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COMPETITION

Merger control in the UK (England and Wales): overview

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REGULATORY FRAMEWORK

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction? What is the regulatory authority?

Regulatory framework

UK merger control is governed by the Enterprise Act 2002 (Enterprise Act), as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA). The ERRA came into force on 1 April 2014.

Regulatory authority

The Competition and Markets Authority (CMA) took over the competition (and some consumer) functions of the Office of Fair Trading (OFT) and the Competition Commission (CC) on 1 April 2014. The OFT and the CC were abolished at the same time. The CMA conducts both the initial Phase 1 examination of mergers and the more detailed Phase 2 investigation and final determination (*see Question 4*). Certain CMA decisions can be appealed to the Competition Appeal Tribunal (CAT) (*see Question 12*).

See box, *The regulatory authorities*.

Guidance documents

Procedure. The CMA published its *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) in April 2014. CMA2 provides general information and advice on the procedures used by the CMA in operating the UK merger control regime. It should be read alongside the following:

- Administrative Penalties: Statement of policy on the CMA's approach (CMA4).
- Transparency and disclosure: Statement of the CMA's policy and approach (CMA6).
- The documents listed in Annex D of CMA2, which have been adopted by the CMA Board.

Substantive assessment. The CMA Board adopted the previous OFT and CC merger assessment guidelines, and certain other guidance, which continue to apply to facilitate transition to the new regime.

TRIGGERING EVENTS/THRESHOLDS

2. What are the relevant jurisdictional triggering events/thresholds?

Either a "relevant merger situation" has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in a relevant merger situation.

Triggering events

A relevant merger situation arises when the following criteria are met:

- Two or more enterprises cease to be distinct, or will cease to be distinct, as a result of being brought under common ownership or control. The Enterprise Act distinguishes three levels of interest that amount to control (including moving from one level to another):
  - a controlling interest (de jure or legal control);
  - de facto control (control of commercial policy); and
  - material influence (ability materially to influence commercial policy, irrespective of shareholding).
- The jurisdictional thresholds are met (*see below, Thresholds*).
- Either the merger has not yet taken place, or it must have taken place not more than four months before a Phase 2 referral is made (*see Question 4, Phase 2: full investigation by the CMA*), unless the merger took place and was not made public, and without the Competition and Markets Authority (CMA) being informed of it.

Thresholds

There are two alternative thresholds:

- The target's UK turnover exceeds GB£70 million.
- The transaction results in the creation of, or increase in, a 25% or more combined share of sales or purchases in (or in a substantial part of) the UK, of goods or services of a particular description.

NOTIFICATION

3. What are the notification requirements for mergers?

Mandatory or voluntary

Notification is voluntary in that there is no requirement to notify the Competition and Markets Authority (CMA). However, if a transaction meets the jurisdictional thresholds and the parties do not notify, the CMA can open an investigation on its own initiative. This can be triggered by its own market intelligence function or because of a complaint. However, the CMA will not investigate a merger simply because of a complaint.

The decision not to notify the CMA in cases where a transaction raises substantive competition issues carries particular risks. The CMA will normally make interim orders, which prevent any action (for example integrating the merging businesses) that may prejudice or impede its investigation. These remain in force until the transaction is cleared or remedial action is taken. If the CMA has reasonable grounds to believe that the parties to a completed

merger are integrating their businesses, it can require that this integration is unwound.

The CMA, following a Phase 2 investigation, may also require termination of a completed transaction through disposal of the acquired businesses or assets (or otherwise remedied). Any such forced sale is more likely to be at a discount to market value or on otherwise unfavourable terms.

Timing

The Enterprise and Regulatory Reform Act 2013 (ERRA) introduced a new statutory 40 working day time limit for Phase 1 (*see Question 4, Phase 1: initial examination by the CMA*) merger investigations. This period starts on the first working day after the CMA confirms that either:

- The Merger Notice is complete.
- For an own-initiative investigation, it has received sufficient information to enable it to begin its investigation.

The 40 working day deadline is subject to extension in certain circumstances. The CMA is also subject to a four month statutory deadline for completed mergers in which to make a Phase 2 reference from whichever is earliest between when the material facts are made public, or the time the CMA is told of those facts.

Pre-notification formal/informal guidance

The CMA gives informal advice on a confidential basis on competition issues (and/or jurisdictional issues where relevant) arising out of potential merger situations if the CMA is satisfied that:

- A good faith confidential transaction exists; that is, the transaction is not hypothetical or in the public domain, and there is a good faith intention to proceed.
- There is a genuine issue, and the advice is not simply to endorse that a transaction raises no concerns.

Any informal advice provided by the CMA is solely the view of the staff (usually a senior member) of the Mergers Unit. It will not bind either the CMA or any Phase 2 inquiry group.

The CMA generally aims to indicate whether it will accept or reject an application for informal advice within five working days of receiving the application, but tries to handle urgent cases more swiftly.

Pre-notification discussions

The CMA encourages parties in all cases to engage in discussions at least two weeks before intended notification. Pre-notification discussions have increased in importance following the introduction of the statutory 40 working day review period. In particular, for a transaction that appears to raise potential competition issues, engaging the CMA at this early stage maximises the CMA's ability to examine those issues in advance.

Parties seeking pre-notification discussions with the CMA must complete a case team allocation form. The CMA aims to allocate case teams within five working days. The case team endeavours to review submissions within a reasonable time (for example, five to ten working days from receipt).

Responsibility for notification

Either party can notify. However, it is customary for the acquiring party to do so.

Relevant authority

Notification is made to the CMA (Mergers Unit).

Form of notification

Notification is made by completing a prescribed Merger Notice, either in the format of the template or in a format of the parties' choosing. The option to submit an informal submission (which existed under the previous regime) is no longer available. On 21 March 2016, the CMA published the findings of its internal review of the use of the Merger Notice and subsequently consulted on certain changes to the format.

Filing fee

The fee depends on the size of the target's UK turnover. With effect from January 2016:

- GB£40,000 where turnover is below GB£20 million.
- GB£80,000 where turnover is GB£20 to GB£70 million.
- GB£120,000 where turnover is GB£70 to GB£120 million.
- GB£160,000 where turnover exceeds GB£120 million.

There are limited exemptions from the filing fee, notably for small and medium-sized enterprises. The fees are payable in all cases when the CMA publishes either a reference decision or any decision not to make a reference (except if found not to constitute a relevant merger situation (*see Question 2*)).

Obligation to suspend

There is no obligation to suspend the transaction and no prohibition on completing a transaction without clearance from the CMA. However:

- The CMA may make an interim order to prevent or unwind pre-emptive integration by the merging parties. The CMA can impose interim orders at any time. However, it is less likely to do so in anticipated merger cases where the risk of pre-emptive action is generally lower. Interim orders remain in place until the merger is cleared or remedial action is taken, unless varied, revoked or replaced.
- The CMA has the power to issue a notice requiring a person to provide information or documents, or to give evidence as a witness (*section 109, Enterprise Act*). If a party fails to comply, the CMA can extend the statutory timetable for as long as the information remains outstanding (including, where relevant, the four month statutory deadline for completed mergers).
- At Phase 2 (*see Question 4, Phase 2: full investigation by the CMA*), the buyer must not acquire any more shares in the target without the CMA's consent (*section 78, Enterprise Act*). When a completed merger is referred to the CMA, the merged entity must obtain its consent before further integrating the businesses (*section 77, Enterprise Act*). In addition, the CMA has the power to take by interim order, or accept undertakings from the parties to take, any action it considers necessary to prevent or unwind pre-emptive action (*sections 80 and 81, Enterprise Act*).
- For mergers subject to the City Code on Takeovers and Mergers, a Phase 2 investigation by the CMA automatically causes the offer to lapse if it starts before the first closing date, or the date when the offer is declared or becomes unconditional (whichever is the later).

PROCEDURE AND TIMETABLE

4. What are the applicable procedures and timetable?

Phase 1: initial examination by the CMA

Pre-notification discussions (for voluntary notification). The Competition and Markets Authority (CMA) encourages parties to contact it a minimum of two weeks before notification. The CMA allocates a case team to review the transaction and liaise with the parties regarding relevant jurisdictional issues and the nature and scope of the information required.

Voluntary notification (Merger Notice). Businesses can formally notify a merger to the CMA by completing a Merger Notice. The form is available at *www.gov.uk/cma*.

Own-initiative investigation. The CMA conducts an own-initiative investigation if there is a reasonable prospect that its duty to refer would be met if it investigated the transaction. In these cases, it sends the merger parties an enquiry letter, to which the parties must respond with the requested information. Once the CMA has sufficient information, it informs the parties and confirms the statutory deadline for its Phase 1 investigation.

Phase 1 assessment. The assessment period is 40 working days, as follows:

- Day 1: The investigation period begins on the first working day after the CMA confirms to the merger parties that it received a complete Merger Notice or that it has sufficient information (for an own-initiative investigation).

  The CMA:

  - engages in information gathering and invites views from interested third parties;
  - may also directly contact third parties; and
  - carries out a substantive examination of the proposed transaction, taking into account the information it gathered from publicly available sources, third parties and the merger parties.
- Days 15 to 20: The CMA holds "state of play" discussions with the parties (usually over the phone).
- Days 25 to 35: An issues meeting is held in cases raising more complex or material competition issues. The CMA sends an issues letter in advance of the meeting.
- By day 40: The CMA issues a clearance decision or a decision that the test for reference to Phase 2 is satisfied.

Phase 1 decision. The CMA makes one of the following decisions at the end of Phase 1:

- Unconditional clearance.
- Clearance subject to legally binding undertakings (*see Question 10*).
- Reference for a Phase 2 investigation (see below, *Phase 2: full investigation by the CMA*).

The CMA must refer a transaction if it considers that it may result in a substantial lessening of competition (SLC) on the market or markets concerned (*see Question 7*). The CMA must refer the transaction when it believes that the merger is more likely than not to result in an SLC. If the CMA believes the likelihood is great, but below 50%, it has a wide margin of appreciation in exercising its judgment. In such cases, it has a duty to refer when it believes there is a realistic prospect that the merger will result in an SLC.

However, the CMA has discretion not to refer a merger if any of the following applies:

- For anticipated mergers, the arrangements are not sufficiently far advanced, or likely to proceed, to merit a Phase 2 investigation.
- The market concerned is of insufficient importance to merit a Phase 2 investigation (the *de minimis* exception). This is considered to apply where:
  - the annual value in the UK of the market or markets concerned is, in aggregate, less than GB£3 million, provided there is no clear cut undertaking instead of a Phase 2 reference available; or
  - the annual value in the UK, in aggregate, of the market or markets concerned is between GB£3 and GB£10 million and the expected customer harm resulting from the merger is not materially greater than the average public cost of a Phase 2 investigation (currently around GB£400,000) having regard to the size of the market concerned, likelihood of an SLC, magnitude of any competition that would be lost and duration of any SLC.
- Any relevant customer benefits outweigh the SLC and its adverse effects.

The CMA is currently reviewing the feedback from its consultation on amendments to its guidance on how the *de minimis* exception applies. In particular, it has proposed that:

- The market size threshold below which the CMA will generally not consider a reference justified should be increased from GB£3 million to GB£5 million.
- The market size threshold above which a market will generally be of sufficient importance should be increased from GB£10 million to GB£15 million.

In addition, the CMA has the discretion not to make a reference in certain other circumstances, including when considering whether to accept undertakings instead of making a Phase 2 reference (*see Question 10*).

Phase 2: full investigation by the CMA

The CMA has a statutory period of 24 weeks to conduct its investigation and publish a report. This period can be extended by up to eight weeks at the CMA's discretion. The investigation includes both:

- Written submissions from the parties to the transaction and interested third parties.
- Oral hearings with the parties to the transaction and very significant third parties.

The CMA must decide whether there is a relevant merger situation (*see Question 2*) and, if so, whether it may lead to an SLC. The CMA must make one of the following decisions at the end of Phase 2:

- Unconditional clearance.
- Conditional clearance, subject to legally binding undertakings (proposed by the merging parties and negotiated with the CMA) or the CMA's order making powers (*see Question 10*).
- Prohibition.

For an overview of the notification process, see *Merger notification flowchart: UK (England Wales)*.

PUBLICITY AND CONFIDENTIALITY

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

Information published by the Competition and Markets Authority (CMA) during Phase 1 (*see Question 4, Phase 1: initial examination by the CMA*) includes:

- The statutory deadlines for its decisions.
- Invitations to third parties to comment.
- Any interim orders made and associated derogations granted.
- Decisions as to whether the merger meets the test for Phase 2 reference (*see Question 4, Phase 2: full investigation by the CMA*).

- Decisions as to whether undertakings instead of a Phase 2 may be suitable.

The CMA publishes more detailed information on its website at Phase 2 (*see below, The Regulatory authorities*). This information may include certain main and third party submissions, summaries of hearings, responses to the issues statement, provisional findings and its final report.

Automatic confidentiality

Generally, all confidential information relating to a business or an individual that the CMA obtains in connection with its investigation remains confidential. However, it can disclose information in the following circumstances:

- If it obtains consent from the party the information relates to (or the disclosing party).
- To comply with a legal requirement.
- In connection with the investigation of a criminal offence (provided the disclosure is proportionate).
- If necessary to facilitate its statutory functions.

Confidentiality on request

A party can specify that information is confidential. The CMA cannot disclose information if its disclosure either would be contrary to the public interest or may significantly harm an undertaking's legitimate business interests or an individual's interest.

RIGHTS OF THIRD PARTIES

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

The Competition and Markets Authority (CMA) consults third parties during its investigation through a published invitation to comment notice on its website. If a merger raises substantive competition issues, the CMA usually contacts those businesses the merging parties identified in the notification as their main competitors, customers or suppliers. In own-initiative investigations, the CMA must consult any person the decision is likely to have a substantial impact on. During a Phase 2 investigation (*see Question 4, Phase 2: full investigation by the CMA*), third parties can make written submissions on the substance and on key interim documents. If appropriate, the CMA also consults other regulators, relevant government departments and other interest groups.

Document access

Third parties do not have access to the CMA's files or to submissions and data submitted by the merging parties. However, the CMA can decide to make non-confidential data available for comments. During a Phase 2 investigation, the CMA will typically publish on its website key documents on which third parties may then comment. This is subject to excluding from disclosure certain confidential information where publication would (in broad terms) prejudice the interests of a business or an individual or the public interest.

Be heard

The CMA is not specifically required to hear third party oral representations and rarely does so. During a Phase 2 investigation, third parties may be invited to attend oral hearings if their views are particularly important to the merger concerned.

SUBSTANTIVE TEST

7. What is the substantive test?

The substantive test is whether a merger has resulted, or may be expected to result in a substantial lessening of competition (SLC) within a market or markets in the UK for goods or services.

There are three main reasons why mergers may lead to an SLC:

- **Unilateral effects.** These may arise in horizontal mergers where the merger involves two competing firms and removes the rivalry between them, allowing the merged firm to profitably raise prices.
- **Co-ordinated effects.** These may arise in both horizontal and non-horizontal mergers where the merger enables or increases the ability for several firms within the market (including the merged firm) jointly to increase prices because it creates or strengthens the conditions under which they can co-ordinate.
- **Vertical or conglomerate effects.** These may arise principally in non-horizontal mergers where the merger creates or strengthens the ability of the merged firm to use its market power in at least one of the markets, thereby reducing rivalry.

8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

The Competition and Markets Authority (CMA) considers any factors that may prevent or significantly reduce any harmful impact of the merger. The CMA considers the following three main factors:

- Efficiencies.
- Entry and expansion in the market.
- Countervailing buyer power.

9. Is it possible for the merging parties to raise a failing/exiting firm defence?

The Competition and Markets Authority (CMA) considers whether the firm would have exited (through failure or otherwise). If so, the CMA considers whether there would have been an alternative purchaser to the acquirer under consideration and what would have happened to the sale of the firm in the event of an exit.

REMEDIES, PENALTIES AND APPEAL

10. What remedies (commitments or undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The Competition and Markets Authority (CMA) can accept undertakings instead of making a reference at the Phase 1 stage (undertakings in lieu of reference (UILs)) (*see Question 4, Phase 1: initial examination by the CMA*).

Timing

Parties have up to five working days after receiving the CMA's reasons for its substantial lessening of competition (SLC) decision to formally offer UILs in writing. The CMA cannot consider offers made after this deadline. However, the parties may discuss UILs with the CMA at any earlier stage of the Phase 1 investigation. Where parties have offered UILs, the CMA has until the tenth working day after parties received the reasons for its SLC decision

to decide whether the UIL offer (or a modified version of it) may be acceptable as a suitable remedy to the SLC. Once a decision has been taken, the CMA must decide whether finally to accept the UILs offered within 50 working days of providing the parties with the reasons for its SLC decision, subject to a 40 working day extension at the CMA's discretion. The CMA may extend its four month statutory timetable for considering completed mergers to avoid running out of time to assess the offered UILs.

Procedure

As the CMA has no power to impose remedial action on merger parties at Phase 1, the onus is on the parties to propose suitable UILs that address the CMA's competition concerns. The CMA can propose modifications to UILs submitted, amending the existing proposal. Where the CMA considers that the UIL offer (or a modified version of it) may be acceptable as a suitable remedy, it will confirm this to the parties who made the offer and issue a public announcement to that effect (UIL decision).

At Phase 2 (*see Question 4, Phase 2: full investigation by the CMA*), the CMA can accept undertakings as a condition of clearing a transaction. These are negotiated and implemented only when the CMA has reached an adverse finding that the merger results (or may be expected to result) in an SLC.

Undertakings can be either:

- Structural, for example, divesting the part of the business where overlaps cause competition concerns.
- Behavioural (that is, formal commitments in relation to future conduct). Behavioural undertakings are less common and highly unlikely to be acceptable at Phase 1.

The CMA generally prefers structural remedies, as behavioural remedies are considered less likely to deal with any adverse effects as comprehensively and may themselves lead to market distortion. The CMA may require on-going monitoring in the event it accepts behavioural remedies, though how this is facilitated will be decided on a case-by-case basis. Irrespective of the remedy applied, the CMA has a statutory duty to keep under review any UILs made under the Fair Trading Act 1973 and the Enterprise Act 2002. From time to time, it must therefore consider whether, by reason of any change of circumstances, undertakings are no longer appropriate and need to be varied, superseded or released.

11. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

Notification is voluntary.

Implementation before approval or after prohibition/failure to comply with interim measures

A transaction can be completed before clearance has been obtained unless it has been referred for a Phase 2 investigation (*see Question 4, Phase 2: full investigation by the CMA*). The Competition and Markets Authority (CMA) can impose a fixed penalty (but not a daily penalty) for failure to comply with interim measures (for example, an undertaking or order to suspend pre- or post-merger integration). The penalty is capped at 5% of the worldwide turnover of the enterprises owned or controlled by the person on whom the penalty is imposed.

Failure to comply with investigatory requirements

The CMA may fine a party if it fails, either intentionally or without reasonable excuse, to comply with investigatory requirements, including failures to attend interviews or meetings with the CMA or to produce documents and other evidence.

Administrative penalties can be imposed in the form of a fixed amount, by reference to a daily rate, or a combination of both. The maximum penalty amounts are set by order and are, as at 1 April 2014:

- GB£30,000 for a fixed amount penalty.
- GB£15,000 for a daily penalty.

Failure to observe

If a party fails to comply with any undertakings it has given or any order imposed on it by the CMA (including a prohibition decision), the CMA can start civil proceedings for an injunction or interdict, or any other appropriate relief or remedy available in the UK courts. In addition, any third party affected by the contravention who has sustained loss or damage can bring an action.

The CMA can also start civil proceedings to enforce interim measures and the statutory prohibitions on certain actions during a Phase 2 reference (*sections 77 and 78, Enterprise Act 2002*).

Criminal offences

It is an offence punishable by a fine or a maximum of two years' imprisonment (or both) to:

- Intentionally alter, suppress or destroy any information that the CMA has required to be produced under an information request notice.
- Knowingly or recklessly supply false or misleading information to the CMA, the Office of Communications (Ofcom), Monitor or the Secretary of State in connection with their merger control functions.

12. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal

The merging parties and any interested third parties may apply to the Competition Appeal Tribunal (CAT) for a review of a decision of the Competition and Markets Authority (CMA) or Secretary of State. "Decision" is broadly defined and includes, for example, a decision to clear, refer or prohibit a transaction, or to reject a complaint in respect of a merger.

Penalties imposed by the CMA can also be appealed before the CAT.

Procedure

An application for review must be made within four weeks of the date on which the applicant was notified of the decision or its publication, whichever is the earlier. In determining an appeal of a merger decision by the CMA, the CAT must apply the same principles a court applies for judicial review applications. Although its Guide to Proceedings states that it will normally regard applications for review of merger decisions as meriting a high degree of urgency, the CAT is not subject to any set timetable to give its judgment.

The CAT's decision can in turn be appealed (on points of law only) to the Court of Appeal within 14 days.

Third party rights of appeal

Third parties who are aggrieved by the relevant decision of the CMA or Secretary of State have rights of appeal as described above (*see above, Rights of appeal and Procedure*).

AUTOMATIC CLEARANCE OF RESTRICTIVE PROVISIONS

13. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

Contractual agreements and restrictive arrangements that are "directly related and necessary" to the legitimate objective of implementing the transaction (ancillary restraints) are justified, and are excluded from the Chapter I and Chapter II prohibitions of the Competition Act 1998.

REGULATION OF SPECIFIC INDUSTRIES

14. What industries (if any) are specifically regulated?

Water mergers

From 2004 to November 2015, the CMA had a mandatory duty to refer any merger between water or sewerage undertakings in England and Wales for a Phase 2 investigation (see *Question 4, Phase 2: full investigation by the CMA*) unless it fell below certain *de minimis* turnover thresholds.

The Water Act 2014 (Water Act) introduced, with effect from 18 December 2015, a number of measures to reform the water mergers regime, including giving the CMA the discretion to decide not to make a reference in certain circumstances. That discretion is subject to requesting and considering the opinion of the Water Services Regulation Authority (Ofwat) as to whether the merger will prejudice Ofwat's ability to make comparisons between water enterprises, and whether any such prejudice is outweighed by the relevant customer benefits. The Water Act also gives the CMA the power to accept undertakings in lieu (UILs) of making a Phase 2 reference in relation to water mergers. The CMA must again request and consider Ofwat's opinion as to the effect of the UILs offered. The Water Act further imposes a new duty on the CMA to keep under review the small mergers threshold of GB£10 million, below which a mandatory reference is not required.

Public interest merger

The Secretary of State can intervene in merger cases that raise the following public interest considerations:

- National security.
- Plurality and other considerations relating to newspapers and the media.
- Stability of the UK financial system.

The Secretary of State can also intervene in a very limited number of cases on public interest grounds where the jurisdictional thresholds are not met.

Other regulated industries

There are no specific merger provisions for other regulated industries, such as electricity, gas, telecommunications, postal services, rail, airports and air traffic services. However, a merger in these industries may require the modification of an operating licence or give rise to other issues falling within the competence or experience of the relevant sectoral regulator. The CMA and sectoral regulators therefore work closely together on such mergers.

15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?

The Competition and Markets Authority (CMA) issued specific guidance (CMA29) on its review of mergers involving a National Health Service (NHS) foundation trust and mergers between NHS trusts and other enterprises in England (NHS mergers). The CMA also maintained the former Competition Commission's (CC's) Guidelines on Water Merger References (CC9).

JOINT VENTURES

16. How are joint ventures analysed under competition law?

A joint venture may constitute a relevant merger situation under the Enterprise Act if previously distinct business activities come under common control (that is, more than one shareholder has "control" as defined by the Enterprise Act (*see Question 2, Triggering events*)).

INTER-AGENCY CO-OPERATION

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information, remedies/settlements)?

The Competition and Markets Authority (CMA) is part of the European Economic Area (EEA) network of European Competition Authorities (ECA). The CMA will contact its foreign counterpart to exchange views. The regulatory authorities also keep each other informed of developments, including whether a case is referred for a Phase 2 investigation, or resolved by means of a Phase 1 remedy.

The CMA may also exchange information with competition authorities outside of the ECA network (for example, the US Federal Trade Commission and Department of Justice).

The CMA typically requests that the parties give their consent to share confidential company information with the competition authorities of the jurisdictions in which the transaction was notified, as well as the CMA's own internal analyses that are commercially sensitive.

RECENT MERGERS

18. What notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable?

Between April 2015 and March 2016, the Competition and Markets Authority (CMA) made 60 Phase 1 decisions. The CMA referred 11 of these cases for a Phase 2 investigation and accepted undertakings in lieu (UILs) of reference in respect of nine others (Regus Group / Avanta Serviced Office Group, MRH (GB) Esso Petroleum Company, Reed Elsevier / Jordan Publishing, BCA Marketplace / SMA Vehicle Remarketing, The Original Bowling Company / Bowlplex, Muller UK & Ireland Group / Dairy Crest Group, Inter City Railways / InterCity East Coast franchise, GTCR UK / Gorkana, Greene King / Spirit Pub Company).

Between April 2016 and March 2017, the CMA made 56 Phase 1 decisions. The CMA referred five of these cases for a Phase 2 investigation and accepted UILs of reference in respect of nine others (Co-operative / ML Convenience and MLCG, Dover

Corporation / Wayne Fueling Systems Ltd, Novomatic / Talarius, Acadia Healthcare Company / Priory Group, Future / Miura, Hain Frozen Foods / Orchard House Foods, Tullet Prebon / ICAP, Breedon Aggregates / Hope Construction Materials, GTCR / PR Newswire).

Only one Phase 2 case for which a final report was published in 2016/2017 was cleared unconditionally, VTech / Leapfrog.

A notable Phase 2 clearance during 2015/16 was the decision in BT/EE, which was the acquisition of the UK's largest mobile telecoms business by the UK's largest telecoms business. This is in addition to BT being the main supplier on the wholesale market through its "Openreach" infrastructure network. A range of concerns were raised during the investigation by other operators and customers in the UK telecoms industry, including in relation to access to the Openreach network; however, the CMA cleared the deal without remedies in January 2016. The CMA concluded that BT and EE operate largely in separate areas, with only limited overlap, and consequently the merger would not substantially lessen competition in any market or markets in the UK, including in relation to the supply of retail mobile, wholesale mobile, mobile back-haul, wholesale broadband and retail broadband services. However, the Office of Communications (Ofcom) had a number of outstanding competition concerns and formally notified BT in November 2016 that it was required to legally separate Openreach from the rest of the company. This came after BT failed to offer voluntary proposals addressing Ofcom's concerns. On 10 March 2017, it was announced that BT had accepted Ofcom's requirements. Openreach will therefore now become a legally distinct company within the wider BT group.

Also of interest is the proposed merger between Sky and 21st Century Fox which, despite being cleared unconditionally at the European level, is now being examined by the CMA and Ofcom. This comes after the Secretary of State for Culture, Media and Sport issued a European Intervention Notice (EIN) on the basis of two public interest considerations:

- Media plurality (the need for citizens to have access to a variety of independent news sources and sufficient plurality of persons with control of media enterprises).
- Commitment to broadcasting standards.

Both bodies have until 20 June 2017 (pushed back from mid-May as a result of the forthcoming general election) to complete their reports.

A further notable case is the currently ongoing CMA investigation of the completed acquisition by Intercontinental Exchange, Inc. (ICE) of Trayport. ICE, an international network of exchanges and clearing houses, bought Trayport, an energy software trading platform, for approximately US$650 million in December 2015. Following complaints by ICE's competitors, an investigation by the CMA found that the merger could result in a substantial lessening of competition, and ICE was subsequently required to sell Trayport, almost a year after the merger was completed. The ruling in October 2016 was the first time the CMA had imposed a total divestiture in a vertical merger. ICE appealed the decision but the Competition Appeal Tribunal has since upheld the CMA's finding that the deal could adversely affect competition in the European energy trading market. The CMA is currently considering one remittal issue relating to the divestiture process.

PROPOSALS FOR REFORM

19. Are there any proposals for reform concerning merger control?

There are currently no proposals for reform concerning merger control specifically. However, the Competition and Markets Authority (CMA) has concluded its internal review of the use of the Merger Notice and initial enforcement orders (IEOs), and is consulting on changes to the Merger Notice template as well as additional guidance on its use of IEOs and the granting of derogations. In addition, the CMA is continuing its review of merger undertakings given before 1 January 2006. So far, reviews have been launched into 15 of the 38 merger remedies it identified. Just one of those 15 remedies has been retained.

It was announced in the Queen's Speech on 18 May 2016 that the UK government is considering a "Better Markets Bill", which aims to:

- Open up markets.
- Boost competition.
- Give consumers more power and choice.
- Make economic regulators work better.

However, no further details or timelines have emerged and there are no plans for it to be dealt with in the 2017 "wash-up" before Parliament is dissolved ahead of the general election.

ONLINE RESOURCES

Official Home of UK Legislation

W *www.legislation.gov.uk*

Description. Official government website where all UK legislation can be found, including the Enterprise and Regulatory Reform Act 2013, the Enterprise Act 2002 and the Competition Act 1998.

Competition and Markets Authority (CMA)

W *www.gov.uk/government/organisations/competition-and-markets-authority*

Description. The CMA's official website. Contains the CMA guidelines issued, and those of the Office of Fair Trading and Competition Commission issued before 1 April 2014 but subsequently adopted by the CMA Board.

Competition Appeal Tribunal (CAT)

W *www.catribunal.org.uk*

Description. The CAT's official website. The CAT Rules 2003 set out the procedure for a follow-on action for damages before the CAT.

THE REGULATORY AUTHORITIES

Competition and Markets Authority (CMA)

Head. David Currie (Chairman) and Andrea Coscelli (Acting Chief Executive)

Contact details. Victoria House, 37 Southampton Row, London , WC1B 4AD, United Kingdom **T** +44 20 3738 6000 **E** *general.enquiries@cma.gsi.gov.uk* **W** *www.gov.uk/government/organisations/competition-and-markets-authority*

Outline structure. The CMA is an independent public body, regulated by a board of 12 members, including the Chairman, Chief Executive, three executive directors and seven non-executive directors.

Responsibilities. The CMA's main competition responsibilities are to:

- Investigate mergers under the Enterprise Act that could restrict competition, and specify measures that the merging parties must take to prevent or unwind integration between them while the investigation takes place.
- Conduct market studies and investigations under the Enterprise Act in markets where there may be competition and consumer problems, or into practices that impact more than one market, and to require market participants to take steps to address these problems.
- Investigate where there may be breaches of UK or EU prohibitions against anti-competitive agreements and abuses of dominant positions, under the Competition Act.
- Bring criminal proceedings against individuals who commit cartel offences under the Enterprise Act.
- Enforce consumer protection legislation to tackle practices and market conditions that make it difficult for consumers to exercise choice, and bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).
- Co-operate with sector regulators and encourage them to use their competition powers more proactively, including the designation of the body who should lead on a case.
- Consider regulatory references and appeals, in relation to price controls, terms of licences or other regulatory agreements under sector specific legislation (gas, electricity, water, post, communications, aviation, rail and health).

Procedure for obtaining documents. The CMA's website provides detailed information about decisions under the Competition Act, and consultations and decisions on mergers and market investigations (*see above, Contact details*).

Competition Appeal Tribunal (CAT)

Head. The Hon Mr Justice Roth (President)

Contact details. Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London , WC1A 2EB, United Kingdom **T** +44 20 7979 7979 **F** +44 20 7979 7978 **W** *www.catribunal.org.uk*

Outline structure. The CAT is a specialist independent tribunal established to hear appeals under the UK and EU competition law provisions.

Cases are heard before a Tribunal consisting of three members, either the President or a member of the panel of chairmen (comprising judges of the Chancery Division of the High Court and other senior lawyers) and two ordinary members (who have expertise in law or related fields such as economics, business and accountancy).

Responsibilities. The CAT hears appeals from decisions by the CMA, the Secretary of State and the sectoral regulators. It can consider the case merits, errors of fact and law, or improper use of powers or discretion, and can:

- Dismiss the application.
- Confirm, set aside, or vary the CMA's decision.
- Remit the matter to the CMA or the sectoral regulator.
- Give such directions, or take such other steps as the CMA or the sectoral regulator could have given or taken.
- Make any other decision the CMA or the sectoral regulator could have made.
- Impose, revoke or vary the amount of any penalty.

Procedure for obtaining documents. Current cases, judgments, procedural rules and guidance are available on the CAT's website (*see above, Contact details*).

The Department for Business, Energy & Industrial Strategy

Head. Greg Clark (Secretary of State) **Contact details.** Ministerial Correspondence Unit Department for Business, Energy & Industrial Strategy, 3rd Floor, 1 Victoria Street, London, SW1H OET, United Kingdom **T** +44 20 7215 5000 **F** +44 20 7215 0105 **E** *enquiries@beis.gov.uk* **W** *www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy*

Outline structure. The Department for Business, Energy & Industrial Strategy is a government ministry. The Minister of State currently responsible for competition policy is Margot James MP.

Responsibilities. The Department for Business, Energy & Industrial Strategy formulates UK government policy on competition law. Involvement in merger and market investigations is limited and the Secretary of State is only involved in:

- Merger investigations that raise public interest issues on national security grounds, newspapers or other media ownership, and the

maintenance of the stability of the UK financial system.

- Market investigations where the Secretary of State is not satisfied with a CMA decision not to conduct a Phase 2 investigation, or that the CMA will reach a decision on a Phase 2 investigation within a reasonable time or on public interest grounds.

Procedure for obtaining documents. Decisions made by the Secretary of State, are available as press releases on the Department for Business, Energy & Industrial Strategy website. Consultation papers and guidance are also available on the website (*see above, Contact details*).

Practical Law Contributor profiles

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Areas of practice. EU and UK competition law.

Recent transactions

- Advising American International Group on obtaining global merger control approval in respect of its US$7.6 billion sale of International Lease Finance Corporation.
- Advising Clayton, Dubilier & Rice in obtaining European Commission (EC) clearances for its US$1.8 billion acquisition of Ashland Water and its US$500 million investment in CHC Group Ltd.
- Advising Dell Inc. on obtaining global merger control approval, including in the EU, in respect of being taken private by Michael Dell in a transaction valued at approximately US$24.9 billion.
- Advising Access Industries in obtaining EC clearance for its acquisition of Warner Music Group (WMG) and, subsequently, WMG on obtaining EC clearance for its US$765 million acquisition of Parlophone Label Group from Universal Music Group.
- Advising Northwestern Mutual in obtaining UK merger control approval for the sale of its subsidiary company Russell Investments to the London Stock Exchange Group.

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