments services to smaller merchants in the UK, because of the competitive constraint coming from traditional POS device providers, and from other mPOS providers, (Square and SumUp), and because product improvement by PayPal in the counterfactual, while being certain, would not be timely.[146]

A1.2.2 The supply of omni-channel services to smaller merchants

It appears that no fundamental new evidence was presented on this theory of harm at Phase 2. The IPO prospectus document had already been relied on during Phase 1 and appears to have been a major source of evidence for the CMA's finding of an SLC.[147] When examined again at Phase 2 the statements in the IPO prospectus were not considered to support the omni-channel theory of harm. Despite the Phase 1 conclusion, at Phase 2 the CMA found that it included no statements pointing to an intention 'to significantly expand its online payment services':[148]

> iZettle's draft IPO prospectus (the prospectus) sets out that, following its IPO, iZettle planned to follow a growth strategy based on four 'levers': (a) [✂]; (b) [✂]; (c) [✂]; and (d) [✂] […] para(7.56) iZettle told us [✂]. It also said that the

[143] Final Report, para. 17
[144] Final Report, Appendix F. The CMA complemented with the Parties' churn data (See para. 8.89-8.90 of the Final Report) and by matching customers' e-mails in the Parties' databases (See para. 8.91-8.92).
[145] Final Report, para. 25
[146] Final Report, para. 8.209
[147] with the caveat that the CMA refers to it as 'draft IPO prospectus', see para.50 and para.145 of PayPal/iZettle Phase 1 Decision. However, when looking at the Appendix D para.63-69, 'draft IPO prospectus' and 'IPO prospectus' are used interchangeably, suggesting that they are the same document.
[148] Final Report, para. 19, 7.51

> significant level of investment that would have been required to build independently an omni-channel payments capability would have needed to be referenced in the draft prospectus as it would have constituted a material investment; no such reference was made.

In addition, at Phase 2 the CMA found no reference in the IPO prospectus to iZettle developing an omni-channel payments capability:[149]

> iZettle told us [✂]. It also said that the significant level of investment that would have been required to build independently an omni-channel payments capability would have needed to be referenced in the draft prospectus as it would have constituted a material investment; no such reference was made.
>
> In terms of [✂], the prospectus says: 'Our strategy is to provide a cohesive commerce platform for merchants, [✂]. [✂], [✂]. The launch [of the new e-commerce platform in April 2018] is part of iZettle's strategy to extend its commerce platform by offering a wider range of affordable tools to small businesses. e-commerce is becoming an increasingly important part of total retail sales in iZettle's key markets, where the UK dominates in Europe with total sales value through e-commerce estimated at €77 billion in 2017.'

Based on iZettle's internal documents the CMA concluded that the a new e-commerce platform was a longer term rather than short-term objective for the company.[150]

Ultimately, the CMA concluded that iZettle's focus post-IPO would have been more on developing and growing its existing lines of business i.e. offline mPOS. It also concluded that, absent the Merger, it would be likely that iZettle's expansion into e-commerce and online payments would have remained relatively less developed and its omni-channel services would therefore have proceeded and developed only at a slow rate.[151]

Phase 2 conclusion on the omni-channel theory of harm

At the end of Phase 2, the CMA concluded that, even if iZettle would have developed an omni-channel capability in the absence of the merger, it would have been counterbalanced by strong competition coming from three main competitors (Square, Sum-up and Shopify):[152]

> Competition in omni-channel for smaller merchants is in its early Phases, but given the existence of significant competitors and the likelihood of future entry, the small scale of intended expansion by iZettle absent the Merger does not lead us to conclude that iZettle's planned expansion in omni-channel would lead to greater competition

Overall therefore, the CMA concluded that the Merger was not likely to result in an SLC in the provision of omni-channel services to smaller merchants.[153] However, it is clear, due to the nascent state of the market, there was considerable uncertainty about how the market would develop in the longer term, and iZettle's importance as a competitor.

A1.3 Analysis

In this section, we revisit the evidence presented in the CMA's Phase 1 and Phase 2 investigations to assess the impact of the proposed SMS merger

[149] Final Report, para. 7.54, 7.56, 7.57
[150] Final Report, para. 7.61
[151] Final Report, para.9.35-9.36
[152] Final Report, para. 47
[153] Final Report, para. 9.35-9.36

regime, if it had been applied to this merger (and if one of the firms had been designated SMS).

First, we take a closer look at the CMA's competition concerns from both Phases to analyse whether the merger would have been cleared at Phase 2 under a 'realistic prospect' test. Second, we describe the consumer benefits that would have been missed if the merger had not been cleared.

A1.3.1 Would the CMA have intervened at Phase 2 under an SMS merger regime?

Supply of offline payment services via mobile point of sale

If the CMA had used a lower and more cautious standard of proof under the SMS regime (i.e. 'realistic prospect'), then we would have expected the CMA to have found an SLC at Phase 2 on the first theory of harm.

First, the CMA concluded at Phase 1 that in the counterfactual, PayPal Here would grow as a competitor to iZettle.[154] This was reinforced by further evidence at Phase 2. Specifically, the new information on PayPal's global strategy appears to show that PayPal Here would have been improved in the short-term and long-term.[155]

Second, although new evidence at Phase 2 on diversion ratios between mPOS and POS found closer competition than was apparent at Phase 1. However, it seems unlikely that this single piece of evidence would have radically changed the CMA's view, such that it no longer believed there would have been a 'greater than fanciful' chance of an SLC.[156] In particular, the Phase 2 evidence, while showing a 30-37% diversion from mPOS to POS, also found a much higher diversion (54-61%) from mPOS to other mPOS. In terms of the diversion between the merging parties, which is highly relevant for assessing unilateral effects in horizontal mergers the CMA's Phase 2 evidence confirmed that iZettle was the most important competitor to PayPal Here.[157] The constraint from PayPal Here on iZettle was found to be less strong.[158]

The supply of omni-channel services to smaller merchants.

At Phase 1, besides the SLC in the offline market, the CMA found a realistic prospect of an SLC in omni-channel, partly because of iZettle's strategy to expand into omni-channel. The CMA identified iZettle's e-commerce tool as an omni-channel service.[159]

> iZettle had already taken concrete steps towards entering this market (in particular by introducing an online e-commerce tool which it described as a form of 'omni-channel' tool)

At Phase 2, the CMA appears to have been convinced that the IPO prospectus and other internal documents referred to e-commerce services, rather than an expansion into omni-channel services. Unlike Phase 1, at Phase 2 the CMA drew a distinction between an e-commerce tool and an omni-channel tool, and

[154] Phase 1 Decision, para.48 (f).
[155] Final Report, para. 17
[156] Final Report, para. 25
[157] Appendix F, tables 1-4
[158] Appendix F, tables 5-10
[159] Phase 1 Decision, para. 13

was less certain about if and when iZettle would have integrated the online and the offline services into an omni-channel service in the counterfactual.

Secondly, the competitive assessment part played a major role in the Phase 2 clearance decision. During Phase 1, the CMA had already investigated the current and future competition exerted by other players in omni-channel.[160] It concluded that Square:[161]

> may be able to compete effectively with PayPal for the supply of omni-channel payment services to small, micro and nano customers, although (in contrast to iZettle, which has already developed a strong position in offline payment services via mPOS devices) it would need to scale up both its UK online and offline offering significantly.

Similarly for Sum-up, the CMA concluded that, in order to be competitive:[162]

> SumUp would have to significantly upscale both its offline and online offering

And, again, for Stripe:[163]

> Stripe is likely to be only a moderate competitive constraint on PayPal within the supply of omnichannel payment services to small, nano and micro customers in the UK.

At Phase 2, the CMA examined these competitors and their future plans in more detail. While this confirmed the plans of rivals to expand their omni-channel capability, it was unclear whether they would target smaller merchants.[164]

To summarise, at Phase 1 the CMA concluded that iZettle did appear to have omni-channel ambitions, and that there was not sufficient competition to counterbalance the merged entity's market power. This was enough to find a realistic prospect of an SLC.

At Phase 2, there was no important new evidence on the strategic plans of iZettle in the counterfactual. However, the CMA's understanding of the IPO prospectus changed, and it drew a distinction between evidence of omni-channel ambitions (which it found were not present), and e-commerce ambitions (which were present).

We cannot be definitive, as we have not seen the confidential internal documents reviewed by the CMA, in particular internal strategic documents and many parts of the IPO Prospectus, but given the Phase 1 decision, it is possible that there may have been an SLC at Phase 2 under an SMS merger regime.

Conclusion

In terms of the offline payments theory of harm, the evidence presented at Phase 2 strongly suggests that under an SMS merger regime the CMA would have found a realistic prospect of SLC, which would have led to the merger being blocked, abandoned, or subject to remedies.

[160] Phase 1 Decision, para. 165
[161] Phase 1 Decision, para.184
[162] Phase 1 Decision, para. 180
[163] Phase 1 Decision, para. 176
[164] Final Report, para. 9.30

The evidence on the omni-channel theory of harm is more mixed, but it is possible that a realistic prospect of SLC would have been found at Phase 2.

A1.4 Merger-specific benefits from the transaction that would have been lost under the SMS merger regime

The price paid by PayPal was $2.2bn whereas the expected IPO valuation if iZettle was approximately $1.1bn.[165] Although there is always uncertainty around IPOs and the subsequent market valuation of the firm post-IPO, it appears that PayPal was willing to pay approximately $1bn over and above what a stand-alone iZettle was considered to be worth.

The CMA examined whether the price paid by PayPal for iZettle suggested that it had taken account of a potential reduction in competition, leading to higher future profits. Following a detailed review of internal PayPal documents and financial broker comments from the time of the acquisition, the CMA concluded that there was no such anticompetitive premium in the purchase price.[166]

> We examined whether the consideration paid by PayPal for iZettle (which was much higher than the expected IPO valuation) suggested that it had taken account of a potential reduction in competition. However, after careful review we have found no evidence to suggest that this was the case.

Instead, the CMA concluded that the commercial valuation was fully explained by expected synergies, including increased sales volumes and cost savings, obtained by cross-selling iZettle offline services to PayPal's online customers:[167]

> We found that the consideration appeared justified by commercial valuation and calculations of synergies including increased sales volumes and cost savings. We saw no evidence that PayPal intended to shut iZettle or increase prices post-Merger.

These synergies were so significant that PayPal was willing to pay approximatively $1bn over and above the standalone market valuation to acquire iZettle.

A proportion of these synergies would almost certainly be passed on to customers. Pass-on is a complex topic and it can be hard to predict exactly what proportion of any merger efficiencies will be passed-on to customers. In this case the synergies were driven by cost savings and opportunities for increased sales volumes.[168]

In addition to cost savings, combining complementary products through a merger can benefit customers directly by lowering prices, expanding output and serving customers who would not otherwise be served. In this case, by combining PayPal's online capability and customer base with iZettle's offline capabilities, the merged entity is likely to have an incentive to lower prices compared to the counterfactual. This is known as the Cournot effect and is

[165] Financial Times (2018), 'Swedish fintech group iZettle to seek $1.1bn valuation in IPO, May. Forbes (2018), 'Why Did PayPal Pay Such A High Price For iZettle?', June.
[166] Final Report, para. 11.
[167] Final Report, para. 4.12, 4.14.
[168] To the extent that cost savings relate to variable costs then they are more likely passed through to customers in the form of lower prices and/or short-run quality improvements. Fixed cost savings can also benefit customers if they lead to output expansion or higher innovation. CMA (2021) 'Merger Assessment Guidelines', para. 8.10.

analogous to the elimination of double marginalisation in vertical mergers, which the CMA recognises as a source of efficiencies.[169]

We have not attempted to quantify the likely efficiency benefits to customers in this case. However, even if we make a conservative assumption that only 10% of the synergies are passed on to customers, this would still represent approximately $100m.[170] The benefits would flow mainly to customers in the 12 countries where iZettle currently operates, of which the UK is the second largest in terms of GDP and has a high take-up of retail electronic payments. If the CMA had intervened at Phase 2 and the deal had been blocked, abandoned, or subject to remedies, this is likely to have reduced (in the case of remedies) or fully eliminated (in the case of the deal being blocked/abandoned) these benefits to customers.

[169] CMA (2021) 'Merger Assessment Guidelines', para. 8.2.
[170] We assume that the synergy benefits to customers would not be included in PayPal's valuation and that the total benefit, to customers and to PayPal's shareholders, would be greater than PayPal's estimated synergies.

A2 Case study: Amazon / Deliveroo

The CMA announced its Phase 1 inquiry into Amazon / Deliveroo in October 2019, and cleared the transaction in August 2020 at Phase 2.

Amazon was founded in 1994 and had a global annual turnover of £174bn in 2018 (the year before the transaction).[171] Its main line of business includes the operation of an online retail marketplace and the provision of logistics services. Deliveroo's core business is the operation of an online food platform. It also operates delivery-only kitchens and delivers convenience groceries through partnerships with grocers.[172] It was founded in the UK in 2013 and its global annual turnover was £476m in 2018.[173]

The figure below displays the relevant product markets that were considered by the CMA in its Phase 1 and Phase 2 investigations.

Figure A2.1 Markets investigated in the Amazon-Deliveroo merger

Source: Oxera.

Through the transaction Amazon acquired a 16% minority shareholder position in Deliveroo, as well as additional rights.[174] In the description of its rationale, Amazon focused on the investment's financial value given Deliveroo's rapid growth in customer base.[175] Additionally, the CMA argued that the transaction could constitute a first re-entry step in the market for online restaurant delivery.[176] Deliveroo submitted that the transaction was the best-available option continue to competing with 'well-resourced' competitors.[177]

A2.1 Core facts of the CMA investigation—Phase 1

The CMA opened a Phase 1 investigation on the grounds that the transaction caused the two companies to cease to be distinct, with Amazon gaining 'material influence' over Deliveroo.[178] While acquisitions of 'material influence' would not be subject to mandatory notification under the new regime, we note that the DMT proposes the establishment of a 'safety net' that would allow the CMA to review transactions of such nature as well.[179]

[171] Final Report: 3.4 – 3.11
[172] Final Report: 3.18 – 3. 25
[173] Including, among other, Australia, France, Ireland, Italy, Netherlands, Singapore, and Spain
[174] Final Report: Overview 1.
[175] Final Report: 3.31
[176] Final Report 3.32 – 3.40
[177] Final Report: 3.41 - 3.55
[178] Material influence is the lowest level of control over the target business that the CMA can use to claim jurisdiction. Higher levels of control are 'de facto' control and 'de jure' control.
[179] DMT Proposal: 4,145

The competitive assessment focused on potential horizontal unilateral effects in the markets for the supply of online food platforms and online convenience groceries in the UK.[180] The main results are summarised below.

A2.1.1 Online food platforms

The market for online food platforms was considered to be 'highly concentrated' at the time of the investigation. The CMA argued that only three firms (i.e. JustEat, Deliveroo, and UberEats) were close competitors, while potential entrants faced material barriers.[181] It identified several dimensions of competition such as access to customers, delivery capability, and price.[182]

Amazon exited the market for online food platforms in 2018 with the closure of Amazon Restaurants.[183] However, the CMA concluded that a presence in the food delivery market was an important part of Amazon's strategy.[184] Further, it argued that Amazon would be a well-positioned company to clear the barriers to entry due to its existing relationships on both sides of the market, as well as knowledge from operating its own online platforms and logistics network. Thus, it defined Amazon's re-entry as a counterfactual scenario absent the merger.[185]

Given the high market concentration, the re-entry was expected to significantly increase competition in the market, the CMA therefore concluded:[186]

> 'that the Merger raises significant competition concerns as a result of horizontal unilateral effects in relation to the supply of online food platforms in the UK.'

A2.1.2 Online convenience groceries

According to the CMA, both Amazon and Deliveroo were active in the market for online convenience groceries, with a combined forecasted market share of over 70%.[187] Despite differences in the product range and delivery times, the CMA concluded that both companies were direct competitors and faced constraints from only two rival services (UberEats and the last-mile logistics provider Stuart). Other services were considered to be mainly limited by not having a sufficient logistics network or customer base.[188]

As the market was still in a nascent state and both companies operated well-established platforms and logistics networks, the CMA argued that they had an edge over potential competitors.[189] Finally, as internal documents provided evidence of plans by both parties to expand their respective propositions, the CMA argued that the closeness of competition between Amazon and Deliveroo was likely to increase absent the merger.[190]

[180] The CMA defines horizontal unilateral effects as 'allowing the merged entity profitably to raise prices or degrade non-price aspects […] on its own and without needing to coordinate with its rivals.' The CMA further investigated three additional theories of harm related to logistics-enabled e-commerce marketplaces, bundling of subscription services, and data sharing. As these did not meet the 'realistic prospect standard', the CMA's analysis is not presented here.
[181] Phase 1 decision: 180 – 202, 377 – 381.
[182] Phase 1 decision: 180 - 202
[183] Phase 1 decision: 19
[184] Phase 1 decision: 27 - 28
[185] Phase 1 decision: 203 - 207
[186] Phase 1 decision: 208
[187] Phase 1 decision: 212 - 213
[188] Phase 1 decision: 279
[189] Phase 1 decision: 281 - 283
[190] Phase 1 decision: 280 - 287

Due to the market position of the parties, as well as insufficient competitive constraints in the market for online convenience groceries, it thus concluded:[191]

> 'that the Merger raises significant competition concerns as a result of horizontal unilateral effects in relation to the supply of online convenience groceries.'

A2.2 Core facts of the CMA investigation—Phase 2

Due to the concerns arising from the transaction described above, the CMA launched a Phase 2 inquiry. Thereby, it built up on its results from Phase 1 and further analysed potential horizontal unilateral effects in the markets of (i) online restaurant platforms and (ii) online convenience groceries.[192]

Box A 2.1 Impact of COVID-19 Pandemic on Phase 2 Investigation

The CMA's Phase 2 investigation of the transaction was coincided by the outbreak of the COVID-19 pandemic. Lockdown measures, health concerns, and a contraction of capital markets had a substantial negative on Deliveroo's financial situation.

Given these circumstances and internal documentation provided by the company, the CMA concluded that the most likely counterfactual scenario would be an exit of Deliveroo. On this basis, it provisionally cleared the transaction in April 2020.

Following the publication of the April Provisional Findings, the company's financial situation drastically improved leading the CMA to reinstate the continued competition of Deliveroo as the most likely counterfactual in its Phase 2 investigation.

Source: Phase 2 decision: 6.9 - 6.24, 6.41 - 6.74. Summary of Provisional Findings.

A2.2.1 Online Restaurant Platforms

For its competitive assessment in the market for online restaurant platforms, the CMA considered two theories of harm. It analysed whether the investment could (i) deter Amazon from re-entering the market and/or (ii) lead to Amazon and Deliveroo competing less strongly post-entry.[193]

First, with regards to Amazon's re-entry plans after the transaction, the CMA agreed with the parties that the acquisition of 16% of Deliveroo's shares did not constitute a significant financial distortion to entry incentives. Despite limited cannibalisation effects, it raised concerns that Amazon might see the investment as a first step to re-entry. By increasing its shareholding later on, other entry routes could be made redundant.[194] It therefore concluded that:[195]

> 'there [was] mixed evidence as to whether Amazon's strategic investment is likely to materially alter its re-entry incentives.'

Amazon's deterred entry was considered to have significant competition implications due to the limited number of competitors. Although the competition among Deliveroo, Just eat and Uber Eats appeared to be already strong, the CMA expected 'effective entry by a fourth player to have a positive impact on competition in a market'.[196]

Second, the CMA investigated whether Amazon would be incentivised to compete less strongly after the re-entry to protect the value of its investment in Deliveroo. The CMA also analysed if the transaction could lead to less fierce

[191] Phase 1 decision: 288
[192] To avoid confusion with the market for OCG services, the CMA referred to the market for online food platforms as 'online restaurant platforms' in its Phase 2 investigation.
[193] Phase 2 decision: 7.1 - 7.4
[194] Phase 2 decision: 7.33 - 7.53
[195] Phase 2 decision: 7.52
[196] Phase 2 decision: 7.73

competition by Deliveroo. This could occur if Amazon directly discouraged strong competition through its 'material influence' or if Deliveroo's management avoided competing with a main investor.[197]

The CMA concluded that Amazon could only recoup a small share of each lost sale if it impaired its own proposition due to its minority shareholding and significant diversion rates to other competitors.[198] Similarly, for the transaction's impact on Deliveroo's offer, it argued that Amazon's shareholding was not sufficient to enforce policies that countered the interests of other stakeholders, while competitive constraints also limited the financial incentives to do so.[199]

A2.2.2 Online Convenience Grocery Services

At Phase 2, the CMA recognised that the impact of the COVID-19 pandemic has increased the demand for OCG services. In response, potential competitors accelerated their plans to expand their proposition.[200] Although the parties still appeared to be well-placed, their advantages were not considered to be sufficient to have a clear competitive edge in the long run.[201]

The analysis of horizontal effects arising from the transaction in the supply of OCG services focused on the prospect of Amazon (i) discouraging Deliveroo to compete against Amazon, (ii) avoiding competing directly against Deliveroo, and (iii) relying on Deliveroo for its presence in the market for OCG services.[202]

The first two competitive concerns are analogous to the second theory of harm from the assessment of online restaurant platforms. The CMA again concluded that Amazon's influence was insufficient to alter Deliveroo's strategic focus, while future competitive constraints would limit the conduct's competition impact. Further, Deliveroo's logistics network was considered to be unsuitable for Amazon's larger-basket delivery, making closer competition of the two services, even absent the transaction, unlikely. [203] Further, the CMA again found that the minority shareholding did not constitute a sufficient financial incentive for Amazon to impair its own proposition.[204]

The third theory of harm was based on the nascent state and uncertain development of the market.[205] The CMA considered whether Amazon could rely on the investment for 'a stronger presence in OCG provision', reducing its own incentives to innovate.[206] Although this view was supported by internal documents, the CMA noted that expansion plans by competitors constituted substantial constraints. Additionally, the minority holding was considered to impose only limited financial constraints on Amazon's incentives to innovate.[207]

Taking the results for both markets into account, the CMA concluded that the transaction 'may not be expected to result in an SLC within a market or markets in the UK for goods and services.'[208]

[197] Phase 2 decision: 7.54
[198] Phase 2 decision: 7.57 - 7. 62
[199] Phase 2 decision: 7.66 - 7.69
[200] Phase 2 decision: 8.137 - 8.246
[201] Phase 2 decision: 8.288
[202] Phase 2 decision: 8.272
[203] Phase 2 decision: 8.290 - 8.297
[204] Phase 2 decision: 8.298 - 8.300
[205] Phase 2 decision: 6.8
[206] Phase 2 decision: 8.315
[207] Phase 2 decision: 8.309 – 8.322
[208] Phase 2 decision: 10.1

A2.3 Analysis

In this section, we revisit the evidence presented in the CMA's Phase 1 and Phase 2 investigations to assess the impact of the proposed SMS merger regime, if it had been applied to this transaction.

For both markets, we gauge the presented evidence against the lower standard of proof under the proposed regime. Specifically, we want to examine whether the CMA could have concluded that the transaction gave rise to a 'realistic prospect of a substantial lessening of competition'.

A2.3.1 Online restaurant platforms

As presented above, the CMA was concerned by the transaction's impact on Amazon's incentives to re-enter the market for online restaurant platforms. Due to the high level of concentration, it argued that the transaction could result in an SLC in its Phase 1 investigation. However, when assessed against the 'more likely than not' threshold in its Phase 2 inquiry, the transaction was cleared. This decision appears to have been based in large part on the limited impact on Amazon's incentives resulting from the minority shareholding in Deliveroo.

The CMA did not present substantial new pieces of evidence on this theory of harm in its Phase 2 investigation. In particular, at Phase 1 it was already aware of the size of Amazon's stake in Deliveroo, and chose to make a reference to Phase 2 on that basis, as it believed there was a realistic prospect of an SLC.

Therefore, we conclude that the CMA's decision was driven by the higher required standard of proof for an SLC. This conclusion is supported by the formulation of the CMA's overall conclusions at Phase 2:[209]

> […] we do not find it **sufficiently** likely that the Transaction will have a material impact on Amazon's incentives to re-enter, or a material impact on Amazon's incentives to compete with Deliveroo in the event of re-entry, such as to result in a substantial reduction in potential competition on the balance of probabilities. (emphasis added)

Overall, the evidence from the CMA's published documents relating to the case strongly suggest that it would have intervened in the acquisition at Phase 2 under the proposed SMS merger regime, based on a 'realistic prospect' of rather than SLC on the balance of probabilities.

A2.3.2 Online convenience groceries services

In its Phase 1 investigation in the market for OCG services, the CMA concluded that the transaction raised 'significant competition concerns'.[210] This assessment was based on the parties' market shares as well as their apparent ability to compete in the market in the future. Nevertheless, the CMA concluded at Phase 2 that the transaction was unlikely to lead to an SLC. [211]

The impact of the COVID-19 pandemic on the OCG services market can be considered as an external factor reducing the likelihood of an SLC in the Phase 2 investigation. As many competitors rapidly expanded, the CMA argued that future competitive constraints were likely to be greater.[212] However, we note that the CMA's Phase 2 assessment mainly relied on aspects of the merger

[209] Phase 2 decision: 7.77
[210] Phase 1 decision: 288
[211] Phase 2 decision: 8.296, 8.308.
[212] Phase 2 decision: 8.296

that were already considered during the Phase 1 inquiry, i.e. Amazon's limited financial incentive and its lack of power to influence Deliveroo's policy.

Further, in the report by the DMT, 'uncertainty about how the market, or the business that is being acquired, is likely to develop in future' was identified as a key rationale for the new regime.[213] It is therefore possible that transactions in nascent markets with strong growth will be subject to a more critical assessment by the CMA under the SMS merger regime. As shown above, these criteria apply to the market for OCG services.

We therefore conclude that, despite the change in circumstances between Phase 1 and Phase 2, it is possible that the overall likelihood of an SLC did not fundamentally change between both decisions. Thus, the CMA may have identified a Phase 2 SLC in OCG services under the SMS merger regime.

A2.4 Welfare benefits of the transaction

To further understand the impact of the proposed regime, we examine the welfare effects that would not have materialised if the Amazon / Deliveroo transaction was blocked, abandoned, or if significant remedies were imposed.

Deliveroo submitted that it 'needs investment in order to compete against well-resourced competitors, such as Uber Eats and Just Eat.'[214] Just Eat was the leader in the market for online restaurant delivery with a share of 60-70% in 2018[215] and the only competitor in many geographical areas outside major cities.[216] Although UberEats was of similar size as Deliveroo, it was backed by its parent company Uber, enabling substantial investments in its service.[217]

First, the Parties argued that the transaction allowed Deliveroo to, among other things, expand its delivery reach or roll out new innovations.[218] Thereby, Deliveroo's proposition is likely to have improved, increasing competition with larger players. Generally, this can be expected to have positive welfare effects on consumers e.g. through lower prices or shorter delivery times, especially in geographic areas where only JustEat was active prior to the transaction.

Second, in its assessment of Amazon's 'material influence' over Deliveroo, the CMA referred to 'Amazon's knowledge and experience that is relevant to Deliveroo's business', in particular in the 'operation of online platforms [and] an ultrafast grocery delivery service'.[219] Deliveroo's management is likely to have benefited from this knowledge. Therefore, Deliveroo could be expected to compete more effectively, enabling further consumer benefits.

Third, Deliveroo submitted to the CMA that it considered Amazon to be a desirable partner, as the company had a reputation of being a patient investor.[220] As Deliveroo relied on external funding to continue competing, Amazon's investment could be seen as a secure, and long-term option, mitigating the risk of the exit of a main competitor in the long run.

[213] DMT Report: 4.130
[214] Phase 2 decision: 3.41
[215] Phase 1 decision: 180
[216] Phase 2 decision: 5.126 (d)
[217] Phase 1 decision: 180. Initial Submission: 2.2
[218] Press release Deliveroo: https://uk.deliveroo.news/news/amazon-leads-series-g.html
[219] Phase 2 decision: 4.34 & 4.47. Phase 2 decision: footnote 131.
[220] Phase 2 decision: 3.54

A3 Mini-case study: Just Eat / Hungryhouse (2017)

The acquisition by JUST EAT Plc ('Just Eat') of Hungryhouse Holding Limited ('Hungryhouse') was investigated by the CMA at Phase 1 from March 2017, referred to Phase 2 in May 2017, and cleared in November 2017. The Parties each provided an online food marketplace, where customers could place orders and organise deliveries from restaurants that paid to be hosted on the platform.

The Parties' combined market share of the food ordering marketplace was between 90-100%, and still made up 80-90% when other ordering logistics specialists were included. Just Eat stated that the merger would allow it to compete with well-funded and fast-growing competitors, and would achieve cost synergies of £12-15m.

A3.1 Theories of harm and competitive assessment

In the Phase 1 investigation, the CMA's analysis focused on the Parties' shares of supply, the closeness of competition, the constraints imposed by competing firms and by direct ordering (i.e. customers ordering food direct from providers), and the interplay of competition on the restaurant and end-consumer sides of the market.

The CMA highlighted that while the Parties' market shares may not reflect the then recent growth in competitors, they were still estimated to supply at least 80-90% of the market.

Consumer surveys, internal documents, and evidence from service outages provided the CMA with evidence that 'on the restaurant side of the market the Parties [were] each other's closest competitors', and also competed on the consumer side. Research undertaken by the Parties found that there is 'significant' customer overlap between the Parties and that this overlap is 'larger than the overlap between each Party and any other competitor'. Despite growing competition from other platforms and direct ordering from restaurants, the CMA concluded there was a 'realistic prospect' of an SLC and referred the case to Phase 2.

At Phase 2, this horizontal theory of harm was investigated, looking at effects of the merger on both restaurants and end-consumers. The counterfactual used by the CMA was that Hungryhouse would have 'continued to operate in the UK', despite the firm's deteriorating financial situation. The CMA made specific reference to the 'uncertainty' in a rapidly evolving market and 'short planning horizon' that firms face in this market, with an inability to forecast effectively beyond one year.

At Phase 2, the CMA looked at the competitive constraint imposed by each party on the other, and found that due to the poor performance of Hungryhouse the constraint had weakened over time. Despite this, the market share figures cited at Phase 1 were reiterated and the CMA stated 'Where a firm enjoys a strong position, we would generally be concerned about the loss of even a small and relatively weak competitor'.

Ultimately, the CMA cleared the merger based on the finding that Hungryhouse was imposing a 'limited competitive constraint' on Just Eat, that Hungryhouse's longer term profitability was in doubt, and that there was a growing competitive constraint imposed by well-funded market entrants such as Deliveroo and UberEATS. The Phase 2 conclusion was that the merger 'may not be expected to result in an SLC'.

Would the CMA have cleared the merger at Phase 2 under a 'realistic prospect' standard?

The Phase 1 investigation centred on market concentration, closeness of competition between the parties, and a lack of established alternative providers. The CMA found that the market was highly concentrated, with market shares 'sufficiently high to raise prima facie competition concerns', and that the two firms were 'each other's closest competitors'.

At Phase 2, the market shares were found to be reliable. The CMA was also concerned about the removal of even 'a small and relatively weak competitor'.

In the Phase 2 final report, the CMA noted that 'the evidence is far from one-sided', and added that under the broad market definition it had used, Just Eat accounted for between '80-90%' of the share of supply, and that Hungryhouse was the only competitor to provide another food ordering marketplace 'to a material extent in the UK'.

Furthermore, the Phase 1 counterfactual, that Hungryhouse would have continued to operate in the market absent the merger, was supported by internal documents from Hungryhouse.

The consistency of analysis between Phase 1 and Phase 2, including the relevant counterfactual, theories of harm and market share data, as well as the reference to evidence on both sides of the conclusion, strongly indicate that the CMA would have concluded that there was a 'realistic prospect' of an SLC at Phase 2.

A3.2 Impact on consumers

Recent evidence shows that Just Eat has not maintained such high market shares. A 2020 survey found that 73% of respondents had ordered through Just Eat, against 33% and 31% for Deliveroo and UberEATS, respectively. These figures indicate a higher level of competition than that implied by the 80-90% market share that Just Eat and Hungryhouse had in 2017. Thus, despite the clearance of a merger where the merging parties had high market shares, the UK's food delivery market has become less concentrated and apparently more competitive. Just Eat / Hungryhouse is therefore an example of how setting a lower standard of proof in mergers in dynamic online focused markets might well have prevented a benign merger from taking place, and illustrates how reducing the threshold may be the wrong tool for intervening in nascent markets.

A4 Mini-case study: Nielsen / Ebiquity (2018)

The acquisition by Nielsen Holdings PLC ('Nielsen') of the advertising intelligence ('AdIntel') division of Ebiquity PLC ('Ebiquity') was investigated by the CMA at Phase 1 from April 2018, referred to Phase 2 in June 2018, and cleared in November 2018.

The rationale for the merger centred on Nielsen improving the scope, depth and functionality of its AdIntel products, while achieving cost synergies.

A4.1 Theories of harm and competitive assessment

The Phase 1 investigation highlighted theories of harm stemming from horizontal unilateral effects in both the UK Deep Dive market and the International AdIntel market. The CMA found there was a 'realistic prospect' of an SLC arising as a result of horizontal effects of the merger, due to the Parties' high market shares, and the lack of other UK-focused suppliers or credible substitutes.

At Phase 2, the CMA focusing focused on the possibility of unilateral horizontal effects in the UK Deep Dive and International AdIntel markets, against the counterfactual that both entities would continue to operate as competitors in the absence of the merger.

The CMA found that an SLC arising from horizontal effects was 'not likely', and that any lessening of competition was 'unlikely to be substantial'. This was because the Parties targeted different customers and there was little evidence of switching between them. Further, other firms in the market provided more competitive pressure than identified at Phase 1, especially in the International AdIntel market. For these reasons, the CMA cleared the merger at Phase 2.

A4.2 Would the CMA have cleared the merger at Phase 2 under a 'realistic prospect' standard?

At Phase 1, the CMA investigation focused on horizontal concerns in two markets, UK AdIntel and International AdIntel, and concluded that there was a 'realistic prospect' of an SLC arising from the merger. The UK AdIntel market was found to be highly concentrated, with the Parties' supply accounting for 90-100% of UK AdIntel. The CMA concluded that this indicated 'strong prima facie competition concerns'. Additionally, the Parties were found to be the main players in the International AdIntel market, supplying 50-60% of the market, and found to compete particularly closely in some aspects of the market such as international ad spend data. It was principally on the basis of these market shares, closeness of competition, and a lack of third-party competition, that the CMA concluded that there was a 'realistic prospect' of an SLC at the end of Phase 1.

At Phase 2 the CMA concluded that the merger 'may not be expected to result in an SLC'. Despite this conclusion, the CMA highlighted at Phase 2 that there were still some customers who would experience 'some loss of competition as a result of the merger'.

At Phase 2, the CMA gathered further evidence on market definition but arrived the same market definitions as Phase 1: 'the relevant market is no wider than the supply of UK Deep Dive AdIntel products…[or] International AdIntel products'. The Phase 2 investigation also confirmed the Phase 1 market shares. The main difference between Phase 1 and Phase 2 was that the Phase 2 investigation found that the parties were not such close competitors.

Despite finding low levels of switching between the Parties, the CMA found that the products they offered were still viewed by some customers as 'functional substitutes' in both markets. This implies some level of competitive constraint between the Parties.

Overall, there is evidence that the 'realistic prospect' test would have been met at Phase 2 under the proposed merger regime. The CMA found a consistent market definition, market shares, and some customer views, at Phase 1 and Phase 2, and thus it is possible there was a 'realistic prospect' of an SLC at Phase 2.

A4.3 Impact on consumers

In the event that the merger had been blocked under the lower evidential threshold, it is likely that the two parties would have continued to operate as separate entities, as per the counterfactual. In the short term this would have removed the possibility of cost synergies and efficiencies that Nielsen cited in its deal rationale. Additionally, in the long run, it may have made it harder for both firms to compete with expanding entrants focusing on digital advertising. The 'very significant changes' to the advertising industry over recent years has meant providers of internet advertising have also become providers of AdIntel. These trends have continued since the investigation, with the digital share of advertising expenditure increasing from 59% in 2018 to 69% in 2020. Both Ebiquity and the CMA cited the rapidly changing market as challenges for their business, and Ebiquity argued that the merger would grant the Parties' the resources to invest and compete effectively in this new market.

A5 Analysis of Phase 2 cleared mergers

The table below contains analysis of all 29 cleared Phase 2 mergers in the period 2013-21. These data form the basis for the statistics provided in section 5.2.

Turnover data was not always stated in the CMA reports, and sometimes only global turnover data was available for the merging parties at the time of the merger (even from other sources). Further, data was not always available of the specific business units in question. This means that the turnover ratios should be considered illustrative.

Table A 5.1 CMA merger cases

Merging parties	Date of case closure	Illustrative turnover ratio	Main theories of harm at Phase 2	Are the parties operating in the digital sector?
Booker / Makro	19/04/2013	0.202	Horizontal	No
AG Barr * / Britvic*	09/07/2013	5.632	Horizontal; conglomerate	No
AEG / Wembley Arena	02/09/2013	-	Horizontal; vertical	No
Optimax / Ultralase	20/11/2013	-	Horizontal	No
Tradebe / Sita	20/05/2014	3.962	Horizontal; vertical	No
Omnicell * / SurgiChem*	08/08/2014	1.101	Horizontal	No
Alliance Medical * / IBA Molecular	15/08/2014	0.023	Horizontal; vertical	No
Ericsson * / Creative	13/11/2014	0.006	Horizontal	No
Xchanging / Agencyport Software Europe* **	29/04/2015	0.053	Horizontal; conglomerate	Yes
Pork Farms Caspian * **/ Kerry Foods* **	03/06/2015	3.557	Horizontal	No
Sonoco Products Company **/ Weidenhammer Packaging Group**	03/07/2015	0.324	Horizontal	No
Ashford St Peter's NHS Foundation Trust / Royal Surrey County NHS Foundation Trust	16/09/2015	0.847	Horizontal	No
Poundland / 99p Stores**	18/09/2015	0.333	Horizontal	No
Pennon Group / Sembcorp Bournemouth Water Investments	05/11/2015	0.080	Horizontal	No
Linergy / Ulster Farm By-Products	06/01/2016	1.284	Horizontal; vertical; co-ordinated conduct	No
BT Group * / EE merger*	15/01/2016	0.353	Horizontal; vertical	No
VTech * / LeapFrog*	12/01/2017	0.309	Horizontal; innovation	No
Central Manchester University Hospitals / University Hospital of South Manchester	03/08/2017	0.473	Horizontal	No

Cardtronics / DirectCash Payments	22/09/2017	0.127	Horizontal	No
Just Eat / Hungryhouse*	01/12/2017	0.122	Horizontal	Yes
Tesco / Booker	20/12/2017	0.125	Horizontal; vertical	No
SSE Retail / Npower	22/10/2018	1.507	Horizontal; vertical	No
Nielsen / Ebiquity ***	22/11/2018	0.180	Horizontal; vertical	Yes
Menzies Aviation (UK) Limited * / Airline Services Limited	17/01/2019	0.014	Horizontal; vertical	No
PayPal Holdings, Inc / iZettle AB*	16/07/2019	0.052	Horizontal	Yes
LN-Gaiety Holdings / MCD Productions	08/01/2020	-	Vertical	No
Bottomline Technologies (de), Inc / Experian Limited* ***	05/04/2020	8.614	Horizontal	Yes
Amazon / Deliveroo*	07/09/2020	0.027	Horizontal; bundling	Yes
Liberty Global plc / Telefónica S.A.	08/10/2020	1.260	Horizontal; vertical	No

Note: Turnover ratio = Turnover of second named party (the acquired party) divided by the turnover of the first named party (the acquiring party). *Global turnover used as UK turnover data was not available. **Turnover data collected from non-CMA sources. ***Turnover given for whole company, even though only one part of the company was being acquired.

Source: Oxera analysis of CMA cases. CMA cases can be found at: https://www.gov.uk/cma-cases. Companies House Accounts can be found at: https://find-and-update.company-information.service.gov.uk

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