

# Merger review in the digital economy

## A UK view of current issues

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# Is there a WhatsApp gap?

- Global debate – has there been underenforcement across all sectors?
- Has this been more acute in the digital space – the WhatsApp gap
- Are current merger control tools suitable for analysing digital mergers?
- Broader question about longer term effect of large platforms, incl. questions not directly related to competition:
  - privacy
  - fake news
  - scams

# Legal challenges

- Jurisdiction
  - in turnover and/or asset based merger control systems, potentially anti-competitive mergers can fall below the regulatory radar
  - the 'share of supply' jurisdictional test (combined 25% share of supply threshold) allows CMA to review mergers in which one of the parties has little or no revenue e.g.
    - Facebook/Instagram
    - Google/Waze
- Particularly relevant in two-sided digital markets where services are often offered “free” to users
- Evidentiary threshold
  - is the balance of probabilities for establishing an SLC test workable for digital mergers?

# Analytical challenges

- Measuring non-price effects - quality, innovation and privacy as parameters of competition
- What is the correct counterfactual?
  - past unlikely to be a good guide to the future in fast-moving markets
  - even ex post, difficult to know whether we got it right or wrong
- Taking due account of network effects
- Understanding the role of data in the competitive assessment:
  - does combining data sets help merging parties overcome barriers to entry?
  - or give them an unreplicable advantage?
- Difficult to predict 'long term dynamic effects' in fast-moving markets, with risk of not placing enough emphasis on dynamic effects because they are uncertain.

# Evidentiary challenges?

- What evidence should we be looking for when assessing digital mergers?
- If start-ups are being bought for billions, need to ask what the acquirer thinks it is getting (or getting ahead of)
  - rationale for the transaction
  - valuation models – insight into growth expectations with and/or without the merger
  - equity research – what are they telling the markets?
  - is there a pattern of behaviours)
  - what products are in development?
  - does the merger increase the amount of personal data they collect or weaken existing privacy protections or controls around the use of data

# Addressing challenges

- Merger control is, by its nature prospective, and we have many years' experience of making predictions: e.g. in relation to potential competition and innovation theories of harm
- CMA started an external evaluation project in October 2018 to look at past merger decisions in the technology sector and approaches to assessing potential competition theories of harm
- Establishment of DaTA team
- Traditional approach was used successfully to assess a merger in a two-sided digital mergers
  - *Just Eat/Hungryhouse*: after our clearance, shares in Just Eat went up but recently decreased by 10% after Deliveroo, one of the competitors which we anticipated the growth of, announced significant expansion plans.
- Support from CAT in *ICE/Trayport* for an SLC finding on the basis of the dynamic effect of the merger on competition, based on reasonable and evidence based predictions