Non-standard counterfactuals in merger control

Peter Davis, Greg Eastman and Kostis Hatzitaskos*
Cornerstone Research

Introduction

Although merger review is inherently forward-looking, the standard counterfactual in merger control is the pre-existing conditions of competition. For example, the European Commission (EC) Horizontal Guidelines state that, 'In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger.' However, there are circumstances when non-standard counterfactuals are adopted by competition agencies, including:

- A potential competition counterfactual involving a scenario that, absent the merger, one of the merging parties would introduce new products or services or otherwise expand its competitive significance. Under the heading of 'loss of a potential entrant scenario', the Competition and Markets Authority (CMA) describes that it 'will consider whether the counterfactual situation should include the entry by one of the merger firms into the market of the other firm or, if already within the market, whether the firm would have expanded had the merger not taken place.'
- A failing firm counterfactual involving a scenario that, absent the merger, one of the merging parties would close either the entire firm or the relevant division. In each case, the non-standard counterfactual is necessary when the pre-merger competitive landscape would not provide a good indication of how the merging parties would likely continue to compete absent the merger.

While the topic of nascent acquisitions has drawn a great deal of attention in merger control circles during the last few years and placed a heavy focus on potential competition counterfactuals, competition agencies' attention is now necessarily shifting to consider failing firm cases following the covid-19 pandemic. This period of transition provides a suitable moment to compare and contrast competition agencies' approaches to the counterfactual in each type of case.

The starting points for this discussion are the observations that the substantive legal test does not depend on the nature of the counterfactual, and the consequences of different approaches to uncertainty about the counterfactual in these two types of cases can be profound. The following sections begin with the failing firm and then consider both the positive and normative aspects of competition agency practice in respect of the counterfactual to uncertainty, and the types of evidence. The paper then considers agencies' approaches to assessing the extent of competition in the counterfactual.

Failing firm counterfactuals

Table 1 outlines the tests that competition agencies in the European Union, United Kingdom and the United States apply to the failing firm counterfactual. The tests, which must each be passed, are briefly discussed in turn.

Table 1: summary of EU, UK and US guidance

Limb	European Union	United Kingdom	United States
1	'The allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking.'	Would the firm have exited the market absent the transaction ('Likelihood of exit')?	'The allegedly failing firm would be unable to meet its financial obligations in the near future.' 'It would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act.'
2	'There is no less anti-competitive alternative purchase than the notified merger.'	Would there have been any substantially less anti-competitive purchaser for the business or its assets ('Alternative buyer')?	'It has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.'
3	'In the absence of a merger, the assets of the failing firm would inevitably exit the market.'	What would the impact of exit be on competition compared to the competitive outcome that would arise from the acquisition?	

Source: EU HG, paragraph 90; UK MAG, paragraphs 4.3.8, 4.3.12–4.3.18; UK FF;[1] US HMG,[2] page 32.

Under the first limb, all three guidelines emphasise financial difficulties in the near future. For example, the EU HG describe that 'Under the first limb of the test, financial difficulties, it has to be demonstrated that the company is unlikely to meet its financial obligations in the near future.'[3] Restructuring forms the basis of a second question in the US HMG. However, since both the UK MAG and EU HG emphasise restructuring under their first limb, the first two US questions have been placed under the first limb. The US HMG emphasise a particular form of restructuring through Chapter 11 bankruptcy. The EU HG highlight the potential for equity or other financial investors: 'Such [financial] difficulties are at hand when no shareholder or other financial investor would be willing to provide the necessary capital for the business to remain in the market as a going concern.'[4] In principle, the CMA allows reasons for an exit other than financial failure: 'The exiting firm scenario is most

commonly considered when one of the firms is said to be failing financially. However, exit may also be for other reasons, for example because the selling firm's corporate strategy has changed.'[5]

The second limb examines the existence of alternative less anticompetitive purchasers. The consideration of alternative offers forms part of a third question in the US HMG, which is placed under the second limb in Table 1 above.[6] The US HMG highlight the evidence that US authorities will look for when evaluating submissions describing that there were no such alternatives.[7] For the EU HG:

> *it has to be assessed whether the production assets are likely to remain in the market in their current use or liquidated and re-allocated for another more efficient use. The rationale for this part of the test is [to] address the possibility of a take-over by third parties of the various production assets of the failing firm in the course of bankruptcy proceedings. If these production assets remain in the market, the effects on competition may be similar to (or more beneficial than) the takeover of the entire failed business by an alternative purchaser.*[8]

The third limb of the test discusses exit of assets. In the EC's submission to the OECD for its discussion paper on the topic of failing firms, the EC describes that 'it has to be assessed whether the production assets are likely . . . liquidated and re-allocated for another more efficient use.'[9] In the UK FF, a very recent publication during the 2020 covid-19 crisis, the CMA has clarified that in practice it has applied the third limb 'less mechanistically' than the UK MAG's wording suggests.[10] The CMA describes that

> *Depending on the nature of the markets at issue, the CMA will not only consider what might happen to the sales of the merging party but will also consider the impact that the merger is likely to have on competition more broadly. More specifically, the CMA is likely to consider the impact that the exit of the failing firm would have on competition within the markets at issue (looking at the overall market structure and taking all relevant parameters of competition into account) compared to the competitive outcome that would arise from the acquisition.*[11]

At present, there is no equivalent to this limb of the UK test explicitly described in the US guidelines.

Uncertainty

The US HMG describe that there is an 'inherent need for prediction'[12] in merger control and that 'certainty about anticompetitive effect is seldom possible'.[13] While certainty about the future is indeed unlikely, the legal standard in most jurisdictions is markedly lower than certainty. Indeed, the US HMG describe that certainty is 'not required for a merger to be illegal'.[14] In the UK, the CMA must believe only that there is a 'realistic prospect' (ie, a likelihood that is 'greater than fanciful')[15] of a significant lessening of competition (SLC) at Phase 1 to refer a merger for a Phase 2 investigation. At Phase 2, the CMA must believe that a merger is 'more likely than not' to result in an SLC finding, by the civil standard of proof.

Although the challenge of uncertainty is inherent in any prediction exercise, the sources and nature of the uncertainty differ across types of cases. In a failing firm case, firms argue they will fail absent the merger, and the required evidence will relate primarily to the short-term future status of the target firm. In contrast, in some potential competition cases the required evidence must potentially be marshalled to inform the medium- or long-term future status of the target firm. It may be very difficult to know at the time of acquisition whether the acquired firm is likely to develop into a competitor.[16]

The acceptance of uncertainty in a potential competition non-standard counterfactual is sometimes in significant contrast with at least the tone of failing firm argument guidelines. For example, under the EU HG, the third limb requires that 'in the absence of a merger, the assets of the failing firm would inevitably exit the market'.[17] Inevitability is a high hurdle. It is also one that cannot always be strictly necessary to achieve a 'more likely than not' standard of proof.

Inherent uncertainty

Guidance documents currently propose to define a counterfactual only by reference to sufficiently likely events. For example, the CMA describes that it must be 'sufficiently certain' to include an event or circumstance in a counterfactual.[18] The EU HG mention that 'the Commission may take into account future changes to the market that can reasonably be predicted',[19] while the US HMG similarly describe the need to identify 'what will likely happen if a merger proceeds as compared to what will likely happen if it does not'.[20] In contrast, the CMA's report on past digital mergers describes that 'there will always be a certain degree of uncertainty as to the counterfactual chosen for the assessment of a merger. Future plans, no matter how carefully set out, are always subject to being unmade by unforeseen market events'.[21]

In practice, there is typically a finding of the counterfactual, and then competition agencies evaluate the SLC. But is that a coherent framework when the counterfactual is itself uncertain? Statistics suggest not – for reasons now described using an illustrative example.

Suppose one could determine that a company that currently has no sales has a 90 per cent probability of developing a product that can be taken to market (and so a 10 per cent chance that its research and development efforts do not pan out and so no marketable product is developed). Suppose further that, if this company develops the product, there is a 55 per cent chance that it will grow into a significant competitor (and so a 45 per cent chance it will not be of any future competitive significance). It would be wrong to follow a chain of argumentation that found, on the balance of probabilities, that it is more likely than not that the company will develop the product (because 90 per cent outweighs 10 per cent) and then simply proceed to say it is, therefore, more likely than not there will be a lessening of competition (because 55 per cent outweighs 45 per cent). The reason is that doing so artificially ignores the 10 per cent risk in the first part of the example. The correct calculation instead would reason that while the company would develop a product to take to market 90 per cent of the time, it only becomes a significant competitor 55 per cent of the time even when it does develop a marketable product, that is, that the probability of a significant lessening of competition is only 49.5 per cent (90 per cent of 55 per cent).[22] The likelihood of an SLC would therefore not meet the more-likely-than-not standard.

Note, in particular, that making a finding of 'fact' about what is, in reality, an uncertain counterfactual, risks misapplying the legal test for an SLC. It would do so if in practice an agency made a finding of fact about the counterfactual and then simply pretended that a counterfactual was certain for the overall evaluation of the likelihood of an SLC. The numerical example above illustrates that in some circumstances this may not be a legitimate approach.[23]

In Phase 1, the risk of such misdirection is reduced. In *Amazon/Deliveroo*,[24] before the financial difficulties encountered by Deliveroo during the pandemic, the CMA noted that 'Amazon has a strong continued interest in the restaurant delivery sector'[25] and found 'There appear to be significant barriers to entry including the need to build relationships with restaurants, couriers and consumers, and to develop the necessary technology to power the logistics',[26] which Amazon, given 'its previous experience, financial resources and customer relationships, may be well-placed to overcome'[27] to provide significant competition in future. Thus, the CMA considered the uncertain counterfactual of potential re-entry of Amazon and believed that 'there is a realistic prospect that Amazon

would have re-entered in the supply of online food platforms in the UK in the near future'[28] absent the merger. The CMA concluded that it 'appears realistic that Amazon would have invested in an alternative online food platform (or similar business) that would enable it or a company it has invested in to re-enter in the UK.'[29] At Phase 1, realistic prospect is a low hurdle and an agency or appeal court may judge that a realistic prospect of potential future competition combined with a likelihood that there would be an SLC in such a counterfactual is, for all practical purposes, sufficient to make a finding that there is a realistic prospect of an SLC. The realistic prospect test can mean, therefore, that an overall SLC assessment is markedly less acutely impacted by the proper treatment of uncertainty than a Phase 2 assessment.

In contrast, when the likelihood of a counterfactual in a potential competition case is too low, the more-likely-than-not civil standard of proof will not be met by a competition authority. The CMA past digital mergers report, for example, recently argued that 'A more speculative counterfactual may result in the Authorities falling short of the burden of proof they are required to satisfy to block a merger'.[30]

The foreseeable future

The UK MAG state: 'The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable, enabling the [CMA] to predict with some confidence. The foreseeable period can sometimes be relatively short.'[31]

For example, in *PayPal/iZettle*,[32] the CMA concluded that some aspects of the counterfactual were foreseeable. Specifically, the CMA describes its view that iZettle on its own would have focussed on bettering its existing services, rather than expanding into omni-channel, and 'iZettle's expansion into online payments offering would have remained relatively less developed and therefore that its omni-channel services would have proceeded and developed only at a slow rate'.[33] The CMA's view was also that PayPal would have 'substantially improved or replaced'[34] its PayPal Here service or in the shorter term made 'incremental improvements to its existing mPOS [mobile point of sale] offering (for example through improvements to pricing, marketing, or product hardware)'[35] and would challenge iZettle more effectively on the mPOS side by being a stronger competitor.

However, a future counterfactual may not always be foreseeable. In *PayPal/iZettle* the CMA acknowledges that 'payment technologies can and do develop quickly, and technological or regulatory changes and developments in consumer habits can result in substantial market changes. . . . However, the likelihood and extent of any such impact from future technologies is unforeseeable.'[36]

A reasonable question is when is it conceptually correct to define the counterfactual in a way that ensures 'events or circumstances and their consequences are foreseeable, enabling the [CMA] to predict with some confidence?'[37] Although that approach can sometimes be very helpful, defining the counterfactual in such a constrained way will sometimes make it less useful as an analytical tool. The reason is that the uncertainty inherent in predicting the future cannot be made to vanish. Removing uncertainty from the counterfactual means it must instead be taken into account when assessing the SLC.

To illustrate, consider a case involving potential competition wherein a short-term approach to the time horizon will not always be appropriate. Doing so involves adopting a less certain counterfactual but has the advantage of potentially simplifying the analysis of the SLC. For example, an SLC may be very likely given the evidence and assuming a counterfactual in which the target grows into a significant future competitor. If the counterfactual includes only foreseeable events, the uncertainty for an SLC assessment does not vanish. Instead, this example demonstrates that agencies have a choice in structuring their analysis of a transaction: in some cases, it will make sense to place the uncertainty in the counterfactual, while in other cases it will make sense to place the uncertainty in the SLC assessment (by requiring a more certain counterfactual). Whichever approach is adopted, competition agencies cannot escape the fact of uncertainty or the consequences of that uncertainty for their decision making under the current legal framework.

Types of evidence

Collecting relevant evidence reduces uncertainty. Competition agencies will examine internal documents, market evidence, and evidence on both the ability and incentive of firms to undertake a strategy envisioned in a counterfactual. Each type is discussed in turn.

Internal documents, external reports and management action

Agencies will review several types of internal documents. For example, the CMA describes that it 'will review contemporaneous internal documents such as board minutes, management accounts and strategic plans'.[38] The CMA has also examined large numbers of internal emails in past cases. For an exiting-firm scenario, the CMA 'will also consider the action the management has taken to address the firm's position'.[39] In terms of external reports:

> *The CMA will also typically request and consider contemporaneous analysis provided by external legal, financial and insolvency advisers, as well as external auditors, in relation to the position of the company. The CMA may also request evidence from the company's debt or equity providers, such as the banks that provide its financial facilities or existing shareholders.*[40]

Also, the CMA's UK FF document describes that, in failing firm cases, 'the CMA will carefully examine the firm's profitability over time, cash flows and its balance sheet in order to determine the profile of assets and liabilities'.[41]

Documentary evidence is relevant for both failing firm and potential competition cases. For example, in *PayPal/iZettle*, the CMA examined several documents regarding iZettle's intentions:

> *In addition to iZettle's submissions and IPO documentation, [the CMA] examined internal papers and strategy documents and reviewed internal email communications for a period prior to the Merger. This was to assess iZettle's business strategy in relation to its online payments capability and a broader omni-channel functionality. The evidence was consistent with its stated intention [which included prioritising its offline offering development].*[42]

Market evidence

The second type of evidence that may be available is market evidence. This can take various forms, including responses to questionnaires sent to third parties, evidence from actual attempts at a sales process for the target, or evidence on market valuations in potential competition cases.

In *Aegean/Olympic II*, the EC 'sent out questionnaires to 24 European airlines in order to establish whether there [was] any interest in acquiring Olympic' (which there was not) or 'in taking over Olympic's Q400 aircraft'.[43] It found that there was no credible third-party interest to Olympic:

> *Although the Commission found in* Olympic/Aegean I *that the parties had not convincingly demonstrated that there was no interested alternative purchaser, in the present case this condition is met. This is due to the facts that (i) between 1999 and 2009 the Greek State sought to divest Olympic four times and found no credible interested party except Marfin and Aegean.... Moreover, the current and foreseeable market conditions are unlikely to be more conducive to Olympic's sale, (ii) Marfin would have had an incentive to find an alternative purchaser given that Olympic's first*

> *merger with Aegean was prohibited by the Commission, and (iii) the data collected during the market investigation did not reveal the likelihood of any credible alternative purchaser of Olympic.*[44]

In potential competition cases, market evidence has focused on the value of the transaction:

> *There is a large number of transactions being undertaken by digital incumbents. The value of the transaction may help the Authorities screen among those transactions to identify those that may warrant a more in-depth analysis of the merger, since it represents the magnitude of the effects (both beneficial and detrimental) associated to the transaction.*[45]

For instance, in *PayPal/iZettle*, the CMA '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'.[46] Also, competition agencies may consider evidence from any sales process undertaken.

The CMA notes that such market evidence must be interpreted appropriately. For example, in respect of evaluating claims in a failing firm case where there are no alternative purchasers, the CMA describes that:

> *the possible unwillingness of alternative purchasers to pay the seller's asking price (or to pay as much as the purchaser [had] ultimately chosen) would not rule out a counterfactual in which there is a merger with an alternative purchaser, so long as any alternative offer would have been above liquidation value.*[47]

Evidence of ability and incentives

Competition agencies have considered evidence relevant to assessing both the ability and incentive of parties to the transaction.

In failing firm cases, there is a natural focus on the financial ability and incentives of a party to continue operating in the counterfactual. Concerning ability, the CMA describes that:

> *If the firm is part of a larger corporate group, the CMA will also consider the parent company's ability to provide continued financial support. In previous cases, the CMA has found that limb 1 [of a failing firm test] has not been met where a parent company would be able to provide continued financial support to a business experiencing financial difficulties.*[48]

Concerning incentives for a firm to continue to support a division, the US HMG contemplate whether 'such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill'.[49]

For example, in *Aer Lingus/CityJet*, the CMA considered CityJet would have exited, not for financial failure reasons, but for strategic reasons:

> *CityJet's decision to exit the LCY-DUB route was part of a wider strategic decision (which preceded the decision to enter into the Agreement) to move towards being a wet lease provider. . . . [T]here is no realistic prospect that CityJet would have continued the provision of scheduled air passenger services on the LCY-DUB route absent the Merger.*[50]

Concerning potential competition cases, competition agencies must also examine evidence on ability and incentives. The fundamental question in such a merger inquiry is whether the target firm will grow, mature, and provide more competition within the relevant marketplaces with the merger or, counterfactually, without it.

In making such assessments in potential competition cases, it will be important to consider ability and incentives in a way that remains grounded in the available case-specific evidence. Superficially, in respect of the factual, large technology firms may always have the ability to launch a new product into a narrow market segment and always have an incentive to grow a successful business.

The counterfactual may, of course, involve the target persisting as an independent firm, or instead, it may be necessary to consider the target's prospects for growth following an acquisition by an alternative purchaser. For example, in *PayPal/iZettle*, the CMA found that, absent the merger, PayPal was likely to have bettered its PayPal Here service and challenged iZettle more efficiently on the mPOS side by offering 'a strong offline payments service to complement its online payments product'.[51] 'Therefore, under the counterfactual it is likely that PayPal would have been a stronger competitor than it currently is, stemming the decline in PayPal Here's competitive position.'[52]

Assessing the loss of competition under a non-standard counterfactual

This section illustrates the approach taken by competition agencies when evaluating the loss of competition owing to a merger under a given non-standard counterfactual using select case studies.

Failing firm

Potential alternative purchasers

Under the second limb of its failing firm test, the CMA considers that even if the target firm is exiting the market, there may still be alternative buyers 'whose acquisition of the firm as a going concern, or of its assets, would produce a better outcome for competition than the merger under consideration'.[53] Hence, the CMA will look at available evidence supporting any claims that there was genuinely only one possible purchaser'.[54] In this assessment, the CMA:

> *will consider the prospects of alternative offers for the business above liquidation value. . . . The fact that no other bids were ultimately received for a business may not, by itself, support the position that there were no alternative purchasers for a firm or its assets.*[55]

For example, in *Aer Lingus/CityJet*, the parties argued that 'it was unrealistic that CityJet would have found another airline . . . for the LCY-DUB route'.[56] This was due, in part, to network effects. Specifically:

> *CityJet told the CMA that an airline would need to have 'frequency, scale, market awareness and sales presence, and/or the ability to offer onward connections either over Dublin or over London City onto other parts of its network to make the London City to Dublin route viable' (and that only Aer Lingus fits this profile).*[57]

The CMA concluded there was no realistic prospect of a less anticompetitive counterparty than Aer Lingus as 'none of the third-party airlines contacted by the CMA expressed any credible interest in entering the LCY-DUB route at this time'.[58] Carriers confirmed either that 'the LCY-DUB route did not fit their business models given LCY would not be able to accommodate its larger aircraft', that their strategic plans did not include wet leasing, that 'the route was not suitable to 'feed' [transatlantic carriers'] long-haul flights', that 'under a wet lease-type arrangement, it would be necessary to build market presence and brand awareness at both ends of the route' requiring 'significant' marketing expenditure, or that 'airlines, as a general rule, tend to focus on their "home markets" where the bulk of their infrastructure is located. A single route outside of that market would be unlikely to generate the required frequency.'[59]

Counterfactual Competition

Under the third limb of the failing firm test, the CMA considers 'What the impact of exit would be on competition compared to the competitive outcome that would arise from the acquisition'.[60] For example, in *Illumina/PacBio*, the CMA found that 'PacBio had been searching for a strategic partner since August 2017', but concluded alternative buyers might be interested.[61] The CMA stated that

> *the evidence presented to [the CMA] and the actions of each of the Parties, shows that PacBio has substantial underlying value, which would be attractive to alternative purchasers. Although any such alternative offers may not have been as attractive to PacBio shareholders as Illumina's bid, they would have resulted in the competitive constraint between the Parties being maintained.*[62]

Potential competition

Future alternative partners

In *PayPal/iZettle*, the CMA examined both parties for potential other partnerships or acquisitions. The CMA 'found no reason to consider it likely that [iZettle] would have entered into a transformative partnership or acquisition to advance its online offering in a significant way in the foreseeable future', and concluded that:

> *PayPal would have substantially improved or replaced PayPal Here but that 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, [ie,] the profile of any acquisition or partnership target.*[63]

Counterfactual competition

At Phase 1 in *Amazon/Deliveroo*, the CMA noted that although 'there appear to be significant barriers to entry including the need to build relationships with restaurants, couriers and consumers, and to develop the necessary technology to power the logistics'. Amazon, given 'its previous experience, financial resources and customer relationships, may be well-placed to overcome these barriers' and hence could provide significant competition in future.[64] Thus, the CMA believed 'there is a realistic prospect that Amazon would have re-entered in the supply of online food platforms in the UK in the near future' absent the merger, and concluded that Amazon would buy another target company: '[it] appears realistic that Amazon would have invested in an alternative online food platform (or similar business) that would enable it or a company it has invested in to re-enter in the UK.'[65]

Conclusion

This article considers competition agencies' approaches to non-standard counterfactuals in different types of cases, illustrating the potential differences that can arise between cases where competition agencies emphasise the need for counterfactuals that are tightly defined to limit the risk of uncertainty in the counterfactual; and those cases where competition agencies emphasise a likely uncertain counterfactual. The failing firm counterfactual is an example of where competition agencies require that non-standard counterfactuals are highly likely. In contrast, recent reports have suggested that agencies should accept – perhaps even markedly – greater uncertainty in potential competition counterfactuals.

This article also examines the implications of such a trend for future analysis in merger cases. Competition agencies can explicitly recognise that counterfactuals may be uncertain in some cases and incorporate that fact into merger assessments directly. In addition, agencies can test the robustness of their guidance documents by examining the degree to which the approach described can be integrated into a single coherent framework, which applies across the various types of cases (and in particular failing firm and potential competition cases). A goal of this paper is to illustrate how those cases may be evaluated in the future.

* *The views expressed herein are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.*

Notes

1 The UK FF document is described only as a general 'refresher' on how the CMA is likely to approach 'failing firm' claims rather than explicitly as a guidance document issued under the Enterprise Act 2002, but in this paper, it has been termed as guidance since it is substantively that. See Competition and Markets Authority, 'Summary of CMA's Position on Mergers Involving "Failing Firms",' April 2020 (UK FF).

2 US Department of Justice and the Federal Trade Commission, 'Horizontal Merger Guidelines', 19 August 2010 (US HMG).

3 OECD Competition Committee, 'Roundtable on Failing Firm Defence – Note by the Services of the European Commission Directorate-General for Competition', 21 October 2009 (OECD Roundtable), paragraph 4.

4 OECD Roundtable, paragraph 4.

5 UK MAG, paragraph 4.3.9.

6 US HMG, page 32.

7 An example of where in the US the DoJ considered a less anticompetitive purchaser is the *Chicago Tribune/Chicago Sun-Times* transaction, where it ultimately required that the company went through a proper bankruptcy auction to find a buyer. See US Department of Justice, 'Department of Justice Statement on the Closing of Its Investigation into the Possible Acquisition of Chicago Sun-Times by Owner of Chicago Tribune,' 12 July 2017.

8 OECD Roundtable, ¶ 7.

9 OECD Roundtable, ¶ 7.

10 UK FF, paragraph 21.

11 UK FF, paragraph 21.

12 US HMG, page 1.

13 US HMG, page 1.

14 US HMG, page 1.

15 See UK MAG, footnote 16, and *IBA Health Limited v OFT* [2004] EWCA Civ 142.

16 Chicago Booth Stigler Center, 'Stigler Committee on Digital Platforms, Final Report', September 2019, page 88, https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E.

17 EU HG, paragraph 90.

18 '[The CMA] may still consider the effects of the merger in the context of an event or circumstance occurring even if that event or circumstance is not sufficiently certain to include in the counterfactual. Future changes in market conditions, such as regulation or market liberalisation, are often addressed as part of the [CMA's] competitive assessment.' See UK MAG, paragraph 4.3.2.

19 EU HG, paragraph 9.

20 US HMG, page 1.

21 Competition and Markets Authority, 'Ex-post Assessment of Merger Control Decisions in Digital Markets – Final Report', 9 May 2019 (CMA Report), page iv, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf. This report was developed by Lear for the CMA.

22 For completeness, there are also two circumstances when the transaction would have no impact on competition: when (90 per cent of the time) the company develops a marketable product that (45 per cent of the time) does not become of competitive significance; and when (10 per cent of the time) the company does not develop a product and

hence again fails to compete. Adding the likelihood of these two circumstances gives 0.9 × 0.45 + 0.1 = 50.5 per cent.

23 A technical discussion generalising this example is provided in the expanded variant of this paper.

24 Competition and Markets Authority, 'Anticipated Acquisition by Amazon of a Minority Shareholding and Certain Rights in Deliveroo – Decision on Relevant Merger Situation and Substantial Lessening of Competition', 11 December 2019 (*Amazon/Deliveroo* referral decision).

25 *Amazon/Deliveroo* referral decision, paragraph 8.

26 *Amazon/Deliveroo* referral decision, paragraph 9.

27 *Amazon/Deliveroo* referral decision, paragraph 9.

28 *Amazon/Deliveroo* referral decision, paragraph 69.

29 *Amazon/Deliveroo* referral decision, paragraphs 69, 178.

30 CMA Report, page xiv.

31 UK MAG, paragraph 4.3.2.

32 Competition and Markets Authority, 'Completed Acquisition by PayPal Holdings, Inc. of iZettle AB – Final Report', 12 June 2019 (*PayPal/iZettle* decision), https://assets.publishing.service.gov.uk/media/5cffa74440f0b609601d0ffc/PP_iZ_final_report.pdf. The CMA describes that 'PayPal is a technology platform company' providing among others 'payment services that allow merchants to accept online and offline … card payments from end-customers' while iZettle is a 'financial technology company that provides payment (and other) services with a focus on small businesses, which mainly allow merchants to accept offline card payments from end customers.' See *PayPal/iZettle* decision, paragraphs 2–3. PayPal's rationale for the acquisition was to combine PayPal's online payment service solutions with iZettle's in-store/offline product offerings to enhance omni-channel payment solutions. See *PayPal/iZettle* decision, paragraph 9. The CMA concluded iZettle on its own would only develop its omni-channel services at a slow rate while PayPal would have 'substantially improved or replaced' its service, known as PayPal Here, to challenge iZettle more effectively on the mPOS side than it currently is. See *PayPal/iZettle* decision, paragraphs 14–22. However, the CMA concluded the acquisition is unlikely to substantially lessen competition in the provision of offline payments services or omni-channel services to smaller merchants in the UK. See *PayPal/iZettle* decision, paragraphs 9, 41.

33 *PayPal/iZettle* decision, paragraphs 18–22.

34 *PayPal/iZettle* decision, paragraph 17.

35 *PayPal/iZettle* decision, paragraph 34. 'mPOS services consist of a card reader that is connected, physically or by Bluetooth, to an app downloaded onto a smartphone or tablet, which enables merchants to accept card payments.' See *PayPal/iZettle* decision, paragraph 4.

36 *PayPal/iZettle* decision, paragraph 29.

37 UK MAG, paragraph 4.3.2.

38 UK FF, paragraph 11.

39 UK FF, paragraph 11.

40 UK FF, paragraph 11. The CMA added a footnote highlighting that it is a criminal offence for external advisers to provide information to another person that is false or misleading in material respect knowing that information is to be supplied to the CMA.

41 UK FF, paragraph 11.

42 *PayPal/iZettle* decision, paragraph 20.

43 European Commission Case COMP/M.6797 – AEGEAN/OLYMPIC II, 9 October 2013 ("Aegean/Olympic II decision"), ¶¶ 811, 827, https://ec.europa.eu/competition/mergers/cases/decisions/m6796_20131009_20682_4044023_EN.pdf. The parties successfully argued that "absent the Transaction, Olympic would cease operating and as a result cease to be a competitor to Aegean. Consequently, with or without the Transaction, …Aegean would become the only operator on those overlap routes where the Commission found competition concerns." See *Aegean/Olympic II* decision, ¶¶ 645, 833. The Commission cleared the transaction in phase 2 without any commitments.

CORNERSTONE RESEARCH

Peter Davis
pdavis@cornerstone.com

Greg Eastman
geastman@cornerstone.com

Kostis Hatzitaskos
khatzitaskos@cornerstone.com

4 More London Riverside, 5th Floor
London SE1 2AU
United Kingdom
Tel: +44 20 3655 0900
www.cornerstone.com

44 *Aegean/Olympic II* decision, ¶ 816.

45 CMA Report, page xiv.

46 *PayPal/iZettle* decision, paragraph 4.12.

47 UK FF, paragraph 16.

48 UK FF, paragraph 12.

49 US HMG, page 32.

50 Competition and Markets Authority, 'Completed Agreement between Aer Lingus Limited and CityJet Designated Activity Company – Decision on Relevant Merger Situation and Substantial Lessening of Competition', 21 December 2018, (*Aer Lingus/CityJet decision*), paragraphs 59, 62, https://assets.publishing.service.gov.uk/media/5c46de96ed915d38a2f5e262/AerLingus_CityJet_Full_Text_Decision.pdf.

51 *PayPal/iZettle* decision, paragraph 14.

52 *PayPal/iZettle* decision, paragraph 17.

53 UK FF, paragraph 14.

54 UK FF, paragraph 15.

55 UK FF, paragraph 15.

56 *Aer Lingus/CityJet* decision, paragraph 63.

57 *Aer Lingus/CityJet* decision, paragraph 63.

58 *Aer Lingus/CityJet* decision, paragraph 71.

59 *Aer Lingus/CityJet* decision, paragraph 70.

60 UK FF, paragraph 8.

61 Competition and Markets Authority, 'Anticipated Acquisition by Illumina, Inc. of Pacific Biosciences of California, Inc. – Provisional Findings Report', 24 October 2019 (*Illumina/PacBio* provisional decision), paragraph 4.4, https://assets.publishing.service.gov.uk/media/5db1b98a40f0b609ba817d38/Illumina_Pacbio_-_ProvFindings.pdf. On 24 October 2019, the CMA provisionally blocked the proposed merger between Illumina Inc (Illumina) and Pacific Biosciences of California Inc (PacBio) concluding 'the Proposed Merger may be expected to result in an SLC in relation to the supply of [next generation sequencing] systems for sale in the UK'. See *Illumina/PacBio* provisional decision, paragraph 10.2. Shortly afterwards, on 3 January 2020, the parties abandoned the merger. See Competition and Markets Authority, 'Illumina/PacBio Abandon Merger', 3 January 2020, https://www.gov.uk/government/news/illumina-pacbio-abandon-merger.

62 *Illumina/PacBio* provisional decision, paragraph 6.118.

63 *PayPal/iZettle* decision, paragraphs 21, 7.42.

64 *Amazon/Deliveroo* referral decision, paragraphs 6–9.

65 *Amazon/Deliveroo* referral decision, paragraphs 69, 178.