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Outline of chapter of UK merger control

Overview of merger control activity during the last 12 months

The last 12 months marked the second year of merger control enforcement in the UK by the Competition and Markets Authority ("CMA") which assumed responsibility for phase 1 and phase 2 merger control investigations in the UK in 2014. The CMA publishes statistics about its merger control enforcement activity each year for a 12-month period to 31 March as follows.

Statistics on first stage outcome

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
</tr>
<tr>
<td>Found not to qualify</td>
<td>21</td>
<td>21%</td>
<td>23</td>
<td>23%</td>
<td>12</td>
<td>18%</td>
</tr>
<tr>
<td>Cleared unconditionally</td>
<td>62</td>
<td>62%</td>
<td>49</td>
<td>49%</td>
<td>42</td>
<td>65%</td>
</tr>
<tr>
<td>De minimis exception applied</td>
<td>3</td>
<td>3%</td>
<td>4</td>
<td>4%</td>
<td>3</td>
<td>5%</td>
</tr>
<tr>
<td>Phase 1 remedies accepted</td>
<td>5</td>
<td>5%</td>
<td>10</td>
<td>10%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Referred to Phase 2</td>
<td>8</td>
<td>9%</td>
<td>14</td>
<td>14%</td>
<td>8</td>
<td>12%</td>
</tr>
<tr>
<td>Total decisions</td>
<td>100</td>
<td>-</td>
<td>100</td>
<td>-</td>
<td>65</td>
<td>-</td>
</tr>
<tr>
<td>Initial undertakings/initial enforcement order imposed</td>
<td>25</td>
<td>25%</td>
<td>23</td>
<td>23%</td>
<td>26</td>
<td>40%</td>
</tr>
<tr>
<td>Case review meeting held</td>
<td>30</td>
<td>30%</td>
<td>32</td>
<td>32%</td>
<td>19</td>
<td>29%</td>
</tr>
</tbody>
</table>

Statistics on second stage outcome

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
</tr>
<tr>
<td>Abandoned</td>
<td>2</td>
<td>20%</td>
<td>2</td>
<td>20%</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Cleared unconditionally</td>
<td>7</td>
<td>70%</td>
<td>4</td>
<td>40%</td>
<td>6</td>
<td>5%</td>
</tr>
</tbody>
</table>
The statistics highlight several themes from the last year of merger control in the UK:

- First, the CMA concluded it did not have jurisdiction over only two cases (3%) for which it opened a merger investigation. This compares with 21% of such cases five years ago, a marked decrease, suggesting the CMA has become more effective at working with merging parties quickly to identify whether the jurisdictional thresholds under UK merger laws are met. The CMA’s Mergers Intelligence Committee (“MIC”) seeks to identify transactions which may have an effect in the UK and then ascertain whether the CMA has jurisdiction to review them under UK merger control. The MIC is understood to have reviewed 550 mergers since April 2015, and the statistics appear to support the view that the MIC is working well. The MIC is adept at identifying deals that have not been notified to it and at contacting the acquiring party promptly to ascertain whether the CMA has jurisdiction to review the deal and is minded to do so. The MIC is also using its Section 5 Enterprise Act 2002 information-gathering powers more extensively to test whether the jurisdictional tests have been met.

- Secondly, the number of transactions subject to a merger investigation fell markedly to a historic low (from 83 in the CMA’s first year to 62 last year) and of those transactions, a significant proportion were found at the end of the phase 1 review to give rise to material competition concerns.

- In some 39% of cases (24/62), the CMA had concerns that the transaction may be expected to result in a substantial lessening of competition. In four of those (Kaplan International/Osborne Books, Transpennine Express Franchise, Sheffield Taxis/Mercury and Tattersalls/Brightwells), the CMA exercised its discretion not to refer the transaction to a phase 2 review, using the de minimis exception whereby the total value of the sector to which the competition concern related was sufficiently low for it not to be in the public interest to open a phase 2 merger investigation.

- In a further nine cases (The Original Bowling Company/Bowlplex, BCA Market Place/SMA Vehicle Remarketing, Reed Elsevier/Jordan, MRH/Esso, Regus/Avanta, Mueller/Dairy Crest, InterCity East Coast Franchise, GTCR/Gorkana and Greene King/Spirit), the merging parties offered undertakings in lieu of a referral to a phase 2 investigation.

- Eleven cases were referred to a phase 2 investigation including Fenland Laundries/Fishers Services, Clariant/Kilfrost, Poundland Group/99p Stores, Pennon/Bournemouth, Joseph Ash/Corbett, BT/EE, Linergy/Ulster Farm, Pearson/Learndirect, Celesio/Sainsbury’s, Iron Mountain/Recall and Ladbrokes/Coral.
In the previous year, a significant lessening of competition was identified at phase 1 in 20% of cases, and the year before in 17% of cases. It is not yet clear whether last year’s spike in the proportion of cases reviewed raising material competition concerns at phase 1 reflects a more cautious approach to merger control at phase 1 by the CMA, or a more selective approach by the CMA as to which deals it decides to call in for review.

• Thirdly, it continues to be the case that a notable proportion of all mergers reviewed by the CMA are completed deals – 32% last year against a five-year average of 30%. This appears to reflect the effectiveness of the MIC in identifying non-notified deals. It may also reflect a continuing appetite on the part of acquiring parties to take the risk of non-notification and find themselves subject to an initial enforcement order (“IEO”), which prevents further integration between the merging parties pending the outcome of a merger control review.

The most notable feature of the phase 2 outcomes last year is that, setting aside the three deals that were abandoned following reference to a phase 2, eight out of the nine deals in which a decision was issued resulted in an unconditional clearance, with just one deal requiring remedies to address an identified competition concern. Although it is conceivable that those deals cleared unconditionally raised complex issues that could not be addressed at phase 1, the high proportion of unconditional clearances, which reflects a growing trend over the last three years, may point to shortcomings on behalf of merging parties and/or the CMA in resolving transactions at a phase 1 without the need for a phase 2 clearance.

The average length of a phase 1 investigation was 35 working days and all phase 1 merger cases were dealt with by the CMA within the statutory deadline of 40 working days. Twenty-five cases were cleared in less than 35 working days including Nikkei/FT (10 working days), Heineken/Diageo (20 working days), NSMP/Total (21 working days), Aviator/Swissport (22 working days), and Netto/Co-op (23 working days). It is also notable that, by and large, the CMA’s phase 2 investigation process is conducted efficiently. The CMA has 24 weeks in which to reach a decision and can extend this period to 32 weeks. Last year, the average length of a phase 2 investigation was only 22 weeks.

New developments in jurisdictional assessment or procedure

Jurisdictional developments: the concept of an “enterprise”

UK merger control applies when two or more enterprises cease to be distinct. As discussed in GLI: Merger Control (4th edition), the question of what constitutes an “enterprise” was at the centre of the Supreme Court judgment of 16 December 2015 in the Eurotunnel case.¹

The legal question considered by the Supreme Court was whether or not Eurotunnel, together with Société Coopérative De Production SeaFrance SA (“SCOP”) acquired an “enterprise”, as defined in the Enterprise Act 2002, comprising ships and various assets (trademarks, IT systems, goodwill and customer lists) as well as the former SeaFrance employees, in particular given that SeaFrance was no longer active at the time of the acquisition of its assets. The acquisition had been prohibited by the Competition Commission in June 2013, and nearly two years of proceedings ensued. The Supreme Court found that the UK merger control provisions are not limited to the acquisition of a business that is a “going concern”. The possession of “activities” is a descriptive characteristic of an enterprise under the Act. An enterprise is subject to merger control if the capacity to perform those activities as part of the same business subsists. The period of time between cessation of trading and acquisition of control of the assets may be a relevant factor, but is not necessarily decisive.

In addition, the Supreme Court found that the relevant test to distinguish between “bare assets” and assets amounting to an “enterprise” is one of economic continuity: “Put crudely, it depends on whether at the time of the acquisition one can still say that economically the whole is greater than the sum of its parts.” More specifically, and in line with the test which had been set out by the CAT in Eurotunnel I, the Supreme Court set out that a purchaser of assets will acquire an “enterprise” where: (i) those assets give the purchaser more than might have otherwise been acquired by going into the market and buying factors of production; and (ii) the extra is attributable to the fact that the assets were previously employed in combination in the “activities” of the target enterprise.

The test set out by the Supreme Court to determine whether a purchaser of assets will acquire an “enterprise” therefore remains quite broad, leaving the CMA with a wide discretion to apply it.

Procedural developments: powers to freeze integration pending approval

It remains standard practice in relation to completed mergers for the CMA to impose immediately an IEO (also known as a “hold separate” order) suspending or preventing further integration at the same time as sending an inquiry letter. IEOs were imposed in all completed mergers that were investigated by the CMA with only one exception (Atos/Countrywide), where implementation of the merger was already at an advanced stage. Although formal derogations can be negotiated (following submission of a reasoned request), this is a time-consuming exercise and it is common to make additional derogation requests throughout the merger review process. However, the CMA has continued its practice of lifting interim orders (either wholly or partially) as soon as it becomes clear that the merger (or parts of it) raises no substantive competition concerns, usually after the Initial State of Play call (Harman/Bang & Olufsen).

The CMA also has the power to impose interim orders that will prevent the parties to an anticipated merger from completing the transaction. The CMA has made clear that it expects to use those powers rarely, though it decided to exercise those powers in one case (Linergy/Ulster Farm) in factual circumstances which were unusual. The CMA has still not used its powers to date to reverse steps already taken in completed mergers at the start of phase 1 or even before.

Procedural developments: extended pre-notification process

A key feature of the UK merger control process over the past year has been the significantly extended period before the start of the formal phase 1 review period for pre-notification discussions. The purpose of these discussions is for the CMA to ensure that the merger notice is “satisfactory” (i.e. it has obtained all of the information that it requires) so that the formal phase 1 period can commence.

The CMA strongly encourages parties to contact it not less than two weeks before the intended formal notification date. In practice, however, pre-notification discussions tend to take significantly longer and the average length of pre-notification is currently 25 working days and, anecdotally, can be considerably longer after the initial substantive contact with the CMA case team commences. The pre-notification process can be intensive, with detailed requests for information, the involvement of CMA economists from the outset and an early analysis of the theories of harm. It has also resulted in a material increase in the cost of notifying a merger. The primary reason for this approach is the CMA's lack of ability to stop the statutory clock during the phase 1 period except in exceptional circumstances – the phase 1 timetable was only stopped in three cases (Northern Rail Franchise, Celesio/Sainsbury’s, Mueller/Dairy Crest).
Procedural developments: submissions: jurisdiction, substance and de minimis

An important new development is the willingness on the part of the CMA to accept submissions from parties about mergers which they do not intend to notify. In response to a short briefing paper on jurisdiction, substance and possibly de minimis, the CMA will give an indication as to whether it might have concerns and would require additional information, or whether it does not require any additional information to be provided for the time being. In effect, the latter response provides an indication that the CMA is very unlikely to call in the completed merger in due course. This gives parties some comfort but ultimately the CMA reserves the right to call in the merger if new information comes to light and/or it receives complaints that might change its assessment (though it is understood that they have not done so yet in any case).

This process is entirely informal and different to the previous “fireside chat” approach adopted by the Office of Fair Trading, or the Informal Advice procedure. The ability to make submissions is generally recognised as having been helpful to merging parties, and has materially contributed to a reduction in the number of completed mergers being called in.

Procedural developments: fast track referrals to phase 2

It is possible for merging parties to apply for a fast-track process for an accelerated referral to a phase 2 investigation in cases that clearly meet the threshold for reference. In BT/EE, BT submitted a request for a fast-track reference, which was granted by the CMA. The Ladbrokes/Coral merger between the second- and third-largest bookmakers in the UK by a number of shops, known as licensed betting offices (“LBOs”) has also been fast-tracked to a phase 2 investigation. The CMA found in its phase 1 investigation that the transaction meets the reference test as it gives rise to a realistic prospect of a substantial lessening of competition in relation to the supply of fixed odds betting products in LBOs in a large number of local areas where the parties overlap.

Procedural developments: de minimis

Although a relatively low number of mergers were cleared under the de minimis exception, it nevertheless remains an important way of avoiding a referral in circumstances where the CMA concludes that the merger would lead to a substantial lessening of competition (Sheffield Taxis/Mercury, Tattersalls/Brightwells).

The CMA now encourages parties that believe the de minimis exception may apply to make this argument more strongly and clearly, up front during the merger control process. In particular, the CMA’s new approach is to take a de minimis decision at the Initial State of Play call stage, which avoids the case going to a Case Review Meeting and an Issues Meeting. The de minimis arguments can also be submitted to the MIC in response to enquiry letters about completed mergers, and the CMA is now using its Section 5 powers more extensively to test de minimis arguments with third parties.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

In his speech reflecting on the CMA’s first two years of existence, Alex Chisholm, Chief Executive of the CMA, noted that: “[I]n the past there have been questions about the ability of the UK authorities to handle cases at sufficient speed, and to manage the process in a way that is transparent and reasonably predictable and efficient. We took this on, and the progress we have made is demonstrated [by the statistics].” In its report in March 2016,
the National Audit Office praised the CMA’s innovative and efficient approach to mergers and said that: “[M]ost stakeholders we spoke to welcomed the CMA’s changes in approach, particularly the ability to have an early meaningful discussion about key issues and the potential for merging parties to offer remedies at phase 1.”

The CMA’s substantive analysis of mergers continues to focus on its assessment of economic and factual evidence based on theories of harm which provide the CMA with a framework for assessing the effects of a merger, and in particular whether or not it could lead to a substantial lessening of competition. The CMA will assess the closeness of competition between the parties, possible changes arising from the merger, the nature and extent of competitive constraints, any impact on rivalry and expected harm to customers as compared with the situation likely to arise without the merger (referred to as the counterfactual).

**Key sectors**

The CMA has assessed a wide range of cases and identified a potential substantial lessening of competition in disparate sectors ranging from value retail (Poundland/99p), water (Pennon/Bournemouth), steel galvanising (Joseph Ash/Corbett), telecommunications (BT/EE), animal by-products (Linergy/Ulster Farm), educational computer-based testing (Pearson/Learndirect), pharmacies (Celesio/Sainsbury’s), cleanroom laundry services (Fenland/Fishers), petrol stations (MRH/Esso and MFL/Shell), records and information management (Iron Mountain/Recall), licensed betting offices (Ladbrokes/Coral), rail transport (InterCity East Coast Franchise), media monitoring and databases (GTCR/Gorkana), pubs (Greene King/Spirit), bowling (The Original Bowling Company/Bowlplex), dairy products (Mueller/Dairy Crest), publishing (Reed Elsevier/Jordan), used vehicle auctions (BCA/SMA), aircraft de-icing (Clariant/Kilfrost), to serviced offices (Regus/Avanta).

This year has been notable for its focus on mergers in the UK telecommunications sector against a backdrop of consolidation across the sector in Europe. In BT/EE, the CMA cleared the acquisition by BT (the UK’s largest fixed line operator) of EE (the UK’s largest mobile operator) on the basis that the parties operate largely in separate communications services, and the limited overlap between them. In the merger between Three/O2, two other large mobile operators, which would have resulted in a reduction in the number of suppliers in the market from four to three, the CMA applied unsuccessfully for the merger to be referred back to the UK from the European Commission. However, in addition to strong representations by the UK communications regulator Ofcom, the Chief Executive of the CMA took the unprecedented step of writing an open letter to the Commission setting out the CMA’s concerns regarding the merger and proposed remedies. The Commission subsequently prohibited the merger.

In the rail sector, although a number of previous rail franchise mergers have been considered and cleared on de minimis grounds, it is not always the case that the CMA will not intervene and impose remedies in rail cases. In the InterCity East Coast Franchise case, the risk of a substantial lessening of competition was identified on certain rail and coach routes. The CMA decided against using its discretion under the de minimis exception not to refer the merger to a phase 2 review on the basis that it was open to the Parties, in principle, to offer clear-cut undertakings to address the competition concerns identified, and it did not consider the use of the de minimis exception to be appropriate in any event. The CMA went on to agree undertakings in lieu of a reference. Conversely, the CMA did use its discretion under the de minimis exception not to refer to a phase 2 review another railways deal, First TransPennine Express’ acquisition of the Transpennine Express Franchise.
Approach adopted to exiting or failing firms

The exiting, or failing, firm defence is rarely used, and even more rarely used successfully, in UK merger control. In Sheffield Taxis/Mercury, the parties failed to prove that the target business was a failing firm that would have exited the market.

Last year was therefore notable for its successful use by Chemring Group in respect of its acquisition of the air countermeasures and pyrotechnics business of Wallop Defence Systems (Chemring/Wallop). Chemring was able to demonstrate to the CMA that absent the merger, the target business, which had been loss-making since 2011, would have been wound up by its parent, there being no alternative purchaser, leaving Chemring with a 100% share of the market. The case provides a notable precedent for future failing firm cases, in particular the need to demonstrate that no alternative viable purchaser existed for the business.

Of additional interest was the CMA’s analysis in Mueller/Dairy Crest of whether the assets of a loss-making and cash flow-negative target business, which was part of a larger profitable business, would have exited the market. As an alternative to the merger, Dairy Crest said that it would have downsized the target business to a single dairy, reduced the depot network and exited from the market for the supply of fresh milk to national multiples. The CMA confirmed that it applies the exiting firm scenario framework to situations that do not involve the exit of an entire firm but are limited to a division of a firm. The CMA will consider whether the parent would have closed that division if the merger did not take place, including the reasons for doing so if the parent was profitable and even if it remains active in the market to a more limited extent.

Key economic appraisal techniques applied

In 2015–16, the economic appraisal techniques used in mergers have largely been a continuation of those applied in previous years. The CMA has found a realistic prospect of substantive concerns (here defined as “leading to UILs at phase 1 or referral”) in several cases. These cases fall into five areas when looked at from the perspective of the industries involved, but there are only three key economic concerns that are generally raised:

<table>
<thead>
<tr>
<th>Type of industry</th>
<th>Key economic concerns</th>
<th>Example cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Local markets</td>
<td>Closeness of competition</td>
<td>Poundland/99p Stores, Ladbrokes/Coral, Celesio/Sainsbury’s, Regus/Avanta, InterCity East Coast Franchise, Greene King/Spirit, MRH/Esso, etc.</td>
</tr>
<tr>
<td>Branded FMCG</td>
<td>Closeness of competition</td>
<td>Reckitt Benckiser/K-Y brand</td>
</tr>
<tr>
<td>Niche market, close competitors</td>
<td>Closeness of competition</td>
<td>Xchanging/Agencyport, GTCR/Gorkana, Reed Elsevier/Jordan</td>
</tr>
<tr>
<td>Homogenous product, few competitors</td>
<td>Credibility of competitors</td>
<td>Mueller/Dairy Crest, Sonoco/Weidenhammer, Kerry/Pork Farms</td>
</tr>
<tr>
<td>Vertical or conglomerate effects</td>
<td>Input or customer foreclosure (vertical); tying, bundling, rebates (conglomerate)</td>
<td>BT/EE</td>
</tr>
</tbody>
</table>

Source: CMA, Frontier Economics analysis

Economic appraisal: closeness of competition

The primary means used by the CMA of measuring closeness of competition between the merging parties is the diversion ratio – the proportion of customers of one merging firm that...
treat the other merging firm as being their next best option. The diversion ratio is sometimes combined with measures of variable margins to create “upwards pricing pressure” metrics such as the Illustrative Price Rise (“IPR”) and Generalised Upwards Pricing Pressure Index (“GUPPI”). Mergers giving rise to a high diversion ratio between the parties, or a high IPR/GUPPI, will typically give rise to concerns.

Typically the diversion ratio is not measured or captured directly by the merging parties and needs to be measured specifically in the merger context. The ideal data would relate to situations where one firm has seen a relative price increase and lost some sales to rivals – the diversion ratio is then calculated to be the ratio of the sales lost to the other merging party over all lost sales. However, this is not always available, and proxy methods often need to be used.

(a) In branded FMCG mergers, parties often promote their products at different times, resulting in relative price variation. Supermarket scanner data can then be used to understand how sales shift across firms in response to these relative price changes, and hence to calculate the diversion ratio. This approach was used in Reckitt Benckiser/K-Y brand.

(b) In local market mergers, it is recognised that diversion ratios are likely to vary across markets according to the local competitive conditions. However, data on how sales shift to rivals, in response to relative price changes at a local level, is not typically available on a market-by-market basis. Instead, survey techniques – asking customers questions along the lines of “If this store was not open today, where would you have bought your shopping instead?” – are commonly used. See for example Poundland/99p Stores, Ladbrokes/Coral, and Greene King/Spirit, amongst others.

(c) The CMA will generally seek to assess diversion ratios, or proxy measures of closeness of competition, in other mergers of close competitors, and the technique employed will depend on the characteristics of specific markets and data availability. In XChanging/Agencyport and GTCR/Gorkana, the CMA examined tender data to see whether the parties competed against and lost to each other on a regular basis.

As mentioned above, the CMA has been concerned where diversion ratios are “too high”. However, the threshold employed varies on a case-to-case basis, both across industries and over time within industries. For instance, looking at phase 1 cases:

(a) In Poundland/99p Stores, the CMA was concerned by a diversion ratio of 25% in either direction, or above 15% in either direction in “4 to 3” areas or below.

(b) In The Original Bowling Company/Bowlplex, the CMA was concerned by diversion ratios between 10% and 20%.

(c) In MRH/Esso, the CMA found that diversion ratios of 10%–20% were “low” or “relatively low”, while diversion ratios of 20%–30% were “quite low”, and one area with a diversion ratio of 40%–50% was not found to pose a prospect of a substantial lessening of competition, although diversions of above 50% did lead to findings of a substantial lessening of competition.

It is hard to discern a pattern in relation to the specific diversion ratio pattern that will be used in any particular case. However, where gross margins are low (as in MRH/Esso) the threshold level of the diversion ratio for concerns appears to be higher.

Following on from its decision to refer the Pure Gym/The Gym case in 2014, the CMA has continued to be interested in whether there is any loss in “potential competition” from the merger. In a local retail market context, the CMA will explore whether sites that the parties are planning to open compete with the existing sites of the other merging party, or even
where neither party is currently present but where both parties are planning to open in the same area. In the phase 1 decision in **Poundland/99p Stores**, the CMA found there to be a realistic prospect of a substantial lessening of competition in 12 areas related to pipeline stores, rather than current stores (in addition to 80 areas where there was a substantial lessening of competition on the current store portfolio).

At phase 1, the burden is typically on the parties to provide survey evidence on diversion ratios in each overlap area. At phase 2, the CMA often carries out its own surveys. However, it has recently had to consider three mergers (**Poundland/99p Stores**, **Celesio/Sainsbury’s**, and **Ladbrokes/Coral**) where the number of local overlaps has made this impractical. Instead, it has surveyed a limited number of areas, and used this evidence, sometimes together with other evidence, to predict diversion ratios in other local areas.

**Economic appraisal: credibility**

In principle, all competitors in a homogenous product market can compete on a level playing field, because they all offer an identical product. In practice, the playing field may not be level because certain competitors do not have the capacity, capability, quality standards, or experience and track record to compete credibly with the merging parties. Appraisal techniques used to assess credibility include asking customers for their views, and exploring the extent of spare capacity held by each rival. The most common data-driven technique is to gather tender data and assess the extent to which the merging parties face each other compared to rivals. This approach was employed in **Mueller/Dairy Crest, Sonoco/Weidenhammer** and **Kerry/Pork Farms**.

**Economic appraisal: vertical and conglomerate effects**

Vertical and conglomerate effects are similar from an economic perspective because both involve putting together complementary products (either because one product is an input into the other, or because both might be bought by customers). The merger concern is whether the merged firm might foreclose rivals (in the vertical context) or out-compete them with a product offer that can’t be replicated by rivals (in the conglomerate context). The CMA explores whether the merged firm will have the ability and incentive to carry out such strategies. In the vertical context, this considers whether the merged firm would find it profitable to raise upstream prices to downstream rivals, taking into consideration: a) the increased margins on retained upstream sales to downstream rivals; b) the lost margins on lost upstream sales; and c) the regained downstream margins on sales recaptured by the downstream firm (where the regained sales proportion is measured by the relevant downstream diversion ratio). This approach was employed in **BT/EE**.

**Approach to remedies**

A key feature of the CMA’s approach to phase 1 mergers has been the material increase in the number of cases which are deemed by the CMA to give rise to a substantial lessening of competition but in which the merging parties offered undertakings in lieu of a referral to phase 2. The CMA has refined the process for offering undertakings in lieu through a new remedies form, giving the parties an upfront decision that there was a substantial lessening of competition, and seeking offers of potential undertakings within five working days, and the use of expertise from the phase 2 ‘remedies unit’.

Undertakings in lieu were accepted in nine cases, with a clear continuing preference on the part of the CMA for structural rather than behavioural remedies. Structural remedies have included divestments, for example, in the **Greene King/Spirit** case where notably the
CMA was able to conclude that the merger gave rise to a realistic prospect of substantially reducing competition in only 16 local areas out of a total of 1,000 overlapping areas. In contrast, in the ongoing Ladbrokes/Coral phase 1 investigation, the CMA has announced that the parties may have to sell 350–400 betting shops to secure clearance, which would be the largest divestment in terms of number of outlets to date.

In Mueller/Dairy Crest, the CMA accepted a remedy in phase 1 which provided for the expansion of an existing supplier to serve national grocery retailers with fresh liquid milk in the geographic area of concern. The CMA noted that: “the Undertakings should be regarded as a quasi-structural remedy rather than an essentially behavioural remedy, notwithstanding that they have certain behavioural element,” despite “the CMA’s general concerns about behavioural undertakings”. However, in some cases, behavioural remedies have been accepted by the CMA. For example, in InterCity East Coast Franchise, the CMA agreed undertakings in lieu of a reference, including a price cap on fares and other commitments relating to timetables, frequency and service quality.

The CMA’s approach to undertakings in lieu is also becoming more innovative. In the phase 2 case of Reckitt Benckiser/K-Y brand, in order to remedy the competition concerns about higher prices for personal lubricants, Reckitt was required to license the K-Y brand in the UK to a competitor for eight years, allowing time for it to develop a new brand to rival the Durex range that could gain access to supermarkets and national pharmacy chains.

**Key policy developments**

The Department for Business, Innovation & Skills issued a consultation seeking views on proposed measures to refine the UK’s competition regime, following an announcement in this year’s Queens’ Speech of a Better Markets Bill, designed to boost competition and reduce red tape for businesses in the UK. ³

The consultation proposes a number of incremental changes to the existing UK merger procedure listed below, which are aimed at refining the current regime and are expected to be implemented by September 2016.

The consultation notes that the introduction of statutory time limits for phase 1 merger assessments places a significant burden on businesses to provide information prior to the initiation of a phase 2 investigation. The CMA will seek to reduce the period between notification and the start of the investigation, and improve the targeting of information requests to reduce this burden.

It is proposed to allow the CMA to impose higher fines for failures to respond to information requests or for the provision of false or misleading information. However, the CMA will also work with government to introduce guidance or legislation which will restrict the type of information the CMA can request, the frequency of requests and a requirement to ensure that it is proportionate. The CMA will also publish updated merger guidance to businesses to explain why the information is being requested.

The CMA plans to issue new guidance on IEOs, which will outline the CMA’s approach to derogations. The CMA is also considering whether to provide an objective definition of the circumstances in which the imposition of a IEO would qualify as disproportionate.

It is also proposed to introduce some refinements to the phase 2 panel appointments process, the panel members’ role and accountability.

* * *
Endnotes

1. Société Cooperative De Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants) [2015] UKSC 75.
2. Contributed by David Parker, Director, Frontier Economics.
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