

**Competition and Markets
Authority (CMA)**

**Mergers: Guidance on the
CMA's jurisdiction and
procedure**

Consultation document

July 2013

CMA2con

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Any enquiries regarding this publication should be sent to us at: BIS CMA Transition Team on behalf of the CMA, Department for Business, Innovation and Skills, 3rd Floor, 1 Victoria Street, London SW1H 0ET, or email cmaconsultation@bis.gsi.gov.uk.

This publication is also available at: www.gov.uk/cma

Scope of this consultation

Topic of this consultation

This consultation seeks views on the attached drafts of:

- Mergers: Guidance on the CMA's jurisdiction and procedure (the Draft Guidance). The BIS CMA Transition Team (the Transition Team)¹ (on behalf of the Competition and Markets Authority (CMA) and in consultation with the Office of Fair Trading (OFT) and Competition Commission (CC)) proposes to issue this Draft Guidance in relation to the reforms to the UK merger control regime introduced by the Enterprise and Regulatory Reform Act 2013 (the ERR13), which come into force on 1 April 2014, and
- certain ancillary documents that the Transition Team proposes to issue in connection with the Draft Guidance.

The Draft Guidance details the approach followed and procedure used by the CMA in exercising its merger control powers under the Enterprise Act 2002, as amended (the Act). It does not cover the policy of Ofcom, Monitor or the Secretary of State in relation to their respective responsibilities regarding the investigation of mergers in the UK.

The CMA's use of its powers in merger investigations to impose administrative penalties for failure to comply with the CMA's investigatory powers or for breach of interim measures will be covered by separate CMA guidance, a draft of which is also being consulted upon at this time: see Administrative Penalties: Statement of policy on the CMA's approach – Consultation Document (CMA4con). As such, the CMA's approach to its use of those powers in merger investigations is not discussed in detail in the Draft Guidance.

In parallel with this consultation, the Department for Business, Innovation and Skills (BIS) has published for consultation proposed secondary legislation relevant to the UK merger control regime. Although referred to in this document, the proposed secondary legislation falls outside the scope of this consultation, and specific comments on it should be submitted to BIS as part of that separate consultation.

¹ This consultation and the accompanying draft guidance have been drafted by the Transition Team, which has been appointed by the CMA Chair Designate and Chief Executive Designate, and consists of individuals from the OFT, the CC and elsewhere.

Geographical scope

The geographical dimension of this consultation is primarily the UK.

Basic information

This consultation is aimed at those who have an interest in the CMA's investigations of mergers under the Act. In particular, it may be of interest to businesses and their legal and other advisors.

How to respond

We would welcome your comments on any aspect of the guidance contained in this document. In particular, your feedback is sought on the specific questions indicated in section 3 of this document and summarised in Annexe A. Please respond to as many questions as you are able and provide supporting evidence for your views where appropriate.

You can respond to this consultation:

By email to cmaconsultation@bis.gsi.gov.uk

By post to:

The BIS CMA Transition Team on behalf of the CMA

(c/o Xinru Li and Easha Lam)

Department for Business, Innovation and Skills

3rd Floor, Orchard 2

1 Victoria Street

London

SW1H 0ET

When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Please also indicate whether you are happy for your response to be made available on the CMA's website. Further information regarding our use of data received during this consultation is provided below.

Enquiries

If have any questions relating to this consultation please contact Xinru Li or Easha Lam on the email address above or by telephone on 020 7215 2078 or 020 7215 2044.

Closing date

Responses should be received by 5pm on Friday 6 September 2013.

Next Steps

The Transition Team will consider the responses to this consultation document and make amendments to the Draft Guidance and/or ancillary documents where appropriate. The CMA Board (once established) will make the decisions on the matters being consulted on and the content of the final guidance and ancillary documents, to be published in advance of 1 April 2014.

Compliance with the Cabinet Office Consultation Principles

This consultation complies with the Cabinet Office Consultation Principles. A list of the key criteria, along with a link to the full document, can be found at Annexe C.

Consultation Period

The deadline for responses to this consultation is eight weeks. While this represents an expedited consultation period, we note that the in-depth Government consultation exercise which led to the decision to create the CMA asked a number of questions and yielded a number of valuable responses on issues related to this consultation, which have informed the proposed approach in the Draft Guidance. Furthermore, the timetable for the formation of the CMA requires that consultation on numerous proposed guidance documents be carried out within a very short period of time. We feel that, given these considerations, the eight week consultation period is an appropriate one to obtain responses from interested parties.

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mr John Conway

Department for Business, Innovation and Skills

Consultation Coordinator

1 Victoria Street

London

SW1H 0ET

Telephone John on 020 7215 6402 or email to: john.conway@bis.gsi.gov.uk

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to publish or refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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1 INTRODUCTION

Background

- 1.1 The CMA will be established under the ERRA13 as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the CC and many of the functions of the OFT will be transferred to the CMA and these bodies abolished. The CMA's primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA will have a range of statutory powers to address problems in markets:
- under the Act, the CMA will be able to investigate mergers which could potentially give rise to a substantial lessening of competition and specify measures which the merging parties must take to protect competition between them while the investigation takes place
 - the Act will also enable the CMA to conduct market studies and investigations to assess particular markets in which there are suspected competition problems, and to require market participants to take remedial action which the CMA may specify
 - the CMA will have powers to enforce a range of consumer protection legislation (either directly or through Part 8 of the Act) and to bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
 - the CMA will also be able to bring criminal proceedings against individuals who commit the cartel offence under the Act,² and
 - finally, under the Competition Act 1998 (CA98) the CMA will be able to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position.
- 1.3 The ERRA13 implements a number of enhancements to these statutory powers (compared to the powers available to the CC and OFT), in order to improve the robustness of decision-making, increase the speed and

² See section 188 of the Act.

predictability of the CMA's activities and strengthen the UK's competition regime as a whole.³ The Transition Team has produced a series of draft guidance documents to assist the business and legal communities and other interested parties in their interactions with the CMA and is consulting publicly on them.

Purpose of this consultation

- 1.4 The primary purpose of this document is to consult on the Draft Guidance on the exercise of the CMA's UK merger control.⁴ The Draft Guidance forms part of the advice and information published by the CMA under section 106 of the Act. It is designed to provide general information and advice to companies and their advisers on the procedures used by the CMA in operating the merger control regime set out in the Act. It also includes the guidance that the CMA is required to publish under section 73A(5) of the Act on its exercise of its powers to extend the period for accepting undertakings in lieu of a reference (UILs) by up to 40 working days for special reasons.
- 1.5 The consultation also invites views on three related merger control documents which the Transition Team proposes to issue alongside the final guidance: a draft remedies form for offers of UILs, a draft merger notification form, and a template initial enforcement order (see respectively paragraphs 3.13, 3.19 and 3.30 below and Annexes D, E and F).
- 1.6 Alongside this consultation, BIS has published for consultation draft statutory instruments reflecting the reforms to the mergers regime, including:
- Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014
 - Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014, and
 - Enterprise Act 2002 (Mergers) (Interim Measures: Financial Penalties) (Determination of Control and Turnover) Order 2014.

³ An overview of the changes is contained in *Towards the CMA* (CMA1), published alongside this consultation document.

⁴ The Draft Guidance describes briefly the role of the European Commission in regulating mergers under Council Regulation (EC) 139/2004 (the EU Merger Regulation) and of the Secretary of State (in public interest cases), Ofcom (for telecoms, broadcasting and media mergers) and Monitor (for NHS mergers) in relation to UK merger control. However, the Draft Guidance does not represent guidance on the use by any of those organisations of their powers in relation to merger control.

Views on those documents should be provided directly to BIS as part of its separate consultation.

- 1.7 The ERR13 introduces significant reforms to the UK's merger control regime, including the creation of the CMA as a unitary competition authority. However, these reforms are primarily procedural rather than substantive – the statutory tests for determining whether to refer a merger for a Phase 2 investigation, or whether remedies are required for any competition concerns identified following the conclusion of a Phase 2 investigation, are unchanged.
- 1.8 In seeking to create effective new processes and policies for implementing in practice the new procedures and powers introduced by the ERR13, the Transition Team has also sought to build on the past success of the OFT and CC in applying the UK merger control regime and to implement incremental improvements to their existing practice where appropriate.
- 1.9 To that end, the Transition Team:
- has adopted as its starting point for the Draft Guidance the existing text of the OFT's and CC's current (and recently published) jurisdictional and procedural guidance documents,⁵ combining them into a single document and amending them as and where required to:
 - reflect: a) the procedural changes being introduced in the light of the reforms in the ERR13; b) developments in case law and experience; and c) incremental improvements to policies and procedures which have been made by the OFT and CC since those documents were published or which are intended to capture the benefits of the CMA's unitary nature, and
 - eliminate duplication between those two existing documents and provide a single point of reference for those seeking guidance on the CMA's core merger control procedures.⁶

⁵ See, respectively, *Mergers: Jurisdictional and procedural guidance* (OFT527), available at www.of.gov.uk/shared_of/mergers_ea02/oft527.pdf, and *Merger Procedural Guidelines* (CC18) available at www.competition-commission.org.uk/assets/competitioncommission/docs/2013/publications/cc18_.pdf

⁶ For example, both the existing OFT and CC procedural guidance documents explain the qualifying criteria of a relevant merger situation under the Act. These have now been consolidated into a single chapter of the Draft Guidance (chapter 5).

The Transition Team considers that this approach ensures that the highly-regarded practices of the OFT and CC are built upon, while also serving to reduce uncertainty and transition costs for parties and for the CMA.

- does not propose to issue at this time new guidance on the CMA's substantive assessment of mergers. Rather, the existing Merger Assessment Guidance published jointly by the OFT and CC in 2010⁷ will – together with other relevant existing OFT and CC guidance documents – be put to the CMA Board (once established) for adoption.⁸ Those adopted guidance documents will however, be kept under review once the CMA is operational, in the light of its developing practice and case experience.

1.10 Annexe D of the Draft Guidance lists the existing (merger control-related) OFT and/or CC documents that it is currently proposed will be put to the CMA Board for adoption.⁹

- Q1. Do you agree with the list in Annexe D of the Draft Guidance of existing merger control-related OFT and CC guidance documents and publications proposed to be put to the CMA Board for adoption?**
- Q2. What, if any, further guidance do you think that the CMA should produce in the future in relation to its operation of the UK merger regime?**

⁷ *Merger Assessment Guideline* (OFT1254/CC2(revised)), available at www.offt.gov.uk/shared_offt/mergers/642749/OFT1254.pdf

⁸ As those pre-existing documents were published prior to the amendments to the Act made by the ERA13, they will (if and when adopted), need to be read subject to the Draft Guidance and to certain other 'global' changes resulting from the coming into force of the ERA13 (for example, reading references to the OFT and CC as referring in each case to the CMA). See further Annexe D of the Draft Guidance.

⁹ For completeness, please note that Annexe D has been drafted (in common with the remainder of the Draft Guidance) as assuming that the CMA has been established and that the existing OFT and CC documents listed have been adopted by the CMA Board. Notwithstanding this drafting, the list represents only the Transition Team's current proposal as to which documents will be put to the CMA Board for adoption. It (and any other references in the Draft Guidance to OFT/CC documents having been adopted by the CMA) are therefore provisional and subject to change.

2 LEGAL FRAMEWORK

2.1 The ERRA13 amends the Act. The principal reforms to the UK merger control regime being introduced as a result of that amendment are:

- the transfer of the OFT and CC's merger control functions under the Act to the CMA
- the introduction of statutory time limits for all parts of the merger review process, including:
 - a 40 working day time limit for all Phase 1 investigations
 - a new, time-limited, process for parties to offer, and the CMA to consider and decide whether to accept, UILs, and
 - following any Phase 2 inquiry, a 12 week period (extendable by six weeks for special reasons) for the CMA to make an order or accept undertakings to implement any final remedies it considers necessary to address its competition concerns
- a new ability for the CMA to suspend its investigation for up to three weeks at the start of Phase 2 if the parties so request and the CMA considers abandonment of the merger to be a possibility
- updated processes for notifying mergers to the CMA
- extension of the CMA's formal information gathering powers to all stages of the CMA's investigation, and an associated ability to impose financial penalties for failure to comply with such powers, and
- extended powers for the CMA to agree or impose interim measures and to impose financial penalties for breach of interim measures.

2.2 Further detail on these reforms and the practical changes to its procedures proposed to be introduced to reflect those reforms, is set out below.¹⁰

¹⁰ Further information on these reforms and the Government's policy reasons for introducing them can be found in the Government's response to the BIS consultation *Growth, competition and the competition regime* (available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf) and the Explanatory Notes to the ERRA13 (available at www.legislation.gov.uk/ukpga/2002/40/notes/content).

3 APPLICATION OF THE REFORMS IN THE DRAFT GUIDANCE

Creation of a unitary authority

- 3.1 Currently, UK merger control is enforced by both the OFT and, in cases referred for a detailed Phase 2 investigation, the CC.¹¹ The ERR13 transfers the merger control functions of those bodies to the CMA. The CMA will therefore be a unitary competition authority conducting both Phase 1 and, where relevant, Phase 2 investigations.
- 3.2 These changes are reflected principally in changes to the sections of the Draft Guidance dealing with the transition of cases from Phase 1 to Phase 2. In particular, paragraph 10.8 of the Draft Guidance has been updated to note that the Phase 2 case team may include members of the Phase 1 case team. In addition, the Draft Guidance seeks to reflect the CMA's intention to make the most efficient use of evidence at Phase 2 which has already been provided at Phase 1 (see, for example, chapter 11 of the Draft Guidance).¹²

CMA decision making

- 3.3 While the CMA will be a unitary authority, the reforms preserve the current separation between the Phase 1 and Phase 2 decision makers in merger cases, by providing that Phase 2 decisions will continue to be made by Inquiry Groups drawn from the CMA's panel of independent experts. The CMA Board is responsible for Phase 1 decisions, but may delegate that responsibility to CMA staff. In public interest cases, the ultimate decision remains with the Secretary of State following the CMA's report.
- 3.4 The Government's response to its consultation on the merger reforms concluded that the CMA would be best placed to determine its own decision making procedures at 'Phase 1' (see further *Towards the CMA (CMA1)*, published alongside this consultation document). In accordance with the high level principle that delegated 'first phase'¹³ decisions will be taken by a

¹¹ The Secretary of State also has a role in enforcing merger control in public interest cases.

¹² Parties and advisers should not, however, assume that the net volume of evidence required for a Phase 2 merger review will be any lower. The substantive tests under the Act have not changed, and accordingly Phase 2 Inquiry Groups will still require sufficient evidence to satisfy themselves on the balance of probabilities as to the substantive questions under the Act.

¹³ The specific nature of the 'first phase' (or 'Phase 1') decision differs from tool to tool. In the context of merger investigations, it is the decisions of the CMA whether to refer a case for a Phase 2 investigation and whether to accept UILs.

senior member of CMA staff, supported and challenged by a further two individuals with the appropriate level of skill and expertise, the Transition Team proposes that the CMA will retain the OFT's existing decision-making process for merger cases at Phase 1. Under that process, decisions are delegated to a senior member of OFT staff, advised by the case team and relevant specialist advisors, and supported and challenged by a senior member of the OFT mergers group and a dedicated 'devil's advocate'. This decision making structure is described principally in paragraphs 7.43 to 7.59 of the Draft Guidance.

Organisational structure

- 3.5 The Draft Guidance amends and updates the existing OFT and CC procedural guidance documents as necessary to reflect the CMA's proposed organisational structure. At the date of this consultation, the detailed organisational structure of the CMA and the specific job titles of its staff have not been finalised.¹⁴ Where the Draft Guidance refers to specific roles within the CMA, these references remain provisional pending the CMA Board's final decisions on these matters. For ease of comparison, the Draft Guidance provisionally uses, in certain instances, the equivalent role/job title currently used by the OFT or CC, as the case may be.

Introduction of statutory time limits for all parts of the merger review process

Time limits for the Phase 1 investigation

- 3.6 The ERRA13 introduces a new 40 working day statutory time limit (extendable in some circumstances) for the CMA to decide whether its duty to refer for a Phase 2 investigation applies. This replaces the OFT's current statutory deadline of 30 working days (including possible extensions) in cases where parties notify using a statutory merger notice, and its non-binding 40 working day administrative deadline in other cases.
- 3.7 The new statutory timetable commences on the first working day after the CMA has informed the parties that:
- in the case of mergers voluntarily notified to the CMA, the parties have submitted a merger notice (see further paragraph 3.19 below) satisfying the requirements of the Act, or

¹⁴ The final decision will be for the CMA Board, when it is constituted. A diagram showing in overview the currently proposed organisational structure of the CMA can be found in *Towards the CMA* (CMA1), published alongside this consultation document.

- in the case of own-initiative investigations where the parties have chosen not to notify the merger, the CMA has sufficient information to enable it to begin its investigation.

3.8 These changes to the legal framework are reflected throughout the Draft Guidance. However, given the existing administrative or statutory timetables to which the OFT works in merger cases, the Transition Team does not propose as a result of these reforms to make significant amendments to the procedures currently utilised by the OFT.

Time-limited process for the offer, assessment and acceptance of UILs

3.9 The process for offering and considering UILs will change. Previously, parties were required to offer any UILs to the OFT at or shortly after an 'issues meeting' with the case team and senior OFT staff, and before the OFT had decided whether the merger met the test for reference to Phase 2 (that is, its decision on the substantive competition issues).

3.10 Under the new process, parties will have a five working day period after receiving the CMA's reasoned decision as to whether its duty to refer applies in which to offer UILs. The CMA then has a further five working days (that is, 10 working days from providing the parties with its reasoned decision) to decide whether the UILs, or a modified version of them, are in principle acceptable to address any competition issues.¹⁵ If so, the CMA has 50 working days (extendable by 40 working days for special reasons) from notifying the parties that its duty to refer applies in which to decide whether to formally accept the proposed UILs.

3.11 These changes will give parties and the CMA greater certainty about the competition issues in a case when they are considering offering or accepting UILs, and about the timescales within remedies must be implemented.

3.12 The new UILs process, and guidance on how the CMA will engage with parties during this period, is set out in chapter 8 of the Draft Guidance. In particular, paragraphs 8.23 to 8.24 provide guidance, as required by section 73A(4) of the Act, on the special reasons for which the CMA may extend the 50 working day period for the acceptance of UILs.

¹⁵ The process is different for public interest cases, where the decision on whether to refer (including the acceptability of any UILs) is made by the Secretary of State.

3.13 The Transition Team proposes that the CMA will adopt a *Remedies form for offers of undertakings in lieu of reference* (the Remedies Form), which parties will use if they wish to offer UILs. This Remedies Form is intended to give clarity to parties about the information that will be required to constitute a clear offer of UILs capable of satisfying the requirements of the Act, and to the CMA in seeking to decide within the statutory deadline whether the proposed UILs may in principle be acceptable.¹⁶ A draft of the Remedies Form is included at Annexe D.

Phase 2 remedies implementation time limits

3.14 If the CMA identifies competition issues at Phase 2, it has 12 weeks (extendable by six weeks if there are special reasons) from publication of its final report in which to accept undertakings or make an order implementing its remedies. Again, these time limits are intended to give merging and other interested parties greater certainty about the timetables for merger review, and to ensure that any necessary remedies can be implemented promptly so as to avoid prolonging any impact on competition.

3.15 Paragraphs 14.3 to 14.8 of the Draft Guidance explain these new time limits.

Q3. Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form?

Q4. Do you consider the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs to be clear and understandable?

Q5. Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?

Suspension of the investigation following a reference

3.16 In anticipated mergers, the CMA will be able to suspend its investigation for up to three weeks at the beginning of a Phase 2 investigation if merging parties request this and the CMA considers that there is a possibility that the merger will be abandoned. The intention is to prevent unnecessary or wasted work by the CMA and information requests being issued to merging

¹⁶ The CMA would be required to publicly consult on the provisionally agreed UILs before it is able to formally accept them.

parties and third parties. This new power is described in paragraph 10.11 to 10.12 of the Draft Guidance.

Updated process for notifying mergers to the CMA

- 3.17 The reforms introduce a new 'single track' process for notifying mergers to the CMA. Parties wishing to voluntarily notify mergers to the CMA will now do so using a Merger Notice.
- 3.18 At present, the majority of merger notifications to the OFT are by way of informal submission (which would proceed on a 40 working day administrative timetable), with statutory merger notices tending to be used in cases where pressing timetable issues require the decision to be taken more quickly (within the statutory timetable of 20 working days (extendable by 10 working days)), and which in many cases did not involve significant competition issues.¹⁷ The new single track notification process will mean that all cases will proceed on the same 40 working day statutory timetable.
- 3.19 The Draft Guidance includes a number of modifications to reflect the new single track notification process. These include:
- updating the merger notification form (the Merger Notice)¹⁸ so as to be suitable for use in all mergers voluntarily notified to the CMA.¹⁹ The Transition Team's proposed draft Merger Notice is included in Annexe E to this consultation. Paragraphs 6.50 to 6.59 of the Draft Guidance reflect the new process for notification,²⁰ and
 - updating the section on pre-notification discussions (see paragraphs 6.40 to 6.49 of the Draft Guidance) to reflect the benefits to parties of engaging in such discussions in order to, for example:

¹⁷ At present, only approximately 5 -10% of mergers reviewed by the OFT are notified by way of a statutory merger notice.

¹⁸ This form is produced pursuant to the obligation on the CMA under section 96(5) of the Act to publish the prescribed form and information for notifications made under section 96 of the Act.

¹⁹ Given that the OFT's statutory merger notice is currently used in a minority of cases, it requires updating in order to be suitable for the full range of cases that could be notified to the CMA.

²⁰ Further provisions on the pre-notification of mergers (for example regarding the persons authorised to submit a merger notice, and regarding the withdrawal or rejection of merger notices) are included in the Enterprise Act 2002 (Merger Prenotification) Regulations 2003 (SI 2003/1369). Consequential amendments will be made to these Regulations to reflect the updated procedures for notifying mergers, but their substantive application will not be altered.

- ensure their notification form is satisfactory and complete, and
- for mergers which could give rise to competition concerns, allow the CMA and the parties to discuss any specific categories of (additional) evidence that could enable the CMA to conclude that it is able to clear the merger at Phase 1.

3.20 The draft Merger Notice at Annexe E has been drafted with a view to providing parties with clear guidance as to the prescribed information that the CMA will require for the purposes of a Merger Notice, while providing appropriate flexibility as to the specific nature and volume of information that may be provided in a given case in response to a particular question. The intention is to ensure that the specific information requested and submitted is that most relevant and necessary for the CMA to undertake its analysis of the competitive effects of the case at hand. In its design of the draft Merger Notice, the Transition Team has, in particular, been conscious of the need to ensure that use of a prescribed form of Merger Notice for all cases does not impose a disproportionate regulatory burden on merger parties in specific cases (in particular small and medium sized enterprises (SMEs)). To this end, the Transition Team proposes that the CMA will, in appropriate circumstances and following any necessary discussion with notifying parties, grant parties a derogation from providing information in relation to a specific question or group of questions in the Merger Notice.

3.21 As a result of the reforms in notification procedures, consequential amendments have also been made to harmonise the time at which a merger fee becomes payable. At present, merger fees are payable to the OFT upon submission of a statutory merger notice, or in non-merger notice cases, upon publication of the decision whether or not to refer the case. It is proposed that under the new 'single track' notification procedure, the fee will be payable upon such publication in all cases.²¹ The level of fees will not change at this point, but this will be kept under review by the CMA and BIS.

Q6. Is the draft Merger Notice at Annexe E clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?

²¹ The Enterprise Act 2002 (Merger Fees and Determination of Turnover) (Amendment) Order 2014 (a draft of which is being consulted upon at the same time as this consultation) will amend the existing 2003 order to bring that change into effect.

- | |
|--|
| <p>Q7. Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?</p> <p>Q8. Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?</p> |
|--|

Introduction of additional formal information gathering powers

- 3.22 The ERRA13 provides for the CMA to have formal information gathering powers at all stages of the merger control investigation, from before the Phase 1 statutory timetable starts, to the implementation and monitoring of remedies at the end of a Phase 2 investigation. Previously, these powers were available to the CC during the course of its investigation, but have now been extended to cover the entire period of the CMA's involvement in a case.
- 3.23 These powers have been extended in order to ensure that the CMA can obtain the evidence it requires in order to reach its decisions within the new statutory deadlines. They are accompanied by powers to suspend the statutory timetables ('stop the clock') if parties do not comply with such notices. They can also be enforced by penalties if a person fails without reasonable excuse to comply with a notice.
- 3.24 The new information gathering powers, and the potential consequences for parties or other persons should they fail to comply with a formal information request issued pursuant to those powers, are reflected in paragraphs 7.2 to 7.5 and 7.17 to 7.20 of the Draft Guidance.
- 3.25 The CMA's use of its power to impose penalties on persons failing without reasonable excuse to comply with its information gathering powers will be covered by separate guidance, a draft of which is being consulted upon consultation in parallel with this consultation.²²

²² See Administrative Penalties: Statement of policy on the CMA's approach – Consultation Document (CMA4con)

Strengthening the voluntary notification regime by giving the CMA additional powers to agree or impose interim measures

- 3.26 The CMA (or, in public interest cases, the Secretary of State) will have strengthened powers to adopt interim measures²³ requiring parties to cease or unwind ‘pre-emptive action’ (that is, action that could prejudice any reference or the CMA’s ability to remedy any competition issues following a Phase 2 decision).²⁴
- 3.27 The CMA will now be able to issue ‘initial enforcement orders’:
- to prevent pre-emptive action and to unwind pre-emptive action that has already occurred (this clarifies the OFT’s and CC’s existing powers to unwind pre-emptive action)
 - in respect of both anticipated and completed mergers (currently, the OFT cannot impose or accept interim measures in anticipated mergers),²⁵ and
 - at an earlier stage; the CMA is no longer required to have reasonable grounds to suspect that it is or may be the case that the turnover or share or supply jurisdictional tests have been met before making an order.
- 3.28 Any initial orders made by the CMA at Phase 1 will automatically remain in force for the duration of any Phase 2 investigation, unless amended, revoked or replaced by new interim undertakings or interim orders at Phase 2 (currently, interim measures put in place by the OFT, unless adopted by the CC, expire following a reference to Phase 2). The CMA can grant derogations to, or supplement, such interim measures at any time during its investigation.
- 3.29 The ERRA13 amendments are intended to strengthen the voluntary merger regime by ensuring that the CMA can pause integration of companies involved in a merger immediately and then consider with the parties whether

²³ These include initial enforcement orders under section 72 of the Act and, following a reference to Phase 2, interim undertakings under section 80 or interim orders under section 81 of the Act.

²⁴ This may include, for example, integration of the merging business, the exchange of competitively sensitive information between them, or the deterioration of the target business.

²⁵ The OFT’s power to accept initial undertakings at Phase 1 has been removed as a result of the revocation of section 71 of the Act.

any further integration should be allowed through derogations, as well as to unwind pre-emptive action that might be difficult to unwind, if necessary, at a later stage.

- 3.30 These reforms are reflected in paragraphs 7.28 to 7.42, 11.8 to 11.12, and Annexe C of the Draft Guidance. Also described therein is the proposal that the CMA adopt a template order, which will be used as the starting point for any order imposed, subject to any modification the CMA considers necessary in appropriate cases. A draft of that template order is provided at Annexe F.
- 3.31 The CMA will have a new power to impose financial penalties on parties breaching interim measures of up to 5% of the aggregate turnover of the enterprises owned or controlled by that person (or such lower limit as the Secretary of State may, by order, determine). Separate draft guidance on the CMA's powers to impose penalties is being published for consultation in parallel with this consultation.²⁶ Accordingly, this consultation does not discuss such powers further.

<p>Q9 Do you have any comments on the draft template order, or on the guidance on the CMA's use of interim measures included in the Draft Guidance?</p>
--

Transitional arrangements

- 3.32 The proposed transitional arrangements for the commencement of provisions within the ERA13 on 1 April 2014 (when the CMA will take on its full functions) are set out in Annexe E of the Draft Guidance. These will be of particular relevance to companies involved in ongoing merger investigations at that date.
- 3.33 Whilst the policy of these transitional arrangements forms part of the Transition Team's CMA guidance consultations, the Secretary of State is responsible for incorporating the transitional arrangements in law where necessary. The legislative drafting will reflect the proposed transitional arrangements policy as set out in Annexe E of the Draft Guidance. As a general principle, it is proposed that, where practicable and appropriate, all CMA powers and/or procedures will come into force as of 1 April 2014 and will be applied prospectively.

²⁶ See Administrative Penalties: Statement of policy on the CMA's approach – Consultation Document (CMA4con).

3.34 The draft amending orders being published for consultation by BIS in parallel with this consultation include separate transitional arrangements relevant to the provisions of those orders, and the statutory instruments which they amend.

Q10. Do you agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E of the Draft Guidance?

ANNEXES

A. SUMMARY OF QUESTIONS

- Q1. Do you agree with the list in Annexe D of the Draft Guidance of existing OFT and CC merger control-related guidance documents and publications proposed to be put to the CMA Board for adoption?**
- Q2. What, if any, further guidance do you think that the CMA should produce in the future in relation to its operation of the UK merger regime?**
- Q3. Is the draft Remedies Form clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested from parties in that form?**
- Q4. Do you consider the guidance on the circumstances in which the CMA may extend the period for acceptance of UILs to be clear and understandable?**
- Q5. Do you have any further comments on the explanation in the Draft Guidance of the time limits and processes described above?**
- Q6. Is the template Merger Notice clear and comprehensible? Do you have any comments regarding the categories, or scope, of information requested in that Notice?**
- Q7. Do you agree with the proposed harmonisation for all merger cases of the point of time at which the merger fee is payable?**
- Q8. Do you have any further comments on the explanation in the Draft Guidance of the updated process for notifying mergers?**
- Q9. Do you have any comments on the draft template order, or on the guidance on the CMA's use of interim measures included in the Draft Guidance?**
- Q10. Do you agree with the proposed transitional arrangements for merger cases ongoing as at 1 April 2014, as set out in Annexe E of the Draft Guidance?**

B. CONSULTATION CRITERIA

[The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focussing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before
- departments will need to give more thought to how they engage with and consult with those who are affected
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy, and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

The full Cabinet Office Consultation Principles can be found on the Cabinet Office website at: www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

C. THE DRAFT GUIDANCE: *MERGERS: GUIDANCE ON THE CMA'S JURISDICTION AND PROCEDURE*

Competition and Markets Authority (CMA)

Mergers

Guidance on the CMA's jurisdiction and procedure

[Date] 2014

CMA2con

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Any enquiries regarding this publication should be [directed to the CMA Mergers Group – contact details are available on the CMA's website].

This publication is also available at: www.gov.uk/cma.

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DRAFT

1 PREFACE

- 1.1 This guidance forms part of the advice and information published by the Competition and Markets Authority (CMA) under section 106 of the Enterprise Act 2002, as amended (the Act). It is designed to provide general information and advice to companies and their advisers on the procedures used by the CMA in operating the merger control regime set out in the Act.¹ It also includes guidance on when the CMA will have jurisdiction to review mergers under the Act.
- 1.2 This document is primarily concerned with those mergers involving companies active in the United Kingdom (UK) that are covered by the provisions of the Act. However, it also briefly addresses those mergers that fall to the European Commission (the Commission) under the European Union Merger Regulation (the EU Merger Regulation²), and the relationship between domestic and European merger control systems. It explains the roles of the CMA, the Secretary of State, and sectoral regulators (the Regulators).³
- 1.3 This guidance should be read alongside the CMA publications Administrative Penalties: Statement of policy on the CMA's approach (CMA4) [*currently in draft and being consulted on*] and Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) [*currently in draft and being consulted on*], and the documents listed in Annexe D, which were first published by the Office of Fair Trading (OFT) and Competition Commission (CC), and have been adopted by the CMA.⁴ It supersedes the OFT's *Mergers: Jurisdictional and Procedural Guidance* (OFT527), the CC's *Merger Procedural Guidelines* (CC18) and Appendix A to the CC's *Merger remedies* (CC8).
- 1.4 This guidance sets out the CMA's intended practice as from 1 April 2014. It reflects the views of the CMA at that date and may be revised from time to time to reflect changes in best practice, legislation and the results of

¹ This guidance incorporates the CMA's guidance on the exercise of its power under section 73A(4) of the Act to extend for special reasons the period during which it must decide whether to accept undertakings in lieu of reference, which the CMA is required to publish by section 73A(5) of the Act (see chapter 8 below).

² Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L24/1.

³ At the date of publication of this guidance the Regulators are the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), the Northern Ireland Authority for Utility Regulation (URegNI), the Office of Rail Regulation (ORR), the Civil Aviation Authority (CAA) and Monitor.

⁴ As the documents in Annexe D were published prior to the amendments introduced to the Act by the Enterprise and Regulatory Reform Act 2013 (ERRA13), they should be read subject to this guidance and to the notes in Annexe D.

experience, legal judgments and research.⁵ It may in due course be supplemented, revised or replaced. The CMA's website will always display the latest version of the guidance. Where there is any difference in emphasis or detail between this guidance and other guidance produced or adopted by the CMA, the most recently published guidance takes precedence. While this guidance is based upon the equivalent procedural guidance previously published by the CMA's predecessors, the OFT and the CC, and cites previous OFT and CC decisions to illustrate how it will apply the provisions of the Act, the CMA is not bound to follow the approach taken by the OFT or CC in merger investigations under the Act prior to the coming into force of the ERRA13.

- 1.5 This guidance is not intended to be comprehensive. It cannot, therefore, be seen as a substitute for the Act and the regulations and orders made under the Act, the ERRA13 or the Competition Act 1998, or for the EU Merger Regulation and other regulations and guidance issued by the Commission, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice.
- 1.6 Furthermore, although the CMA will have regard to this guidance in handling mergers under the Act, the CMA will apply this guidance flexibly and may depart from the approach described in the guidance where there is an appropriate and reasonable justification for doing so.
- 1.7 In addition, the UK merger control regime provides that in cases referred for an in-depth 'Phase 2' investigation the final decision-making authority is an independent group of experts selected from a Panel appointed by the Secretary of State (the Inquiry Group) or, in public interest cases, the Secretary of State. Where this guidance is expressed to apply to the CMA's policy when making decisions whether to refer a merger for an in-depth Phase 2 investigation, this does not bind the independent Phase 2 Inquiry Group.

⁵ At the date of publication, the Commission was consulting on possible changes to the EU Merger Regulation relating to the types of merger falling within the Commission's jurisdiction, and the process for referring cases between the Commission and national competition authorities. If implemented, those changes may affect in particular the guidance provided in Chapters 4 and 18 below.

2 INTRODUCTION

Scope of the guidance

- 2.1 This guidance discusses in detail the criteria that the CMA applies to determine whether it has jurisdiction under the Act (chapter 4) and the policies and procedures that the CMA will use in discharging its functions under the Act (chapter 5 onwards).
- 2.2 This guidance does not address in detail the substantive 'substantial lessening of competition' test against which the CMA assesses mergers. Detailed information on the application of the substantive test for mergers is provided in the publications *Merger Assessment Guidelines* (OFT1254/CC2), *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference* (OFT1122), and *Merger remedies* (CC8), adopted by the CMA.

Who does what?

- 2.3 The Act assigns distinct roles in relation to merger control to the CMA, the Secretary of State and the Regulators. How these roles interrelate is summarised in the following paragraphs. Background information on the interrelationship with the Commission is also provided.

The CMA

- 2.4 The ERA13 established the CMA as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and many of the functions of the Office of Fair Trading (OFT), including the CC's and OFT's merger control functions, were transferred to the CMA and these bodies abolished. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.
- 2.5 Under the Act, the CMA has a function to obtain and review information relating to merger situations, and a duty to refer for an in-depth 'Phase 2' investigation any relevant merger situation where it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in a UK market. Following a reference for a Phase 2 investigation, the CMA conducts a more detailed analysis to determine whether: (i) there is a relevant merger situation falling within the UK merger control regime, (ii) that relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition, and (iii) it should take action to remedy any substantial lessening of competition identified. At Phase 2, those decisions are taken by an Inquiry Group of at

least three people, selected for each case from the independent experts appointed by the Secretary of State to the CMA's panel.⁶

- 2.6 The CMA must bring to the attention of the Secretary of State any merger it is investigating at Phase 1, which it believes raises a material public interest consideration. The CMA must advise the Secretary of State on any mergers which might fall within the scope of the public interest or the special public interest provisions of the Act where the Secretary of State has served an intervention notice in that case (see chapter 5).
- 2.7 In anticipated or completed mergers, the CMA can, either on its own account, or, in public interest cases where so requested by the Secretary of State, negotiate undertakings in lieu of a reference for a Phase 2 investigation (UILs) (see chapter 8).
- 2.8 If asked to do so, the CMA may also (in appropriate cases, where certain conditions are met) provide informal advice to the parties involved in contemplated mergers (see chapter 5).
- 2.9 The CMA employs administrative, legal, economics and accounting staff to perform these functions and duties. The activities of the CMA in relation to mergers are coordinated by its Mergers Group (the MG), part of the CMA's Markets and Mergers Directorate.
- 2.10 The CMA may (and in some cases is required to) also contact other governmental departments, the Regulators, industry associations and consumer bodies for their views on merger cases where appropriate. The Regulators may carry out their own public consultation before providing comments to the CMA.

The Secretary of State

- 2.11 The Secretary of State has a role in certain public interest cases (see chapter 16). The Secretary of State is able to modify certain provisions of the Act by secondary legislation, for example those provisions relating to jurisdictional thresholds, and to make secondary legislation regarding matters such as the level of merger fees.

The European Commission

- 2.12 Under the EU Merger Regulation, the Commission has jurisdiction over those mergers that have an 'EU dimension' (calculated by reference to the turnover

⁶ Where the Secretary of State has referred a merger for a Phase 2 investigation after issuing an intervention notice, the Phase 2 Inquiry Group considers different statutory questions and the Secretary of State has a role in the final decision. See chapter 16 for further information.

of the merging undertakings). These proposed mergers have to be notified to the Commission. In addition, the Commission may, if the parties so request prior to notification, obtain jurisdiction to review mergers that do not have an EU dimension but that are capable of being reviewed in three or more Member States. The Commission may also obtain jurisdiction where one or more Member States request that the Commission examine a transaction that does not have an EU dimension. In any of these three situations, whenever the Commission has jurisdiction, national merger law does not – with very limited exceptions (see chapter 18) – apply to the merger.

- 2.13 Where a transaction does have an EU dimension, and is therefore required to be notified to the Commission, but has its principal competitive effect in the UK, it may be referred back, in whole or in part, for investigation by the CMA. This may occur through a pre-notification request by the parties or by the CMA itself seeking a reference back after the merger has been notified to the Commission.
- 2.14 As a result of this flexibility in the allocation of jurisdiction between the Commission and the CMA, the CMA would encourage companies to keep it informed of an intention to notify a merger to the Commission where there are potential competition concerns that may arise in the UK.
- 2.15 The UK government may take certain steps in respect of mergers notified under the EU Merger Regulation to the Commission that affect national security, and other legitimate non-competition interests, including asking the CMA to advise under the Act on any action needed to protect such legitimate interests in mergers that are otherwise being examined by the Commission.

The Regulators

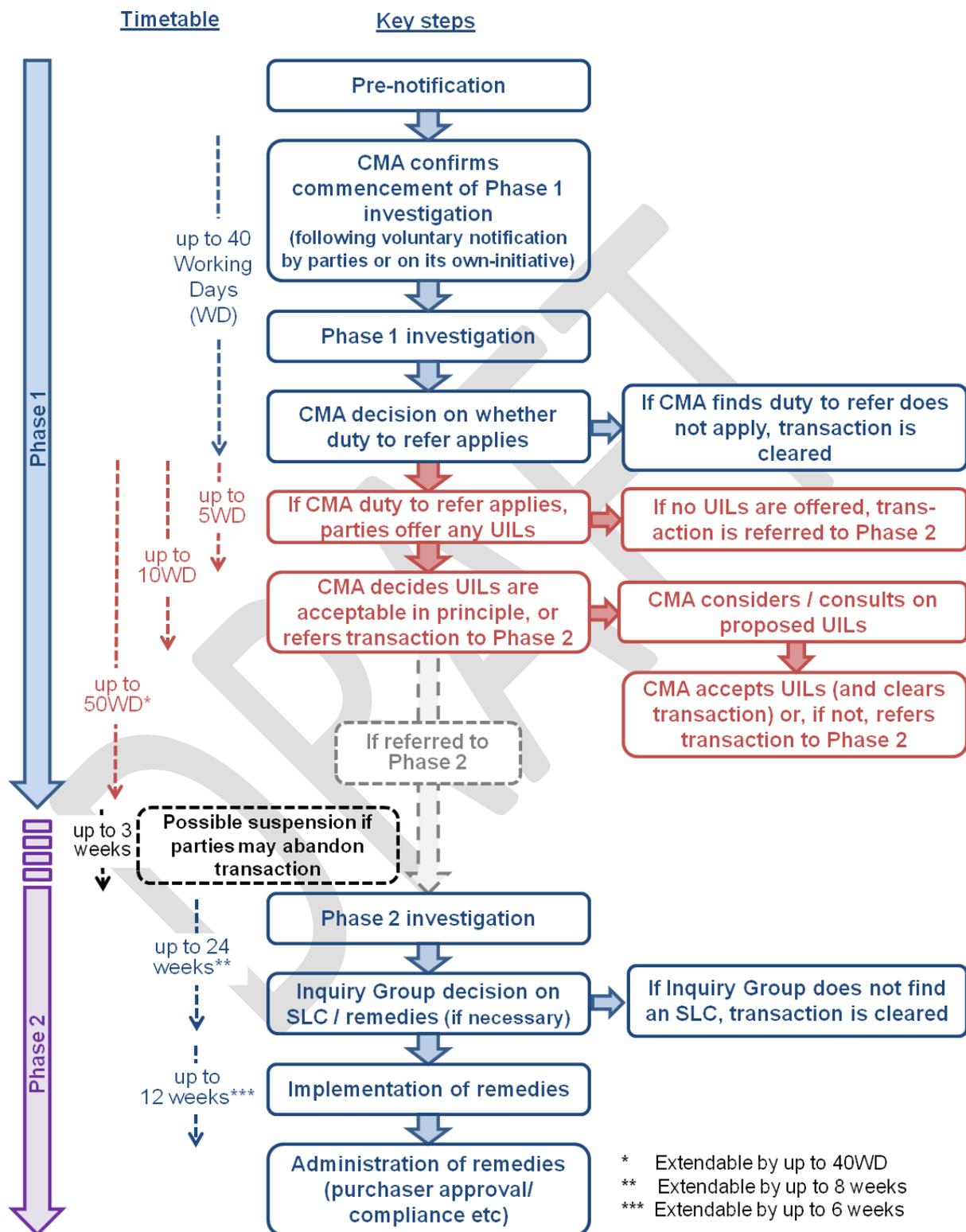
- 2.16 The CMA routinely consults the Regulators about any mergers in which they are likely to have industry-specific knowledge. In addition, Ofcom and Monitor have statutory roles in the assessment of, respectively, certain media mergers and mergers involving NHS foundation trusts. See paragraphs 7.13 to 7.16 and chapter 17.

Overview of the CMA's merger investigation process

- 2.17 The diagram below provides a high-level summary of the principal stages in Phase 1 and Phase 2 merger investigations undertaken by the CMA under the

Act, from initial contact with the CMA through to, in appropriate cases, the outcome of a full, two-phase investigation.⁷

Figure: CMA merger investigations – principal stages



⁷ This diagram provides a summary only: it does not show, for example, processes that are relevant only in certain limited cases (for example public interest cases, local media mergers or NHS mergers, where the Secretary of State, Ofcom and Monitor respectively have a role).

The structure of this guidance

2.18 This guidance seeks to follow broadly the chronology of the UK merger process shown in the diagram above. To this end, it is structured as follows:

- **chapters 3 and 4** set out the legal framework for the UK merger control regime and provide guidance on the relevant merger situation which the CMA has jurisdiction to review
- **chapters 5 to 9** provide guidance on the Phase 1 process, from initial contact with the CMA, and covers the notification (and 'calling in') of mergers.
- the Phase 2 process is detailed in **chapters 10 to 15**, explaining the further information gathering and assessment that the CMA will undertake as part of this more in-depth examination of the merger, its remedial powers and the role of CMA panel members in the investigation and decision making process. These chapters also explain the process followed in cancelling an investigation, and
- finally, **chapters 16 to 20** provide more general information on the different process applicable to public interest mergers, the interaction of the UK merger control regime with other processes (such as the City Code on Takeovers and Mergers and European Union merger control law) and the payment of merger fees to the CMA following its Phase 1 investigation.

Further information

2.19 Further information can be obtained from the MG (contact details are available on the CMA's website and at Annexe F).

3 THE LEGAL FRAMEWORK

The statutory questions

- 3.1 The Act imposes a duty on the CMA to refer completed and anticipated mergers for an in-depth Phase 2 investigation if it believes that it is or may be the case that:
- a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and
 - the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets for goods or services in the UK.^{8,9}
- 3.2 The CMA may, however, decide not to make a reference for a Phase 2 investigation if it believes that:
- the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference
 - any relevant customer benefits in relation to the creation of the relevant merger situation outweigh the substantial lessening of competition concerned and any adverse effects of that substantial lessening of competition, or
 - in the case of an anticipated merger, the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference.¹⁰
- 3.3 Where the CMA finds that it is under a duty to refer a merger for a Phase 2 investigation, it may under section 73 of the Act accept UILs to remedy, mitigate or prevent the substantial lessening of competition concerned or any adverse effect of it (see chapter 8).
- 3.4 Under section 22(3) of the Act, the CMA cannot refer a merger if:
- the Secretary of State has issued a public interest intervention notice concerning the merger and that notice remains in force

⁸ Crown dependencies (Jersey, Guernsey and the Isle of Man) are not part of the United Kingdom and may have separate merger control laws applicable in their respective jurisdictions (for example Jersey has a specific merger control regime: see the Jersey Competition Regulatory Authority, which forms part of the Channel Islands Competition and Regulatory Authorities, at www.cicra.gg).

⁹ Sections 22(1) and 33(1) of the Act.

¹⁰ Sections 22(2) and 33(2) of the Act.

- the Commission is considering a request for the merger to be referred to the Commission for review, or
- in the case of completed mergers, the relevant merger situation concerned is being, or has been, dealt with in connection with a reference made of the anticipated merger.¹¹

3.5 Following a reference for a Phase 2 investigation, the Inquiry Group must decide:

- whether a relevant merger situation has been or will be created, and
- if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services (where both limbs are satisfied, this is referred to as an 'anti-competitive outcome').¹²

If the Inquiry Group finds that there is an anti-competitive outcome it must decide:

- whether action should be taken by it, or by others, to remedy, mitigate or prevent the substantial lessening of competition concerned or any adverse effect that has resulted from, or may be expected to result from, that substantial lessening of competition, and
- if action is to be taken, what action should be taken and what is to be remedied, mitigated or prevented.

3.6 While most mergers that take place in the UK will not raise competition issues, the merger control process is designed to allow the CMA to identify those where such issues may arise, so that they may be properly investigated and, where necessary resolved through appropriate remedies.

3.7 At Phase 1, the CMA's test for reference (its 'duty to refer') will be met if the CMA has a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that the merger will lessen competition substantially. The statutory context of the Act means that, in those Phase 1 cases where there is genuine uncertainty as to whether the duty to refer arises, this question is one for resolution by the Inquiry Group on the basis of a detailed Phase 2 investigation. At Phase 2, the Inquiry Group is then required to base its decisions on the balance of probabilities. Further guidance on the application of these tests may be found in *Merger Assessment Guidelines* (OFT1254/CC2), and *Mergers: Exceptions to the duty to refer and*

¹¹ This is not an exhaustive list – see sections 22(3) and 33(3) of the Act.

¹² Section 35(2) of the Act.

undertakings in lieu of reference (OFT1122), and in the CMA's (and its predecessors') published decisions on the CMA's website.

Public interest interventions

3.8 The Act permits intervention by the Secretary of State in exceptional cases where public interest issues arise.¹³ In such cases, the Secretary of State may take public interest factors into account in deciding whether to make a reference to Phase 2, accept UILs, or impose remedies following a Phase 2 investigation. The public interest considerations that the Secretary of State may take into account are those relating to:

- national and public security
- newspaper and other media mergers, and
- the stability of the UK financial system.¹⁴

3.9 The Secretary of State has the power to add further public interest considerations by statutory instrument.¹⁵

3.10 The Secretary of State is also able to intervene in special public interest cases where the standard jurisdictional thresholds relating to share of supply and turnover are not satisfied. At the time of writing, these cases comprise instances where one of the enterprises concerned is a relevant government contractor (as defined) in defence mergers, or where the merger involves certain newspaper or broadcasting companies. These are known as special merger situations and are considered under the special public interest regime of the Act. There is no competition assessment in such cases. See Chapter 16 for more information on public interest mergers.

The EU Merger Regulation

3.11 As a general rule, mergers that fall under the scope of the EU Merger Regulation are excluded from review under the Act. Further information on the interaction of EU merger control laws and the Act is provided in chapter 18.

¹³ See section 42 of the Act.

¹⁴ Section 58 of the Act.

¹⁵ Sections 58(3) and 58(4) of the Act.

4 WHAT IS A RELEVANT MERGER SITUATION?

4.1 As explained above and detailed further below, the question of whether there is a 'relevant merger situation' under the Act or arrangements are in progress or contemplation that will give rise to such a relevant merger situation is relevant at both Phase 1 and Phase 2.¹⁶

4.2 The Act's definition of a 'relevant merger situation' covers several different kinds of transaction and arrangement. A company that buys or intends to buy a majority shareholding or a significant minority shareholding in another company is the most obvious example, but other arrangements such as the transfer or pooling of assets or the creation of a joint venture may also give rise to relevant merger situations. The Act's provisions apply both to mergers that have already taken place (subject to time limits) and to those that are proposed or in contemplation.

4.3 A merger must meet all three of the following criteria to constitute a relevant merger situation for the purposes of the Act:^{17, 18}

- two or more enterprises (broadly speaking, business activities of any kind)¹⁹ must cease to be distinct, or
- there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct,

and either:

- the UK turnover associated with the enterprise which is being acquired exceeds £70 million (known as 'the turnover test'),²⁰ or
- the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it.

¹⁶ See paragraph 2.5 above in relation to the standard of proof required for these decisions at Phase 1 and Phase 2.

¹⁷ It may, in certain limited circumstances, be appropriate to treat a single commercial transaction as giving rise to more than one relevant merger situation. See for example the Monopolies & Mergers Commission's Bass PLC/Carlsberg A/S and Carlsberg-Tetley PLC inquiry (1997) (where the transaction had different stages with different levels of control arising at different points), and the CC's Thomas Cook Group plc/Co-operative Group Limited/Midlands Co-operative Society Limited inquiry (2011) (where parent companies to a newly formed joint venture retained related activities outside of the joint venture).

¹⁸ Section 23 of the Act.

¹⁹ See paragraphs 4.6 to 4.11 below.

²⁰ See further paragraphs 4.47 to 4.52 below.

The merger must also result in an increment to the share of supply or acquisition. (This test is hereafter referred to as 'the share of supply test')²¹

and either

- the merger must not yet have taken place, or
- it must have taken place not more than four months before the day the reference is made, unless the merger took place without having been made public and without the CMA being informed of it (in which case the four month period starts from the earlier of the time the merger was made public or the time the CMA was told about it).²² The four month deadline may be extended in certain circumstances.²³

4.4 In the context of mergers that have not yet completed, at Phase 1 the CMA will generally consider that 'arrangements are in progress or in contemplation' for the purposes of section 33 of the Act if a public announcement has been made by the parties concerned.²⁴

Enterprises ceasing to be distinct

4.5 Two enterprises will 'cease to be distinct' if they are brought under common ownership or control.²⁵

Enterprises

4.6 The term 'enterprise' is defined in section 129 of the Act as the activities, or part of the activities, of a business. This does not mean that the enterprise in question need be a separate legal entity: it simply means that the activities in question could be carried on for gain or reward. However, there is no requirement that the transferred activities generate a profit or dividend for

²¹ See further paragraphs 4.53 to 4.62 below.

²² In this context, the date of the merger refers to the date when the enterprises cease to be distinct (see section 24(1) of the Act).

²³ See for example sections 25, 42 and 122 of the Act.

²⁴ In the case of a public bid, this will generally mean announcement of a possible offer or of a firm intention to make an offer.

²⁵ Section 26 of the Act. A joint venture may qualify as a relevant merger situation in the UK in circumstances where it does not qualify as a concentration under the EU Merger Regulation given the wide definition of an enterprise in section 129 of the Act compared to that of a full function joint venture in Article 3 of the EU Merger Regulation. In the case of a 'start-up' joint venture, the question under the Act will be whether the activities transferred to the joint venture by one or more parents (or acquired from a third party) are sufficient to constitute an enterprise.

shareholders: indeed, the transferred activities may be loss making or conducted on a not-for-profit basis.²⁶

4.7 In making a judgement as to whether or not the activities of a business, or part of a business, constitute an enterprise under the Act, the CMA will have regard to the substance of the arrangement under consideration, rather than merely its legal form.²⁷ As a result, it may not be the case that one single factor will prove determinative in reaching a conclusion. Rather, the CMA will make an assessment based on the totality of all relevant considerations.

4.8 An 'enterprise' may comprise any number of components, most commonly including the assets and records needed to carry on the business and the employees working in the business, together with the benefit of existing contracts and/or goodwill. In some cases, the transfer of physical assets alone may be sufficient to constitute an enterprise: for example, where the facilities or site transferred enables a particular business activity to be continued. Intangible assets such as intellectual property rights are unlikely, on their own, to constitute an 'enterprise' unless it is possible to identify turnover directly related to the transferred intangible assets.²⁸ The basis on which the CMA decides whether the business or assets constitute an 'enterprise' may vary from case to case, depending on, for example, the industry in question. However, in making its assessment the CMA will have regard to the following specific considerations.

- The transfer of 'customer records' is likely to be important in assessing whether an enterprise has been transferred.
- The application of the TUPE regulations²⁹ would be regarded as a strong factor in favour of a finding that the business transferred constitutes an enterprise.³⁰

²⁶ See OFT Decision: Completed merger of Seniorlink Eldercare and Aid Call resulting from the completed merger between Help The Aged and Age Concern England (21 July 2009). NHS Foundation Trusts may also constitute enterprises for this purpose - see the OFT publication *The OFT's role in reviewing NHS mergers: Frequently Asked Questions*.

²⁷ For example, the fact that there was no direct sale agreement between the existing cinema operator and the new cinema operator did not mean that enterprises did not cease to be distinct for the purposes of the Act in the OFT case: Anticipated acquisition by Cineworld Group plc, through its subsidiary Cine-UK Limited, of the Cinema Business operating at the Hollywood Green Leisure Park, Wood Green (17 March 2008).

²⁸ See the CC's Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel 4 Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecoms Limited and Arqiva Limited – Project Canvas inquiry (2010) and OFT Decision: Completed supplier agreement between Guestlogix Inc and Panasonic Avionics in respect of a commercial arrangement to provide services in the development of onboard point of sale payment facility integrated into in-flight entertainment systems (21 December 2012).

²⁹ The Transfer of Undertakings (Protection of Employment) Regulations 2006.

- The CMA would normally (although not inevitably) expect a transfer of an enterprise to be accompanied by some consideration for the goodwill obtained by the purchaser. The presence of a price premium being paid over the value of the land and assets being transferred would be indicative of goodwill being transferred.

4.9 Outsourcing arrangements involving ongoing supply arrangements will not generally result in enterprises ceasing to be distinct, but may do so where, for example, they involve the permanent (or long-term) transfer of assets, rights and/or employees to the outsourcing service supplier and where those may be used to supply services other than to the original owner/employer. The CMA will assess whether, overall, the assets, rights and employees transferred to the outsourcing service supplier are such as to constitute an enterprise under the principles set out above.³¹

4.10 The fact that a target business may no longer be actively trading does not in itself prevent it from being an enterprise for the purposes of the Act. In such cases, while the relevant criteria may vary according to the particular circumstances of a case, the CMA will consider, for example:

- the period of time elapsed since the business was last trading
- the extent and cost of the actions that would be required in order to reactivate the business as a trading entity³²
- the extent to which customers would regard the acquiring business as, in substance, continuing from the acquired business, and
- whether, despite the fact that the business is not trading, goodwill or other benefits beyond the physical assets and/or site themselves could be said to be attached to the business and part of the sale.³³

³⁰ See OFT Decisions: Completed acquisition by Servisair UK Limited of the Regional Ground Handling Business of Aviance UK Limited (27 May 2010); and Anticipated acquisition by Tramlink Nottingham Consortium of NET Phase Two concession (12 September 2011).

³¹ See OFT Decisions: Anticipated contract award to Nuclear Management Partners Limited as the Parent Body Organisation for Sellafield Limited (22 October 2008)(for analogous analysis), and Completed acquisition by AEG Facilities (UK) Limited of the contract to manage Wembley Arena (22 March 2013).

Similar principles apply in relation to the award of contracts or concessions. See OFT Decision: Anticipated acquisition by Tramlink Nottingham Consortium of NET Phase Two concession (12 September 2011).

³² It is not essential for the purposes of the jurisdictional test for the buyer to use the business assets in the same manner as they were used before the target enterprise ceased trading. See OFT Decisions: Completed acquisition by a consortium of Shell UK Limited, Greenergy International Limited and Vopak Holdings UK Limited of certain assets of former Petroplus Refining and Marketing Limited (24 May 2013); and Completed acquisition by Servisair UK Limited of the regional ground handling business of Aviance UK Limited (27 May 2010).

4.11 None of these factors, individually, is likely to be conclusive. The CMA will assess all relevant circumstances (including whether there is evidence that the closure of the business was designed to avoid merger control), with a view to determining whether the target business constitutes an enterprise under the Act.

Control

4.12 'Ceasing to be distinct' is defined in section 26 of the Act as two enterprises being brought under common ownership or control. 'Control' is not limited to the acquisition of outright voting control but may include situations falling short of outright voting control. Section 26 of the Act distinguishes three levels of interest (in ascending order):

- material influence
- de facto control, and
- a controlling interest (also known as 'de jure', or 'legal' control).

4.13 Section 26(3) of the Act provides that the CMA may treat material influence (and indeed 'de facto' control) as equivalent to 'control', for the purposes of establishing whether enterprises have been 'brought under common ownership or control'. In the context of its Phase 1 decision, the CMA's policy is to treat material influence as control whenever it considers that the test for reference would be met in the case in question.

Material influence

4.14 The ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation.³⁴ When making its assessment, the CMA focuses on the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target in this context means the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives.

³³ See OFT decisions: The assignment of a lease to Tesco plc for the site of a former FreshXpress store at St Helens (21 April 2009); Anticipated acquisition by Cineworld Group plc, through its subsidiary Cine-UK Limited, of the cinema business operating at the Hollywood Green Leisure Park, Wood Green (17 March 2008); and Completed acquisition by Home Retail Group plc of 27 leasehold properties from Focus (DIY) Ltd (15 April 2008).

³⁴ The ability materially to influence the policy of the target (under the Act) is a lower standard than the ability to exercise decisive influence (the standard used to define control under Article 3 of the EU Merger Regulation).

- 4.15 Assessment of material influence requires a case by case analysis of the overall relationship between the acquirer and the target. In making its assessment, the CMA will have regard to all the circumstances of the case.
- 4.16 A finding of material influence may be based on the acquirer's ability to influence the target's policy through exercising votes at shareholders' meetings, together with, in some cases, any additional supporting factors (see paragraph 4.21 below). However, material influence may also arise as a result of the ability to influence the board of the target, and/or through other arrangements: that is, without the acquirer necessarily being able to block votes at shareholders' meetings.
- 4.17 Each of these potential sources of influence (shareholding, board representation and other sources) is described further below. The variety of commercial arrangements entered into by firms makes it difficult to state categorically what will (or will not) constitute material influence. The following matters may be of particular relevance, although this list is by no means exhaustive.

Shareholdings

- 4.18 The size of the acquirer's minority shareholding in the target company will typically have a direct bearing on the extent of the acquirer's voting power at a shareholders' meeting, and thus on the acquirer's influence on the corporate and strategic decisions of the target company. For example, a shareholding conferring on the holder more than 25% of the voting rights in a company generally enables the holder to block special resolutions.
- 4.19 Given the nature of the decisions that typically will require a special resolution – and which the holder could therefore block – a share of voting rights of over 25% is likely to be seen as conferring the ability materially to influence policy – even when all the remaining shares are held by only one person.
- 4.20 Although there is no presumption of material influence below 25%, the CMA may examine any shareholding of 15% or more in order to see whether the holder might be able materially to influence the company's policy. Exceptionally, a shareholding of less than 15% might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present.^{35, 36}

³⁵ See, for example, the factors discussed in paragraphs 4.26 and 4.27 below.

³⁶ This does not mean that all cases in which parties obtain material influence through minority shareholdings need to be notified to the CMA, or will be investigated by the CMA on its own initiative. In deciding whether to investigate any such merger situation on its own initiative, the CMA will have regard to whether, on the information available to it, the merger could lead to substantive competition concerns (see *Merger Assessment Guidelines* (OFT1524/CC2)).

4.21 In considering whether material influence may be present in a particular case, the CMA will consider not only whether the acquiring party has the right to block special resolutions but also whether, given other factors, it is able to do so as a practical matter.³⁷ This gives effect to the general principle that the purpose of UK merger control is to enable the CMA to consider the commercial realities and results of transactions and that the focus should be on substance and not legal form. As such, other factors relevant to an assessment of a particular shareholding may include:

- the distribution and holders of the remaining shares, for example whether the acquiring entity's shareholding makes it the largest shareholder
- patterns of attendance and voting at recent shareholders' meetings based on recent shareholder returns,³⁸ and, in particular, whether voter attendance is such that a shareholder holding 25% of the voting rights or less would be able in practice to block special resolutions. In making this determination, the CMA may have regard to the votes of other shareholders that it considers may be expected to be voted with the acquirer against a special resolution
- the existence of any special voting or veto rights attached to the shareholding under consideration, and
- any other special provisions in the company's constitution conferring an ability materially to influence its policy.

4.22 In addition, an acquirer's shareholding, whilst insufficient in itself to enable the acquirer to defeat a special resolution, may still in some cases be sufficient to enable it materially to influence a policy that would be expected to require a special resolution. In this respect, the CMA may have regard to the status and expertise of the acquirer, and its corresponding influence with other shareholders, and may consider whether, given the identity and corporate policy of the target company, the acquirer may be able materially to influence policy formulation at an earlier stage through, for example, meetings with other shareholders.³⁹ Where a company's appetite for pursuing certain strategies would be reduced because of a perception that these strategies

³⁷ See OFT report: Acquisition by British Sky Broadcasting Group plc of a 17.9% in ITV plc, Report to the Secretary of State for Trade and Industry (14 December 2007) and *British Sky Broadcasting Group plc v the CC and the Secretary of State* [2008] CAT 25, and OFT Decision: Anticipated acquisition by Centrica plc of a 20% stake in Lake Acquisitions Limited (a wholly owned subsidiary of EDF SA) (7 August 2009).

³⁸ Given that any prediction of attendance and voting at shareholders' meetings is complex, involving a wide range of factors, the CMA considers that patterns of participation at recent shareholders' meetings of a particular company (for example over the last three years) are likely to be the best available indication of future participation.

³⁹ See the CC's British Sky Broadcasting Group/ITV plc inquiry (2007).

would be likely to cause conflict with the acquirer, this may be a relevant factor in determining material influence.

Board representation

- 4.23 In addition to the ability materially to influence policy through the voting of shares, the CMA's determination may also, or alternatively, turn on whether the acquirer is able materially to influence the policy of the target entity through board representation.⁴⁰ Indeed, board representation alone may confer material influence.⁴¹
- 4.24 Whether as a free-standing basis for material influence or as a supporting factor in the context of a shareholding, the CMA will review a range of factors in relation to such board representation, including, for example, the corporate/industry expertise, experience or incentives of the various members of the board.⁴²
- 4.25 Where the acquiring party has a right to obtain board representation, and the CMA considers that the prospect of that right being taken up in the future is more than fanciful, the CMA considers it appropriate to have regard to this possibility in relation to its jurisdictional assessment (and potentially also in its substantive assessment).

Other sources of material influence

- 4.26 The CMA may also consider whether any other factors, such as agreements with the company, enable the acquirer materially to influence policy. These might include the provision of consultancy services to the target or might, in certain circumstances, include agreements between firms that one will cease production and source all its requirements from the other.
- 4.27 Financial arrangements may in certain circumstances confer material influence where the conditions are such that one party becomes so dependent on the other that the latter gains material influence over the company's commercial policy (for example, where a lender could threaten to withdraw loan facilities if a particular policy is not pursued, or where the loan conditions confer on the lender an ability to exercise rights over and above those

⁴⁰ See OFT Decision: Completed acquisition by JCDecaux UK Limited of rights in Concourse Initiatives Limited and Media Initiatives Limited (19 March 2012); and OFT Decision: Anticipated acquisition by Centrica plc of a 20% stake in Lake Acquisitions Limited (a wholly owned subsidiary of EDF SA) (7 August 2009).

⁴¹ This does not mean that all cases in which parties obtain material influence through board representation need to be notified to the CMA. See footnote 36 above for analogous considerations in the context of minority shareholdings.

⁴² See OFT Decision: Completed acquisition by First Milk Limited of a 15% stake in Robert Wiseman Dairies plc (7 April 2005).

necessary to protect its investment, say, by options to take control of the company or veto rights over certain strategic decisions).⁴³

De facto control

- 4.28 Merger arrangements may give rise to a position of 'de facto' control when an entity controls a company's policy, notwithstanding that it holds less than the majority of voting rights in the target company (that is, it does not have a controlling interest). This may include situations where the acquirer has in practice control over more than half of the votes actually cast at a shareholder meeting. It might also involve situations where an investor's industry expertise leads to its advice being followed to a greater extent than its shareholding would seem to warrant (although this factor could equally be relevant to a finding of material influence over the target company).
- 4.29 The CMA has the ability under section 26(3) of the Act to decide whether or not to treat 'de facto' control as a controlling interest for the purposes of the Act; but, as explained in the context of material influence (see paragraph 4.17 above), its practice in the context of Phase 1 decisions is to do so whenever it considers that the test for reference would be met in the case in question.

A controlling interest

- 4.30 A 'controlling interest' generally means a shareholding conferring more than 50% of the voting rights in a company. Only one shareholder can have a controlling interest, but it is not uncommon for a company to be subject to the control (in the wider senses described above) of two or more major shareholders at the same time – in a joint venture, for instance. Therefore, a significant minority shareholder may be seen as being able materially to influence a company's policy even though someone else owns a controlling interest.

Acquiring control by stages

- 4.31 Under section 26(4) of the Act, should a shareholding (and/or a level of board representation) that confers the ability materially to influence a company's policy increase subsequently to a level that amounts to 'de facto' control or a controlling interest, that further acquisition may produce a new relevant merger situation (which is therefore potentially liable to reference for a Phase 2 investigation and to the imposition of remedies at the end of the Phase 2

⁴³ See OFT Decision: Completed acquisition by First Milk Limited of a 15% stake in Robert Wiseman Dairies plc (7 April 2005).

process).⁴⁴ The same applies to a move from 'de facto' control to a controlling interest.

- 4.32 In principle, therefore, if Company A acquires Company B in stages, this could give rise to three separate relevant merger situations:⁴⁵ first, as Company A acquires material influence; then to 'de facto' control; and, finally, to a controlling interest.⁴⁶ But further acquisitions of a company's shares by a person who already owns a controlling interest do not give rise to a new merger situation.
- 4.33 For the purposes of a merger reference, where a person acquires control of an enterprise (in any of the three senses described above) during a series of transactions or successive events within a single two year period, sections 27(5) and 29 of the Act allow them to be treated as having occurred or occurring simultaneously on the date of the last transaction. In giving effect to this provision, the CMA may take into account transactions in contemplation (that is where the last of the events has not yet occurred).⁴⁷
- 4.34 A new merger situation would not arise directly from the fact that there has been a reduction in the level of a shareholder's control (for example from a controlling interest to 'de facto' control). However, it is possible in these circumstances that a merger situation could arise through a third party thereby acquiring material influence, 'de facto' control or a controlling interest.

Temporary merger situations

- 4.35 The Act does not define the period of time that a merger situation should last in order for it to qualify as a relevant merger situation under the Act. In theory, therefore, acquisitions of control intended purely as a temporary step in a

⁴⁴ See for example OFT Decision: Anticipated acquisition by Air Products Group Limited of a controlling interest in CryoService Limited (16 June 2008). Such cases may qualify on the share of supply test (as well as the turnover test) given that section 26(4) of the Act allows for the acquirer to be 'treated' as bringing the target under its control (notwithstanding that it already had material influence or 'de facto' control over the target) such that there would therefore (under such 'treatment') be an increment in the share of supply.

⁴⁵ Clearly, it does not necessarily follow that the CMA would find that moving from one level to another would itself create the realistic prospect of a substantial lessening of competition.

⁴⁶ See OFT Decisions: Anticipated acquisition by The Coca-Cola Company of full control over Fresh Trading Limited (1 May 2013); Completed acquisition by Travis Perkins plc of a controlling interest in Toolstation Limited (29 March 2012); and Anticipated acquisition by Cavendish Square Partners (General Partner) Limited of a controlling interest in each of Lakeside 1 Limited (Keepmoat) and Apollo Group Holdings Limited (Apollo) (24 November 2011).

⁴⁷ Article 3 of the Enterprise Act 2002 (Anticipated Mergers) Order 2003 SI2003/1595 (as amended).

wider overall transaction might constitute a relevant merger situation. In practice, the most common form of such an arrangement is a break-up bid.⁴⁸

- 4.36 Break-up bids occur where one or more entities purchase an enterprise pursuant to an agreement that the acquired enterprise will be divided up according to a pre-existing plan upon completion of the transaction. In some cases, the break-up bid is structured in anticipation of merger control concerns that would otherwise occur. The question therefore arises whether the CMA will consider the first step (that is, the initial acquisition of the target enterprise) as a separate relevant merger situation concerning the entire target enterprise, or whether it will examine the ultimate acquisitions in the second step (that is after the target enterprise is split up).⁴⁹
- 4.37 Unlike under the EU Merger Regulation, the nature of the voluntary regime under the Act means there is, as a starting point, no requirement on the party or parties acquiring control under the first step in the above scenario to notify the CMA about the initial acquisition.
- 4.38 In terms of whether the CMA will investigate the initial acquisition on its own initiative, the CMA will generally be unlikely do so where it is clear that it will be merely an interim step in the context of a wider transaction and that the subsequent steps will occur within the four month time period within which the CMA has the ability to refer the initial acquisition. Where it appears that the subsequent steps may not take place within four months of the completion of the initial acquisition, the CMA will not risk losing its ability to refer the initial acquisition simply on the basis that it is intended that the current situation will not be permanent. To do so would risk the CMA breaching its duty to refer.
- 4.39 Where the initial acquisition is notified to it (whether the initial acquisition is anticipated or completed), the CMA would not be able to clear the transaction unconditionally simply on the basis that the situation as notified was not intended to be permanent. To avoid any referral for a Phase 2 investigation that would otherwise be required on the basis of the initial acquisition, the CMA would require UILs (potentially effectively codifying in undertakings the parties' intended break-up).⁵⁰

⁴⁸ The other common situation involves stake-building in the context of a public bid. In this situation, the CMA's decision if and when to investigate on its own initiative a minority interest will depend on all the circumstances of the case (including the likelihood of a public bid being launched), and in particular its belief as to the extent of the competition concerns that could potentially result from a minority shareholding.

⁴⁹ The CMA will apply similar principles to those set out in paragraphs 4.38 to 4.39 in the context of joint acquisitions for a start-up period.

⁵⁰ By way of example, in the OFT's GHG/Nuffield case, GHG originally notified the completed acquisition of nine hospitals from Nuffield but, during the course of the OFT's investigation, completed the on-sale of the two hospitals that gave rise to local competition concerns. Given that

Associated persons

- 4.40 For purposes of considering whether an enterprise has ceased to be distinct, section 127 of the Act requires the CMA to consider whether a number of persons acquiring an enterprise are in fact 'associated persons' and thus should be viewed as acting together.
- 4.41 This situation will most commonly arise where the acquiring persons are related or have a signed agreement to act jointly to make an acquisition. The Act does not require that each of the acquiring parties should themselves individually have control over the acquired entity for them all to be regarded as being associated persons. Separate groups of enterprises may be associated persons where a single member that is an associated person to each of those groups is common to both groups.⁵¹

Time limits for reference decisions

- 4.42 After starting an investigation, the CMA is in most cases required to decide whether the test for reference is met within a timetable of 40 working days, failing which it loses its ability to refer. Where parties notify the CMA using a Merger Notice, that timetable (referred to in the Act as the 'initial period') starts on the first working day after the CMA confirms to the parties that the Merger Notice is complete.⁵² In other cases, the timetable starts on the first working day after the CMA confirms that it has received sufficient information to enable it to begin its investigation.⁵³ The 40 working day deadline is subject to extension in certain circumstances,⁵⁴ and does not apply to decisions by the Secretary of State to refer a merger after issuing a public interest intervention notice or a special public interest intervention notice.
- 4.43 In addition, for the CMA to be able to refer a merger either:

the OFT's decision on whether or not to refer the merger was taken based on the facts existing at the time of the decision, rather than at the time of notification, the OFT was able to clear the retained acquisition of seven hospitals unconditionally because the on-sale transactions had completed by the time of the reference decision (OFT Decision: Completed acquisition by General Healthcare Group of assets of Nuffield Hospitals (1 May 2008)).

⁵¹ See OFT Decisions: Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel 4 Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecoms Limited and Arqiva Limited – Project Canvas (19 May 2010); and Anticipated acquisition by Tramlink Nottingham Consortium of Net Phase 2 Concession (12 September 2011).

⁵² Section 34ZA(3)(a) of the Act. A Merger Notice must meet the requirements set out in section 96(2) of the Act. Further information on notifying mergers to the CMA is set out in Chapter 5.

⁵³ Section 34ZA(3)(b) of the Act.

⁵⁴ Section 34ZB of the Act. These include where relevant parties have failed to comply with the requirements of a formal information request under section 109 of the Act, where the Secretary of State has served an intervention notice in relation to a merger which may raise public interest issues, and where the Commission is considering whether to accept a request from the UK for the merger to be referred to the Commission under Article 22(1) of the EU Merger Regulation.

- the merger must not yet have taken place (that is, it must not have completed), or
- under section 24 of the Act, the completed merger must have taken place not more than four months before the reference is made, unless the merger took place without having been made public and without the CMA being informed of it (in which case the four month period starts from the earlier of the time that material facts are made public or the time the CMA is told of material facts).

4.44 The test under the Act for when material facts are ‘made public’ is when they are ‘so publicised as to be generally known or readily ascertainable’.⁵⁵ In interpreting these provisions of the Act, the CMA will have regard to the following factors.

- The CMA interprets ‘material facts’ to be the necessary facts that are relevant to the determination of the CMA’s jurisdiction in terms of the four month time period (but not in terms of other jurisdictional issues). In practice, this means information on the identity of the parties and whether the transaction remains anticipated (including the status of any conditions precedent to completion) or has completed.⁵⁶
- Where the parties do not notify the CMA, but ‘make public’ material facts about the transaction such that they are generally known or reasonably ascertainable, the CMA interprets this as meaning that such information could readily be ascertained by the CMA acting reasonably and diligently in accordance with its statutory functions. In practical terms, the CMA would consider that an acquiring party would normally be said to have ‘made public’ material facts where those facts had been publicised in the national or relevant trade press in the UK and where the acquiring party had itself taken steps to publicise the transaction at large, normally by publishing and prominently displaying on its own website a press release about the transaction.⁵⁷

4.45 The Act permits the CMA to extend the four-month time period in certain circumstances. When examining completed mergers, for example, the CMA may under section 25 of the Act extend that period if an information request

⁵⁵ See OFT Decision: Completed acquisition by Genus plc of Local Breeders Limited (14 May 2008).

⁵⁶ See the CC’s report: Icopal Holding A/S and Icopal a/s: A report on the merger situation (2001), paragraph 2.50. That report concerned the application of the equivalent provisions of the Fair Trading Act 1973, but the result would not have differed under the Act.

⁵⁷ See OFT Decisions: Completed acquisition by Genus plc of Local Breeders Limited (14 May 2008) and Completed acquisition by Tesco Stores Limited of Brian Ford’s Discount Store Limited (22 December 2008).

issued by it under section 109 of the Act is not complied with (for example, information is not supplied within the stated deadline).⁵⁸

- 4.46 Section 27(5) of the Act allows the CMA to treat successive events within a period of two years between the same parties (or in consequence of the same arrangements or transaction) as occurring simultaneously on the date of the latest event.⁵⁹ The CMA has discretion in whether to apply this section; in exercising this discretion, the CMA will have regard to the nature and extent of any competition issues associated with the merger.⁶⁰ In giving effect to this provision, the CMA may take into account transactions in contemplation (that is where the last of the events has not yet occurred).⁶¹

The turnover test

- 4.47 The 'turnover test' is satisfied where the annual value of the UK turnover of the enterprise being acquired exceeds £70 million.⁶² In essence, the turnover in question is that achieved by the target, or targets, in the UK.⁶³
- 4.48 Under section 28 of the Act, two types of situation may be distinguished for the purposes of calculating turnover: those where one or more enterprises remain under the same ownership and control after the merger, and those where no enterprise remains under the same ownership and control after the merger.
- 4.49 Where one or more enterprises remain under the same ownership and control after the merger, turnover is calculated by taking the total value of all enterprises ceasing to be distinct (that is acquiring entities and target entities)

⁵⁸ Other circumstances in which the CMA can extend the four month time period include, for example, by agreement with the parties, in certain circumstances following the giving of an intervention notice by the Secretary of State or due to the application of the EU Merger Regulation. See, in those respects, sections 25, 42 and 122 of the Act. As regards extension due to the application of the EU Merger Regulation (section 122(4) of the Act), such extension may also cover the period of any appeal to the European Courts against the Commission's decision under the EU Merger Regulation (see *Ryanair Holdings plc v Office of Fair Trading* [2012] EWCA Civ 643).

⁵⁹ See OFT Decision: Completed acquisition by Dairy Crest Group plc of certain assets of Arla Foods UK plc (8 January 2007).

⁶⁰ See OFT Decision: Completed acquisitions by Tesco plc of the Co-Operative Group's stores in Uxbridge Road, Slough (2 February 2004), in which the OFT declined to exercise its discretion.

⁶¹ Article 3 of the Enterprise Act 2002 (Anticipated Mergers) Order 2003 SI2003/1595 (as amended).

⁶² See the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended).

⁶³ This does not require, however, that the enterprise be legally incorporated in the UK. These principles apply equally to non-UK persons that sell to (or acquire from) UK customers or suppliers. In assessing whether a firm is active in the UK, the CMA will have regard to whether its sales or purchases are made directly or indirectly (via agents or traders) to UK customers.

and deducting the turnover of those enterprises that remain under the same ownership and control after the merger.

- This situation includes a straightforward acquisition, in which the acquirer (A) and the target (T) cease to be distinct from each other. The turnover of the acquirer is deducted as it remains under the same ownership and control after the merger. Hence, the relevant turnover is that of the target. (See Figure 1 below.)
- It also includes a situation where two or more companies (A and B) form a joint venture incorporating their assets and businesses in a particular area of activity. In this situation, each parent with control ceases to be distinct from the target business contributed to the joint venture by the other parent.⁶⁴ As all the parent companies remain under the same ownership and control after the merger,⁶⁵ and hence have their turnover deducted, the turnover is the sum of the turnover of each of the contributed enterprises (which are, effectively, the target enterprises) (T_A and T_B).⁶⁶ (See Figure 2 below.)

4.50 Where no enterprises remain under the same ownership and control after the merger, the relevant turnover is calculated by taking the total value of all enterprises ceasing to be distinct and deducting the turnover of the enterprise with the highest UK turnover.

- This includes a situation in which two enterprises (A and B) come together to form a full legal merger.⁶⁷ The relevant turnover would be that of the existing enterprise with the smaller UK turnover (B). (See Figure 3 below.)
- It also includes a situation in which two or more companies (A, B and C) form a joint venture (Newco) incorporating all of their assets and businesses. The relevant turnover would be that of all the existing companies, excluding the company with the largest UK turnover. (See Figure 4 below.)

⁶⁴ See CC: A report on the anticipated joint venture between BBC Worldwide Limited, Channel Four Television Corporation and ITV plc relating to the video on demand sector (2009), paragraph 3.53.

⁶⁵ In certain cases, the CMA may treat entry into a joint venture as giving rise to more than one relevant merger situation (see footnote 17 above). In such a case, the CMA will treat the turnover of the enterprise being taken over as being the turnover of the enterprises contributed to the joint venture by the other parent(s).

⁶⁶ See OFT decision: Anticipated relevant joint venture between Goodrich Corporation and Rolls-Royce plc (8 December 2008).

⁶⁷ A full legal merger occurs where a full merger of A and B as equals is achieved by Newco C acquiring both. In this circumstance, neither A nor B survives the merger. Both firms are brought under common control, but neither remains under the same control as it was pre merger. The turnovers to be considered are those of A and B.

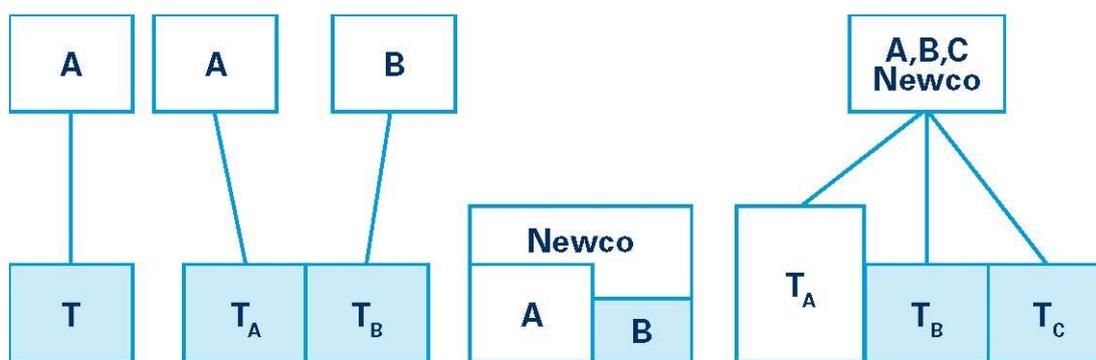


Fig. 1

Fig. 2

Fig. 3

Fig. 4

Shaded areas mark those businesses to be included in the turnover calculation

4.51 In principle, the turnover test applies to the turnover of the acquired enterprise that was generated in relation to customers within the UK⁶⁸ in the business year preceding the date of completion of the merger or, if the merger has not yet taken place, the date of the reference for a Phase 2 investigation.⁶⁹ The figures in the enterprise's latest published accounts will normally be sufficient to measure whether the turnover test is met, unless there have been significant changes since the accounts were prepared.⁷⁰ In this circumstance, more recent accounts would provide a better guide to the actual turnover of the enterprises concerned. Where company accounts do not provide a relevant figure, for example because only part of a business is being acquired or the accounts do not provide a suitable geographic breakdown of turnover, the CMA will consider evidence presented by the parties and other interested parties to form its own view as to what it believes to be the value of UK turnover for jurisdictional purposes.

⁶⁸ For the purpose of the geographic allocation of turnover, subject to complying with the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended), the CMA will generally follow the principles set out by the Commission in section C(V) (Geographic allocation of turnover) of its Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p.1) (the Consolidated Jurisdictional Notice). Subject to the precisions outlined in the Consolidated Jurisdictional Notice, the general rule is that turnover should be regarded as UK turnover for the purposes of the Act when the customer is located in the UK.

⁶⁹ In some cases, this may include intra-group sales (for example where a target business previously made intra-group sales, which would become external sales as a result of the acquisition of the target by a third party). See further Annexe B, paragraphs B.19 to B.21. Such considerations were relevant in OFT Decision: Anticipated joint venture between Vodafone Limited and Telefonica UK Limited (28 September 2012).

⁷⁰ In line with Article 11(3) of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended), the CMA would regard acquisitions or divestments or other transactions or events as relevant for these purposes, but considers that the gain or loss of individual customers would, absent exceptional circumstances, be unlikely to be relevant.

4.52 The basic principles set out above are elaborated further in Annexe B.

The share of supply test

4.53 Under section 23 of the Act, the 'share of supply test' is satisfied only if the merged enterprises:

- both⁷¹ either supply or acquire goods or services of a particular description,⁷² and
- will, after the merger,⁷³ supply or acquire 25% or more of those goods or services, in the UK as a whole or in a substantial part of it.

4.54 Where an enterprise already supplies or acquires 25% of any particular goods or services, the test is satisfied so long as its share is increased as a result of the merger, regardless of the size of the increment.⁷⁴ Where there is no increment, the share of supply test is not met.

4.55 The increase in the share of supply must result from the enterprises ceasing to be distinct. In the case of an acquisition, this requires calculation of the share of supply based on the activities of the acquirer and the target company. In joint venture situations, the share of supply is calculated by reference to the activities of the joint venture, although it will include shares of the controlling joint venture parents where they remain active in the same activities as the joint venture. For example, where two companies, Company A and Company B, form a joint venture incorporating their assets and businesses in a particular area of activity, enterprises T_A and T_B respectively, the share of supply test is applied with reference to whether there is an increase in the share of supply between A, B, T_A and T_B in relation to the areas of activity in which T_A and/or T_B are active. The CMA would therefore

⁷¹ Where more than two enterprises cease to be distinct, at least two of them must supply or acquire such goods or services.

⁷² OFT Decision: Completed acquisition by Milk Link Limited, First Milk Limited and Dairy Farmers of Britain Limited of assets of United Milk Limited, namely the Westbury Milk processing plant (26 February 2004), provides an example of the OFT taking the parties' combined share of purchases into account its jurisdictional assessment.

⁷³ In accordance with section 23(9) of the Act, the CMA assesses whether the share of supply test is met at the time of its decision on reference, unless the reference of an anticipated merger is subsequently treated by the CMA as being a reference of a completed merger pursuant to section 37(2) of the Act (in which case, it is at such time as the CMA may determine).

⁷⁴ In normal merger cases under the Act, there must be an increase in the share of supply in order for the CMA to have jurisdiction. However, no increase is required in relation to shares of supply of newspapers or broadcasting where the Secretary of State issues a special intervention notice (see paragraph 16.23 below), and the CMA is required to refer mergers involving two or more 'water enterprises' for a Phase 2 investigation where their turnover exceeds a specified threshold (see paragraphs 17.1 to 17.6 below).

not apply the share of supply test as between A and B outside the areas of activity of the joint venture.

4.56 The Act expressly provides the CMA with a wide discretion in describing the relevant goods or services, requiring only that, in relation to that description, the parties' share of supply or acquisition is 25% or more.⁷⁵ In applying the share of supply test, the CMA will have regard to the following considerations.

- The share of supply test is not an economic assessment of the type used in the substantive assessment; therefore, the group of goods or services to which the jurisdictional test is applied need not amount to a relevant economic market, and can aggregate, for example, intra-group and third party sales even if these might be treated differently in the substantive assessment.⁷⁶
- The CMA will have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met. This will often mean that the share of supply used corresponds with a standard recognised by the industry in question, although this need not necessarily be the case. In applying the share of supply test, the CMA may under section 23(5) of the Act have regard to the value, cost, price, quantity, capacity, number of workers employed or any other criterion in determining whether the 25% threshold is met.
- The test may be satisfied on the basis of the share of supply or acquisition in a relatively wide geographic area (such as the UK, Great Britain, England, Scotland, Wales or Northern Ireland) even if the transaction's competitive impact is more likely to be regional or local in nature. However, if the test is not met on one of these bases, the issue of 'substantial part of the UK' will need consideration (see below).
- The CMA cannot apply the share of supply test unless the parties together supply or acquire the same category of goods and services (of any description). The test cannot capture mergers where the parties are solely active at different levels of the supply/procurement chain.⁷⁷

⁷⁵ Section 23 of the Act.

⁷⁶ See OFT Decision: Anticipated acquisition by Montauban S.A. of Simon Group plc (21 August 2006).

⁷⁷ See OFT Decisions: Completed acquisition by GFI Group Inc of Trayport Limited (28 May 2008) and Completed acquisition by the BUPA Group of the Cromwell Hospital (24 June 2008). In the OFT case: Anticipated acquisition by Odeon Cinemas Limited and Cineworld Cinemas Limited of Carlton Screen Advertising Limited (1 July 2008), the relationship between the parties was not purely vertical, and hence the share of supply test was applicable.

Supply or acquisition of goods or services in the UK

- 4.57 The share of supply test requires that the merger would result in the creation or enhancement of at least a 25% share of supply or acquisition of goods or services either in the UK or in a substantial part of the UK. This does not require, however, that the merging parties be legally incorporated in the UK.⁷⁸
- 4.58 Services or goods are generally supplied in the UK where they are provided to customers who are located in the UK.⁷⁹ That is, in most circumstances, the place where competition with alternative suppliers takes place. The CMA will apply this general rule in a flexible and purposive way. In all cases, it will have regard to all relevant factors, including where relevant procurement decisions are likely to be taken and where, in turn, any competition between suppliers takes place.⁸⁰
- 4.59 In the case of sales to multinational companies, irrespective of place of incorporation, domicile or principal place of business, the general question is the presumptive location of the procurement decision. It would generally be a UK supply if the procurement decision is made by a business unit located in the UK and it will be non-UK if such a decision is made outside the UK. Certain strategic decisions may on the facts be made at a multinational's headquarters, even if the goods are delivered, title passes, or the services supplied are outside the jurisdiction of the headquarters (for example, secondary stock exchange listings).
- 4.60 In the case of services with a foreign component supplied to UK end-consumers, supply will generally be in the UK if both the procurement decision (for example internet purchase) took place in the UK and it is appropriate to deem the UK as the location of competition for that customer. This would capture, for example, foreign package holidays from the UK, or services otherwise primarily directed at UK consumers, but not supply of services abroad directed at local consumers or tourists (for example directly booked accommodation or leisure services, a proportion of customers for which happened to be UK tourists who purchased these services in advance in the UK: competition for these UK customers would be deemed to take place abroad).

⁷⁸ See footnote 63 above.

⁷⁹ As in the case of the application of the rules concerning the allocation of turnover, and save as otherwise stated in this guidance, the CMA will generally follow the guidance of the Commission as set out in section C(V) of the Consolidated Jurisdictional Notice in determining when goods or services should be regarded as supplied in the UK.

⁸⁰ The mere fact that a supplier is located in the UK is therefore not conclusive that services are being supplied in the UK. Conversely, suppliers based overseas may be supplying services in the UK.

Substantial part of the UK

- 4.61 The share of supply test may be applied to the UK as a whole or to a substantial part of it. There is no statutory definition of ‘a substantial part’. The House of Lords (now the Supreme Court of the UK) ruled in the context of similar provisions in the Fair Trading Act 1973 that, while there can be no fixed definition, the area or areas considered must be of such size, character and importance as to make it worth consideration for the purposes of merger control.⁸¹ The CMA will take such factors into account as: the size, population, social, political, economic, financial and geographic significance of the specified area or areas, and whether it is (or they are) special or significant in some way.⁸²
- 4.62 In line with the approach taken previously by the CC and OFT, there is no need in the application of the share of supply test for the substantial part of the UK to constitute an undivided geographic area. This interpretation gives effect to the purposes of the Act. The economic significance of a merger, in terms of a substantial lessening of competition, does not necessarily depend on whether several localities are contiguous or separated.⁸³

⁸¹ See *Regina v Monopolies and Mergers Commission and another ex parte South Yorkshire Transport Limited* [1993] 1 WLR 23.

⁸² The CC has found, applying the House of Lords’ test as to whether an area was of such size, character and importance as to make it worth consideration, that the Borough of Slough represented a substantial part of the UK. In reaching this conclusion, the CC had regard to such considerations as population and economic factors, as well as the fact that the markets in which the merging parties competed were local in nature (CC: A report on the acquisition of the Co-operative Group (CWS) Limited’s store at Uxbridge Road, Slough, by Tesco plc (28 November 2007)). The CC has also found that Renfrewshire is a substantial part of the UK, in its *McGill’s Bus Services Limited/Arriva Scotland West Limited* inquiry (2012).

⁸³ See CC: A report on the acquisition by Archant Limited of the London newspapers of Independent News and Media Limited (22 September 2004), Appendix C paragraph 28.

5 THE PHASE 1 PROCESS: OVERVIEW

- 5.1 The table below shows the key stages – and indicative timing – of a typical Phase 1 investigation by the CMA, together with a high level summary of the actions that are typically taken by the CMA⁸⁴ and by the merger parties (and, where relevant, third parties) at each stage.
- 5.2 As noted in the table, certain actions (for example information gathering, or the imposition of interim measures) may in practice occur at various stages of the Phase 1 process, including prior to the formal commencement of the investigation timetable.
- 5.3 Each of these stages is described in more detail in chapters 6 to 9 below.

⁸⁴ The table does not show the statutory functions performed by Ofcom, Monitor or the Secretary of State in relation to, respectively, local media mergers, NHS mergers and public interest mergers (as to which, see chapters 7 and 15 below).

Figure: The key stages of a typical Phase 1 inquiry

	MILESTONES	CMA	PARTIES
STAGE 1: Pre-notification discussions (for parties wishing to submit voluntary notification)			
Typically minimum of 2 weeks before notification	Initial contact between parties and CMA	CMA allocates case team of CMA staff to review transaction and liaise with parties	Merger parties engage in initial contact with CMA and submit a case team allocation request form
	Pre-notification discussions	CMA case team discusses transaction with merger parties, including relevant jurisdictional issues and the nature and scope of information which the case team considers the merger parties will need to provide in their voluntary notification	Merger parties discuss transaction with CMA case team, and submit drafts of their voluntary notification
STAGE 2A: Voluntary notification by merger parties			
	Merger parties submit voluntary notification (Merger Notice)	CMA assesses whether notification is in the form, and contains the information, required by the Act If so, CMA confirms this to merger parties, and confirms the consequent statutory deadline for its Phase 1 decision CMA considers whether it is necessary to make an interim order to prevent or unwind pre-emptive action ⁸⁵	Merger parties submit completed Merger Notice
STAGE 2B: Own initiative investigation (where transaction is not voluntarily notified by the merger parties)			
	CMA becomes aware of a transaction that has not been voluntarily notified	CMA considers whether there is a reasonable prospect that its duty to refer would be met if it investigated the transaction In appropriate cases, CMA sends an enquiry letter to the merger parties requesting further information about the transaction CMA considers whether it is necessary to make an interim order to prevent pre-emptive action	Merger parties respond to enquiry letter and provide CMA with requested information

⁸⁵ The Act permits the CMA to make an interim order at any stage of the investigation process (including prior to its formal commencement of its Phase 1 investigation), in order to prevent action which may prejudice any reference to Phase 2 or impede any remedial action taken or required by the CMA following its Phase 2 investigation.

	MILESTONES	CMA	PARTIES
		When CMA has sufficient information to begin its investigation, it confirms this to merger parties, and confirms the consequent statutory deadline for its Phase 1 decision	
STAGE 3: Phase 1 assessment			
Day 1		The 40 working day initial period for the CMA's Phase 1 investigation begins on the first working day after it confirms to merger parties that it has received a complete Merger Notice or that it has sufficient information to begin its investigation	
	Information gathering	CMA continues to engage with merger parties as appropriate throughout the 40 working day period CMA requests further information from merger parties (if necessary) during the 40 working day period	Ongoing liaison between case team and merger parties Merger parties respond to any information requests
	Invitation to comment	CMA publishes invitation to comment notice, inviting views from interested third parties on the transaction under review CMA may also directly contact third parties to seek their views on the transaction CMA assesses responses from third parties	Third parties respond to invitation to comment or any requests for information
Day 15 – 20	State of play discussion	CMA holds 'state of play' discussion with merger parties (typically by phone)	Merger parties attend state of play discussion
STAGE 4A: Phase 1 decision-making process (for cases raising no serious competition concerns)			
By Day 40	Phase 1 decision	CMA clears transaction CMA drafts clearance decision and communicates this to the merger parties CMA publicly announces clearance decision (full decision published at a later date following identification of confidential information)	

	MILESTONES	CMA	PARTIES
STAGE 4B: Phase 1 decision-making process (for cases raising more complex or material competition issues)			
By Day 40	Issues Meeting	<p>CMA invites merger parties to issues meeting</p> <p>CMA sends merger parties 'issues letter' stating core arguments for reference to Phase 2</p> <p>CMA holds 'issues meeting' with merger parties</p>	<p>Merger parties may provide written response to issues letter (before and/or after issues meeting)</p> <p>Merger parties attend issues meeting</p>
	Phase 1 decision	<p>CMA holds internal 'Case Review Meeting'</p> <p>CMA holds internal decision meeting. The CMA's Phase 1 decision maker decides whether duty to refer has been met</p>	
	Notice of decision	<p>CMA provides merger parties with its reasoned decision within statutory period</p> <p>CMA publishes notice of decision (full decision published at a later date following identification of confidential information)</p>	
STAGE 5: Phase 1 remedies– where CMA decides duty to refer is met			
0-5 working days after parties given decision	Offer of undertaking in lieu of reference (UILs)	If no UILs offered within 5 working day period, CMA refers transaction to Phase 2	<p>Merger parties decide whether to offer UILs to remedy identified concerns</p> <p>Merger parties submit completed Remedies Form and draft UILs to CMA</p>
Up to 10 working days after parties given decision	Consideration of offered UILs	<p>CMA considers any UILs offered, including the need for a monitoring trustee</p> <p>CMA decides whether to provisionally accept UILs (or a modified version of them)</p> <p>If CMA rejects UILs, transaction is referred to Phase 2</p>	Merger parties respond to any modifications to the UILs proposed by the CMA
Within 50 working days of	Agreement and acceptance of UILs	CMA gives detailed consideration to terms of proposed UILs to determine if any modifications required before they can be finally accepted	<p>Merger parties discuss any necessary modifications to the UILs so as to agree a version for publication for third party consultation</p> <p>Third parties submit comments on draft UILs within consultation period (at least 15</p>

	MILESTONES	CMA	PARTIES
parties being given decision (subject to extension for special reasons)		<p>CMA publishes draft UILs for third party comment</p> <p>CMA considers, in light of third party comments, whether to formally accept draft UILs (with possible further, shorter consultation if required following any changes to the UILs)</p> <p>If UILs are agreed, CMA publishes notice of acceptance of UILs. If not, the transaction is referred to Phase 2</p>	<p>days for the initial consultation, and at least seven days for any subsequent consultation)</p> <p>If CMA agrees UILs, merger parties sign UILs</p>
	Implementation of UILs if agreed	<p>CMA publishes UILs agreed with merger parties</p> <p>CMA assesses, and as appropriate approves, proposed purchaser(s) of the business(es) being divested by merger parties (will occur prior to acceptance of UILs in 'upfront buyer' cases)</p>	<p>Merger parties implement UILs, including (where no upfront buyer was required) submitting for CMA approval details of proposed purchasers of any assets required to be divested under the UILs</p>

6 NOTIFYING MERGERS TO THE CMA

- 6.1 Under the Act, there is no requirement to notify mergers to the CMA, regardless of whether or not the CMA would have jurisdiction to review the merger. Notification to the CMA is therefore described as ‘voluntary’ in the UK,⁸⁶ in contrast to the situation in many other jurisdictions, including under the EU Merger Regulation.
- 6.2 Since notification of a qualifying merger is not mandatory under the Act, it is perfectly acceptable for parties not to notify a merger which meets the jurisdictional thresholds, and the fact that a merger has not been notified does not negatively affect the CMA’s substantive evaluation of the competitive effects of a merger.
- 6.3 Indeed, in cases that constitute a relevant merger situation solely on the basis of the turnover threshold, but where competition concerns clearly do not arise because there is no (or no material) overlap between the merging parties’ activities (and where there is no non-horizontal concern), the parties may well decide that notification to the CMA would be disproportionate and unnecessary.
- 6.4 However, in cases that do raise the possibility of competition concerns, parties should consider carefully whether to notify the merger to the CMA. In making this choice, they should be aware that:
- the CMA may well become aware of the transaction as a result of its own market intelligence functions (including through the receipt of complaints), and
 - a decision not to notify the CMA carries particular risks once the merger has been completed.

These considerations are discussed in turn below.

The CMA’s market intelligence function

- 6.5 The fact that a merger has not been voluntarily notified to the CMA does not mean that the CMA will not review it.
- 6.6 The UK merger regime contemplates the possibility of merger review initiated by the CMA itself where it believes it may have jurisdiction.

⁸⁶ The parties may, however, be asked to provide sufficient information for the CMA to be able to review the merger if the CMA chooses to investigate on its own initiative, see paragraphs 6.60 to 6.61 below.

- 6.7 Under section 5 of the Act, the CMA is responsible for obtaining, compiling and keeping under review information about matters related to the carrying out of its functions under the Act. In order to carry out these functions, the CMA pro-actively reviews a variety of information sources, including national and representative trade press, to obtain information about anticipated and completed mergers. The CMA also maintains an active dialogue with Governmental departments and other regulatory bodies to obtain intelligence about merger activity. In addition, the CMA considers information received from third parties, most often customers and competitors of the merging parties.
- 6.8 The CMA has dedicated mergers intelligence staff responsible for monitoring non-notified merger activity and liaising with other competition authorities. The CMA can be contacted confidentially if any interested party wishes to make the CMA aware of a merger that it considers might potentially be anti-competitive. Contact details are available on the CMA's website.

Handling complaints from third parties relating to non-notified mergers

- 6.9 The CMA has a responsibility to keep merger activity under review and is under a duty to refer certain mergers for a Phase 2 investigation. The CMA may investigate and take action against mergers that have completed (subject to the time limits set out in paragraphs 4.42 to 4.46 above). The fact that a merger has recently completed should therefore not deter third parties from informing the CMA about a transaction they consider may be anti-competitive.
- 6.10 However, it does not follow that the CMA must, or will, follow-up and investigate every complaint relating to a non-notified merger (even where it is clear that the CMA would have jurisdiction), as this would undermine the benefits of the voluntary regime. The CMA will not investigate a merger simply because a complaint has been made to it.
- 6.11 Rather, the CMA will judge each complaint on its merits. It will have regard to the strength of the complaint having regard to all evidence provided. Although the CMA will take account of all credible available evidence, it will also be mindful of the incentives of the complainant in the context of the merger and candidate theories of competitive harm in question.
- 6.12 Customer concerns are treated, all else equal, as particularly significant because customers will suffer from an anti-competitive merger.⁸⁷ Conversely, where a competitor complains that a horizontal merger will dampen competition, its interest would generally be directly opposite to those of

⁸⁷ In a situation where a non-horizontal merger raises concerns, competitor concerns will be more closely aligned with the interests of customers.

customers and consumers, because a rival would tend to benefit from less competition, and suffer from greater competition, post-merger. Equally, rival bidders may try to use the regulatory process to frustrate or delay a benign or pro-competitive transaction that the parties – for good reason – chose not to notify.

- 6.13 The CMA will therefore take into account the need not to burden competitively benign or pro-competitive mergers with own-initiative investigations, in order to preserve a key advantage of the voluntary regime. Equally, the fact that a complainant might decide to challenge a clearance decision will not influence the CMA's decision on whether or not the duty to refer is met.
- 6.14 The CMA will also not act upon explicit non-competition concerns based on legitimate public policy issues outside the CMA's remit, such as protection of UK employment and environmental issues, among others, unless required to do so pursuant to an intervention notice issued by the Secretary of State. In all cases,⁸⁸ the question for the CMA is whether the transaction might be one that creates the realistic prospect of a substantial lessening of competition. However, the CMA may also take into account the existence of its statutory discretions not to refer (including its 'de minimis' exception to the duty to refer) when determining which cases to investigate.⁸⁹

Enquiry Letters

- 6.15 In cases where the merger is not voluntarily notified to the CMA, but where the CMA learns of it through another route, the CMA will consider whether to seek further information about the case by sending the acquiring party or parties an enquiry letter. In making a decision whether to send an enquiry letter, the CMA will consider whether the case in question is one in which there is a reasonable prospect that its duty to refer may be met. As discussed above, the CMA will not send an enquiry letter merely because it has received an unsubstantiated complaint about a merger from a third party.
- 6.16 The purpose of the initial enquiry letter is for the CMA to establish whether the jurisdictional thresholds under the Act are met and to ascertain information about the transaction. The extent of information requested by the CMA in its enquiry letter will vary depending on the circumstances of the case in question. If the response to the enquiry letter contains all the information that the CMA needs to begin its investigation (including both jurisdictional and substantive information), the CMA may then review the merger in the same way as if it had been notified, and its 40 working day statutory timetable (see

⁸⁸ Except where the Secretary of State has issued a public interest intervention notice.

⁸⁹ For further guidance on these exceptions, see *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122).

paragraph 4.42 above) will begin from the working day after it confirms receipt of the necessary information.⁹⁰

- 6.17 Parties receiving an enquiry letter are encouraged to respond as soon as practicable and, in any event, within the specified deadline in the enquiry letter. Where the merger has already completed at the time the CMA sends the enquiry letter, it is likely to request the information under a statutory notice under section 109 of the Act.⁹¹ If the parties do not respond within the specified deadline, the CMA can suspend the statutory timetable (both the 40 working day investigation timetable, and the four month deadline to refer completed mergers. This does not mean, however, that the CMA will wait indefinitely for a satisfactory response before taking further action. In cases where the parties do not provide a satisfactory response, the CMA will if appropriate commence its investigation and then send the parties an issues letter.⁹² For completed mergers, the CMA will also normally notify the parties that it has made an initial enforcement order under section 72 of the Act that prevents them from starting integration (or undertaking further integration) at the same time as it sends the enquiry letter.⁹³
- 6.18 The template for the enquiry letter used by the CMA when seeking information about a merger that has been drawn to its attention other than by the parties to the merger is available on the CMA's website although, as stated above, additional or more specific information may be requested in individual cases.
- 6.19 Once the CMA has given notice to the parties that the statutory timetable has commenced,⁹⁴ it is required by section 34ZA(1) of the Act to proceed to make its decision as to whether its duty to refer applies. Where the CMA has sent an enquiry letter on its own initiative it would normally expect, therefore, to proceed to a decision on whether that duty applies.

Risks to the parties of not notifying completed mergers

- 6.20 As explained above The CMA may become aware of mergers that have not been voluntarily notified to it through its market intelligence function and/or third party complaints, and will consider whether to investigate such mergers.

⁹⁰ See section 34ZA(3)(b) of the Act.

⁹¹ As noted in paragraph 7.18, persons failing without reasonable excuse to comply with a section 109 notice can also be subject to a penalty.

⁹² See paragraphs 7.46 to 7.59 for the procedure followed by the CMA following the sending of an issues letter.

⁹³ The CMA's use of such orders is described further in paragraphs 7.28 to 7.42 below)

⁹⁴ That is, once the CMA has given notice that it has received sufficient information to enable it to begin its investigation (or that it has received a complete merger notice): as such, the statutory timetable will not necessarily start immediately following receipt of a response to an enquiry letter.

6.21 The fact that a merger has been completed does not prevent the CMA from investigating and referring it for a Phase 2 investigation for possible remedial action, or accepting UILs, even if the merger is a relatively small transaction. The CMA will not treat completed mergers more favourably than anticipated mergers.⁹⁵

6.22 For the merging parties, there are several important considerations that they should bear in mind in the context of completed mergers.

- First, the CMA will normally make interim orders⁹⁶ in investigations where it has reasonable grounds for suspecting that two or more enterprises have ceased to be distinct.⁹⁷ An interim order⁹⁸ is intended at a minimum to prevent the parties from starting integration of, or further integrating, the merging businesses to prevent the reference being prejudiced or the taking of any remedial action by the Inquiry Group following a Phase 2 investigation. An interim order will remain in force until the merger is cleared or remedial action is taken, unless varied, revoked or (in the case of an order imposed at Phase 1), replaced by an interim order made (or interim undertakings given) during a Phase 2 investigation.⁹⁹ If the CMA also has reasonable grounds for suspecting that parties to a completed merger have already started integration of the merging businesses, it may make an order requiring the parties to unwind that integration. See paragraphs 7.28 to 7.42 and Annexe C below for further information about interim orders.
- Second, completing a merger without first obtaining clearance from the CMA carries the risk that the completed transaction may be ordered to be terminated by disposal of the acquired business (or otherwise remedied by disposal of other businesses or assets) following a reference to, and an adverse finding by, the Inquiry Group following a

⁹⁵ A number of cases referred by the OFT (the CMA's predecessor) for a Phase 2 investigation were ones which the parties did not voluntarily notify, but which the OFT decided to investigate the case on its own initiative or following a complaint from a third party.

⁹⁶ Such interim orders (in particular in cases which are referred for a Phase 2 investigation) may also require the appointment, at the cost of the merging parties, of a hold separate manager or monitoring trustee to oversee the order.

⁹⁷ This is a lower threshold than having reasonable grounds for suspecting that a relevant merger situation has been created, since it does not require the turnover or share of supply jurisdictional tests to be met (see chapter 4 above).

⁹⁸ The Act itself refers to orders made at Phase 1 under section 72 of the Act as 'initial enforcement orders' and those made at Phase 2 under section 81 as 'interim orders'. In this guidance, except where specified or apparent from the context, the term 'interim order' has been used to refer to both orders made under section 81 and those made under section 72.

⁹⁹ An interim order made at Phase 1 will be reassessed in the event of a reference to Phase 2, and additional or alternative safeguards may be put in place (for example, to prevent the target business from deteriorating during the Phase 2 investigation).

Phase 2 investigation. This has occurred under the Act in a number of cases.¹⁰⁰ The fact that a merger has been completed does not reduce the likelihood of the CMA referring the merger to Phase 2 or of implementing remedies (which may include prohibiting the merger). Furthermore, parties should be aware that, when considering remedies in the context of a completed merger, the CMA will not normally consider the costs of divestment to the parties as it is open to the parties to make merger proposals conditional on competition authorities' approval.¹⁰¹

- Third, if parties choose not to notify a completed merger, the initial period for the CMA's Phase 1 investigation may be reduced to less than 40 working days by virtue of the four month statutory deadline for a reference with which the CMA must also comply under the Act. This would therefore reduce the time available for the CMA's Phase 1 review and the time for the parties (and the CMA) to obtain evidence that would support a Phase 1 clearance, without the need for a Phase 2 investigation.

Informing the CMA about mergers

6.23 Companies and their advisers are strongly encouraged to contact the CMA at an early opportunity to discuss the application of the Act to a merger situation, particularly in cases where competition concerns cannot easily be ruled out. Contact details are available on the CMA's website.

6.24 There are alternative ways in which parties to a merger may ask the CMA to consider the merger. These are:

- informal advice
- pre-notification discussions, and
- making a voluntary written notification (a Merger Notice).¹⁰²

6.25 Informal advice is used to obtain information about the CMA's views of likely competition issues in a future transaction, but does not trigger an actual investigation leading to a public decision. Pre-notification discussions are a preliminary stage for cases where the parties wish to proceed to notify the merger. Merger Notices represent a party's actual notification of a merger to the CMA. Each of these routes is described below.

¹⁰⁰ See the CC's Stericycle, Inc/Ecowaste Southwest Limited inquiry (2012) and its Stagecoach Group plc/Preston Bus Limited inquiry (2009).

¹⁰¹ See *Merger Remedies* (CC8).

¹⁰² See section 96 of the Act.

Informal advice (IA)

- 6.26 In planning mergers and acquisitions, it is for parties and their advisers to assess whether transactions might give rise to competition concerns. However, in order to assist the planning and consideration by companies and their advisers of future mergers, the MG is prepared to give advice on an informal basis on competition issues¹⁰³ (and/or, where relevant, jurisdictional issues) arising out of a prospective merger situation that has not yet been made public, where certain conditions are met, as outlined below.¹⁰⁴

Informal advice – principles

- 6.27 The following are screening principles for IA applications, based on the CMA's need to be discriminating in the work it takes on and to deploy senior experienced staff to maximum effect. In the merger control context, such resources are primarily focused on managing how the CMA evaluates the approximately 100 anticipated and completed transactions that it investigates per year.
- 6.28 **Informal advice is appropriate for good faith confidential transactions only** – IA is available only for transactions that are neither hypothetical ('too soon for IA') nor in the public domain ('too late for IA'). In assessing whether a confidential transaction is suitable for the IA process, the CMA will generally expect to be satisfied that there is a good faith intention to proceed as evidenced by a likely ability to do so, having regard to (i) adequate financing; and (ii) heads of agreement or similar for agreed transactions; or (iii) evidence of board-level consideration by the acquirer where circumstances required IA prior to notifying the target. The factors listed above are non-exhaustive and the CMA will be open to persuasion that a specific good faith proposal is appropriate for IA consideration, for example when a trade purchaser is genuinely considering making a bid in the context of an auction situation.
- 6.29 **Informal advice is useful and appropriate only when there is a genuine issue** – The CMA believes it can materially assist business, and justify use of its own resources for IA, only when its duty to refer is a genuine issue. It sees no value to business or the taxpayer in accepting invitations to endorse the propositions of advisers that a transaction raises no such issue. Parties, with the exception of pro bono cases, are well-placed to rely on proper external

¹⁰³ Including how the CMA might approach the counterfactual in the particular case, for example as to whether one of the merging businesses can be regarded as a 'failing firm'.

¹⁰⁴ The IA process can also provide further detail on the information required for any merger notification to be complete and whether UILs might be acceptable. In addition, the CMA will discuss information requirements and the potential availability of remedies in all cases in the context of pre-notification discussions (that is, outside the confines of the IA process).

advice in such cases; as the UK regime is voluntary, they are of course under no obligation to notify their transaction to the CMA.

- 6.30 In practical terms, the CMA will provide up-front assistance where it can engage with a candid presentation of an issue. In order to do that advisers will therefore be expected to articulate the theory of harm that the CMA might reasonably rely upon as a credible candidate case for reference. This standard is that employed within the CMA to decide whether a notified case should be subject to the CMA's in depth phase 1 Case Review Meeting (CRM) procedure, including the issues meeting process (see paragraphs 7.45 to 7.59 below).¹⁰⁵ This standard will not be met simply through a claim that the client is 'very risk averse', or that 'third parties might complain'. Nor should self-incrimination be an issue. Such CRM cases may still be (and have often in the past been) cleared because the CMA (or, in those past cases, its predecessor, the OFT) decides it had no duty to refer.
- 6.31 Where the CMA is not satisfied that the request for IA relates to a transaction that does raise a genuine issue as to referral, the request will be rejected save in exceptional circumstances (such as in pro bono cases, involving public bodies or private enterprises unable to afford external competition law advice) as and when resources permit.
- 6.32 **Delivery and content of advice will be tailored to assist business most –** The CMA will provide a bespoke response to an IA application according to what, in its view, is proportionate and would most suit the parties in the circumstances. In some circumstances the CMA may offer over-the-phone advice. However, where CMA officials possess no particular insights that the parties and their advisers lack and/or the analysis turns particularly on the market test, the response will be to this effect.
- 6.33 Two examples are set out below.

Example – CMA advises that it cannot offer meaningful guidance beyond that available in published practice. An IA application relates to a market for which suitable guidance in the form of previous CMA, OFT, CC or other decisional practice exists. The CMA advises by phone to this effect, adding any additional insights it feels it can offer prior to evaluation of any third party evidence. It offers a pre-notification conference call with the case team in due course to discuss a draft notification and suggests evidence which may be appropriate to shed light on the key competition issues of the case.

¹⁰⁵ The CMA does not automatically send an issues letter in all notified cases that have previously been the subject of IA, as this decision is taken depending in significant part on the information that is received in response to the CMA's market consultation.

Example – CMA advises that third party evidence is likely to be decisive as to its duty to refer. An IA application presents a merger as a ‘4:3’ in a declining market with high entry barriers and a sophisticated, concentrated customer base. It argues that buyer power alone is sufficient to avoid a reference outcome, but seeks the CMA’s view. The CMA’s advice is as follows: (i) primary weight would be given by the CMA to customers’ own views on this point, substantiated with evidence; (ii) the parties’ best course of action in the interim would be to gather credible evidence that buyers have leveraged such ‘power’ – by threatening to self-supply, sponsor entry or retaliate in other markets as the case may be – in past pricing negotiations; (iii) at the end of its Phase 1 inquiry, the CMA would weigh the probative value of such ‘rebuttal’ evidence against evidence supporting concerns in assessing whether it had the duty to refer. A pre-notification meeting with the case team is offered for when the parties have gathered the relevant evidence.

- 6.34 An application for IA will normally seek the CMA’s substantive view as to the likelihood of the case being referred for a Phase 2 investigation. However, the CMA may provide advice on jurisdictional issues,¹⁰⁶ either on a standalone basis, or along with any advice on the substantive issues raising the genuine issue of a duty to refer. The CMA will not, however, give advice in cases that do not appear to raise competition issues given that this would not be a sensible use of resources in a merger regime with voluntary notification.
- 6.35 The limitations of the IA process¹⁰⁷ mean it is unsuitable, however, for the CMA to advise on the decisive legal question of whether the structure of a transaction, designed to fall outside the Water Industry Act 1991 regime, is nonetheless caught by the relevant automatic reference provisions (see paragraph 17.1 to 17.6 below). Pre-notification is recommended in such a case.

Informal advice – procedures and caveats

- 6.36 **Applications** – Parties should make all IA applications to the CMA via the contact details listed on CMA website. The request should be presented in a clear, concise executive summary format of no more than five pages in length, covering:

¹⁰⁶ For example on the share of supply test or material influence questions, or on questions relating to case allocation between the Commission and the CMA.

¹⁰⁷ In particular, the fact that the IA process is simply the non-binding view of the CMA officials giving the advice – not that of the CMA Phase 1 or Phase 2 decision maker(s) – and the fact that the CMA does not consider that the case team are in a materially better position than external lawyers to advise on whether a particular corporate structure triggers a mandatory reference for a Phase 2 investigation.

- the suitability of the proposed transaction for IA treatment by reference to the principles set out in paragraphs 6.27 to 6.35 above
- the theory of harm underlying a credible candidate case for reference, leading the CMA to believe the duty to refer is a genuine issue, and
- the key substantive issue(s) – and/or where applicable, jurisdictional issues – on which the parties seek guidance.

6.37 **Timing** – while there is no standard timetable for the provision of IA, the CMA will endeavour to indicate whether it will accept or reject an IA application within five working days of receipt of the application. Where IA is to be given immediately at the conclusion of a meeting, the CMA will endeavour to schedule that meeting within ten working days of receipt of the original application. Urgent cases will be handled more swiftly if (i) adequately justified by the parties and (ii) the diaries of relevant CMA staff permit.

6.38 **Caveats** – the following conditions and caveats to IA apply.

- First, IA is solely the view of the CMA staff in the MG. IA will usually be given by a senior member of the MG. IA is not given by the CMA Chair or any other member of the CMA's Board or Panel. It does not bind the CMA nor any Phase 2 Inquiry Group, and creates no expectations as to the outcome at the public stage of any transaction.
- Second, both the content of IA and the fact that a party has applied for it is strictly confidential to the party or parties seeking that advice and their legal advisers, even after the transaction becomes public. The CMA would be concerned by any intentional or accidental breach of trust in this respect – either by the companies concerned or by their advisers – and might take the view that it could not offer those responsible any such IA in the future. This restriction applies even where only one party to a transaction seeks IA, as the advice should not be revealed by the recipient to the other party. The CMA will, however, normally be willing on request to inform orally the other party of the terms of the IA given. In all cases, the guidance given by the CMA is confidential and is only for the board members, senior executive officers and general counsel (and not individual shareholders) of the company/companies making the request and the legal/financial advisers that are privy to the request.¹⁰⁸
- Third, the CMA is unable to test the parties' submissions to verify information provided in an IA application: any advice given is based on

¹⁰⁸ In case of doubt, parties should confirm with the CMA the identity of the persons with whom they are permitted to share the advice received.

the assumed accuracy of that information. For this reason, although the information provided should be brief, the quality and accuracy of the advice will, to a large extent, reflect the quality and accuracy of the information provided.

- Fourth, the IA process is ‘one-shot’ and not iterative, though subsequent pre-notification contacts may be encouraged (see paragraphs 6.40 to 6.49 below).

6.39 As a condition of seeking and obtaining IA, once parties have received the MG’s IA, they agree to inform the relevant case officer if and when the proposed transaction goes ahead and becomes public knowledge. The CMA and its staff will respect the confidential nature of the IA procedure, and no public announcement is ever made about the outcome. Nor is any indication given that a request for IA has been made in a given case.¹⁰⁹ Furthermore, discussions on IA remain without prejudice to the handling and investigation of the case if formally notified or, if not notified, the CMA opens an own-initiative investigation after being informed that the transaction has completed or will do so.

Pre-notification discussions

Benefits of pre-notification

6.40 Pre-notification discussions take place when the parties to a merger have decided to notify the CMA and wish to engage with it, typically on the contents of a draft notification, prior to formal submission. Use of the pre-notification phase to discuss an intended notification with the case team on a confidential basis is an important part of the whole merger review process. It is in the interests of both the CMA and the parties to any transaction that notifications are complete at the time of an actual submission, in particular because the 40 working day statutory timetable for considering the merger does not start until the CMA has confirmed to the parties that it has received a complete Merger Notice.¹¹⁰ For companies planning to notify a merger, the CMA therefore strongly encourages parties to contact it to engage in pre-notification

¹⁰⁹ In the exceptional circumstances where the CMA considers that there is a risk of pre-emptive action before the transaction becomes public knowledge, it may consider imposing an interim enforcement order under section 72 of the Act preventing that pre-emptive action. Such orders are required to be published by section 107(1)(e) of the Act.

¹¹⁰ Or (where the CMA has commenced the investigation of its own initiative) it has sufficient information to enable it to begin its investigation.

discussions at least two weeks before the intended date for notification (even in cases that the parties consider to be non-problematic).¹¹¹

6.41 Pre-notification contacts benefit the parties, and often the CMA, by serving, for example, to:

- educate the case team where markets are complex and/or unfamiliar (in particular through discussions with the business people of the merging parties)
- frame the transaction, including its rationale and efficiencies, in a realistic context early on
- clarify the information and evidence the CMA will: a) require for the purposes of the Merger Notice in the case at hand, so as to be able to formally start its investigation on the 40 working day statutory timetable, and/or b) will request early in the review process
- allow the parties and the CMA to explore any types of information in the Merger Notice form for which the CMA may be willing to grant a waiver and thus to reduce the information needed to provide a complete notification
- identify useful items of evidence that may assist the parties' case, such as internal, day-to-day documentation, or any relevant data or management information
- potentially avoid or minimise burdensome information requests
- be an additional forum for informal dialogue on the CMA's likely approach to consideration of a novel issue or the assessment of particular competition concerns (although pre-notification discussions are not intended to cover an assessment on the substance of the case by the CMA and applications will not be treated as applications for IA, for which the separate procedure described in paragraphs 6.25 to 6.39 above applies)
- promote discussion on pragmatic methodological solutions to tackling issues, for example, the appropriate scope of any local analysis, estimating the degree of substitutability between products or stores, or

¹¹¹ The extent and format of pre-notification discussions will, however, be likely to vary depending on the complexity of the case in question. In more complex cases a more extended pre-notification period may be appropriate and in the interest of parties.

the extent of any quantitative evidence that may be required to analyse the case within a Phase 1 investigation,¹¹² and

- in appropriate cases, allow for the case team and the parties to consider the structure of potential UIL options. The CMA is particularly ready to engage in early dialogue with parties where they acknowledge that their transaction may raise a competition issue and seek advice on structural remedies to resolve it – such discussions will not be disclosed to the CMA decision maker in advance of their decision on competition issues (as regards UILs, see further chapter 8 below).

6.42 Pre-notification discussions are especially important following the introduction of statutory time limits for the CMA to make its decision as to:

- whether its duty to refer applies, and
- if so, whether any UILs may be sufficient to address any identified competition issues.

6.43 Where the CMA is assessing, at Phase 1, whether there is a realistic prospect that a merger would lead to a substantial lessening of competition (that is, whether its duty to refer applies), it has limited time available to do so. Where a merger appears likely to raise potential competition issues, parties wishing to secure an unconditional or conditional clearance at Phase 1 may wish to use the opportunity of engaging in more detailed pre-notification discussions in order to maximise the CMA's opportunity fully to consider those issues (and any information submitted in that regard), and thus the appropriateness of any such conditional or unconditional clearance. Parties should also note that, once the CMA's Phase 1 statutory period of 40 working days for considering a notification has formally commenced, the CMA is not able to 'stop the clock' (that is, to suspend that period) to allow time for further consideration of complex issues or significant volumes of new information, except in limited

¹¹² This includes any primary data collection undertaken for the purposes of merger review, such as a consumer survey. The time and scale of work required to design and conduct reliable consumer surveys means that they are often more suited to use during an in-depth Phase 2 process.

However, if parties consider that the gathering of survey evidence may allow the merger to be cleared at Phase 1, the CMA encourages parties, prior to undertaking such a survey, to discuss the need for, and, (as appropriate) design and scope of, the survey with the MG during pre-notification discussions. This will increase the likelihood that the survey results will constitute robust evidence (although the final assessment of the evidence remains one for the decision maker at the end of the investigation).

The CMA has also adopted the guidance document *Good practice in the design and presentation of consumer survey evidence in merger enquiries* (originally published by the OFT and CC) to provide further assistance to parties. However given that the circumstances of each case vary considerably, parties are encouraged to discuss with the CMA in advance how the principles in that document should be applied in their case.

circumstances where information it has formally requested from parties remains outstanding.

- 6.44 In cases involving the merger of NHS foundation trusts, parties may wish to engage in pre-notification discussions with Monitor as well as the CMA in order to anticipate the types of evidence both agencies will require when assessing whether there are relevant customer benefits (RCBs) arising from the merger.¹¹³ In particular, given the statutory time limits applicable to the CMA's review following notification, parties wishing to rely on RCBs to obtain a clearance at Phase 1 may wish to engage in more extensive pre-notification discussions with both Monitor and the CMA, in order to maximise both authorities' opportunity fully to consider those issues.

Purpose of pre-notification discussions

- 6.45 The pre-notification process is available for all transactions regardless of whether or not they are in the public domain. The CMA does not make public the fact that it is in pre-notification discussions on a case.¹¹⁴ However, the pre-notification process is not available for transactions that are hypothetical and the CMA will generally expect to be satisfied that there is a good faith intention to proceed as evidenced by, for example, adequate financing, heads of agreements or similar, or evidence of board-level consideration.
- 6.46 In appropriate cases, pre-notification discussions also provide an opportunity for the parties to engage constructively with the CMA on the question of which competition authority is best placed to review the merger. If the transaction does not have an 'EU dimension' for the purposes of the EU Merger Regulation, the parties may wish to discuss the possibility of a pre-notification referral to the Commission under Article 4(5) of the EU Merger Regulation. Alternatively, where the transaction does have an EU dimension, the parties may wish to discuss with the CMA whether the CMA is best-placed to review the transaction and whether a pre-notification referral request (under Article 4(4) of the EU Merger Regulation) or a post-notification referral request (under Article 9 of the EU Merger Regulation) is appropriate. The CMA can provide guidance to parties on the referral processes involved (see further chapter 18 below).¹¹⁵

¹¹³ As regards the CMA's assessment of RCBs when considering whether an exception to its duty to refer applies, see further *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122).

¹¹⁴ See footnote 109 above in relation to interim orders.

¹¹⁵ The discussion as to which authority would be best placed to review a transaction could take place either in the context of IA (in respect of a potential future transaction) or pre-notification discussions (in respect of a transaction that is proceeding).

Pre-notification process

- 6.47 In the first instance, parties seeking to hold pre-notification discussions should complete a case team allocation form to allow for the selection by the CMA of an appropriate case team. As a general rule, case teams will be allocated from within the MG at weekly meetings, however the MG will consider requests for urgent consideration in exceptional circumstances.¹¹⁶
- 6.48 The CMA will nominate a case team including a specific case officer to take primary responsibility for dealing with the case. The name of the case officer is passed to the party who submitted the case team allocation form. In subsequent exchanges, the merging parties and their representatives should regard that officer as their point of contact within the CMA. The work of individual case officers is co-ordinated and overseen by senior staff in the MG. The allocated case officer will then contact the relevant parties to discuss the timing and process for pre-notification discussions.
- 6.49 The case team will endeavour to review submissions and revert to the parties within a reasonable time frame; as a guide, this is generally expected to be some five to ten working days from receipt. Where the CMA considers that a pre-notification meeting or conference call is desirable, the case team will schedule one; otherwise pre-notification contacts will proceed on the basis of phone, email and formal written contacts as required.

Submitting a Merger Notice

- 6.50 Once a merger is announced, and thereby becomes public knowledge, the companies concerned may formally notify their merger to the CMA.¹¹⁷ Where the parties have not signed a share purchase agreement or equivalent, the CMA will generally expect to be satisfied that there is a good faith intention to proceed, as evidenced by, for example, adequate financing, heads of agreements or similar, or evidence of board-level consideration. In the case of a public bid, the CMA will expect at least a public announcement of a firm intention to make an offer or the announcement of a possible offer in order to open a Phase 1 investigation.¹¹⁸

¹¹⁶ A copy of the form to be completed, and details of the current deadline for submitting requests in order to be considered at the weekly allocation meeting, are available on the CMA's website.

¹¹⁷ Section 96(2)(b) of the Act. Parties are not able to notify transactions to the CMA that they wish to keep confidential given that the CMA issues a public invitation to comment at the start of its investigation. The CMA is therefore not able to begin its statutory timetable for review of the case until the merger has been announced.

¹¹⁸ Corresponding with Rules 2.5 and 2.4 of the City Code on Takeovers and Mergers respectively.

- 6.51 **As noted above, parties are encouraged in all cases to engage in appropriate pre-notification discussions with the MG prior to making their final notification.** Parties should understand that should they choose (even if for potentially understandable commercial reasons) to limit pre-notification discussions, they will reduce the scope to agree with the CMA a more targeted approach (for example through the granting of derogations) to the information required for its investigation to commence. In potentially difficult cases, they would also give the CMA a more limited period of time in which to assess any further information required to decide whether the test for reference is met, and thereby risk not maximising their chances of a Phase 1 outcome.
- 6.52 In any case, the CMA's statutory timetable will only start on the working day after the CMA has confirmed to the parties that:
- it is satisfied that it has received a complete Merger Notice meeting the requirements of the Act: that is, it is in the prescribed form and contains the prescribed information, including stating that the existence of the proposed merger has been made public, or
 - (in cases where the CMA – in the absence of a satisfactory notification by the parties – commences the investigation of its own initiative) that it has sufficient information to enable it to begin its investigation.¹¹⁹
- 6.53 Where parties submit a notification, the MG will, on receiving it, consider whether it meets the requirements of the Act. Once the MG is satisfied that it does, it will confirm this to the parties. The 40 working day period within which the CMA must decide whether the test for reference is met begins on the working day after that confirmation is given.
- 6.54 The procedures for submitting a Merger Notice are described more fully in Annexe A.

Completion of the template Merger Notice: the prescribed form

- 6.55 A template Merger Notice for parties to complete for these purposes is available to download on the CMA's website. This template, once completed, comprises the 'prescribed form' for the purposes of the Act. The template also sets out the categories of information required by the CMA for the purposes of its investigation (the prescribed information, as to which, see below) together with additional guidance notes to assist parties in identifying the specific information required by the CMA in the case at hand.

¹¹⁹ If they have not already done so in advance of pre-notification, before submitting a Merger Notice, parties should first complete and submit a case team allocation form (see paragraphs 6.47 above)

6.56 The CMA wishes to obtain the information necessary to carry out its responsibilities under the Act without placing undue burdens on the parties. Parties are therefore free to supply the required information using the Merger Notice template or to provide a submission in a written format of their choosing, accompanied by a completed Merger Notice indicating clearly where in that submission the required information can be found.

Completeness of submissions: the prescribed information

6.57 It is important that any Merger Notice submitted is complete. As noted above, the template Merger Notice published by the CMA indicates the categories of information required by the CMA, and provides additional guidance to assist parties in individual cases. Parties requiring further clarification as to the specific information that the CMA requires in a given case are encouraged to engage in pre-notification discussions with the MG.

6.58 Where information important to begin a merger investigation is missing from a submitted Merger Notice, the CMA will inform the merging parties of this fact at the earliest opportunity (and generally within five to ten working days of receipt of that Merger Notice). The CMA may, in appropriate circumstances, opt to use its information-gathering powers (described in chapter 6) to obtain the necessary information.

6.59 While all notifications must contain the prescribed information set out in the Merger Notice, the CMA may be willing to grant derogations from the obligation to provide specific pieces or categories of information required by the template Merger Notice (particularly in cases which are evidently unlikely to give rise to substantive competition concerns). Where parties wish to seek such a waiver, they should discuss this with the MG during pre-notification discussions.

Own-initiative investigations

6.60 Even where parties have not voluntarily notified a merger by way of a complete Merger Notice, the CMA may decide that the information it has relating to the parties and the merger and/or any information it has received from the parties in response to its enquiry letter is sufficient for it to commence its investigation and start the 40 working day statutory timetable for its Phase 1 investigation.¹²⁰

¹²⁰ See s.34ZA(3) of the Act. The extent and nature of the information that the CMA will consider 'sufficient' in such circumstances will depend on the specific circumstances of the case. The CMA may consider that it has sufficient information to begin its investigation and to proceed to a decision even if the parties have not responded in full to its enquiry letter.

6.61 Where the CMA sends an enquiry letter to the parties on its own initiative (see paragraphs 6.15 to 6.19 above), the information it requests, potentially by way of additional information requests, will ultimately be similar to that which the parties would have provided had they chosen to notify the transaction by way of Merger Notice. For this reason, if the CMA receives from the parties in such situations a response to its enquiry letter containing sufficient information for the CMA to begin its investigation, the CMA will confirm this to the parties, and the 40 working day statutory timetable commences on the working day after such confirmation is given.

Fast track reference cases

6.62 The CMA considers that, exceptionally, it may be possible to accelerate significantly the treatment of cases for referral for a Phase 2 investigation where this corresponds with the wishes of the merging parties and where there is sufficient evidence available to meet the CMA's statutory threshold for reference.

6.63 For a case to be fast tracked to reference, the CMA must have evidence in its possession at an early stage in an investigation that it believes objectively justifies a belief that the test for reference is met and the notifying parties must have requested and given consent for use of the procedure.

6.64 Merging parties are generally incentivised to seek to remedy competition concerns by means of UILs where this is feasible. Candidate cases for fast track reference for a Phase 2 investigation are therefore likely to be cases where, to the extent that the CMA does find a concern with the merger, that concern would impact on the whole or substantially all of the transaction, and not just one part (that could be resolved through structural UILs – see chapter 8).

6.65 Given that fast track reference cases will by definition be those where the parties accept that the test for reference is met (and agree to waive their normal procedural rights during Phase 1), the CMA will not be required to undergo all of the normal procedural steps followed when a case is referred (including an issues meeting and a CRM). In these cases, the CMA will generally reduce the time for third party consultation given that third parties will have an opportunity to present their views during the Phase 2 investigation. The CMA would expect the overall time taken from formal notification to reference decision would be ten-15 working days. However where there are EU Merger Regulation referral processes¹²¹ or public interest

¹²¹ See Chapter 18.

interventions¹²², a fast track process may be delayed or take longer than these anticipated timescales.

- 6.66 It is open to merging parties to inform the CMA that they consider their case meets the criteria for fast track reference for a Phase 2 investigation during pre-notification, at the time of notification or at any point during the course of the CMA's investigation. In addition to considering whether the case meets those criteria, the CMA will in deciding whether to utilise the fast track process have regard to its administrative resources and the efficient conduct of the case.

Interaction with other processes

- 6.67 The CMA recognises that parties may be subject to other regulatory processes in addition to UK merger control, such as the City Code on Takeovers and Mergers governing public takeovers, or merger control regulation in other jurisdictions. Parties should inform the CMA if the merger is subject to such processes and any associated timing constraints for the merger (see further paragraphs 19.1 to 19.5 below in relation to the CMA's interaction with competition authorities in other jurisdictions). The CMA will take account of such constraints when conducting its review and may, where the demands of the particular case and its existing caseload allow, seek to make its decision more quickly than the standard statutory timetable. If parties wish to request that a decision is taken more quickly than the statutory timetable, the case team allocation request should clearly explain why the case is urgent, with evidence if available, and why the parties did not commence pre-notification discussions earlier. In such cases, the CMA would expect the merging parties to be particularly alert to the importance of a full and complete merger submission and to the need for very prompt responses to additional requests for information.

Competing bids and parallel industry mergers

- 6.68 Where there are competing bids for the same company, the CMA tries, other factors being equal, to consider them simultaneously, but will not yield to strategic behaviour to delay review of a bid notified earlier in time. It does not necessarily follow that, because one is referred, the other or others will be also. As in the case of a single bidder, each case must be considered on its own merits.

¹²² See Chapter 16.

Restrictions directly related and necessary

- 6.69 Mergers and ancillary restrictions to the merger are generally excluded from the prohibitions of the Competition Act 1998 under Schedule 1 of the Competition Act 1998. The Commission has adopted an interpretive notice on ancillary restrictions¹²³ which provides that only restrictions that are ‘directly related and necessary’ to the legitimate objective sought of implementing the transaction are justified, and sets out a principle of self-assessment.¹²⁴
- 6.70 The CMA’s analytical approach to ancillary restrictions generally follows the Commission notice and, in light of the guidance it contains and particularly given the constraints of the Phase 1 review process, the CMA considers that it is in principle no better placed than the merging parties and their advisers in most cases to determine whether contractual arrangements and agreements are ancillary to a merger and, therefore, automatically excluded from the Chapter I and Chapter II prohibitions of the Competition Act 1998. Accordingly, as a normal rule, the CMA will not give a view in its published decision (or to the merging parties confidentially) on whether or not a restriction is ancillary.
- 6.71 Exceptionally, at the request of the merging parties, and where the CMA considers that the request raises novel or unresolved questions giving rise to genuine uncertainty as to whether a restriction is directly related and necessary in the context of a merger situation (not covered by the principles set out in the Commission’s notice), the CMA may, in the context of its merger assessment, agree to provide guidance on the ancillary nature of a restriction based on its own assessment of the issues, based on the following points.
- To enable such a request to be considered, the CMA will ask for various information to be provided and may wish to seek the views of third parties. It will be for the parties to the merger to indicate in their submission which elements of the arrangements are commercially confidential. If the CMA is unable to seek public comments, then it may be unable to express a view as to whether the restrictions are ancillary.
 - The CMA will include its assessment of whether a restriction is directly related and necessary to a merger situation in its published decision on the merger, including why it considers it appropriate to provide guidance in the case in question.

¹²³ *Commission Notice on restrictions directly related and necessary to concentrations*, OJ 2005 C56/24.

¹²⁴ In particular, the notice indicates that restrictions to competition should be of limited duration.

- The CMA is required to reach its decision whether the test for a referral to Phase 2 is met within 40 working days. Given the additional time and resources required to assess ancillary restraints, the CMA will not usually agree to a request to provide guidance on ancillary restraints unless it has had sufficient opportunity to have an informed discussion with the parties about the request during pre-notification.

DRAFT

7 THE PHASE 1 ASSESSMENT PROCESS

7.1 This chapter of the guidance provides a more detailed account of certain aspects of the CMA's Phase 1 assessment process (chapters 11 to 14 provide equivalent information on the Phase 2 process). It first explains how the CMA may gather supplementary information from the merging parties to that received in their initial submission. It also describes the process for verifying information provided with third parties. It details how the CMA will use its powers to make interim orders during Phase 1. It then sets out the decision making process followed in determining where the duty to refer is met, both in cases which do not raise material competition concerns and more complex cases.

Information gathering powers

7.2 Sometimes the CMA may need additional, or more comprehensive, information from the merging parties than is provided in the initial Merger Notice (even though the information it has received is sufficient for the CMA to be satisfied that the Merger Notice is complete for the purposes of commencing the CMA's review and its 40 working day timetable) to allow it to make a decision on reference. The CMA asks for any such additional data, information or documents as soon as it is clear they will be necessary, but, if the timetables are to be met, replies also have to be supplied quickly. Requests for such information normally identify a short deadline for a full response, which might be as short as one business day where necessary.

7.3 The CMA has the power under section 109 of the Act to issue a notice requiring a person to provide information or documents, or to give evidence as a witness (a section 109 notice). While the CMA may issue requests for information informally, it is likely to use the section 109 power where (i) it considers there to be a risk that it will not receive the information sufficiently in advance of its statutory deadline for the information to be analysed and taken into account in its decision(s), (ii) it has doubts that the recipient will comply with an informal request, or (iii) the CMA believes that there is a risk that relevant evidence may be destroyed.¹²⁵ If a relevant party¹²⁶ fails to comply with a section 109 notice, this permits the CMA to extend the relevant statutory timetable (including, where relevant, the four month statutory deadline for referring completed mergers) for as long as the response to the information requested is overdue. If the parties have notified the merger to the CMA using a Merger Notice, the CMA may also reject the Merger Notice.

¹²⁵ Such notices may also be issued before the CMA's investigation formally opens, for example the CMA may issue enquiry letters under its formal section 109 powers.

¹²⁶ In this context, this does not include third parties who are not connected to the merging parties.

- 7.4 In addition to causing delay to the review timetable, failure to comply without reasonable excuse with a notice under section 109 of the Act can have more serious consequences, including in some circumstances the imposition of a fine. See paragraph 7.17 below for further information.
- 7.5 Whether or not an information request is made using the CMA's formal section 109 powers, it is important that recipients, as soon as possible after receiving a request for information, inform the CMA of any difficulties they may have in meeting the deadline for providing the information or in submitting the information in the requested format. Such discussions may enable the CMA to vary the information request or the stipulated response date (where appropriate).

Discussions with merging parties

- 7.6 The CMA encourages merging parties and their advisers to liaise closely with the case team within the MG during the lifetime of the case. Ideally, this process should start with pre-notification discussions and consideration by the MG of a draft Merger Notice before it is formally submitted for review (see paragraphs 6.50 to 6.53 above).
- 7.7 The level of interaction required between merging parties and their advisers and the CMA's case team will depend on the individual circumstances of the case in question. In cases that raise no material competition issues, it may well be sufficient for the parties to liaise with the case team by email on a periodic basis. In other cases, it may be helpful for parties and the case team to have conference calls and/or meetings. There is no fixed timetable as to when such contacts should occur. Notifying parties may suggest such contacts if they consider they would be useful and the CMA will agree to a meeting where the case team considers it appropriate.
- 7.8 In all cases, the CMA commits that, generally in the period between working days 15 and 20, it will have a 'state of play' discussion with the parties, typically by conference call. The purpose of this discussion is to give the parties as much information as possible about any competition concerns, including feedback from the CMA's market test, and whether or not the CMA is minded at that point in time to send the parties an issues letter. The case team will also provide an update on the likely timetable for the case going forward. In most cases appearing at that stage of the process to raise potential competition concerns, a senior member of staff in the MG will attend the 'state of play' discussion.

Third parties

- 7.9 The CMA invites comments on any public merger situation under review from interested third parties by means of an invitation to comment notice published through the Regulatory News Service and on its website. It also takes note of any unsolicited comments that are received.
- 7.10 The CMA also targets consultations more specifically by requiring merging parties to provide contact details for some or all of their customers and competitors (see *Merger Assessment Guidelines* (OFT1254/CC2) for examples of the type of issues such consultations may cover).¹²⁷
- 7.11 Where adverse third party views raise significant competition issues, and where the CMA wishes to rely on this evidence in its decision, the merging parties are informed of the nature of the concerns expressed (but not the actual identity of the persons involved¹²⁸) in sufficient detail to enable them to respond to them. The time constraints of the Phase 1 process mean that in most cases it is not feasible to provide merging parties with non-confidential versions of third party submissions.
- 7.12 The CMA will seek to test any issue material to the outcome of a case directly with the market participant best-placed to supply facts and evidence on that issue.¹²⁹ For example, buyers in relation to buyer power, potential entrants in relation to entry, and rivals in relation to expansion and repositioning of their offer. It will not rely simply on self-serving statements by the merging parties or competitors on the ability, or lack thereof, of rivals to compete with the merged firm. Where it is reasonable to expect a party advancing an argument to substantiate it with internal documentary evidence prepared in the ordinary course of business, the CMA may be more cautious towards the relevant argument in the absence of such evidence. In more extreme cases, where it is implausible that such evidence is unavailable on request, the CMA may dismiss the views of that party as lacking credibility. The CMA's powers to require a person to submit information or documents, or to give witness evidence, can apply to third parties as well as the merging parties. The CMA will consider using its section 109 powers in relation to third parties where it considers such evidence to be necessary for its decision, and has doubts

¹²⁷ In some cases, where the customers of the merger parties are final consumers, contact details for these customers may not be available or it may not be feasible to provide them. In such instances, the merger parties are expected to make best efforts to publicise the CMA's invitation to comment and the means through which customers can contact the CMA. For example, this may involve signs or displays in the merger parties' stores or on their websites.

¹²⁸ Where useful, the CMA may give the merging parties an indication of the generic position or role of the persons supplying the information where this would not enable them actually to identify the persons involved.

¹²⁹ *UniChem v OFT* [2005] CAT 8.

about whether it will receive a full or timely response to an informal request. See paragraphs 7.17 to 7.20 below and Administrative Penalties: Statement of policy on the CMA's approach (CMA4) [*currently in draft and being consulted on*] for further information about the potential consequences of failing to comply with a section 109 notice.

Contacts with other bodies

7.13 The CMA may also contact other governmental departments, sectoral regulators, industry associations and consumer bodies for their views on merger cases where appropriate. Sectoral regulators may carry out their own public consultation before providing comments to the CMA.

Media mergers

7.14 In local media mergers involving newspaper publishing and/or commercial radio or television broadcasting, where the case raises prima facie competition concerns, the CMA will ask Ofcom to provide it with a local media assessment in order further to inform the CMA's decisions on the reference test and on the application of any available exceptions to the duty to refer. Drawing on Ofcom's understanding of media markets, the assessment may include input on the following:

- the overall market context
- the relevant counterfactual to the merger (including the risk of the asset or business in question failing)
- the scope of relevant product and geographic markets
- the competitive effects of the merger, and
- exceptions to the duty to refer, and in particular Ofcom's views on whether the markets are of insufficient importance (*de minimis*) to warrant reference and whether there are 'relevant customer benefits' (RCBs) – such as higher quality (which, in the context of newspapers, could for example reflect the range and quality of news reporting) or greater choice of products – which might be weighed against an identified substantial lessening of competition.

7.15 Although the decision on all of these matters remains one for the CMA, the CMA will take Ofcom's views into account in reaching its conclusions in the same way as it would consider views from other third parties received during the course of its investigation. The CMA will therefore consider Ofcom's local media assessment within the context and timeframe of its normal review processes.

National Health Service mergers

7.16 In mergers involving NHS foundation trusts, the CMA must notify Monitor where it decides to carry out an investigation into the merger. Monitor is then required to provide advice to the CMA on relevant benefits for NHS users arising from the merger, and any other matters relating to the investigation that Monitor considers appropriate to bring to the CMA's attention.¹³⁰ The CMA retains responsibility for making the decision under the Act, but in doing so, will take Monitor's advice into account in reaching its conclusions within the context and timeframe of its normal review processes.

Penalties for failure to comply with CMA's investigatory powers

7.17 There are penalties for both notifying parties and third parties supplying false or misleading information to the competition authorities. It is an offence punishable by a fine or a maximum of two years imprisonment (or both) to:

- knowingly or recklessly to supply false or misleading information to the CMA, Ofcom, or the Secretary of State in connection with any of their merger control functions under Part 3 of the Act, or to give false or misleading information to any third party knowing that they will then supply it to the CMA, Ofcom or the Secretary of State,¹³¹ or
- intentionally alter, suppress, or destroy any information that the CMA has required to be produced under an information request notice under section 109 of the Act.¹³²

7.18 In addition, the CMA may impose a fine¹³³ where a person has:

- without a reasonable excuse, failed to comply with any requirement of an information request notice under section 109 of the Act,¹³⁴ or
- intentionally obstructed or delayed a CMA official or other person in the exercise of their powers under section 109(6) of the Act to take a copy of information produced pursuant to such a notice.¹³⁵

¹³⁰ This is a requirement under section 79 of the Health and Social Care Act 2012.

¹³¹ Section 117 of the Act.

¹³² Section 110(5) of the Act.

¹³³ Fines may be of a fixed amount or calculated by reference to a daily rate. The amount of the fine is determined by the CMA, up to a maximum of £15,000 per day or £30,000 for a fixed amount, or such lower maximum as the Secretary of State may impose by statutory instrument.

¹³⁴ Section 110(1) of the Act.

¹³⁵ Section 110(3) of the Act

- 7.19 This is in addition to the CMA's powers to, for example, suspend the statutory timetables for reviewing mergers where information is not provided or is found to be false and misleading.
- 7.20 Further guidance on the CMA's approach to penalties is set out in *Administrative Penalties: Statement of policy on the CMA's approach (CMA4) [currently in draft and being consulted on]*.

Confidentiality

- 7.21 It is strict CMA policy to observe appropriate confidentiality in all aspects of its operation and the CMA recognises that respecting the confidentiality of confidential information provided to it is vital to the effective performance of its merger review functions. The CMA will not therefore publicly disclose such confidential information unless required to do so by law.
- 7.22 The classes of information the CMA publishes on its website in the course of Phase 1 merger reviews include:¹³⁶
- any interim orders made by the CMA and associated derogations granted
 - invitations to comment
 - decisions as to whether the merger meets the test for reference under the Act (including decisions that a transaction is not a relevant merger situation qualifying for review under the Act)
 - decisions as to whether any UILs offered by the parties may be suitable to address competition concerns, or to make a reference for a Phase 2 investigation
 - the statutory deadlines for its decisions and any extensions to those deadlines, and
 - case lists.¹³⁷
- 7.23 Further detail on the classes of information typically published by the CMA in the context of a Phase 2 investigation are provided at paragraphs 11.27 to 11.29 below. Where parties consider that information to be published by the CMA in this regard (at either Phase 1 or Phase 2) contains confidential

¹³⁶ This is not an exhaustive list. Section 107 of the Act sets out further information on publication requirements for the CMA's decisions.

¹³⁷ Information on 'legacy' OFT and CC cases, and on merger advice made under the Fair Trading Act 1973, is also available through the CMA's website.

information, the CMA will expect the parties to identify that information and explain why it is considered to be confidential.¹³⁸

- 7.24 The Freedom of Information Act 2000 (the FOIA) was introduced to improve the transparency and accountability of public bodies and gives anyone a general right of access to information held by such bodies, including the CMA.¹³⁹ A request for information under the FOIA will be dealt with within 20 working days of receipt.
- 7.25 There are a number of exemptions from disclosure under the FOIA of potential relevance to a request for information held by the MG, including where disclosure would be prohibited under any statutory enactment including the Act.¹⁴⁰ Part 9 of the Act, under which information relating to any business of an undertaking may not be disclosed unless the disclosure is permitted under one of the gateways in the Act, therefore continues to apply. In addition, the CMA may rely on section 31 of the FOIA in withholding information if it considers its disclosure would, or would be likely to, prejudice the exercise by the CMA of its statutory merger control functions and there are public interest arguments for maintaining the exemption outweighing the public interest in disclosing the information.
- 7.26 Other government departments and regulators with sectoral expertise may be given information in confidence so that the CMA can take account of their views on any competition issues and about a possible reference for a Phase 2 investigation.
- 7.27 Further advice on exchanges of confidential information in the context of multi-jurisdictional mergers (similar principles are applicable to exchanges of information with non EU countries) is provided in paragraphs 19.1 to 19.5 below.

Interim orders

- 7.28 As there is no requirement to notify mergers in the UK to the CMA, there is similarly no bar to companies completing transactions without clearance from the CMA, or even during the CMA's Phase 1 review.¹⁴¹

¹³⁸ See Part 9 of the Act, and paragraphs 9.2 and 11.27 to 11.29 below.

¹³⁹ More information on the FOIA can be found on the CMA's website, including contact details should you require further information. More detailed information on the FOIA is available on the Information Commissioner's website at www.ico.org.uk or by writing to: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

¹⁴⁰ Section 44(1)(a) of the FOIA.

¹⁴¹ If the CMA refers an anticipated merger for a Phase 2 investigation, certain statutory restrictions on the parties' ability to complete the merger until the outcome of the Phase 2 investigation take effect (section 78 of the Act).

- 7.29 However, the CMA may, before it has reached its decision whether to make a reference in an anticipated or completed merger, make an order under section 72 of the Act if appropriate to prevent or unwind pre-emptive action (an interim order). Further information on the content of interim orders, and the circumstances in which they may be made by the CMA, is provided below and in Annexe C.
- 7.30 Pre-emptive action is defined in the Act as meaning any action that might prejudice the reference or impede the taking of any action that may be justified by the Phase 2 Inquiry Group's decision if the merger were to be referred for a Phase 2 investigation (section 72(8) of the Act). In essence, interim orders are designed to stop the merging parties from starting integration (or prevent further integration), including the sharing of commercially sensitive information between them, before the CMA completes its investigation. As well as seeking to prevent integration, the CMA may also, in appropriate circumstances, require by order that existing integration is unwound. All such interim orders (including consents thereunder) are published on the CMA's website.¹⁴²
- 7.31 The CMA's interim orders require that merging parties 'cease and desist' from integration beyond that which has already taken place at the time of the order being imposed. However, the CMA may subsequently (on application by the parties) grant a derogation, giving consent to the parties to undertake certain actions prohibited by the order where such actions are, in the CMA's view, necessary and do not undermine the purpose of the interim order.
- 7.32 At Phase 1, the CMA would, in general, expect to seek to achieve an unwinding of integration that has already occurred only in limited circumstances (see Annexe C for further detail), but will assess each case on its own facts. Similarly, the CMA would not expect generally to impose an interim order at Phase 1 preventing the parties to an anticipated merger from completing the transaction (although an order may prevent integration from occurring post-completion). However where the CMA suspects that pre-emptive action may be occurring or may occur while the merger remains in contemplation, it may make an interim order requiring the parties to cease and desist from such pre-emptive action (see Annexe C for further detail). Furthermore, in both cases, in the event of a reference for a Phase 2 investigation (at which time the parties may also be bound by certain statutory restrictions on completion under the Act), the Phase 2 Inquiry Group will

¹⁴² Section 107 of the Act.

consider whether interim measures are appropriate during the Phase 2 investigation.¹⁴³

Statutory test and timing

7.33 Under section 72 of the Act, interim orders may be made as soon as the CMA has reasonable grounds for suspecting that two or more enterprises have ceased to be distinct or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct. It is not necessary for the CMA to establish that the other jurisdictional thresholds for making a reference to Phase 2 (the turnover or share of supply tests) are met.¹⁴⁴

7.34 Experience has shown that, for initial measures¹⁴⁵ to be effective, they should be implemented as soon as possible after completion of the merger in question¹⁴⁶ (or, in some cases, while the merger is in anticipation). As a matter of practice, the CMA will consider the appropriateness of making an interim order as soon as it has reasonable grounds for suspecting that: (i) two or more enterprises have ceased to be distinct or will cease to be distinct during the CMA's review, or (ii) arrangements are in progress or contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct, and that integration of those enterprises may be occurring prior to completion. This would typically be at the time an enquiry letter is sent out or after being informed of the merger by the parties. However the need for interim orders is kept periodically under review during the life of a case and interim orders may be imposed at any time during the CMA's review. It should be noted that the fact that the CMA has made an interim order in a particular case does not rule out its eventual clearance of the merger.

Threshold applied by the CMA

7.35 The threshold the CMA applies to consider whether it is appropriate to make an interim order at Phase 1 is a low one. The CMA will not have sufficient information to form a detailed judgement on the precise risks of pre-emptive

¹⁴³ The Act imposes statutory restrictions on certain actions following a reference. These include, in the case of anticipated mergers, a restriction on the acquisition of shares in the target company, and, in the case of completed mergers, restrictions on the completion of any further matters in connection with the merger arrangements or transferring ownership or control of the target company (see sections 77 and 78 of the Act). Separate provisions apply where references are made on public interest grounds (see paragraphs 7 and 8 of Schedule 7 to the Act).

¹⁴⁴ For detailed guidance on CMA's application of the jurisdictional thresholds in the Act, see chapter 4 above.

¹⁴⁵ Except where apparent from the context in which it is used, the term 'interim measures' refers collectively to initial enforcement orders made under section 72 of the Act (Phase 1), interim orders made under section 81 (Phase 2) and/or interim undertakings accepted under section 80.

¹⁴⁶ See *Stericycle v Competition Commission* [2006] CAT 21.

action at such an early stage in its assessment process. Lengthy consideration of these issues would divert CMA resources from the substantive assessment of the case, which may well result in a clearance such that any interim order falls away, and could increase the risk of pre-emptive action occurring before any interim order is made. In a completed merger, the CMA will normally make an interim order at the same time as an enquiry letter is sent out or after being informed of the merger by the parties.

Proportionality and customisation

- 7.36 The CMA attaches importance to proportionality and a desire not to burden benign transactions with delay and cost. In cases (alleged to) raise competition issues, however, the CMA recognises that completed mergers that may harm competition pose potentially irreversible long-run harm to consumers.
- 7.37 Accordingly, in such cases the inherent short-run cost and disruption to parties of interim orders will generally be given little, if any, weight in balancing the long-run risk of consumer harm for two reasons. First, this cost was avoidable as it was open to parties to complete a transaction without commencing integration or indeed to seek to manage the merger control risk upfront by seeking pre-merger clearance. Second, any cost and inconvenience imposed by the CMA at Phase 1 is short-lived, being generally limited in time to the short duration of the Phase 1 investigation. If the merger is cleared or UILs are accepted the burden is lifted; if referred, the parties will have an opportunity for more detailed discussions with the Inquiry Group on the need for, and scope of, interim measures during the Phase 2 investigation.
- 7.38 In this respect, a distinction should be drawn between parties' rights to make unconditional bids to acquire share capital or assets, especially common in auction settings, on the one hand, with, for example, actual integration after closing, on the other. The making of interim orders will bite on the latter, whilst leaving parties free to complete mergers if they are prepared to assume regulatory risk.
- 7.39 The proportionality of interim orders will primarily relate to the issue of the scope of the order and parties may request (subsequent) derogations from the interim order (see paragraph 7.41 below and Annexe C for further detail).¹⁴⁷

¹⁴⁷ If parties consider an interim order is unnecessary, they may also make submissions to the CMA setting out reasons why there is no risk of pre-emptive action and the CMA will consider if it would be appropriate to revoke the interim order.

Procedure

- 7.40 To reduce uncertainty for parties, and to ensure swift implementation of interim orders, the CMA has developed a standard text for interim orders in completed mergers, which is available on the CMA's website.¹⁴⁸ The provisions in the template may be supplemented with further restrictions and/or obligations where the CMA considers it necessary, or may be adjusted to account for specific facts known by the CMA in relation to the merger. The template includes a provision stipulating regular updates on compliance to the CMA by designated individuals on behalf of the notifying parties. The interim order will state the date on which it will take effect (normally it will be stated to have immediate effect).
- 7.41 To minimise concerns that the making of an order on the basis set out above could, in some circumstances, lead to a disproportionate regulatory burden, the CMA will provide the required flexibility where appropriate. However, parties should not expect that the CMA will do so through negotiating with parties the need for, or scope of, the order at length up-front: rather the CMA will consider subsequent derogation requests that will exempt certain specified business areas or conduct from the hold-separate obligation imposed by the interim order if justified. Such consents may be required, for example, in order to ensure the ongoing financial viability or proper management of the acquired company (such as where the acquired company is a 'failing firm'). Parties can help the CMA to deal efficiently with derogation requests by ensuring that requests are fully reasoned and supported by evidence where available (see Annexe C for further detail).
- 7.42 If agreed, such notices of consent will be published by the CMA on its website alongside the interim order to which they relate. Prior to publishing such a consent letter, the CMA will provide the parties seeking consent with a reasonable opportunity (at least one working day) to revert with any requests for business secrets to be redacted from the published version of the document.

The Phase 1 decision making process

- 7.43 This section provides detail on the procedure for the CMA's decision as to whether the test for reference for a Phase 2 investigation is met (the SLC decision). The parties will have an opportunity after that SLC decision to offer binding undertakings to the CMA as an alternative to making a reference for a Phase 2 investigation ('undertakings in lieu' or 'UILs'). The procedure for

¹⁴⁸ Many provisions in the template order will be relevant even in the limited cases where an initial order is made in relation to an anticipated merger, however interim orders in such anticipated merger cases are likely to be more tailored to the CMA's concerns in each case.

offering such UILs, and the CMA's decision as to whether those UILs may be sufficient to address any identified competition concerns, is set out in chapter 8 below.

- 7.44 In cases that raise no serious competition issues, the decision to clear the merger is made by the MG (ordinarily by [a Director]). The case team will prepare a clearance decision, which is subject to review by senior CMA staff and specialist economic and legal staff. The decision will then be adopted by the CMA, relayed to the parties or their advisers and announced publicly. The text of the decision is subsequently published on the CMA's website (see paragraph 7.59 below).
- 7.45 In cases that raise more complex or material competition issues, a different process is followed. As noted above (see paragraph 7.8 above), the CMA will, generally between working days 15 and 20, have a 'state of play' discussion with the parties, usually by conference call. This discussion will provide the merging parties with as much information as possible about any competition concerns, including feedback from the market investigation and whether or not the MG is minded to proceed to a Case Review Meeting (CRM).
- 7.46 Once a merger has definitely been identified as warranting consideration at a CRM, the parties are advised as soon as possible and will be invited to attend an issues meeting, with the case team and other MG and/or CMA officials.(see further paragraph 7.52 below.).
- 7.47 To help the parties prepare for the issues meeting, the case officer sends an issues letter to the parties.
- The issues letter sets out the core arguments in favour of a reference in the case so that parties have an opportunity to respond to the outlined concerns. The CMA seeks wherever possible to limit the content of the issues letter to include only theories of harm that are genuinely of concern or of potential concern. Where appropriate, it may give guidance in the issues letter, sometimes by a form of 'grading' or 'ranking', of the extent of its concern regarding different theories of harm to try to enable respondents to focus on those issues that appear most likely to lead to the test for reference being met.
 - Not all the concerns in an issues letter necessarily originate from the CMA, nor have been fully explored if, for example, they are raised by third parties at a late stage in the investigation. In these circumstances,

the fact that the issues letter is sent does not necessarily mean that the case team fully shares the concerns in the issues letter at that stage.¹⁴⁹

- The issues letter is therefore not a provisional decision or a statement of objections. Rather, the issues letter sets out hypotheses which the CMA is still evaluating in the light of the evidence put to it by the parties and gathered from third parties.
- The issues letter does not discuss in detail the arguments in favour of clearance.

7.48 Once an issues letter is sent, the CMA will inevitably follow the remainder of the CRM process, even if new evidence received thereafter would suggest that the case no longer requires a CRM. This is to provide some degree of certainty (for both the CMA and the merging parties) about the structure and timing of the decision making process in these cases.

7.49 The CMA will provide the merging parties with an interval of at least two working days between receipt of the issues letter and the date of the issues meeting to allow them time to prepare. Although this is a relatively short time period, the description of the competition concerns provided by the case team in the state of play discussion should ensure that, when an issues letter arrives, it contains few, if any, surprises. This in turn should reduce the practical burden on the parties of having to prepare for an issues meeting after receipt of the issues letter.

7.50 Parties to a merger may either respond to the issues letter in writing, or orally at an issues meeting, or both. The CMA has found that it can be helpful for parties, where possible, to provide a written response to the issues letter in advance of the issues meeting and then, if necessary, to follow-on with a short supplementary paper addressing any further points in the light of the discussion at the issues meeting. However, the choice of whether to provide a written response before or after the issues meeting (or both) is entirely up to the parties. The case team will advise the parties on the deadline within which responses must be received in order to be considered within the statutory time limits for the SLC decision.

7.51 It is not the CMA's practice to provide third parties with the opportunity to comment on the issues letter in light of the time and confidentiality constraints under which its Phase 1 investigations are carried out. Third parties will not

¹⁴⁹ Case teams who believe a case should ultimately be cleared may nonetheless send an issues letter in certain circumstances: (i) to increase the robustness of the case for likely clearance with the parties, allowing review of the case for and against reference by those present at the CRM (see paragraph 7.54 below in this respect); and (ii) so as not to prejudice the ability of the CMA decision-maker to decide the case differently.

normally be informed as to whether an issues letter has been sent in a particular case (and therefore whether a CRM will be required). However, to the extent that the CMA wishes to rely in its decision on key facts relating to a third party that have been not previously been confirmed with the third party in question, it will verify such facts with third parties around this time.

- 7.52 Issues meetings will generally be chaired by an [Assistant Director or Director] of the MG. In addition to such senior MG staff and the case team, a legal officer and a senior economist from within the MG will also often attend. To further enhance the level of scrutiny to which the case team's recommendations are subjected and subsequently to assist the Phase 1 decision maker in making his/her SLC decision, a CMA official from outside the MG is charged specifically with acting as a 'devil's advocate' to comment critically on the case team's recommended outcome (whether that be for or against reference), and will therefore also attend the issues meeting. The Phase 1 decision maker will not attend the issues meeting, but will be informed of the discussion at the issues meeting by those who were present at the meeting, and will consider this alongside the other (written and oral) evidence in the case.
- 7.53 From the parties' side, it is important that there is at least one representative from the merging parties at the issues meeting who is able to speak authoritatively on the business areas affected by the merger, in addition to representatives from legal or regulatory affairs. The CMA will often provide guidance to the parties on which class of representatives it considers it would be most useful to hear from directly at the issues meeting.¹⁵⁰ Parties may wish to provide an agenda or presentation for the issues meeting, particularly where they have not yet responded in writing to the issues letter.
- 7.54 Following the issues meeting, the MG's internal economic analysis, the issues letter and any written response to the issues letter from the parties are circulated to the members of the review group in advance of a CRM. The CRM is usually chaired by the [Director of Mergers], and will be attended by the CMA staff who attended the issues meeting, potentially also with a representative from the CMA Office of the Chief Economic Adviser, and colleagues from the relevant CMA Directorate if appropriate. The devil's advocate will also always be present at the CRM.
- 7.55 Following the CRM, there is a separate meeting to make the SLC decision (the SLC decision meeting), chaired by the Phase 1 decision maker, generally the [Chief Executive or the Senior Director of Mergers, or in some cases

¹⁵⁰ The CMA has the power under section 109 of the Act to require individuals to provide witness evidence. However since it is in the parties' interests to provide appropriate representatives at the issues meeting, the use of such powers at this stage is likely to be infrequent.

another official at the grade of [Senior Director] or above.] The SLC decision meeting is normally attended by those officials who attended the CRM and will always include the chair of the CRM and the devil's advocate each of whom will assist the Phase 1 decision maker by acting as formal 'supporter-challengers' at the SLC decision meeting. The decision maker will not have attended the CRM.

- 7.56 At the SLC decision meeting, the Phase 1 decision maker hears a report on the discussions at the issues meeting and the CRM, including the overall recommendation from the CRM. The Phase 1 decision maker will then, based upon his/her view of the evidence, determine whether he or she agrees with the recommendations. In a minority of cases there will not be a consensus of opinion emerging from the CRM as to its recommendations for the SLC decision (or, exceptionally, even as to the reasoning for such a recommendation). In such cases, the non-consensus position will be relayed to that effect, and (in the absence of a CRM majority view) the devil's advocate argues the parties' case. The Phase 1 decision maker will not be informed, prior to taking his or her SLC decision, of any discussions held between the parties and the case team or other CMA officials regarding possible UILs.
- 7.57 In a minority of cases, the decision maker may decide to adjourn the SLC decision meeting where he or she wishes to reflect on the case further before reaching a final view, evaluate the robustness of the provisional decision by way of a full draft decision, or have the case team verify a particular factual or evidential point.
- 7.58 In cases where the decision maker concludes that the test for reference is met, the decision maker will then consider whether any of the available exceptions to the duty to refer should be applied (most commonly the 'de minimis' exception).¹⁵¹
- 7.59 Following the SLC decision meeting, the case officer then prepares a draft SLC decision in accordance with the Phase 1 decision maker's reasoning offered verbally at the SLC decision meeting. The provisional SLC decision becomes final only when the prepared draft document is signed by the Phase 1 decision-maker. On the day that the decision is finalised and signed, the CMA's reasoned decision is communicated to the parties or their advisers and then the outcome of the SLC decision is announced publicly one hour thereafter. The CMA will normally issue a press release in cases where it finds that the duty to refer applies (either following that decision, or any offer of UILs), and may exceptionally issue a press release in a clearance case where

¹⁵¹ See *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122).

the facts of the case warrant it. The text of the decision is provided to the parties and subsequently published on the CMA's website, subject to excision of confidential information (see paragraph 9.2 below).

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8 PHASE 1 REMEDIES

Undertakings in lieu of reference (UILs)

- 8.1 If the CMA finds that its duty to refer the merger for a Phase 2 investigation applies, the parties may have an opportunity to avoid that outcome by agreeing UILs.
- 8.2 Experience has indicated that UILs are agreed most frequently in cases where, first, the problematic overlaps represent a more minor proportion of the transaction and, second, those overlaps involve asset packages – such as stand-alone businesses in separate local markets – that are severable from the remainder of the transaction without materially affecting the overall commercial rationale for the merger. These cases have almost invariably led to ‘structural’ UILs to divest relevant assets to a suitable third party purchaser approved by the CMA.¹⁵²
- 8.3 Under the Act, the CMA (or the Secretary of State in public interest cases) may accept binding undertakings as an alternative to making a reference for a Phase 2 investigation.
- 8.4 UILs may be accepted only where the CMA (or the Secretary of State in public interest cases) has concluded that the merger – whether anticipated or completed – should be referred for a Phase 2 investigation. Any CMA UILs must be for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effects identified.
- 8.5 In order to accept UILs under section 73 of the Act, the CMA must be confident that the competition concerns identified will be resolved by means of the UILs offered without the need for further investigation. UILs are therefore appropriate only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut, and those remedies are capable of ready implementation.
- 8.6 In cases in which there is doubt over the precise identification of the substantial lessening of competition or in which the effectiveness or proportionality of the proposed UILs may be questioned, the CMA considers it unlikely that the ‘clear cut’ standard referred to above would be met. In these circumstances, acceptance of UILs would not be appropriate.
- 8.7 More guidance on structural and behavioural UILs and their substantive consideration can be found in *Mergers: Exceptions to the duty to refer and*

¹⁵² At Phase 1, the CMA will typically expect UILs offered by parties to be structural, rather than behavioural, in nature (see further *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122)).

undertakings in lieu of reference guidance (OFT1122) and Merger remedies (CC8).

Procedure for submission of UILs

- 8.8 The Act gives the CMA a discretion to accept UILs from such of the parties concerned as it considers appropriate. The CMA has no power to impose remedial action on merging parties at Phase 1.¹⁵³ It is therefore for the parties to offer remedies sufficient to address the competition concerns, although the MG will seek to provide guidance to the parties, and will be as transparent as possible as regards its thinking, during the course of the investigation in order to facilitate this process and increase the prospects of successful UILs being offered.
- 8.9 An acquiring company may always take the initiative to propose suitable UILs to the MG case team at any stage of the Phase 1 investigation, or during pre-notification.¹⁵⁴ Indeed, even where proposed UILs are not actually communicated to the MG, the CMA strongly recommends that, in suitable cases, notifying parties and their legal advisers themselves consider UILs during pre-notification and in the early days of the CMA's assessment. This ensures that, when UILs fall to be formally proposed following the SLC decision, parties will be able to submit their proposed UILs and engage in any related discussions with the CMA rapidly, maximising the chances of acceptance before the deadlines for provisional and final acceptance of the UILs by the CMA are reached.
- 8.10 The CMA case team will assist merging parties in understanding the function of UILs. They will also, where possible, provide guidance to parties on how remedies might operate given the SLC decision or, where discussions take place before the decision, any provisional competition concerns. However, the case team is not able formally to agree with the parties whether a particular package of UILs would or would not be sufficient. This is because the final decisions on whether, first, the duty to refer arises and, second, whether to accept UILs are not to be pre-judged and remain with the Phase 1 decision maker.
- 8.11 Whether or not parties have raised the possible offer of UILs with the case team during the course of the Phase 1 investigation, they will have a further

¹⁵³ The CMA does have power under section 75 of the Act to make an order where an undertaking in lieu has not been, is not being or will not be fulfilled, or where the undertaking in lieu was given following the provision of false or misleading information to the CMA by the party giving the undertaking.

¹⁵⁴ Such discussions with the case team will not impact on the prospect that the CMA decision maker ultimately determines that the test for reference is not met; nor will they prejudice the parties' right ultimately to decide not to offer any UILs.

opportunity to do so at the end of the issues meeting, when the CMA official chairing the meeting will ask them whether they wish to discuss any such UILs. The parties may wish to make use of this opportunity to discuss UILs in person.

- 8.12 In some cases, parties may wish to see the SLC decision before raising the matter of UILs with the MG. That SLC decision will identify the CMA's competition concerns, and should therefore provide parties with sufficient information to identify the UILs that would provide a clear cut remedy to those concerns. In most cases, the case team will be available to discuss UILs following the SLC decision by telephone. However given the short window of time before the deadline to offer the UILs, it may not be possible to arrange a meeting between the parties and the case team or to engage in iterative discussions. For these reasons, parties may find that engagement with the case team at or before the issues meeting provides a helpful opportunity to identify and resolve any potential issues with any proposed UILs.
- 8.13 Under the Act, parties have up to five working days after receiving the CMA's reasons for its SLC decision to formally offer UILs.¹⁵⁵ Such offers (accompanied by the parties' proposed draft text of their UILs) should be made using the CMA's template Remedies form for the submission of undertakings in lieu of reference (the Remedies Form).¹⁵⁶
- 8.14 The Remedies Form provides details of the categories and extent of information that the CMA will require from parties in order to clearly identify what they are offering (or not offering) in their UILs.
- An offer merely to 'remedy the SLC', without specifying how this will be achieved, will be considered insufficiently clear-cut to enable the CMA to suspend its duty to refer.
 - An offer to remedy the SLC through divestment of one of the overlapping businesses should make it clear which of the overlapping businesses the parties are prepared to divest (alternatively, parties may be equally willing to divest either the acquirer's business or the target's business, in which case they should state this in their offer).
 - Where the parties name only one business, the CMA will infer from this that they would not be prepared to sell the other overlapping business. In making this decision, parties should be aware that, in certain cases, the CMA may consider that divestment of one of the overlapping businesses, or of one particular business, may not be sufficient to remove the

¹⁵⁵ Section 73A(1) of the Act.

¹⁵⁶ The latest version of the Remedies Form is available on the CMA's website.

competition concerns given the need for the divestment to be a viable business and to be capable of attracting a suitable purchaser.

Procedure for consideration of UILs

- 8.15 Section 73(1) of the Act makes it clear that the CMA's discretion to accept UILs in a given case arises only when it has found that it is under a duty to refer. Accordingly, the CMA will always assess whether its duty to refer arises without taking into consideration whether or not parties have indicated that they would be willing to formally offer UILs should the Phase 1 decision maker decide that the CMA's duty to refer has been met.
- 8.16 In practical terms, this principle is upheld within the context of the Act and the CMA's decision-making procedure through the fact that the parties need only formally offer UILs after they have received the decision-maker's decision that the duty to refer has been met. Furthermore, the decision-maker will not be informed before reaching an SLC decision whether or not the parties have, at that point, even discussed the possibility of UILs with the case team or MG.
- 8.17 The CMA is given the discretion to accept UILs for the purpose of remedying, mitigating or preventing the substantial lessening of competition or any resultant adverse effect from the merger. In exercising this discretion, it will have regard to the need for the remedy to be effective in relation to the harm identified.
- 8.18 Given the limited time period in which to consider UIL proposals, parties should submit the remedy offer that they consider is capable of addressing fully the competition concerns set out in the decision. Submitting a range of alternative remedy options is likely to slow down the process and lead to a risk of the CMA being unable to accept UILs in the time available.

CMA discretion to propose modifications to proposed UILs

- 8.19 The Act requires that parties submit any UILs they wish to have considered within five working days following receipt of the reasons for the SLC decision. The CMA therefore considers that it is unable to consider UILs offered after that deadline, including where parties wish to make a second offer of materially more extensive UILs. It will therefore always be in the best interests of the parties to submit their best offer of UILs in good time (and in any event by the statutory deadline).
- 8.20 Given that the parties will have received the CMA's SLC decision before submitting their offer of UILs, the CMA expects that in the vast majority of cases the parties will be in a position to assess – and thus to offer – the UILs necessary to provide a clear cut remedy to the substantial lessening of competition (SLC) identified by the CMA. However, the CMA is mindful of the

significant public policy benefits (to consumers, the parties and the public purse) that are achieved through the UILs process. It will therefore be slow to reject UILs offered by the parties for purely technical reasons.¹⁵⁷ The CMA therefore reserves the right, where it considers it appropriate, to revert to the parties¹⁵⁸ to inform them that their UILs may be suitable to address the SLC identified subject to specified modifications. In these circumstances, which the CMA expects will be rare, it would ask whether the parties would agree to the proposed modifications before undergoing more detailed analysis and public consultation on the modified UILs. Parties would be offered a short window of opportunity (typically not more than one working day) to confirm whether they would accept the modifications. In practice, this communication is likely to take the form of a short telephone call between a senior member of the MG and the nominated individual representing the merging party that had offered UILs, which would be likely to be followed up in writing.

Procedure for acceptance of UILs

Non-upfront buyer cases

- 8.21 Where the CMA decision maker concludes that there are reasonable grounds for believing that offered UILs, or a modified form of them, might be accepted by the CMA as a suitable remedy to the substantial lessening of competition or the identified adverse effects arising from it, the CMA will confirm this to the parties who offered the UILs, and issue a public announcement to that effect.
- 8.22 Following announcement of that decision, the CMA may under section 25 of the Act extend its four-month statutory timetable for considering a completed merger. This is to avoid the situation where the CMA may be unable to conclude its assessment of the offered UILs because there is insufficient time to do so before the expiry of the relevant statutory deadline. The CMA is required to decide whether to accept the offered UILs, or a modified form of them, within 50 working days of providing the parties with the reasons for its SLC decision, subject to an extension of up to 40 working days if the CMA considers that there are special reasons for doing so.¹⁵⁹
- 8.23 In considering whether such an extension for special reasons may be appropriate in any given case, the CMA will have regard to:

¹⁵⁷ In general, the CMA would not exercise this discretion where parties offer behavioural undertakings that purport to regulate parameters of competition (for example, price, quantity, quality), as an offer of a behavioural undertaking of this type would not generally (absent particular facts) be considered to be a credible clear-cut remedy.

¹⁵⁸ In practice, this is most likely to mean to their legal advisers.

¹⁵⁹ The CMA may also extend the period for considering UILs if it considers that a relevant person has failed to comply with a notice requiring evidence issued under section 109 of the Act.

- in completed cases, whether any delay may increase the risks of anticompetitive outcomes from the merger (for example where there is a risk that the target business may deteriorate pending the outcome of the merger review, or where any customer/consumer harm may be ongoing)¹⁶⁰
- the ability of the CMA and the parties (acting in good faith) to have concluded the UIL process within the 50 working days, and
- the likelihood that it will be able to agree acceptable UILs with the parties if an extension is granted.

8.24 As Phase 1 remedies will be clear cut solutions to clear cut problems, the CMA would not expect to have to extend the timeframe for acceptance of UILs unless:

- the case involves an ‘upfront buyer’ (see paragraphs 8.30 to 8.35 below)
- it is necessary for the CMA to undertake a further consultation or consultations with interested third parties on a modified version of the UILs (see paragraph 8.28 below), or
- there is some other exceptional circumstance and an additional time period will likely lead to acceptance of UILs.

8.25 Once the CMA has announced that it considers there to be reasonable grounds for believing that the offered UILs or a modified version of them might be accepted, the CMA will give detailed consideration to the terms of the proposed UILs, in order to determine what, if any, modifications to the UILs it considers may be required before they can be finally accepted. The MG will discuss with the parties their offered UILs with a view to agreeing any such necessary modifications with them and agreeing a version of the provisionally agreed UILs for publication for third party comment (see paragraph 8.27 below).

8.26 The CMA remains under a statutory duty under section 103 of the Act in deciding whether to make a reference to have regard to the need to make a decision as soon as reasonably practicable. It will therefore aim to complete its assessment of the UILs and subsequent agreement of the final form of the UILs (as modified if necessary) as quickly as possible. In all cases, a

¹⁶⁰ The CMA’s assessment of this issue may be linked to the likelihood of it being able to agree acceptable UILs with the parties if an extension is granted. Where the CMA considers that there is a sufficient likelihood of reaching agreement, it would be more likely to grant an extension in order to avoid the delay associated with an in-depth Phase 2 investigation. By contrast, where reaching agreement appears unlikely, an extension would be likely to cause further delays.

reference may still be made if the CMA is unable to accept the UILs, or a modified form of them, within the statutory deadlines under the Act.

- 8.27 In order to give interested third parties an opportunity to comment, the Act provides for third parties to be consulted prior to the CMA's final acceptance of any UILs.¹⁶¹ The CMA will publish the draft of the provisionally agreed UILs¹⁶² and will invite comments from third parties. The CMA is required by the Act to give third parties a period of not less than 15 days in which to respond with comments on the purpose and effect of the proposed UILs.¹⁶³
- 8.28 To the extent that, as a result of the consultation process or otherwise, the originally published draft UILs are modified in a material respect, a second consultation period will be required. In such a case, the consultation period for third parties to respond on the modified UILs is seven days.¹⁶⁴
- 8.29 Following the necessary consultations, the CMA will ask the parties to sign the final version of the UILs, after which they will be formally accepted by the CMA (or Secretary of State in the case of public interest cases). The CMA will announce publicly that it has formally accepted the UILs, thereby ending its duty to refer, and will publish the final version of the accepted UILs on its website.

Upfront buyer cases

- 8.30 The procedure described in paragraphs 8.21 to 8.29 above differs in situations where the CMA decides that UILs will be accepted only where the parties have identified an upfront buyer.
- 8.31 In this situation, the CMA will not accept the UILs unless a sale agreement, generally conditional from the buyer's perspective only on acceptance of the UILs by the CMA (and the completion of the main transaction if it remains anticipated), has been agreed with a buyer for the divestment business and the CMA considers that the buyer would be acceptable.

¹⁶¹ section 90 of, and Schedule 10 to, the Act.

¹⁶² The CMA may also publish non-confidential parts of the parties' submitted Remedies Form alongside the draft UILs.

¹⁶³ Paragraph 2 of schedule 10 to the Act specifies a minimum period of 15 calendar days. Subject to complying with its statutory deadlines (including allowing sufficient time for any further period of consultation that may be required following receipt of material comments), an overriding interest in a particularly speedy remedy, or other timing constraints in an individual case, the CMA will generally try to give third parties 15 working days in which to respond.

¹⁶⁴ Paragraph 2 of schedule 10 to the Act specifies a minimum period of seven calendar days. Subject to complying with the considerations in footnote 163 above, the CMA will generally try to give third parties seven working days in which to respond.

- 8.32 The CMA will normally seek an upfront buyer where the divestiture package is not an existing standalone business and/or where the risk profile of the remedy requires it, for example where the CMA has reasonable doubts with regard to the ongoing viability of the divestment package and/or there is only a small number of candidate suitable purchasers.
- 8.33 The parties may, in their offer of UILs, identify a proposed buyer for any divestments or make their offer on the basis that any divestment would be to an upfront buyer. Where the CMA considers that an upfront buyer is required, the parties will be given a relatively short, individually-determined period after the CMA's decision that it is considering whether to accept the offered UILs, or a modified form of them, in which to identify the upfront buyer, obtain provisional confirmation from the CMA that the buyer is likely to be acceptable, and enter into the sale agreement on the terms described above.¹⁶⁵ The CMA would also expect typically to require the appointment of a monitoring trustee to oversee and report on this process.¹⁶⁶ The time period given to parties is likely to be a matter of weeks, rather than months, given the statutory deadline by which UILs must be finalised. Consequently, parties are advised to give early consideration to the possible need for, and identity of, an upfront buyer.
- 8.34 In each upfront buyer case, the CMA will, following the decision that it is considering whether to accept the offered UILs, or a modified form of them, agree with the parties a timetable of milestones for this period in order to ensure that the parties are making timely progress towards the ultimate signing of an agreement with a suitable purchaser. This timetable will be communicated to the parties confidentially and will not be made public. However, failure by the parties to progress a sale as envisaged under the timetable will be taken into account if the CMA is considering whether to extend the 50 working day timetable for agreeing UILs. As noted above, the CMA is likely to require the appointment of a monitoring trustee, whose responsibilities will include reporting on the progress of the sale and parties' compliance with the timetable.
- 8.35 Once the parties have agreed a sale to an upfront buyer, the CMA will publicly consult on the terms of the UILs (as discussed in paragraph 8.27 above) and the identity of the proposed purchaser at the same time. To the extent that the

¹⁶⁵ See further *Merger remedies* (CC8). The CMA requires that the proposed purchaser is in effect contractually bound by the time that the CMA accepts the UILs because, once the UILs have been accepted, the CMA loses its duty (and ability) to refer the merger for a Phase 2 investigation under section 74 of the Act.

¹⁶⁶ The parties will be responsible for the remuneration of the trustee. To ensure that the structure of such remuneration does not compromise the trustee's independence and provides sufficient incentive to perform the required function to an appropriate standard, the CMA must approve the remuneration agreement with the trustee.

public consultation does not raise material concerns, the CMA will accept the UILs and formally approve the purchaser. If the public consultation does raise material concerns, the CMA will consider whether the proposed sale should proceed (if necessary subject to changes to the terms of the sale or to the UILs). If following the public consultation the CMA considers that the proposed buyer is not suitable, the merger may either be referred to Phase 2 or the parties will be required to locate a suitable alternative buyer. In either case, the principles set out in paragraph 8.28 above in relation to further public consultation will apply.

Procedure following acceptance of UILs

- 8.36 Where no upfront buyer provision was required by the CMA in relation to the UILs, the CMA will have a particularly active role to play after it has formally accepted the UILs from the parties.¹⁶⁷
- 8.37 Where the UILs are structural in nature, the undertakings, as signed by the parties and accepted by the CMA, will provide for a divestment period within which the merging parties must identify a suitable purchaser for the divestment business and conclude a sale agreement with that buyer. During this period, the CMA may (to the extent one is not already in place) require parties to appoint – at the parties' cost – a monitoring trustee to assist with separating out a business and ensuring the divestiture package is as described in the UILs. The need for a monitoring trustee will depend among other things upon the nature of the divestiture package and the risk profile of the remedy.
- 8.38 Once it has located an appropriate purchaser, the acquiring party will be required to satisfy the CMA that its proposed purchaser is suitable to acquire the divestment business (see *Merger remedies* (CC8)). In short, the parties must satisfy the CMA that their proposed purchaser is independent of the merger parties, has the necessary capability to compete, is committed to competing in the relevant market(s) and divestiture to the purchaser will not create further competition or regulatory concerns.
- 8.39 In assessing whether a proposed purchaser should be approved, the CMA will examine information presented by the parties carefully and impartially, but it will only undertake a proportionate amount of investigation and analysis at this phase. If approval of a proposed purchaser requires a detailed investigation, it

¹⁶⁷ Where an upfront buyer was required, then it is expected that the sale will proceed to complete once the UILs have been formally accepted.

is likely that the CMA will choose not to approve that purchaser rather than to undertake that in depth analysis.¹⁶⁸

- 8.40 Once a purchaser has been formally approved by the CMA, the parties are able to proceed with the divestment. Depending on the terms of the UILs, the merging parties will be required to achieve signing and/or completion of the divestment transaction by a specific date.
- 8.41 It is important for merging parties and potential divestment purchasers to appreciate that divestments as a result of UILs may in themselves result in the creation of a new relevant merger situation (see chapter 4 above). The fact that the CMA has approved a purchaser does not as a formal matter prevent it from investigating any corresponding relevant merger situation. However, in practice, where the divestment purchase raises competition concerns,¹⁶⁹ the CMA will in any event reject the purchaser as being unsuitable by letter to the original merging parties, rather than proceed via full standard merger review of the divestment transaction.
- 8.42 To the extent that merging parties are unable to find a suitable purchaser capable of being approved by the CMA within the time period specified within the UILs, the UILs are likely to provide for the CMA to be able to appoint a divestment trustee to sell the divestment business on behalf of the merging parties at no minimum price, or for the CMA to direct the parties to sell at no minimum price.
- 8.43 For behavioural undertakings, the CMA has an ongoing monitoring role for the duration of the UILs under section 92 of the Act.¹⁷⁰
- 8.44 Whether UILs are structural or behavioural in nature, if, after accepting the UILs, it becomes apparent to the CMA that the undertakings are not being or will not be fulfilled, section 75 of the Act gives the CMA the power to issue an order against the parties to ensure fulfilment of the UILs. Such orders are enforced in the High Court.

The Secretary of State

- 8.45 In public interest cases (described more fully in chapter 16), the CMA will advise the Secretary of State whether UILs are appropriate pursuant to

¹⁶⁸ *Co-operative Group (CWS) Limited v Office of Fair Trading* [2007] CAT 24.

¹⁶⁹ The fact that the acquisition by a proposed purchaser would qualify for investigation pursuant to the share of supply test does not necessarily mean that it would create substantive competition concerns; this will depend on the circumstances of the case and the market(s) in question.

¹⁷⁰ Note, however, that, as discussed above and in *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122), behavioural undertakings will not generally (absent particular facts) be considered to be a credible clear-cut remedy suitable for UILs.

section 44 of the Act. Any such UILs concerning competition issues are negotiated by the CMA and accepted by the Secretary of State. For mergers involving national security considerations, the Ministry of Defence will discuss any proposed public interest undertakings with the parties on the Secretary of State's behalf.

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9 COMMUNICATION AND PUBLICATION OF PHASE 1 DECISIONS

9.1 Section 34ZA(1)(b) of the Act requires the CMA to provide the parties with the reasons for its decision whether its duty to refer applies in merger cases. Section 107 of the Act requires it to publish all such decisions, including decisions that a transaction is not a relevant merger situation (that is, a 'found-not-to-qualify' or FNTQ case) and clearance decisions (including de minimis cases). Where the CMA finds that its duty to refer applies, and considers that there are reasonable grounds for believing that any undertaking in lieu offered by the parties (or a modified version of them) might be accepted by the CMA, it will also publish notice of that decision.¹⁷¹

9.2 Publication is generally a two step process.

- The first step is the announcement of the nature of the CMA's decision, done through the Regulatory News Service and placed on the CMA website. The CMA has a system for advanced warning for merging parties. Although the case team will seek to keep the merging parties informed of the likely date for announcement of the decision, notifying parties or their advisers will be contacted one hour before the actual public announcement of the decision to advise them of the precise timing and nature of the decision. In those cases where a press release is issued, this will normally be sent to the parties at the same time. In every case, an email will be sent to the parties or their advisers that lays out the terms on which this price-sensitive information is being provided, to which it is a condition that the parties should provide agreement in advance. Should there be any difficulty with handling of price-sensitive information in a particular case, the CMA would consider, if necessary, adjusting its procedure going forward and reverting to a situation of giving the notifying parties just five minutes' notice of the fact of an announcement instead of an hour. On the day the CMA announces its SLC decision, it will also provide the parties with the reasons for that decision.
- The second step, usually some time later, is the publication of the non-confidential text of the decision or notice on the CMA's website, which will be announced on the Regulatory News Service. Following announcement of the decision/notice, but before it is published, the text of the public version of the decision/notice will be circulated to the parties or their advisers to enable them to request the excision of business

¹⁷¹ The final decision on whether to accept the UILs would be made following further consideration and public consultation – see paragraphs 8.21 to 8.35 above.

secrets from the text if necessary to protect confidentiality. The CMA will be mindful of the need to respect the confidentiality of commercially sensitive information provided to it (by the merging parties and third parties). At the same time, it is required by section 107 of the Act to publish its decisions and in respect of SLC decisions it will try to ensure that evidence that is key to the reasoning and outcome of its decision is included within the public version of the decision.¹⁷² The CMA will therefore ask that, when parties make requests on the excision of confidential information from the text, they justify each of those requests and do not make blanket claims that particular classes of information are confidential.¹⁷³

- 9.3 In the event of a disagreement with the case team as to the confidentiality of specific information relating to the parties, which the CMA proposes to publish in its decision, parties should seek in the first instance to resolve the matter with the case team or – as necessary – the MG staff member with overall responsibility for the conduct of the investigation. If, thereafter, the parties' concerns remain unresolved, they may make representations to the CMA's dedicated Procedural Officer, who will consider those representations and reach a determination on the issue.¹⁷⁴

Publication of undertakings and orders

- 9.4 As required under section 91 of the Act, the CMA will publish the details of all merger undertakings and orders that have been agreed and accepted or imposed under the Act in a Public Register of Undertakings and Orders, which can be found on the CMA's website. This register covers interim orders¹⁷⁵ made by, and interim undertakings given to, the CMA; undertakings in lieu of reference for a Phase 2 investigation; and final undertakings and orders. The printed version of the register is open to public inspection, by appointment, at the CMA between 10.00 am and 4.00 pm on every day that the CMA is open for business. Publication is designed to ensure that interested third parties are aware of the undertakings. This is important because, in the event of a breach

¹⁷² For guidance on the CMA's wider approach to such issues of confidentiality, see Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) [*currently in draft and being consulted on*].

¹⁷³ In relation to market share data, the CMA will normally require that such information is published but will accept that the data are given as falling within a small range rather than a precise number.

¹⁷⁴ The Procedural Officer is intended to provide a swift, efficient supplementary mechanism for resolving disputes relating to the confidentiality of information proposed to be published by the CMA in its Phase 1 decision. The procedure followed by the Procedural Officer in this regard will be flexible, and will be tailored to the nature of the dispute at hand, the expedited nature of the Phase 1 merger investigation process, and in particular, to any specific timing constraints to which the CMA's investigation is subject.

¹⁷⁵ As noted above, the CMA is also required by section 107 of the Act to publish any interim order made by it under section 72 or 76, or paragraph 2 of Schedule 7 to, the Act.

of undertakings, they may take action in the courts under section 94 of the Act.

- 9.5 Once they are in place, undertakings and orders are monitored by the CMA under section 92 of the Act in order to ensure compliance so that the CMA may consider whether they should be amended or replaced, or where relevant may advise the Secretary of State as to such issues (see further paragraph 14.9). Any changes that are agreed are published in the same way as the original undertakings.

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10 THE PHASE 2 PROCESS: OVERVIEW

10.1 Subject to complying with the CMA Rules of Procedure, and to any guidance issued by the CMA Board,¹⁷⁶ Phase 2 Inquiry Groups are free to decide how they conduct a Phase 2 inquiry. In practice Phase 2 inquiries usually follow a fairly standard pattern, which is described in the following chapters, but Inquiry Groups have flexibility to vary the way they operate in order to carry out their legal responsibilities effectively and within the strict statutory deadlines. The duties and powers of Inquiry Groups conducting a Phase 2 inquiry are set out in the Act.¹⁷⁷

The Phase 2 Inquiry Group and case team

- 10.2 All the CMA's functions in Phase 2 merger inquiries are performed Inquiry Groups. An Inquiry Group is appointed for each inquiry, supported by a case team of CMA staff.
- 10.3 Under the ERRA13, the Chair of the CMA is responsible for identifying and appointing the Inquiry Group that will conduct a particular inquiry and for selecting one of them to act as chair of the Inquiry Group (the Inquiry Group Chair). In practice, the Chair of the CMA will delegate these responsibilities to the CMA Panel Chair¹⁷⁸ (or one of the CMA Deputy Panel Chairs).
- 10.4 The CMA's panel members come from a variety of backgrounds, including economics, law, accountancy and/or business; the membership of an Inquiry Group usually reflects a mix of expertise and experience (including industry experience). For a Phase 2 inquiry, an Inquiry Group will comprise at least three (and typically no more than five) members, including the Inquiry Group Chair.
- 10.5 The Inquiry Group will be appointed as soon as the CMA can satisfy itself of members' availability and consider whether their outside interests could affect the impartiality, or perception of the independence, of the Inquiry Group. Outside interests of appointed members are disclosed on the CMA website. In some cases the CMA may contact main parties to disclose particular interests and give them an opportunity to comment before deciding whether to make a proposed appointment.¹⁷⁹ Until the Inquiry Group is appointed the Chair of the

¹⁷⁶ See Schedule 4, paragraph 52(1) to the ERRA13.

¹⁷⁷ See Parts 3 and 9 of, and Schedules 8 and 10 to, the Act and Schedule 4 to the ERRA13.

¹⁷⁸ The CMA Panel Chair is a member of the CMA Board.

¹⁷⁹ If at any time during an inquiry it appears to the Chair of the CMA (or his/her delegate) that because of a particular interest of a member it is inappropriate for them to remain in the Inquiry Group, he/she may appoint a replacement for that member. See, Schedule 4, paragraph 43 to the ERRA13.

CMA (or his/her delegate) may act in its place.¹⁸⁰ Phase 2 Inquiry Groups are appointed for the duration of the inquiry, up to the point at which the reference is 'finally determined'.¹⁸¹ In cases where a merger is found to give rise to a substantial lessening of competition (SLC), the merger is finally determined when remedy undertakings¹⁸² are accepted by the CMA or a final remedy order is made; and if no SLC is found, the reference is finally determined when the final report is published.¹⁸³

- 10.6 The appointed Inquiry Group are the decision-makers on Phase 2 inquiries. Their role is to set the overall direction of the inquiry, review the appropriate evidence and analysis, and answer the statutory questions on the case (see chapter 3). They also hear directly from the main parties in a formal hearing during the assessment phase of the case (see paragraphs 12.10 to 12.14), and will usually attend a site visit (see paragraph 11.40).
- 10.7 Inquiry Groups are supported by a case team. As was the case during Phase 1, the case team will include both:
- administrative staff from within the MG responsible for the day-to-day running of the inquiry, and ensuring that inquiry procedures are followed correctly and that the inquiry progresses according to the published timetable, and
 - specialist, professional staff, who will provide advice to the Inquiry Group in their areas of expertise and are responsible for analysing and advising the Inquiry Group on the substantive issues that arise during the inquiry. There are usually one or more economists, lawyers, and business/financial advisors assigned to each Phase 2 inquiry as well as other professional experts as appropriate (for example, statisticians).

The parties will be notified of their key point of contact in the case team.

- 10.8 At operational (case team) level, in order to avoid unnecessary duplication and facilitate an efficient end-to-end merger review process, the CMA would normally expect to have a degree of case team continuity by retaining at least some of the Phase 1 case team to work alongside newly assigned staff on the in-depth Phase 2 investigation when a matter is referred.

¹⁸⁰ ERR13, Schedule 4, paragraphs 46.

¹⁸¹ Section 79(1) and (2) of the Act.

¹⁸² Under section 82 of the Act.

¹⁸³ Under section 84 of the Act.

The key stages of a Phase 2 inquiry

- 10.9 The key stages of a typical Phase 2 inquiry are shown in the table below. This indicates the steps the CMA will usually take and what the main and third parties will usually need to do at each key stage of a Phase 2 inquiry. Although indicative timings for each stage have been set out, the steps described may not, in practice, always take place or may not take place sequentially and may sometimes overlap. In particular, information gathering takes place throughout the inquiry.

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Figure: The key stages of a typical Phase 2 inquiry

Figure: The key stages of a typical Phase 2 inquiry

	MILESTONES	CMA	PARTIES
FOLLOWING REFERRAL: Possible suspension of reference			
Following reference to Phase 2	Possible abandonment of transaction	<p>CMA considers, in response to any request by merger parties, whether transaction may be abandoned and whether to suspend the Phase 2 investigation for up to 3 weeks</p> <p>If transaction is abandoned, CMA cancels reference</p> <p>CMA publishes notice of suspension (and termination of any suspension)</p>	Merger parties may request suspension of reference in light of any possible abandonment of transaction
STAGE 1: Phase 2 Information gathering		Weeks 1–6¹⁸⁴	
	Reference	<p>CMA issues Phase 2 opening letter to merger parties, as well as an initial data request and request for an initial Phase 2 submission</p>	<p>Merger parties respond to the initial data request</p> <p>Merger parties attend case management meeting and data meeting with CMA case team</p> <p>Merger parties submit their Phase 2 submission (or confirm their wish to rely on submission(s) previously made to the CMA during the Phase 1 investigation)</p>
		CMA considers need for modified interim measures	Merger parties discuss with the CMA any ongoing Phase 1 interim orders or if necessary Phase 2 interim measures and reporting on compliance. Merger parties offer interim undertakings if necessary
		CMA creates administrative timetable. Timetable is published after consultation with merger parties	Merger parties comment on administrative timetable
		CMA invites third party submissions on the transaction	Third parties make written submissions to the CMA

¹⁸⁴ Information gathering continues to some extent throughout the inquiry. However, this initial phase (around weeks 1 to 6) is the period during which parties should expect information gathering to be most intensive (although the precise extent of necessary information gathering during this period will vary from case to case, depending on the extent, and ongoing relevance to the CMA's investigation, of information previously submitted by the parties at Phase 1.

	MILESTONES	CMA	PARTIES
		CMA issues market and financial information requests to merger parties (and third parties) as necessary	Merger parties (and third parties) respond to market and financial information requests
		CMA develops any surveys of customers or suppliers	Merger parties comment on any draft survey
		CMA attends site visit	Merger parties organise site visit
		CMA holds third party hearings and discloses any summaries of these hearings	Third parties participate in hearings and check hearing summaries prior to disclosure
	Publication of issues statement, reflecting theories of harm on which the CMA is focusing	CMA publishes issues statement and considers responses to it	Merger parties (and third parties) respond to issues statement
STAGE 2: Phase 2 assessment		Weeks 7–15	
		CMA conducts analysis of evidence and produces working papers. Extracts of those papers are put back to relevant parties to check factual accuracy and to identify confidential information. Working papers (or extracts of them) are disclosed to parties as appropriate An annotated issues statement is sent to merger parties in advance of hearing with merger parties (the 'main party hearing')	Parties check material and provide comments on factual accuracy and identify confidential information. Parties respond to working papers (or extracts of working papers) disclosed to them
		CMA holds main party hearing	Merger parties attend main party hearing
		Put-back of further material to merger parties (and third parties) for checking for factual accuracy and to identify confidential information prior to publication of provisional findings	Merger Parties (and third parties) check further put-back
Around week 15	Publication of Notice of provisional findings, provisional findings and (if relevant) Notice of Possible Remedies		

	MILESTONES	CMA	PARTIES
STAGE 3: After provisional findings		Weeks 16–24	
		CMA considers the responses to provisional findings and (if relevant) Notice of Possible Remedies	Merger parties (and third parties) comment on provisional findings and Notice of Possible Remedies
		Put-back of further material to merger parties (and third parties) for checking for factual accuracy and to identify confidential information prior to publication of final report	Merger parties (and third parties) check further put-back
		Where relevant the CMA will conduct subsequent hearings to receive evidence on provisional findings and remedies proposals (response hearings)	Merger parties (and third parties) attend response hearings to provide evidence on provisional findings and remedies proposals
		CMA considers remedies working paper and discloses to merger parties (and, where relevant, third parties) for comment	Merger parties (and, where relevant, third parties) comment on remedies working paper
Week 24	Statutory deadline for publication of the final report	CMA publishes final report by the end of week 24 (subject to any extension of statutory deadline)	
STAGE 4: Implementation of remedies – after publication of the CMA's final report		Weeks 24 –36	
		CMA considers whether any variation to interim measures is necessary	Merger parties offer updated interim undertakings if appropriate
		CMA creates timetable for implementation of undertakings/order, and informs merger parties of key milestones	
		CMA consults merger parties (and, where relevant, third parties) on draft undertakings/order	Merger parties (and, where relevant, third parties) comment on draft undertakings/order and request excisions (if any) prior to publication
		CMA consults publicly on draft undertakings/order	Merger parties (and third parties) comment further on draft undertakings/order
Week 36	Statutory deadline for implementation of remedies (subject to any	CMA accepts final undertakings/makes final order within statutory 12 week deadline (subject to extension by six weeks if there are special reasons to do so). Responsibility for further implementation	

	MILESTONES	CMA	PARTIES
	extensions of statutory deadlines)	is assigned to the Inquiry Group, reappointed for this purpose, or to a special Group	

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10.10 The key actions during these stages are described in more detail below.

Suspension of the reference

10.11 Following reference of an anticipated merger for a Phase 2 investigation, in order to prevent wasted or unnecessary work by the CMA (and the need for main parties and third parties to respond to initial information requests), if the merging parties request it and the CMA considers there is a possibility that the merger will be abandoned by the merging parties, the CMA can suspend its Phase 2 inquiry for a period of up to three weeks.

10.12 If the CMA suspends the investigation, it will publish, at the end of the suspension period, a notice stating that the power was used and (if the merger was not abandoned) the date by which the CMA's Phase 2 report will be published.

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11 PHASE 2 INFORMATION GATHERING

Preparatory work for the Phase 2 inquiry

- 11.1 Shortly after a merger is referred, the CMA will publish the terms of its reference for a Phase 2 investigation¹⁸⁵. These terms of reference specify the transaction which is to be investigated, and summarise at a high level the basis on which the reference is made (that is, the market in which the Phase 1 decision maker believes there is an SLC and whether the merger appears to meet the turnover or share of supply test).¹⁸⁶
- 11.2 The CMA will continue to refer during the Phase 2 investigation to information gathered during the Phase 1 investigation (unless the parties inform the CMA that that information is (or specific parts of it are) no longer up to date).
- 11.3 At an early stage in its Phase 2 inquiry the CMA considers the 'theories of harm' which will frame its substantive assessment of the Phase 2 statutory competition questions and focus its further information gathering and analysis. The theories of harm describe hypothetically the possible effects of the merger on competition, and are derived from the information the CMA has received up to that point, in particular from the Phase 1 investigation. They are normally reflected in the issues statement when it is published (see paragraph 11.41), and evolve during the course of the inquiry in light of the further evidence received and analysis undertaken.
- 11.4 The CMA also considers how best to conduct the Phase 2 inquiry and draws up an administrative timetable which reflects the statutory time limits for investigations (see paragraph 10.9 and the table above). The main parties are sent a draft of the administrative timetable for comment. The final version of the administrative timetable is published on the CMA's website.
- 11.5 The CMA will consider the conduct of any hearings to be held in the course of the Phase 2 inquiry (see paragraphs 11.30 to 11.34, 12.10 to 12.14 and 13.4 to 13.7 below), including whether any hearings should be held in public (see paragraph 11.35) or jointly with one or more parties. In considering how to organise hearings during Phase 2, the CMA will consider various factors, including the views of main and third parties, confidentiality, and the efficient and proper conduct of the Phase 2 inquiry.

¹⁸⁵ Pursuant to either section 22 (completed mergers) or section 33 (anticipated mergers) of the Act. In certain cases raising public interest considerations the reference is made by the Secretary of State, see chapter 16.

¹⁸⁶ See *Merger Assessment Guidelines* (OFT1254/CC2), paragraphs 3.3.1–3.3.8.

11.6 To bring the extension of the CMA's inquiry into Phase 2 to the attention of the public (in particular interested parties who may be able to submit relevant evidence), the CMA will publish information on its website explaining briefly the subject of the inquiry and will invite (within two or three weeks) submissions of written evidence. An advertisement inviting submissions may be placed by the CMA in suitable publications (and/or on other websites where appropriate). The CMA will also ask potentially interested third parties such as competitors, customers, suppliers, sectoral or other relevant regulators, relevant public authorities and industry experts (including, in each case, those which it has previously contacted during Phase 1) for (further) views or information on the merger.

Contact with the main parties at the outset of the Phase 2 process

11.7 Following a reference from Phase 1, the CMA will send the parties to the merger a 'Phase 2 opening letter'. This letter marks the formal start of the Phase 2 inquiry. The Phase 2 opening letter:

- Covers important administrative details, for example, requesting information about the availability of parties or advisers during the inquiry period (and, if different from Phase 1, their contact details).
- Invites the parties to provide, should they wish, a further submission, supplementing or updating any submissions made at Phase 1, on issues outlined in the letter.¹⁸⁷
- Includes an initial data request, normally with a response date of one week. That data request will be individually tailored to each case and its scope will be determined primarily by the extent (and continued relevance) of information gathered by the CMA at Phase 1, on which it seeks to build.¹⁸⁸ Where the CMA considers any information already provided in full at Phase 1 to be sufficient for the purposes of the Phase 2 inquiry, it will not ask parties to submit it again, but may (where

¹⁸⁷ Where parties do make a new submission, this should specify clearly if (and to what extent) it replaces or revises submissions made during Phase 1. Otherwise (and in cases where the parties choose not to provide a further submission), the CMA will rely on any submissions made during Phase 1. Where any further submissions differ in material respects (on matters of fact or substance) from those previously submitted, the CMA will expect parties to explain the reasons behind those differences.

¹⁸⁸ The request may ask for, for example, pre-existing internal documents regarding the transaction, the corporate and financial structure of the parties, the parties' business strategies, and competitor and accounting information (to the extent that equivalent, up to date information has not already been provided at Phase 1).

relevant) ask for it to be updated to cover the time period (and any relevant developments or changes) since its original submission.

- Invites the parties to attend:
 - a 'case management meeting' with the case team. This meeting is an important opportunity for parties to discuss the Phase 2 timetable and administrative arrangements¹⁸⁹ (including the principal similarities and differences anticipated between the CMA's Phase 2 process and the completed Phase 1 investigation) and to ask the CMA questions about the Phase 2 process, and
 - in most cases, a data meeting (sometimes on the same day as the case management meeting). This is a chance for the case team to discuss what (if any) relevant additional or updated data and other information sources, not already drawn on during the Phase 1 investigation, may be available to the parties. This helps to focus subsequent information requests. The CMA will therefore request that representatives of the main party who are familiar with that party's data systems (including its IT systems where these may impact on the ability to search for or deliver data) attend this meeting, and
- Refers to:
 - the ongoing applicability and effect of any interim order(s) made during the Phase 1 investigation, including any variation that may be required to such order(s) (see further paragraphs 11.8 to 11.12 below), and
 - in the case of anticipated mergers, to section 78 of the Act, which prohibits the acquiring company from buying, without the CMA's consent, an interest in shares in a company if any enterprise to which the reference relates is carried on by or under the control of that company.

Interim measures

11.8 Once a merger has been referred to Phase 2 the CMA has the power to take by interim order¹⁹⁰ – or to accept interim undertakings¹⁹¹ from the parties to

¹⁸⁹ For example, suggestions for site visits.

¹⁹⁰ Section 81 of the Act.

¹⁹¹ Section 80 of the Act.

take – any (further) action it considers necessary to prevent or unwind pre-emptive action.¹⁹²

- 11.9 Interim orders made during Phase 1 (see paragraphs 7.28 to 7.42 above), will continue in force for the duration of the Phase 2 inquiry, unless released by the CMA or replaced by a new interim order or undertakings accepted by the CMA under its Phase 2 powers.¹⁹³ For many completed mergers, interim orders made at Phase 1 will therefore simply continue in force for the duration of the Phase 2 inquiry. However the CMA will keep any such interim orders under review and may require, by way of order or undertakings, additional safeguards where necessary to prevent or unwind pre-emptive action.¹⁹⁴
- 11.10 In order to assess what further interim measures, if any, are required, in addition to the Phase 2 opening letter and the case management meeting with the case team, parties can expect to engage in further discussions relevant to interim measures. Representatives of the parties participating in such discussions should be in senior management roles and will be expected to be able to explain the structure of the merging enterprises, before and after the merger, provide details of relevant reporting lines on business and financial data and describe any steps that have been taken to integrate the businesses or to keep them separate.
- 11.11 Where parties seek (whether before interim measures are adopted or at any time after such adoption) derogations from the CMA consenting to action that would otherwise be prohibited by the interim measures, they will be expected to provide a fully reasoned submission supported by evidence where available (see Annexe C for more detail). If a monitoring trustee/hold-separate manager has been appointed, the CMA will usually seek their views as to the need for and the appropriateness of the intended actions. The CMA will seek to consider these requests as quickly as possible. Parties should be aware that any derogation granted from the interim measures will be published on the CMA's website (subject to excision of confidential information in accordance with the CMA's statutory duties in Part 9 of the Act).
- 11.12 Further information on interim measures, including on the use of monitoring trustees and hold-separate managers, is set out in Annexe C of this guidance.

¹⁹² See paragraph 7.30 above for the meaning of 'pre-emptive action'.

¹⁹³ Section 72(6) of the Act.

¹⁹⁴ Additional safeguards may be required, for example, to prevent the acquired company from deteriorating during the Phase 2 inquiry. The CMA will also consider whether interim measures may be required for anticipated mergers – see Annexe C.

Phase 2 information gathering

11.13 The theories of harm (see paragraph 11.3) form the framework for subsequent information gathering by the CMA from both the main and third parties. Information may be gathered by various means, including questionnaires, submissions, hearings, surveys and site visits. Information gathering takes place throughout the Phase 2 inquiry. It should be noted that given the statutory time constraints that apply to the CMA's Phase 2 inquiries, there is likely to be some overlap between the various information-gathering activities described here.

Questionnaires and data requests

11.14 As soon as practicable after the start of the Phase 2 inquiry the CMA will issue the main parties with questionnaires requesting, as necessary, detailed financial and market information. Again, these requests will, where appropriate, build upon the information already submitted at Phase 1, and their scope and depth will be in large part determined by that previously-submitted information. The market information which the CMA will typically seek is that relating to customers, suppliers, product characteristics, market shares, competition, pricing, marketing and barriers to entry, expansion and exit. It will usually also contain (or be supplemented by) an initial data request focusing on the quantitative information at the parties' disposal that will enable the analysis of the effects of the merger on competition. Such information might include sales figures, pricing information and cost data, among other things. The financial questionnaire is likely to focus on financial performance and projections, including margin calculations.

11.15 Main parties are generally given between two and three weeks to provide the information requested, and the CMA will indicate which information should be provided as a priority. Third parties will generally be less involved in the Phase 2 inquiry process than main parties.¹⁹⁵ However, some will receive data requests and may be invited to participate in hearings with the case team, which may in some cases be attended by members of the Inquiry Group (before and/or after provisional findings—see paragraphs 11.30 to 11.37). Third parties may also receive extracts of working papers or provisional findings for put-back purposes (see paragraphs 12.5 to 12.9).

11.16 The CMA may send further requests for data and information to parties during the inquiry as the issues to be addressed become clearer.

¹⁹⁵ In cases where third parties have a significant role in the industry affected by the merger, third party input may be substantial.

- 11.17 It is very important that parties respond to information requests fully and accurately. As at all other stages of the CMA's investigation, intentional or reckless provision of false or misleading information is a criminal offence, regardless of whether that information has been required by a notice under section 109 of the Act or has been provided voluntarily.¹⁹⁶ Intentional alteration, suppression or destruction of any documents a person is required to produce by a notice under section 109 of the Act is also an offence.¹⁹⁷
- 11.18 Because of the strict Phase 2 statutory deadlines that the CMA has to meet, it is essential that the CMA gathers the bulk of the additional information that it requires for its Phase 2 analysis early in the process (notwithstanding that it may need to make further requests for information as the inquiry progresses (see paragraph 11.13)).
- 11.19 The CMA recognises that providing timely information can place a burden on parties to an inquiry and parties are encouraged to discuss with the case team as early as possible any difficulties in providing the requested information, providing it in the form requested, or meeting any deadlines for provision of information. This enables the CMA to plan its Phase 2 work within the constraints of the statutory timetable.
- 11.20 Often requests for information during Phase 2 are made without formally exercising the CMA's section 109 powers. However, delays in the provision of information can have significant repercussions for inquiries. As such, in the event of delay or failure to respond to its specific requests, the CMA is likely to issue formal notices under section 109 of the Act.¹⁹⁸ The CMA is not obliged to have regard to any information that it receives after the date reasonably specified for its receipt.

Submissions

- 11.21 In addition to requesting specific information from parties, the CMA invites submissions at different stages in the process, including an initial submission and a response to the issues statement and, later in the process, a response to the provisional findings and, if relevant, a response to the Notice of Possible Remedies.

¹⁹⁶ Section 117 of the Act.

¹⁹⁷ Section 110(5) of the Act.

¹⁹⁸ Further details on the CMA's powers to obtain evidence under section 109 of the Act, and the consequences of failing to comply with a section 109 notice, are set out in paragraphs 7.17 to 7.20 above.

11.22 In making submissions to the CMA, parties should provide the reasoning and evidence (including supporting documents) necessary to support the arguments or contentions made. Parties can, if they wish, provide this evidence by reference to previous submissions to the CMA (including submissions at Phase 1).

The initial Phase 2 submission

11.23 Any Phase 2 submission(s) from the main parties made at the outset of Phase 2¹⁹⁹ should set out (or, where it has been previously submitted, cross refer to):

- background information on the businesses involved in the transaction (including the history of the businesses, details of market entry or exit by the merger parties in relation to the market(s) affected by the merger and any related markets, and fully updated details of the transaction). The Inquiry Group will wish to understand the organisation of the businesses and the extent to which they have reached their current position through acquisition or organic growth
- the main parties' views on the economic markets affected by the merger, both in terms of product or service and the geographic market, and on the competitive conditions in those markets (including identifying the principal competitors, customers and suppliers and any barriers to entry, expansion or exit that exist in those, or related, markets). The Inquiry Group will want to understand the current business strategy of the main parties in relation to the products or services affected by the merger
- the main parties' views on what would have happened to the businesses involved in the merger, and in the market in general, in the absence of the merger situation. In assessing the effects of the merger, the CMA will consider the prospects for competition with the merger and compare this with the competitive situation without the merger (the latter is called the counterfactual),²⁰⁰ and
- the main parties' views on the expected impact of the merger on competition, in particular the expected effects on customers (including effects on prices, quality, availability and innovation). In doing so, the submission should address the issues set out in the CMA's Phase 1 reference decision, which form the starting point for the CMA's Phase 2 inquiry.

¹⁹⁹ In completed mergers, parties often submit joint submissions. This is less common in anticipated mergers. In either case, the CMA may seek the views of parties independently.

²⁰⁰ See *Merger Assessment Guidelines* (OFT1254/CC2), Section 4.3.

11.24 Where the parties have provided a full submission at Phase 1 that they believe covers all these issues, they may, for the purposes above, rely on that submission.

Submissions of technical economic analysis

11.25 When making submissions of technical economic analysis, parties should refer to the principles set out in the CC publication *Suggested best practice for submissions of technical economic analysis from parties to the CMA*. Whilst parties are free to submit their own economic analysis, parties should not expect the CMA to agree the approach to analysis in advance or to work jointly with parties on its analysis. Although the CMA will consider the views of the parties, it is for the CMA to decide what analysis is appropriate for it to carry out to enable it to answer the statutory questions.

Submissions of evidence based on surveys

11.26 In some cases parties submit to the CMA evidence derived from surveys of consumers or suppliers; the CMA may also or alternatively commission its own surveys (see further paragraphs 11.36 to 11.39). In such cases it is important that the research is statistically robust and the design and implementation of the survey is effective. The CMA therefore encourages parties, prior to undertaking such a survey, to discuss the need for, and, (as appropriate) design and scope of, the survey with the CMA in advance (see further footnote 112).

Publication of submissions

11.27 The CMA generally discloses initial Phase 2 submissions and responses made by parties to the Phase 2 issues statement²⁰¹ through publication on the CMA website.²⁰² Parties should provide non-confidential versions of all submissions for publication on the CMA's website at the same time as their full submissions. If this is not possible, parties should discuss timing of submission of the non-confidential version with the case team. In such cases, parties will be expected to provide appropriate non-confidential versions as soon as possible thereafter and in any event within a week. The non-confidential version of the submission must set out the fundamentals of the relevant party's case, with a sufficient description of the evidence relied upon to enable other parties to understand, and if appropriate, produce arguments against the inferences drawn from this evidence. Parties should accompany

²⁰¹ Including any Phase 1 submission(s) made by the parties that they have chosen to rely on instead of providing the CMA with a separate initial Phase 2 submission.

²⁰² The CMA may also publish other submissions received from parties.

the non-confidential version with a detailed explanation of why they consider that particular parts of their submissions should not be disclosed, including explaining the nature of the information, the harm that could be caused, and the likelihood and magnitude of that harm. Requests for confidential treatment of information should be limited to information that is genuinely sensitive, the disclosure or publication of which would be likely to cause significant harm to their legitimate business interests or to the interests of any individual to whom the information relates.²⁰³ When submitting non-confidential versions of submissions for publication, parties should ensure that any excised text cannot be read and that where information is provided about a third party, the parties indicate whether this is information that may be sensitive and/or confidential to the third party in question.

- 11.28 The final decision on disclosure lies with the CMA, having regard to its powers and duties under the Act.²⁰⁴ By publishing a non-confidential version of a party's submission on its website, the CMA does not necessarily accept that the excised material should not be published or disclosed at some future stage of the inquiry, if such disclosure becomes necessary to fulfil the CMA's functions under the Act.²⁰⁵
- 11.29 If the CMA accepts that there are issues of confidentiality, it may be possible to avoid disclosure of sensitive information by, for example, publishing an anonymous version of the submission or publishing the confidential information in a way that avoids confidentiality problems, for example replacing specific figures with ranges. In the event of a disagreement on the matter with the Inquiry Group, parties may make representations to the CMA's Procedural Officer. The Procedural Officer will advise the Inquiry Group following consideration of the parties' representations. The Inquiry Group will have all due regard to that advice, but the final decision remains with the Inquiry Group.

Third party hearings

- 11.30 The CMA identifies third parties to be invited to hearings as soon as possible following the reference. Third party hearings are usually held early in the

²⁰³ Section 244 of the Act.

²⁰⁴ As described in this guidance, as well as in Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) [*currently in draft and being consulted on*] and *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7).

²⁰⁵ Parties will be informed of any decision to publish previously excised material that remains unpublished and given an opportunity to make representations.

investigation, during the information-gathering phase and before the main party hearing (see paragraphs 12.10 to 12.14) so that any significant points that emerge can be put to the main parties. Third parties may be selected on the strength of their position in the market(s) affected by the merger (such as key customers or competitors), their role in the industry (such as relevant regulators or other public authorities), whether they have been actively involved in the Phase 1 process, their response, or anticipated response, to the third party letters, or their ability to contribute to a representative range of views.

- 11.31 In the case of completed mergers, the CMA may wish to seek views on the merger from those associated with the acquired business, separately from any submissions from or hearings with the acquirer. For example, senior management of the acquired business who have transferred to the acquirer, may be asked to attend hearings separately from the acquirers. In addition, the seller, including any senior management of the acquired business that have left the organisation, will usually be asked to provide information to the CMA during the course of its inquiry and may be required to attend hearings with the CMA. The CMA will usually need to understand the rationale for the sale of the business, particularly if a failing firm argument has been made. The seller's views of the market will also be relevant. Advisers to the seller may also be asked to provide information during the inquiry. This may be necessary in order for the CMA to establish whether there were credible alternative purchasers for the business.
- 11.32 The majority of third party hearings and evidence gathering will be led by the case team, although Inquiry Group members may also participate. Hearings with third parties are often conducted by telephone. In advance of the hearing, the case team will send third parties a note of the topics likely to be raised. A record of the hearing will be made, usually in the form of a verbatim transcript²⁰⁶ (which is not published) or sometimes as a case team note of the key points discussed which will be agreed with the third party concerned, and will be provided to the Inquiry Group.
- 11.33 The case team usually prepare summaries of the evidence given at third party hearings for disclosure by publication on the CMA website. If so, prior to its publication, the summary will be sent to the relevant third party for checking of factual accuracy and for the identification of any confidential material that it would not wish to be disclosed through publication. The relevant third party should explain in detail why it considers that particular parts of the hearing

²⁰⁶ Where the hearing is conducted by telephone, and a transcript produced, the telephone call will be recorded for the purposes of preparing the transcript.

summary should not be disclosed through publication at the same time as it identifies the material in question (see paragraphs 11.27 to 11.29 above). Third parties should note that in circumstances where the CMA agrees not to publish information, it may nevertheless decide to disclose the information to other parties where it believes this would facilitate the performance of the CMA's functions. In doing so, the CMA will have regard to its disclosure guidance.²⁰⁷

- 11.34 There may be other meetings or phone calls with third parties to clarify specific facts. A transcript is not normally taken, nor, necessarily, are notes prepared for sharing with the third parties concerned. Summaries are not normally disclosed. Any key information derived from such meetings and phone calls, however, will be disclosed to the relevant parties as appropriate, subject to the constraints of Part 9 of the Act.

Open and joint hearings

- 11.35 Early in the inquiry, the CMA will consider whether one or more public hearings, generally known as open hearings, and/or joint hearings should be held. Given the timescales in a Phase 2 inquiry, it is very unusual to hold an open hearing. It is more common to hold a private, multi-party hearing (for example, involving industry commentators or a group of industry participants, sometimes under the auspices of a trade association). These hearings are inquisitorial and the aim is to allow the CMA to put questions to the parties, probe responses and test the strength of the submissions and evidence of the parties. Multi-party hearings provide each party with an opportunity to hear and respond directly to evidence put forward by others. A record of any hearing will be made, usually in the form of a verbatim transcript, and a summary published.

Surveys and consultants

- 11.36 Where an inquiry involves a significant number of third party suppliers or customers, or where the market is one directly affecting consumers, a survey may be a useful part of the information-gathering process. If the CMA decides to conduct a survey the main party or parties will be consulted on the draft survey design and survey questions.

²⁰⁷ Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) [*currently in draft and being consulted on*] and *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7).

- 11.37 Before any contract is awarded and as far as practicable, the main party or parties will be informed which market research organisations have been invited to tender. Where possible, the parties will be asked if they have any objections to the proposed market research organisations (for example, due to possible conflicts) and any objections will be considered by the CMA prior to any appointment being made.
- 11.38 In some cases where a survey is conducted, main and/or some third parties may be required to provide contact details for a sample of their customers or suppliers so that the survey company can seek the views of relevant persons.²⁰⁸
- 11.39 For some merger inquiries, the CMA may wish to employ a consultant to provide specialist advice on the sector concerned. Where possible, before any contract is awarded, the main party or parties will be informed and allowed a short time to inform the CMA of any objections to the proposed consultants and any such objections will be considered prior to any appointment being made.

Site visit

- 11.40 During the early weeks of the inquiry the case team will usually arrange a 'site visit' for the Inquiry Group and a selection of the case team.²⁰⁹ This is a chance for the CMA to gain a greater understanding of the parties' businesses by visiting key facilities and meeting key operational staff. Parties are encouraged to organise a short presentation on their businesses in order to explain the nature of the business and the context in which the merger transaction takes place, followed by a tour of the relevant business areas and an opportunity for questions.²¹⁰ They may also wish to present their initial views on the relevant competition issues as they see them.

The issues statement

- 11.41 At an early stage the CMA publishes an issues statement with an accompanying news release. The issues statement sets out one or more theories of harm which will form the framework for the competitive analysis

²⁰⁸ Parties may request that the CMA require them to provide such information pursuant to its powers under section 109 of the Act, where they have regulatory concerns about providing the data voluntarily.

²⁰⁹ Where this is appropriate given the nature of the businesses involved. If the nature of the business does not lend itself to a site visit, a presentation by the parties on the relevant industry may take place instead.

²¹⁰ Although these are intended to be scene-setting meetings, where appropriate, the CMA may disclose to other parties non-confidential versions of material presented to it.

and outlines the issues which the inquiry will be exploring. It may also address the question of whether there are any potential relevant customer benefits (RCBs)²¹¹ resulting from the merger (see paragraph 13.8). The issues statement will invite comments from parties, setting a deadline for their receipt. The issues statement and the accompanying news release (embargoed until the publication date) will be sent to the main party or parties shortly before publication. Exact timings will depend on whether the CMA considers the issues statement to be market sensitive.²¹²

11.42 Later in the inquiry, the issues statement will be annotated to indicate the current state of the CMA's thinking on the issues and provided to the main parties in advance of the main party hearing (see paragraph 12.3). The annotated issues statement will not generally be published.

²¹¹ RCBs are defined in section 30 of the Act. See also *Merger Remedies* (CC8), paragraphs 1.14 to 1.20.

²¹² Where statements are market sensitive, embargoed documents will generally be provided after markets have closed, with publication at 7.00 am the following morning, just before markets open. See also paragraph 13.14.

12 DEVELOPING THE ASSESSMENT

Working papers

- 12.1 The CMA uses the information that it has gathered to develop its assessment of the effects of the merger. This analysis is developed through internal CMA papers, which are used to facilitate internal debate on the substantive and procedural issues that arise during the Phase 2 inquiry. As the CMA's analysis develops, working papers will be prepared by the case team covering the factual background, evidence and analysis relevant to the statutory questions and the theories of harm that have been identified. They may cover various topics including, for example, market definition, the counterfactual (what would have been expected to happen in the absence of the merger), competitive effects, and entry or expansion. They will include reference to the key evidence and/or analysis which the CMA is taking into account when considering the statutory questions it must answer (see chapter 4). For information on the CMA's analytical approach see *Merger Assessment Guidelines* (OFT1254/CC2).
- 12.2 Working papers contain the CMA's approach and developing thinking on issues at a point in time. They are not definitive, nor do they represent the CMA's final views, either in relation to the scope of the inquiry or the merits of any particular argument. The CMA's approach to disclosure of such papers is set out in its published guidance on disclosure of information.²¹³

Annotated issues statement

- 12.3 In advance of the main party hearing, the CMA will provide the parties with an annotated issues statement as well as a hearing agenda, giving an overview of its analysis to date and an indication of the topics that the CMA wishes to explore in the main party hearing. Parties will also generally have an opportunity to comment on any further working papers that are disclosed to them after that hearing (either in writing, or where appropriate at a case team meeting (a record of such meetings would be made and provided to the Inquiry Group)).

²¹³ See Transparency and disclosure: Statement of the CMA's policy and approach (CMA6) [currently in draft and being consulted on], and *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7).

Sharing technical analysis

12.4 The CMA may invite parties to comment on specific pieces of technical analysis. If this raises issues as to the confidentiality of the data underlying a particular piece of analysis, but the CMA nevertheless considers that limited disclosure is necessary to facilitate it performing its functions (subject to additional protections being put in place), the CMA may restrict the disclosure of that data to the main parties' external advisers only, in order to preserve as far as possible the confidentiality of the data concerned. In such cases, strict rules relating to access and onward disclosure will be applied and recipients will be required to acknowledge that they understand the basis on which such disclosure is made and that they will comply with these restrictions. If advisers fail to comply with these requirements, they will be subject to sanctions including, at a minimum, revoking their access to the data. Where the CMA decides that it is appropriate to disclose information in order to facilitate the exercise of its functions, but the information in question is not made public, it is an offence for the recipient to disclose that information or use it for a purpose other than that for which it was disclosed without the CMA's prior consent.²¹⁴

Put-back

12.5 The CMA will send relevant working papers (or relevant extracts) to parties for the purposes of enabling them to:

- verify the factual correctness of certain content (usually information supplied by them), and
- identify confidential material, prior to disclosure of the material. Parties should give reasons for any requests they make for material to be excised from CMA documents that are to be published by reference to section 244 of the Act (see also paragraphs 12.17 to 12.18).

12.6 This process is referred to as 'put-back'. The purpose of the put-back process is not to enable a restatement of case by parties. The put-back process is separate from disclosure of the CMA's developing thinking and if parties wish to comment on substantive issues arising from the materials disclosed to them, this should be done separately.

12.7 As far as practicable, the source of all material in working papers will be identified so as to assist the parties in checking such papers.

²¹⁴ Section 241(2) of the Act.

- 12.8 In addition to putting back extracts from working papers where necessary, the CMA may also put back extracts of its proposed provisional findings and proposed final report, to the extent that the relevant extracts have not already been checked for accuracy and confidentiality.
- 12.9 As the put-back process is intended to be limited to correcting factual inaccuracies and identifying confidential information, the relevant parties will be given a relatively brief period to respond to put-back requests.

The main party hearings

- 12.10 Towards the close of the assessment phase the CMA will hold hearings with the main parties.²¹⁵ The hearings will be attended by the Inquiry Group²¹⁶ and members of the case team. The CMA is likely to wish to speak to senior management in the businesses affected by the merger. The CMA will inform the parties if it wishes specified individuals to attend the hearing. In the case of a completed merger, the CMA will usually want a separate hearing with the sellers/former management of the acquired company (see paragraph 11.31). For an anticipated merger, the CMA is likely to want to hear from the acquirer and the target company separately.
- 12.11 Unlike a court hearing, CMA main party hearings are an inquisitorial and not an adversarial process. The primary purpose of this hearing is to enable the CMA to test the evidence and explore key issues with the parties. The hearings therefore take place at a stage in the investigation at which Inquiry Group members have absorbed sufficient evidence to produce an annotated issues statement and to frame challenging questions from it. It also provides an opportunity for the parties to explain their position on these issues orally, directly to the decision-makers.
- 12.12 Prior to the hearings the CMA will provide the parties with an agenda of the topics that it wishes to explore in the hearings. As noted in paragraph 12.3, in advance of the main party hearings the CMA will provide the relevant party with an overview of the CMA's analysis at that stage in the form of an annotated issues statement.
- 12.13 The main party hearings are a formal occasion. The main party is given the opportunity to make brief opening and/or closing statements.²¹⁷ Parties should

²¹⁵ The CMA may compel specified persons to attend to give evidence and may also take evidence under oath using its powers under section 109 of the Act.

²¹⁶ Where practicable, the parties will be informed if members of the Inquiry Group are unable to attend the hearing.

²¹⁷ Parties must inform the case team in advance if they wish to make an opening or closing statement and discuss the appropriate length of such statements given the timing constraints of the

expect to provide a concise explanation of their case and to respond to the CMA's questions.²¹⁸ A transcript of the hearing will be taken, and will be sent to the relevant main party after the hearing for checking (the transcript is not published). Intentional or reckless provision of false or misleading information is a criminal offence (this includes where the information is provided during a hearing).²¹⁹ Whilst a party may be accompanied by its legal or other professional advisers, the CMA will expect to hear primarily from the representatives of the business themselves. The CMA may direct its questioning at specific individuals. If parties are unable to provide specific information requested at the hearing, this may be provided subsequently in writing.²²⁰

12.14 Summaries of main party hearings are not normally prepared during merger inquiries, although points arising from these hearings may be put to third parties for comment where appropriate

Case team meetings

12.15 The case team (and, on occasion, members of the Inquiry Group with specialist skills in the relevant area)²²¹ will sometimes also participate in face-to-face meetings with parties with the aim of facilitating understanding of detailed technical or analytical matters arising during the inquiry or to clarify evidence. An agenda will be provided in advance of the meeting setting out the topics that the CMA wishes to explore. Such meetings will be led by the case team, and a transcript or note will be taken, depending on the circumstances. These meetings are typically less formal than the main party hearings. However, the statutory rules prohibiting the provision of false or misleading information apply equally to case team-led meetings.

hearing. Where relevant, parties should provide copies of any presentation materials they wish to use when making those statements. As the CMA will have received and considered written submissions from the parties, there is no necessity for the parties to restate in detail all aspects of their case.

²¹⁸ Parties have the opportunity to comment more fully in writing on the approach and views of the CMA disclosed to them in working papers disclosed to them for comment (see paragraphs 12.5 and 12.6) and in its provisional findings.

²¹⁹ Section 117 of the Act.

²²⁰ In such circumstances, the CMA may recall specified persons to give further evidence (whether voluntarily or pursuant to a notice issued under section 109 of the Act).

²²¹ Where practicable, parties will be informed if it is intended that members of the Inquiry Group will attend such meetings.

Publication of provisional findings

- 12.16 The CMA reaches provisional conclusions on the first two statutory questions (see paragraph 3.5). These are recorded in the Notice of provisional findings. The provisional findings represent a provisional decision on the two statutory questions, including the CMA's competition assessment. They will set out the core background details necessary for an understanding of the inquiry (for example, details of the main party or parties, the principal features of the industry where relevant and a description of the relevant merger situation) and a full explanation of the CMA's reasoning in reaching its provisional findings. The provisional findings report is therefore the key means by which the CMA discloses its provisional views, reasoning and relevant evidence to the main and third parties.
- 12.17 Prior to publication the case team will normally put back to parties excerpts from the provisional findings not already put back in some other form²²² to check for factual inaccuracies and to check that all confidential material has been identified. As well as identifying any confidential material, parties should, at the same time, explain why they consider that the material in question should be excised by reference to section 244 of the Act (see paragraphs 11.27 to 11.29). Given the constraints of the inquiry timetable, the deadline for parties to respond to such further put-back may be short (generally no more than 24 hours).
- 12.18 When the Inquiry Group has made its decision on excisions from its provisional findings, each party is informed of any of its requests the Inquiry Group has rejected. The party has the right to make further representations to the Procedural Officer (see paragraph 11.29 above).
- 12.19 The CMA's practice is to provide to the merging parties shortly before publication: a copy of the press release; the Notice of provisional findings; the summary of provisional findings; together with, where relevant, the Notice of Possible Remedies. The parties will usually also be given the redacted version of the full provisional findings report at this stage. These documents are provided on an embargoed basis until publication to enable the parties to prepare their communications. The CMA will publish the Notice of provisional findings, summary of provisional findings and Notice of Possible Remedies after a short delay.²²³ If the parties have not previously received the redacted

²²² Where information has been put back through preparation of working papers or summaries, the process will not generally be repeated in preparation of provisional findings.

²²³ Where the parties are not UK-listed companies, this delay will generally be a matter of a few hours. In cases where one or more of the main parties is a UK-listed company, a copy of the Notice of provisional findings, summary of provisional findings and, where relevant, Notice of remedies is

version of the full provisional findings report, it will be given to them at this stage. Publication of the redacted provisional findings report will take place once the parties have had an opportunity to check that confidential material has been correctly redacted. The CMA will discuss with parties the period within which they must indicate whether any further redactions are required, but this period will be brief and generally no more than 48 hours. However, if the CMA is fully satisfied that all confidential material (except any it has decided to publish) has been removed from the provisional findings, it may publish the full decision at the same time as the Notice of provisional findings. If an SLC has been identified a Notice of Possible Remedies is published, usually at the same time as the summary of the provisional findings.

- 12.20 It may be appropriate, though unusual, to include proposals for possible remedies in the provisional findings report, depending on the CMA's proposed decision on the competition questions and the stage that its thinking has reached. Usually where there is a provisional SLC finding, the CMA publishes a separate Notice of Possible Remedies.
- 12.21 The Notice of Possible Remedies acts as a formal starting point for discussion of remedies. It will set out one or more options to remedy the SLC that the CMA provisionally expects to arise as a result of the merger, and may set out the CMA's initial thoughts on the relative merits of these options. If parties wish to propose potential remedies in advance of publication of provisional findings, details of the proposals should be provided in writing and may be discussed with the case team without prejudice to the CMA's provisional findings. Where relevant, the Notice of Possible Remedies will include any options put forward by the parties (although generally these will not be identified as such in the Notice). The Notice of Possible Remedies will invite comments by a given date from all interested parties on the remedies set out in the Notice, and will also invite parties to suggest alternatives.
- 12.22 The CMA will issue a news release announcing the publication of its provisional findings and, if relevant, the Notice of Possible Remedies.

made available to the main parties on an embargoed basis after the London Stock Exchange has closed on the day before publication, normally after 4.30 pm. By 7.00 am (when the London Stock Exchange opens) the following day, these documents are published on the CMA website. Where the main parties are listed companies in other jurisdictions, the CMA will, where possible, seek to avoid publication during stock exchange hours in those jurisdictions.

13 AFTER PROVISIONAL FINDINGS

Public consultation on provisional findings and Notice of Possible Remedies

- 13.1 The Notice of provisional findings identifies a period (of at least 21 days²²⁴) in which the parties can comment on the provisional findings. Where the CMA has provisionally found an SLC arising from the merger, consideration of possible remedies to the SLC proceeds in parallel with consultation on the provisional findings. Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of that Notice (and in any event, no less than seven days) so that they can be considered before response hearings.²²⁵
- 13.2 Responses from parties to the provisional findings and the Notice of Possible Remedies are generally disclosed through publication on the CMA website. Parties should, at the same time as they submit their responses to the CMA, identify any confidential material contained in those responses and explain why such material should be excised by reference to section 244 of the Act.
- 13.3 The CMA will consider all responses it receives, and whether the provisional findings should be altered in the light of these (see paragraph 13.14). In most cases, views on provisional findings and on remedies will be explored at a single hearing. Where the merger is subject to investigation in other jurisdictions, it would be usual for the CMA to discuss issues relating to remedies with the relevant competition authorities.

Response hearings

- 13.4 Where the CMA's provisional finding is that the merger gives rise to an SLC, or may be expected to give rise to an SLC, response hearings will take place. Response hearings will generally be held with the main parties and potentially with key third parties likely to provide evidence or views useful for reaching a final decision on the competition question or on remedies. This could include potential buyers, customers or relevant economic regulators.

²²⁴ Note that these are calendar days and run from the date on which the parties are notified of the provisional findings, and not the date of publication.

²²⁵ In the interests of keeping the inquiry to schedule, response hearings may be held before the 21-day consultation period on the provisional findings has expired. In such cases, the parties are still able to provide their written comments in response to the provisional findings at any time within the period specified in the Notice of provisional findings.

- 13.5 Response hearings may take place where the provisional finding is that no SLC arises as a result of the merger, although main parties often choose not to take advantage of this.²²⁶
- 13.6 The response hearing with the main parties will be led by the Inquiry Group with case team support. Hearings with third parties may often be led by the case team, and may be held face-to-face or by teleconference. Parties will be given the opportunity to comment orally on the provisional findings and the CMA may seek clarification of particular points made in written submissions or at the hearing. However, the hearing is likely to focus on possible remedies. Transcripts of the hearings will be taken and processed in a similar way as the transcripts of the hearings held earlier in the inquiry process (see paragraph 12.13). However, summaries of third party response hearings will not necessarily be prepared or published—the publication of such summaries will depend on the circumstances of the case and will take into account confidentiality considerations. Where relevant and subject to confidentiality considerations, comments from third parties will be incorporated into the remedies working paper that is disclosed to the main parties (see paragraph 13.8 below).
- 13.7 Following the main party response hearing, the main party or parties may submit further, or amended, proposals for remedies. Non-confidential versions of these proposals will be published on the CMA’s website. There may also be further meetings with the main parties at case team level. These meetings will be working meetings led by CMA staff at which the details of specific remedies proposals can be explored. A transcript or note of such meetings will be taken, depending on the circumstances.

Remedies working paper

- 13.8 A remedies working paper, containing a detailed assessment of the different remedies options and setting out a provisional decision on remedies, will be sent to the main parties for comment following the response hearings.²²⁷ This paper will also set out the CMA’s views on whether the merger gives rise to RCBs,²²⁸ and if so, whether the proposed remedy should be modified in order to preserve those benefits. A period of typically no less than five working days would normally be allowed for the main parties to submit their comments.

²²⁶ The CMA will consider in each case where it has provisionally found that no SLC may be expected to arise, whether it is appropriate to have response hearings with third parties.

²²⁷ *Merger Remedies* (CC8) explains how the CMA conducts its substantive assessment of remedies options, and how it takes RCBs into account in this assessment.

²²⁸ As defined in section 30 of the Act.

Third parties may also be consulted about the proposed scope of remedies and their views on any relevant customer benefits, and the remedies working paper may in some cases be published on the CMA's website if the CMA deems a wider consultation to be necessary. The remedies working paper is not, however, usually published.

- 13.9 Following consultation with parties on the remedies working paper and any further discussions and meetings with the parties that the CMA considers necessary, the CMA takes its final decisions on both the competition issues and any remedies.

Publication of the final report

- 13.10 The CMA is required to publish its conclusions on the statutory questions (see paragraph 3.5) in a report which must contain the reasons for the decisions and such information as the CMA considers appropriate for a proper understanding of the decision.²²⁹

- 13.11 The report must normally be published²³⁰ within 24 weeks of the date of the reference.²³¹ The inquiry can be extended, once only, by up to eight weeks if the CMA considers there are special reasons why a report cannot be prepared and published within the statutory deadline.²³² In addition to an extension for special reasons, the inquiry period can be extended if one of the main parties fails to provide information in response to a formal section 109 notice within the time stated in the notice²³³ (see paragraph 11.18 to 11.20 on section 109 notices). In this case the inquiry timetable is extended until the information is provided to the satisfaction of the CMA or the CMA decides to cancel the extension. If the inquiry timetable is extended for any reason a notice of extension will be published²³⁴ and the administrative timetable will be revised and republished.

- 13.12 The final report contains the CMA's final decisions on the statutory questions it must decide (see paragraph 3.5), including remedies if there is an SLC

²²⁹ Section 38 of the Act.

²³⁰ The CMA is responsible for publishing all its reports of merger inquiries that are not public interest cases (see Part 8).

²³¹ Section 39(1) of the Act. The statutory deadline for publication will normally, for convenience, be stated in the Phase 1 reference and will also be shown in the administrative timetable and on the inquiry page for the relevant inquiry on the CMA's website.

²³² Section 39(3) of the Act. The CMA is required also to publish the reasons for any such extension (section 107(2)(c) and 107(4) of the Act).

²³³ Section 39(4) of the Act.

²³⁴ Section 107(2)(c) of the Act.

finding. The final report will also contain the reasons for those decisions and such information as is necessary to facilitate a proper understanding of the decisions and the reasons.²³⁵

- 13.13 If the final report contains significant additions to, or amendments of, the account of evidence received from the parties as set out in the provisional findings, this new or revised text will be put back to the relevant parties prior to publication of the final report (see paragraphs 12.5 to 12.9). Where the CMA changes its provisional decisions on the statutory questions as a result of evidence received following publication of its provisional findings, it may be appropriate for the CMA to publish, or otherwise disclose to the main parties and relevant third parties, a description of its reasons for changing its provisional decision in order to provide parties with an opportunity to comment prior to publication of the final report. In such cases, the requirement for a minimum 21-day period for consultation on provisional findings does not apply. In deciding whether it is necessary to publish or otherwise disclose such an update of its provisional findings, the CMA will in particular have regard to its statutory duties to consult where it proposes to make a relevant decision that is likely to be adverse to the interests of the merging parties.²³⁶
- 13.14 The CMA will send the final report, including a summary, to the main parties in the form in which it will be published, that is, with excisions. The final report and summary are embargoed until publication. At this stage, the main parties are not generally invited to make a final check of the text because most excision requests will have been resolved ahead of publication of provisional findings (see paragraphs 12.17 to 12.19). In cases where the main party is a UK-listed company,²³⁷ a copy of the final report, as well as the news release, is made available to the main parties on an embargoed basis after the London Stock Exchange has closed on the day before publication, normally after 4.30 pm. By 7.00 am (when the London Stock Exchange opens) the following day, the final report is published on the CMA website.
- 13.15 If there is no SLC finding in the CMA's final report, this is the final stage in the Phase 2 inquiry process.

²³⁵ Section 38 of the Act.

²³⁶ Section 104 of the Act.

²³⁷ Where the main parties are listed companies in other jurisdictions, the CMA will, where possible, seek to avoid publication during stock exchange hours in those jurisdictions.

14 IMPLEMENTATION OF REMEDIES

- 14.1 Following publication of the final report, if the CMA has concluded that a merger would give rise to an SLC and that remedial action should be taken by it to remedy that SLC, the CMA will take steps to implement such remedies. This may be achieved either by the CMA accepting undertakings from appropriate persons²³⁸ that have been negotiated with the parties concerned or by the CMA exercising its power to make an order.²³⁹ The main focus at this stage in the process is on implementing the detail of the chosen remedy option, not on points of principle. Action by the CMA must be consistent with the decision on remedies set out in the final report unless there has been a material change of circumstances or there are special reasons for acting differently.²⁴⁰
- 14.2 The Inquiry Group remains in existence throughout this phase until final undertakings are accepted by the CMA or an order made.²⁴¹ Existing interim measures remain in force during this period. The CMA will also consider whether interim measures should be put in place (where none are already in place) or existing interim measures varied (for example, allowing for the appointment of a monitoring trustee), pending the implementation of final remedies. The administrative case team at the CMA may change at this point of the inquiry. The main parties will be informed of any new points of contact.
- 14.3 The CMA is subject to a statutory deadline of 12 weeks following its final report, extendable once by up to six weeks if the CMA considers there are special reasons for doing so, to implement its Phase 2 remedies.²⁴² The CMA will draw up a timetable for the drafting and implementation of undertakings or an order, and share key milestones with the main parties to help them plan their input to the process.
- 14.4 The process of agreeing undertakings or making an order will involve informal consultation between the CMA (with meetings usually being held at staff level) and the main parties. Third parties may also be consulted where relevant. Parties will be asked to comment both on the substance of the draft under-

²³⁸ Section 82 of the Act. This includes, but is not limited to, the main parties.

²³⁹ The CMA's order-making powers are set out in sections 84, 86, 87, 88 of, and Schedule 8 to, the Act.

²⁴⁰ Section 41(3) of the Act.

²⁴¹ Although the Inquiry Group may be reappointed to oversee any action required to be taken by the parties to give effect to the undertakings/order rather than this oversight role being carried out by the [Remedies Standing Group] (see paragraph 14.7).

²⁴² These time limits may be further extended where a relevant party has failed to comply with the requirements of a notice requiring the submission of evidence issued under section 109 of the Act.

takings or order, and on any material which they consider to be confidential and which they would want to be excised from the published version by reference to section 244 of the Act.

- 14.5 When a version of the undertakings has been provisionally agreed on which the CMA is willing to consult publicly, the CMA will then publish a 'notice of intention to accept final undertakings' or a 'notice of intention to make an order' on its website, to which the draft undertakings or order are annexed. A minimum consultation period (15 days for undertakings and 30 days for an order)²⁴³ is allowed for interested parties to comment on the notice.
- 14.6 The CMA will decide whether any changes need to be made to the draft undertakings or order in light of responses to the consultation. If any material changes are required, a further minimum seven-day consultation period is required.²⁴⁴ Minor changes do not require further consultation.
- 14.7 The CMA then publishes a 'notice of acceptance of undertakings' or a 'notice of making an order'. At this point, the inquiry is finally determined. Responsibility within the CMA for any further implementation (for example, overseeing any divestiture process) will either pass to the [Remedies Standing Group] or to an Inquiry Group appointed to oversee this part of the process (possibly the original Inquiry Group). Where remedy implementation is expected to be complex or involve detailed considerations it is likely that either the original Inquiry Group will be reappointed to oversee that process, or that a new Inquiry Group will be appointed rather than the matter being dealt with by the Remedies Standing Group.
- 14.8 If a party fails to comply with any undertakings it has given or any order imposed on it by the CMA, compliance may be enforced by means of civil proceedings brought by the CMA for an injunction or for interdict or for any other appropriate relief or remedy in one of the UK courts. In addition to enforcement by the CMA, any person affected by the contravention of undertakings or an order who has sustained loss or damage as a result of such contravention may also bring an action against the party bound by the undertakings or order.²⁴⁵
- 14.9 The CMA has a statutory duty²⁴⁶ to keep undertakings and orders under the Act under review. From time to time, the CMA must consider whether, by

²⁴³ Paragraph 2(f) of Schedule 10 to the Act.

²⁴⁴ Paragraph 5(c) of Schedule 10 to the Act.

²⁴⁵ Section 94 of the Act.

²⁴⁶ Under sections 92(2) and 162(2) of the Act. There is a similar legacy duty under sections 88(4) and (5) of the Fair Trading Act 1973 (as preserved in Schedule 24 to the Act).

reason of a change in circumstances, the set of undertakings or the order is no longer appropriate and should be varied or terminated.²⁴⁷ Responsibility for deciding on variation or termination of undertakings or orders lies with the CMA in all but a very limited number of cases.²⁴⁸

14.10 Changes of circumstances that the CC (which previously undertook this function prior to the creation of the CMA) considered in the past to merit a variation or termination of undertakings or orders included significant changes in market structure and changes in laws and regulations affecting a market.

14.11 Further guidance on the CMA's approach and procedures in considering the variation and termination of undertakings and orders in merger cases is available on the CMA's website.

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²⁴⁷ The statutory language refers to the variation, release or superseding of undertakings and the variation or revocation of orders.

²⁴⁸ Certain undertakings and orders originally given to the Secretary of State under the Fair Trading Act 1973 remain the responsibility of the Secretary of State.

15 THE CANCELLATION PROCESS

- 15.1 In some cases an anticipated merger may be abandoned by the parties during the course of the CMA's review.
- 15.2 If an anticipated merger is abandoned during the course of the CMA's Phase 1 investigation, the CMA can issue a decision finding that its duty to refer does not arise because there is no relevant merger situation. If an anticipated merger is abandoned following a reference to Phase 2, the CMA can cancel the reference and stop the inquiry.²⁴⁹ The CMA has no power to cancel an investigation of a completed merger.²⁵⁰
- 15.3 Section 37(1) of the Act requires the CMA to cancel a Phase 2 reference if it considers that the proposal to make arrangements of the kind mentioned in the reference has been abandoned. Where it is claimed that the arrangements have been abandoned and new arrangements are proposed or contemplated, the CMA must be satisfied that the arrangements that are described in the terms of reference have, in fact, been abandoned and that the new arrangements are not merely an amended form of the arrangements that were referred.²⁵¹
- 15.4 In order to be satisfied that the parties have abandoned the merger (at either Phase 1 or Phase 2), the CMA will require written assurance from the parties to the transaction to that effect. Written assurances are normally sought from the proposed acquirer (signed by persons of suitable seniority and with authority to bind the acquirer), though there may be cases where the CMA will require additional assurances from the seller.

²⁴⁹ As discussed in paragraphs 10.11 – 10.12, the CMA may also, within three weeks of the reference and at the request of a relevant person connected to the parties, suspend the Phase 2 timetable for up to three weeks if the CMA reasonably believes that an anticipated merger might be abandoned. (section 39(8A) of the Act). If during this suspension the parties abandon the merger, the CMA will cancel the reference.

²⁵⁰ In circumstances where only part of the arrangements under consideration have been abandoned, it may be appropriate for the CMA to continue its investigation. This will depend upon the terms of reference. For example, in the Monopoly and Merger Commission's (MMC, the predecessor to the CC) report: NTL Communications Corp and Newcastle United PLC (July 1999), the terms of reference included a completed merger situation and an anticipated merger situation. During the course of the inquiry, the anticipated merger situation was abandoned. However, the MMC continued its inquiry into the completed merger situation that had been referred to it and published its report accordingly. Where the transaction is abandoned after the publication of the issues statement, the CMA may decide to publish a commentary on the matters set out in the issues statement, if it believes this would assist participants in future inquiries involving the relevant industry to understand how the CMA has analysed the issues raised by the inquiry in question— see, for example, the CC's First Group/ICEU Merger inquiry; commentary on issues statement (June 2005).

²⁵¹ *R v MMC and SoS for Trade and Industry ex parte Argyll Group* [1986] 2 All ER 257.

- 15.5 If parties decide not to proceed with a merger, this decision will often be taken soon after the merger has been referred for a Phase 2 investigation and before an Inquiry Group has been appointed. If an Inquiry Group has not been constituted, or an Inquiry Group has not held its first meeting, the Chair of the CMA is able to cancel a reference where he or she is satisfied that arrangements have been abandoned.²⁵² If an Inquiry Group has been appointed and has held its first meeting, it falls to the Inquiry Group to cancel the reference.
- 15.6 Parties may seek cancellation at any time prior to final determination of the reference. Final determination occurs upon the acceptance of final undertakings or the making of a final order.²⁵³

²⁵² ERR13, Schedule 4, paragraph 47.

²⁵³ Section 79(1) of the Act.

16 PUBLIC INTEREST MERGERS

Introduction to public interest mergers

16.1 The Act provides that (as the default position) the CMA decides whether or not to refer the merger for a Phase 2 investigation, and the Phase 2 Inquiry Group makes the final decision as to whether any competition issues arise and whether any remedies are required, based purely on whether the merger has caused or may cause a substantial lessening of competition. However the Act also allows for the Secretary of State to assume responsibility for determining whether or not to refer a merger when defined public interest considerations are potentially relevant by issuing a public interest intervention notice (PIIN). If the Secretary of State has referred a merger on public interest grounds, he or she also takes the final decision on whether the merger operates or may be expected to operate against the public interest, and on any remedies for identified public interest concerns.

16.2 Section 42 of the Act therefore provides that the Secretary of State may issue a PIIN in the case of mergers that meet the Act's jurisdictional thresholds,²⁵⁴ that have public interest implications and that the CMA has not referred for a Phase 2 investigation. Public interest considerations are limited to:

- national security (including public security)
- plurality and other considerations relating to newspapers and other media,²⁵⁵ and
- the stability of the UK financial system.²⁵⁶

16.3 To facilitate this, the CMA has an obligation under section 57 of the Act to inform the Secretary of State where it is investigating a merger (at Phase 1) that it believes raises material public interest considerations. However, even where a public interest consideration is present, if such a PIIN is not issued, the CMA will treat the case and make its decision on competition grounds as if it were any other merger case (and submissions on the public interest considerations would therefore not be relevant in those circumstances).

²⁵⁴ The Secretary of State may also intervene in certain public interest cases where the jurisdictional thresholds are not met – see paragraph 16.23 below.

²⁵⁵ Guidance from the Department for Business, Innovation and Skills on the operation of the public interest provisions for media mergers can be found at: www.bis.gov.uk/files/file14331.pdf

²⁵⁶ Recent examples of cases in which PIINs were issued include: Acquisition by British Sky Broadcasting of a 17.9% stake in ITV plc (2007); Anticipated acquisition by Lloyds TSB plc of HBOS plc (2008); and Completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited (2012).

16.4 In Phase 1 cases in which the Secretary of State has intervened on media public interest grounds, Ofcom will advise the Secretary of State on the public interest aspects of the case under section 44A of the Act. There is no statutory role for Ofcom unless a PIIN is issued, although the CMA routinely consults regulators about any mergers in which they are likely to have industry-specific knowledge.²⁵⁷ Ofcom may also advise the Secretary of State at Phase 2, following receipt of the CMA's Phase 2 report.

Public interest considerations

16.5 Section 58 of the Act details the public interest considerations on which the Secretary of State may intervene in a merger case. These are:²⁵⁸

- national security, including public security
- the need for accurate presentation of news and free expression of opinion in newspapers
- the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK
- the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience
- the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests
- the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003, and
- the interest of maintaining the stability of the UK financial system.²⁵⁹

²⁵⁷ See further paragraphs 7.13 to 7.16.

²⁵⁸ The media considerations were added by the Communications Act 2003. See also BIS (formerly DTI) Guidance: *Enterprise Act 2002: Public Interest Intervention in Media Mergers: Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers* (May 2004) and Ofcom guidance for the public interest test for media mergers.

²⁵⁹ Added by the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 SI 2008/2645. However, the interest of maintaining the stability of the UK financial system is

16.6 In addition to those specified considerations discussed above, section 42(3) of the Act also allows the Secretary of State to intervene on the basis of a consideration which is not specified but which the Secretary of State believes ought to be specified. To the extent that the Secretary of State intervenes on the basis of a consideration that he or she believes ought to be specified, he or she is required by section 42 of the Act to seek to have that consideration subsequently inserted into section 58 by means of an order approved by both Houses of Parliament.

Process for public interest cases

Phase 1

16.7 If a PIIN is issued, the case is handled in the following way:

- The CMA will publish an invitation to comment seeking third party views on both competition and public interest issues.
- As well as generally issuing an invitation for comment, the CMA will actively contact other governmental departments, sectoral regulators, industry associations and consumer bodies for their views on public interest issues where appropriate.²⁶⁰
- The CMA will carry out its review of the jurisdictional and competition issues in the same way as it would for any other case, with the caveat that its timetable will be adapted in order to enable it to provide its report to the Secretary of State by the deadline specified in the PIIN.
- Following its own internal review, the CMA then provides advice to the Secretary of State on jurisdictional and competition issues, which must be accepted (section 46 of the Act). The CMA is also required (other than in media public interest cases) to pass to the Secretary of State a summary of any representations it has received that relate to these public interest matters.²⁶¹ The Act allows the CMA to provide advice and recommendations on the public interest consideration to the Secretary of

not a relevant consideration for intervention in European mergers or when a merger is referred back to the CMA under Article 4(4) or 9 of the EU Merger Regulation (see Chapter 18 below).

²⁶⁰ For example, in a case raising national security issues relating to security of energy supply, the CMA would seek submissions from Ofgem and would pass these on in full to the Secretary of State. In media cases, section 44A of the Act provides expressly for a report by Ofcom.

²⁶¹ In cases raising media public interest issues, Ofcom will provide a separate report on issues of media plurality and diversity, as occurred in relation to British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV plc. In addition, the CMA may also summarise any representations it has received that relate to the media public interest.

State; however, given the CMA's role as a competition agency, it would not normally be expected that the CMA would provide its own advice on public interest issues at Phase 1. (By contrast, following a reference on public interest grounds the independent Phase 2 Inquiry Group will report to the Secretary of State about whether the merger operates or may be expected to operate against the public interest.)

- The CMA will also inform the Secretary of State about the applicability of any of the exceptions to the duty to refer and as to whether it would be appropriate to deal with competition concerns by way of UILs. The content of such advice will clearly depend on whether the parties have indicated to the CMA that they would be willing to offer UILs.
- The Secretary of State then makes a judgement on the outcome of the case in the light of the CMA's advice. References for a Phase 2 investigation can be made under section 45 of the Act either because the Secretary of State believes that it is or may be the case that the merger has resulted, or may be expected to result, in a substantial lessening of competition and, combined with the relevant public interest consideration(s), operates or may be expected to operate against the public interest; or because, while there is no realistic prospect of a substantial lessening of competition arising from the merger, the public interest considerations are such that it is or may be the case that the merger operates or may be expected to operate against the public interest. Alternatively, the Secretary of State may decide under section 45(6) of the Act not to make a reference on the basis that an anti-competitive outcome in the form of a CMA finding of a realistic prospect of a substantial lessening of competition is justified by one or more public interest considerations. Where the Secretary of State is minded to refer, he or she will also consider whether UILs are justified.

16.8 If the Secretary of State concludes, after receipt of the CMA's report, that there are no public interest issues that are relevant to the PIIN, the CMA will be instructed under section 56 of the Act to deal with the merger as an ordinary merger case.²⁶² In any event, any decision in the case based on competition considerations must follow from the CMA's advice on whether or not it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition.

²⁶² Under section 34ZB(4) of the Act, the CMA may in those circumstances extend the 'standard' 40 working day deadline to decide whether its duty to make a reference for a Phase 2 investigation applies.

Phase 2

- 16.9 If a reference is made on public interest grounds (with or without competition grounds) the CMA conducts a Phase 2 inquiry and reports to the Secretary of State. If the CMA considers that the merger operates or may be expected to operate against the public interest, it makes recommendations as to the action the Secretary of State or others should take to remedy any adverse effects. The Secretary of State will make the final decision on the public interest test and take whatever remedial steps he or she considers necessary to address the competition and public interest issues.
- 16.10 The CMA's Phase 2 procedures for public interest inquiries are similar to those for normal merger references. The principal differences are that the CMA provides its report to the Secretary of State and the final decision on public interest matters lies with the Secretary of State. The CMA has to prepare a report and give it to the Secretary of State within 24 weeks (subject to a possible eight-week extension) from the date of the reference. The Act does not require the CMA to consult the Secretary of State in the event that it proposes to extend the inquiry.
- 16.11 Some key procedural differences in public interest cases include:
- The CMA sends the excised version of the provisional findings to the Secretary of State and Ofcom (if appropriate) at the same time as copies go to main parties in advance of publication.
 - The CMA conducts an excisions process as set out in paragraph 12.17, even though the CMA does not make the final decision on excisions to be made in the published version of the final report²⁶³ (see paragraph 16.14). The CMA will consider requests for excisions, and decide whether it would be minded to accept or reject such requests. Its views will be made available to the Secretary of State to facilitate the Secretary of State's task of preparing an excised version of the report for publication. The parties will not have seen the CMA's views on excisions at the time the report goes to the Secretary of State and there will consequently be no provision to make representations to the CMA's Procedural Officer about any rejected excision requests, as in the case of standard merger inquiries (see paragraph 11.29).

²⁶³ Section 118 of the Act.

- The CMA will inform the main parties at least 24 hours before the final report is sent to the Secretary of State that the report is to be despatched imminently.
- The CMA will issue a news release announcing only that the CMA has delivered the final report to the Secretary of State; no part of the report or summary of it is disclosed at this time.

16.12 Once the Secretary of State has received the CMA's report, he or she has 30 days in which to make and publish his or her decision.²⁶⁴ The Secretary of State is bound by the CMA's decision on whether there is a merger situation and its findings on the competition question. But he or she must decide whether there is a problem in relation to the specified public interest issue. Whilst the Secretary of State must have regard to the findings in the CMA's report regarding remedies, he or she can also decide on remedies other than those the CMA has recommended. However, if the Secretary of State decides that the public interest issue is not relevant, he or she will send the case back to the CMA to decide how to remedy any competition issue identified. The Secretary of State's decision is published on the relevant government website and later posted on the CMA website.

Publication of decisions

16.13 When the Secretary of State has made a decision as to whether or not to refer the case for a Phase 2 investigation, the Secretary of State is required under section 107 of the Act to publish the CMA's Phase 1 report (although the CMA will also wish to make the report available through its website). The parties will be contacted prior to publication to discuss whether the report contains confidential information that should be excised prior to publication (see paragraph 9.2 above).

16.14 The Secretary of State must also publish a non-confidential version of the CMA's final report in public interest cases no later than the publication of his or her decision on the case²⁶⁵ (that is, within 30 days). The final decision on the material to be excised from the published report is made by the Secretary of State. Shortly after the Secretary of State has published the CMA's final report, it is also posted on the CMA's website.

²⁶⁴ Section 54(5) of the Act.

²⁶⁵ Section 107(9)(b) of the Act.

Fees

16.15 A fee is calculated in respect of cases in which a PIIN has been issued in the same way as for normal competition cases (see chapter 20 below).

Public interest intervention in cases under the EU Merger Regulation

16.16 The Secretary of State may also intervene on public interest grounds²⁶⁶ in cases falling for consideration under the EU Merger Regulation through the use of Article 21(4) of the EU Merger Regulation (described in paragraph 18.36 to 18.38 below).

16.17 Article 21 is invoked by means of the Secretary of State giving the CMA a European Intervention Notice (EIN) under section 67 of the Act. In this situation, the Commission will examine, or continue to examine, the merger on competition grounds in the normal way, but the Secretary of State is able to make a decision on public interest grounds.²⁶⁷

16.18 The EIN requires that the CMA advise the Secretary of State on the considerations relevant to the making of a reference under section 22 or 33 of the Act which are relevant to the decision on whether to make a reference under the provisions of the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (as amended).²⁶⁸ The CMA is also required to provide a summary of representations received from third parties relating to the public interest considerations.

16.19 When an EIN has been issued, the CMA will publish an invitation to comment seeking third party views on the public interest issues (but not on competition issues). The CMA's advice will not contain a competition assessment, as this aspect of the merger remains the responsibility of the Commission. However, the CMA's advice will contain a summary of any representations received from third parties that relate to the public interest considerations specified in the EIN.

16.20 The Secretary of State may make a reference for a Phase 2 investigation if he or she believes that it is or may be the case that, taking account only of the

²⁶⁶ Article 21(4) of the EU Merger Regulation limits the grounds on which the Secretary of State may intervene. The public interest considerations on which the Secretary of State may intervene are those listed in section 58 of the Act (other than the interest of maintaining the stability of the UK financial system which is expressly stated not to be a consideration for the purposes of intervention under the EU Merger Regulation).

²⁶⁷ See, for example, the EIN issued in relation to the Anticipated acquisition of British Sky Broadcasting PLC by News Corporation (November 2010).

²⁶⁸ SI 2003/1592. These are essentially jurisdictional matters.

public interest consideration, the creation of the European relevant merger situation operates or may be expected to operate against the public interest.

16.21 Following a reference for a Phase 2 investigation, the Phase 2 Inquiry Group will report to the Secretary of State whether, taking account only of the public interest consideration specified in the EIN, the merger operates or may be expected to operate against the public interest. The Secretary of State takes the final decision on public interest issues and any remedies required to resolve such issues.

16.22 No merger fee is payable in EIN cases.

Public interest in special merger situations

16.23 Section 59 of the Act also allows the Secretary of State to intervene in a very limited number of cases that do not qualify under the Act's general merger regime but where a specified consideration is relevant to the merger. These special merger situations may arise in defence industry mergers if at least one of the enterprises concerned is carried on in the UK by, or under the control of, a body corporate incorporated in the UK and where one or more of the enterprises concerned is a relevant government contractor. In addition, following the Communications Act 2003, a special merger situation may also arise where the merger involves a supplier or suppliers of at least 25% of any description of newspapers or broadcasting in the UK. Unlike the standard jurisdictional test, no increment to this share of supply is required. There will be no competition assessment in such cases.

16.24 In cases where the Secretary of State has issued a special public interest intervention notice (SPIIN), the CMA will prepare a report under section 61 of the Act for the Secretary of State advising on whether a special merger situation has been created. The SPIIN will set out the time period within which the CMA must provide this report to the Secretary of State. The CMA will also summarise representations that it has received relating to the considerations in the SPIIN. Given that the CMA is not expert in the considerations that would be expected to be specified in the SPIIN, it is likely to confine itself at Phase 1 to summarising and commenting on the representations received by relevant third party experts, such as the Ministry of Defence. (By contrast, following a reference on special public interest grounds the independent Phase 2 Inquiry Group will report to the Secretary of State about whether the merger operates or may be expected to operate against the public interest.)

16.25 The Secretary of State may make a reference for a Phase 2 investigation under section 62 of the Act if he believes that it is or may be the case that,

taking account only of the public interest consideration, the creation of the special merger situation operates or may be expected to operate against the public interest. The CMA's report is published by the Secretary of State at the time the reference decision is announced (and is also made available by the CMA). The parties will be contacted prior to publication to discuss whether the report contains confidential information that should be excised prior to publication (see paragraph 9.2 above).

16.26 Following a reference on special public interest grounds, the CMA would apply similar procedures to those outlined for normal mergers subject to the procedural differences set out in paragraphs 16.9 to 16.11 above relating to public interest mergers, although its assessment would be confined to the public interest issues specified in the intervention notice.

16.27 No fee is payable in special public interest cases.

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17 INTERACTION WITH OTHER PROCESSES

Mergers of water or sewerage undertakings²⁶⁹

- 17.1 In some circumstances, mergers of water or sewerage undertakings in England and Wales are subject to mandatory reference for a Phase 2 investigation. Under the Water Industry Act 1991 (as amended by section 70 of the Act) the CMA must refer any merger involving two or more 'water enterprises'²⁷⁰ unless the turnover of one or both of them falls below certain thresholds.
- 17.2 As stated above (see paragraph 6.35 above), the CMA does not consider its Phase 1 IA process is suitable for advising on whether a structure or transaction triggers the mandatory reference provisions.
- 17.3 However, by way of guidance, a hypothetical example of when the CMA believes a mandatory reference for a Phase 2 investigation would not be triggered is where an entity that controls a 'water enterprise', (Enterprise A), considers acquiring another 'water enterprise', (Enterprise B):
- where the turnover of each of Enterprise A and B is not less than £10 million, and
 - the parties structure the transaction back-to-back so that either:
 - the interest in Enterprise A is disposed of prior to the acquisition of the interest in Enterprise B, or
 - there is a mere legal instant in time ('scintilla temporis') between the acquisition of Enterprise B and the disposal of Enterprise A.
- 17.4 In reporting on the effects of any merger referred under the Water Industry Act 1991, the Phase 2 Inquiry Group must have regard to the number of water enterprises under independent control. This is to prevent prejudice to the ability of Ofwat to make comparisons between different enterprises in carrying out its regulatory functions.²⁷¹

²⁶⁹ The Water Bill 2013 is currently before Parliament. If passed, this will amend the existing mandatory reference regime, and supersede the information in paragraphs 17.1 to 17.4.

²⁷⁰ A 'water enterprise' is an enterprise carried on by a water or sewerage undertaking appointed under section 6 of the Water Industry Act 1991.

²⁷¹ More information about the special water regime can be found in sections 32 to 35 of the Water Industry Act 1991 and *Water Merger References* (CC 9).

- 17.5 In deciding on remedies, the Phase 2 Inquiry Group will be able to have regard to their effect on customer benefits, but only where taking account of those benefits would not prevent a solution to the prejudice concerned or where the benefits are expected to be substantially more important than the prejudice.
- 17.6 Guidance on the CMA's substantive Phase 2 assessment of water mergers is set out in *Water Merger References* (CC9). The CMA will follow its normal Phase 2 merger procedures for water mergers as set out in chapters 11 to 14 of this document.

Regulated utilities

- 17.7 There are no special provisions under UK merger legislation for regulated utilities such as electricity, gas, telecommunications, postal services, rail,²⁷² airports and air traffic services. A merger in these industries, however, may require the modification of an operating licence or give rise to other issues falling within the ambit or experience of the relevant sectoral regulator. For this reason, the CMA and the regulators work closely together on such mergers. In some cases, the regulator may issue a consultation document in respect of the merger, the responses to which will inform the views offered to the CMA. The CMA is not bound by the regulator's views but is required to give attention to them.

The City Code

- 17.8 The procedures under the Act focus on the underlying economic and other substantive effects of a merger. The City Code on Takeovers and Mergers applies to offers for all listed and unlisted public companies (and certain other companies) resident in the UK. The City Code operates principally to ensure fair and equal treatment of all shareholders in relation to offers. The CMA is not responsible for its administration or interpretation. Any enquiries should be addressed to the Panel on Takeovers and Mergers.²⁷³

²⁷² It should be noted that entering into a rail franchise agreement constitutes an acquisition of control of an enterprise by virtue of section 66(3) of the Railways Act 1993.

²⁷³ At the time of writing, the Takeover Panel's website address is www.thetakeoverpanel.org.uk

18 THE EU MERGER REGULATION

- 18.1 Under the EU Merger Regulation, the Commission has jurisdiction over ‘concentrations with an EU dimension’ (as defined in Articles 1 and 3 of the EU Merger Regulation). National competition authorities (NCAs) may not apply their own competition laws to these mergers, except in certain limited circumstances.
- 18.2 The starting point for the allocation of jurisdiction between the Commission and the CMA is that mergers that fall within the jurisdictional provisions of Article 1 of the EU Merger Regulation are not subject to review under the Act. This is because mergers reviewed by the Commission under the EU Merger Regulation benefit from the ‘one-stop shop’ principle such that national competition filings are not required in the EU. However, as described further below, the EU Merger Regulation allows for the transfer of cases between NCAs and the Commission in a number of ways. Parties should also be aware that, even in cases where the Commission has and retains jurisdiction, the Commission always consults the NCAs about mergers, and the EU Merger Regulation provides for NCAs to advise the Commission in certain circumstances.²⁷⁴
- 18.3 The competent UK authorities for the purpose of the EU Merger Regulation are the Secretary of State and the CMA.
- 18.4 The CMA has charge of the UK competent authority role in respect of the majority of mergers falling under the EU Merger Regulation. This means that it is the CMA that liaises with the Commission on the assessment and determination of cases over which the Commission has jurisdiction. Significantly, it also means that the CMA’s functions include deciding whether to request the referral of an EU Merger Regulation case from the Commission to the UK in whole or in part under Article 9 of the EU Merger Regulation and whether to seek to refer a UK merger to the Commission in accordance with Article 22 of the EU Merger Regulation. Alternatively, the CMA may have to determine whether to consent to any request by the parties for the referral of an EU Merger Regulation case from the Commission to the UK in whole or in part under Article 4(4) of the EU Merger Regulation or to a request that a case falling under the Act be transferred to the Commission in accordance with Article 4(5) of the EU Merger Regulation. Each of these mechanisms for the transfer of jurisdiction is discussed in detail below.

²⁷⁴ Most notably the Advisory Committee of representatives of the competition authorities of the Member States is required to be consulted prior to the taking of a decision at the end of a detailed investigation.

18.5 The Secretary of State has responsibility for UK policy on legislative initiatives in relation to the EU Merger Regulation. The Secretary of State also has responsibility for the taking of decisions relating to mergers falling within the EU Merger Regulation on action to protect the UK's national security and other legitimate non-competition interests.²⁷⁵

Concentrations with an EU dimension²⁷⁶

18.6 Mergers that are deemed to be concentrations under the EU Merger Regulation²⁷⁷ fall under the jurisdiction of the Commission where they have an EU dimension, that is where they satisfy one of two alternative sets of jurisdictional thresholds:

- either
 - the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion, and
 - the aggregate EU wide turnover of each of at least two of those undertakings is more than €250 million
- or
 - the combined aggregate worldwide turnover of all the undertakings concerned is more than €2.5 billion, and
 - in each of at least three Member States, the combined aggregate turnover of all those undertakings is more than €100 million, and
 - in each of at least three of the Member States included for the purposes above, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million, and

²⁷⁵ In accordance with Article 346 of the Treaty on the Functioning of the European Union (TFEU) or Article 21(4) of the EU Merger Regulation (as described in paragraphs 18.36 to 18.38 below).

²⁷⁶ See generally the Commission's Consolidated Jurisdictional Notice.

²⁷⁷ According to Article 3(1) and (4) of the EU Merger Regulation, a concentration is deemed to arise where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings
- the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase or securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings or
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

- the aggregate EU wide turnover of at least two of the undertakings concerned is more than €100 million
- unless
 - in relation to either situation above, each of the undertakings concerned achieves more than two-thirds of its aggregate EU wide turnover within one and the same Member State.

18.7 Those mergers that satisfy one of these two sets of jurisdictional thresholds must be notified to the Commission prior to their implementation, that is, in essence, prior to the merger being completed. There is no specific deadline within which a merger must be notified to the Commission, although notification is formally required following:

- the conclusion of the agreement
- the announcement of a public bid, or
- the acquisition of a controlling interest.

18.8 Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with an EU dimension.

18.9 The Commission has prescribed the form in which a notification should be made. This is set out in Form CO, published as an annexe to the Commission's Implementing Regulation 802/2004.²⁷⁸

18.10 The CMA receives copies of all merger notifications sent to the Commission and it informs the Commission of any competition concerns such mergers may raise for the UK.

18.11 If the Commission decides to open proceedings to initiate a full investigation, CMA staff participate in oral hearings with the merging companies and third parties in Brussels. CMA representatives also attend meetings of the Advisory Committee of representatives of the competition authorities of the Member

²⁷⁸ Commission Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004 OJ 2004 L133/1 as amended by Commission Regulation (EC) No. 1033/2008. This can be obtained on the Commission's website: http://ec.europa.eu/competition/mergers/legislation/regulations.html#impl_reg. At the time of writing, the Commission was consulting on proposed amendments to the Implementing Regulation.

States, which must be consulted before the Commission can reach a final decision on those cases which have been referred for a full investigation.

18.12 It is helpful if mergers with an EU dimension that might be considered to have a particular impact on competition in the UK are brought directly to the attention of the CMA by the merger parties at the earliest possible stage, in addition to the mandatory notification to the Commission.

18.13 The remainder of this chapter considers referrals between the Commission and the CMA. When considering case referrals, the CMA will have regard to the Commission Notice on Case Referral. In particular, the CMA will take due account of all aspects of the application of the principle of subsidiarity and the importance of legal certainty with regard to jurisdiction. The over-arching principle in case referrals is that jurisdiction should only be re-attributed to another competition authority in circumstances where that authority is the more appropriate for dealing with the case.

Case referrals from the Commission to the CMA

18.14 In some circumstances, a merger that falls to be considered under the EU Merger Regulation may, in whole or in part, be considered under the Act. There are three relevant provisions of EU law:

- referral of the case at the request of the merging parties prior to notification to the Commission (Article 4(4) of the EU Merger Regulation)
- referral of the case at the request of the CMA following notification to the Commission (Article 9 of the EU Merger Regulation), and
- (whilst not a referral as such) protection of national legitimate interests at the initiative of the Secretary of State (Article 346 TFEU and Article 21(4) of the EU Merger Regulation).

18.15 Each of these mechanisms is detailed below.

Pre-notification referral to the CMA (Article 4(4) of the EU Merger Regulation)

18.16 Article 4(4) of the EU Merger Regulation allows merging parties to request that the whole or part of a merger that constitutes a concentration satisfying the turnover thresholds in Article 1 of the EU Merger Regulation, and would therefore otherwise be reviewed by the Commission under the EU Merger Regulation, is referred to a Member State (or Member States) that is better placed to review the transaction.

18.17 Under Article 4(4) of the EU Merger Regulation, the merging parties may request a referral of the transaction in whole or part to a specific Member State or States before they notify the case to the Commission. In order for the referral to be granted by the Commission, it must be satisfied that the transaction may significantly affect²⁷⁹ competition in a market within the named Member State which presents all the characteristics of a distinct market, so that the merger should therefore be examined, in whole or in part, by that Member State. Further guidance on the legal requirements to be satisfied, and the other relevant factors to be taken into account, can be found in the Commission Notice on Case Referral.

18.18 On substance, a transaction suitable for Article 4(4) referral to the UK should affect a market or markets not wider than the UK in scope. The CMA considers that Article 4(4) of the EU Merger Regulation is particularly suited to transactions involving local or regional markets. Additional support for a referral to the UK may include, for example, the following factors:

- the case concerns entirely or largely the UK or a market within the UK
- the CMA²⁸⁰ has experience in reviewing the market or markets in question
- any possible competition concerns could feasibly be resolved by way of remedies in the UK, in particular where remedies might not be open to the Commission (because the affected market is not a substantial part of the common market), and
- the CMA is already reviewing or about to review another transaction in the same sector, including a competing bid for the target business.

18.19 A request to the Commission under Article 4(4) of the EU Merger Regulation should be made in the form of a Reasoned Submission (Form RS).²⁸¹ Article 4(4) of the EU Merger Regulation stipulates that the Commission shall transmit the Form RS to all Member States without delay and that the Member State mentioned in the Form RS shall, within 15 working days of receiving the submission, express its agreement or disagreement as regards the request to

²⁷⁹ Such effects need not be adverse for the purposes of Article 4(4). Recital 16 of the EU Merger Regulation states that the parties are not required to demonstrate that the effects of the concentration would be detrimental to competition.

²⁸⁰ Or its predecessors, the OFT and CC.

²⁸¹ This is published as an annexe to the Commission's Implementing Regulation No. 802/2004 and is available on the Commission's website http://ec.europa.eu/competition/mergers/legislation/regulations.html#impl_reg

refer the case.²⁸² The Commission must take a final decision within 25 working days of receiving the Form RS as to whether the conditions for the request are met and whether it is willing to relinquish jurisdiction over the case by referring it in whole or part to the requested Member State. The Commission will thereafter inform the Member States and the requesting party or parties of its decision.²⁸³

18.20 If an Article 4(4) referral request to the UK has been made, CMA officials make an assessment of the Form RS, checking whether the share of supply and/or turnover tests are met (given that the CMA will have jurisdiction to review the transaction only if the Act's jurisdictional tests are met) and the accuracy and completeness of the information it contains. The CMA will disagree with a referral request if it considers that the Form RS is based on wrong information or assumptions (for example, that the market in question is in fact wider than the UK).

18.21 If the CMA does not disagree, and the Commission decides to refer a case to the UK under Article 4(4) of the EU Merger Regulation, national competition law shall apply and the CMA will carry out the procedures previously described in this guidance for the consideration of mergers under the Act. However, Article 4(4) provides certain obligations on the CMA if the case is referred back. These include that the CMA may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.²⁸⁴

18.22 Upon a reference back, the CMA has, under section 34A of the Act, a maximum of 45 working days beginning on the working day after receipt of the Commission's referral decision to inform the merging parties of the result of its preliminary competition assessment,²⁸⁵ that is whether it has decided to refer the case for a Phase 2 investigation or to seek UILs. Although the CMA has a statutory deadline of 45 working days in which to announce its decision, it will generally try to decide the case within the 40 working day timetable used for 'standard' mergers.

18.23 In circumstances when a merger is referred back to the CMA under Article 4(4) of the EU Merger Regulation, the CMA may require a notification of the

²⁸² Where that Member State takes no such decision within the 15 working days, it is deemed to have agreed to the referral.

²⁸³ If the Commission does not take a decision within this period, it is deemed to have adopted a decision to refer the case in accordance with Form RS.

²⁸⁴ Articles 4(4) and 9(8) of the EU Merger Regulation.

²⁸⁵ Pursuant to Articles 4(4) and 9(6) of the EU Merger Regulation. These timing obligations in the EU Merger Regulation do not impact on the Phase 2 investigation if the case is referred by the CMA.

merger from the merging parties. Much of this information will already be contained in the Form RS, but additional information may still be needed in order that the notification can be deemed complete such that the CMA can carry out its review. The CMA will generally write to the merging parties as soon as the case has been referred back informing them whether the 45 working day statutory period has commenced or whether the investigation timetable will be immediately suspended until the additional information to constitute a full submission has been received.²⁸⁶

18.24 In practice, therefore, although the CMA will not start its assessment of the merger until the Commission has decided to agree to the parties' request, parties are recommended to contact the CMA in advance of the Commission's decision to discuss what further information may be required (in addition to that in the Form RS) to constitute a satisfactory submission for the purposes of the Act in the event of jurisdiction passing to the CMA. Early contact allows for efficient and expedient consideration of cases under the Act upon receipt of a Commission referral decision, and reduces the time between the reference back decision and the formal commencement of the CMA's investigation. Where appropriate, the suitability of UILs may also be discussed at this stage.

18.25 The parties should be aware of the risks for the parties in completing the transaction following a referral back but prior to clearance of the transaction by the CMA (see paragraph 6.22 above). Although the parties are free to complete a transaction referred back²⁸⁷ to the CMA, the suitability of initial orders will be considered by the MG in the same way as for a purely domestic completed merger (see chapter 7 above (in particular paragraph 7.28 onwards)).

Post-notification referral to the CMA (Article 9 of the EU Merger Regulation)

18.26 Under Article 9 of the EU Merger Regulation, the CMA may, within 15 working days of receipt from the Commission of a copy of the Form CO notifying the

²⁸⁶ Under sections 34A and 109 of the Act, the 45 working day period is subject to the normal risk of suspension if the parties fail to provide requested information within a specified deadline (see by analogy paragraph 6.3 above). If the notifying parties are unable to provide a satisfactory submission (potentially by way of additional information to the Form RS) on or immediately after receipt of the Commission's decision, the CMA will consider using formal information requests under section 109 of the Act.

²⁸⁷ Where only part of the transaction is referred back to the UK, with the remainder being retained for investigation by the Commission, the suspension obligation under Article 7 of the EU Merger Regulation prohibiting parties from implementing the transaction prior to clearance from the Commission will continue to apply.

merger, request that the whole or part of a merger be referred to the CMA for consideration under the Act, if it:

- threatens to affect significantly competition in a market within the UK which presents all the characteristics of a distinct market (Article 9(2)(a)), or
- affects competition in a market within the UK which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market (Article 9(2)(b)).

18.27 The Commission must first verify whether the above legal criteria are met. In relation to the first condition, it has discretion to decide whether to refer a case or a part thereof, whereas for the second condition the Commission is required to make the referral if it agrees that the criteria are met. The reference back to the UK may be made in whole or in part, and the Commission may also invite the UK to make a referral request if it considers that the case is suitable for Article 9 application.

18.28 The Commission will inform the CMA and the notifying parties of its decision within 35 working days from notification of the merger or, where the Commission has already initiated proceedings, within 65 working days.²⁸⁸

18.29 To assist in considering whether to make an Article 9 request, the CMA may, where it considers it relevant to do so, publish an invitation to comment seeking views from any interested third party on the implications of the merger for competition in the UK and seeking the views of the parties. The CMA will also, at a later stage, normally publish a non-confidential version of any Article 9 request.

18.30 Factors pointing towards the CMA requesting that a case be referred back from the Commission are:

- the case concerns entirely or largely the UK or a market within the UK
- the CMA²⁸⁹ has experience in reviewing the market or markets in question
- any possible competition concerns could feasibly be resolved by way of remedies in the UK, in particular where remedies might not be open to

²⁸⁸ If the Commission does not take a decision within this period following a request, it is deemed to have adopted a decision to refer the case to the UK.

²⁸⁹ Or its predecessors, the OFT and CC.

the Commission (because the affected market is not a substantial part of the common market), and

- the CMA is already reviewing or about to review another transaction in the same sector, including a competing bid for the target business.

18.31 Should such a request be made and granted, the CMA will carry out the procedures previously described in this guidance for the consideration of mergers under the Act. Reflecting the obligations under the EU Merger Regulation,²⁹⁰ section 34A of the Act requires that the CMA make its decision on whether or not to refer the merger for a Phase 2 investigation, or seek UILs, within 45 working days beginning on the working day after the Article 9 referral decision is taken by the Commission.²⁹¹ The same principles that apply to notification of the merger following a successful Article 4(4) reference also apply in the case of an Article 9 referral back – see paragraphs 18.23 to 18.25 above.

Relationship between Article 4(4) and Article 9 of the EU Merger Regulation

18.32 Articles 4(4) and 9 of the EU Merger Regulation are both designed to achieve essentially the same goal – namely to transfer jurisdiction, in whole or in part, from the Commission to an NCA where that NCA is better placed to review the competitive impact of the transaction.

18.33 There is no obligation on merging parties to make an Article 4(4) referral request, even where they consider that the requirements for reference back are fulfilled. Nevertheless, the CMA considers that there are certain advantages for parties in using Article 4(4) of the EU Merger Regulation in appropriate cases, rather than waiting for the CMA to make a request under Article 9 of the EU Merger Regulation, namely that:

- although the parties are encouraged to discuss a relevant case up-front with the CMA regardless of whether or not they intend to make an Article 4(4) request, use of the Article 4(4) mechanism typically allows for a more open dialogue with the CMA at an early stage in the transaction as to whether the criteria for reference back are satisfied, and
- the parties are guaranteed a decision whether the case will be referred back under Article 4(4) of the EU Merger Regulation within 25 working

²⁹⁰ Article 9(6) to 9(8) of the EU Merger Regulation.

²⁹¹ This is subject to the usual risk of suspension if parties fail to provide requested information by a specified deadline. If the notifying parties are unable to provide a satisfactory submission on or immediately after receipt of the Commission's decision, the CMA will use its powers to suspend the 45 working day time period under section 34A of the Act.

days of submission of the Form RS, whereas a decision whether or not to refer back under Article 9 of the EU Merger Regulation may be made up to 35 working days after notification of the Form CO (and may be made up to 65 working days after notification if the case is taken into second phase).

18.34 In all cases in which a referral back might be considered appropriate, parties are recommended to contact the appropriate CMA case officer for the sector concerned prior to notification to the Commission to discuss any UK issues raised by the transaction and, if necessary, what further information may be required by the CMA in the event of a referral back. The suitability of UILs may also be discussed.

18.35 In view of the availability of the Article 4(4) referral mechanism, the CMA envisages that the need for the use of Article 9 of the EU Merger Regulation will remain limited. However, use of Article 9 of the EU Merger Regulation may be considered appropriate where there are indications that the merger threatens to affect significantly competition in a market within the UK, the substance of which the CMA may not be able to investigate until after a referral is made. In cases where the CMA considers that it may be better placed to review a transaction, the fact that the parties have chosen not to make an Article 4(4) request will in no way deter the CMA from making a request under Article 9 of the EU Merger Regulation.

Article 346 TFEU Treaty and Article 21(4) of the EU Merger Regulation

18.36 Government departments take the lead on liaison between merging parties and the Commission on mergers falling within Article 346 TFEU or Article 21(4) of the EU Merger Regulation.

18.37 Article 346 TFEU provides that a Member State is not obliged to supply information the disclosure of which it considers to be contrary to the essential interests of its security, and may take such measures as it considers necessary for protection of those essential interests. This provision has been used in relation to defence mergers.²⁹²

18.38 Article 21(4) of the EU Merger Regulation allows Member States to take appropriate measures to protect legitimate interests, namely public security, plurality of the media, and prudential rules. It does not, however, prevent the Commission from examining the competition implications of such a merger. For further information see the discussion of public interest intervention in cases under the EU Merger Regulation at paragraph 16.16 above.

²⁹² See Case No. IV/M.1438 *British Aerospace/GEC Marconi* OJ 1999 C241/8, paragraph 2.

Case referrals from the CMA to the Commission

18.39 In some circumstances, certain mergers that do not meet the thresholds for notification to the Commission under Article 1 of the EU Merger Regulation may be transferred to the Commission for consideration. There are two relevant provisions of EU law:

- referral of the case at the request of the merging parties (Article 4(5) of the EU Merger Regulation), and
- referral of the case at the request of the CMA (Article 22 of the EU Merger Regulation).

18.40 Each of these mechanisms is detailed below.²⁹³

Pre-notification referral to the Commission (Article 4(5) of the EU Merger Regulation)

18.41 Under Article 4(5) of the EU Merger Regulation, parties to a concentration that does not meet the turnover thresholds for notification to the Commission but is capable of being reviewed under the national merger control laws of at least three Member States may, prior to notification, request that the transaction be examined by the Commission under the 'one stop shop' principle.

18.42 Transactions are deemed 'capable of being reviewed' in the UK if they meet either the share of supply or turnover test under the Act (see chapter 4 above). If parties have any doubts or questions about jurisdictional qualification in this context, they should contact the MG.

18.43 Guidance on the process for requesting referrals, legal requirements to be satisfied and other factors to be considered can be found in the Commission Notice on Case Referral.

18.44 Article 4(5) of the EU Merger Regulation stipulates that the Commission shall transmit the referral request to all Member States without delay and that any Member State competent to examine the merger under its own national competition laws may, within 15 working days of receiving the request, express its disagreement as regards the request to refer the case (thereby vetoing the referral).

²⁹³ See also the Commission Notice on Case Referral and the European Competition Authorities Association's Principles on the Application, by National Competition Authorities within the ECA, of Articles 4(5) and 22 of the EU Merger Regulation (the ECA Principles).

- 18.45 The Commission will subsequently inform all Member States and the requesting parties of the outcome. Where at least one Member State having competence to review the merger expresses disagreement, the case shall not be referred. Where no Member State competent to examine the merger expresses disagreement, the transaction is deemed to have an EU dimension and the parties are then required to notify it to the Commission. National merger control laws will no longer apply (including, where relevant, UK jurisdiction under the Act).
- 18.46 When examining Article 4(5) referral requests, the CMA is likely to exercise its veto on referral only where various factors (as discussed in the Commission Notice on Case Referral) would suggest that the UK is better placed than the Commission to investigate the transaction and carry out enforcement action if necessary.²⁹⁴ A relevant factor in this regard would be whether the merger appeared likely to have an impact on competition in a market representing a non-substantial part of the common market.
- 18.47 Where the merging parties intend to make an Article 4(5) request in a case capable of being notified within the UK, they are recommended to contact the appropriate CMA case officer for the sector concerned prior to notification to the Commission to discuss any UK issues raised by the transaction.

Post-notification referral to the Commission (Article 22 of the EU Merger Regulation)

- 18.48 Under Article 22 of the EU Merger Regulation, a merger that does not meet the turnover thresholds for notification to the Commission may be referred by an NCA (including by the CMA), singularly or jointly with other NCAs, to the Commission for consideration where it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.
- 18.49 When a merger is notified to the CMA, or otherwise comes to its attention, the CMA will try to determine as quickly as possible whether the merger is appropriate for referral to the Commission under Article 22 of the EU Merger Regulation. Although there is no restriction under Article 22 of the EU Merger Regulation that Member States may make a request only when they would be

²⁹⁴ For example, the OFT vetoed the referral request in relation to the acquisition by Bayard Capital Partners Pty Ltd of Landis & GYR (15 November 2004) because the main effects of the merger appeared to be felt in the UK in particular in respect of prepayment meters, the UK being the only Member State in which such meters are used. Similarly, the OFT vetoed the referral request in relation to the anticipated acquisition by London Stock Exchange Group plc of control of LCH.Clearnet Group Limited (14 December 2012) on the basis that it considered that any competition concerns, if present, would most likely arise in the UK.

competent to review the transaction under their own national competition laws, the CMA would be unlikely, absent unusual circumstances, to make such a request under Article 22 of the EU Merger Regulation unless the merger would qualify for investigation under the Act.²⁹⁵

18.50 When considering whether to make a referral request under Article 22 of the EU Merger Regulation, the CMA will therefore examine whether the merger satisfies the following criteria:

- it is a concentration
- that affects trade between Member States, and
- that threatens to significantly affect competition within the UK.

18.51 The CMA will also take into account other considerations in trying to establish whether a merger might be appropriate for an Article 22 referral request, including any third party feedback and whether:

- a relevant geographic market affected by the concentration is wider than national
- the concentration is subject to filing in several EU Member States such that parties would benefit from the 'one-stop-shop' review by the Commission (although this fact by itself does not make a case an automatic candidate for referral to the Commission)²⁹⁶
- suitable remedies for any competition concerns identified would lie outside the CMA's jurisdiction, and
- whether the transaction has already been reviewed by one or more Member States and, if so, whether a further review by the Commission would be useful and proportionate.

18.52 The CMA will carefully consider whether the Commission appears the best-placed authority to consider the merger in terms of gathering relevant information and, if necessary, securing appropriate remedies. This is more likely when the assets concerned by the transaction are located outside the

²⁹⁵ It is likely that any horizontal merger that meets the test under Article 22 of the EU Merger Regulation of threatening to significantly affect competition within the UK would qualify for investigation under the share of supply test under the Act.

²⁹⁶ Guidance on the circumstances in which NCAs are likely to use Article 22 is contained in the Notice on Case Referral and the ECA Principles.

UK when, for example, it would be difficult for UK authorities to obtain a remedy in the event that the merger is found to raise competition concerns.

18.53 Article 22 of the EU Merger Regulation provides that Member States have 15 working days to make a request for referral from the date on which the transaction is notified or, if no notification is required, otherwise ‘made known’ to the relevant NCA.²⁹⁷ Commission guidance stipulates that the notion of ‘made known’ should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria for the making of a referral request pursuant to Article 22.²⁹⁸ As the UK has a voluntary system of notification, the CMA therefore equates ‘made known’ for the purposes of the 15 working day time period with the date on which the CMA accepts that the cumulative information supplied by the parties constitutes a satisfactory submission under the Act, which will typically include in this context the provision of market shares at an EEA level where this is appropriate (see paragraph 5.44 above).²⁹⁹

18.54 Article 22 of the EU Merger Regulation stipulates that the Commission must inform Member States without delay of the receipt of the initial request. Other Member States that have not yet requested a referral have the right to join the initial request within 15 working days of being informed of the initial request. All national time limits, including the CMA’s statutory timetables under the Act, are suspended during this period.

18.55 In determining whether to join an existing request, the CMA will take into account views of the parties and whether the parties would benefit from the ‘one-stop-shop’ review by the Commission. It will have particular regard to whether the relevant geographic market affected by the concentration is wider than national. To the extent that the relevant geographic market was UK-wide, or narrower, the CMA would be significantly less likely to join a request than if the market in question were wider than national.

18.56 The Commission has 25 working days after all the Member States have received the initial request from the Commission to make its decision on referral. If the Commission agrees to examine the transaction in accordance

²⁹⁷ This time period may be extended in some circumstances. See EU case COMP/M.5675 *Syngenta/ Negocio Semillas Girasol Monsanto* (2009).

²⁹⁸ Footnote 43 of the Commission Notice on Case Referral.

²⁹⁹ The CMA believes that any other interpretation as to when the Article 22 timetable commences would place the UK at odds with the timetable for the application of Article 22 in all other Member States (which have compulsory notification regimes) and would in practice potentially deprive Article 22 of substantial effect in respect of the UK, thereby fragmenting the coherence of the case allocation regime under the EU Merger Regulation. This does not, however, prevent the CMA from making an Article 22 request before it has received a satisfactory submission.

with a request by the CMA, national legislation under the Act no longer applies and the Commission will request a notification under the EU Merger Regulation from the parties. If the CMA decides not to initiate or join a request under Article 22, the provisions of the Act will continue to apply, although any administrative timetable may be affected. However, the CMA will continue to cooperate with any parallel consideration of the merger by other NCAs and/or the Commission.

18.57 In the interests of good administrative practice, the CMA will inform the notifying parties as soon as possible that a referral of the merger is being considered and, where possible, invite them to provide their views in writing or at a meeting. While the parties may inform the CMA that they would be in favour of an Article 22 reference, the agreement of the parties is not considered a necessary condition for a referral. The CMA will normally publish a non-confidential version of any Article 22 request. If the CMA decides to request a referral, it will inform the parties using the normal warning system one hour in advance of public announcement under the Act (see paragraph 9.2 above). In those cases where a press release is issued, this will be sent to the parties at the same time.

18.58 The CMA will also informally contact the Commission as soon as possible upon consideration of an Article 22 referral of a merger in order to verify its position regarding the option. The consent of the Commission is actively sought.³⁰⁰ A waiver is sought from the parties to enable the copying of any documents regarding the merger received in the context of proceedings under the Act to the Commission and it is recommended that the notifying parties prepare a confidentiality waiver in advance if they believe that an Article 22 request might be considered by the CMA.³⁰¹

³⁰⁰ The Commission may also inform the CMA that it considers a transaction fulfils the criteria for a referral and invite it to make a referral request.

³⁰¹ Examples can be found on the International Competition Network's website (www.internationalcompetitionnetwork.org).

19 COOPERATION WITH OTHER COMPETITION AUTHORITIES

- 19.1 The CMA considers that where mergers are subject to investigation in more than one country (multi-jurisdictional mergers), there can be substantial benefits to the parties and to the competition authorities in those jurisdictions from encouraging communication and cooperation between the competition authorities. This can take place within formal multilateral arrangements or bilaterally.
- 19.2 The European Competition Authorities (ECA), a network of competition authorities, was formed in 2001 from the competition authorities in the European Economic Area (EEA) (the Member States of the European Union, the Commission, the EFTA States and the EFTA Surveillance Authority). Further competition authorities have joined the ECA as the countries became members of the European Union and others may join. The ECA facilitates cooperation among competition authorities on a wide range of issues. In addition, in January 2010, the EU Merger Working Group was formed by the European Commission and the competition authorities of EU member states (with authorities of EEA member states as observers). The Working Group has agreed Best Practices on Cooperation between EU National Competition Authorities in Merger Review,³⁰² which sets out non-binding principles of cooperation concerning mergers subject to review in more than one EU Member State.
- 19.3 To facilitate the consideration of multi-jurisdictional mergers, it has been agreed that when a National Competition Authority (NCA)³⁰³ with responsibility for merger review within an ECA country is informed by the parties to a merger that they have also notified or will be notifying the merger to NCAs within the ECA, the relevant official within that authority will, as soon as possible, send by email an ECA Notice to the relevant officials in the other NCAs informing them of the fact of notification, and seeking the names of the relevant officials in other NCAs to whom the merger has been notified.
- 19.4 The relevant officials of the notified NCAs will then make direct contact with the appropriate case officer and exchange views on the case without exchanging confidential information (unless national legislation or a waiver from the parties makes this possible). The relevant officials will keep each other informed of the development of the case as appropriate, including whether the case is referred into Phase 2 or resolved by means of a Phase 1

³⁰² http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf

³⁰³ The CMA is the designated NCA for the UK.

remedy, and, if it is to be referred into Phase 2, the outcome of the Phase 2 investigation.

19.5 Where national legislation prevents the exchange of confidential information and it seems likely that:

- the analysis will demonstrate a competition problem worthy of further investigation or, potentially, of remedy, and
- an exchange of confidential information will benefit the analysis of the case or make it easier to identify an appropriate remedy

the CMA and the relevant NCA may seek permission from the parties to exchange confidential information.³⁰⁴ Without such permission, there will be no exchange of such information.³⁰⁵

³⁰⁴ This may include the exchange of information with competition authorities outside the ECA Network, such as the US Federal Trade Commission and Department of Justice.

³⁰⁵ The gateway for permitted disclosure of specified information to overseas public authorities under section 243 of the Act does not apply to information that comes to the CMA in connection with a merger investigation (section 243(3)(d) of the Act).

20 FEES

- 20.1 Subject to some limited exceptions, any merger that qualifies as a relevant merger situation (including on the 'may be the case' standard)³⁰⁶ and in which the CMA (or Secretary of State in public interest cases) reaches a decision on whether or not to refer the merger for a Phase 2 investigation, is subject to a fee irrespective of whether a reference is made.³⁰⁷ That fee is collected by the CMA on behalf of HM Treasury. The main exception is where the interest acquired or being acquired is less than a controlling interest (see chapter 4 above).³⁰⁸ In addition, a fee is not payable when the acquirer is a 'small or medium sized enterprise' (SME), as defined in the Companies Act 2006 (see paragraph 20.6 below).
- 20.2 Where a fee is due, that fee is payable by the person (or group of persons) filing the Merger Notice, or – in cases in which no Merger Notice is filed – the person acquiring control. The fee becomes payable on the publication by the CMA of either a reference decision or any decision not to make a reference. No fee is payable if the CMA finds that the case does not qualify as a relevant merger situation. For cases resolved through UILs, the fee becomes payable when the CMA loses its duty to refer as a result of its formal acceptance of UILs. In the case of public interest cases decided by the Secretary of State, the fee becomes payable to the CMA when the Secretary of State publishes a reference decision under section 45 of the Act or publishes any decision not to make such a reference. In all cases, an invoice will be issued by the CMA when the fee becomes payable. Payment must be made within 30 days of the date of the invoice.
- 20.3 Given that a fee is payable in all cases in which the CMA reaches a decision whether or not to refer in respect of a relevant merger situation, a fee will be payable in cases where the CMA decides to investigate the merger on its own initiative and proceeds to publish such a decision (save, as noted above, in cases where the interest acquired is a less than controlling interest).

³⁰⁶ This therefore excludes found-not-to-qualify cases (where the transaction is found not to give rise to a relevant merger situation). In those cases, no fee is payable.

³⁰⁷ Full details in respect of the payment of fees are, pursuant to section 121 of the Act, set out in the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended).

³⁰⁸ It should be noted, however, that multiple parties may be treated as one person for the purposes of determining whether fees are payable, potentially as a result of the application of the 'associated persons' provision, in which case they are jointly and severally liable for the fee under Article 6(4) of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended).

- 20.4 Information on how to pay the fee (including the CMA's account details and the forms of payment that it will accept) is available on the CMA's website.
- 20.5 Fees vary according to the type and size of the merger. Details of the current fee scales are available from the case team and on the CMA's website.
- 20.6 Where the acquirer is an SME (as defined by sections 382 and 465 of the Companies Act 2006³⁰⁹) it is exempt from paying the above fees.
- 20.7 Fees are payable on the making of a merger reference under the Water Industry Act 1991 (see chapter 17). In such cases, the level of the fee is determined depending on the value of the turnover of the water enterprise being acquired in England and Wales.³¹⁰

³⁰⁹ At the time of writing, 'small enterprises' under the Companies Act 2006 are those satisfying two or more of the following criteria: (i) turnover of not more than £6.5 million; (ii) balance sheet total of not more than £3.26 million; (iii) number of employees not more than 50. 'Medium enterprises' are those satisfying two or more of the following criteria: (i) turnover of not more than £25.9 million; balance sheet total of not more than £12.9 million; (iii) number of employees of not more than 250. Full details are set out in sections 382 and 465 of the Companies Act 2006. Where the acquirer is a member of a group as defined in section 474 of the Companies Act, it will qualify as a small if the group qualifies as small under section 383 of the Companies Act, or medium sized if the group qualifies as medium-sized under section 466 of the Companies Act.

³¹⁰ The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended).

ANNEXE A – USING A MERGER NOTICE

- A.1** If a company wishes to voluntarily notify a merger to the CMA, it should use the prescribed Merger Notice form to set out the information that the CMA will require about the transaction (the prescribed information), with details of the markets involved.³¹¹
- A.2** Copies of the form, with further guidance on the information required to be provided, can be obtained from the CMA at the address shown at the end of this guidance or as a downloadable document from the CMA website. The CMA may modify this form from time to time: the latest version will be that published on the CMA's website and in the London, Edinburgh and Belfast Gazettes (as required by the Act).

Submission of a Merger Notice

- A.3** A Merger Notice may be given only by an 'authorised person', defined as any person carrying on an enterprise to which the notified arrangements relate. The authorised person may, however, appoint a representative (such as a firm of solicitors) to complete the Merger Notice on his behalf and to act for him in further correspondence with the CMA.
- A.4** The completed Merger Notice may be delivered to the CMA by post, by hand, or by email.

Rejection of a Merger Notice after commencement of the initial period

- A.5** Even where the CMA has accepted a Merger Notice and confirmed that the 40 working day initial period has commenced, it can, at any time during that initial period, nonetheless reject a notice for four reasons:
- a.** it suspects the information given in the Merger Notice, or subsequently, to be false or misleading
 - b.** it suspects that the parties do not propose to carry the notified arrangements into effect

³¹¹ Chapter 6 above provides guidance on the steps parties should take if they consider that any category of information requested in the Merger Notice is not available or is not applicable to the merger that they are notifying. The CMA may be willing to grant specific derogations from the obligation to provide information in response to specific parts of the Merger Notice. See further paragraph 6.56 above.

- c. the parties fail to provide on time, or at all, the information required to be included in the Merger Notice, or any supplementary information requested by the CMA using its powers under section 109 of the Act, or
- d. the notified arrangements appear to be a concentration with an EU dimension within the EU Merger Regulation.

A.6 The CMA's decision to reject a Merger Notice takes effect from the moment it is sent to the notifier or an authorised representative. The CMA will give notice in writing (including by email or other form of electronic transmission), although advance notice is normally given by phone.

Withdrawal of a Merger Notice

A.7 A company can withdraw a notice at any time. The withdrawal must be made in writing by the notifier or an authorised representative, and may be delivered by hand, post, or email.

A.8 Where a Merger Notice is withdrawn, but the CMA suspects that the parties nevertheless propose to carry the notified arrangements into effect, it will continue to examine the merger. In that scenario, the CMA will not be bound by its original statutory deadline to reach its decision as to whether its duty to refer applies.³¹²

Exceptions to automatic clearance

A.9 There are some limited circumstances in which a notified merger can still be referred for a Phase 2 investigation after expiry of the consideration period (whether extended or not). These are where:

- a. the Merger Notice is rejected by the CMA
- b. the Merger Notice is withdrawn
- c. before the merger covered by the Merger Notice is completed – any of the enterprises concerned enters into an unrelated merger with any other enterprise not covered by the Merger Notice
- d. the merger covered by the Merger Notice is not completed within six months of the expiry of the consideration period

³¹² Section 100(1)(f) of the Act. A fee will be payable on the publication of the CMA's decision whether its duty to refer applies.

- e. any information supplied by the notifier (or any associate or subsidiary) is in any material respect false or misleading
- f. any material information which is, or ought to be, known to the notifier (or an associate or subsidiary) is not disclosed to the CMA (such information must be given in writing), or
- g. the parties have offered UILs to the CMA (or to the Secretary of State in public interest cases) but the CMA (or Secretary of State) has not accepted those UILs.

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ANNEXE B – GUIDANCE ON THE CALCULATION OF TURNOVER FOR THE PURPOSES OF PART 3 OF THE ENTERPRISE ACT 2002

- B.1** This annexe provides guidance on the calculation of turnover for the purposes of Chapter 1 of Part 3 of the Act.
- B.2** While this annexe is intended to help explain the detailed provisions of the law concerning turnover calculation, it should not be regarded as a substitute for the Act and secondary legislation made under it. Nor should it be regarded as a substitute for expert legal advice on the interpretation of the Act and secondary legislation.

Background

- B.3** Under the turnover test in the Act, a relevant merger situation will arise if two or more enterprises cease to be distinct and the turnover in the UK of the enterprise being taken over exceeds £70 million.³¹³ The definition of a relevant merger situation is explained in more detail in chapter 4.
- B.4** The turnover of the enterprise being taken over is, for these purposes, calculated by taking together the total value of the UK turnover of all the enterprises ceasing to be distinct and deducting either:
- a.** the UK turnover of any enterprise which continues to be carried on under the same ownership and control, or
 - b.** if no enterprise continues to be carried on under the same ownership or control, the UK turnover of the enterprise whose turnover has the highest value.³¹⁴
- B.5** In most relevant merger situations, this means in practice that the applicable turnover for mergers within (i) above – which is most takeovers and acquisitions – will be the UK turnover of the target enterprise. For mergers falling within (ii) above – a full legal merger or a joint venture combining all of the parties' assets and businesses, for example – the applicable UK turnover will be that of the enterprise having the lower turnover (or, put another way, in this scenario both enterprises must have UK turnover exceeding £70 million).

³¹³ Section 23(1)(b) of the Act.

³¹⁴ Section 28(1) of the Act.

B.6 The method of calculating the applicable turnover is set out in the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended) (the Order).

Period over which turnover is calculated

B.7 The relevant period used for the purposes of determining turnover under Part 3 of the Act is the business year preceding either: the date the enterprises ceased to be distinct, in the case of a completed merger; or, the date of the CMA's decision whether or not to make a reference, in the case of a proposed merger. However, in either case, the CMA may substitute such earlier date as it considers appropriate.³¹⁵ In practice, the CMA will usually consider the turnover for the last completed 'business year' preceding the date the enterprises ceased to be distinct (for a completed merger) or the date of notification (in the case of a proposed merger).

B.8 A 'business year' for these purposes is any period of more than six months for which accounts have been or will be prepared.³¹⁶ In general, this will, of course, be a 12-month period. Where (perhaps because the enterprise has been newly formed) there is a period for which there is no preceding business year then the applicable turnover is the turnover for that shorter period.³¹⁷

B.9 If the preceding business year is not a period of 12 months, then turnover, for the purposes of Chapter 1 of Part 3 of the Act, is arrived at by adjusting the applicable turnover received in that period by the same proportion as 12 months bears to that period.³¹⁸ Thus, if the preceding business year for an enterprise ceasing to be distinct is a nine-month period during which the applicable turnover was £54 million, then turnover for this purpose (that is, for determining whether the jurisdictional threshold is met) would be £72 million (£54 million ÷ 9 × 12).

B.10 In determining the applicable turnover of an enterprise, the CMA may take into account events which have occurred since the end of the business year and which may have a significant impact on the turnover of the enterprise ceasing to be distinct.³¹⁹ This allows the CMA to take account of acquisitions or divestments or other transactions which have had, or will potentially have, a continuing positive or negative effect on the turnover of the enterprise. The

³¹⁵ Article 11(2)(a) and (b) of the Order.

³¹⁶ Article 2(c) of the Order.

³¹⁷ Article 11(4) of the Order.

³¹⁸ Article 2(b) of the Order.

³¹⁹ Article 11(3) of the Order.

CMA would only expect to exercise this discretion in cases where the effect may impact upon the question of jurisdiction or the fee due.

Applicable turnover

B.11 The applicable turnover of an enterprise is the turnover of the enterprise arising during the previous business year. It comprises the amounts derived from the sale of products and the provision of services which it makes in the ordinary course of its business activities to customers (businesses or consumers) in the UK, net of any sales rebate, value added tax and other taxes directly related to that turnover.³²⁰ The calculation of turnover for these purposes should be interpreted in accordance with accounting principles and practices that are generally accepted in the UK.³²¹ Turnover includes any aid granted by a public body to a business which is directly linked to the sale of products or the provision of services by the business and therefore reflected in the price of those products/services.³²² Special provisions, described below, apply to an enterprise which is (in whole or in part) a credit institution, financial institution or insurance undertaking.

Credit institutions and financial institutions

B.12 The applicable turnover of an enterprise which, in whole or in part, is a credit institution or financial institution is the sum of certain specified income received by the branch or division of that institution in the UK, after the deduction of value added tax and other taxes directly related to those items.³²³ The types of income specified for these purposes are:

- a.** interest income and similar income
- b.** income from securities:
 - i.** income from shares and other variable yield securities
 - ii.** income from participating interests
 - iii.** income from shares in affiliated undertakings
- c.** commissions receivable
- d.** net profit on financial operations, and

³²⁰ Paragraph 3 of the Schedule to the Order.

³²¹ Paragraph 2 of the Schedule to the Order.

³²² Paragraph 13 of the Schedule to the Order.

³²³ Paragraphs 10 and 11 of the Schedule to the Order.

e. other operating income.

B.13 These types of income will be given the same meanings as they are given in Council Directive (EEC) 86/635.³²⁴

Insurance undertakings

B.14 The applicable turnover of an enterprise which, in whole or in part, is an insurance undertaking is the value of the gross premiums received from residents of the UK after deduction of taxes and certain other premium-related deductions.³²⁵ Gross premiums received comprises all amounts received together with all amounts receivable in respect of insurance contracts issued by or on behalf of an insurance undertaking, including outgoing reinsurance premiums.

Enterprises treated as under common ownership or control

B.15 Where an enterprise ceasing to be distinct consists of two or more enterprises which are under common ownership or common control the applicable turnover is calculated by adding together the applicable turnover of each of those enterprises.³²⁶ For the purposes of determining whether enterprises are treated as being under common control when calculating the applicable turnover, the provisions of section 26(2) and (3) (as reproduced in paragraphs 5 and 6 of the Schedule to the Order) and section 127 of the Act apply as they apply in the Act for the purposes of determining whether enterprises have ceased to be distinct.³²⁷

B.16 As a result, applicable turnover may include not only the applicable turnover of the particular enterprise ceasing to be distinct but also that of certain other enterprises to which it is 'linked'. In particular, this might include the applicable turnover of any enterprise over which the enterprise ceasing to be distinct has control for the purposes of section 26(3) (as reproduced at paragraph 6 of the Schedule) of the Act – that is where the interest held confers, at least, the ability materially to influence policy. Where applicable turnover includes the applicable turnover of a linked enterprise, in which the enterprise ceasing to be distinct has less than a controlling interest, the whole of the applicable turnover of the linked enterprise is included in assessing whether the jurisdictional test is met. There is no reduction simply because the interest is less than a controlling interest.

³²⁴ OJ 1986 L372/1.

³²⁵ Paragraphs 10 and 12 of the Schedule to the Order.

³²⁶ Paragraph 4 of the Schedule to the Order.

³²⁷ Paragraphs 5, 6 and 7 of the Schedule to the Order.

B.17 For example:

- a. Company A acquires Company B and also its subsidiaries B1 and B2: B and B1 and B2 are enterprises of interconnected bodies corporate which are treated as being under common control and their turnover is taken together in arriving at the applicable turnover of the enterprises ceasing to be distinct.
- b. Company A acquires Company C which also has a significant shareholding – conferring at least material influence – in Company D. The turnover of Company C and Company D is taken together in determining the applicable turnover.
- c. Partnerships A, B and C act together to secure control of Partnership D and form Partnership E. Partnerships A, B and C are associated persons and their turnover is added together. To determine the applicable turnover, the higher of the two turnover figures (that is, of A, B and C together or of D) is deducted from the combined turnover figure (of A, B, C and D).

B.18 In the case of some joint ventures, none of the enterprises will remain under the same ownership or control. For example, Company A and Company B may form a 50:50 joint venture (Newco) incorporating all their assets and businesses. In this case, neither enterprise A or B will remain under the same ownership or control as previously. In determining the relevant applicable turnover, the highest turnover (of A or B) would therefore, effectively, be ignored. By contrast, where Company A and Company B form a joint venture incorporating their assets and businesses in a particular area of activity, each parent with control ceases to be distinct from the target business contributed to the joint venture by the other parent, but the parent companies themselves remain under the same ownership and control after the merger. Therefore, the parent companies have their turnover deducted and the relevant turnover is the sum of the turnover of each of the contributed enterprises.

Treatment of intra-group transactions

B.19 To avoid double counting, applicable turnover does not include amounts that are derived from transactions involving the sale of goods or provision of services between enterprises that are and will remain, post-merger, under the same common ownership or common control.³²⁸ In other words, external sales only are taken into account.

³²⁸ Paragraph 8 of the Schedule to the Order.

- B.20** However, in certain cases the CMA may take into account sales that were previously internal to a group and may attribute an appropriate value to such sales. This is to allow the CMA to make a sensible assessment of the turnover for jurisdictional purposes of the business being sold.
- B.21** Where, as a result of the merger, one or more enterprises will cease to be under the same common ownership or common control – that is, where what was an intra-group transaction pre-merger would, post-merger, be regarded as an external transaction – then the CMA may treat the amounts derived from the previously internal transactions as applicable turnover. In these cases, if such transactions have not resulted in any turnover, or the CMA believes that the turnover attributed to them does not reflect open market value, then the CMA may attribute an appropriate value to those transactions for inclusion in the applicable turnover.³²⁹

Example:

The enterprise ceasing to be distinct is part of a vertically integrated process, a mill supplying flour to a downstream baking operation. It is possible that, pre-merger, the raw material (flour) may be supplied by the mill to the baking operation at a nil value or less than market price. If only the mill was being taken over, the turnover attributed to the milling operation may, as a result, be artificially low. In these circumstances the CMA might exercise its discretion to take into account the pre-merger supplies of raw materials (flour) to the baking operation in calculating the applicable turnover, and to attribute a more appropriate value for those supplies. In seeking to re-value the turnover attributed to the supply of such goods so that it more accurately reflects an open market value, the CMA might have regard to the terms of any future supply agreement that might be part of the transaction as well as market prices more generally. Again, it is likely that the CMA would only seek to exercise this discretion in those cases where the effect may impact upon the question of jurisdiction or the fee due.

Treatment of foreign currencies

- B.22** The turnover test is expressed in terms of pounds sterling. If it is necessary to convert foreign currencies in order to arrive at this figure then the CMA would usually be content to accept the approved exchange rate applicable at the date of the accounts.

³²⁹ Paragraph 9 of the Schedule to the Order.

ANNEXE C – INTERIM MEASURES

Introduction: interim powers and restrictions

- C.1** At Phase 1, the CMA may, before it has reached its decision whether to make a reference in an anticipated or completed merger, make an interim order³³⁰ under section 72 of the Act if appropriate to prevent or unwind ‘pre-emptive action’. This is action which might prejudice the outcome of the reference and/or impede the CMA taking appropriate remedial action if it reaches an SLC decision in Phase 2.
- C.2** Once a merger has been referred, the CMA has the power under section 80 and 81 of the Act to take any action to prevent or unwind pre-emptive action, either by making an interim order or accepting interim undertakings.
- C.3** These interim orders and undertakings (referred to collectively in this annexe as ‘interim measures’) continue in force – subject to subsequent variation, release or revocation by the CMA³³¹ – until final determination of the inquiry.³³²

Interim orders and undertakings

- C.4** Under section 72 of the Act, interim orders may be made as soon as the CMA has reasonable grounds for suspecting that two or more enterprises have ceased to be distinct or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct.
- C.5** The CMA will consider the need for interim measures on a case-by-case basis (see paragraphs C.10 to C.14 below for when an interim order is likely to be made in relation to completed and anticipated mergers).
- C.6** Given that interim orders will be made at short notice in order to prevent pre-emptive action from taking place and at an early stage in the CMA’s consideration of the merger, the CMA has prepared a template interim order

³³⁰ The Act itself refers to orders made under section 72 ‘initial enforcement orders’. For ease, and except where specified or apparent from the context, in this guidance the term ‘interim order’ has been used to refer to both orders made at Phase 2 under section 81 and those made at Phase 1 under section 72. The term ‘interim measures’ is used to refer collectively to interim orders and interim undertakings.

³³¹ Or unless the CMA replaces the initial undertakings or initial order with a different type of measure (as envisaged in sections 80(7) and 81(7) of the Act).

³³² Final determination of an inquiry occurs on acceptance of final undertakings or the making of a final order or, in the absence of a substantial lessening of competition finding, on publication of the final report.

and associated compliance statements for completed mergers. The template is displayed on the CMA's website and may be updated from time to time.

- C.7** The template interim order is not intended to deal exhaustively with all matters that the CMA may reasonably wish to address with interim measures. In some cases therefore, it will be necessary to put in place further interim measures that go beyond the safeguards contained in the template, either at the outset or by way of supplement to the interim order (see for example, the section below on hold separate managers and monitoring trustees).
- C.8** In the case of completed mergers, interim orders will usually be addressed to the acquiring party in order to prevent pre-emptive action. In the case of an anticipated merger, interim orders addressed to both the acquirer and the target or vendor company may be needed in order to preserve the target business. Similarly, in a joint venture interim orders may be made to each of the parties to the joint venture.
- C.9** Interim undertakings may be accepted by the CMA at Phase 2 where an interim order has not previously been made but some interim measures are considered necessary, or where it is necessary to supplement the measures previously put in place by an interim order made at Phase 1. Interim undertakings are likely to depend on the circumstances of the case. As such, the CMA does not consider it appropriate to publish template interim undertakings, but any interim undertakings may draw on the requirements set out in the template interim order.

Need for interim measures for completed mergers

- C.10** The risk of pre-emptive action in a completed merger is generally higher than in an anticipated merger (as to which see paragraph C.12 below) and can be very high where post-merger integration has already begun.
- C.11** In a Phase 1 completed merger, an interim order will normally be made at the same time as the enquiry letter is sent to the parties.³³³ There may be some exceptions to this, for example if there is a lack of clarity as to which parties have ceased to be distinct. Where parties to a completed merger approach the CMA to notify the merger, the CMA will also normally issue an interim order soon after that approach. The interim order will require the parties to cease all integration steps with immediate effect. Parties will subsequently be able to make submissions to the CMA to consider derogation requests or to revoke the interim order if they can make the case that there is no risk that

³³³ See paragraph 7.34 above.

pre-emptive action could take place. However, the CMA would expect such evidence to be compelling in order to revoke an interim order.

Need for interim measures for anticipated mergers

C.12 As noted above, the risk of pre-emptive action in an anticipated merger is generally lower than in a completed merger. As such, the CMA would not normally expect to make an interim order at Phase 1 in an anticipated merger. However, an interim order might be required if the CMA believed that there was a risk that pre-emptive action might take place. Based on the past experience of the CMA's predecessor, the CC, under the Act,³³⁴ situations in which the CMA might consider an interim order necessary at Phase 1 (or subsequently at Phase 2) in relation to an anticipated merger include, but are not limited to:

- a. commercially sensitive information is being exchanged between merging parties³³⁵
- b. the parties intend to, or are already, integrating their businesses
- c. the merging parties have begun to conduct jointly commercial negotiations with customers or suppliers,³³⁶ and
- d. key staff have begun to leave the target business or are likely to do so (in which case, the interim order would typically be addressed to the target business).

C.13 During the course of a Phase 2 inquiry into an anticipated merger, and if no interim measures are in force, the Act prevents the parties (or associated persons) from acquiring any interest in shares in a company to which the reference relates without the CMA's consent. The statutory restriction on dealing for anticipated mergers prevents the transfer of shares, but not assets, pending final determination of the reference. Hence, there may also be a need for interim measures to be introduced at Phase 2 in relation both to asset acquisitions and to certain share acquisitions (in the latter instance, where there is a concern that assets may be transferred from the seller to the

³³⁴ See for example, the CC's Project Kangaroo joint venture, Ratcliff/Ross & Bonnyman inquiry (2011) and its Stena Line (UK) Limited/DFDS Seaway Irish Sea Ferries Limited inquiry (2011).

³³⁵ Except where such exchange is objectively necessary for the purposes of commercial due diligence and is subject to appropriate limits and confidentiality obligations on recipients of the information.

³³⁶ Parties should also note that until the merger is completed, the parties are considered to be independent business and may be subject to the general antitrust provisions of Chapter I of the Competition Act 1998 and Article 101 TFEU. These may prohibit, for example, coordination or exchange of commercially sensitive information between competing businesses.

acquirer prior to final determination of the reference). If so, a set of interim undertakings or an interim order will be prepared preventing the parties from: proceeding with the acquisition or with any related purchases; exercising voting rights; or proceeding with any integration of the relevant businesses pending final determination of the reference. The interim measures may also include the need to address relevant issues such as those in paragraph C.12 or to unwind any prior integration (see for example those aspects listed in paragraph C.31 below).

C.14 If the CMA finds an SLC at Phase 2, this may also lead to a need for interim measures (for example the appointment of a monitoring trustee to oversee a divestiture process).

Scope of interim measures and requests for derogation

C.15 To ensure that interim measures can be introduced quickly, the CMA will normally base any interim measures on the template interim order published on its website.

C.16 The interim order will state the date on which it will take effect. Normally, it will be stated to have immediate effect, and prevents the parties from starting integration, or from undertaking further integration. However, the CMA acknowledges that in some cases certain integration steps may need to continue, for example in order to maintain the viability of the acquired business. There may, therefore, be a need for parties to make subsequent derogation requests from interim orders (or from agreed interim undertakings).³³⁷ The CMA will consider derogation requests promptly. When making derogation requests, parties are expected to set out clearly, supported by evidence where available:

- a.** an explanation of the derogation request and a full description of the action the party wishes to take and in respect of which the request is made
- b.** why the derogation request is being sought
- c.** whether the derogation request is urgent (and if so how urgent it is and why it is necessary in advance of the CMA's decision on the merger), and
- d.** any other information which the party considers may assist the CMA in considering the request.

³³⁷ If parties consider an interim order is unnecessary, they may also make submissions to the CMA setting out reasons why there is no risk of pre-emptive action and the CMA will consider whether it would be appropriate to revoke the interim order.

- C.17** The CMA will be able to handle derogation requests that are fully specified, reasoned and evidenced with greater speed than those that do not address issues (a) to (d) above.
- C.18** The CMA is unlikely to grant derogation requests unless it can be shown that the request is necessary to safeguard the viability of the acquired business which would otherwise be at significant risk, to ensure the effective operation of the interim measures as a whole, or to meet a regulatory, statutory or other obligation. Requests that relate solely to bringing forward merger synergies are unlikely to be granted. Arguments that integration can subsequently be unwound are not on their own sufficient reasons to allow such integration; the CMA will instead focus in the first instance on the factors above and whether the integration increases the risk of pre-emptive action.
- C.19** The CMA will keep the scope of any interim measures under review during their lifetime, and will consider whether further interim measures are necessary (or if there is no interim order in place, it will consider what interim measures are required and to whom they should be applied). The CMA will examine the need for further interim measures on a case-by-case basis, and it will be open to the parties to demonstrate that additional measures beyond those in the template interim order are neither necessary nor appropriate on the particular facts.
- C.20** In considering additional interim measures, the CMA will examine whether the measures will assist in preventing pre-emptive action. Examples of further interim measures put in place in past cases include:
- a.** confidentiality agreements to provide further protection against sharing of confidential information
 - b.** requiring parties to provide suitable incentives in order to retain key staff, and
 - c.** requiring logs to be kept of communications between the merging parties.

Monitoring trustees and hold separate managers

- C.21** Additional safeguards beyond those envisaged in the template interim order may involve the appointment of a monitoring trustee to monitor and report on compliance with the interim order or undertakings. A monitoring trustee's role will usually be to assess in its first report the extent of integration and to make recommendations as to how to mitigate the risk of pre-emptive action. If appointed at Phase 2, the monitoring trustee will also be required to report on the extent of compliance with any Phase 1 interim order and the adequacy of

existing interim measures. Thereafter the monitoring trustee will be tasked with monitoring compliance with the interim measures and assisting with the consideration of derogation requests. In the event that the CMA requires a divestiture, the monitoring trustee's role may be expanded to ensure that any divestiture process is carried out in compliance with the CMA's decision in its final report and with the interim measures.

- C.22** In addition, such additional safeguards may involve the appointment of a hold separate manager (HSM) with executive powers to operate the acquired business separately from the acquirer and in line with the interim measures for the duration of the investigation.
- C.23** The CMA will normally consider the need for the appointment of an HSM and/or a monitoring trustee during a Phase 1 inquiry (including following the acceptance of UILs by the CMA) and, where a case is referred for a Phase 2 investigation, at the outset of a Phase 2 inquiry. It will also review the issue throughout the Phase 2 inquiry. The appointment of an HSM and/or a monitoring trustee will be at the expense of the acquiring party.
- C.24** The CMA may consider it necessary to appoint a monitoring trustee and/or an HSM at Phase 1 where one or more of the risk factors below apply and/or where it is clear at an early stage that the merger raises prima facie competition concerns.³³⁸
- C.25** At Phase 2, the CMA will usually require a monitoring trustee to be appointed in completed mergers unless parties can provide compelling evidence as to why there is little risk of pre-emptive action and/or that none of the risk factors below are present:
- a.** there has been substantial integration of the two businesses prior to implementation of the interim measures
 - b.** there have been breaches of the interim measures
 - c.** there is a need for further or continued integration of the business throughout the CMA's Phase 1 or Phase 2 inquiry subject to the necessary consents from the CMA, for example if the acquired business is not a stand-alone business
 - d.** there is a risk of deterioration of the business, for example through loss of key customers or members of staff, or

³³⁸ See for example, the CC's Global/GMG inquiry (2013).

- e. the pre-merger senior management of the acquired business is absent and/or strong incentives exist for the current senior management of the acquired business to operate the acquired business on behalf of the acquirer. This last risk factor, in particular, will suggest the need for the appointment of an HSM.³³⁹

Procedure for appointment of a monitoring trustee or HSM

- C.26** The CMA will notify the merging parties of its decision to require them to appoint a monitoring trustee by sending a letter containing draft directions. The parties will be given a short period of time to comment on the draft directions (typically no more than 24 hours before they are finalised and published on the CMA's website). The CMA maintains a roster of monitoring trustees with whom it has either worked in the past or who would be suitable for similar assignments in the future.³⁴⁰ The roster is supplied to merger parties on request or at around the same time as the letter requiring a monitoring trustee to be appointed.
- C.27** Parties are typically given two working days to nominate a suitable monitoring trustee and five working days to appoint a monitoring trustee on terms approved by the CMA, although this timeframe may be altered depending on the facts of the case. When nominating a monitoring trustee to the CMA, parties and/or the nominated monitoring trustee should provide evidence on the independence of the monitoring trustee from the merging parties and the relevant experience and qualifications of the monitoring trustee.
- C.28** The CMA will consider the nomination provided by the parties and will approve the appointment if the monitoring trustee is independent and suitably qualified and a satisfactory draft mandate has been provided.
- C.29** The procedure for appointment of an HSM will vary depending on the circumstances of the case and in particular the existing management arrangements at the acquired business. The CMA will usually invite the parties to put forward candidates for the role of HSM but may also or instead look for candidates itself. The CMA will need to approve any candidate proposed by the parties prior to their appointment.

³³⁹ The CMA's predecessor, the CC, has in the past, for example, required appointment of an external HSM in its Stericycle/STG (2006), Stonegate/Deans (2007) and Stagecoach/Preston Bus (2009) inquiries. In other cases, the CC has stopped short of requiring an external HSM but has achieved hold separate arrangements by requiring existing employees of the merged entities to act independently in key managerial roles in the acquired business. The factors the CMA will consider when weighing up the choice between an external or internal HSM are: the relative experience and suitability of existing employees; the independence of existing employees; and the complexity of the hold separate requirements.

³⁴⁰ The CMA will periodically seek to expand the roster and meet with potential candidates.

Power to unwind integration

- C.30** In certain circumstances, the CMA may consider it necessary to use its powers³⁴¹ to unwind integration that has already occurred. This will be assessed on a case by case basis. The CMA would expect to use these powers at Phase 1 only in limited circumstances. However given in particular the longer duration of a Phase 2 inquiry, and that any merger referred to Phase 2 raises prima facie competition concerns, the CMA may be more likely to use its unwinding powers at Phase 2 where the circumstances of the case require.
- C.31** Examples of measures to unwind integration that have been required in the past include requiring the:
- a. reversal of any re-branding of the target's assets with the acquirer's branding (for example, changing the livery of buses)
 - b. destruction of, or retention by a third party (for example, legal advisers) of, confidential information relating to the acquired business (for example, customer lists)
 - c. reversal of changes to an organisation's structure, either by requiring departed key staff to be replaced (for example a Finance Director) or a HSM to be appointed to manage the acquired business (see paragraphs C.22 to C.23 above)
 - d. separation of functions or decision-making processes which have previously been integrated (for example, sales forces or production lines), and
 - e. retraction of regulatory requests (for example, bus route registrations and deregistrations).

Compliance and enforcement

- C.32** To help ensure compliance with interim measures, the CMA will normally require the Chief Executive Officers (or equivalent) of the companies providing interim measures to provide a monthly compliance statement.³⁴² In addition, the CMA may require further information or a further statement of compliance to be provided on an ad hoc or periodic basis. In certain circumstances, the

³⁴¹ Pursuant to sections 72(3B), 80(2A) or 81(2A) of the Act.

³⁴² The matters set out in the template compliance statement are a starting point for discussion between the CMA and the relevant party or parties. The template will be adapted to meet specific requirements on a case-by-case basis.

CMA may also require a representative of the **acquired** business to prepare a monthly report to the CMA in such form as may be directed by the CMA for the purpose of monitoring compliance with any interim measures. It is a criminal offence³⁴³ for a person to provide, either knowingly or recklessly, false or misleading information to the CMA.

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³⁴³ Section 117 of the Act.

ANNEXE D – STATUS OF OFT AND CC PUBLICATIONS

D.1 The table below indicates the status of OFT and CC merger-related guidance documents and publications that had been published and were in effect prior to the transfer of their merger control functions to the CMA on 1 April 2014. Certain of those documents have been adopted by the CMA Board in order to facilitate transition to the new UK merger control regime, and to minimise disruption to parties and the CMA.

OFT/CC CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/ obsolete ¹	Adopted by the CMA Board ²
OFT527	Mergers jurisdictional and procedural guidance	✓	-
CC18	Merger procedural guidelines	✓	-
OFT1254/ CC2	Merger assessment guidelines	-	✓
OFT1313/ CC2(summary)	Quick guide to UK merger assessment	-	✓
OFT1122	Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance	-	✓
CC8	Merger remedies: Competition Commission guidelines	-	✓ (save for Appendix A, which is replaced by this guidance)
OFT1060	Memorandum of understanding between the OFT and the CC on the variation and termination of merger and market undertakings and orders	✓	-
CC9	Guidance on water merger references	-	✓
OFT1230/ CC com1	Good practice in the design and presentation of consumer survey evidence in merger inquiries	-	✓
OFT1305/ CC2com2	Commentary on retail mergers	-	✓
Merger Notice (Dec 2010)	Merger Notice under section 96 of the Enterprise Act 2002	✓	-
OFT	OFT: Template initial undertakings	✓	-
OFT (Aug 2012)	Mergers fee information	✓	-
	OFT: Enquiry letter template	✓	-

OFT/CC CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/ obsolete ¹	Adopted by the CMA Board ²
	Competition Commission: Template Interim Undertakings (Completed Merger)	✓	-
	Memorandum of understanding between Ofcom and the OFT	✓	-
	The OFT's role in reviewing NHS mergers: Frequently Asked Questions	-	✓
CC1	Competition Commission: rules of procedure for merger reference groups, market reference groups and special reference groups	-	✓
CC4	Competition Commission: general advice and information	✓	-
CC5	Statement of policy on penalties	✓	-
CC6	Competition Commission: guidance to merger reference groups, market reference groups and special reference groups	✓	-
CC7	Chairman's guidance on disclosure of information in merger and market inquiries	-	✓
CC12	Disclosure of information by the CC to other public authorities	✓	-
	Suggested best practice for submission of technical economic analysis	-	✓
	Guidance on outside interests of members, staff and external advisors	✓	-
OFT441	How will the Enterprise Act 2002 change the Competition Act 1998 regime?	✓	-
OFT518	Overview of the Enterprise Act	✓	-
OFT530	Practical information – everything you need to know about the Enterprise Act	✓	-

¹ OFT and CC publications listed in this column have, at the date of publication of this guidance, been replaced, or rendered obsolete, by CMA guidance or publications.

² OFT and CC publications listed in this column have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future).

D.2 Parties should refer to those documents listed above as having been adopted by the CMA board (the adopted guidance) for further guidance on how the CMA will investigate and analyse mergers, subject in particular to the following general limitations:

- all references in the adopted guidance to issues of jurisdiction or procedure in mergers cases must be read in the light of this guidance
- in the case of conflict between this guidance and the adopted guidance, this guidance prevails
- the original text of the adopted guidance has been retained unamended: as such, that text does not reflect or take account of developments in case law, legislation or practice since its original publication, and
- all the adopted guidance should be read subject to the following cross-cutting amendments:
 - references to the 'OFT' or 'CC' (except where referring to specific past OFT or CC practice or case law), should be read as referring to the CMA
 - references to 'referral to the CC' or 'a reference to the CC' should be read as referring to the referral of a case by the CMA (or Secretary of State) of a case for a Phase 2 investigation involving an Inquiry Group of CMA panel members
 - references to articles of the EC Treaty should be read as referring to the equivalent articles of the Treaty on the Functioning of the European Union (TFEU)
 - certain OFT or CC departments, teams or individual roles may not be replicated in the CMA, or may have been renamed. A copy of the CMA's organisational chart is available on the CMA's website, and
 - parties should check any contact details against those listed on the CMA's website, which will be the most up to date.

ANNEXE E – TRANSITIONAL ARRANGEMENTS

- E.1 This Annexe explains the transitional arrangements that apply to merger investigations that are ongoing as at 1 April 2014, the date on which the OFT and CC's merger control functions transfer to the CMA (the effective date).³⁴⁴
- E.2 Detailed below are transitional arrangements necessary as a result of changes to the UK merger control regime made by the ERRA13.³⁴⁵ Other new procedures and processes described in this guidance and being introduced by the CMA, which do not flow directly from changes mandated by the ERRA13, are considered capable of application in all cases with effect from the effective date.

Interim measures and penalties for breach

- E.3 Any undertakings accepted by the OFT or CC,³⁴⁶ or orders made by the OFT or CC,³⁴⁷ which are in force on the effective date, shall, from that date, be treated as having been given to, or made by, the CMA. The provisions of the Act (as amended) relating to the circumstances in which such undertakings or orders will cease to have effect³⁴⁸ will apply to those undertakings or orders as though they had been given or made by the CMA.³⁴⁹
- E.4 The extension to anticipated mergers of the CMA's powers to make an order under section 72 of the Act and related amendments to the Act (for example, the clarification of the CMA's power to reverse pre-emptive action) will apply in all cases from the effective date.

³⁴⁴ This Annexe does not detail necessary transitional arrangements in relation to matters which are not specific to merger cases, but are of more general application (for example the transfer of the OFT's rights and obligations to the CMA). These will be provided for by secondary legislation.

³⁴⁵ The transitional arrangements in this Part will, as necessary, be effected through secondary legislation.

³⁴⁶ Including initial undertakings or UIs accepted by the OFT (under section 71 (now repealed) or 73 of the Act respectively) and interim or final undertakings accepted by the CC (under section 80 or 82 of the Act respectively).

³⁴⁷ Including initial orders made by the OFT under section 72 of the Act, or interim or final orders made by the CC under section 81 or 84 of the Act respectively.

³⁴⁸ For example, sections 72(4) and 72(6) of the Act.

³⁴⁹ As the Act (as amended by the ERRA13) no longer includes provisions governing the expiry of initial undertakings by the CMA at Phase 1 (for example, the ERRA13 revoked sections 71(4) and 71(5) of the Act), transitional arrangements will be introduced through secondary legislation to bring this into effect.

- E.5 The CMA's new powers under section 94A of the Act to impose a penalty for failure to comply (without reasonable excuse) with an interim measure³⁵⁰ that is in force take effect in all cases on the effective date. However, the CMA will be able to impose such a penalty only where the failure to comply took place after the effective date.
- E.6 Paragraphs E.3 to E.5 above apply equally to undertakings accepted by or orders made by the Secretary of State following the issuance of a public interest intervention notice, a special intervention notice, or a European intervention notice.

Investigatory powers and penalties for failure to comply

- E.7 The amendments to the CMA's power to issue formal notices under section 109 of the Act³⁵¹ (section 109 notices) will take effect in all cases from the effective date.
- E.8 The associated enforcement powers under sections 110 to 110B of the Act will apply only to failures to comply with a section 109 notice where that notice was issued after the effective date. Where the CC has issued a section 109 notice prior to the effective date, section 110 as in force prior to the effective date will determine the CMA's ability to take enforcement action in respect of that notice³⁵² (including where the failure to comply arises after the effective date).³⁵³

Statutory time limits and other procedural changes introduced by the ERRA13

- E.9 The table below explains when and how the new procedures introduced by the ERRA13 will apply to OFT and CC merger cases ongoing at the effective date. For these purposes, 'new procedures' is used to refer collectively to:
- the new 40 working day time limit (extendable in certain circumstances) for the CMA to decide whether its duty to refer for a Phase 2 investigation applies (including the provisions of the Act governing, for example, the commencement and suspension of that period) (see for example, paragraph 4.42 and Chapter 6 of this guidance)

³⁵⁰ That is an undertaking given to the CC or the CMA under section 80, or (b) an order under section 72 or 81 or paragraph 2 of Schedule 7.

³⁵¹ See paragraphs 7.2 to 7.5 above.

³⁵² In doing so, the CMA will also apply the limitations on the level of administrative penalties that were in force prior to the effective date.

³⁵³ Similarly, where information has been requested at Phase 1 prior to the effective date, pursuant to provisions of Part 3 of the Act repealed by the ERRA13 (for example sections 31 or 34B), those provisions will continue to be applied to enforcement of such information requests after the effective date.

- the amended procedure for the making of voluntary notifications to the CMA under section 96 of the Act, including the revised form of merger notice to be used for such purposes (see paragraphs 6.50 to 6.59 above and the template Merger Notice published on the CMA's website)
- the revised procedures and statutory time limits for the submission of UILs by merging parties, and consideration of these by the CMA (see chapter 8 above and the Remedies Form published on the CMA's website)
- the new statutory deadlines (and associated procedures) for the CMA to implement remedies at both Phase 1³⁵⁴ and Phase 2³⁵⁵ (see paragraphs 8.21 to 8.35 and 14.3 above), and
- the power for the CMA to suspend the Phase 2 investigation for a period of up to three weeks, if so requested by the parties and it believes there is a possibility that the merger will be abandoned.³⁵⁶

Conversely, the 'old procedures' refers to the equivalent provisions to those in the preceding paragraph that were in force and applied by the OFT and CC prior to the effective date. Other merger control procedures provided for in the Act (as amended by the ERRA13) that are not listed in the preceding paragraph, will apply in all cases from the effective date.³⁵⁷

E.10 Cases are deemed to be 'ongoing' for the purposes of this Annexe if, as at the effective date:

- either: i) the OFT's statutory timetable has commenced following submission of a satisfactory merger notice³⁵⁸ in relation to the case (and that merger notice has not been rejected or withdrawn³⁵⁹); or ii) the OFT has confirmed to the parties that its 40 working day administrative

³⁵⁴ That is, the 50 working day period (extendable by 40 working days if there are special reasons) from notifying the parties of its Phase 1 SLC decision, within which the CMA has to decide whether to formally accept the proposed undertakings (see section 73A of the Act).

³⁵⁵ That is, the period of 12 weeks (extendable by six weeks for special reasons) following publication of its final report that the CMA has to accept undertakings or make an order implementing its remedies (see section 41A of the Act).

³⁵⁶ See section 39(8A) of the Act.

³⁵⁷ These procedures are not substantively different from those in the Act prior to its amendment by the ERRA13.

³⁵⁸ That is, a merger notice meeting the requirements of section 96(2) of the Act (prior to the amendments made to that section by the ERRA13).

³⁵⁹ Under section 99(5) of the Act (rejection of Merger Notices) or article 7 of the Enterprise Act 2002 (Merger Prenotification) Regulations 2003 SI 2003/1369 (as amended) (withdrawal of Merger Notices)

timetable has commenced; or iii) an intervention notice has been issued by the Secretary of State, and

- the case has not come to an end as a result of either:
 - an OFT decision not to refer the merger (either unconditionally, following acceptance of UILs, or because the merger is found not to qualify)
 - a decision of the Secretary of State not to refer the merger, or
 - a CC decision to clear unconditionally or prohibit the merger, to accept remedies from, or impose remedies on, the merging parties, or to cancel the reference.

Application of transitional arrangements in merger cases

Position as at the effective date	Transitional arrangements
Phase 1	
Cases that are not yet ongoing. ³⁶⁰	The new procedures will apply from the effective date.
The OFT's statutory or administrative timetable has commenced (and any statutory Merger Notice submitted has not been rejected or withdrawn), but no decision on the duty to refer has yet been taken by the OFT.	<p>The old procedures will continue to apply. If the CMA refers the case for a Phase 2 investigation, the new procedures will apply from the date of that reference decision.</p> <p>If the merger notice is rejected or withdrawn (including where this occurs after the effective date), the new procedures will apply from the date of such withdrawal or rejection. The CMA may, following such withdrawal or rejection, formally notify the parties pursuant to section 34ZA(3) of the Act that it has sufficient information to commence an investigation, and thus thereafter to proceed to reach a decision as to whether or not to refer the case.³⁶¹</p>
<ul style="list-style-type: none"> - A concentration with an EU Dimension has been notified to the European Commission under Article 4(1) of the EU Merger Regulation (or a request made under Article 4(4) of that regulation), and - subsequently (either before or after the effective date) the case has been referred back to UK under Art 4(4) or 9 of the EU Merger Regulation). 	<p>The old procedures will continue to apply. If the CMA refers the case for a Phase 2 investigation, the new procedures will apply from the date of that reference decision.</p> <p>Where the concentration is notified or the Article 4(4) request made after the effective date, the new procedures apply.</p>

³⁶⁰ Including, but not limited to, those in which the merging parties have engaged with the OFT for the purposes of, for example, informal advice or pre-notification, or in which the OFT has sent an enquiry letter, but in which neither the OFT's statutory or administrative timetable has commenced.

³⁶¹ If the CMA's investigation is well progressed at the time at which the Merger Notice is rejected or withdrawn, the CMA is likely, once it has informed the parties that it has sufficient information to investigate for the purposes of section 34ZA(3), to be able to reach a Phase 1 SLC decision in advance of the usual 40 working day deadline. However, parties should have no expectation that this will necessarily be the case, or that the CMA will reach its decision within 40 working days from the date of submission of the original Merger Notice.

Phase 2	
The case has been referred by the OFT (or the Secretary of State) for a Phase 2 investigation, and the CC has yet to publish its final report. ³⁶²	The new procedures will apply from the effective date (note that the ERRA13 did not make any substantive changes to the Phase 2 process prior to the publication of the CMA's final report).
The CC has published its final report, but has not yet accepted final remedial undertakings from, or made a final order in relation to, the parties.	The old procedures will continue to apply (again, given the limited changes made to the Phase 2 process by the ERRA13, the principal impact of this continuation of the old procedures is that the CMA will not be subject to the statutory time limits for agreeing remedies).
The CC has accepted final undertakings from, or made a final order in relation to, the parties.	Such cases are not considered to be ongoing for the purposes of this Annexe. Insofar as is relevant, the new procedures will apply from the effective date.

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³⁶² Pursuant to section 38 of the Act.

ANNEXE F – CONTACT ADDRESSES

For further information about the application of competition law to mergers in the UK, and to obtain copies of the statutory Merger Notice form, contact:

**The [Mergers Group]
Competition and Markets Authority
Victoria House
Southampton Row
London
WC1B 4AD.**

**Tel: 020 7[]
Fax: 020 7[]
CMA switchboard: 020 7[]
CMA website: [www.cma.gov.uk]**

For further information about public interest mergers, contact:

**Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1-19 Victoria Street
London
SW1H 0ET**

**BIS switchboard: 020 7215 5000
BIS website: www.bis.gov.uk**

For further information about the EU Merger Regulation, contact:

**European Commission
Directorate-General for Competition
Merger Registry
Place Madou / Madouplein 1
1210 Saint-Josse-ten-Noode / Sint-Joost-ten-Node
Brussels
Belgium**

**Tel: (+32) 2 296 5040
Fax: (+32) 2 296 4301
Commission switchboard: (+32) 2 299 1111
Commission's website: http://ec.europa.eu/comm/competition/index_en.html**

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D. DRAFT REMEDIES FORM FOR OFFERS OF UNDERTAKINGS IN LIEU OF REFERENCE

COMPETITION AND MARKETS AUTHORITY

REMEDIES FORM: FOR OFFERS OF UNDERTAKINGS IN LIEU OF REFERENCE

This form (the Remedies Form) specifies the information and documents to be submitted by the merger parties for the purpose of offering structural remedies pursuant to section 73 of the Enterprise Act 2002 (as amended) (the Act).

The information requested is necessary for the Competition and Markets Authority (CMA) to examine whether the proposed undertakings in lieu of reference (UILs) are likely to remedy, mitigate or prevent in a clear cut manner, the substantial lessening of competition (SLC) identified by the CMA in its decision pursuant to section 22 or 33 of the Act.

Guidance on the process for assessing UILs and on how the CMA assesses remedies is set out in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) and *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122).

This Remedies Form refers to a 'business' to be divested. This is because the CMA generally prefers divestiture of an existing business that can compete effectively on a stand-alone basis independently of the merger parties over divestiture of part of a business or a collection of assets. The CMA will, however, consider a proposed divestiture that comprises only part of a business, but, in general, it is less likely that this will offer a clear cut solution to the CMA's competition concerns.

The CMA does not inevitably refuse behavioural remedies as UILs. However, in general, it is highly unlikely that behavioural remedies will be sufficiently clear cut to address identified competition concerns for the purposes of UILs and this form therefore focuses on structural remedies. Nevertheless, if the merger parties wish to submit a behavioural remedy as UILs they should provide a detailed description of the behavioural remedy and how it would remedy, mitigate or prevent in a clear cut manner the CMA's competition concerns.

The CMA may dispense with the obligation to provide any particular information in this Remedies Form where it considers that it is not necessary for the purpose of considering whether to accept the UILs offered.

The information required will vary according to the remedy proposed. The CMA case team is available to discuss the information required with the merger parties before they submit their remedy offer. If those parties consider that any particular information requested by this Remedies Form may not be necessary for the CMA's assessment, they are asked to provide adequate reasons why that information is not relevant.

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Description of the UIL

1. Provide:
 - (i) a general description of the UILs offered
 - (ii) any conditions for their implementation, and
 - (iii) the proposed text of the UILs offered (as a separate document).¹

How the UILs will remedy, mitigate or prevent competition concerns

2. Describe how the UILs offered will remedy, mitigate or prevent in a clear cut manner the SLC identified by the CMA or any adverse effect which has or may have resulted from it or may be expected to result from it.
3. Provide a **non-confidential summary** of the nature and scope of the UILs offered and how, in your view, they will remedy, mitigate or prevent in clear cut manner the SLC identified by the CMA or any adverse effect which has or may have resulted from it or may be expected to result from it. The CMA may use this summary in order to market test the UILs offered with third parties (including potential purchasers).

Information on the business to be divested

4. Describe the business to be divested generally, including:
 - (i) its operational history
 - (ii) the entity(ies) belonging to it
 - (iii) its registered place of business and head office
 - (iv) other locations for production or provisions of services
 - (v) how, in broad terms, the business operates and is managed, and
 - (vi) an overview of the organisational structure.

¹ Template UILs are available on the CMA's website.

5. For the business to be divested, list and describe the products or services supplied and any new products or services planned with respect to the business.
6. List the key assets and liabilities of the business to be divested including:
 - (i) staff, including a list of employees who are critical for the operation of the business to be divested, describing their functions
 - (ii) production facilities
 - (iii) intellectual property rights and licences
 - (iv) intangible assets, including brands
 - (v) leases and freehold property
 - (vi) working capital and other such assets or liabilities
 - (vii) cash
 - (viii) debt leases and other financial liabilities, and
 - (ix) other liabilities (for example, pensions).

Highlight if any of the above assets come from more than one party to the merger (that is, whether a 'mix and match' divestiture is proposed). Please set out any debt or leasing obligations that will pass with the business to be divested.

7. For the business to be divested, list and describe any significant customer contracts or supplier contracts, including setting out when they are due for renewal.
8. Provide summary financial statements for the business to be divested at profit and loss level for each of the two most recent financial years, the current financial year and a forecast period of two financial years. The below table provides a guide to how you may wish to present the information. For the current financial year, you should, as necessary, split the information between actual and forecast information. If relevant, you should also provide a breakdown by product type/market.

Business to be divested	Historical FY-2	Historical FY-1	Current FY	Forecast FY 1	Forecast FY 2
Revenue					
Cost of sales					
Gross profit					
EBITDA					
Depreciation					
EBIT					

9. Provide a balance sheet for the business to be divested for the most recent financial year and a forecast balance sheet at completion of the divestment.

Assets excluded from the business to be divested and continuing links to the merger parties

10. Describe any of the operational or management functions which will not form a part of the proposed business to be divested but which are currently necessary for the functioning of the business. This description should include such functions as:
- (i) research and development
 - (ii) production
 - (iii) marketing and sales
 - (iv) logistics
 - (v) relations with customers
 - (vi) relations with suppliers, and
 - (vii) the maintenance and provision of IT systems and various support functions (for example, payroll, general finance, accounting and regulatory compliance).
11. Set out what transitional service arrangements you would include as part of the divestment with regard to the functions referred to in Question 10 in the event they are required by the purchaser.

12. Describe in detail any continuing links between the business to be divested and other businesses controlled by the merger parties, such as:
 - (i) supply, production, distribution, service or other contracts
 - (ii) shared tangible or intangible assets
 - (iii) shared or seconded personnel
 - (iv) shared IT systems or other systems
 - (v) shared customers, and
 - (vi) administrative and other support functions.
13. For each of the links referred to in Question 12 describe any changes envisaged and the expected timing of these changes.
14. Describe the customers or groups of customers which will not form a part of the proposed business to be divested but which are currently customers of the business to be divested. Provide the total turnover generated by these customers (in GBP and as a percentage of the total turnover of the business to be divested).
15. Describe any other areas where the business to be divested differs from the nature and scope of the business as currently operated.
16. Describe any arrangements envisaged for carving out or reconfiguring the business to be divested from its existing form.

Implementation process

17. Describe how you intend to run the divestiture process including which advisers you intend to appoint.
18. Provide a proposed timetable setting out key milestones including preparation of documentation and filtering of potential purchasers. Please note that the CMA has 50 working days beginning on the day after the CMA gives the notice required pursuant to section 34ZA(1)(b) or section 34A(2)(b) of the Act to accept undertakings in lieu of a reference (which can be extended by no more than 40 working days if there are special reasons for doing so).

19. If you have already identified a potential buyer please set out why you consider this buyer would meet the CMA's purchaser suitability criteria.²
20. Provide any reasons as to why the CMA should not require divestment to an upfront buyer in this case.³
21. Explain the reasons why, in your view, the business will be acquired by a suitable purchaser in the timeframe proposed in Question 18. List likely purchasers for the business to be divested highlighting those potential purchasers who you have already approached with a view to a sale and summarising the strength of their interest and their capability to complete a transaction within the timescale proposed. Where you have already approached potential purchasers, submit any expressions of interest, informal or formal offers or any draft heads of terms.
22. State whether there are likely to be significant due diligence, statutory or regulatory issues that may delay the divestiture process. These may include any third party rights, obligations, consents, licences and regulatory approvals. Set out the expected timeframes for resolving each of these.
23. In instances of multiple businesses to be divested, state whether and why these are intended to be sold to several buyers or to one. If to several, explain whether you intend to 'package' some of the businesses to be divested together in order to achieve a sale. Highlight whether it is likely that other assets not associated with the identified SLC will need to be included in a broader divestment package in order to achieve a successful sale.
24. Set out whether you consider the appointment of a monitoring trustee would be appropriate in this case. If you do not consider a monitoring trustee is required, provide reasons why.

² See *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122), available on the CMA website.

³ An 'upfront buyer' means having a buyer in place with a signed sale and purchase agreement conditional only on CMA approval **before** the CMA accepts the UILs. The upfront buyer would need to meet the CMA's purchaser suitability criteria set out in *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122).

E. DRAFT MERGER NOTICE

COMPETITION AND MARKETS AUTHORITY

MERGER NOTICE UNDER SECTION 96 OF THE ENTERPRISE ACT 2002

PREAMBLE

1. This merger notice (Notice) is for use for the purpose of notifying an anticipated or completed merger to the Competition and Markets Authority (CMA) pursuant to section 96 of the Enterprise Act 2002 (as amended) (the Act).
2. A Notice may be submitted by any person carrying on an enterprise to which the notified arrangements relate,¹ or by authorised representatives acting on their behalf (that is, authorised under the declaration in Part III of this Notice). Whether or not the Notice is submitted by an authorised representative, the person authorising that representative remains responsible for the content of the Notice and must ensure that it is complete and accurate.
3. The party or parties submitting the Notice take(s) responsibility for the accuracy and completeness of the information. Merger parties are free to submit a Notice jointly. This may in particular be appropriate in anticipated mergers where the acquirer may not have access to the target's internal information or documents, and will not therefore be able to verify the accuracy or completeness of the information provided, or for similar reasons in joint ventures. Where merger parties are submitting a Notice jointly, each notifying party must sign the declaration below.
4. The UK merger control regime is set out in the Act. Guidance on the procedures followed by the CMA in reviewing mergers is provided in Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2) (the Guidance). The text of the Act together with the Guidance and other relevant documents can be found on the CMA's website.
5. The Act sets statutory time limits for all parts of the merger review process. In the initial period (the Phase 1 investigation), the CMA has a 40 working day

¹ See the Enterprise Act 2002 (Merger Prenotification) Regulations 2003 (SI 2003/1369) (as amended).

period (subject to extension in certain circumstances) to decide whether its duty to make a reference for an in-depth Phase 2 investigation applies. Where the merger parties voluntarily notify a merger to the CMA by submitting a Notice, the period of 40 working days begins on the first working day after the day on which the CMA gives notice to the notifying parties that it is satisfied that the Notice is in the prescribed form, contains the prescribed information and states that the existence of a proposed merger has been made public (a satisfactory notification).²

6. Accordingly, this Notice sets out the categories of information that merger parties must provide when notifying a merger to the CMA.³ That information is required by the CMA to ensure that it is able to assess the notified merger within the time limits set out in the Act.
7. However, the specific nature and extent of information required in response to each of these categories will vary from case to case depending, for example, on the activities of the parties or the extent of overlap in their activities. Accordingly, some cases will require more or less information under each category. For guidance on the nature and extent of information required in a particular case, please refer to the Guidance Notes below and to previous merger decisions published by the CMA (and its predecessors, the Office of Fair Trading (OFT) and the Competition Commission (CC)) on mergers in the relevant sector, which are available on the CMA's website.
8. The CMA strongly recommends that merger parties engage in early pre-notification discussions. These pre-notification contacts are extremely valuable both to the notifying parties and the CMA to determine the level of information that will be required for a satisfactory notification in the case at hand. Early engagement is likely to generate efficiencies in terms of timing and information gathering and may result in a reduction in the information merger parties are required to provide. Notifying parties are encouraged to refer to the Guidance, which provides further information on pre-notification contacts and the preparation of submissions.
9. In particular, if merger parties consider that any particular information requested in this Notice may not be necessary for the CMA's assessment of the case or is not available, they are encouraged to discuss this with the CMA in advance of submitting the Notice. In appropriate circumstances, the CMA may, at its

² See sections 34ZA(3) and 96(2A) of the Act.

³ See section 96(2) of the Act.

discretion, consider that either less information than indicated in the Guidance Notes will be required for a satisfactory notification or that notifying parties can dispense with the obligation to provide information responsive to certain parts of the Notice altogether (an information waiver).

10. The Guidance Notes indicate circumstances where notifying parties may wish to consider requesting an information waiver for some categories of information. However, notifying parties are not restricted to only requesting information waivers in those circumstances. Merger parties should also note that, during the course of an investigation following the submission of a satisfactory notification and the commencement of the 40 working day period, the CMA may subsequently require further information from the merger parties, including information that was previously subject to an information waiver.
11. Merger parties are also advised to discuss with the CMA any additional information that they may wish to provide to aid the CMA's review. It is particularly important to discuss with the CMA in advance of notification any customised evidence that merger parties intend to produce in support of a notification, such as economic analysis and customer surveys, prior to commencing that work (in particular in the case of surveys) (see further paragraph 6.41 of the Guidance). The CMA may also, where appropriate, request additional information required for its review of the merger during pre-notification.
12. The Guidance Notes also form part of this Notice. Notifying parties should read them in full before answering any of the questions. When completing a Notice, notifying parties are encouraged to refer to the Guidance, and to the following publications, which explain certain terminology used and/or how the CMA is likely to approach its assessment, as well as the types of information and evidence required in support of submissions:
 - *Merger Assessment Guidelines* (OFT1254/CC2)
 - *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122), and
 - *Commentary on retail mergers* (OFT1305/CC2com2).
13. When completing this Notice, please ensure that to the extent possible, supporting evidence (including contemporaneous documents) for statements made is provided.

14. All information required in this Notice must be complete and correct. In particular, merger parties should note that:
- (a) As stated above, the initial period of 40 working days will not begin until the first working day after the CMA has confirmed to the notifying parties that it is satisfied that the information received is a satisfactory notification. The extent of information required for these purposes may vary from case to case and further information may be requested from the merger parties at a later stage.
 - (b) The CMA will seek to inform the notifying parties as to whether or not the Notice is a satisfactory notification in writing within five to ten working days of its submission to the CMA.⁴ Where merger parties have engaged in pre-notification discussions, it may be possible for the CMA to confirm that a Notice is a satisfactory notification more quickly.
 - (c) If any information contained in the Notice is found to be, in any material respect, false or misleading, the CMA may reject the Notice (including in instances where the CMA has previously confirmed that it considers the Notice to be a satisfactory notification).⁵
 - (d) It is an offence punishable by a fine and/or imprisonment to intentionally or recklessly give the CMA information that is false or misleading in a material respect.⁶
15. If, after submitting the Notice, there are any changes in the circumstances of the merger or the merger parties which are relevant to the information provided in the Notice or other information the merger parties have provided to the CMA, they must inform the CMA immediately.
16. Information on how to submit a Notice to the CMA is available on its website.

⁴ For these purposes, any merger notice received after 5pm will be considered to have been submitted on the following working day.

⁵ Section 99(5)(a) of the Act.

⁶ Section 117 of the Act.

PART I - GENERAL INFORMATION

See Guidance Note 1

1. Specify who is submitting the notice and indicate whether representatives have been appointed; provide full contact details of the person to whom the CMA should address any correspondence.

PART II – MERGER DETAILS

The merger situation

See chapter 5 of *Mergers: Guidance on the CMA's jurisdiction and procedure* and part 3 of *Merger Assessment Guidelines*

2. Describe the arrangements by which the enterprises will cease/have ceased to be distinct, including:
 - a. the merger parties to the transaction
 - b. type of transaction
 - c. consideration
 - d. key terms
 - e. timing
 - f. strategic and economic rationale
 - g. whether it is being notified in any other jurisdictions and, if so, whether the merger parties are willing to offer a waiver to support coordination between the CMA and the competition authorities in those jurisdictions, and
 - h. ownership structure pre and post-merger, including any pre-merger links between the merger parties (see Guidance Note 2).
3. Describe the businesses of the merger parties and briefly state the product and geographic overlaps (both horizontal overlaps and vertical relationships) between the acquirer group and target (see Guidance Note 3).
4. Provide brief details of any other transactions (merger, acquisition, disposal, joint venture) undertaken by either of the merger parties in the last two years.

Jurisdiction

See chapter 5 of *Mergers – jurisdiction and procedures guidance* and paragraphs 3.1.3 to 3.3.10 of *Merger Assessment Guidelines*

5. Explain why:
 - a. a relevant merger situation (as per section 23 of the Act) has been created, or
 - b. arrangements are in progress or contemplation which will result in the creation of a relevant merger situation (see Guidance Note 4).
6. Explain why the transaction is not subject to the European Union Merger Regulation (EU Merger Regulation),⁷ (highlighting whether it is notifiable in the UK by virtue of the 'two-thirds' rule in article 1(2) or 1(3) of that Regulation).

Supporting documents

7. Provide:
 - a. a press release or report and details of any notifications to listing authorities (for example, for admission to the UK Listing Authority Official List and for admission to trading on the London Stock Exchange) or other documentation evidencing that the transaction has been made public, and
 - b. a copy of the documents bringing about the merger situation, including any heads of terms, memorandum of understanding, sale and purchase agreement, business purchase agreement or equivalent.
8. If the offer is subject to the City Code on Takeovers and Mergers (the Takeover Code), supply copies of the Offer Document and Listing Particulars. If these are not yet available, provide copies of the latest drafts and supply the final versions as soon as they are issued (see Guidance Note 5).
9. Supply, for each of the merging/merged enterprises, the most recent annual report and accounts (see Guidance Note 6) and latest monthly management accounts. Indicate what the UK turnover associated with each of the acquirer (including group companies where relevant – see Annex B of the Guidance) and the target (if not already provided under question 5) is.

⁷ Council Regulation (EC) No 139/2004 of 20 January 2004.

10. Provide copies of the most recent business plan of the acquirer and acquirer group (if relevant) and the target. Where any horizontal overlap or vertical relationship involves, for example, a specific division or brand of one or both of the merger parties, a business plan for the relevant division or brand should be provided.
11. Provide any documents setting out the rationale for the merger. Indicate (if not contained in the document itself) the date of preparation and the identity and role of the author(s) within the business.
12. Provide copies of any documents (including but not limited to, minutes of meetings, studies, reports, presentations, surveys, analyses or recommendations including where these are contained in substantive/key emails)⁸ prepared internally or by external consultants for the purpose of assessing or analysing the transaction with respect to competitive conditions, competitors (actual and potential), potential for sales growth or expansion into new product or geographic areas, market conditions, market shares, the benefits of the acquisition, the investment case and/or the price to be paid and indicate (if not contained in the document itself) the date of preparation and the identity and role of the author(s) within the business. This should include but not necessarily be limited to:
 - a. documents prepared by or for personnel working on the transaction
 - b. documents prepared by or for senior management and/or member(s) of the Board
 - c. post-merger business plans or strategy, including integration plans and financial forecasts, and
 - d. all Information Memoranda that specifically relate to the sale of the target. If no such Information Memoranda exists, explain what information, or document(s) were given to the acquirer meant to serve the function of an Information Memorandum.
13. Provide copies of documents (including but not necessarily limited to reports, presentations, studies, analysis, industry/market reports or analysis – including customer research and pricing studies) in the acquirer's and/or target's possession or which are readily available and prepared or published

⁸ If merger parties are unsure what may be responsive, the CMA recommends that merger parties discuss the process for gathering these documents with the CMA.

in the last three years setting out the competitive conditions, market conditions, market shares, or competitors in the industry or business areas where the merger parties have a horizontal overlap or vertical relationship.

14. Provide any marketing and advertising strategy documents generated by, or on behalf of, either of the merger parties in the last year and relating to the product(s) or service(s) identified at 16 below.

Counterfactual

See Guidance Note 7 and paragraphs 4.3.1 to 4.3.29 of *Merger Assessment Guidelines*

15. To the extent that the merger parties do not agree with the CMA's general practice in relation to the counterfactual at Phase 1, specify what alternative counterfactual they submit the CMA should adopt, providing supporting evidence.

Market definition

See Guidance Note 8 and section 5.2 of *Merger Assessment Guidelines*

16. Describe the relevant product(s) or service(s) and geographic area(s) where the merger parties overlap or have a vertical relationship.
17. Identify the narrowest plausible set(s) of products or services and the narrowest geographic areas where the merger parties overlap as well as products/services and (supply from) geographic areas that might be considered substitutes.

Horizontal effects

See sections 5.4 to 5.5 of *Merger Assessment Guidelines*

18. Provide a description of how competition works for the product(s) or service(s) and geographic area(s) identified at 16 above (see Guidance Note 9).
19. For each of the product(s) or service(s) and geographic area(s) identified at 16 above, explain to what extent the merger may give rise to unilateral horizontal effects, that is, to what extent it is likely to cause loss of competition. Include:
 - a. information on the competitive constraint posed by each of the merger parties on each other

- b. information on the competitive constraint posed by the other principal suppliers in the market(s). Include the merger parties and each of their competitors' market shares (by value and volume) specifying the total market size(s) together with an explanation as to how these are calculated
 - c. a discussion of the extent to which the merger parties' products or services are substitutes and any supporting data, and
 - d. other information which may be relevant to the CMA's assessment depending on the type of sector the merger parties are active in or the data the merger parties hold. This includes bidding data, spare capacity and/or switching data (see Guidance Note 10).
20. Provide the names and the contact details for both merger parties' relevant customers and competitors (see Guidance Note 11).

Loss of potential competition

21. What barriers to entry or expansion exist for each merger party to start supplying product(s)/service(s)/geographic area(s) which it does not currently supply but which the other merger party is already supplying (or expected to supply)?
22. Are there any plans to do so? Provide any internal documents setting out any plans of either party to expand in the overlapping product(s), service(s) and geographic area(s) or to enter a market where the other party is operating.

Coordination

See paragraphs 5.5.1 to 5.5.19 of *Merger Assessment Guidelines*

23. Describe the impact of the merger on the potential for coordinated conduct between remaining competitors on the product(s) or service(s) and geographic area(s) identified at question 16 above post-merger.
24. In relation to the product(s) or service(s) identified at question 16, provide details of any inquiries by competition authorities in the UK or other countries where the merger parties are active in supplying these product(s) or service(s).

Potential entry or expansion

See section 5.8 of *Merger Assessment Guidelines*

25. Provide details of any barriers to entry and expansion in the product(s) or service(s) and geographic area(s) identified at question 16 above (see Guidance Note 12).
26. Provide details of any expansion, entry or exit over the past five years and of any companies that the merger parties consider are likely to enter or expand in the product(s) or service(s) and geographic area(s) identified at question 16 above post-merger in a sufficiently timely manner so as to adequately constrain the merged entity, providing any available evidence for that submission and contact details for any such entrant(s) (see Guidance Note 13).

Increase in the merger parties' buyer power

See section 5.4.19 to 5.4.21 of *Merger Assessment Guidelines*

27. For any product(s) (including raw materials) or service(s) which the merger parties both purchase, provide details of the merger parties' ability to obtain more favourable commercial conditions from suppliers as a result of this merger and the effects of any such increased ability on competition on all levels of the supply chain (see Guidance Note 14).
28. Provide contact details for each of the merger parties' relevant suppliers indicating the annual value and volume of purchases (see Guidance Note 15).

Countervailing buyer power

See Guidance Note 16 and section 5.9 of *Merger Assessment Guidelines*

29. Explain, with evidence where available, whether the merged entity will be subject to any countervailing buyer power.

Vertical and other effects

See section 5.6 of *Merger Assessment Guidelines*

30. If the merger parties operate at different levels of the supply chain, describe whether the merger would, or would be likely to, limit the supply of inputs or access to distribution such that downstream or upstream rivals would face higher costs post-acquisition or full or partial foreclosure of key inputs or distribution channels (see Guidance Note 17).
31. Provide contact details for the relevant competitors and customers of the merger parties on the upstream and downstream markets (to the extent not

already provided in response to questions 20 and 28) (see Guidance Note 18).

Efficiencies

See Guidance Note 19 and section 5.7 of *Merger Assessment Guidelines* and chapter 4 paragraphs 4.1 to 4.13 of *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance*

32. If applicable, provide a description of any efficiencies or relevant customer benefits that the merger parties believe will arise from the merger as well as any documents prepared internally or by external consultants discussing the expected efficiencies or relevant customer benefits.

Conglomerate effects

See section 5.6 of *Merger Assessment Guidelines*

33. Provide details of any areas of business in which only one of the merger parties is active but the other is active in the supply of a complementary product or another product which is generally purchased by the same set of customers.
34. Provide contact details for the relevant competitors and customers of the merger parties for the related products in which each of the merger parties is active (to the extent not already provided in response to question 20) (see Guidance Note 20).

Other information

35. Provide the name and contact details for any relevant regulatory authorities covering the industry in which the merger parties overlap.
36. Provide details of any trade associations which cover the industry in which the merger parties overlap.
37. Provide any other information that may be relevant to the application (see Guidance Note 21).

PART III – DECLARATION

As noted above, see the CMA's website for information on how to submit a Notice.

Declaration

The CMA will not accept a Notice unless the Declaration has been signed by the authorised person (see Guidance Note 22). Where a Notice is submitted jointly, each notifying party must sign the Declaration.

I understand that:

It is a criminal offence for a person to supply information in a Notice which that person knows to be false or misleading in any material respect.

The CMA may reject any Notice if it is suspected that it contains information which is false or misleading in any material respect.

The CMA will bring the existence of the merger proposal described in this Notice, and the fact that the Notice has been given, to the attention of interested parties.

Signed:

Name: (block letters)

Position: (block letters)

Date:

I have read and understood the declaration above. I confirm that the person named in reply to question 1 (if any) is authorised to act on my behalf for the purposes of this Notice and that I retain responsibility for the contents of this Notice.

Signed:

GUIDANCE NOTES TO MERGER NOTICE

Part I – General Information

Guidance Note 1

The notifying entity/entities can appoint a representative, for example, a firm of solicitors, to complete the Notice on its behalf and to act for it in further correspondence with the CMA. If the notifying entity/entities do authorise someone to act in this way it must sign the authorisation at Part III of the Notice.

If the appointed representative ceases to act for the notifying entity/entities, the CMA must be advised of this immediately.

Notifying entity/entities must give a full address to which the CMA can send all correspondence. If the notifying entity/entities have appointed a representative and wish correspondence to be sent to it, give its address here. Otherwise give details of the person within the company who will deal with the correspondence, and the address to which the CMA should write. Confirm that the person to whom correspondence should be addressed is authorised to accept service.

Relevant contact details includes full name, telephone number, UK address and email address and ensure that the CMA can make contact between 9.00am and 5.00pm on weekdays. If the notifying entity/entities' address changes, notify the CMA immediately in writing.

Part II – Merger details

The merger situation

Guidance Note 2

When describing the merger parties to the transaction, provide their full legal names and explain how this entity fits within the group structure if relevant, specifying the ultimate ownership. Identify any legal or natural person which, directly or indirectly, owns, controls, or has material influence (together, referred to as 'control')⁹ over the acquirer and is active in a relevant market, and any legal or natural person which the company directly or indirectly controls and is active in any of the product(s) or

⁹ Within the meaning of section 26 of the Act. See chapter 5 of the Guidance for further information on the meaning of ownership, control and material influence.

service(s) and geographic area(s) identified at question 16 above. If the acquiring party or group (where relevant) is a 'small or medium sized enterprise' (SME) under the Companies Act 2006 (sections 382 and 465) please specify as such companies are exempt from paying fees.

When describing the type of transaction, indicate, for example, whether it is a full merger, an agreed bid, a full takeover or the acquisition of assets or of a minority shareholding giving material influence, change of directorship or a joint venture.

When describing the consideration, provide its value as well as the form it will take.

The description of the key terms of the transaction should include but should not necessarily be limited to any factors upon which completion of the merger is conditional together with the status of these factors.

If the structure of the proposed arrangements is complex, provide a diagram.

Include a description of any other links between the merger parties (either formal or informal). This should also include (but should not necessarily be limited to) any associated persons.

On timing, for completed mergers, specify when the enterprises ceased to be distinct (within the meaning of sections 26 and 27 of the Act). For anticipated mergers, specify the expected time scale for exchange of contracts and completion of the merger as well as any other dates the merger parties wish the CMA to be aware of.

The CMA considers that where mergers are subject to investigation in more than one country (multi-jurisdictional mergers), there can be substantial benefits to the merger parties and to the competition authorities in those jurisdictions from encouraging communication and cooperation between the competition authorities. If the transaction has or is being notified in other jurisdictions, please indicate whether the merger parties would be willing to provide the CMA with a confidentiality waiver allowing it to exchange confidential information with the relevant competition agencies in other jurisdictions in respect of the notified merger.

Guidance Note 3

When describing the business or businesses being acquired, if assets are being acquired, set out which assets – both tangible and intangible - form part of the acquisition and include a brief description of the main products and services supplied.

Provide a brief description of the acquirer group's business (including the main products and services provided) together with a corporate structure chart and

organisation chart (showing the names, job titles and areas of responsibility of the senior executives of the merger parties).

Horizontal overlaps include any business activity in which both merger parties are active. Vertical relationships include any product or product types which one of the merger parties supplies, and which another merger party purchases (or could purchase as a substitute for other products), within the same geographic area. For the purposes of this Notice, it is not necessary for there to be a direct supply or purchase arrangement between the merger parties in order to constitute a vertical relationship.

SIC codes should be provided for all overlapping products. For the latest version of the SIC codes to be used, please consult the CMA's website.

Jurisdiction

Guidance Note 4

Explain the reasons why the merger parties consider that:

- two or more enterprises have ceased to be distinct or arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct, and
- the turnover or share of supply tests are met, including where relevant:
 - the UK turnover associated with the enterprise being acquired (see section 28 of the Act and chapter 5 of the Guidance). If relevant, explain the methodology adopted to estimate such turnover and/or
 - an estimate of the share of supply for any product or service of any description where the merging/merged businesses combined have a share of supply in the UK, or in a substantial part of the UK, of 25% or more and where the merger causes an increment in such share. Explain the methodology adopted to estimate such shares.

Supporting documents

Guidance Note 5

For mergers governed by the Takeover Code, the CMA does not envisage that the pre-notification timetable will raise significant difficulties in relation to the timing of public offers. Merger parties should however bear in mind the need to reconcile submission of the Notice with the requirements of the Takeover Code. If merger

parties are seeking a decision by the first closing date of an offer, the CMA will need to receive the Notice (following pre-notification) before the posting of the Offer Document. This will increase the likelihood of obtaining a Phase 1 decision by the first closing date. The CMA cannot be bound by the first closing date however, and where it is not in a position to reach a decision by the first closing date, the consideration period will need to be extended.

Guidance Note 6

The CMA will usually need only the most recent annual report and accounts of the main parties to the merger. However, where the acquiring company is part of a larger group, the CMA will normally also need the most recent group annual report and accounts. It will not need group accounts for the target's parent company where the target is a subsidiary or associate company and separate accounts are prepared for that company. It is important that the target's UK turnover for the preceding business year is provided. If no annual report or accounts are available, provide separate figures (audited if possible) on turnover (including UK turnover), profits and assets. For turnover, provide details of sales exclusive of VAT and duty. For profit, provide the profit and loss accounts.

Counterfactual

Guidance Note 7

Merger parties may wish to submit an alternative counterfactual from the current or pre-existing competitive situation to the merger.

Where the merger parties contend that the acquired firm is an exiting firm they should submit evidence (including internal documents) supporting the submission that the firm would have exited. These could include, but are not limited to, board documents, cash flow forecasts, balance sheet projections, documents showing that underlying assumptions of these forecasts hold absent the merger, documents that show all avenues of operational and financial restructuring have been exhausted and documents showing that the firm has sought additional finance and been rejected). Merger parties should also provide an explanation of how, if at all, the exiting business was marketed to purchasers, to whom, if any expressed an interest, what bids were offered and any internal documents assessing the bids.

Where the merger parties submit that the acquired firm was an exiting firm, provide the name and contact details for any relevant insolvency or company voluntary arrangement (CVA) practitioners working with the companies and lenders (secured or unsecured) that have provided the exiting firm with financing.

Market definition

Guidance Note 8

Where relevant, the response to this section should include a description of the catchment area for the geographic area(s).

Where the merger parties do not supply similar products but do nevertheless supply different products that are or may be substitutes for each other, the narrowest set of products will include all those products that are or may be substitutes for each other. Similarly, where the merger parties do not supply in the same geographic areas but do supply in geographic areas, supply from which may be substitutable, the narrowest geographic area will include both areas.

Where merger parties wish to refer to substitutes, provide a brief description, in terms of characteristics/price differences, of any product(s) or service(s) or (supply from) geographic areas that might be considered substitutes to the products(s) or service(s) or geographic areas of overlap between the merger parties on the demand or supply side. Provide supporting evidence of the extent of demand-side and supply-side substitutability.

Horizontal effects

Guidance Note 9

The description of competitive dynamics should include (but not be necessarily limited to):

- an indication of the product or service characteristics or other aspects of the firms' commercial propositions which are relevant for determining customers' choices
- an explanation of the role and importance of product differentiation in the product(s) or service(s) and geographic area(s) identified at question 16 above. Indicate the extent to which the merger parties' products are differentiated
- an explanation of how pricing is determined (that is, whether set by suppliers (posted pricing), negotiated between suppliers and customers (negotiated pricing) or the result of a bidding process organised by customers (bidding process), including any supporting documentation outlining the merger parties' price setting process and any analysis used to set prices
- an explanation of any different distribution channels through which overlapping products are supplied, and

- an explanation of the supply chain for the product(s) and any differences between the geographic areas identified at question 16.

Guidance Note 10

Use merger parties' internal data and refer to industry data (and provide copies of the same), where available. Wherever figures are provided, use the most recent figures available and specify the period they cover. If market shares vary significantly from year to year, information for several years will be required. If the market is thought to be wider than the UK, it is helpful to have separate figures for the domestic market and for imports, segmented by supplier if possible, and exports.

In addition, in response to question 19, where relevant, provide:

- an estimate of the merger parties' and, if available, their competitors' spare capacity
- for markets in which the merger parties submit bids or requests for quotations are made, details of any bids made by each of the merger parties in the last one to five years¹⁰ to win business in the overlapping markets, indicating for each bid (i) whether this bid was won or lost, (ii) if known, the reasons why it was won or lost, (iii) what suppliers participated in the bid, (iv) if available, the winner and the ranking of the other bidders, and (v) the date of the bid
- if available, any data of customers switching between suppliers in the past three to five years or, more generally, information that points to the degree of competitive interaction between suppliers,¹¹ and
- variable profit margins (sales revenue minus direct cost of sales) for each of the products supplied by each party. Provide details about the income and all of the costs for each product and an explanation of whether such costs are fixed (and therefore excluded) or variable costs.

¹⁰ The time frame over which bidding information should be provided depends on the extent of the parties' bidding activity. For example, should the parties submit infrequent or irregular bids as part of their day to day business activity, the period for which bidding information should be provided is likely to be longer. The parties are encouraged to contact the CMA to discuss the appropriate scope of bidding information in their case.

¹¹ This information can take various different forms and may involve pricing and volume information over time. The CMA encourages parties to engage with the case team in pre-notification to establish the information available that may allow for an assessment of the closeness of substitution between products.

Some or all of the information listed above may be waived by the CMA if not relevant to the sector or case at hand.

Guidance Note 11

Contact details must include a named contact, address, e-mail address and telephone number. Contact details, where possible, should be for the named contact.

In the majority of cases, this should include:

- contact details for the top 10 to 20 competitors (including overseas companies/importers) for each product or service provided by both parties to the merger in each geographic area of overlap
- contact details and estimated share of the party's business of both merger parties' top ten to 50 customers (including overseas customers if appropriate). Where there are marked differences in the size or other features of the merger parties' customers, such that some customers may purchase goods or services by different means or in significantly different quantities, provide these same details for five to 20 customers for each group identified (for example, five large, five medium and five small customers), and
- to the extent not already provided and relevant, the contact details for the entity or entities running any bidding process in relation to the product(s) or service(s) and geographic area(s) where the merger parties overlap.

The number of contact details required will vary on a case by case basis and the notifying parties are encouraged to contact the CMA to discuss what number is appropriate in their case.

Potential entry or expansion

Guidance Note 12

Any response should cover (but not necessarily be limited to) for each of the sets of product(s), service(s) and geographic area(s):

- how easy it is to start supplying the products in the appropriate geographical areas, and
- how easy it is for customers to switch between competitors' products or services, with an estimate of any switching costs.

Where merger parties submit that it is easy to enter and supply the product(s), service(s) and geographic area(s) where the merger parties overlap, provide:

- an estimate of the capital expenditure and time required to enter the market on a scale necessary to gain a 5% market share, both as a new entrant, and as a company which already has the necessary technology and expertise (for example, a company located overseas)
- an estimate of the scale of annual expenditure on advertising/promotion required to achieve a market share of 5%
- details of any other factors affecting entry, for example, planning restraints, technology or R and D requirements, availability of raw materials, length of contracts etc including, where possible, an estimate of the time and resources necessary to overcome these factors, and
- an assessment of the ease of exit from the market (including an estimate of to what extent costs are recoverable).

Some or all of the information listed above may be waived to the extent that the horizontal overlap(s) is/are not considered material by the CMA and neither of the merger parties planned to expand in the relevant product(s) or service(s) and geographic area(s) identified at question 16 above or enter a product or service or geographic area in which the other is present. Merger parties are encouraged to discuss with the case team where they consider an information waiver is relevant.

Guidance Note 13

In identifying any third parties likely to enter the relevant market(s), merger parties should:

- explain whether such entrant(s) would have started supplying the products in the absence of the merger and the extent to which such entry would lead to greater competition
- provide evidence of any firms which do not currently supply the product(s) or service(s) but which, nevertheless, could readily enter, and
- provide evidence of any existing smaller suppliers that could readily expand.

Contact details must include a named contact, address, e-mail address and telephone number. Contact details, where possible, should be for the named contact.

Increase in the merger parties' buyer power

Guidance Note 14

The response should include (but not necessarily be limited to):

- the merger parties' share of procurement from the market upstream to the product(s) or service(s) they supply
- an explanation of whether any such ability could result in the suppliers being forced or induced to offer less favourable conditions to the merger parties' competitors. For example, where the supplier incurs fixed costs, it may recover such costs by charging a larger proportion of them to the merger parties' competitors than to the merger parties, as a result of the merger parties' increased buyer power (known as the 'waterbed effect'), and
- details of the merger parties' ability and incentive to reduce demand in order to reduce the purchase price (known as 'demand withholding'), as a result of the merger parties' increased buyer power.

Some or all of the information listed above may be waived to the extent that the horizontal overlap(s) is/are not considered material by the CMA. Merger parties are encouraged to discuss with the case team where they consider an information waiver is relevant.

Guidance Note 15

Contact details must include a named contact, address, e-mail address and telephone number. Contact details, where possible, should be for the named contact.

In the majority of cases, the response should include contact details for each of the merger parties' top five to 20 suppliers. However, the number of contact details required will vary on a case by case basis and the notifying parties are encouraged to contact the CMA to discuss what number is appropriate in their case.

Countervailing buyer power

Guidance Note 16

Where merger parties wish to rely on countervailing buyer power, provide an explanation of (but not necessarily be limited to) the following:

- whether there are single customers or groups of customers holding particular negotiating strength with the merger parties for the product(s) or service(s)

where they overlap (for example, where the customer(s) can easily switch its/their demand away from the supplier, can sponsor entry or supply the product(s) itself/themselves)

- whether and, if so, how customers outside such groups would be able to benefit from the negotiation strength of the customers within the group. For example, explain whether contracts are negotiated individually with single customers and the extent to which it is possible for the supplier to price discriminate across customers of varying negotiation strength, and
- how (and the extent to which) the merger will affect customers' negotiating strength.

Vertical and other effects

Guidance Note 17

Any response to question 30 should cover (but not necessarily be limited to) the following:

- a description of the vertical supply chain (including each of the merger parties and their key competitors' roles at each stage and the extent of pre and post-merger vertical integration)
- a description of the pricing mechanism at each stage of the supply chain where any of the merger parties operates (as well as in any other relevant stage)
- each of the merger parties' share of supply in each level of the vertical chain
- variable profit margins (sales revenue minus direct cost of sales) for each of the products supplied by each party. Provide details about the income and all of the costs for each product and an explanation of whether such costs are fixed (and therefore excluded from the calculation of variable profit margin) or variable costs
- the ratio between average upstream and average downstream price for each of the products supplied by each party in each level of the vertical chain
- the general importance of any input to the downstream product
- the degree of economies of scale or scope in the input product or service in any vertical supply arrangement and the extent to which demand is characterised by network effects (that is, when the value of a product increases when the number of customers using the product increases)

- if available, any estimate of cost-pass through
- a list of exclusivity agreements and any internal documents discussing any plans to put in place an exclusivity agreement in the future, and
- the merger parties' views on the scope for the merger to enable the merger parties to enhance their ability and/or incentive to engage in input or output foreclosure or any other vertical effect.

Some of the information listed above may be waived to the extent that the vertical relationship is not considered material by the CMA. Merger parties are encouraged to discuss with the case team where they consider an information waiver is relevant.

Guidance Note 18

Contact details must include a named contact, address, e-mail address and telephone number. Contact details, where possible, should be for the named contact.

In the majority of cases, merger parties should provide between:

- five and 20 of the top competitors of the merger parties on the upstream and downstream markets (to the extent not already provided in response to question 20 and 28), and
- five and 30 of the top customers of the merger parties on the upstream and downstream markets. Where there are marked differences in the size or other features of the customers, such that some customers may purchase goods or services by different means or in significantly different quantities, provide these same details for five customers for each group identified (to the extent not already provided in response to question 20 and 28).

The number of contact details required will vary on a case by case basis and the notifying parties are encouraged to contact the CMA to discuss what number is appropriate in their case.

Efficiencies and relevant customer benefits

Guidance Note 19

Where merger parties submit that the transaction gives rise to efficiencies, any description should include (but not necessarily be limited to) the following:

- a detailed explanation of how the merger would generate such efficiencies

- if possible, a quantification of any such efficiencies, specifying the timeframe required to achieve them
- an explanation of the extent to which the efficiencies would be sufficient to prevent a substantial lessening of competition
- an explanation of the reasons why such efficiencies could not be achieved in the absence of this merger, and
- any documents prepared internally or by external consultants discussing the expected efficiencies.

Where merger parties wish to submit that the transaction gives rise to relevant customer benefits, any description should include (but not necessarily be limited to) the following:

- a detailed explanation of how the merger would generate such relevant customer benefits
- if possible, a quantification of any relevant customer benefits, specifying the timeframe required to achieve them
- an explanation of the extent to which the benefits generated by the merger are likely to be passed on to UK customers and UK final consumers
- an explanation of the reasons why such relevant customer benefits could not be achieved in the absence of this merger or a similar lessening of competition, and
- any documents prepared internally or by external consultants discussing the expected relevant customer benefits.

Where merger parties wish to put forward efficiency/relevant customer benefit arguments, the CMA requires these to be made at the time of the filing for the Notice to be a satisfactory notification¹² and encourages advanced pre-notification discussion with the case team.

¹² In healthcare mergers, the CMA will liaise closely with Monitor as to whether the information received with respect to relevant customer benefits will allow Monitor to start its assessment of the same. The CMA reserves the right to consider the Notice incomplete if this is not the case.

Conglomerate effects

Guidance Note 20

Where relevant, the merger parties should provide the following:

- each of the merger parties' share of supply in each of the related product(s) or service(s) and geographic area(s) identified at 16 above
- the merger parties' variable profit margins (sales revenue minus direct cost of sales) for each of the products supplied by each party in each of the related product categories. Provide details about the income and all of the costs for each product and an explanation of whether such costs are fixed (and therefore excluded) or variable
- the extent to which customers purchase the products together as a bundle or from the same supplier
- customer preferences for variety and one-stop shopping, and
- the costs to rivals of providing variety and one-stop shopping at a scale to enable them to compete effectively with the merged firm.

Merger parties are encouraged to discuss with the CMA where they consider an information waiver is relevant.

Contact details must include a named contact, address, e-mail address and telephone number. Contact details, where possible, should be for the named contact.

In the majority of cases, merger parties should provide between:

- five and 20 of the top competitors of the merger parties supplying neighbouring product(s) or service(s) (to the extent not already provided in response to question 20), and
- five and 30 of the top customers of the merger parties in each of the neighbouring product(s) or service(s). Where there are marked differences in the size or other features of the customers, such that some customers may purchase goods or services by different means or in significantly different quantities, provide these same details for five customers for each group identified (to the extent not already provided in response to question 20).

The number of contact details required will vary on a case by case basis and the notifying parties are encouraged to contact the CMA to discuss what number is appropriate in their case.

Other information

Guidance Note 21

The merger parties may, of course, provide any other information they consider relevant. For example, references to earlier decisional practice within the same markets, contacts with other government departments or regulators about the merger, either because they have responsibilities in the relevant areas or because they are customers, and any contacts with overseas competition authorities. This could also include, for example, submissions on the relevance of the 'de minimis' exception (see *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122)).

The merger parties are also welcome to give their own views on the competition implications or any other effects of the merger.

Part III – Declaration

Guidance Note 22

The Declaration must be signed by the authorised person. It draws the notifying parties' attention to two important provisions of the Act. The first relates to the provision of false or misleading information. Under section 117 of the Act it is an offence to intentionally or recklessly give the CMA information, which is false or misleading in a material respect. More specifically, it is an offence:

- knowingly or recklessly to give to the CMA information that is false or misleading in a material respect, either in the Notice, or in reply to any additional questions raised by the CMA during the consideration period, or
- knowingly or recklessly to supply information to a third party that is false or misleading in a material respect, for example an authorised representative or legal adviser, in the knowledge that they will then supply it to the CMA.

The penalties for breach of this provision may include an unlimited fine or a maximum of two years' imprisonment, or both.

The CMA also has powers to reject the Notice, at any time before the period for considering it expires, where it suspects that any information given in the Notice, or in response to further enquiries, is false or misleading. The effect of rejection is that the proposal which is notified will remain liable for reference for a period of four months after the date of its completion (subject to any extension in some circumstances).

Secondly, the Declaration reminds the notifying parties that the CMA will publicise the existence of the merger proposal as notified. It will also draw it to the attention of third parties in order to seek their views. The CMA will have regard to the provisions of the Act in relation to disclosure of information. Its aim in publicising the merger proposal is solely to ensure that those with an interest in the merger are given an opportunity to comment.

The Declaration also confirms the authorisation of any representative named in the Notice to act on behalf of a company.

The Declaration must be signed by a person or persons with authority to bind that company.

DRAFT

F. DRAFT *TEMPLATE INTERIM ORDER*

COMPETITION AND MARKETS AUTHORITY

TEMPLATE INITIAL ENFORCEMENT ORDER (COMPLETED MERGER)

ACQUISITION BY X (ACQUIRER) OF Y (TARGET)

Initial Enforcement Order made by the Competition and Markets Authority pursuant to section 72 of the Enterprise Act 2002 (the Act)

Whereas:

- (a) the Competition and Markets Authority (CMA) has reasonable grounds for suspecting that it is or may be the case that X and Y have ceased to be distinct
- (b) the CMA is considering, pursuant to section 22 of the Act whether it is or may be the case that the transaction has or may be expected to result in a substantial lessening of competition in any market or markets in the UK
- (c) the CMA wishes to ensure that no action is taken pending final determination of any reference under section 22 of the Act which might prejudice that reference or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the reference, and
- (d) the circumstances set out in section 72(6) of the Act do not apply and the reference has not been finally determined in accordance with section 79(1) of the Act.

Now for the purposes of preventing pre-emptive action in accordance with section 72 of the Act the CMA makes the following order addressed to X.

Title, commencement, application and scope

1. The title of this Order is [*title of order*].

2. This Order commences on the commencement date.
3. This Order applies to X.
4. Notwithstanding any other provision of this Order, no act or omission shall constitute a breach of this Order, and nothing in this Order shall oblige X to reverse any act or omission, in each case to the extent that it occurred or was completed prior to the commencement date.

Management of the X and Y business until determination of proceedings

5. Except with the prior written consent of the CMA, X shall not during the specified period take any action which might prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:
 - (a) lead to the integration of the Y business with the X business
 - (b) transfer the ownership or control of Y or any of its subsidiaries, or
 - (c) otherwise impair the ability of Y to compete independently in any of the markets affected by the transaction.
6. Further and without prejudice to the generality of paragraph 6 and subject to paragraph 4, X shall at all times during the specified period procure that, except with the prior written consent of the CMA:
 - (a) the Y business is carried on separately from the X business and Y's separate sales or brand identity is maintained
 - (b) the Y business is maintained as a going concern and sufficient resources are made available for the development of the Y business, on the basis of its pre-merger business plans
 - (c) except in the ordinary course of business, no substantive changes are made to the organizational structure of the Y business or to the management responsibilities within the Y business
 - (d) the nature, description, range and quality of [goods and/or services] supplied in the United Kingdom by each of the two businesses are maintained and preserved
 - (e) except in the ordinary course of business for the separate operation of the two businesses:

- (i) the assets of the Y business are maintained and preserved, including facilities and goodwill
 - (ii) none of the assets of the Y business are disposed of, and
 - (iii) no interest in the assets of the Y business is created or disposed of
- (f) there is no integration of the information technology of the two businesses, and the software and hardware platforms of the Y business shall remain essentially unchanged, except for routine changes and maintenance
- (g) the [customer] [supplier] lists of the two businesses shall be operated and updated separately and any negotiations with Y's existing or potential [customers] [suppliers] in relation to the Y business will be carried out by the Y business alone and for the avoidance of doubt X will not negotiate on behalf of Y (and vice versa) or enter into any joint agreements with Y (and vice versa)
- (h) all existing contracts continue to be serviced by the business to which they were awarded
- (i) no changes are made to key staff or to the organizational structure of the Y business or to the management responsibilities within the Y business
- (j) no key staff are transferred between the two businesses
- (k) all reasonable steps are taken to encourage all key staff to remain with the Y business, and
- (l) no business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to the two businesses, shall pass, directly or indirectly, from Y (or any of its employees, directors, agents or affiliates) to X (or any of its employees, directors, agents or affiliates), or *vice versa*, except where strictly necessary in the ordinary course of business and on the basis that, should the merger be prohibited, any records or copies (electronic or otherwise) of such information wherever they may be held will be returned to the relevant business and any copies destroyed.

Compliance

7. X shall procure that each of its subsidiaries complies with this Order as if the Order had been issued to each of them.

8. X shall forthwith provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by X and its subsidiaries with this Order. In particular, on the [●] 201[●] and subsequently on the [●] of each month, (or, where the [●] does not fall on a working day, the first working day thereafter) the Chief Executive Officer of X shall provide a monthly statement to the CMA on behalf of X confirming compliance with this Order in the form set out in the Appendix to this Order.
9. At all times, X shall, or shall procure that Y, actively keep the CMA informed of any material developments relating to the Y business which includes but is not limited to:
 - (a) details of staff who leave or join the Y business
 - (b) any interruption of Y's business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours
 - (c) all substantial customer volumes won or lost by the Y business including any substantial changes in customers' demand, and
 - (d) substantial changes in the Y business contractual arrangements or relationships with key suppliers.
10. If X has any reason to suspect that this Order might have been breached it shall immediately notify the CMA and any monitoring trustee that X may be directed to appoint under paragraph 11.
11. (1) The CMA may give directions falling within subparagraph 11(2) to:
 - a. A person specified in the directions, or
 - b. A holder for the time being of an office so specified in any body of persons corporate or unincorporated.(2) Directions fall within this paragraph if they are directions:
 - a. To take such steps as may be specified or described in the directions for the purpose of carrying out, or ensuring compliance with, this Order, or
 - b. To do, or refrain from doing, anything so specified or described which the person might be required by this Order to do or refrain

from doing.

(3) the CMA may vary or revoke any directions so given.

12. X shall comply in so far as it is able with such directions as the CMA may from time to time give to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with this Order.

Interpretation

13. The Interpretation Act 1978 shall apply to this Order as it does to Acts of Parliament.

14. For the purposes of this Order:

'the Act' means the Enterprise Act 2002

'an affiliate' of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on from time to time and any enterprise that the second person carries on from time to time would be regarded as being under the common control for the purposes of section 26 of the Act

'business' has the meaning given by section 129(1) and (3) of the Act

'commencement date' means [*date of order*]

'control' includes the ability directly or indirectly to control or materially to influence the policy of a body corporate or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, and in the case of a body corporate, a person shall for the purposes of this Order be deemed to control it if he holds, or has an interest in, shares of that body corporate which amount to 10% or more of its issued share capital or which carry an entitlement to vote at meetings of that body corporate of 10% or more of the total number of votes which may be cast at such meetings

'the decisions' means the decisions of the CMA on the questions which it is required to answer by virtue of section 35 of the Act

'key staff' means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business

‘the ordinary course of business’ means matters connected to the day-to-day supply of [*goods and/or services*] by Y and does not include matters involving significant changes to the organizational structure or related to the post-merger integration of Y

‘specified period’ means the period beginning on the commencement date and terminating when the reference is finally determined in accordance with sections 79(1) and (2) of the Act

‘subsidiary’, unless otherwise stated, has the meaning given by section 1159 of the Companies Act 2006

‘the transaction’ means the acquisition of Y by X

‘the two businesses’ means the X business and the Y business

‘X’ means [*full registered name of acquirer parent company*]

‘the X business’ means the business of X and its subsidiaries carried on as at [*date of acquisition*]

‘Y’ means [*full registered name of target*]

‘the Y business’ means the business of Y and its subsidiaries carried on as at [*date of acquisition*], and

unless the context requires otherwise, the singular shall include the plural and vice versa.

Compliance statement for X

I [*insert name*] confirm on behalf of X that:

- (a) X has complied with the Order made by the CMA on [date] ('the Order') in the period from [*insert date*] to [*insert date*].
- (b) X's subsidiaries have also complied with this Order in the period from [*insert date*] to [*insert date*].
- (c) No action has been taken by X in the period from [*insert date*] to [*insert date*] that might prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action by the CMA which may be justified by its decision on such a reference.
- (d) X and its subsidiaries remain in full compliance with the Order and will, or will procure that Y, continue actively to keep the CMA informed of any material developments relating to the Y business in accordance with paragraph 10 of the Order.
- (e) The Y business has been maintained as a going concern and sufficient resources have been made available for the development of the Y business, on the basis of its pre-merger business plans (other than changes to the Y business made prior to the commencement date).
- (f) Subject to integration which had occurred prior to the commencement date:
 - i) the Y business's customer/supplier lists have been operated and updated purely for the purposes of the Y business without any involvement of X; and
 - ii) All customer/supplier negotiations for the Y business have been carried out independently of X (and *vice versa*).
- (g) There have been no substantive changes to the nature, description, range and quality of any goods and/or services currently supplied in the United Kingdom by the X business or the Y business in the period from [*insert date*] to [*insert date*].

Assets—including facilities and goodwill

- (h) Except in the ordinary course of business, none of the assets of the Y business

have been disposed of in the period from *[insert date]* to *[insert date]*.

- (i) Except in the ordinary course of business, no interest in the assets of the Y business has been created or disposed of in the period from *[insert date]* to *[insert date]*.
- (j) Except in the ordinary course of business, all of the assets of the Y business have been maintained and preserved as at *[start date of this compliance reporting period]*.

Contracts

- (k) All existing contracts awarded to the Y business continue to be serviced by Y, except to the extent novated, assigned or subcontracted prior to the commencement date.

Information technology systems

- (l) There have been no changes to the software and hardware platforms of the Y business, beyond routine changes and maintenance, in the period from *[insert date]* to *[insert date]*.

Staff

- (m) No changes have been made to or to the key staff or the organizational structure of the Y business or to the management responsibilities within the Y business in the period from *[insert date]* to *[insert date]*.

Material developments

- (n) Except as listed in paragraph (o) below, in the period from *[insert date]* to *[insert date]* there have been no:
 - (i) interruptions of Y's business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that have prevented it from operating in the ordinary course of business for more than 24 hours
 - (ii) substantial customer volumes won or lost for the Y business or substantial changes to the Y business's customer contracts, or
 - (iii) substantial changes in the Y business contractual arrangements with key suppliers.

(o) [list of material developments]

Confidential information

(p) Except as permitted by the Order, no business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to the two businesses, has passed, directly or indirectly, from Y (or any of its employees, directors, agents or affiliates) to X (or any of its employees, directors, agents or affiliates), or *vice versa*.

Interpretation

(q) Terms defined in the Order have the same meaning in this compliance statement.

FOR AND ON BEHALF OF X

Signature

Name

Title

Date