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Termination of Adobe / Figma Merger

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The case is an example in which the UK Competition and Markets Authority focused on innovation theories of harm in its assessment. It also is notable in that the proposed remedies would effectively amount to a prohibition of the proposed merger. On 18 December 2023, Adobe and Figma (together, the "**Parties**") mutually agreed to terminate their $20 billion merger deal (the "**Proposed Merger**"), after they concluded that there was "no clear path" to get clearance from EU and UK antitrust regulators. This case is an example in which the UK Competition and Markets Authority ("**CMA**") focused on innovation theories of harm in its assessment, and is further notable in that the CMA's proposed remedies would effectively amount to a prohibition of the Proposed Merger. **Background** On 13 July 2023, the CMA announced that it had decided to refer the Proposed Merger for an in-depth Phase 2 investigation under the Enterprise Act 2002. In its Phase 1 investigation, the CMA found that the Parties compete in the supply of: (i) screen design software (where Figma has established a substantial share of the market and Adobe has been continually making investments), and (ii) creative design software (where Adobe is the industry standard and Figma is an emerging competitive threat). The CMA provisionally concluded that the merger may be expected to result in a substantial lessening of competition ("**SLC**") in the global markets for: (i) all-in-one product design software for professional users, and (ii) certain creative design software (vector and raster editing software). **Theories of harm considered by the CMA focused on innovation and potential competition**

1. SLC in all-in-one product design software

In its assessment of the potential SLC in all-in-one product design software, the CMA noted that Figma accounts for over 80% of the relevant market by revenue, and that Adobe's competing product, Adobe XD, has a market share of 5-10%. Also, Adobe had significantly reduced investment in Adobe XD prior to the Proposed Merger, and had also cancelled the development of a new product design software (Project Spice) which would compete more strongly with Figma in product design. The CMA provisionally found that, absent the Proposed Merger, Adobe would have continued to be a close competitor of Figma through its innovation efforts in an all-in-one product design software.

2. SLC in vector and raster editing software

The competitive harm identified by the CMA in the market for vector and raster editing software was expansive in that the Parties do not currently compete in this market; rather, Figma is a potential competitor of Adobe. The CMA's provisional conclusion was rooted in the premises that Figma has the ability and incentive to develop vector and raster editing functionality, and Adobe perceived Figma to pose a competitive threat, and undertook actions to mitigate this threat, for example through product development. Notably, the CMA considered that the markets for vector and raster editing software on the one hand and product design software on the other are adjacent. Particularly, Adobe and Figma's platforms are characterised by network effects, which cause the value of their respective platforms to increase with the number of users, and, importantly, operate across markets. This means, for example, that the value of Figma's vector and raster editing offerings is greater the more Figma is used for product design, and vice versa. This consideration of network effects is indicative of the new focus by competition regulators on mergers that involve several linked markets (or "ecosystems"), a theory of harm that was central in the European Commission's prohibition of the Bookings / eTraveli merger. **Remedies proposed by the CMA** In response to its provisional findings, the CMA only presented

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two possible structural remedies, in keeping with its preferred stance, in its notice to the Parties:

1. Prohibition of the merger (being regarded by the CMA as a “feasible remedy” that provides a “comprehensive solution”); and
2. Divestiture of overlapping operations to eliminate the SLC in each of the markets in which the CMA provisionally identified an SLC.

Despite presenting these two options, the CMA acknowledged that, as substantially all of Figma’s business is carried out in the all-in-one product software market, which includes its leading product, Figma Design, this would effectively mean that any ‘partial’ divestiture involving Figma operations would in reality be substantially similar to prohibition of the Proposed Merger.[1] Likewise, as the CMA remained of the belief that, absent the Proposed Merger, Adobe would have continued to compete with Figma in all-in-one product design and has a strong position in an adjacent market, any partial divestiture involving Adobe assets may not be sufficient to restore the conditions of competition that would have prevailed absent the Proposed Merger.[2] The CMA also considered, given the nature of the relevant products in the digital design sector, there may be an unacceptably high level of composition risk relating to identification, allocation and transfer of assets arising from the carve-out of any divestiture package; for example, Adobe’s businesses are closely integrated with its operations in creative design.[3] **Increased reliance by CMA on parties’ internal documents** The CMA’s provisional findings in Adobe / Figma also demonstrate its continued reliance on the internal documents of parties when considering evidence for a proposed merger, despite the Parties’ submission in this case that such evidence had been “mischaracterised and misunderstood” by the CMA. Importantly, the CMA considered that some documents evidenced concerns by Adobe’s management over the competitive threat from Figma weeks before the Proposed Merger was announced. The CMA’s approach in this case is reflective of a wider trend of the CMA increasingly relying on internal documents in merger investigations. **Parallel European Commission investigation also focused on innovation and potential competition** In parallel to the CMA’s probe, the European Commission (“**EC**”) opened a Phase 2 investigation into the Proposed Merger on 7 August 2022, citing similar competition concerns to the CMA in the markets for the supply of product design and digital asset creation tools. In its statement of objections, the EC set out the provisional view that the Proposed Merger may significantly reduce competition in both of these markets, with reasoning that was substantially similar to the CMA’s. Following the abandonment of the Proposed Merger, Executive Vice-President Vestager commented that the Proposed Merger “would have terminated all current and prevented all future competition between [the Parties]”, emblematic of the EC’s continued focus on innovation and the safeguarding of potential future competition. **Conclusion** The approach of the CMA and EC in the Adobe / Figma case indicates an intention on the part of the agencies to continue to be seen as strong enforcers, particularly in the tech space and anywhere innovation or future competition could be seen to be put at risk through merger activity. It serves as a warning that it is important for legal teams to acknowledge the scale of risks that a deal may pose and to address those risks upfront and early. Key steps for companies contemplating deals that may raise these kinds of risks include building in sufficient time at the outset for thorough internal document review to pick up potential sources of concern, stress-testing of efficiencies and pro-competitive arguments, and early consideration of possible remedy packages. Early substantive engagement with the agencies’ possible theories of harm and potential remedies will also be key. In this respect, the proposed amendments to the CMA’s Phase 2 processes are intended to encourage exactly this kind of engagement. _____ [1] CMA *Notice of possible remedies* (28 November 2023), paragraph 27. [2] CMA *Notice of possible remedies* (28 November 2023), paragraphs 28 - 29. [3] CMA *Notice of possible remedies* (28 November 2023), paragraph 31.

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