Merger Control in the UK Utilities Sector

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**Introduction**

Competition law, including merger control, applies to companies active in the utilities sector, such as telecommunications, energy (gas and electricity) or water. With the exception of the water sector, the United Kingdom’s general merger regime applies to all utilities mergers, although sector regulators are consulted on mergers in their sector. Some important changes to the UK merger regime were introduced with the entry into force on 1 April 2014 of a new enforcement regime and the creation of a new UK competition authority, the Competition and Markets Authority (CMA), with a significantly increased budget and staff.

Several of the main features of the regime remained unchanged – in particular, the voluntary nature of the notification system, the jurisdictional thresholds, the substantive test and the two-phase review process. Nevertheless, material changes were made to the way in which the UK merger control regime is enforced, which mean that merging parties must give more careful consideration to the risks of not notifying mergers that are likely to meet the jurisdictional thresholds and may give rise to potential competition concerns. Other changes to the review process also mean that it has become more intensive, formal and costly than before.

**Mergers in the utilities sector**

Merger activity varies greatly across the different utilities sectors. The telecoms industry has been the subject of a wave of consolidation in recent years. In 2015, more than £20 billion worth of mergers and acquisitions were under discussion in the United Kingdom, including the acquisition by BT of EE, the largest UK mobile group. Despite initial concerns about the ability of BT’s competitors to access its network, this transaction was eventually cleared unconditionally by the CMA in January 2016 on the basis that the current regulatory regime applying to BT would prevent the risk of access price rises post-merger. At EU level, and in the first prohibition of a merger since 2013, the European Commission blocked the proposed Three/O2 merger which, would have reduced the number of mobile network operators in the United Kingdom from four to three.1

Other utilities sectors have seen less M&A activity, especially in the energy and water sectors, but this could be changing. For example, the Water Act 2014 includes changes to how the UK merger regime applies to water mergers and will exclude certain mergers from being automatically referred for an in-depth Phase II investigation, as was the case under the old regime. This should allow for an increased number of water mergers to be tested at Phase I and remedies offered without the need for a full Phase II review. The new regime may create the potential for a more dynamic industry and increased consolidation in the sector. In 2015–2016 two water mergers were reviewed by the CMA: the acquisition by Pennon Group plc of Sembcorp Bournemouth Water Investments Limited was cleared by the CMA in November 2015,2 while the joint venture between Severn Trent Plc and United Group Plc was cleared in Phase I by the CMA in May 2016.3 In the energy sector, the last two mergers reviewed by the CMA date from the end of 2014, and were both Phase 1 clearances.4 The UK energy sector still shows relatively low levels of concentration compared to other European countries, and there may be further consolidation in this sector.

**Legislation and relevant authorities**

Except in the case of water mergers, there are no special provisions under the UK merger rules for regulated utilities such as electricity, gas, or telecommunications, and the general UK merger control regime therefore applies to utilities mergers.

The legislation governing the UK merger regime is the Enterprise Act 2002 and the Enterprise and Regulatory Reform Act 2013, which came into force on 20 June 2003 and 1 April 2014, respectively. In the case of mergers in the water and sewerage industry, the applicable legislation is the Water Industry Act 1991 as amended by the Water Act 2014 which came into force on 18 December 2015. The water merger regime is intended to ensure that a merger between two existing water companies in England and Wales does not prejudice the ability of the water regulator to make comparisons between water companies. The ability to compare the costs, efficiency and performance of regulated water companies is a key aspect of the analysis by Ofwat, the Water Service Regulation Authority, for the purpose of imposing price controls on the regulated water companies.

Because the general merger regime applies to utilities, the CMA is the main authority responsible for enforcing

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2 See completed acquisition by Pennon Group plc of Bournemouth Water Investments Limited cleared by the CMA on 5 November 2015.
3 See anticipated non-household retail water and sewerage services joint venture between Severn Trent Plc and United Group Plc, cleared on 3 May 2016.
4 See anticipated acquisition by Eniviva Holdings LP of the entire issued share capital of Green Circle Bio Energy, Inc.; cleared by the CMA on 22 December 2014; and completed acquisition by IGas Energy Plc of Dart Energy Limited cleared on 20 October 2014.
the general and utilities merger rules. However, the CMA works closely with the sector regulators and routinely consults them about any mergers about which they are likely to have industry-specific knowledge. The relevant sector regulators are:

- for telecommunications and media: Ofcom (Office of Communications);
- for electricity and gas: Ofgem (Office of Gas and Electricity Markets); and
- for water and sewerage: Ofwat (Water Services Regulation Authority).

The regulators’ views carry a particular weight with the CMA, as was seen, for example, with the key role played by Ofcom in the CMA’s review of the acquisition by BT of EE, which resulted in an unconditional clearance decision. However, the CMA will not be bound by the regulators’ consultations. This is different for mergers in the water sector, where the CMA has a duty to consult Ofwat in specific cases, and in particular: (i) before the CMA makes a decision on whether there is a duty to refer for a Phase II investigation; and (ii) when considering whether to accept undertakings in lieu. Under the new provisions in the Water Act 2014, Ofwat now has an enhanced role in Phase I. The CMA must ask Ofwat for, and Ofwat must give, an opinion on whether and to what extent the merger has prejudiced or is likely to prejudice its ability to make comparisons between water enterprises, and whether the prejudice in question is outweighed by any relevant customer benefits relating to the merger. Although Ofwat has no formal role in relation to a Phase II investigation, it is likely that the CMA will continue to work closely with Ofwat.

**Triggers and thresholds**

**Division of competence between the United Kingdom and the EU**

The UK merger regime applies to utilities mergers only if the European Commission does not already have exclusive jurisdiction (based on the parties’ combined global and EU-wide turnover) to investigate the merger under the EU Merger Regulation. For example, in the telecoms sector, the Three/O2 merger fell within the European Commission’s jurisdiction even though the activities of the merging parties were limited to the United Kingdom. In some cases, the CMA or the parties may request the referral back to the United Kingdom of the review of a merger (or part of a merger) from the Commission under Article 4 (pre-notification referrals at the request of the parties) and Article 9 (post-notification referrals at the request of Member States) of the EU Merger Regulation. However, the Commission retains a discretion to grant or reject such requests. For example, in the Three/O2 merger, the CMA’s request, which was based on Article 9 of the EU Merger Regulation, was rejected on the grounds that mobile merger consolidation across the EU and its impact on the creation of a pan-EU telecoms market is a high priority for the Commission.7

Notwithstanding this division of competence, relevant national authorities will be consulted by the Commission throughout the EU review process, since the Commission is required under the EU Merger Regulation to act in ‘close and constant liaison’ with national competent authorities of the Member States—especially in the context of Article 9 proceedings.8 The close liaison between the Commission and Member States authorities is also reinforced by the obligation of the Commission to consult the Advisory Committee prior to taking certain decisions on a transaction, in particular in the context of Phase II proceedings.9

In addition, despite the Commission’s exclusive jurisdiction over transactions that have an EU dimension Member States may, under Article 21(3) of the EU Merger Regulation, ‘take appropriate measures to protect legitimate interests other than competition’. This means that Member States can, under certain conditions, prohibit a concentration or make it subject to additional conditions and requirements on legitimate grounds other than those covered by the EU Merger Regulation. This is particularly relevant to the utilities sector since UK sectoral regulations have in the past been invoked as being ‘legitimate interests’ in order to impose additional measures in the context of utilities mergers. In particular:

- The Commission accepted that UK water regulation was a ‘legitimate interest’, thus entitling the United Kingdom to review the regulatory aspects of a transaction and impose regulatory measures.10 This means that, in mergers between water companies which meet the EU thresholds, there can be parallel investigations where the Commission will review the competition aspects and the CMA will review the regulatory aspects.
- In the EDF/London Electricity merger, the UK authorities argued that the United Kingdom had a public interest in maintaining the integrity of the regulatory system for the electricity sector and considered it to be in the public interest to be able to make modifications to the statutory licence of a public electricity supply company, even in cases where such a

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8 EU Merger Regulation, Article 19.
9 EU Merger Regulation, Article 19(2); see, for example, Ofcom’s comments and the CMA’s open letter to the European Commission in Case No M.7612 Hutchison 3G UK/ Telefonica UK available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515405/CMA_letter_to_Commissioner_Margrethe_Vestager.pdf (CMA letter) and http://media.ofcom.org.uk/comment/2016/three-and-O2-merger/(Ofcomcomment), 10 EU Merger Regulation, Article 19(3). The Advisory Committee comprises representatives of the Member States’ authorities and must be consulted by the Commission prior to taking certain decisions. The role of the Advisory Committee is to provide a means by which Member States can express their views to the Commission on certain important aspects of the Commission’s merger investigations and the Commission is required to ‘take the utmost account’ of opinions delivered by the Advisory Committee (see EU Merger Regulation, Article 19(6)).
10 See Case No IV/M567 Lyonnaise des Eaux/Northumbrian Water in which the Commission recognised the legitimate interest of the UK authorities in applying the Water Industry Act 1991 to the transaction.
company was a party to a concentration with an EU dimension. The Commission considered that the regulatory actions requested by the United Kingdom could have been taken in the absence of the concentration and therefore did not need to be recognised as a ‘legitimate interest’ under Article 21 of the EUMR.\(^\text{12}\) This was later confirmed by Ofgem in the context of the acquisition by Powergen of Midlands Electricity,\(^\text{13}\) in which Ofgem took the view that licence modifications following the merger were an application of Ofgem’s regulatory powers that did not prejudice the Commission’s exclusive jurisdiction. Accordingly, even where transactions are subject to the EU Merger Regulation, UK regulators should be free to carry out licence modifications in the gas and electricity sector so long as the changes are motivated by regulatory, rather than competition, considerations.

Finally, the division of powers between the European Commission and the national competition authorities is further underpinned by the duty of sincere cooperation of Member States pursuant to Article 4(3) of the Treaty on European Union, under which they must refrain from taking any measure which could jeopardise the attainment of the EU’s objectives. In the context of merger control, this means that the UK authorities should avoid making conflicting decisions in relation to transactions having an EU dimension.\(^\text{14}\) For cases that fall below the EU thresholds, the CMA has jurisdiction to investigate a transaction where a ‘relevant merger situation’ arises in the United Kingdom and the relevant jurisdictional thresholds are met.

**UK jurisdictional triggers**

**(i) A relevant merger situation**

A ‘relevant merger situation’ requires that two or more enterprises cease to be distinct and that the jurisdictional thresholds are met. An ‘enterprise’ is defined as the activities or part of the activities of a business, which can sometimes include asset transfers.\(^\text{15}\) Enterprises cease to be distinct when they are brought under common ownership or control. Under the UK merger control rules, ‘control’ arises when an enterprise can at least exercise material influence over the policy of another enterprise. ‘Material influence’ is an easier test to satisfy than the EU Merger Regulation’s test and the relevant jurisdictional thresholds are met.

**(ii) Jurisdictional thresholds**

Except in the case of water mergers where specific thresholds apply, the CMA has the jurisdiction to investigate any merger if either of the following tests is met:

- turnover test – the target business has turnover in the United Kingdom of £70 million or more; or
- share of supply test – as a result of the merger the combined enterprise will supply or acquire 25 per cent or more of any goods or services in the United Kingdom or a substantial part of the United Kingdom.

The share of supply test is not a market share test based on an economic definition of a relevant product or geographic market. The test can be applied to any reasonable description of goods or services and in very narrow geographical areas. Therefore, the test is easily met and the CMA has a wide margin of appreciation. However, it is necessary to show some overlap between the activities of the purchaser and the target in the United Kingdom which results in some increment in the combined share of supply as a result of the merger. As a result, many – even small – mergers in the United Kingdom are caught by this test, although there is a carve-out for de minimis mergers where the aggregate annual value of the market in the United Kingdom is less than £10 million.

In the case of water mergers, the CMA’s jurisdictional test is based on turnover only rather than on both the turnover and share of supply tests. The CMA is under a duty to refer a merger between two water enterprises for a Phase II investigation unless the value of the turnover of the water enterprise being taken over, or the value of the water enterprises already belonging to the acquirer, is less than £10 million each.\(^\text{16}\) The relevant turnover is limited to the ‘regulated’ provision of services as a water or water and sewerage company. Any turnover amount attributed to other services offered by the water company is excluded from the relevant turnover for the purpose of the test.\(^\text{17}\)

**A system of voluntary notification**

The UK merger regime is voluntary. This means that, even if the jurisdictional thresholds have been met, the merging

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12 See Case No IV/M.1346 EDF/London Electricity.
14 For an application of the duty of sincere cooperation in the context of mergers, see Ryman Holdings Plc v Competition and Markets Authority & Another [2015] EWCA Civ 83, 12 February 2015.
15 For a discussion on the concept of ‘enterprise’ under the Enterprise Act 2002, see the Supreme Court judgment in Société Coopérative de Production de Sainte-Foy v The Competition and Markets Authority and another [2015] UKSC 75, 16 December 2015. In this judgment relating to the acquisition by Eurotunnel of certain assets of SeaFrance, the Supreme Court, held, inter alia, that the test for whether an ‘enterprise’ has been acquired, rather than ‘bare assets’, is essentially one of economic continuity.
17 Section 33(4) Water Industry Act 1991 states that the applicable turnover is calculated in accordance with the provisions specified in regulations published by the Secretary of State (The Water Mergers Determination of Turnover Regulation, SI 2004/3206), and Schedule of the SI 2004/3206. Paragraph 3 of the Schedule, the applicable turnover of water enterprise ‘shall be limited to the amounts derived from the sale of products and the provision of services falling within the appointed business of the water enterprise to businesses or consumers in England and Wales after deduction of sales rebates, value added tax and other taxes directly related to turnover’.
parties can complete and implement the transaction without notifying and obtaining prior clearance from the CMA. This enables the parties to self-assess and decide, even if the thresholds are met, not to notify a transaction for prior clearance to the CMA in advance of completion. This provides merging parties with greater flexibility when it comes to negotiating the terms of a deal and the allocation of antitrust risk. For that reason, a seller in a strong bargaining position will often require a deal to be completed without it being conditional on prior UK merger clearance and for the buyer to assume the risk of a subsequent investigation and any remedies.

However, companies choosing not to notify must bear in mind that within four months of completion of a transaction or material facts about the transaction entering the public domain, the CMA can decide to investigate the transaction and refer it for a more detailed Phase II investigation. The CMA will often do so when it has received complaints about the transaction from customers or competitors, but it also actively monitors the national, local and trade press and other sources for information about new transactions. Where it considers that a transaction might give rise to substantive competition concerns, the CMA will send an inquiry letter to the buyer asking for information about the deal in order to assess whether the jurisdictional tests are met. If that is the case, the CMA will require the parties to submit information of the same type that would be required for a formal notification.

In addition, a stricter approach has been taken by the CMA to non-notified mergers for some time and changes to UK merger control procedures, as a result of the reform of the competition law regime, mean that the risk of not notifying mergers that meet the UK jurisdictional thresholds and may give rise to substantive competition issues has increased.

The CMA has strong powers to investigate and intervene in mergers to prevent harm to competition pre- and post-completion. The CMA also has the power to impose interim orders that will prevent the parties to an anticipated merger from completing the transaction, but it expects to use those powers rarely. The CMA’s objective is to ensure that the integration of the merging businesses progresses in such a way that would not prejudice the CMA’s ability to implement remedies (for example, the divestment of a business). In completed mergers, it is now standard for the CMA to impose immediately an interim enforcement order suspending or preventing further integration at the same time as sending an inquiry letter. The terms of the interim order are onerous and include a requirement to submit regular compliance reports. Although derogations can be negotiated and agreed, this is a time-consuming exercise and it is common to make additional derogation requests throughout the merger review process. If the buyer breaches the terms of the order, the CMA can require the appointment of an independent monitoring trustee and a trustee will usually be put in place in Phase II in any event. However, the CMA is also prepared to lift interim orders (either wholly or partially) as soon as it becomes clear that the merger (or parts of it) raises no substantive competition concerns. Finally, the CMA has powers not only to suspend integration, but also to reverse steps already taken in completed mergers at the start of Phase I or even before. A failure to comply with any such requirement could result in significant fines of up to 5 per cent of turnover.

As a result of this stricter approach to investigating non-notified mergers and the CMA’s stronger interim enforcement powers, there is an increased risk in the United Kingdom for buyers that decide to complete and implement mergers without notifying and seeking prior clearance. In the year since 1 April 2015, ten of the CMA’s 54 merger decisions (19 per cent) were picked up by the CMA’s mergers intelligence function; of these, three resulted in a finding that there was a substantial lessening of competition but they were each cleared at Phase I following the acceptance by the CMA of undertakings in lieu of a reference. As a result, there is a trend towards more deals being made conditional on prior CMA clearance. In the alternative, buyers which choose not to notify are considering more carefully the need to hold separate, as far as possible, the acquired business from the buyer’s business and avoid any unnecessary integration steps until the expiry of the CMA’s four-month review period.

Because of this increased risk, the parties may want to seek informal guidance from the CMA in relation to proposed mergers that are still confidential which the CMA is prepared to give under certain limited circumstances.

**Deciding to notify: the notification requirements**

There are no time limits as to when a merger filing must be made. The only time limit that applies is that the CMA must make a decision on referral for a Phase II investigation within four months of completion of a deal or material facts about the merger entering the public domain. Therefore, the CMA encourages parties to notify anticipated or completed mergers as early as possible.

The earliest that an anticipated merger can be notified is when the share purchase agreement (or equivalent) has been signed or there is a good-faith intention by the parties to proceed with the transaction (for example once heads of terms have been signed, board approval has been obtained or adequate financing has been put in place).

The transaction can be formally submitted only once the merger has been announced and is in the public domain, although it can be submitted in draft for the purposes of commencing the pre-notification discussions while the deal is still confidential. The purpose of pre-notification discussions is to ensure that the merger notice is satisfactory (that is, the CMA has obtained all of the information that it requires), so that the formal Phase I period can commence. The CMA strongly encourages parties to contact it not less than two weeks before the intended notification date. In order to enable the pre-notification discussions to commence, the parties must submit a case team allocation form and provide an estimated date for submission of a draft merger notice. In practice, pre-notification discussions tend to take significantly longer and the average length of pre-notification is currently 25 working days.


19 Stated for the period April 2015 to 8 March 2016, Jonathan Parker, Director of Mergers CMA, Law Society Competition Section seminar, 8 March 2016.
days.\textsuperscript{20} The pre-notification discussions themselves can be quite intensive, with detailed requests for information, the involvement of CMA economists from the outset and an early analysis of the theories of harm even before the statutory clock starts to run.

The CMA requires that the merger be notified using a prescribed format known as a merger notice. All notifications must contain the information specified, although the CMA may be willing to agree derogations during pre-notification discussions.

The parties will be required to pay merger fees to the CMA, based on the ‘user pays’ principle. The fees are calculated by reference to the turnover of the target and are on a sliding scale ranging from £40,000 where the UK turnover of the target is £20 million or less, to £160,000 where the turnover of the target exceeds £120 million.\textsuperscript{21}

\textbf{Substantive review: procedure}

The UK merger control regime involves a two-phase approach with both phases being undertaken within the CMA. At Phase I, the CMA carries out an initial assessment to determine whether it believes that the merger results in a realistic prospect of a substantial lessening of competition. If so, the CMA has a duty to launch an in-depth Phase II assessment. The water mergers regime also comprises a two-stage assessment by the CMA, and the procedures and timetable adopted by the CMA for water mergers are broadly the same as for other mergers other than the involvement of Ofwat in Phase I.

For mergers that clearly do not raise substantive competition concerns, there is no simplified notification process or truncated timetable, although the parties can choose not to notify if they are confident that no substantive competition concerns will arise. However, the CMA has said that it aims to clear at least 60 per cent of less complex mergers (that is, those mergers that do not require an issues meeting and case review meeting) within 35 working days.\textsuperscript{22} Parties can abandon their merger after a Phase II referral has taken place, in which case the CMA’s investigation will be closed.

\textbf{Phase I}

The CMA has a statutory deadline of 40 working days within which to complete its Phase I review of both anticipated and completed mergers; the current average length of the Phase I period is 35 working days. At the end of this period, it must decide whether to clear the deal unconditionally, clear it subject to agreeing undertakings in lieu with the buyer or refer it for a Phase II investigation for a more detailed investigation. The statutory period starts to run on the first working day after the CMA confirms that:

\begin{itemize}
\item it has received a satisfactory merger notice containing the information it requires for its review; or
\item in the case of an investigation started by the CMA it has received sufficient information to enable it to begin its investigation.
\end{itemize}

The CMA will publish on its website a notice summarising the merger and inviting comments from interested parties. It will also ask the merging parties to provide contact details for their top ten customers, suppliers and competitors, and the CMA will contact them to request their views. In the case of utilities mergers, the sector regulators will be consulted.

If the CMA has material concerns about the merger, it will hold an internal case review meeting. Before doing so, it will have a ‘state of play’ conference call with the parties to inform them of the decision to hold such meeting and invite them to an issues meeting to discuss its concerns. The parties will be provided in advance with an issues letter and offered the opportunity to make representations about the CMA’s reasons why a Phase II reference should be made and the theories of harm. If the CMA still concludes that a reference should be made, the parties will have the opportunity after receipt of the reasoned Phase I decision to offer undertakings in lieu (that is, remedies to avoid a reference).

It is also possible for the parties to apply for a fast-track process for an accelerated referral to a Phase II investigation in cases that clearly meet the threshold for reference. This was the case in the BT/EE merger, where BT submitted a request for a fast-track reference, which was granted by the CMA. The CMA found that the transaction met the test for reference as it gave rise to a realistic prospect of a substantial lessening of competition in relation to the supply of wholesale access and call origination services to mobile virtual network operators and fibre mobile backhaul services to mobile network operators in the United Kingdom.

\textbf{Phase II}

There are three exceptions to the CMA’s duty to refer under the general regime:

\begin{itemize}
\item where the affected markets are worth less than £10 million in aggregate, in which case the CMA may decide that the markets are of insufficient importance to justify a reference (the \textit{de minimis} exception); 
\item where the customer benefits outweigh the substantial lessening of competition; or 
\item where the merger arrangements are insufficiently advanced or unlikely to proceed.
\end{itemize}

In the case of water mergers, the Water Act 2014 has introduced specific exceptions to the CMA’s duty to make a Phase II reference, including:

\begin{itemize}
\item the merger arrangements are not sufficiently advanced or are unlikely to proceed; 
\item the merger is not likely to prejudice Ofwat’s ability in carrying out its function to use comparative regulation; or 
\item the water merger is likely to prejudice Ofwat’s ability to make comparisons but the prejudice is outweighed by the relevant customer benefits which will accrue as a result of the merger.
\end{itemize}

\textsuperscript{20} Jonathan Parker, Director of Mergers CMA, Law Society Competition Section seminar, 8 March 2016.


If the water or any other merger is referred to Phase II, there is a much more intense, detailed and burdensome investigation of the merger involving requests for information, the drafting of substantive submissions, hearings with the parties and third parties, site visits by the CMA and the review of and comments on working papers. In order to ensure a transparent and distinct process, the decision-makers at Phase II, comprising a panel of independent members, are different from the decision-makers at Phase I, although they will often include members of the Phase I case team to ensure continuity. The CMA’s Phase II review period is fixed at 24 weeks (extendable by up to eight weeks), although there is a statutory time limit (12 weeks, extendable by up to six weeks) to agree remedies. The reference rate for Phase II mergers over recent years is approximately 10 per cent, but rose significantly in the last year (1 April 2015 to 30 April 2016) to 18 per cent. 23

The CMA has extensive powers to require the parties to provide information and documents, and to require the attendance of witnesses, in Phase I and II investigations. The CMA can impose a fine (up to £15,000 per day or a fixed penalty of £30,000) for failure to comply with such requests in the absence of a reasonable excuse. This applies to both merging parties and third parties, and disputes may arise where the CMA has issued an onerous information request with an unreasonably short deadline. It is a criminal offence for any party to provide false or misleading information. The parties must also comply with any interim orders (for example, to hold separate the merging businesses) and fines of up to 5 per cent of worldwide turnover can be imposed for breaching an order.

Substantive review: test

The CMA has a duty to refer a merger for a Phase II investigation where it believes that the merger meets the jurisdictional tests and has resulted or may be expected to result in a ‘substantial lessening of competition’ within any market for goods or services in the United Kingdom. The test is based on an assessment of competition issues only, which includes considering whether the merger will weaken rivalry to such an extent that the competitive process would no longer deliver a similar level of customer benefit as it would without the merger – for example, as a result of higher prices or reduced choice, output quality or innovation. At Phase I, the CMA must make the reference where it believes that it is more likely than not that the merger will result in a substantial lessening of competition. If the CMA believes that the likelihood is less than 50 per cent, it has a duty to refer when it believes that there is a realistic prospect that the merger will result in a substantial lessening of competition. This is a lower test than that applied by the CMA in its Phase II investigation and the CMA has a wider margin of appreciation in making this determination at Phase I. At Phase II the CMA must decide, on a balance of probabilities, whether the merger has resulted, or may be expected to result in a substantial lessening of competition.

Merger Remedies

The vast majority of remedies are structural and involve divestments. Behavioural remedies are generally not favoured, as they require a greater level of monitoring by the CMA. With structural remedies, the CMAs starting point will generally be the divestiture of all or part of the acquired business. This is because restoring the pre-merger situation represents a straightforward remedy which usually addresses the competition issue. 24 However, the CMA will also consider a divestiture drawn from the buyer’s existing business (or part of it) as an alternative.

For water mergers, if the CMA considers that a water merger either has or may be expected to prejudice the ability of Ofwat to make comparisons between different water enterprises, it must consider:

• whether it should take any action itself for the purpose of remedying, mitigating or preventing the prejudice or any adverse effect resulting from that prejudice;
• whether it should recommend the taking of action by others for that purpose. Such action is most likely to involve Ofwat;
• what action should be taken, and what is to be remedied, mitigated or prevented.

The CMA’s starting point in determining the nature of a prospective remedy is that it should prevent the prejudice to Ofwat’s ability to make comparisons, and any resulting adverse effects. The range of possible remedies is the same as that available under the general merger regime.


Review of Merger Decisions

The merging parties and any other third party aggrieved by a decision of the CMA, the Secretary of State or Ofcom can apply for a review of a merger decision to the Competition Appeal Tribunal (CAT) on points of law and not on the merits (that is, a judicial review standard).\(^{25}\) The CAT will review the CMA’s investigation and materials in order to assess whether the CMA’s decisions are reasonable and demonstrate sufficient grounds for the conclusions reached, whilst recognising that the CMA has a wide margin of appreciation to decide what action is required to remedy, mitigate or prevent the substantial lessening of competition it has identified.\(^{26}\)

An appeal must be lodged with the CAT within four weeks of the CMA’s decision. The CAT will usually aim to conclude appeals in merger cases within six months, but it is not bound by a fixed timetable. An appeal of the judgment of the CAT on points of law can be made to the Court of Appeal within 14 days.

Conclusion

Merger activity in the utilities sector is strongly correlated with sector regulation. Thus, the relaxation of the merger regime for water companies following the entry into force of the Water Act 2014 could lead to more merger activity in this sector. Ofcom’s recent Strategic Review of Digital Communications, which includes the opening of BT’s network and the reform of Openreach, could also potentially lead to further M&A activity in the telecoms sector – although following the prohibition decision by the European Commission in the Three/O2 merger, further consolidation in the UK mobile market appears unlikely in the short term. Utility companies contemplating acquisitions should keep in mind the strong powers that the CMA enjoys under the merger rules, as well as the role that sector regulators play in the process, both at UK and EU level.

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25 See section 120 of the Enterprise Act 2012.