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Nascent competition in the UK – all about the *potential*

By David Weaver[1]

Introduction

How should antitrust authorities investigate deals that threaten *potential* competition? This is a focus for antitrust regulators across the globe, which is playing out most publicly in the context of acquisitions and business practices, in particular in the digital sector, that threaten *nascent competitors* and are feared to be '*killer acquisitions*'. Antitrust authorities and policy makers across Europe, the U.S. and China stepped-up efforts to address these concerns in 2020 by adapting merger control tools, introducing new legislation to protect competition in the digital space and pursuing behavioural actions against large digital platforms.

The UK Competition and Markets Authority (the **CMA**) has been particularly active in seeking to address a perceived "under-enforcement" of merger control laws in digital markets that has permitted the elimination of nascent competition.[2] This article considers the CMA's recent jurisdictional and substantive practice, as well as the new proposed tools that it will soon have to monitor these concerns.

As will be seen, the CMA's recent practice indicates that it will no longer shy away from using the high degree of discretion it is afforded under the UK's voluntary merger control regime to adopt an interventionist approach.

Dealmakers and their advisers must now adapt to the investigative tools and analytic frameworks being applied by the CMA. To focus only on static market dynamics and current "overlaps" is no longer enough to properly assess antitrust risk, particularly – though by no means exclusively – in digital markets.

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[2] Speech by Lord Andrew Tyrie, former chair of the Competition and Markets Authority, at the CMA Digital Markets event, 3 March 2020. Also see CMA's revised Merger Assessment Guidelines, CMA129, March 2021, para. 1.7.

Killer acquisitions, future potential competition and nascent competition – what does it mean?

The debate is often articulated as a concern over 'killer acquisitions'.[3] The concept is understood as an acquisition by a large or dominant firm of a small nascent competitor or a firm that it considers will develop into a rival over time and threaten its future business. The term was first applied to certain pharmaceutical mergers and is now more often used to describe the acquisition strategies of large (mainly U.S.-based) technology companies. A popular data point among those who advocate tougher merger control enforcement is the more than 400 acquisitions completed by the GAFA firms (Google/Alphabet, Amazon, Facebook and Apple) over the past ten years, of which only a handful has been scrutinised and none has been prohibited.[4]

The term 'killer acquisition' does not appear in CMA guidance, nor is it a complete description of concerns that are – in practice – being identified in CMA merger control reviews. Indeed, a recent economic review on this subject has evidenced that, even among the myriad of acquisitions made by GAFA, very few can properly be considered 'killer'.[5]

The concern articulated by the CMA more often in practice is the loss of *potential* competition between firms. This can arise in three principal ways. First, the merger may involve the acquisition of a new or *nascent* competitor (*i.e.,* a firm that has recently entered or, absent the transaction, will in the near term enter a market to compete with the acquiring firm, including markets that are nascent themselves). Second, the merger may reduce the potential for competition between the firms by eliminating the prospect of entry, or re-entry, by the acquiring firm, which may shelve its own entry plans as a result of transaction.[6] Third, the merger may more generally limit non-price based competition (*e.g.,* with respect to 'innovation' or R&D) between the firms (*e.g.,* between existing, established competitors active in a market dependent on dynamic competition).

Ultimately, the concern with killer acquisitions or the elimination of nascent competition is all about the broader concern with the loss of *potential* competition between the merging firms. This is not a new phenomenon, and certainly not a concern that the CMA has raised exclusively in relation to digital markets.[7] However, the concern is certainly becoming a more central focus of investigations and, in line with this, the CMA has recently published revised guidance indicating how it proposes to assess these issues in the future, drawing on its recent practice.[8]

The CMA's new guidance describes two broad forms of loss of potential competition that it will investigate:

a) First, the loss of *future potential competition*, where a merger involves the loss of a potential entrant and therefore a loss of any competitive constraints that would have materialised following the entry or expansion. This concern applies regardless of whether the potential

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[3] See further '*Killer Acquisitions*', Cunningham, Colleen and Ederer, Florian and Ma, Song, April 19, 2020 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707).

[4] See '*Unlocking digital competition – Report of the Digital Competition Expert Panel*' chaired by Professor Jason Furman, March 2019.

[5] See economic analysis of these acquisitions by Latham, Tecu and Bagaria of Charles River Associates, '*Beyond killer acquisitions: are there more common potential competition issues in tech deals and how can these be assessed?*', May 2020.

[6] The term '*reverse killer acquisition*' has been coined by a group of prominent European antitrust economists to describe the strategy of an acquiring firm that chooses to expend its own innovation efforts by buying (as opposed to building) the expertise (product, technical, people) to enter a market where it is not active. An acquisition strategy will usually be a quicker route to entry than organic investment and development. See '*How tech rolls: Potential competition and 'reverse' killer acquisitions*', Caffarra, Crawford, Valletti, 11 May 2020. Also see retort and a challenge to any assumption that such strategies harm competition in 'H*ow Merger Control Rolls: A Response to Caffarra, Crawford and Valletti*', Simon Bishop and Stephen Lewis, RBB Economics, December 2020.

[7] The CMA considered the loss of future potential competition in a sector far away from digital markets in its review of a low-cost gym merger in 2014 (see *Pure Gym Limited / The Gym Limited*, Phase 1 decision, September 2014). The CMA's ten-year-old Merger Assessment Guidelines also detail the approach of the then Office of Fair Trading and Competition Commission to assessing the loss of potential competition, considering a delineation between the loss of "actual potential competition" and the loss of "perceived future competition" (see Merger Assessment Guidelines, CC2/OFT1254, September 2010, paras. 5.4.13-5.4.18).

[8] Merger Assessment Guidelines, CMA129, March 2021.

entrant is the large acquiring firm itself, or the 'small' – or *nascent* – competitor being acquired.

b) Second, the loss of *dynamic competition*, whereby existing firms and current or potential competitors would, absent the merger, interact in an ongoing, dynamic competitive process (for example to innovate on existing or new products), and a merger could lead to a loss of this dynamism. The CMA explains that a "*merger may reduce the incentives of firms to continue with efforts to enter or expand, or to mitigate the threat of future rival entry or expansion*" and that while an "*assessment of dynamic competition may, in some cases, focus on entry and expansion in relation to specific products, in others, it may consider a broader pattern of dynamic competition in which the specific overlaps may not be identified easily at the point in time of the CMA's assessment* [but] *the CMA may assess a broader loss of competition arising from a reduction in the merger firms' incentives to continue investing in these competing programmes or strategies, rather than focusing on individual future overlaps*" (emphasis added).[9]

This revised CMA guidance is therefore helpful in framing the debate around the loss of potential competition that can arise in different forms depending on the fact pattern and the nature/dynamic of competition between firms in the sector. However, the more interesting development is not that the CMA is investigating the loss of potential competition in these circumstances *per se,* but the degree of evidential uncertainty with which the CMA is now willing to wrestle when assessing the loss of potential competition, and the interventionist approach that it has demonstrated it is willing to adopt despite that evidential uncertainty. This is particularly so in relation to assessing future incentives to invest and innovate even where there are no current overlaps between the firms, and the impact of that loss on dynamic competition.

Even in relatively recent times, and in most industries, one might have expected theories of harm based on a loss of potential competition to form an ancillary or secondary limb of objections raised to a merger – one that an enforcement agency like the CMA would raise only to the extent that orthodox theories of harm based on current competition and existing overlaps or vertical links are established and supported by available evidence.

This is no longer reflective of the CMA's approach. CMA guidance and, more importantly, its recent practice demonstrates that, from both a jurisdictional and substantive perspective, the CMA is prepared to pursue such concerns more aggressively than in the past, and as freestanding theories of harm across a range of sectors, but particularly in markets that are fast moving and innovative. While recognising that it must be minimised where possible, Andrew Coscelli, Chief Executive of the CMA, recently emphasised that uncertainty is inevitable when reviewing these issues and uncertainty cannot preclude action. He stated that any resulting risk of over-enforcement needs to be balanced against the risk of under-enforcement, which can lead to irreversible consumer harm.[10]

The CMA's approach in practice – establishing jurisdiction

One of the perceived obstacles faced by merger control authorities is that bright-line jurisdictional thresholds – often based on the merging firms' revenues – are poorly suited to catching mergers that are most likely to raise loss of potential competition concerns. Small or nascent competitors at the time of acquisition will often be generating low revenues that do not reflect their future potential either as a disruptive competitor itself or as a catalyst for the more established firms to innovate. While jurisdictional thresholds are undoubtedly a barrier to the investigation of certain mergers, this

9 *Ibid*, para. 5.21.
10 Speech by Andrea Coscelli, Chief Executive of the CMA, at the Bannerman Competition Lecture, 9 February 2021.

justification for perceived past under-enforcement does not offer a complete explanation. As noted above, potential competition is not all about large firms acquiring small firms, and jurisdictional barriers do not explain the historic lack of focus on the loss of potential competition in mergers between established firms. Indeed, two acquisitions that are often presented as examples of merger control failing to protect competition – Facebook's acquisitions of Instagram and WhatsApp – were reviewed and cleared by regulators in both the U.S. and Europe; jurisdiction was certainly no barrier to those reviews.

While certain merger control authorities have sought to overcome the jurisdictional obstacle by introducing transaction value thresholds,[11] the CMA has instead chosen to test the boundaries of its existing discretion to assert jurisdiction over acquisitions that may appear to have limited immediate nexus to the UK but that nonetheless raise concerns about loss of potential competition in the UK.

The UK merger regime is somewhat unusual in that it is voluntary and non-suspensory, meaning that, while merging parties do not have to notify an acquisition to the CMA and wait for approval before completion, the CMA has the authority to call in acquisitions for a period of four months after completion.[12] The CMA may then establish that it has jurisdiction to review the acquisition either on the basis that the target generates revenues in the UK in excess of £70 million, or that, as a result of the acquisition, the parties supply or acquire to a greater extent at least 25% of any goods or services in the UK.[13]

The CMA has often relied on the share of supply test to capture those mergers that may otherwise fall under the £70 million revenue threshold, and its recent practice demonstrates a willingness to take novel approaches to share of supply assessments to assert jurisdiction over cases that it considers are worthy of investigation. The CMA has been transparent that it will adopt a flexible approach to the share of supply test to review deals that might raise potential competition concerns. For example, the CMA's CEO recently referred to the share of supply test as: "*a flexible test which, in practice, has meant that the CMA has consistently been able to exert jurisdiction over transactions in digital markets, for example where the turnover of the target was limited, but the value of the deal was high*".[14]

Recent examples of deals caught by the CMA's novel interpretation of the test serve as a stark warning to merging parties and their advisers about the creative approaches that the CMA is willing to adopt, for example:-

a) In its review of Roche Holdings, Inc.'s USD 4.3 billion acquisition of Spark Therapeutics, Inc.,[15] the CMA investigated the impact of the acquisition on potential competition for gene therapy treatments for Haemophilia A. Roche had a commercial product available in the UK, whereas Spark was in the process of developing a potentially competing product. However, that product was not commercially available at the time of the review and Spark generated *zero* sales in the UK. The CMA nevertheless reasoned that a core dynamic of the industry was competition between firms even before products are commercialised and that it was therefore appropriate to consider whether the share of supply test was met in the context of the merging parties' global R&D efforts (which were not particularly focused in the UK). The CMA concluded that it was. The merging parties had employees in the UK researching Haemophilia A treatments and had

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11 For example, Germany and Austria have each introduced transaction value-based thresholds. In contrast, the European Commission has proposed to deal with concerns about mergers that may impact competition but that fall under EU and national Member State jurisdictional thresholds by amending its policy on referrals under Article 22 EUMR, and encouraging Member States to refer cases that may raise a concern even where national competition authorities themselves would not have jurisdiction (see speech by European Commission Executive Vice-President, Margrethe Vestager, '*The future of EU merger control*', 11 September 2020).

12 Or four months after details of the acquisition are 'made public', whichever is later.

13 Enterprise Act 2002, section 23.

14 '*Competition in the digital age: reflecting on digital merger investigations*', a speech delivered by Andrea Coscelli to the OECD/G7 conference on competition and the digital economy, June 2019.

15 *Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc.*, ME 6831/19, December 2019.

procured patents related to these treatments. The CMA considered that, in relation to both number of employees and procurement of patents, the merging firms exceeded a 25% share of supply/procurement. Ultimately, the CMA cleared the deal at phase 1, applying a substantive assessment that is in line with the approach it has taken in other transactions involving pipeline pharmaceutical overlaps. It nevertheless demonstrates the CMA's willingness to take novel positions on jurisdiction in the context of a global deal that it believes may impact future competition in UK markets.

b) More recently, the CMA adopted a creative approach to its jurisdictional discretion in its review – and eventual prohibition – of Sabre Corporation's acquisition of Farelogix Inc.[16] A global deal with seemingly limited nexus to the UK, the merging firms had overcome Department of Justice opposition to the deal in a U.S. court only two days prior.[17] In this case, the CMA asserted jurisdiction based on the *indirect* supply by Farelogix of services to a single customer in the UK – British Airways – through a contractual relationship that British Airways has with its partner airline, American Airlines. The CMA concluded that Farelogix supplied a customer in the UK and established that the share of supply text was met – an assertion that was ultimately supported by the Competition Appeal Tribunal on appeal.[18]

What is striking about both cases is the extent to which the CMA appears to have considered jurisdiction not as a threshold question, determining whether it is *properly empowered* to investigate an acquisition, but as a broader question relating to its policy of intervention. The CMA itself seemed to acknowledge this in its Phase 1 decision on Sabre's proposed acquisition of Farelogix, stating that, with the overall purpose of merger control in mind,[19] the approach in relation to the assessment of jurisdiction had been "*to focus on whether the Merger might restrict competition in the UK and, as a result, harm UK consumers*."[20] By adopting an approach to the jurisdictional inquiry that collapses procedural and substantive considerations, the CMA seems to be adopting a more purposive approach to jurisdiction to determine in each case if a transaction is one over which the CMA *should* be able to establish jurisdiction. If upheld by the UK courts, such an approach will give the CMA considerable discretion to investigate potential competition concerns in the future.

There is considerable criticism that this approach has created a high degree of uncertainty for commercial parties. If the CMA can justify novel grounds on which to assert jurisdiction over deals that have perhaps only a small nexus to the UK,[21] a mandatory and suspensory regime (with appropriately set jurisdictional thresholds) may be seen as preferable by companies engaged in M&A that has a nexus with the UK. Although such a regime would require notification of a far greater number of transactions, it would provide considerably more certainty for parties who believe that the CMA does not have jurisdiction to intervene.

A mandatory regime for certain digital mergers

The UK Digital Markets Taskforce published in December 2020 a series of recommendations to the UK Government on the possible design and implementation of a new regulatory regime.

16 '*Anticipated acquisition by Sabre Corporation of Farelogix Inc.*', CMA Final Report, April 2020. On 1 May 2020, the Parties announced that they had agreed to terminate the merger agreement. The announcement states that the CMA acted "outside the bounds of its jurisdictional authority".
17 United States v. Sabre Corp., Civil Action No. 1:19-cv-01548-LPS, Dkt. No. 277 (D. Del. Apr. 8, 2020).
18 See our update here for more details: https://www.allenovery.com/en-gb/global/news-and-insights/publications/court-confirms-long-reach-of-uk-merger-control-jurisdiction.
19 '*Anticipated acquisition by Sabre Corporation of Farelogix Inc.*', CMA Decision on relevant merger situation and substantial lessening of competition, August 2019, para 92.
20 *Ibid*, para 95.
21 For another global deal abandoned under scrutiny from the CMA, see '*Anticipated acquisition by Thermo Fisher Scientific Inc. of the electron microscope peripherals business of Roper Technologies, Inc.*', where the Target had a very limited nexus to the UK and generated very limited sales, but where the CMA asserted jurisdiction based on an overlap that led to a share of supply in excess of 25% only when taking into account Thermo Fisher's internal supply of the competing product.

Included in these recommendations was a proposal for the creation of a *Digital Markets Unit* (the **DMU**) as a new division of the CMA, tasked with overseeing digital firms designated as having Strategic Market Status (**SMS**). This proposal is perhaps a sign of the changes to come should the CMA find its ability to flexibly apply its jurisdictional thresholds curtailed.[22]

It is currently envisaged that, once the DMU is established in April 2021,[23] digital firms designated as having SMS will face greater scrutiny of their acquisition activities, with a requirement for these firms to report *all* of their global acquisitions to the CMA within in a short period of time after signing, and an additional *mandatory* and *suspensory* merger control process for acquisitions of control by these firms that meet a certain, potentially transaction value-based, threshold. Alongside a more burdensome notification process, the recommendation is also for the CMA to provide a lower burden of proof, under which it would seem to block transactions it determines have 'realistic prospect' of a substantial lessening of competition, rather than the current 'balance of probabilities' test.[24]

The new regulatory regime will be a significant development for those digital firms caught by it, and while the regime's purpose is much wider than merger control, it is highly likely that the CMA will have its sights set on harms to potential competition and acquisitions of nascent competitors when reviewing acquisitions by firms that fall within the purview of the DMU.

The CMA's approach in practice – the *substantive* review

A review of the CMA's practice in recent cases where *potential competition* theories of harm have been raised demonstrates that these are no longer ancillary theories for the CMA. Indeed, the CMA is now actively investigating and pursuing such theories on multiple deals across a range of sectors, as demonstrated by a spate of recent Phase 2 investigations:

a) ***Illumina/PacBio***.[25] Illumina's proposed acquisition of Pacific Biosciences of California, Inc. was abandoned after the CMA indicated in its provisional findings that it would likely block the deal due to a negative impact on product innovation.[26] Illustrating the CMA's willingness to look beyond price factors, the provisional findings emphasise the importance of innovation, which it describes as a 'crucial aspect' of competition in the market. Competition between the two businesses to become the preferred supplier of DNA sequencing systems was found to be a key driver of innovation. This case evidences a partial shift in focus away from quantitative evidence towards a more holistic approach to understanding competition dynamics between firms and how that would likely lead to innovation over time. The CMA acknowledges that such evidence, including sales forecasts and econometric analysis, is potentially less informative and more uncertain in the context of dynamic markets; however, it was nevertheless

[22] The CMA has consistently stated that it would push the UK Government to adopt a broad mandatory and suspensory merger control regime should its ability to protect against competitive harms be limited by the courts, for example through challenges to its ability to impose global hold separate orders on merging businesses. The UK specialist competition court, the Competition Appeals Tribunal, has so far been generally supportive of the CMA's broad discretion to enforce its statutory duties to prevent substantial lessening of competition in the UK. See for example, Facebook's recent unsuccessful challenge to the CMA's power to hold separate GIPHY Inc., from its global businesses (*Facebook, Inc. and Facebook UK Limited v Competition and Markets Authority* [2020] CAT 23).

[23] For further information on the creation of the DMU and its proposed powers to protect competition in digital markets, see '*UK taskforce recommendations map out new regulatory regime for digital firms*', Allen & Overy LLP, December 2020 (**here**).

[24] A lowering of the burden of proof to a test based on a 'balance of harms' had been recommended in the Furman Review, but this recommendation has been rejected during the creation of the DMU on the basis that it would not be possible to apply in a transparent and robust way. Similarly, a reversal in the burden of proof for these technology firms to prove that an acquisition does not give rise to competitive harm was rejected on the basis that it would be difficult in practice for merging parties to meet that burden, including in non-problematic cases.

[25] '*Anticipated acquisition by Illumina, Inc. of Pacific Biosciences of California, Inc.*', CMA Provisional Findings Report, October 2019.

[26] The merging parties were also facing opposition to the deal by the U.S. Federal Trade Commission.

prepared to put weight on such factors and deal with any consequential uncertainty as part of its review.

b) ***PayPal/iZettle***.[27] PayPal's proposed acquisition of Swedish fintech company iZettle for USD 2.2bn amounted to nearly double the valuation that iZettle had itself suggested when publishing an intention to float its shares to the public very shortly before the acquisition. Accordingly, the CMA interrogated PayPal's transaction rationale and valuation materials to determine whether it was paying a premium for the elimination of competition from iZettle that it would have expected to face in the future. The CMA also examined carefully both parties' internal documents, including those regarding iZettle's future growth plans and whether PayPal was a likely entrant to iZettle's segment absent the merger, to construct alternative scenarios and develop a 'dynamic counterfactual' against which to assess the merger. To this end, one of the CMA's concerns centred around the potential for iZettle to expand into one of PayPal's core markets, but also vice versa, despite the lack of any concrete plans from either party to do so pre-merger. A review of the parties' internal documents to assess the likelihood of successful entry eventually assuaged the CMA's concerns in this respect on the basis that those documents suggested in particular that any potential entry by iZettle was likely to be slow to materialise and form a relatively weak constraint. The CMA ultimately granted unconditional clearance, but the case is a stark demonstration that merging firms must be conscious of the contents of their internal strategic documents. In its final report, the CMA stated that it is important for parties to present all relevant context in terms of strategy for the CMA to conduct its counterfactual assessment and that acquirers should be prepared to justify transaction values without reference to a reduction in competition.

c) ***Amazon/Deliveroo***.[28] The CMA investigated the likelihood of Amazon's *re-entry* into the food delivery market in the UK, assessing whether the acquisition of a minority shareholding in Deliveroo would disincentivise Amazon from re-entering the market in the future (Amazon having closed its 'Amazon Restaurants' service in 2018). The CMA ultimately cleared the transaction on the basis that Amazon's proposed acquisition of a 16% shareholding in Deliveroo would not disincentivise Amazon from re-entering the market. Despite this being a minority acquisition, the CMA closely examined Amazon's internal documents, which proved pivotal to the clearance decision. Interestingly, Amazon indicated that it does not produce large quantities of internal strategy documents, making the CMA's assessment more difficult despite reviewing thousands of documents. As a result, in order to supplement the document review, the CMA also relied on its statutory power to conduct interviews with senior Amazon management, a power that it exercised for the first time in a merger review. In contrast with similar interviews conducted in the U.S., these interviews are not taken under oath, but a transcription is taken for use as evidence in the case file. Any person that provides materially false or misleading information (or is reckless as to whether it is false or misleading) could face a fine or criminal sanctions – this is therefore a powerful investigative tool that we expect the CMA to use more in the future.

d) ***Experian/ClearScore***.[29] This merger was abandoned following the CMA's expression of concerns during its phase 2 investigation. In its provisional findings, the CMA demonstrated appreciation of the dynamic nature of the wider financial services industry but doubted whether it was certain enough that this dynamism would result in increased levels of competition such that the CMA should develop an alternative counterfactual to the prevailing market conditions. The CMA found the parties to be in close competition and that this was a key driver

27 '*Completed acquisition by PayPal Holdings, Inc. of iZettle AB*', CMA Final Report, June 2019.
28 '*Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo*', CMA Final Report, August 2020.
29 '*Anticipated acquisition by Experian plc of Credit Laser Holdings Limited*', CMA Provisional Findings Report, November 2018.

of product development and innovation. While recognising that the merger would not necessarily result in a deterioration of current offerings, the CMA found that it would reduce the parties' incentive to improve their future offerings by removing an important element of dynamic competition. In another case in which heavy emphasis was placed on the parties' internal documents, the CMA indicated a general desire to place weight not only on documents influencing commercial or strategic decision-making but also on those prepared in the ordinary course of business, should the latter provide relevant insights into competition in the relevant markets. Following this investigation, the CMA stated in a blog post that internal documents can be "especially useful" in "dynamic digital markets where past data might not be a good guide to present and future competition".[30]

The CMA has since published revised guidance on its approach to identifying potential competition concerns that makes clear its willingness to address such concerns with greater focus than previously. Codifying an approach already visible in the above cases, the guidance details a greater focus on parties' internal documents and deal valuations, and explicitly identifies the "loss of future competition" as a key concern. The guidelines acknowledge what we have already seen: that the CMA will take a flexible approach to questions of market definition; and that the CMA is willing to move away from traditional sources of evidence where these are uninformative or unavailable in order to assess the dynamic effects of a merger.

This focus on protecting potential competition, particularly in fast-moving and innovative industries, will be welcome to many but will likely be a source of concern for dealmakers craving certainty, particularly as the CMA is clear that it will make its own assessments as to the potential for future competition. For instance, the guidance states that a lack of evidence of expansion plans or efforts to enter a market "*will not be sufficient to demonstrate that the firm would not have entered absent the merger*". As seen in *Amazon/Deliveroo* and *PayPal/iZettle*, the CMA is willing to undertake independent analysis into a firm's incentives and likely strategies absent the merger to determine the 'dynamic counterfactual'. This may necessitate a reliance on predictions as to the future developments on the market that may only be loosely inferable from the parties' internal documents (or other third-party documentary evidence). The CMA will also look to assess the impact on future competition in dynamic markets, even where firms are not currently producing or supplying products that overlap. These approaches make self-assessment by the firms of whether a merger may substantially lessen competition – a vital judgement call in the context of the voluntary regime – particularly challenging.

Nevertheless, while every case must be considered on its merits and in the context of the relevant markets, there are helpful threads and evidentiary points that we can expect the CMA to pursue in almost all future merger reviews. There is clearly more importance placed on what the parties' internal documents say, particularly where economic evidence or prior market data may not be available or reflective of future dynamics. Parties should expect questions around transaction valuation to arise as a matter of course, and should be prepared for the CMA to assess dynamic counterfactuals rather than focus on the *status quo* competitive dynamics between the firms. This means considering not only classic 'pipeline' overlaps where there is evidence of an intent to enter, but also focusing on the likelihood that a firm would expand or innovate in ways that would otherwise increase competition in that counterfactual (even where there are no current overlaps). Internal documents will again be key in this regard, not only for evidence of entry plans, but in allowing the CMA to build a holistic narrative of the firms' strategies and likely changes in market dynamic absent the merger.

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[30] CMA, '*Merger controls in the digital age: investigating the proposed Experian and ClearScore merger*', 11 April 2019.

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Conclusion

The UK's regime is voluntary, but merging parties should not draw comfort that this means deals will escape heavy scrutiny. Quite the opposite; the CMA has shown willingness to creatively apply its discretion on jurisdictional questions to review the deals it considers may raise competition concerns, even in the context of global mergers that have a limited nexus to the UK.

The CMA's recent focus on investigating potential competition concerns, combined with its flexible approach to jurisdiction, creates a high degree of uncertainty for merging firms. Commercial parties are able to mitigate jurisdictional uncertainty where the substantive framework to be applied by an authority is clear and, in conjunction with legal and economic advisers, antitrust risk can be properly assessed. However, combining jurisdictional uncertainty with a considerable degree of unpredictability in the nature of theories of harm that the CMA may pursue has the potential to create a highly uncertain environment in which to conduct M&A.

Dealmakers and their advisers must now adapt to these new investigative tools and analytic frameworks being applied by the CMA. To focus only on static market dynamics and current "overlaps" is no longer enough to properly assess antitrust risk, particularly – though by no means exclusively – in digital or other fast moving innovative markets.

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