SPC Network

Dynamic Competition and Big Tech Mergers

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1 SUMMARY

1.1 Introduction

1. For many years, some competition economics academics and practitioners have argued that competition authorities do not take sufficient account of dynamic competition when assessing merger cases, instead relying on neoclassical economic theory and static competition. Under dynamic competition firms use innovation to introduce new products, processes and services and compete for future rents, whilst under static competition products are generally close substitutes and firms compete for current rents.
2. This report, commissioned by the British Institute for International and Comparative Law (BIICL) reviews two recent merger cases in the UK (Meta/Giphy and Microsoft/Activision), which were both rejected by the Competition and Markets Authority (CMA), and examines how, if at all, dynamic competition was considered in their analysis. This report does not consider whether the CMA came to the right conclusion or not, only the process they followed when dynamic competition could be significant.

1.2 Defining Static and Dynamic Markets

3. Market definition, which is usually the first stage of a merger assessment, is traditionally based on the Hypothetical Monopolist Test (HMT), which examines potential supply and demand side substitution by similar products. However, in many markets we can see generational shifts in products and services brought about by innovation, such as the shift from feature phones to smart phones. These shifts often see old suppliers replaced by new ones, for example when Apple's iPhone replaced RIM's Blackberry, showing that dynamic competition often comes from outside the market. Therefore, authorities often need more qualitative techniques than the HMT to develop an understanding of the competitive arena.
4. Static market definition also tends to concentrate on vertical relationships between focal products and their upstream suppliers and downstream customers and horizontal relationships with direct competitors. However, this method of defining markets is increasingly outdated as firms and products become part of wide ecosystems, consisting of many types of relationships including complementors and co-creators. Competition exists both within and between ecosystems.

5. In both cases under review, the CMA seeks to avoid the static means of defining markets and instead uses a more qualitative approach to try to understand the various relationships that exist in the market. Despite this, however, they end up with what are arguably static market definitions of products that currently exist, and do not take account of any potential future developments.
6. This leads the CMA to examine two traditional theories of harm in the markets: horizontal effects and vertical effects.

1.3 Horizontal Effects

7. Horizontal effects are found only in Meta/Giphy, where both firms are found to be competitors in the display advertising market. Giphy was developing an advertising product called "Paid Alignment" under which advertisers could have their products featured in GIFs. The CMA considered Paid Alignment as potential dynamic competition that would be removed as a result of the merger leading to a Substantial Lessening of Competition (SLC).
8. The Competition Appeal Tribunal (CAT), which heard an appeal against the decision brought by Meta, considered the question of dynamic competition and set out four indicators that may assist the CMA in identifying genuinely dynamic competition as opposed to "duds". These were:
   a) *The motives and thinking of the merging firms.*
   b) *The market value attached to the dynamic element.*
   c) *Contestability of the market, pointing out that a contestable market has low barriers to entry and exit.*
   d) *The manner in which the dynamic element can be monetised.*

9. Importantly, and in contrast to many of the academic contributions to this debate, the CMA and the CAT considered dynamic competition as something the merger could substantially lessen, rather than something coming from outside the market that could reduce the effect of an SLC.

1.4 Vertical Effects

10. The CMA found vertical effects were present in both cases. This was because Giphy and Activision both had strong positions in the searchable GIF and gaming markets respectively

and the merger would have allowed the merged entity to refuse to supply downstream rivals with access to these important products.

11. In both cases the discussion on vertical effects does not include dynamic competition but only considers foreclosure of existing products. However, when considering countervailing factors, the CMA does examine whether the merger could result in efficiency gains or higher barriers to entry and expansion in the future. It does not consider whether foreseeable developments could counter any static SLC arising from vertical effects. The CAT also only applies its analysis to horizontal effects.

1.5 Conclusion on Recent Cases

12. From our reading of the cases we draw three conclusions about the use of dynamic competition analysis in merger cases:
    a) *The CMA takes account of dynamic competition to some degree but appears to do so in an ad hoc manner rather than employing an holistic framework. For example, the inclusion of dynamic competition when assessing horizontal, but not vertical, effects.*
    b) *Dynamic competition is only considered as something that could be lost as a result of the merger rather than something that could overcome any SLC if new technologies were available to potential rivals.*[1]
    c) *The CMA relies for information on the Parties, other firms involved and the knowledge of its panel members rather than being able to call on independent experts to provide the panel with a neutral but informed view of likely market developments.*

1.6 Proposed Changes to Merger Analysis

13. In the light of these conclusions, we propose a five stage process for incorporating dynamic competition analysis into future merger analysis, which we present as five questions to be analysed:
    a) *Do technical and economic conditions mean that the market is likely to be subject to dynamic competition? We propose a further set of questions is considered in answering this first question which we have based on our comparison of static and dynamic competition set out in Section 3 of this report. We also propose that the panel should*

[1] Conversely, the CMA does consider potential competition as something that will overcome an SLC of static competition in the Viasat/Inmarsat merger (CMA 2023b).

have access to independent experts to help their assessment along the lines of the panel of digital experts recently appointed by the CMA.

b) *What is the scope of the relevant market? We suggest that the CMA adopts a systems thinking approach to develop a "map" of the competitive arena which would allow it to identify the area of concern and how that interlinks with the overall market system.*
c) *If a static SLC is not found, could there be a dynamic SLC? This is broadly in line with the approach proposed by the CAT and designed to ensure future competition is not negatively affected by the merger.*
d) ***I**f a static SLC is found, could dynamic competition be an effective counter? This is the inverse of the previous question with the purpose of assessing whether foreseeable developments could facilitate entry by new rivals with dynamically competitive products. Again, a panel of experts could provide independent advice.*
e) *Do coordination benefits from integration outweigh an SLC? Innovation may require a closer relationship between firms in the market than one based on contracts to overcome dynamic transaction costs. A merger may, therefore, allow the merged entity to adopt a new organisation design that can deliver enhanced innovation benefits to consumers that are sufficient to outweigh any loss caused by the merger. We believe that it is for the Parties to make such a case and for the CMA to assess that case, perhaps with independent expert advice.*

2 INTRODUCTION

14. According to Brad Smith, Microsoft's vice chair and president, the decision by the UK's Competition and Market Authority (CMA) to block his company's merger with Activision Blizzard showed *"a flawed understanding of this market and the way the relevant cloud technology actually works"*. In its response, Activision went further, saying that the decision was a "*disservice to UK citizens, who face increasingly dire economic prospects", adding, "the UK is clearly closed for business".*[2]
15. The Parties' strong reaction to the CMA's decision to block such a large merger, valued at $75 billion, is perhaps not surprising, especially in the light of the EU's subsequent decision to allow the merger on receipt of behavioural undertakings from Microsoft.[3]
16. The CMA's decision came just six months after it had required Meta to reverse its acquisition of Giphy and sell its newly acquired subsidiary.
17. Perhaps with these two decisions in mind, Adobe's chief executive, Shantanu Narayen, is reported in the FT as arguing that "*a regulatory environment that prevents tech acquisitions will lead to less investment in start-ups*" ahead of the company's proposed $20bn takeover of the design software company Figma.[4]
18. Unsurprisingly, the CMA disputes these views, both the specifics regarding the cases and in general. Sarah Cardell, the CMA's Chief Executive, has said that *"competitive markets spur firms to operate efficiently, to invest and to innovate"* (Cardell 2023)[5]. She does not accept that the CMA's decisions close the country for business.
19. Some academics have long argued that competition authorities, including the CMA, tend to examine mergers using a static competition paradigm. They contend that a dynamic competition analysis, which takes account of future developments, would result in decisions that better reflect market realities.
20. Prof. David Teece, who has written extensively on the subject together with various collaborators, sets the central question as *"how would competition policy be shaped if it*

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[2] Financial Times, 26 April 2023, Activision Blizzard blasts UK after regulator blocks $75bn Microsoft deal.
[3] European Commission Press Release, 15 May 2023, Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions.
[4] Financial Times, 8 June 2023, Adobe chief warns competition watchdogs against stifling innovation.
[5] Details of referenced articles can be found in the "References" section at the end of this report in alphabetical order of author's surname.

were explicitly to favour Schumpeterian (dynamic) competition over neoclassical (static) competition?" (Sidak and Teece 2009).

21. This report examines the development of the concept of dynamic competition and considers whether and how the CMA has taken this into account in its decisions on the Meta/Giphy and Microsoft/Activision mergers. Based on the analysis we make suggestions for how dynamic competition effects can be considered in a structured, although qualitative, manner building on contributions from academia, the CMA and the CAT.

22. The report is structured as follows:

    a) Section 3 provides economic background on the concepts of static and dynamic competition;

    b) Section 4 explores the use of a dynamic competition framework in the context of merger analysis;

    c) Section 5 provides a review of two recent UK merger cases (Meta/Giphy and Microsoft/Activision) and the extent to which the CMA considered dynamic competition; and

    d) Section 6 concludes and provides recommendations based on our analysis.

3 ECONOMIC BACKGROUND

23. In this Section we define static and dynamic competition. In so doing, we appreciate that each description is something of a caricature and so imperfect. Nevertheless, we consider it important to set out how these approaches differ from each other.

3.1 Static Competition

24. Much of the post-war economics of competition analysis was developed by the Chicago School economists who stressed an efficiency rationale behind vertical restraints and mergers and through case law in the USA. The Chicago school assumed that firms would only merge to gain efficiencies.
25. Whilst economists of this period would probably not consider themselves as taking a "static approach", their analysis is largely based on neo-classical economics. Competition is viewed as being between close substitutes and the main concern is whether increased market concentration could lead to consumers paying higher prices. Economic tools used in competition assessment, such as the Hypothetical Monopolist Test (HMT) and market concentration, are inherently static in nature, examining the market as it is rather than as it may become.
26. Sidak and Teece (2009), somewhat disparagingly, describe static competition as *"offering an unchanging menu of unimproved products at very good prices"*. All firms in the market have the same technologies, costs and business models and *"markets are in a comfortable but bland equilibrium"*.
27. Under the model of static competition, neither the cost nor the demand curve are disrupted and only change in incremental degrees. Prices are driven down to marginal cost and demand remains fairly stable. The competition is for a redistribution of any supplier surplus between existing firms rather than disrupting the boundaries of the market.

3.2 Dynamic Competition

28. The alternative idea that competition is a dynamic process can be traced back to the Austrian school of economics, and thinkers such as Carl Menger (1840 – 1921), Friedrich Hayek (1899 – 1992) and Israel Kirzner (b1930).
29. The Austrians rejected the mainstream concept of perfect competition, in which firms competed with identical goods for consumers who had perfect knowledge of their

preferences. Instead, the Austrians saw competition and entrepreneurship as a discovery process. They held that individual entrepreneurs would compete for consumer groups with heterogeneous tastes and/or by being more efficient than their rivals. This allowed for product differentiation and imperfect substitutes.

30. Kirzner (1973) developed a theory of entrepreneurship and competition that centres around the concept of "alertness" to previously unnoticed profit opportunities, or what became known as "entrepreneurial discovery".
31. This idea held that entrepreneurs were constantly discovering new information about consumer demand and would acquire the necessary resources to meet this demand and earn a profit for the entrepreneur. However, individual entrepreneurs would seek to meet demand in a way that differentiated them from rivals, rather than supplying a perfect substitute, and this process creates a competitive market.
32. The competitive process is, therefore, a dynamic one in which consumer tastes and the goods and services provided by firms are constantly changing. A static market equilibrium, therefore, can never exist.
33. An important element of the Austrian's thought is the role that individuals play in the competitive process through being alert to opportunities. This contrasts with the more traditional economic approach that sees market structure as the determinant of innovation. We will return to this point later in this report.
34. In similar vein, Schumpeter (1943) held that capitalism is an evolutionary process subject to a process of "creative destruction". He argued that it is not price competition which counts but…

> *"… competition from the new commodity, the new technology, the new source of supply, the new type of organisation – competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and outputs of the existing firms but at their foundations and their very lives. This kind of competition is much more effective than the other (…) and so much more important that it becomes a matter of comparative indifference whether competition in the ordinary sense functions more or less promptly; the powerful lever that in the long run expands output and brings down prices is in any case made of other stuff." (p. 74)*

35. Building on the Austrian tradition, and on Schumpeter, is the current economist David Teece who has written extensively with various collaborators on dynamic competition and antitrust. Teece has long argued that competition authorities and courts that deal with such matters should focus on dynamic rather than static competition.

36. Sidak and Teece (2009) describe dynamic competition as:

"… a style of competition that relies on innovation to produce new products and processes and concomitant price reductions of substantial magnitude. Such competition improves productivity, the availability of new goods and services and, more generally, consumer welfare."

37. Later, Petit and Teece (2021) describe it as:

"… a situation in which firms compete for future rents. In dynamic competition, firms use innovation to introduce new products, processes and services. Rivalry results in product differentiation, integration, diversification, or platformisation. It is a type of competition animated not by firms that compete head-on with similar products but by heterogeneous competitors, complementors, suppliers and customers (…). Such competition improves long-term factor productivity, raises consumer welfare and supports higher wages."[6]

38. From these two extracts we can see, firstly, that dynamic competition is based on product and process differentiation rather than on prices of close substitutes. Secondly, it is longer term competition for future rents rather than current rents. These rents, known as Ricardian (efficiency based) and Schumpeterian (innovation rents) are beneficial to the economy because they incentivise investment and innovation (Petit and Teece 2021). Current (monopoly) rents are harmful because they arise from monopolistic practices, such as restricting supply, for which no competitive response will be forthcoming.

39. We should also recognise that innovation is not the exclusive preserve of smaller rivals to the largest incumbent seeking to disrupt the market. Innovation can also take place within incumbents allowing them to sustain their market position.

[6] Complementors are businesses that directly sell a product or service that complement the product or service of another company by adding value to mutual customers: for example, Intel and Microsoft, or Microsoft and McAfee.

3.3 Differences between Static and Dynamic Competition

40. Table 1 below characterises the differences between static and dynamic competition. This is a development of a table in Teece 2021, but with different market characteristics.

Table 1: Characteristics of Static and Dynamic Competition

Characteristics of the market	Static Competition	Dynamic Competition
Product differentiation	Minimal. Firms produce close substitute products.	Substantial. Firms develop new products to capture new value from consumers.
Costs/Price	Some productive efficiency improvements from cost reductions, but firms have broadly similar costs.	Firms have substantially different costs and cost functions.
Consumers	Firms compete for the same consumer groups.	Firms compete to bring new consumer groups into the market.
Inter-firm relationships	Linear horizontal and vertical relationships.	Non-linear, multi-faceted relationships with other firms in the ecosystem, e.g. complementors and co-creators.
Evolution of firms	Slow.	Rapid and constant transformation.
Source of rents	Competition for current monopoly rents.	Competition for future (Ricardian and Schumpeterian) rents.

41. In summary, under static competition the main focus is on customers moving from one existing product to another (with the possibility of new suppliers being more or less an afterthought), whereas under dynamic competition it is new entrants providing new products that is the main action. The former is competition within the existing market structure, the latter is competition that disrupts the market structure.

42. In the following Sections we look at how these ideas have been used in merger analysis in general and in the Microsoft/Activision and Meta/Giphy cases in particular.

4 DYNAMIC COMPETITION AND MERGER ANALYSIS

43. A standard merger analysis follows a well-known process. Firstly, the relevant market is defined. Secondly, the authority undertakes a competitive assessment of the market and the position of the Parties to the merger. Finally, various theories of harm will be assessed to determine whether the merger is likely to result in a Substantial Lessening of Competition (SLC).

44. In this section of the report we consider how these stages of analysis may differ between a static and a dynamic market analysis drawing on literature by academics and on the CMA's Merger Assessment Guidelines (MAGs). We then discuss two aspects of competition analysis that do not fall neatly into the current structure of analysis, but which nevertheless affect competition: the interplay between market structure and innovation and a firm's capabilities.

4.1 Defining Static and Dynamic Markets

45. For over forty years market definition in merger control has been conducted using the Hypothetical Monopolist Test (HMT) to establish whether demand or supply side substitutability would be profitable in the event of small but significant non-transitory increases in price (SSNIP). This test is designed to put a boundary around the narrowest possible market to be analysed.

46. Demand side substitutability is based on a sufficient number of consumers switching from the focal product to a close substitute following a SSNIP such that the price increase is not profitable. The market definition is widened when substitution would make the SSNIP non-profitable and it would cease to widen if the SSNIP is profitable.

47. An important aspect of supply side substitutability is that entry by another supplier must be "easy, rapid and feasible. The producer of another good must already have the skills and assets required to produce the product under consideration" (Motta 2004, p104).

48. This is almost the polar opposite of a dynamic market, where supply-side competition is likely to come from outside the existing market through a non-market supplier investing and innovating in new products that may be imperfect, though superior, substitutes.[7]

[7] For further discussion, see in particular Christensen (2013).

49. Evans and Schmalensee (2002) provide some examples of dynamic market substitution as the PalmPilot vs. the Apple Newton and the pocket calculator vs. the slide rule. Perhaps more recent dynamic supply-side substitutes would be the iPhone vs. the Blackberry and video streaming vs. DVDs.

50. The CMA recognises that in some markets it is not possible to establish a specific definition of a relevant market. In markets involving differentiated products competitive constraints may not be dichotomous (present or not present), but better described as strong or weak. The CMA may, therefore, take the approach of *"describing the market as comprising the most important constraints on the merger firms that have been identified in the CMA's assessment of competitive effects"* (CMA 2021, Para 9.4 – 9.5). In Microsoft/Activision, the CMA adopts the term "competitive framework" rather than "relevant market" (CMA 2023, Para. 5.25).

51. What we see here is that defining markets comprising differentiated products can be an iterative process which combines both a qualitative description of the market and the results of the competitive assessments as the authority learns more about supplier and consumer behaviour.

52. Market definitions can be extended further to "ecosystems", which arise from interactions between the components of the system. Ecosystems do not have a legal definition but can be described as "*mulitactor groups of collaborating complementors and multiproduct bundles offered to customers focussed on customer ease"* (Jacobides and Lianos 2021).

53. In an earlier paper (Cennamo, Gawar & Jacobides 2018) identified three types of ecosystem:

> *"… a "business ecosystem" stream, which centres on a firm and its environment; an "innovation ecosystem" stream, focused around a particular innovation or new value proposition and the constellation of actors that support it; and a "platform ecosystem" stream, which considers how actors organize around a platform."*

54. It should be noted from the above quote that an ecosystem extends beyond a platform and consists of other forms of market structure. Thus, whilst there are existing economic tools for assessing two-sided platform markets, these may not always be sufficient for defining a non-platform ecosystem.

55. Jenny (2021) distinguishes between "production ecosystems" and "consumption ecosystems" in digital markets. Production ecosystems *"arise from the use of digital*

technology to better connect interdependent activities and enhance a firm's value proposition". Consumption ecosystems make *"the value proposition of each product or service offered by the digital ecosystems more valuable than if it were offered on a standalone basis"*.

56. An ecosystem consists of a variety of relationships, both horizontal and vertical, but also complementors and co-creators. Simply viewing the market as discrete relationships between firms may, therefore, be unrealistic in many markets today, hence the need for a more holistic way to define markets that captures all relationships in the ecosystem.

57. Consumers are an important part of ecosystems. Their behaviour, for example whether they single or multi-home,[8] can have an essential role to play in the competitive interactions between and within ecosystems.

58. Whilst there is not a settled approach on how relevant authorities should go about defining a market that consists of ecosystems rather than products, what does seem clear is that the traditional idea of a relevant market:

> *"… does not define either the locus of activity of digital consumption ecosystems or the locus of competition between ecosystems. (…) Thus, to understand who could be competing with whom in the digital sector one has to look at a much wider set of possible candidates than in traditional antitrust cases where one can limit oneself to the potential producers of a specialized but clearly defined product. Understanding the trends of demand by platform users (…) is crucial to the definition of potential competition. Clearly, competition authorities need to invest in understanding the consumption trends of a fast moving digital world."* (Jenny 2021)

59. But perhaps in doing so they should take note that:

> *"… the relevant market has the purpose to expose the competitive process so as to illuminate and test possible theories of harm relating to that market. There is thus a closer connection between the theory of harm and the relevant market. Similarly, and particularly in digital market environments, market characterisation would not lead to the finding of static market boundaries but would instead emphasise the interplay*

[8] Single and Multi-home tends to refer to platform markets. Under single-homing a user tends to connect to only one platform of any particular type, e.g. Facebook for social media. Under multi-homing the user may connect to several platforms, e.g. ride sharing apps.

between different markets and different market sides as well as how they change over time." (Robertson 2021)

60. Later in this report, we will examine how the CMA has set about defining markets in the two merger cases under consideration. We will also put forward our own ideas on how competition authorities can define markets that are susceptible to dynamic competition.

4.2 Competitive Assessment and the Analysis of a Substantial Lessening of Competition

61. In conducting a competitive assessment, the competition authority traditionally seeks to establish whether either of the merging parties or the merged entity will have dominance in the relevant market and whether the merger will result in a Substantial Lessening of Competition (SLC).

62. There is a clear and well-established definition of dominance in both EU and UK law: the ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers.[9]

63. However, whilst neither UK law nor the CMA's Merger Assessment Guidelines (MAGs) provide a definition of an SLC, one can say that an SLC refers to a substantial reduction in the levels of rivalry between firms in the relevant market to the detriment of consumers. We will discuss the meaning of "substantial" later in this Section. For now, we focus on a lessening of competition.

64. Whether or not a merger results in a lessening of competition is based on a case-by-case assessment of "theories of harm", defined by the CMA as *"a hypothesis about the how the process of rivalry could be harmed as a result of the merger"* (CMA 2021, Para 2.11). The CMA sets out the main theories of harm in the MAGs which it will consider when deciding if there is an SLC:

(a) the merged entity being able to profitably and unilaterally raise its prices, worsen its quality or service and non-price factors of competition, or reduce innovation efforts at one or more of the pre-merger businesses;

(b) coordination occurring between some remaining suppliers or becoming more stable as a result of the merger; or

[9] This was established by the European Court of Justice in 1979: Case 865/76 Hoffman-LaRoche & Co AG vs. Commission [1979] ECR461 ("Hoffman-LaRoche").

(c) the foreclosure of rivals when the merger is between firms at different levels of a supply chain or when the merger is between firms in different markets which are nevertheless related in some way. (CMA 2021, Para. 2.17)

65. The first of these theories is most likely to arise from horizontal effects under which the merged entity can increase its market power at one level of the market to such an extent that it can behave in the manner described in (a) above. Such horizontal effects are specifically discussed in the Meta/Giphy case.

66. The third theory refers to non-horizontal or vertical effects that allow the merged entity to behave anticompetitively by leveraging its market power from one level of the market to another. These two theories of harm are discussed in the two cases reviewed below.

67. Importantly, and before it lists these main theories of harm, the MAGs state that the CMA will consider the effects of a merger *"both now, and in the future*" (CMA 2021, Para 2.14).

68. The theories of harm do not, or at least do not overtly, cover what is known as a "killer acquisition" when a dominant firm buys a nascent potential rival to protect the rents it already earns rather than increase its prices.

69. We now turn to what economists and others have written about what should be considered by competition authorities when assessing a potential SLC in dynamic markets. Again, much is taken from work by Teece with various collaborators. As we will examine the Microsoft/Activision and Meta/Giphy cases later on, our commentary is mainly on factors that are relevant to these cases.

Vertical and Horizontal Relationships

70. Merging firms that operate at different stages of the value chain are said to be in a vertical relationship. Although such firms do not compete directly with each other, a vertical merger can result in an SLC if the merged entity is able to restrict access to the upstream goods to its rivals in downstream (often retail) markets. This was a concern in both the Meta/Giphy and Microsoft/Activision cases.

71. Firms that operate at the same stage of the value chain are said to be in a horizontal relationship and compete directly with each other. By combining they will increase their market share and so be in a stronger position vis-à-vis their rivals in that market. This was a concern in the Meta/Giphy merger only and dynamic competition and horizontal effects were explicitly considered by the CAT and will be discussed later in this report.

72. However, as we have discussed earlier, many dynamic markets are ecosystems in which the traditional vertical and horizontal relationships may no longer be valid. Teece (2021) states that:

"Distinctions between vertical and horizontal markets are no longer meaningful as lateral firms (complementors) can become competitors too, and they must be assessed when calibrating the strength of potential competition."

73. Traditional theory of the firm analysis holds that vertically aligned firms will choose to integrate or deal through contracts on efficiency grounds. However, Petit and Teece (2021) suggest that in dynamic markets members of the ecosystem will need to be "cospecialised" and that orchestration of assets *"cannot be readily achieved by price based contracting mechanisms"*. They also say that remaining separate poses a risk if Research and Development cannot be co-ordinated or if there is an asymmetry in capabilities between firms. Thus, for dynamic markets "*integration is the rule, market-based transactions are the exception"* (Petit and Teece 2021).[10]

74. An explanation for this rule can be that there are higher costs of negotiating and co-ordinating with an outside firm, such that it is more efficient to extend the boundary of the firm and bring the resources inside the firm. Langlois (1992) called these *"dynamic transaction costs"*. The implication is that dynamic transaction costs are higher than static transaction costs.

75. We may conclude from the above that vertical integration may support innovation in dynamic markets in a manner that contracting cannot. Vertical integration of this kind could, therefore, be in consumers' interests by facilitating innovation in the market. A merger that reduces transaction costs by bringing resources within the bounds of the company may be pro-innovation and pro-consumer welfare, even if there is an SLC.

76. How firms choose to organise themselves, for example whether to merge with other firms or to remain independent organisations with contractual relationships, will be a strategic choice dependent on market conditions at the time.

[10] In making this claim, they cite three sources: Teece 1996, Teece 2000 and Chesbrough and Teece 1996.

4.3 Countervailing Factors

77. In assessing an SLC, the CMA examines countervailing factors that may mitigate any SLC arising from the merger. Whilst the CMA says it is uncommon for mergers to be cleared on the basis of countervailing factors, they are discussed here because in Meta/Giphy and Microsoft/Activision the CMA takes a forward-looking view of countervailing factors that may to some degree take account of new competitive forces.
78. The two factors considered by the CMA are entry and expansion, and efficiency.

Entry and Expansion

79. When incumbent firms can satisfy demand for the current product then there is likely to be little innovation and market entry is unlikely (Sidak and Teece 2009). This implies that entry is most likely when incumbent firms, for whatever reason, are not able to satisfy latent demand, or do not wish to do so for fear of cannibalising existing revenues and profits (Christensen 2013). This may be because incumbent firms simply do not see the potential of a new technology as a source of competition. Perhaps, more importantly, entry is most likely when entrants see an opportunity to steal existing customers from incumbents by satisfying their abstract needs with a different product and/or by offering a product variation that serves a different customer segment.
80. This replacement may go further than a new generation of product replacing an old one, as noted by Evans and Schmalensee (2002). Jenny (2021) describes Apple and Google's Android as competing consumption ecosystems with different business models. He describes Apple as a multi-product ecosystem which offers consumers access to a multiplicity of devices and services that can all be accessed from the various devices. Google's ecosystem, by contrast, is service based built around the distribution of a free Android operating system to OEMs that provides access to multiple services via Google's Play Store.
81. The CMA's framework for assessing entry and expansion is that it *"must be timely, likely and sufficient to prevent an SLC"* (CMA 2021, Para 8.31). It also cites experience of when it has cleared a merger on the basis of expected entry or expansion which has, in fact, failed to materialise. It, therefore, wishes to see robust evidence when Parties claim that entry or expansion could prevent an SLC and says it will place greater weight on previous experience of entry and expansion in the market (CMA 2021, Paras 8.29 – 8.30).

82. The “timely, likely and sufficient” analysis applies equally to potential and dynamic competition as it does to static competition.

Efficiency

83. The CMA, and other competition authorities, recognise that mergers can lead to efficiencies that may mitigate an SLC (CMA 2021, Section 8). Thus, even if there is an SLC, the expected efficiency benefits may outweigh that SLC, assuming those benefits are passed onto consumers.

84. In a static analysis, there will be an efficiency gain if net upward pricing pressure (UPP) is negative, i.e. the downward pricing pressure from efficiency gains is greater than the UPP from increased market concentration (Farrell and Shapiro 2010).

85. Importantly, the efficiencies recognised by the CMA may be “*greater innovation or quality arising from the combination of unique assets*” (CMA 2021, para. 8.2). These efficiencies are likely to come from synergies obtained through intimate integration of the parties’ unique, hard to trade assets and should be welcomed by competition authorities. Mergers that do not lead to synergies should be treated more sceptically (Motta 2004).

86. According to Teece (2020):

> *“The requirement for quantifying efficiencies bites hard when innovation is at issue. The agencies usually require efficiencies to be quantified; but innovation gains (or losses) are often hard to quantify with a high degree of reliability. The result is that the “reliable quantification” requirement de facto causes innovation gains or losses to be ignored, even if they are likely monumental in magnitude compared with that which can be measured. Administrability can no longer be the enemy.”*

87. The MAGs already appear to allow for dynamic as well as static efficiencies and we will see later that these are considered by the CMA in the two cases under review.

4.4 Additional Matters for Consideration of Dynamic Competitive Effects

Relationship between Market Structure and Innovation

88. The conventional wisdom is that market structure drives innovation. A monopolist has little or no incentive to innovate, and certainly no incentive to disrupt, and so does little in the way of innovation. After all, as was famously stated by Hicks, *“the best of all monopoly rents is a quiet life”* (Hicks 1935).

89. Petit and Teece (2021) describe this position as a "trap" or "dead-end". They argue that innovation is an external factor that can drive or disrupt market structure.

90. Similarly, Sidak and Teece (2009) say that:

> *"… the received wisdom and dominant logic in industrial organisation studies remains that market structure is the main determinant of innovation. A less familiar logic – but in our view a far more convincing and empirically supportable logic – runs the other way: innovation shapes market structure."*

91. They give the example of jet engines in the USA post-war, arguing that the decision to adopt the technology for civilian aircraft was not driven by domestic market structure. Rather, the aircraft manufacturers decided to tap into external technical knowledge resulting in a changed market structure.

92. They also refer to various studies that find a linkage between government and university funded research in the fields of technology and biotech being picked up by entrepreneurs and developed by venture capital funded start-ups, not incumbent companies. Entrepreneurs that are currently outside the market see the opportunity of new technologies better than firms already in the market and can use those technologies to disrupt the market.

93. Technological opportunity can be used by incumbent firms to sustain their own position in the market or it may support radical breakthroughs which incumbent firms are not alert to, often because they do not wish to cannibalise their own revenues (Christensen 2013). An example of such technological opportunity, which is particularly pertinent to this study, is Generative AI radically changing the quality of computer games as well as reducing the high costs of development.[11]

Capabilities

94. The static economic approach to competition analysis tends to consider firms as homogenous and focuses on the firm's market share. By contrast, strategic management scholars consider the firm's capabilities and these capabilities are key to understanding corporate decisions (Teece 2020). This capabilities-based approach places an emphasis

[11] Financial Times, 28th June 2023, Gaming industry puts generative AI to the test.

not just on the technology but also on management being capable of seizing and creating opportunities to develop a competitive advantage. This approach follows on from the Austrian school's concept of entrepreneurial alertness and discovery.

95. Teece et al (1997), in a highly cited article, refer to the ability of firms to achieve new forms of competitive advantage as "dynamic capabilities". To provide more detail they go on to say:

> *"The term 'dynamic' refers to the capacity to renew competences so as to achieve congruence with the changing business environment; certain innovative responses are required when time-to-market and timing are critical, the rate of technological change is rapid, and the nature of future competition and markets difficult to determine. The term 'capabilities' emphasizes the key role of strategic management in appropriately adapting, integrating, and reconfiguring internal and external organizational skills, resources, and functional competences to match the requirements of a changing environment."*

96. As firms have different dynamic capabilities, they become heterogeneous and individual firm performance varies. Successful firms will have some resources that are core to their business and are non-contractable and need to be in-house and this core group of resources changes over time. In an ecosystem market structure, the ability to orchestrate the system is a core and dynamic capability (Teece 2020).

97. Capabilities can affect competition outcomes when there is a positive correlation between a firm's technical capabilities and the fitness of those capabilities to consumer demand. A firm that is good at producing something that the market needs will have a strong market position and vice versa.

98. Firms may, therefore, view mergers and acquisitions as a means to acquire capabilities that they do not have to allow them to compete more effectively in the market. This may be to bring in-house currently contracted capabilities, which are now seen as core, or to reduce transaction costs or to acquire new capabilities to allow the firm to expand its ecosystem to fulfil its expectation of developing customer demand.

99. The new organisational forms that emerge from mergers designed to increase capabilities may be pro- or anti-competitive. Boa et al (2023) developed a model of merging capabilities with the aim of showing that understanding firms' capabilities can help competition authorities assess whether a merger is likely to be pro-competitive or not.

100. Their model consists of three firms with different capabilities and shows the competitive effects of mergers between firms with overlapping capabilities compared with non-overlapping capabilities. They conclude that mergers between firms with overlapping capabilities are likely to be more problematic through four mechanisms:
   a) *With more overlapping capabilities the opportunities to enhance competition in non-overlapping markets will be less;*
   b) *Lost competition in overlapping markets is less offset by efficiency gains that reduce market prices when capabilities are more overlapping;*
   c) *Future competition is more constrained when there are more capabilities that are overlapping and scarce; and*
   d) *Future innovation opportunities are likely to be less.*

101. Therefore, competition authorities taking a capabilities approach to merger assessment should “be more wary of mergers when capabilities are more overlapping, particularly if the overlapping capabilities are scarce” (Boa et al 2023).

102. Having explored what academics have said about dynamic competition and merger cases, we go on to examine two recent merger cases in the UK and the role of dynamic competition assessment.

5 RECENT UK MERGER CASES

103. In this section we examine the role dynamic competition has played in two recent merger cases assessed by the CMA: Meta/Giphy and Microsoft/Activision. In both cases the CMA found an SLC and rejected the proposed mergers. We consider how these cases have helped develop the practical use of dynamic competition in merger cases and what lessons these hold for future cases. We provide a brief overview of the cases and have structured our analysis around key issues: market definition and dominance, horizontal effects and vertical effects, and we discuss the cases together under these headings.

104. We do not seek to either support or oppose the findings of the CMA. Our purpose is only to examine these cases in the light of the analysis above and consider the role dynamic competition analysis has played and can play in merger investigations. We were not involved in the cases for any participant.

5.1 Case Backgrounds

Meta/Giphy

105. Meta, formerly Facebook, is a leading technology company incorporated in 2004 and which, by 2020, had annual revenues of $86 billion. It operates under many brands (including Facebook, Instagram and WhatsApp) and is the largest social media platform in the world with around three billion active monthly users. Its revenues are largely earned from display advertising.

106. Giphy was founded in 2013 and operates an online database and search engine that allows users to search for and share video GIFs and GIF stickers. It describes itself as the world's largest library of free GIFs and stickers. Giphy has a reach of over 800 million users and facilitates searches through its Application Programming Interfaces and Software Development Kits. Giphy started to generate revenues in 2017 through "Paid Alignment" agreements.

107. "Paid Alignment offers brands and advertisers the ability to align their GIFs with popular search terms, so users see these brands' content first when searching for a GIF, or to insert their GIFs into Giphy's "trending feed" on its [owned and operated] channel, in exchange for a fee." (CMA 2022, Para. 2.8)

108. Meta completed its acquisition of Giphy in May 2020, after which the CMA determined that it should conduct a merger investigation and imposed an Initial Enforcement Order in

June 2020, requiring Meta to keep the businesses separate until it had conducted its enquiry. The CMA published its Final Report on the merger in November 2021 (CMA 2021a) in which it found that the merger resulted in an SLC and required Meta to sell Giphy in its entirety to a suitable purchaser.

109. Meta appealed the Decision to the CAT which delivered its judgement in June 2022. The CAT unanimously dismissed all but part of one of Meta's six grounds of appeal, which concerned the disclosure of redacted material by the CMA to Meta. The CAT invited the parties *"to identify how and when the question of remittal can be determined"* (CAT 2022, Para 177).

110. The CMA then reassessed the Decision, issuing a new Final Report in October 2022 (CMA 2022). The revised Decision upheld the original finding and again required Meta to dispose of Giphy.[12]

111. To distinguish between the 2021 and 2022 Final Reports we will refer to the 2021 report as the "Final Report" and the 2022 report as the "Remittal Report".

112. Neither the European Commission nor the USA Federal Trade Commission felt it necessary to investigate the merger.

Microsoft Activision

113. In January 2022, Microsoft's offer for the Activision Blizzard (Activision) was accepted by the Activision Board and various competition authorities, including the CMA, were notified. The merger was valued at $68.7 billion.

114. Microsoft offers a wide range of services and products, of which the most relevant for this analysis are the Windows Operating System (OS), Azure (Microsoft's public cloud platform and associated services) and Xbox Cloud Gaming (Microsoft's cloud-based game streaming service).

115. Activision is a game developer and publisher founded in 2008. It is publicly listed on Nasdaq and had a global turnover of over $7.5 billion in the financial year 2021. Activision's most important games are Call of Duty (CoD), World of Warcraft (WoW) and

[12] Meta sold Giphy to Shutterstock in May 2023 for a reported $53 million, approx. 1/8th of the price it paid for it originally. (Source: https://www.reuters.com/markets/deals/shutterstock-acquire-giphy-inc-53-million-cash-2023-05-23/).

Candy Crush. Of these three, CoD is the most important for the merger case as it is a very widely used and popular game.

116. The CMA identified three relevant markets: the supply of gaming hardware, supply of cloud gaming services and supply of game publishing services. It found that there would only be an SLC in the supply of cloud gaming services and that this SLC would arise from vertical effects. Our assessment is, therefore, confined to the cloud gaming service market.

117. At the time of writing this report the decision was subject to appeal to the CAT with the hearing due to take place on 28 July, although this may no longer happen due to recent developments in the US courts noted below. The merger had been accepted by the European Commission, subject to behavioural remedies proposed by the Parties and was still progressing through the system in the USA. On 11th July 2023, the Federal Court in San Francisco refused an appeal by the Federal Trade Commission (FTC) for an injunction preventing the deal from closing.[13] The CMA immediately announced that it had asked the Parties to come up with new concessions to satisfy its concerns, having already rejected similar remedies to those accepted by the European Commission. In the meantime, the legal proceedings have been put on hold.[14]

5.2 Market Definition

118. In Meta/Giphy, the CMA defines three markets where it considers there may be competition problems: the supply of searchable GIF libraries, social media and display advertising. It found potential problems in the first and third of these three markets. In Microsoft/Activision it also found three markets: the supply of gaming hardware (and associated gaming distribution), the supply of cloud gaming services, and the supply of game publishing services. It only found a competition problem in the supply of cloud gaming services.

119. The CMA does not use the standard market definition tool of the hypothetical monopolist test (HMT) but relies on a qualitative market assessment that it considers more suitable for defining a relevant market where dynamic competition is present. It explains the reason for this in the Remittal Decision of the Meta/Giphy case, stating:

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[13] See United States District Court, *Northern District of California, Federal Trade Commission vs, Microsoft Corporation,* Case No. 23-cv-02880-JSC *Preliminary Injunction Opinion, Redacted Version*

[14] See Financial Times 12th July 2023 *Court ruling changes the game for Microsoft's $75bn Activision deal*

"The potential issues under analysis relate in various ways to how competition between the merging Parties and their rivals will dynamically evolve over time. In these circumstances, the CMA will place more emphasis on the competitive assessment than on static market definition…. Evidence on concentration and on closeness of competition can be interpreted and taken into account without the need for a precise definition of the relevant markets." (CMA 2022, Para. 5.4)

120. Similar language is used in Microsoft/Activision where the CMA states that a single market definition *"may not always capture the true competitive interactions between different providers"* (CMA 2023, Para 5.23).

121. It goes on the say that the CMA recognises that the potential issues raised by this case relate "to how competition between the Parties and their rivals will dynamically evolve over time, in particular in relation to Multi Game Subscription (MGS) and cloud gaming services, and also in relation to the next generation of consoles" (CMA 2023, Para 5.24).

122. In both Decisions, the CMA interlinks the substitutability of services, which is an important element of market definition, with an assessment of the market power of each of the Parties.[15] In Meta/Giphy they state:

"In setting out the evidence on substitutability of the Parties' services, we consider the extent to which the Parties have ***market power*** *in the markets or segments where they operate"* (CMA 2022, Para 5.8) (emphasis in original).

123. In Microsoft/Activision it says that it will take account of market concentration and closeness of competition, which means assessing the strength of the current and likely future constraints between the products of the Parties and their rivals. It can do this, it says, without the need for a precise definition of relevant markets (CMA 2023, Para 5.24).

124. The CMA's analysis "does not seek to conclude on a bright-line definition of the relevant markets, but instead describes the **competitive framework** within which the Parties and their rivals operate" (CMA 2023, Para 5.25 (emphasis added). Despite this claim, the CMA does, in our view, produce bright line market definitions in both cases, as listed in paragraph 118 above.

[15] "The Parties" refer to the two merging companies: Meta and Giphy.

125. It maybe that the CMA feels the need to come up with this bright line definition so that a competitive assessment can be undertaken. However, where such a market exists within an ecosystem there may be, indeed there probably are, synergies between the defined market and the wider ecosystem that affect competitive outcomes.

126. The Parties to Meta/Giphy objected to the CMA using a market definition based on what they called "arbitrary 'functional characteristics'" rather than "an 'economically robust' market definition exercise" (CMA 2022, Para. 5.10). This implies that the Parties would have preferred the CMA to use the HMT to define markets.

127. The CMA rejects the Parties' objections, stating that its approach to market definition complies with its Merger Assessment Guidelines (MAGs), and specifically para. 9.2, which states:

> *"While market definition can be an important part of the overall merger assessment process, the CMA's experience is that in most mergers, the evidence gathered as part of the competitive assessment, which will assess the potentially significant constraints on the merger firms' behaviour, captures the competitive dynamics more fully than formal market definition. Consequently, while the appropriate approach will reflect the circumstances in each case, the CMA anticipates that in future, merger assessments will place more emphasis on the competitive assessment as opposed to static market definition."* (CMA 2021, Para 9.2)

128. The types of evidence the CMA may rely on to assess the closeness of substitutability are set out in the MAGs and apply to both market definition and market power assessment given the interrelationship between these two. Product characteristics and intended use are considered indicative of substitutability[16] and the CMA says it will gather the views of customers and competitors alongside any internal documents of the merging parties to draw conclusions on substitutability (CMA 2021, Para. 4.13).

129. This qualitative approach allows the CMA to avoid using the static approach to market definition embodied in the HMT, which is likely to result in a narrow market definition

[16] In this the CMA is in line with the European Commission (2018) which states at Para. 33 "[National Regulatory Authorities] should thus commence the exercise of defining the relevant product or service market by grouping together products or services that are used by consumers for the same purpose (end use)."

when in dynamically competitive markets and ecosystems potential substitution can come from outside the existing market.[17]

130. The qualitative approach adopted by the CMA in both cases certainly allows it the scope to look beyond market definition as substitutability between current products and take a forward-looking approach to foreseeable developments that might result in a different definition. Under dynamic competition, the CMA can investigate where new competition may emerge to satisfy latent demand. This would be challenging for any competition authority which cannot be expected to have a crystal ball, so they would probably need to stick to the “timely-likely-sufficient” framework but apply that outside the existing market.

131. The authority may also consider undertaking an audit of the resources and dynamic capabilities of the merging firms and the economic moats they may have developed to see how feasible a broader market definition may be.

132. However, examining the CMA’s analysis, we find that much of what they do is still static and there is very little in the way of a forward-looking assessment of potential new products that could change the market definition of the markets they define.

133. In Meta/Giphy, the CMA considered substitutability for searchable GIF libraries as below:

(a) Whether video GIFs and GIF stickers should be considered within the same product frame of reference;

(b) Whether GIF stickers should be considered within the same product frame of reference as other forms of sticker (i.e. non-GIF stickers); and

(c) Whether the product frame of reference should be widened to include other types of content aimed at driving user engagement on social media (such as emojis, animojis, and avatars). (CMA 2022, Para. 5.19)s

134. GIF stickers, non-GIF stickers, emojis, animojis and avatars are all products that are available today and are, therefore, not disruptive to the market. However, the CMA found that non-GIF stickers and other types of content are not in the same relevant market.

[17] Petit and Teece (2021) refer to “a misplaced focus on static patterns of substitution” leading the European Commission to find Google’s Android and Apple’s iOS being in different markets since Apple did not licence iOS to third party OEMs, despite evidence of each stealing the other’s customers. This would lead, they claim, to the “curious implication” that a merger between the two operating systems would not be problematic.

135. Also in Meta/Giphy, the CMA defined social media on the same basis as it had done so in its Market Study:

> *"Social media platforms facilitate interaction between their users, allowing them to communicate with each other, and share and discover engaging content. Social media platforms are generally available through a mobile app, with some also available via a web browser … Features commonly provided by social media platforms include: user profiles or accounts; user 'friends' or connections; a personalised 'feed' of news or other content; content sharing features; comments; private messaging features; and likes or 'reactions'."* (CMA 2022, Para 5.102)

136. Finally, display advertising is defined as "*where advertisers pay online companies to display advertising using a range of advertising content types shown within defined ad units on web pages or mobile apps"* (CMA 2022, Para 5.463).

137. The CMA brings in a degree of forward-looking analysis here as it considered the potential substitutability of Giphy's Paid Alignment advertising service. It concluded that Giphy's product was still novel and did *"not believe that it is necessary to reach a conclusion as to the precise categorisation of Giphy's advertising product relative to display advertising. We have focused instead, for the purpose of our assessment of horizontal effects, on the closeness of competition between the merging parties' advertising services"* (CMA 2022, Para. 5.169).

138. The CMA also brings a forward-looking analysis into its assessment of the cloud gaming market definition in Microsoft/Activision. The CMA finds that cloud games can be played on low-powered devices such as mobiles, smart TVs and low-end PCs, whereas console based games need higher powered devices. The CMA says that this will make *"cloud gaming attractive to a new pool of consumers"* and that *"an important aspect of cloud gaming is being device agnostic and bringing new customers into gaming"* (CMA 2023, Para 5.82 & 5.88).

139. Bringing in new customers is a feature of dynamic competition aligning with the evolution of firms and markets as set out in Table 1 above.

140. What we see here, therefore, is the CMA integrating the assessment of an SLC with the market definition as discussed in paragraph 123 above. In considering the closeness of competition, the CMA took account of barriers to entry and expansion, Meta's profitability and the views of market participants (CMA 2022, Para. 5.167).

141. Whilst the market definitions in both cases do not employ static techniques, such as the HMT, they only partially examine any dynamic changes in the market that may affect the definition, leaving that to the competitive assessment.

5.3 Horizontal Effects

142. One of two theories of harm considered by the CMA in Meta/Giphy is horizontal effects, specifically that there is close competition between Meta's display advertising and Giphy's Paid Alignment. It is in the CMA's assessment of horizontal effects that we see a structured approach to dynamic competition assessment following the appeal to the CAT. Both the CMA's approach and the CAT's judgement are considered here.

143. There were no horizontal effects in the Microsoft/Activision case.

CMA Analysis: Final Report

144. In the Final Report the CMA is concerned with Giphy's position as a potential competitor to Meta in the display advertising market. It refers to Giphy's Paid Alignment service as "*the type of advertising that Giphy was developing prior to the Merger"* (CMA 2021a, Para 47.2). It concludes that the merger would lead to an SLC in the UK market for display advertising "*arising from a loss of* ***dynamic competition***" (CMA 2021a, Para 7.279 (emphasis added)).

145. It should be noted here that the CMA does not find a problem with static competition, only that the merger will lead to an SLC in dynamic competition. The CMA's approach to dynamic competition is, therefore, the opposite to that of the academics cited earlier in this report, who tend to see dynamic competition as a possible countervailing factor to a static SLC. This is not an unreasonable approach by the CMA, but it could mean they are only looking through one end of the telescope when they should be looking at both ends to determine how there may be a substantial lessening of dynamic competition and how dynamic competition could overcome a static SLC.

146. The CMA considers two aspects of Giphy's activities that could, absent the merger, have provided future, dynamic competition to Meta's display advertising.

147. Firstly, the CMA discussed Giphy as an innovator and that one of its key innovations was its Paid Alignment service, which *"allowed advertisers to ensure the prominence of GIFs which promoted their brands on Giphy's services*"(CMA 2021a, Para 7.35).

148. The CMA notes that after the merger was finalised in May 2020, Meta "required the termination of all of Giphy's existing Paid Alignment arrangements and the cessation of all of Giphy's revenue-generating activities" (CMA 2021a, Para 7.40).

149. Secondly, the CMA considers the importance of Giphy's activities in the light of Meta's position of market power. It came to the view that Giphy was the only viable dynamic competitor to Meta. Crucially, the CMA states that Giphy's:

> *"… Paid Alignment model was a multi-sided platform serving both advertisers and third-party platforms. As such, it was subject to network effects; for example, greater advertiser spend on Giphy Paid Alignment would make it more attractive to third party platforms, and as more platforms signed up for the service, it would have more inventory to sell to advertisers. This had the potential to increase the threat to Facebook, including by strengthening the competitive position of other display advertising providers in partnership with Giphy"* (CMA 2021a, Para 7.44).

150. After a lengthy and detailed discussion about competitive effects the CMA concludes that "*the Merger will lead to a substantial lessening of competition in the supply of display advertising services in the UK arising from a loss of dynamic competition. The effects on dynamic competition in display advertising arising from the elimination of Giphy as a potential competitor are exacerbated by the weakening of competition between social media platforms"* (CMA 2021a, Para. 7.255).

151. This conclusion was partly based on Meta's past behaviour noted in paragraph 148 above.

The CAT's Assessment

152. In its introduction to the substantive challenges and in its judgement on Ground 2 of the appeal,[18] the CAT makes an important contribution to the understanding of dynamic competition and how it should be assessed.

153. The CAT distinguishes between static, potential and dynamic competition. However, it says that these forms of competition exist on a spectrum, implying there is no clear break between them (CAT 2022, Para. 30).

[18] The ground for review advanced by Meta was that "(t)he CMA's finding that there was a Horizonal SLC contradicts or is inconsistent with the CMA's definition of the market on which it alleged Meta competes" (CAT 2022, Para 14(2)).

154. The CMA describes static competition as the *"consideration of the market as it is".* It then provides a simple example of a hypothetical market for widgets where there are three firms with market shares of 60%, 25% and 15%. If the largest firm seeks to acquire the smallest firm this would result in a merged entity with a market share of 75%, the competition authority would have concerns with the merger. It says that the analytical framework (of post-merger market shares) is easy to state and apply and *"most importantly to justify*" (CAT 2022, Para. 30 (emphasis in original)).

155. The CAT defines potential competition as moving away from static competition and *"focuses on the potentialities that exist in or arise out of the static case"* (CAT 2022, Para 31). It says that this definition is broadly in line with the CMA's own definition in the MAGs which refers to a potential competitor as a firm that is not yet in the market but has the potential to enter or expand in competition with incumbent firms (CMA 2021, Para 5.1).

156. It uses the example of a market of ten widget manufactures each with a share of 10%, two of which were seeking to merge. Ordinarily this would be of little concern. However, if those two firms were each on a trajectory of significant expansion (due to lower costs or better widgets) and were expected to achieve market shares of 40% each in the near future then the competition authority would be concerned as the merger would result in one firm having an 80% market share.

157. The CAT considers that justifying intervention in this case would be harder than under static competition as the authority would have to reach a view, on a proper basis, regarding the expansion potential of the merging parties.

158. Finally, and most importantly, the CAT considers dynamic competition, which "involves a much more fluid form of competition between innovating firms". Dynamic competition "*involves a far greater consideration of innovation and invention – in short, potentiality – rather than analysis of an existing market or an assessment of the future trends that lie within it*". It states that this is in line with the CMA's definition in the MAGs (CAT 2022, Para. 34).

159. The CAT goes on to make three points about dynamic competition:

   a) *"The facts and matters that render competition dynamic will likely be present in the market at the time of regulatory intervention, but they will not necessarily have manifested themselves.*

b) *"The traditional tools of analysis (concentration, market share, market definition etc.) are less likely to be determinative than in the case of static or potential competition.*
c) *"Identifying the criteria that are relevant for determining whether a state of dynamic competition exists (…) is extremely difficult" (CMA 2022, Para 37).*

160. It concludes this section of its judgement by finding that a weakening of dynamic competition can justify a finding of an SLC within the meaning of the Enterprise Act (CAT 2022, Para. 38).

161. Later in the Judgement, the CAT sets out its thinking on Ground 2. It points out that the Decision finds that the merger will lead to an SLC in the supply of digital advertising services *"**arising from a loss of dynamic competition**"* (CMA 2021a, Para 7.255 (emphasis in original)). The CAT then points out that a proper reading of the CMA's Decision finds that there is *"no substantial lessening of <u>static</u> competition"* (CAT 2022, Para 99(1) (emphasis in original)).

162. The CAT then refers to paragraph 7.12 of the Final Decision. The CAT says that the importance of Giphy as a potential competitor in display advertising, and hence its importance to dynamic competition, depends on a range of factors. These are:
a) *The efforts Giphy would have made to expand in the display advertising market;*
b) *The value of its efforts to innovate;*
c) *The likelihood of expansion of its monetisation activities;*
d) *The extent to which Giphy may have stimulated innovation and competition by third parties (such as its API partners);*
e) *The extent to which it may have been a competitive threat to Meta; and*
f) *Meta's incentives to respond to this threat.*

163. However, our reading of the Final Report shows that this list of factors does not align with the subsequent sub-headings in the CMA's analysis, nor in the substance of its analysis.

164. In, for our purposes, possibly the most important words in the Judgement, the CAT says:

> *"… we do accept, given that there is no established framework for assessing an impairment to dynamic competition, that it is important to set out, in the abstract but with reasonable certainty, the relevant factors that need to be considered. This is so that the facts, as they are understood, can be grouped in relation to these factors, and a decision as to whether there is or is not a substantial lessening of dynamic competition*

can be made by the competition authority and, thereafter (if challenged), its lawfulness can be reviewed by the Tribunal." (CAT 2022, Para 99(4))

165. As the CMA is increasingly likely to take account of a potential loss of dynamic competition into account in merger reviews, even when there is no loss of static competition, the statement quoted above is extremely important and helpful for future parties in such cases. Looking through the other end of the telescope, there is the equally important question of whether potential or dynamic competition could offset a finding of an SLC based on static competition, which the CMA considered in Viasat/Inamrsat (CMA 2023b).

166. In the following paragraph the CAT notes that the CMA did not explicitly set out such factors and so the CAT sees its job as doing so since *"it is helpful when judicially reviewing a slippery concept like an impairment of dynamic competition"*, even on a non-exhaustive basis (CMA 2022, Para. 99(5)).

167. The CAT begins its non-exhaustive list by stating that dynamic competition cannot and should not be considered in isolation from static or potential competition and that the state of static competition should be the starting point of any investigation. In platform and multi-sided markets this may involve the definition and consideration of more than one market. The CAT does not use this term, but this implies that the wider ecosystem needs assessment rather than just one component part (CAT 2022, Paras. 100 – 101).

168. Next, the CAT says that potential competition, which *"essentially involves an extrapolation of existing trends"* should be considered. It points out that potential competition cannot be treated too distinctly from dynamic competition. Nevertheless, as dynamic competition is inherently unpredictable, it makes sense to consider those trends that can be more reliably determined before considering those that are more speculative (CAT 2022, Para 103).

169. The next element of the proposed framework is the timeframe over which dynamic competition will be expected i.e. an outcome with a more than 50% chance, to manifest itself. Here the CAT is considering whether the merger could result in a substantial lessening of dynamic competition, rather than dynamic competition as a threat to the merged entity.

170. The CAT's view is that if an impairment to dynamic competition is not thought to manifest itself within five years, it cannot be considered an expectation. So, in looking for an SLC in dynamic competition, the realistic timeframe for analysis is five years.

171. The CAT goes on to say that "identification of the dynamic element will be very difficult…Nevertheless, in order to find an impairment to dynamic competition, the broad nature of the dynamic must be set out for a decision that dynamic competition is impaired to be defensible" (CAT 2022, Para 107).

172. It then sets out a list of four factors that it thinks may help in differentiating "duds" from the genuinely dynamic. "Duds" refer to dynamically competitive products that fail to materialise and so place no direct competitive constraint. The CAT implies though that duds may still have a constraint effect as the merged entity does not know if they will fail and so has to respond. The factors set out by the CAT are:

173. *The motives and thinking of the merging firms.* A larger firm acquiring a smaller firm to kill off a rival would be an indicator that dynamic competition is being impaired. But a larger firm buying a financially struggling smaller firm to provide financial backing for a novel business may be pro-competitive.

174. *The market value attached to the dynamic element.* The greater the financial market interest in the target firm because of its plans, the more the CMA would be justified in not permitting the merger with a much larger firm.

175. *Contestability.* If the target firm has successfully entered a market where there are barriers to entry, then there is less justification for permitting a merger.

176. *Monetisation.* If there is good potential for monetisation of the dynamic element then the significance of the dynamic element is high, but if that potential does not exist, and the dynamic element is no more than a good idea, acquisition may not lead to an impairment to dynamic competition. (CAT 2022, Para. 109)

177. As the CAT points out identifying these four factors is hard for competition authorities, who are not blessed with a crystal ball, and require some degree of judgement about the effect of the merger on both static and dynamic competition. Nevertheless, the fact that the CAT has set out this *"indicative and non-exhaustive"* list is very helpful and, we believe, important for future investigations into mergers in dynamically competitive markets.

Horizontal Effects: Remittal Report

178. In the CMA's 2022 Remittal Report, it noted that the CAT had accepted that the framework set out in Para. 7.12 of the Final Report was sufficient for Ground 2 to be rejected. It, therefore, applied the same framework for assessing horizontal effects as in

the Final Report and maintained its conclusion that *"the Merger will lead to a* ***substantial lessening of competition in the supply of display advertising services in the UK arising from a loss of dynamic competition.***" (CMA 2022, Para 7.279 (emphasis in original)

5.4 Vertical Effects

179. The CMA considers vertical effects in both cases. Vertical effects have the potential to allow the merged entity to behave anticompetitively by leveraging its market power from one level of the market to another and foreclosing the downstream market to competitors. It was on this basis that the CMA blocked Microsoft/Activision and required Meta to sell Giphy.

180. In Meta/Giphy the CMA found that Giphy had a position of dominance in the searchable GIF market and that access to high quality video GIFs and GIF stickers may contribute to greater user engagement for social media users. It, therefore, examined whether Meta's post-merger access to Giphy's GIF library could allow it to foreclose downstream markets and found that it did.

181. In Microsoft/Activision the CMA was primarily concerned with vertical effects in cloud gaming services, specifically foreclosure of the market to rivals by post-merger refusal to supply very popular games, in particular CoD and WoW, or supplying those games on discriminatory terms.

182. In assessing whether any vertical effects in both cases would lead to an SLC, the CMA followed the process as set out in the MAGs and considered three questions:

    (a) Would the Merged Entity have the **ability** to use its control of inputs to harm the competitiveness of its downstream rivals?

    (b) Would it have the **incentive** to actually do so, i.e. would it be profitable?

    (c) **Effects** of foreclosure: would the foreclosure of these rivals substantially lessen overall competition between social media platforms? (CMA 2021, Para 7.10)

183. Equivalent wording can be found in the Microsoft/Activision Final Report (CMA 2023, Para. 8.3).

184. This "ability, incentives, effects" framework is well established in economics. However, it is inherently static and examines the effects of the merger as it looks at the merged entity's likely behaviour in the market as it is. It lacks a perspective of the market as it might evolve

and whether the merged entity's ability, incentive and effects may be strengthened or mitigated by dynamic competition.

185. However, the CMA does consider dynamic markets in the section of its report on countervailing factors in which it looks at how the market may develop in the absence of the merger. The CMA's analysis framework is important to this debate as it starts to set out how dynamic competition could counter an SLC arising from vertical effects.

186. In its analysis of the countervailing factors, the CMA first considers barriers to entry and expansion, which, it says, could mitigate or prevent an SLC, but to do so any entry must be simultaneously *"timely, likely and sufficient"* (CMA 2021, Para 8.31- 8.32).

187. In Meta/Giphy the CMA says that whether entry or expansion is timely "will depend on the industry and the characteristics and dynamics of the market, and the timeframe over which the CMA expects an SLC to result from a merger". In this case, for entry to be timely it would need to take place "within a short timeframe" (CMA 2022, Para. 9.6).

188. The CMA is slightly more specific in Microsoft/Activision, saying that it would normally consider two years to be timely, but that this depends on the nature of the market (CMA 2023, Para. 9.5).

189. The CMA then considers the case specific factors that would affect the likelihood of timely and sufficient entry or expansion. In Meta/Giphy, the CMA concludes after an extensive analysis that such entry or expansion would not occur in a manner that would prevent or mitigate the impact of any SLC arising as a result of the Merger (CMA 2022, Para 9.97).

190. Much of the equally extensive analysis of barriers to entry in the CMA's final report into Microsoft/Activision is redacted as the qualitative assessment deployed by the CMA relies heavily on internal documents. However, a few points are worth noting.

191. First, CoD in particular has a very strong place in the market, with WoW also in strong demand. These multi-player games are often played socially with players in different locations competing against each other. This leads to strong network effects, which may be regarded as a barrier to entry as a large number of users would have to switch to an alternative game.

192. Secondly, many games, including CoD and WoW, can be played on different consoles, i.e. on Microsoft's Xbox and Sony's PlayStation. The games' publishers have an incentive to make their games available on multiple consoles to maximise their own revenues. Post-merger, Microsoft would have both the ability and incentive to refuse to supply a cloud-

based version of these games to its rivals. The effect of such foreclosure would be that CoD and WoW would not be available on non-Microsoft clouds and consumers may then switch to the Microsoft cloud to continue to access the games.

193. Thirdly, cloud gaming is at an early stage of development. Having the right content to attract paid users is the main barrier to success. Technical barriers to entry are decreasing, but there are still network effects that act as a barrier (CMA 2023, Paras. 8.43 – 8.44).

194. Fourthly, evidence of multi-homing is mixed. There is still no strong evidence as to whether cloud gamers will single or multi-home.

195. Finally, Microsoft potentially has a strong position in cloud gaming as it owns and operates a variety of the services needed. Even before the merger Microsoft had its own cloud infrastructure, its own OS and content, which together provided Microsoft with a strong market position.

196. When assessing the merged entity's ability and incentive to foreclose the market to rivals, the CMA concludes that the merged entity would have the ability to foreclose due to its ownership of CoD and WoW. No other game is likely to be sufficient to off-set the loss of one of these games. The CMA finds that multi-homing is unlikely to limit its ability to foreclose.

197. The CMA also finds that the merged entity would have the incentive to foreclose the market given its already strong position in a nascent market. The effect of the foreclosure would *"distort the development of the cloud gaming market and result in substantial harm to overall competition in the market"* (CMA 2023, Para 8.441).[19]

198. In both cases the "ability, incentive, effect" framework is a static analysis of the market as it is and we need to look at the section of the Final Report on countervailing factors to find a dynamic approach (Section 9). In this section the CMA again considers entry or expansion by third parties in response to the merger and merger efficiencies.

199. The CMA sets out several barriers to entry and expansion that are merger specific. For example, the cost of developing games is very significant. Various estimates are given in the report, generally around $100 to 150 million per release. They also require a large number of people to develop the games. These figures are mostly redacted, but one

[19] In contrast, the US Federal Court found that Microsoft had no incentive to foreclose market access to CoD and other games (See footnote 13).

published number from Activision shows CoD used more than 2,000 full time equivalent employees in 2021 (CMA 2023, Para. 9.34(a)). The time taken to develop a game is also substantial, ranging from three to five years (CMA 2023, Para. 93.7).

200. Another major barrier to entry is network effects, which create high switching costs, especially for multi-player games, such as CoD and WoW.

201. For the purposes of this report, the important point to note is that the assessment of countervailing factors could identify that, post-merger, the market will be sufficiently contestable that the merged entity could face potential or dynamic competition from entry by firms that may not currently be in the market. Assessing whether it could happen would, as the CAT suggests, be difficult, but in our view it is important this is done to assess dynamic competition as mitigating an SLC.

202. This contestability could come through a new innovation that has the potential to change the market structure. For example, generative AI is being talked about as an innovation that could change the gaming market (see footnote 11 above). This could affect CoD's position in the market and so the competition lessening effects of the merger or it could be used by the merged entity to sustain its position in the market to the detriment of competition. It is therefore important for the CMA to examine both potential outcomes.

203. Another countervailing factor the CMA considers is efficiencies. In line with the MAGs, the CMA's framework for assessing merger efficiencies consists of four parts. Merger efficiencies must:

   a) *Enhance rivalry in the supply of those products where an SLC might otherwise arise;*
   b) *Be timely, likely and sufficient to prevent an SLC from arising;*
   c) *Be merger specific; and*
   d) *Benefit customers in the UK. (CMA 2021, Para. 8.8)*

204. The first of these criteria is important for the purpose of this report. Relevant merger efficiencies must be expected to counter what would otherwise be an SLC arising from the merger. They must therefore *"be likely to strengthen the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers"* (CMA 2021, Para. 8.9).

205. Efficiency gains are not restricted to improvements in productive efficiency, whereby the merged entity can produce the same volume of goods of the same quality but at a lower

cost. They also include dynamic efficiency gains, which are normally measured by investment in innovative production techniques and/or products. The CMA recognises in the MAGS that a merger may bring together complementary assets that may reduce the incremental cost of innovation (CMA 2021, Para. 8.11).

206. However, the CMA did not consider that the Meta/Giphy merger would bring about any such efficiency gains that were merger-specific, despite arguments by the Parties. Likewise, no efficiency gains were identified in Microsoft/Activision that would be sufficient to overcome the SLC.

5.5 Conclusion on Recent Cases

207. From our reading of the two cases, we draw the following conclusions.

a) *The CMA takes account of the mergers' effect on dynamic competition as well as static competition. However, it appears to do so in a somewhat ad hoc manner without a detailed underlying methodology. This was to some extent addressed in the Remittal Report of Meta/Giphy as a result of the findings of the CAT. One example of the ad hoc nature of the analysis is that dynamic competition is only considered in relation to horizontal effects and not in relation to vertical effects, where one needs to look at the countervailing factors of the report to see how competition in future may be affected by the merger.*

b) *To the extent that dynamic competition is considered by the CMA in the two cases, such consideration is only through the lens of whether there will be a lessening of future competition as a result of the merger. There does not appear to be a consideration of whether dynamic competition is sufficiently timely, likely and sufficient to mitigate or overturn any static SLC.*

c) *The CMA relies on input from the merging companies and other parties in the market in its investigation. Whilst these views are, of course, important the CMA does not appear to have access to independent experts in, say, business strategy or technology development. Of course, CMA panel members, who come from a variety of relevant backgrounds, may bring in such experience and knowledge to any panel they serve* *on.*[20] *However, we are left wondering whether such input is available to panels on a consistent basis.*

208. In the next and final Section of this report we make some proposals for how merger investigations can take account of dynamic competition in a consistent and structured manner.

[20] See Feasey 2021 for a review of the make-up of CMA panel members.

6 DISCUSSION

209. In this final Section of the report, we set out five questions that we propose the CMA and other relevant competition authorities should consider when undertaking a merger investigation that could involve dynamic competition.

6.1 Do technical and economic conditions mean that the market is likely to be subject to dynamic competition?

210. In answering this first question, we suggest that the CMA needs to consider how the market(s) in which the merging firms operate is likely to develop and whether competition is expected to be dynamic i.e. an outcome of more than 50%. To address this question, we refer back to Table 1 and the market conditions therein. These are reworded below as questions for consideration:

   a) *Are there likely to be significant new product and service variations that meet the same customer need through different means in a timely manner that are sufficient to compete with current products and services?*
   b) *Are firms likely to be able to exploit new technologies and processes that will allow them to substantially undercut the costs of producing existing products and services in a timely manner that are sufficient to compete with current products and services?*
   c) *Are firms likely to compete for previously unserved customer segments?*
   d) *Are inter-firm affiliations in the market currently, or likely to become, complex and non-linear relationships that move beyond traditional horizontal and vertical relationships, for example complementors and co-creators?*
   e) *Is product, process and structural evolution currently, or likely to become, rapid and constant?*
   f) *Are firms currently, or likely to become, competing for current or future (Ricardian or Schumpeterian) rents?*

211. We propose that enquiry panels have access to independent expert advice to help answer these questions, in addition to input from the Parties and other firms in the market. Specifically, the expert advice would be concerned with the latest thinking on business strategy and on technology developments in the markets where the merging firms operate. The panel of experts recently appointed by the CMA to support the Digital

Markets Unit (DMU) could be the model for this panel of experts and may even involve some of the same people.

212. Where the market is expected to be subject to dynamic competition, then the CMA should address the following questions.

6.2 What is the scope of the relevant market(s)?

213. In Meta/Giphy, the CAT makes the point that dynamic competition should not be considered in isolation from static competition (CAT 2022, Para 100). In our view, therefore, when defining the relevant market, the CMA should start with a static market definition, perhaps using the HMT. This would provide a base line from which to extend the market definition as dynamic competition takes an effect.

214. To develop a market definition appropriate for dynamic competition, we suggest that the CMA develops an understanding of the ecosystem within which any area of competitive concern operates. This may not be straightforward and, as the CAT says, may well be hard, but it is something that will increasingly need to be developed as product markets give way to system markets.

215. There is a well-established management and academic discipline of understanding systems,[21] which are defined in Meadows (2008) as:

"A system is an *interconnected* *set of* *elements* *that is coherently organised in a way that* *achieves* *something"* (emphasis added).

216. The three features of elements, interconnectedness and achievement distinguish a system from an arbitrary collection of things. In her example, sand scattered on a road is not in itself a system, so nothing happens if some sand is removed. However, by arbitrarily adding or removing players from a football team or parts of the digestive system, one no longer has the same system.

217. Whilst such systems thinking has not been widely adopted in the investigation of competition matters despite a symposium held by the American Antitrust Institute (AAI) in 2009 (Gunlach and Moss, 2011), it is our view that the time is now right for competition authorities to adopt a formal way of defining and presenting ecosystem markets.

[21] See (Forrester, 1961 and Meadows 2008).

218. This is important for competition analysis of ecosystem markets. A systems approach to market definition can do, at least, two things. First it can help identify whether any changes to the system resulting from a merger may result in an SLC. Secondly, it may help understand how any remedies imposed in one part of the system may affect the whole system for the benefit, or to the disadvantage, of consumers.

6.3 If a Static SLC is not found, could there be a Dynamic SLC?

219. This is essentially the question asked in Meta/Giphy in relation to horizontal markets in which the CAT also sets out a series of questions the CMA should ask. The CAT recognised that identifying the dynamic element is very difficult but that *"to find an impairment to dynamic competition, the broad nature of the dynamic must be set out for a decision that dynamic competition is impaired to be defensible"* (CAT 2022, Para 107).

220. The CAT suggests a non-exhaustive and indicative list of four factors that may assist in identifying genuinely dynamic competition, as opposed to "duds":

a) The motives and thinking of the merging firms;

b) The market value attached to the dynamic element;

c) Contestability of the market, pointing out that a contestable market has low barriers to entry and exit; and

d) The manner in which the dynamic element can be monetised (CAT 2022, Para 109).

221. Any set of questions is likely to be merger specific, but the four questions suggested by the CAT are a reasonable starting point and, in our view, should be addressed in any merger investigation where dynamic competition is expected. These questions should be applied in consideration of both horizontal and vertical effects, and indeed any other effects that may occur within any relevant ecosystem.

6.4 If a Static SLC is found, could Dynamic Competition overturn that SLC?

222. This question is the inverse of the above and is in line with much of the academic thinking cited in this report. It is also in line with the approach taken by the CMA in Viasat/Inmarsat, that is not the subject of this report. However, the CMA allowed the Viasat/Inmarsat merger, finding that whilst the merging firms would likely remain close competitors absent a merger, the constraints it would face from other competitors, especially Starlink, would increase and constrain any SLC (CAT 2023b, Para 48).

223. In coming to this conclusion, the CMA's methodology was described as:

"To assess the impact of the Merger we first considered the extent of competition between the Parties that would be lost because of the Merger, and then considered whether that loss would be substantial in view of the constraints that the Merged Entity would face post-Merger from emerging and established rivals" (CAT 2023b, Para 19).

224. In undertaking this assessment, we propose that the CMA should first identify the potentially dynamic element. For this it may need input not only from the Parties and others but also from the independent experts we have suggested in paragraph 211 above.

225. Having identified the dynamic elements, the next task would be to determine whether such dynamic competition is "likely, timely and sufficient" such that it could be expected with an outcome of more than 50%, to place constraints on the merged entity. Where such an outcome is expected there would be a strong case for allowing the merger.

226. However, we also recognise that the merged entity itself could make use of the dynamic element and use it to effect a dynamic SLC, which would then need consideration under the previous question.

6.5 Do Coordination Benefits from Integration Outweigh an SLC?

227. Firms that are in a vertical or complementor relationship may find coordination benefits from being integrated that allow them to be more dynamic and which cannot be realised through contracts. The purpose of integration in this case is to overcome dynamic transaction costs (Langlois, 1992).

228. Where the potential reduction in dynamic transactions costs is expected to outweigh any SLC, and provided such benefits are passed on to consumers, this may result in the CMA finding this dynamic efficiency gain is sufficient to allow the merger to go ahead.

229. We would expect that where this is the case it would be the responsibility of the Parties to bring this potential benefit to the attention of the CMA and not the CMA's responsibility to go looking for such a benefit on a speculative basis. However, where the Parties do raise coordination benefits as a pro-innovation outcome the CMA may again wish to refer to an independent expert panel for their advice.

References

Boa, I., Elliott, M., & Foster, D. (2023). *A Capability Approach to Merger Review* (No. 2312). Faculty of Economics, University of Cambridge.

Cardell, S. (2023). *Competition and Innovation: a priority for the CMA* Speech to University of East Anglia's Centre for Competition Policy Annual Conference 2023. https://www.gov.uk/government/speeches/competition-and-innovation-a-priority-for-the-cma

CAT (2022) *Case no. 1429/4/12/21 Meta Platforms Inc vs. Competition and Markets Authority*

Cennamo, C., Gawer, A., & Jacobides, M. G. (2018). Towards a theory of ecosystems. *Strategic Management Journal*, *39*, 2255-2276.

Chesbrough, H. W., & Teece, D. J. (2009). When is virtual virtuous? Organizing for innovation. In *The strategic management of intellectual capital* (pp. 27-37). Routledge.

Christensen, C. M. (2013). *The innovator's dilemma: when new technologies cause great firms to fail*. Harvard Business Review Press.

CMA (2004). *Assessment of Market Power.*

CMA (2021). *Merger Assessment Guidelines* 18 March 2021.

CMA (2021a). *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. Final Report* 30 November 2021.

CMA (2022). *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. Final Report on the case remitted to the CMA by the Competition Appeal Tribunal* 18 October 2022.

CMA (2023). *Anticipated Acquisition by Microsoft of Activision Blizzard Inc: Final Report* 26 April 2023.

CMA (2023a) *CMA Economic Research Strategy Microeconomics Unit* 8 March 2023.

CMA (2023b) *Anticipated Acquisition By Viasat, Inc. Of Connect Topco Limited* 9th May 2023.

European Commission (2018). *Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services.*

Evans, D. S., & Schmalensee, R. (2002). Some economic aspects of antitrust analysis in dynamically competitive industries. *Innovation policy and the economy*, *2*, 1-49.

Farrell, J., & Shapiro, C. (2010). Antitrust evaluation of horizontal mergers: An economic alternative to market definition. *The BE Journal of Theoretical Economics*, *10*(1).

Feasey, R. (2021). ‘*The role of the CMA panel in decision making: Merger enforcement and reform’.* Speech to Law Council of Australia’s Competition and Consumer (ACCC) 1st September 2021.

Forrester, J. (1961). *Industrial Dynamics.* MIT Press.

Gundlach, G., & Moss, D. L. (2011). Systems competition and challenges to antitrust thinking: An introduction. *The Antitrust Bulletin*, *56*(1), 1-11.

Hicks, J.R. (1935). 'The Theory of Monopoly', *Econometrica.*

Jacobides, M. G., & Lianos, I. (2021). Ecosystems and competition law in theory and practice. *Industrial and Corporate Change*, *30*(5), 1199-1229.

Jenny, F. (2021). Competition law and digital ecosystems: learning to walk before we run. *Industrial and Corporate Change*, *30*(5), 1143-1167.

Kirzner, I. M. (2015). *Competition and entrepreneurship*. University of Chicago press.

Langlois, R. N. (1992). Transaction-cost economics in real time. *Industrial and corporate change*, *1*(1), 99-127.

Meadows, D. H. (2008). *Thinking in systems: A primer*. Chelsea Green publishing.

Motta, M. (2004). *Competition policy: theory and practice*. Cambridge university press.

Petit, N., & Teece, D. J. (2021). Innovating big tech firms and competition policy: favoring dynamic over static competition. *Industrial and Corporate Change*, *30*(5), 1168-1198.

Schumpeter, J.A (1943) *Capitalism, Socialism and Democracy* Routledge Classics.

Sidak, J. G., & Teece, D. J. (2009). Dynamic competition in antitrust law. *Journal of Competition Law & Economics*, *5*(4), 581-631.

Teece, D. J. (1996). Firm organization, industrial structure, and technological innovation. *Journal of economic behavior & organization*, *31*(2), 193-224.

Teece, D. J. (2000). *Managing intellectual capital: Organizational, strategic, and policy dimensions*. OUP Oxford.

Teece, D. J. (2020). Innovation, governance, and capabilities: implications for competition policy: A Tribute to Nobel Laureate Oliver Williamson by his Colleague and Mentee David J. Teece. *Industrial and Corporate Change*, *29*(5), 1075-1099.

Teece, D.J. (2021). Towards a Dynamic Competition approach to Big Tech merger enforcement: The Facebook Giphy example *TechREG Chronicle* December 2021.

Teece, D. J., Pisano, G., & Shuen, A. (1997). Dynamic capabilities and strategic management. *Strategic management journal*, *18*(7), 509-533.