12 September 2024

Feedback of

ACT | The App Association

to the

United Kingdom's Competition and Markets Authority

regarding its

Draft Updated Mergers Guidance Documents

Introduction and statement of interest

ACT | The App Association is a trade association representing small business technology companies from across the United Kingdom (UK), European Union (EU), and the United States (U.S.). Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology.

Small and Medium-Sized Enterprises (SMEs) are a key engine of the UK technology economy

The UK has the third largest tech sector in the world, valued at more than $1 trillion. In 2021, 56 per cent of the digital sector's £182.1 billion contribution to the UK economy came from SMEs. SMEs account for more than 50 per cent of all private sector jobs in the UK.[1]

The app economy is important to UK prosperity

A huge amount of economic activity involves apps, much of which we do every day without a second thought. A few examples include shopping, booking travel, gaming, banking, watching media, working, communicating, teaching kids in school, monitoring our health, and learning new languages; the list goes on and on. Apps are also used to control our homes, cars, factories, and medical devices, plus countless more activities, via the internet of things (IoT). These activities don't just generate money, they increase sustainability, boost productivity, and provide genuine support to people with specific health needs.

The term for this broad ecosystem of economic benefit is 'the app economy', and it is a significant contributor to the country's economy. The direct revenues of the UK app economy in 2021 amounted to £33 billion. Including direct and indirect contributions, the app economy generated £74.8 billion in revenue throughout all sectors of the UK's economy in 2021, creating more than 400,000 jobs in the process.[2]

The App Association appreciates this opportunity to provide feedback to the CMA on its draft updated mergers guidance documents.

App Association position on the CMA's draft updated mergers guidance documents

Success for a startup or small business can take a variety of forms and be accomplished through different means, including but not limited to being acquired by a larger company with the resources and knowledge to improve the product and/or streamline market entry or an initial public offering (IPO) all to the benefit of end-consumers. Acquisition is often the best of these options for the business owner(s) and consumers, as IPOs are expensive and fraught with risk and thus reduce likelihood of consumer benefit. App Association members often start their businesses with the understanding that once they have brought their idea to fruition, their business may be acquired, allowing them to move on to develop new businesses. The UK economy and consumers have benefitted immensely from the freedom to combine the novel products App Association members create with the resources, technical knowledge, and commercial knowledge of businesses that later acquire their innovations. A merger that helps deliver better products or services for consumers is often the desired outcome and is desirable from a competition policy standpoint. Any changes to the merger guidelines likely will have significant long-term, negative effects on

[1] Tech UK - UK Tech SMEs: A Global Force to Be Reckoned With | #techUKDigitalTrade - 2023
[2] Deloitte – The App Economy in Europe – 2022

App Association members' ability to innovate and compete, affecting their ability to fully realise success.

In this regard, we urge the CMA to ensure that its updated policy recognises that mergers and acquisitions are a natural and desirable outcome for many SMEs. Any modifications should maintain a deference to thorough economic analysis as a foundation of any merger review or enforcement. Diminishing the role of, or eliminating, economic analysis from the merger guidelines will result in uncertainty and harm App Association members' ability to achieve success through procompetitive mergers. In updating the merger guidelines, it is crucial that the CMA base any changes in settled law and well-demonstrated experiences and effects. The merger guidelines should avoid making policy-level decisions based on edge cases or hypotheticals that do not reflect the reality of our business environment.

Building on the above, we have significant concerns with the CMA's proposed shift in approach that would significantly lower the threshold to which a merger is presumed to be anticompetitive. The updated guidance expands the definition of 'relevant merger situations', encompassing not only majority shareholdings but also the transfer of assets, joint ventures, and outsourcing arrangements in certain circumstances. This broad definition introduces uncertainty for SMEs engaging in typical growth strategies, such as forming joint ventures or outsourcing operations.

To minimise the risk of unintended consequences, we recommend that the CMA clarify the conditions under which these expanded definitions apply. This would provide much-needed certainty for SMEs and their investors, who may otherwise be deterred from engaging in these arrangements for fear of inadvertently triggering merger control thresholds.

We appreciate the CMA's ongoing efforts to refine the turnover and share of supply tests as part of its jurisdictional thresholds. However, we are concerned that the current revisions could lead to unnecessary interventions in cases that do not raise substantive competition concerns. For instance, the application of the share of supply test without a clear economic market analysis risks capturing mergers that do not meaningfully impact competition. This could deter small businesses from pursuing mergers or partnerships that would ultimately benefit consumers.

We strongly encourage the CMA to maintain a cautious approach when applying these tests, ensuring that any intervention is backed by a rigorous economic assessment and that SMEs are not disproportionately impacted by rules that were designed for larger firms.

In addition, the reporting requirements for digital firms with Strategic Market Status (SMS) are a critical part of ensuring that markets remain competitive. However, the new reporting obligations should be carefully calibrated to avoid overburdening smaller firms that may interact with SMS firms. While large digital platforms have significant resources to comply with these obligations, the ripple effects on smaller businesses and startups must be considered, particularly in ensuring that they are not inadvertently swept into complex reporting and compliance regimes.

Conclusion

In conclusion, while we support the CMA's commitment to promoting competition, we urge caution in the implementation of these new guidelines. The focus should remain on ensuring that interventions are evidence-based and proportionate to the actual risks posed by a merger. For small businesses, which drive much of the innovation in the UK's digital economy, maintaining the flexibility to engage in mergers and acquisitions without unnecessary regulatory burdens is essential. We encourage the CMA to continue refining its guidance with the goal of fostering, rather than stifling, entrepreneurial activity.

The App Association remains at your disposal to provide further input and would welcome the opportunity to contribute to developing practices and solutions that address competition issues in ways that benefit all market participants, especially innovative UK SMEs.

Sincerely,

Mike Sax
Founder and Chairperson

Stephen Tulip
UK Country Manager