

Competition Policy for FinTech M&A—What to Expect When You’re Expecting ... a FinTech M&A Deal

Daniel Schwarz

Jordan Bernstein*

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Abstract

The UK Competition & Markets Authority has closely scrutinised M&A deals in the FinTech sector in recent years. This article provides an overview of the UK regulatory framework and key themes regarding the approach by regulators to FinTech M&A deals. It concludes by reflecting on the policy decisions which regulators will need to make as activity in this sector increases.

In recent years, there has been a boom in investment in FinTech and a rise in scrutiny of FinTech M&A by the UK Competition & Markets Authority (CMA). Investment in UK FinTech reached \$37.3 billion in 2021 alone, representing the completion of 603 UK FinTech deals.¹ In response, the CMA has conducted several in-depth reviews of FinTech M&A deals such as FNZ’s acquisition of GBST, PayPal’s acquisition of iZettle, and the merger of Crowdcube and Seedrs. The UK Government is also consulting on reforms to make the UK’s merger control regime stricter, especially in relation to acquisitions by digital platforms.

The UK has therefore been a focal point for both FinTech M&A, due to its role as a global financial centre, and an innovator in regulating acquisitions by tech companies. The approach of the CMA is relevant to FinTech businesses and investors both in the UK and across the globe, as regulators the world over evaluate the merits of adopting the UK’s potentially stricter approach.

The CMA’s approach shows that it has applied many of its concerns regarding tech firms to FinTech in particular, while taking into account the financial regulatory environment. There are several key themes that can be seen from recent investigations by the CMA:

- The CMA will closely scrutinise M&A deals in the FinTech sector;
- Emphasis will be placed on potential and dynamic competition;
- Internal documents will be scrutinised;
- Valuations will be analysed;
- The regulatory environment will be considered; and
- Input will be sought from financial regulators.

From Square’s \$29 billion acquisition of Afterpay in Sydney, to JP Morgan’s acquisition of Nutmeg based in London, major FinTech M&A deals are continuing across the globe. As FinTech firms continue to expand and acquisitions continue, the CMA’s role in influencing market structure will become increasingly important. As concerns over competition in digital markets lead to institutional, substantive and jurisdictional reforms, the regulation of acquisitions of FinTech businesses will be affected.

Institutional architecture for competition policy in FinTech in the UK

There are a number of regulators in the UK that have a role in ensuring markets in which FinTech businesses operate are competitive:

CMA

The CMA is the UK’s economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. The CMA is responsible for reviewing relevant merger situations in the UK. After a Phase I investigation it can clear the transaction, accept undertakings from the parties to clear the transaction or refer it for a more in-depth Phase II investigation. The Phase II investigation can lead to the transaction being cleared, cleared subject to remedies or blocked. The CMA also has the power to investigate and sanction anticompetitive agreements and conduct under Chapters 1 and 2 of the Competition Act 1998 respectively.

In 2021, a new Digital Markets Unit (DMU) was established within the CMA. As set out in further detail below, a bespoke merger framework for acquisitions by digital platforms with Strategic Market Status (SMS) will be created if proposed new legislation comes into effect. This is likely to see the DMU play a leading role in a distinct merger control regime for SMS firms.²

* Clifford Chance LLP.

¹ KPMG, “UK fintech investment soars to \$37.3 billion in 2021—up sevenfold from 2020” (7 February 2022), <https://home.kpmg/uk/en/home/media/press-releases/2022/02/uk-fintech-investment-soars-to-37-billion-in-2021.html>.

² Competition and Markets Authority, “The CMA’s Digital Markets Strategy—February 2021 refresh” (9 February 2021), para.3.11. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959399/Digital_Markets_Strategy.pdf.

FCA

The Financial Conduct Authority (FCA), the UK's financial services conduct regulator, has concurrent competition powers with the CMA to investigate financial services markets under the Enterprise Act 2002 and can also investigate and take enforcement action over breaches of the Competition Act 1998.³ Although only the CMA has the powers to decide whether mergers should be prohibited on competition grounds, the FCA may give the CMA information about the firms or markets affected by a proposed merger.⁴ The FCA will also be given a formal route to raise and hand over competition concerns to the DMU that the FCA identifies if the DMU is better placed to address them through their new powers.

PSR

The Payment Systems Regulator (PSR), a subsidiary of the FCA, also has concurrent competition powers in relation to payment systems. The PSR's competition powers have so far been focused on market reviews, but it has also recently imposed its first fine for an alleged cartel infringement.⁵ Although the 2015 Memorandum of Understanding between the CMA and PSR appears to leave all merger control decisions to the CMA, the PSR has also provided expertise to the CMA in relation to its investigations into mergers relating to payment systems.⁶

Bank of England

Finally, the Bank of England has a secondary competition objective, which includes the facilitation of effective competition between firms.⁷ In the most recent competition report of the Prudential Regulation Authority (PRA), the UK's main prudential regulator within the Bank of England, the PRA gives an overview of the steps it has taken to facilitate effective competition in the banking and insurance sectors.⁸ As well as maintaining a close working relationship with both the CMA and the FCA, the PRA regularly reviews the competitiveness of its markets in a number of areas, including by measuring, for example, competition in the UK deposit-taking sector.

Approach of competition policy to M&A in financial sector

Competition authorities have often treated both financial services firms and technology firms differently to businesses in other sectors. This raises the question as to how they will treat FinTech firms that provide financial services in innovative ways powered by new technologies. Acquisitions of FinTech firms could be viewed as similar to acquisitions of financial services firms, operating in a highly regulated industry with strong consumer protection laws where financial stability is a key consideration. They might also be viewed as similar to acquisitions of tech firms, characterised by dynamic markets and winner-takes-all features where data is a key commodity. Although the competition authority will normally be responsible for deciding whether a FinTech merger should be permitted, the decisions it takes will have a profound effect on the markets which financial regulators police.

In the UK, as in other jurisdictions, legislators have created bespoke competition rules for firms engaging in acquisitions of financial services businesses. When calculating turnover to assess whether the CMA has jurisdiction to review a transaction, the CMA applies different rules for credit institutions, financial institutions and insurance undertakings. For credit and financial institutions, turnover is calculated by adding certain types of specified income, such as interest income, income from securities, interests from shares, commissions receivables and net profit on financial operations.⁹ For insurance undertakings, turnover is calculated as the value of the gross premiums received from residents of the UK after deduction of taxes and certain other premium-related deductions.¹⁰ The Secretary of State may also make a public interest intervention where mergers may affect the stability of the UK financial system.¹¹ Financial services firms are also subject to conduct and prudential requirements that other firms are not. They are regulated by the FCA and often also by the PRA. Where the CMA has identified a Substantial Lessening of Competition arising from the transaction, it may be more willing to accept behavioural remedies where a sectoral regulator, such as the FCA, can be involved in the monitoring regime.¹²

³ Financial Conduct Authority, "FCA Mission: Our Approach to Competition" (December 2017), p.10, <https://www.fca.org.uk/publication/corporate/our-approach-competition.pdf>.

⁴ Financial Conduct Authority, "FCA Mission: Our Approach to Competition", December 2017, p.10.

⁵ PSR, "The PSR fines five companies more than £33 million for cartel behaviour in the prepaid cards market" (18 January 2022), <https://www.psr.org.uk/news-updates/latest-news/news/the-psr-fines-five-companies-more-than-33-million-for-cartel-behaviour-in-the-prepaid-cards-market/>.

⁶ CMA, PSR, "Memorandum of Understanding between the Competition and Markets Authority and the Payment Systems Regulator—concurrent competition powers" (December 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487947/PSR-CMA_memorandum_of_understanding.pdf.

⁷ Bank of England, "Our Competition Objective", <https://www.bankofengland.co.uk/prudential-regulation/secondary-competition-objective>.

⁸ Prudential Regulation Authority, "Annual Report: 1 March 2021 to 28 February 2022", pp.66–81, <https://www.bankofengland.co.uk/-/media/boe/files/annual-report/2022/pr-a-2022.pdf>.

⁹ Competition & Markets Authority, "Mergers: Guidance on the CMA's jurisdiction and procedure" (January 2021; as amended on 4 January 2022), para.A.12; and paras 10 and 11 of the Schedule to the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (SI 2003/1370) (as amended), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf.

¹⁰ Competition & Markets Authority, "Mergers: Guidance on the CMA's jurisdiction and procedure" (December 2020), para.A.13; and paras 10 and 12 of the Schedule to the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (SI 2003/1370) (as amended), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf.

¹¹ Enterprise Act 2002 s.58.

¹² Competition & Markets Authority, "Merger Remedies" (December 2018), para.7.6, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf.

Other jurisdictions also take a different approach to M&A deals in the financial sector to M&A deals in other sectors. The EU takes a similar approach to the UK when calculating turnover of financial services businesses to assess whether the competition authority has jurisdiction to review a transaction. In the US, in a far-reaching Executive Order on competition, President Biden recently encouraged the Attorney General to review current practices and adopt a plan for “the revitalization of merger oversight” under the Bank Merger Act.¹³ In September 2020, the US Department of Justice also sought public comments on revisions to the Bank Merger Competitive Review Guidelines, stating that “Innovative emerging technologies are disrupting traditional banking models and introducing new competitive elements to the financial sector”.¹⁴ The Department of Justice again welcomed public comments on revising these guidelines at the end of 2021.¹⁵

Approach of competition policy to M&A in the tech sector

The tech sector has received widespread scrutiny from competition authorities and a new regulatory regime is likely to come into force to improve competition in the sector. The Furman Report identified that large digital platforms often operate in multiple-sided markets characterised by economies of scale and scope, services provided for zero monetary-price, ecosystems and a key role for data.¹⁶

Revised MAGs

The CMA has updated its Merger Assessment Guidelines (MAGs) to address the challenges posed by the digital economy:

- *Potential and dynamic competition*—The revised MAGs seek to address concerns that mergers may involve the acquisitions of firms that would otherwise enter or expand into the market, or could create new products through investment and innovation. The MAGs therefore establish a low evidential burden for finding that firms are potential or dynamic competitors.
- *Two-sided markets*—In two-sided platforms, the value of the product for customers on one side of the platform depends on the number of users either on

the same side of the platform (direct network effects) or on the other side of the platform (indirect network effects). The CMA considers that these network effects mean that mergers between platforms are more likely to give rise to competition concerns due to: mergers tipping markets; lost sales undermining alternative networks; and high barriers to entry. However, mergers which increase network effects may also benefit customers on either side of the platforms.

- *Digital input foreclosure*—the MAGs list new mechanisms by which a merged firm could achieve input foreclosure which are relevant to the digital economy: slowing the rollout of upgrades, deteriorating product interoperability, shutting down Application Programme Interfaces (APIs) and limiting access to data.¹⁷ The CMA may also investigate if there are features that may limit the constraint from upstream rivals, such as economies of scale, switching costs, direct or indirect network effects, brand and reputation, high fixed costs, control of intellectual property, access to data or integration into wider ecosystems.¹⁸

DMU

The UK government recently consulted on introducing a new merger control regime that would only apply to large acquirers who have been deemed to have SMS.¹⁹ These would be firms that are identified as having substantial and entrenched market power in at least one digital activity, which provides them with a strategic position. Although it is not yet known which firms this will include, based on recent and current market studies and investigations carried out by the CMA, it is likely to catch at least Apple, Facebook and Google.

Firms with SMS would be subject to a bespoke merger regime that would apply when acquiring FinTech firms. This would require them to inform the CMA of their most

¹³ White House, “Executive Order on Promoting Competition in the American Economy” (9 July 2021), s.5(e), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

¹⁴ US Department of Justice, “Antitrust Division Seeks Public Comments On Updating Bank Merger Review Analysis” (1 September 2020), <https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis>.

¹⁵ US Department of Justice, “Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide” (1 September 2020), <https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide>.

¹⁶ J. Furman et al., “Unlocking digital competition—Report of the Digital Competition Expert Panel” (March 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

¹⁷ See MAGs 7.13. This seeks to apply longstanding concerns around input foreclosure to new conduct in digital markets. The CMA has explained input foreclosure to be as follows: “where a merger involves one party that supplies an input to rivals of the other party, the merged entity may restrict these rivals’ access to this input or offer it on worse terms, directly harming the rival’s competitiveness and therefore competition in the downstream market.” See MAGs 7.8(a).

¹⁸ MAGs 7.14.

¹⁹ UK Government, “A new pro-competition regime for digital markets—government response to consultation” (6 May 2022), <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets>.

significant transactions prior to completion.²⁰ The CMA would then conduct an initial review of the mergers to consider whether they warrant further investigation.

Key themes in the CMA's approach to FinTech M&A

The CMA has reviewed several FinTech M&A deals in recent years, showing a keen interest in the sector. There are several key themes that can be seen in these decisions, some of which led to transactions being abandoned:

The CMA will closely scrutinise M&A deals in the FinTech sector

Six of the investigations opened by the CMA from 1 April 2018 to 31 March 2021 into FinTech M&A deals were referred for detailed Phase II investigation.²¹ These included, amongst others: PayPal's acquisition of iZettle; FNZ's acquisition of GBST; Bottomline's acquisition of Experian Payments Gateway; and Experian's acquisition of ClearScore. This accounted for almost 20% of the total Phase II outcomes over the same period.²² This shows a strong willingness of the CMA, which has limited resources, to prioritise reviewing M&A deals in the FinTech sector over other sectors.

Emphasis will be placed on potential and dynamic competition

The CMA often looks at potential and dynamic competition when assessing FinTech mergers, as it does with tech mergers. For example, for PayPal's acquisition of iZettle, the CMA looked at whether iZettle would likely enter into omni-channel services if it was not acquired by PayPal and whether this would lead to greater competition. Similarly, in Visa's acquisition of Plaid, the CMA looked at whether the removal of Plaid as an emerging competitor to Visa would reduce competition in the market for consumer-to-business payments.

Internal documents will be scrutinised

The CMA is increasingly interrogating the internal documents of merging firms and this is equally applicable in the context of FinTech mergers. For example, for Visa's acquisition of Plaid, the CMA reviewed "a significant volume of internal documents".²³ For FNZ's

acquisition of GBST, the CMA's Final Report included sections on the internal documents of the parties which discussed switching, the closeness of competition between the parties and the competitive constraint from alternatives.²⁴ It also had separate appendices on the parties' internal documents related to market definition and the competitive assessment. The CMA dismissed submissions by FNZ that only a small set of documents had been used and many of these were in draft or produced by third parties.²⁵

Internal documents also played an important role in the outcome of the Crowdcube/Seedrs merger. On the basis of internal documents, along with responses to its questionnaires, the CMA concluded that the competitive constraint exerted by other equity finance providers on equity crowdfunding platforms was much weaker than that exerted by equity crowdfunding platforms on each other. Its provisional view was therefore that the relevant product market included only the supply of equity crowdfunding platforms and not other equity finance providers.²⁶ This narrower market definition meant that the merging parties were considered to have a market share of at least 90% in the market for the supply of equity crowdfunding platforms to SMEs and investors in the UK. This market share was far higher than if other equity finance providers were included. Despite venture capital and angel investors being excluded from the relevant market, the competitive constraint from them was still taken into account. The CMA's initial view was that blocking the merger may have been the only way to address these concerns, leading the parties to abandon the merger.

Valuations will be analysed

The CMA will also scrutinise evidence on deal valuation when trying to understand the deal rationale and its synergies, and when considering losses of actual and potential competition.²⁷ For example, the CMA may look at the way that the target's business has been valued by the acquirer to see whether the motivation is to remove a potential future competitor of the acquirer. The CMA examined whether the consideration paid by PayPal for iZettle, which was much higher than the expected IPO valuation, suggested that it had taken into account the potential reduction in competition, however it found no evidence that this was the case.²⁸

²⁰ The Government has stated that it is minded towards this being when: the SMS firm acquires over a 15% equity or voting share after the transaction, the value of the SMS firm's holding is over £25 million and the transaction meets a UK nexus test. UK Government, "A new pro-competition regime for digital markets—government response to consultation" 6 May 2022, p.14.

²¹ (i) Experian/Clearscore; (ii) TopCashback/QuidCo; (iii) PayPal/iZettle; (iv) Bottomline/Experian; (v) Crowdcube/Seedrs; and (vi) FNZ/GBST.

²² CMA, "Merger Outcome Statistics", <https://www.gov.uk/government/publications/phase-1-merger-enquiry-outcomes>.

²³ CMA, "Anticipated acquisition by Visa International Service Association of Plaid Inc.—Decision on relevant merger situation and substantial lessening of competition", para.38.

²⁴ CMA, "Completed acquisition by FNZ of GBST—Final report on the case remitted to the CMA by the Competition Appeal Tribunal on 21 January 2021", paras 7.21, 8.132–8.169, 8.252–8.268, https://assets.publishing.service.gov.uk/media/60bd95c8fa8f57ceec3c82b/Final_Report_2_-_FNZ_GBST_.pdf.

²⁵ CMA, "Completed acquisition by FNZ of GBST—Final report on the case remitted to the CMA by the Competition Appeal Tribunal on 21 January 2021", paras 7.21, 8.147, https://assets.publishing.service.gov.uk/media/60bd95c8fa8f57ceec3c82b/Final_Report_2_-_FNZ_GBST_.pdf.

²⁶ CMA, "Anticipated acquisition by Crowdcube Limited of Seedrs Limited—Provisional findings report", para.16, https://assets.publishing.service.gov.uk/media/6061ddb9d3bf7f5ceaca0d82/Provisional_Findings_Crowdcube_Seedrs.pdf.

²⁷ MAGs, para.2.24.

²⁸ CMA, "Completed acquisition by PayPal Holdings, Inc. of iZettle AB—final report", para.11, https://assets.publishing.service.gov.uk/media/5cfa74440f0b609601d0ffc/PP_iZ_final_report.pdf.

Regulatory environment will be considered

The CMA will take into account the impact of the regulatory environment on competition. Where regulation improves competition, such as by lowering barriers to entry, this may make it more likely that the deal is approved. In the Experian/ClearScore merger, the CMA considered that the potential impacts of regulatory changes on the ability to ease entry and expansion needed to be included in its assessment.²⁹ In that case, the CMA recognised that the markets which the parties operated in, and the markets for consumer financial products more generally, are dynamic and that the introduction of GDPR, PSD2 and Open Banking, as well as technological developments, were likely to impact markets. The CMA cited the FCA’s Regulatory Sandbox and an FCA Policy Statement on the extent that Open Banking and PSD2 had increased competition in the relevant markets.³⁰ However, ultimately it considered that the implications of the regulatory and technical developments on competition were not sufficiently clear to include them in the counterfactual against which it was comparing the effects of the merger.

As set out in further detail below, the launch of Open Banking in the UK made it easier for third parties to access bank account data using APIs, which was a factor in the CMA permitting the Visa/Plaid deal. In contrast, there were no equivalent pro-competition regulations in the US, which contributed to the decision of the Department of Justice (DOJ) to sue to block the merger.

Input will be sought from financial regulators

Although the CMA is ultimately responsible for decisions regarding mergers involving FinTech firms, it has often sought input from other UK financial regulators. For example, the FCA assisted the CMA in its understanding of the investment platforms sector and the regulated activities of FNZ in the CMA’s investigation of the completed acquisition of GBST Holdings Limited by FNZ. The FCA also shared its expertise with the CMA regarding the Crowdcube/Seedrs merger and the acquisition of Plaid by Visa. Additional input was provided by the PSR to the CMA in relation to payment systems for Visa’s acquisition of Plaid.

Recent decisions by the CMA on FinTech M&A

As mentioned above, the CMA has reviewed several FinTech M&A transactions recently. An overview of the CMA’s approach to PayPal’s acquisition of iZettle and Visa’s acquisition of Plaid are set out below as illustrative examples.

PayPal’s acquisition of iZettle

On 17 May 2018, PayPal announced the acquisition of iZettle for \$2.2 billion, only nine days after iZettle announced its intention to list all of its shares on Nasdaq Stockholm. On 5 December 2018, the CMA referred the completed acquisition for an in-depth Phase II merger inquiry. iZettle provides mobile point of sale services (mPOS) with a focus on small businesses, allowing them to accept card payments from customers offline. mPOS services involve a card reader that is connected to a smartphone or tablet, either using Bluetooth or physically, which enable merchants to accept card payments. This was introduced as an alternative to traditional point of sale (POS) services whereby a standalone device is connected to a payment system using Wi-Fi, a wired connection or a mobile connection, instead of using a smartphone or tablet. Although the two businesses were active in multiple jurisdictions, they only overlapped in the supply of mPOS services in the UK.

The CMA paid close attention to the fact that the price paid by PayPal far exceeded the expected IPO valuation. This led it to consider whether the acquisition was motivated by a desire to prevent future competition from an emerging rival. However, the CMA found no evidence that this was the case and established that the price paid was justified by the commercial valuation and calculations of synergies.

The CMA highlighted that:

“the payment services industry is a fast-moving and dynamic market ... distinguished by rapid growth in a relatively short period of time and notable technological and commercial developments that often result in disruption to the current state of competition and how consumers interact in the marketplace.”³¹

It therefore looked not only at the current state of competition, but also at the way that competition is likely to develop in the future, relying on forward-looking evidence.

The CMA reviewed an extensive selection of PayPal’s internal documents, provided by the company in response to the CMA’s information requests and identified in a search and detailed review of internal emails. This is another example of a competition authority relying heavily on internal documents of parties to assess their true motivations and views on the relevant markets.

The CMA considered the impact on competition in the markets for mPOS services and for “omni-channel payment services”:

- mPOS—the CMA looked at the market for the supply of offline card payment services to smaller merchants in the UK, smaller merchants being those with a monthly transaction payment volume below

²⁹ Experian/ClearScore, “Anticipated acquisition by Experian plc of Credit Laser Holdings Limited—Provisional findings report”, para.13.56.

³⁰ Experian/ClearScore, “Anticipated acquisition by Experian plc of Credit Laser Holdings Limited—Provisional findings report”, fnn.86–87.

³¹ CMA, “Completed acquisition by PayPal Holdings, Inc. of iZettle AB—final report”, para.10.

£15,000. It acknowledged that “payment technologies can and do develop quickly, and technological or regulatory changes and developments in consumer habits can result in substantial market changes”.³² iZettle was by far the largest provider of mPOS services in the UK, with PayPal being the second largest and expected to expand further. The CMA used a counterfactual in which PayPal was a stronger competitor in the future than it was at the time, showing the CMA’s interest in potential competition. However, the CMA considered that it was unlikely that the merger would substantially lessen competition in this area, and that there was a material constraint from the much larger POS providers and a significant constraint from Square and Sum Up.

- Omni-channel—this refers to the provision of an integrated online and offline payment service, whereby a single provider is used by a merchant to receive all payments. However, there are other components such as sales management, online-selling functionalities and other services. The CMA looked at potential competition: whether iZettle would likely enter into omni-channel services if it was not acquired by PayPal and whether this would lead to greater competition. However, it found that iZettle’s expansion would have been on a small scale and there would have been other significant competitors and therefore thought that competition would not be harmed in this area.

iZettle also came with a POS app which included inventory management and sales analytics tools.³³ Customers also had the option to use “iZettle PRO” which provided table management, open tab and split bills, employee management and stock management. This is another example of non-financial services being provided alongside financial services in a way that is more common for FinTech providers than traditional financial services providers.

Visa’s acquisition of Plaid

Different conclusions may be reached by competition authorities in different jurisdictions. Divergent results can be seen in relation to Visa’s announcement in January 2020 that it had agreed to buy Plaid for \$5.3 billion. In the UK, the CMA cleared the acquisition without

requiring an in-depth Phase II investigation.³⁴ However, in the US the Antitrust Division of the DoJ filed a complaint seeking to block Visa’s acquisition of Plaid.³⁵

Visa supplies core solutions for consumer-to-business payments, particularly card-based payments. Plaid is a US-based technology platform provider that enables third-party software applications to connect to users’ payment accounts through APIs. Plaid provides both account information services and payment initiation services. Account information services give users aggregated online information on their payment accounts with different payment services providers. Payment initiation services involve signalling to a payee that a payment has been initiated so that a transaction can be completed. They therefore enable consumers to pay merchants directly from a bank account without using a card payment. The parties therefore both provided services enabling consumer-to-business payments, including card-based payments and account-to-account payments but excluding cash and cheques.

The CMA looked at whether the removal of Plaid as an emerging competitor to Visa would reduce competition in the market for consumer-to-business payments. It highlighted that there are a large number of providers of payment initiation services in the UK already, some of which are better positioned than Plaid and would be able to compete with the combined business if the deal was approved. Therefore, the CMA did not have concerns in this area, despite it considering that payment initiation services will compete more closely with card-based payment in the future.

The CMA also analysed whether the combined business would be able to leverage Visa’s position in card-based payments to foreclose rival providers of payment initiation services by tying or bundling its card services with its payment initiation services offering. It found that merchants often source payment options from multiple suppliers and that large merchants could offer payments enabled by payment-initiated services by partnering directly with one of these providers, rather than via merchant acquirers. As a result, the CMA did not consider that the combined business would be able to harm competition in this way.

The CMA looked at Visa’s valuation methodology to assess whether Visa was paying a premium to reduce competition in the future. However, it could reconcile Visa’s methodology with previous funding rounds and considered the valuation to be consistent with Visa’s high expectations for Plaid’s expansion.³⁶

The DoJ claimed that Visa was a monopolist, controlling approximately 70% of the online debt transactions market in the US. It stated that merchants did not have a choice as to whether they accepted Visa

³² CMA, “Completed acquisition by PayPal Holdings, Inc. of iZettle AB—final report”, para.29.

³³ CMA, “Completed acquisition by PayPal Holdings, Inc. of iZettle AB—final report”, paras 2.34 and 2.36.

³⁴ CMA, “Anticipated acquisition by Visa International Service Association of Plaid Inc.—Decision on relevant merger situation and substantial lessening of competition”, ME/6886/20 (24 August 2020), https://assets.publishing.service.gov.uk/media/5f7aede48fa8f55e2c8bc8e3/20201002_-_Visa_Plaid_-_Full_Text_Decision_FINAL_---.pdf.

³⁵ Complaint, *United States v Visa Inc.*, Case No.3:20-cv-07810 (ND Cal. 5 November 2020), <https://www.justice.gov/opa/press-release/file/1334726/download>.

³⁶ CMA, “Anticipated acquisition by Visa International Service Association of Plaid Inc.—Decision on relevant merger situation and substantial lessening of competition”, para.43.

debit cards, despite perennial complaints about the high cost of Visa’s debit service, due to the ubiquity of the use of Visa. New challengers to Visa would face “a chicken-and-egg quandary”³⁷ as they would need to attract both thousands of merchants and millions of consumers, creating a substantial barrier to entry. Further long-term contracts which Visa had with many of the largest banks in the US restricted the ability of these banks to issue Mastercard debit cards. Plaid, meanwhile, is used for some of the most prominent US FinTech apps, such as Venmo, Acorns and Betterment. It had connected to 11,000 US financial institutions and more than 200 million consumer bank accounts in the US.

Although the DoJ stated that Plaid did not compete directly with Visa at the time, it noted that Plaid was planning to leverage its technology and relationships to facilitate transactions between consumers and merchants, in competition with Visa. It made extensive references to Visa’s internal documents during its complaint. When evaluating whether to acquire Plaid, one senior Visa executive referred to the threat from Plaid and stated “I don’t want to be IBM to their Microsoft”. They made an analogy to Plaid as an island “volcano” whose current abilities are “the tip showing above the water”, stating that “what lies beneath, though, is a massive opportunity—one that threatens Visa”.³⁸ Visa’s CEO described the acquisition as “an insurance policy to protect our debit biz in the US”. Like the CMA, the DoJ also looked at the purchase price of the business. However, the DoJ pointed to comments from Visa’s CEO that the acquisition was a “strategic, not financial” decision because “our US debit business is critical and we must always do what it takes to protect this”.³⁹

The differences in conclusions reached between US and UK authorities could be caused by a number of different factors:

- *Internal documents*—In conducting its analysis, the CMA reviewed “a significant volume of internal documents”⁴⁰ to see whether they were consistent with its stated rationale for the transaction. They found them to be consistent with Visa’s “network of networks” strategy under which the company seeks to remain the preferred network for its customers and to meet their needs for all types of transactions, including payments between accounts. It is possible that the CMA did not receive the internal documents to which the DoJ referred to in

its complaint, or it did receive them but considered that they focused on the competitive dynamics of the US market.

- *US-driven deal*—The CMA also identified that the main rationale for the merger was due to Plaid’s position in the US and the US market more generally.
- *Regulatory divergence drives competition divergence*—Under the second Payment Services Directive (PSD2), third-party providers are able to access the account holders’ bank account information and request payments using open APIs made available by banks. Following the CMA’s 2016 market investigation into retail banking, under the Retail Banking Market Investigation Order 2017, the largest UK banks are required to use common and open standards for APIs. However, there was not equivalent legislation in the US enabling third-party connectivity, making it much more difficult for a third party to connect to financial institutions. This, along with a more fragmented US banking market, made Plaid’s established connections to many US banks more valuable in the US than it would be in the UK.⁴¹

Visa and Plaid subsequently agreed to abandon the transaction after the DoJ sued to block it.⁴²

Kalifa review

The application of merger control by competition authorities is one of the key determinants of market structure affecting FinTech businesses. Consideration of these issues will therefore have implications for consumers, investors, financial regulators and FinTech businesses.

The approach of the CMA has not been universally welcomed. The Kalifa Review of UK FinTech argued that the “CMA must adapt its approach” to the FinTech sector in order to “better balance competition and growth”. It considered that the CMA should take a more flexible approach and that “some consolidation will ... be critical in facilitating the growth that UK fintechs need in order to become global champions”. It therefore recommended that “the CMA’s mandate must reflect these market dynamics”.⁴³ This reflects familiar tensions between competition and industrial policy. Closely scrutinising mergers would ensure there are multiple competing firms domestically, whereas being more

³⁷ *United States of America v Visa Inc. and Plaid Inc.*, complaint filed by DoJ, para.4.

³⁸ *United States of America v Visa Inc. and Plaid Inc.*, complaint filed by DoJ, para.9.

³⁹ *United States of America v Visa Inc. and Plaid Inc.*, complaint filed by DoJ, para.12.

⁴⁰ CMA, “Anticipated acquisition by Visa International Service Association of Plaid Inc.—Decision on relevant merger situation and substantial lessening of competition”, para.38.

⁴¹ CMA, “Anticipated acquisition by Visa International Service Association of Plaid Inc.—Decision on relevant merger situation and substantial lessening of competition”, para.46.

⁴² US Department of Justice, “Visa and Plaid Abandon Merger After Antitrust Division’s Suit to Block” (12 January 2021), <https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block>.

⁴³ Independent report on the UK Fintech sector by Ron Kalifa OBE, p.9, <https://www.gov.uk/government/publications/the-kalifa-review-of-uk-fintech>.

permissive towards more mergers would encourage consolidation in an attempt to create national champions. However, it does not appear that the UK government will change competition policy in response to these criticisms; indeed, it seems the government is instead planning to support “FinTech Champions” through the Department for International Trade.⁴⁴

Conclusion

The CMA has closely scrutinised acquisitions of FinTech businesses and taken a similar approach to that which it takes for tech mergers more broadly. It has, however, taken into account the regulatory context for FinTech businesses and sought input from financial regulators. This has caused some concerns that the CMA is preventing industry consolidation and thus hampering the emergence of global FinTech champions. The importance of these decisions will grow over time as FinTech businesses develop and markets mature. Looking towards the future, competition authorities will have to make policy decisions on FinTech M&A:

- *Integration of financial and non-financial services*—Creating a FinTech business often involves the integration of financial and non-financial services. We are therefore more likely to see reviews of technology deals look more at financial services, and reviews of financial services deals look more at technology. For instance, in Google’s acquisition of FitBit, the European Commission considered “the role of wearable devices in the insurance sector”,⁴⁵ as did the Australian Competition & Consumer Commission.⁴⁶
- *New tech merger frameworks*—New frameworks are being created in most jurisdictions for tech firms, in particular platforms including Google, Apple and

Facebook. If these firms seek to acquire FinTech businesses then FinTech mergers will have to be analysed under these new frameworks.

- *International cooperation*—Merger authorities are seeking to increase international cooperation on merger control. This will be even more complex in FinTech cases that involve collaboration both internationally between competition authorities and domestically between merger authorities and financial regulators. International cooperation may even give rise to international disagreement, particularly where, as in Visa/Plaid, different competition authorities may have independently reached divergent conclusions.
- *Evolving regulatory framework*—Financial regulatory frameworks in many jurisdictions are rapidly evolving to take into account new business models and market dynamics involving FinTech firms. Competition authorities have grappled with the best way to deal with dynamic markets, with fast-moving businesses. Now they also have to take into account dynamic regulations that are quickly evolving. These will impact both market structures and the competitive landscape for merging parties.
- *The state as a market participant*—governments have sought to innovate to compete with the private sector such as with the introduction of Central Bank Digital Currencies. As the state increasingly competes with the private sector, competition authorities may have to take into account the role of the state.

⁴⁴ Statement by Rishi Sunak, UK Parliament (26 April 2021), <https://questions-statements.parliament.uk/written-statements/detail/2021-04-26/hcws938>.

⁴⁵ Case M.9660, *Google/FitBit* (17 December 2020), para.490, https://ec.europa.eu/competition/mergers/cases/1/202120/m9660_3314_3.pdf.

⁴⁶ Australian Competition & Consumer Commission, “Google LLC—proposed acquisition of Fitbit Inc, Statement of Issues” 18 June 2020, <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/google-llc-proposed-acquisition-of-fitbit-inc>.