

Press release

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CMA publishes E.CA Economics' ex-post evaluation of vertical mergers

On 14 April 2022, the Competition and Markets Authority (CMA) published E.CA Economics' ex-post evaluation of its approach to vertical mergers. The CMA retained E.CA to look at four recent mergers with a vertical component and evaluate whether the CMA's assessment was reasonable and correct. E.CA also reviewed the current thinking on vertical mergers to help the CMA learn from the latest developments.

E.CA found that the CMA largely carried out high quality analysis, with only a small number of debatable analytical choices. The CMA appears to treat vertical mergers with more lenience than horizontal mergers, and perhaps with more than can be justified. That said, E.CA did not conclude that the CMA should have blocked any of the mergers which this study examines. The evaluation also found that the CMA would benefit from evolving its toolkit to accurately capture the complexities that vertical mergers bring, including making potentially uncomfortable decisions in the platform markets space.

E.CA's evaluation reviewed four recent CMA assessments of vertical mergers, or mergers with a vertical component. The mergers all took place in 2017. They were:

- (i) the acquisition by a vertically integrated pig farming and pork processing operation, **Tulip**, of a large pig farm specialised in outdoor bred pigs, **Easey**;
- (ii) the acquisition by the brewer and pub owner, **Heineken**, of **Punch** pubs;
- (iii) the acquisition by **Mastercard** of the payment infrastructure provider, **Vocalink**; and
- (iv) the acquisition by the UK's largest grocery retailer, **Tesco**, of the UK's largest grocery wholesaler, **Booker**.

All four mergers were ultimately cleared. Tesco/Booker was fast-tracked to Phase 2, while the remaining cases were dealt with in Phase 1. Mastercard/Vocalink's clearance was subject to remedies for a horizontal concern that the CMA identified.

E.CA found that the CMA carried out largely reasonable and correct assessments of these mergers, so none of the recommendations were aimed at addressing category errors. Instead, the following key findings aim to help the CMA fine tune its practice in the future:

1. **Business evidence is important:** Vertical mergers tend to be more complex than horizontal mergers, which means that vertical harm can be more difficult to understand. E.CA found that in all reviewed cases there was good quality evidence, both from the

parties and from other market stakeholders, that would have helped the CMA understand the purpose of the merger. The CMA could have derived useful knowledge from this evidence for its assessment of competition concerns.

2. **Vertical mergers are rarely isolated events:** In all four reviewed industries (as diverse as they were) other cases of vertical consolidation were taking place within a similar time frame. The CMA would have benefitted from understanding the impact of and motivation for the mergers in a wider industry context, and from taking a more dynamic approach to the counterfactual.
3. **Updating the vertical toolkit:** The CMA's Merger Assessment Guidelines ("MAGs") help with some vertical cases, but may not provide sufficient guidance to tackle some of the more recently formulated concerns, such as softening of competition through a vertical recoupment mechanism, or potential competition concerns in a platform market setting.
4. **Balancing the SLC test:** The CMA could be more mindful of the need to balance its SLC test with both greater interest in (and rigorous testing of) efficiencies, as well as with consistent application of the ability-incentive-effect framework for the assessment of foreclosure. The CMA could also be more thorough in its assessment of entry and expansion.
5. **Benefits of simplicity:** The CMA tended to investigate more theories of harm for longer than E.CA considered necessary. Given that some of the most plausible theories of harm were complex and required careful assessment, the CMA would have benefitted from focusing on a smaller number of higher likelihood concerns.

Vertical mergers have come under increased scrutiny in recent years, with many challenging the orthodoxy that they are less problematic *per se* than horizontal mergers, and so should not face the same scrutiny. The E.CA evaluation found that the CMA was more lenient with respect to the vertical aspects of the reviewed mergers than the horizontal aspects; some issues triggered concerns when seen through a horizontal lens, while the equivalent vertical concerns did not lead to the same level of concern. While the evaluation did not find any obvious mistakes in the CMA's assessment, it recommends that the CMA consider the current challenge to historic practice and reflect on these findings going forward.

To read the evaluation, please see [the CMA's website](#).

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About E.CA Economics

E.CA Economics is one of the leading European competition economics consultancies, advising law firms, companies and authorities in the fields of competition policy and regulation. This includes work such as mergers, antitrust or state aid cases and economic analyses within regulatory procedures as well as studies on competition policy issues for international organisations. Our international team of over 40 economists works in a wide variety of sectors and in numerous European jurisdictions. Our offices are based in Berlin, Brussels, London and Munich.

We contribute substantial value to our clients by providing tailor-made advice built on robust economic analyses and thorough research. As a partner of ESMT Berlin, a leading business school in Germany, E.CA Economics can draw on the latest economic research. On transatlantic cases, we work jointly with our US partner firm, Bates White LLC. E.CA Economics has been named in Global Competition Review's annual ranking of the Top 23 consultancies for antitrust economics advice since 2008. www.e-ca.com