United Kingdom

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1. Introduction to merger control in the UK

The UK has a voluntary filing system. Parties can close without filing or clearance subject to the risk that the transaction may be investigated and remedies imposed after closing.

The UK antitrust authority, the Competition and Markets Authority ('CMA' or 'Authority'), can and does take enforcement action when it finds that a transaction could result in a 'substantial lessening of competition'. The authority will generally not prevent a pre-clearance closing unless the closing would result in steps being taken that would frustrate a future remedy being imposed by the Authority. In appropriate cases, it will obtain a 'hold separate' order pending its investigation and decision.

1.1 Overview of the merger clearance process

The UK merger control provisions are found in the Enterprise Act 2002 ('EA 2002') and various guidance and related documents.[1] All Authority decisions and notices are published on its website.

The UK's competition law regime underwent significant changes in April 2014, with the advent of the CMA, the revamped competition law enforcer. The CMA, which is an amalgamation of its now defunct predecessors the Office of Fair Trading ('OFT') and the Competition Commission ('CC'), became operational on 1 April 2014, and brought with it some developments of the existing merger regime.

The UK operates a voluntary merger notification regime. There is no legal obligation to wait for merger clearance before closing a transaction, or even to notify the Authority that a merger meeting the jurisdictional thresholds will take place. However, the Authority can and does take enforcement action where it finds that a transaction could result in a 'substantial lessening of competition'.

Indeed, the Authority has various powers to enhance and render more

[1] Before the EA 2002, the relevant legislation was the Fair Trading Act 1973, and the regulatory authority was known as the Monopolies and Mergers Commission.

effective its regulatory control of transactions which have a UK nexus. In particular, as compared to the pre-2014 regime, the Authority now has greater power to: (1) impose interim orders at a much earlier stage in its review; (2) require integration that already took place to be unwound;[2] and (3) impose penalties for breaching an interim order. (Recent practice indicates that the Authority is routinely imposing interim orders requiring integration to be halted and gradually rolling back the restrictions imposed.) The Authority also has information-gathering powers and the power to impose financial penalties for failure to comply with a compulsory information request. In addition, parties can wait until the Authority has prepared its reference decision (decision to refer the transaction to an in-depth, phase II investigation) before offering remedy commitments, or 'undertakings in lieu', instead of a reference.[3]

1.2 The role of the UK institutions

(a) Current institutions

The following institutions have a role in UK merger control:

- The CMA: The Authority is responsible for: (a) undertaking an initial review of qualifying mergers, and has a duty to refer transactions that have raised, or may be expected to raise, significant competition issues to a second-phase in-depth review (unless the parties propose remedies); and (b) carrying out more detailed second-phase reviews of mergers raising significant competition issues, and has the power to impose remedies. In addition, it monitors the press for transactions that have not been notified and considers complaints and mergers that have been filed with the European Commission.
- The Secretary of State: can intervene in a small category of defined cases which raise public interest or national security considerations, by means of serving an 'intervention notice'.
- The Competition Appeal Tribunal ('CAT'): this is an independent appeals body, which can review decisions on mergers taken by the Authority or the Secretary of State.

[2] Even under the pre-2014 regime, the Authority had the power to impose interim measures halting further integration where it perceived a risk that it would later become more difficult to unwind a potentially anti-competitive transaction. However, it could not order the unwinding of integration which had already taken place except by means of a final decision. See eg, the CC order on 6 June 2013 ordering the unwinding of the completed merger between Eurotunnel and SeaFrance. This decision was appealed and the transaction was remitted to the Authority. On remittal, the Authority published its final report *Eurotunnel/Sea France merger enquiry remittal* (27 June 2014), confirming the original findings that, in this case, the acquisition of assets was tantamount to the acquisition of a business. Following several appeals, the CMA's remedy order (unwinding the transaction) was ultimately reinstated by the UK's Supreme Court.

[3] Under the pre-2014 regime, the parties had to submit remedies immediately after the 'Issues Meeting' and before the reference decision had been drafted.

Transactions taking place in the UK may be subject to review under the European Merger Regulation ('EUMR'). Under the EUMR, where a qualifying transaction meets the EUMR thresholds, a mandatory notification to the European Commission may be required. The EUMR does allow for a transaction notified to the Commission to be referred back to the Authority (and/or any other relevant national authority) where the transaction may have effects in the national or more local market only, or where it raises issues of legitimate national or local interests (public policy considerations, such as media plurality or defence).

(b) The old regime/the new regime

Since assuming full functions and powers on 1 April 2014, the CMA has investigated and issued decisions in respect of a large number of mergers in a wide variety of industries. Further, as the substantive test is the same as that used under the old regime, previous decisions of the OFT and CC remain relevant. Furthermore, the CMA has issued a host of new guidance materials and, where relevant, we will refer to these.[4]

(c) The structure of the CMA

Although the Authority is now the sole UK competition authority, its governance structure reflects a continuation of the two phases of decision-making in merger transactions (previously split between the OFT in the first instance and on referral the CC):

- 'Phase I' decisions are made by the Authority Board. Decisions include whether the test for reference has been met (see below), and whether there are grounds to exercise the Authority's discretion not to refer a qualifying transaction for an in-depth (phase II) review; and
- 'Phase II' decisions are made by a group of independent experts selected from a pool of panel members appointed to the Authority by the Secretary of State. This review focuses on whether the relevant merger situation has resulted in, or may be expected to result in, a 'substantial lessening of competition' and, if so, what action should be taken to remedy, mitigate or prevent any anti-competitive outcome.

(d) The role of the CMA

The Enterprise and Regulatory Reform Act 2013 ('ERRA 2013') formally established the CMA. The role of the Authority is to promote competition within and outside the UK for the benefit of consumers.

One of the primary functions of the Authority is to review 'relevant merger

[4] Much of the historic OFT/CC documentation has been archived and uploaded to the UK National Archives (www.nationalarchives.gov.uk).

situations' by gathering information on transactions during the phase I review. ('Relevant merger situation' means a merger that meets the jurisdictional and transaction thresholds.[5])

Various types of transactions may fall under the ambit of a 'relevant merger situation'. Most involve the purchase of a shareholding in another company, but they may also involve other arrangements, such as the transfer or pooling of assets or the creation of a joint venture. However, the test for a 'relevant merger situation' is different from a 'concentration' under the EUMR. (Please see section 2.1 below.)

At the end of a phase I investigation, the Authority has a duty to refer any merger situation which has resulted, or may be expected to result in, a 'substantial lessening of competition' in a UK market to a phase II in-depth investigation.[6]

However, as further discussed at section 4.9(c) below, the Authority may choose not to refer the transaction at the end of a phase I review if it believes that:

- the merger situation is only anticipated and the arrangements are not far enough advanced to make a referral;[7] or
- the benefits created by the merger situation outweigh the lessening of competition concerns; or
- the market(s) concerns are not significant enough to require a reference ('test for reference').

NOTE: While the UK merger regime is a voluntary notification regime, parties should be aware that the Authority conducts its own market monitoring of non-notified merger activity. It has a dedicated team monitoring the trade press and communicates regularly with other competition authorities. It can also become aware of a merger through a complaint made by a third party. As a result the Authority often investigates completed mergers that were not notified by the merging parties.

1.3 Methodology of merger analysis

As indicated before, the UK merger regime is concerned with 'relevant merger situations' that may cause a 'substantial lessening of competition'. (Please see section 2.1 below for a discussion of 'relevant merger situations'.)

The merger review process applies to completed or anticipated merger transactions where:

- two or more companies cease to be distinct, or there are arrangements in

[5] UK Merger Assessment Guidelines, ss 1.9 and 3.1.1.
[6] CMA Merger Guidance on jurisdiction and procedure (pp6–7).
[7] CMA Merger Guidance on jurisdiction and procedure (p11).

progress or in contemplation which, if carried out, will lead to companies ceasing to be distinct; and

- either one or both of the following criteria are satisfied:
  - the UK turnover associated with the enterprise being acquired exceeds £70 million (‘the turnover test’); or
  - as a result of the merger, a 25%+ share in the supply or acquisition of goods or services of any description in the UK (or in a substantial part of the UK) is created or enhanced (‘the share of supply’ test); and
- the merger either has not yet taken place, or has taken place within four months of the reference.

All three criteria set out above must be met for there to be a relevant merger situation and for the EA 2002 to apply. As discussed at section 3.1(c) below, special jurisdictional thresholds apply to national security mergers.

1.4 The filing process and timing

If the parties wish to have pre-merger clearance, the first step is to contact the Authority and request a case team to be allocated to review the transaction. This can be done via a ‘Merger Case Team Allocation Request Form’ available on the Authority’s website.

Once the case team has been established and a preliminary discussion has taken place, formal notification is made using the Authority’s Notice template, laid out in section 96 of the EA 2002. The timelines for notification are set out in detail at section 4.2 below.

1.5 Referral to, and jurisdiction of, the EU

The Authority might not always be the best placed regulator to review a merger. If the merger has an effect across the EU, it may be that the European Commission is better placed to review the transaction. The Commission may be asked by either the parties or one or more of the national competition authorities to review the transaction.

The Authority will determine whether it has sufficient jurisdiction to review a merger, or whether it should make a referral to the Commission. The Authority will liaise with the Commission when making its determination.[8]

Similarly, it is possible that a transaction meets the EUMR thresholds but that the Authority considers that it raises significant competition issues within the UK that warrant its own investigation into the merger.

1.6 Public interest intervention by the Secretary of State

The Secretary of State has the power to intervene in mergers, even those falling

[8] CMA Merger Guidance on jurisdiction and procedure (p140).

within the jurisdiction of the European Commission under the EUMR, on the grounds that they raise certain public interest considerations. Relevant public interest considerations include for example national security, plurality of media ownership and the need to maintain the stability of the UK financial system.

The process for considering the public interest implications of a merger which meets the jurisdictional thresholds (see section 3.1 below) is, broadly, as follows:

- The Secretary of State will give a public interest intervention notice to the CMA if the Secretary of State believes that a public interest issue is relevant to the consideration of the merger.
- During phase I, the CMA will seek comments from third parties on both competition issues and public interest issues. The CMA then prepares a report to the Secretary of State on the jurisdictional and competition issues (which are binding on the Secretary of State). The report will also summarise the public interest representations received by the CMA.
- Following the CMA's report, the Secretary of State can decide that: (1) the case can be progressed by the CMA in the normal way as there are no public issues which are material to the outcome; (2) the transaction should be cleared at phase I (eg, if public interest grounds justify any substantial lessening of competition identified by the CMA); or (3) the transaction should be referred to a phase II investigation, either on public interest considerations alone or in conjunction with competition grounds.
- If referred to phase II, whether on pure public interest grounds or in conjunction with competition issues, the CMA will consider whether the merger will operate against the public interest and, if relevant, whether it will result in an SLC and possible remedies. The CMA will report its conclusions to the Secretary of State (including recommendations with regards to the public interest issues), which then has 30 days from receipt of the CMA's report to publish a decision. The CMA's competition findings are binding on the Secretary of State, but the Secretary of State decides how to proceed with regards to any public interest issues.

In addition to the power to intervene on public interest grounds in mergers which meet the jurisdictional thresholds, the Secretary of State can also intervene in mergers which raise certain defined public interest issues even where the jurisdictional thresholds are not met. By issuing a special public interest intervention notice, the Secretary of State can intervene in this manner where a merger involves government contractors or sub-contractors which hold or receive confidential defence-related material or in certain media mergers. Special public interest mergers are only scrutinised on public interest grounds and not competition grounds.

The proposed merger between Sky and 21st Century Fox is a recent example of the Secretary of State intervening on public interest grounds. Despite unconditional clearance by the European Commission, the Secretary of State issued an intervention notice on the public interest grounds of media plurality and commitment to broadcasting standards. The CMA issued its final phase II report in May 2018, which recommended that the transaction was not in the public interest due to concerns of media plurality pointing, amongst other things, to the possible increased influence of the Murdoch Family Trust over public opinion and the political agenda, The CMA therefore recommended to the Secretary of State that the most effective and proportionate remedy was to divest Sky News to a third party. The Secretary of State accepted the CMA's report and recommendations on 5 June 2018.

2. Types of transactions that may need to be filed

2.1 Overview: basic concepts of a 'relevant merger situation'

A 'relevant merger situation' exists where two or more enterprises cease to be distinct, or where arrangements are in place or contemplated, whereby two or more enterprises will cease to be distinct if the arrangements are carried out.

If two enterprises are brought under common ownership or control then they will cease to be distinct.[9]

The following definitions are relevant when considering whether a 'relevant merger situation' exists:

- 'Enterprise': an enterprise (for the purposes of the EA 2002) is defined as "the activities, or part of the activities, of a business".[10] Therefore, the 'enterprise' does not need to be a separate legal entity, and it may cease to be distinct where only part of its business activities are acquired.
- 'Business': a business is defined as including "a professional practice and … any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge".[11]
- 'Control': when considering the concept of 'control', the Authority takes into account section 26 of the EA 2002, which sets out three levels of interest which may amount to control. In ascending order, these are: (a) material influence, (b) *de facto* control, and (c) *de jure* control (a controlling interest). These are further detailed below at section 2.2. Acquisition of any one of these levels of control, or where a shareholder moves from one level to a higher level of control, will result in a merger situation.

[9] EA 2002, s 26.

[10] EA 2002, s 129(1).

[11] EA 2002, s 129(1).

2.2 Acquisition of shares

An acquisition of control through the acquisition of shares may result in a merger if the necessary 'change of control' has occurred. The level of control may be distinguished as follows (in descending order):

- *De jure* control is legal control. This occurs when a controlling interest is acquired (a shareholding of 50% plus one vote).
- *De facto* control is exercised where the shareholder does not exercise legal control through a majority shareholding, but in practice controls a business's policy (strategy and direction) because of the dynamics and structure of the shareholding. It is analysed on a case-by-case basis, and may be conferred by shareholdings of 25–30%, in particular, where the remainder shareholding is fragmented.
- Material influence is exercised where there is not outright control, but an ability to materially influence policy decisions exists. A 25% shareholding gives rise to a presumption of material influence. A shareholding of 15% (or below, in exceptional circumstances) could be sufficient, dependent on the structure of the other shareholdings. The Authority is likely to consider the relative distribution of the remaining shares, patterns of attendance at shareholders meetings, and special provisions in the company's constitution.

The UK Ryanair/Aer Lingus case confirms that 'material influence' is a lower threshold than the acquisition of control under the EUMR.[12] Although the European General Court held that Ryanair's acquisition of shares in Aer Lingus did not confer control, it recognised that national law may differ in its treatment of control of mergers.[13] In that case, the OFT held that the minority shareholding fell under the jurisdiction of the UK and Ryanair was required to reduce its 29.81% shareholding down to 5%. (The OFT's decision was unsuccessfully appealed to the UK's CAT, Court of Appeal, and Supreme Court.)

2.3 Acquisition of assets

Whilst the acquisition of assets alone could result in a merger situation, it must be analysed on a case-by-case basis.

When analysing whether a sale of assets amounts to the acquisition of a business for the purposes of the EA 2002, the Authority will look not just at the acquisition agreement but also at the effect on the market, including the combined effect of all agreements and understandings between the parties, even those not intended to be legally enforceable.

[12] *Competition Commission Report on Ryanair Holdings plc and Aer Lingus Group plc*, published 28 August 2013; Report *Ryanair Holdings PLC v Competition Commission*, [2014] CAT 3, judgment of 7 March 2014.

[13] Case T-411/07, Judgment of the General Court, 6 July 2010, paras 64 and 78.

The Authority is only required to analyse the facts on a balance of probabilities. It does not need to prove that what has been acquired amounts to an enterprise.

Where the acquiring party is able to carry on at least part of the business carried on previously by the vendor, it will not be possible to claim that the enterprises remain distinct. Typically, the transfer of mere assets will not amount to a merger. But an asset transfer that includes contracts, goodwill, and employees normally will constitute a merger.

In the Eurotunnel/SeaFrance transaction, the UK's Supreme Court established that the company must acquire something more than merely assets that it could otherwise have bought separately on the open market and the extra value paid for the assets must stem from the fact that the collection of assets was previously employed in combination in the activities of the target enterprise. Where an enterprise has ceased trading, the longer the interval between the enterprise's cessation of trading and the acquisition of control over the assets, the higher the likelihood that the transaction would be an acquisition of bare assets and therefore not subject to UK merger control.

2.4 Acquisition of control

Discussed above in section 2.2.

2.5 Acquisition of competitively significant influence

Discussed above in section 2.2.

2.6 Strengthening of an existing affiliation and banking clause

Discussed above in section 2.2.

2.7 Joint ventures

A joint venture will trigger merger control where the assets contributed are sufficient to constitute an 'enterprise', defined in section 2.1 above.

Note that the analysis of a joint venture under the EA 2002 differs from the analysis of a 'full function joint venture' under the EUMR.

2.8 Foreign-to-foreign mergers

Foreign to foreign mergers can be reviewed by the Authority if the UK jurisdictional thresholds have been met (see section 3.1 below).

The UK thresholds have been formulated to only catch transactions that have an impact in the UK: the target needs to have sufficient UK sales (exceeding £70m) or the parties together exceed the 25% share of supply test in the UK (and there is an incremental increase in that share of supply). Special jurisdictional rules apply to national security mergers (see section 3.1(c) below).

Given that notifications are voluntary, if it is clear that the transaction has no effect on competition in the UK, then there is no need to file.

3. Confirming the filing obligation

If the transaction potentially qualifies as notifiable, the next step is to see if it meets the thresholds.

3.1 Jurisdictional thresholds

There are two threshold tests: (1) turnover; and (2) share of supply. As of 11 June 2018, special thresholds apply to national security mergers (see section 3.1(c) below).

(a) The turnover test

Basic elements of the turnover test are:

- Calculation of turnover: turnover means revenue from sales to UK customers in the preceding business year, deducting any sales rebates, VAT and other turnover-related taxes. (There are special rules for the calculation of turnover of credit and financial institutions as well as for insurance companies.)
- If the annual turnover of the target enterprise exceeds £70 million, then the turnover test is satisfied.

(b) The share of supply test

Basic elements of the share of supply test (set out in section 23 of the EA 2002) are:

- The test is satisfied if the merging entities in question: (a) both supply or buy goods/services of the same description; and (b) after the merger, will continue to supply or buy 25% or more of those goods/services in the UK, or in a substantial part of it.
- The test is not satisfied if an enterprise already holds 25% or more of a particular market, unless its share of that market is increased as a result of the merger. (Even if the increase may be very small, the test will still be satisfied.)

NOTE: The share of supply test is not equivalent to a market share test. The Authority establishes the parties' share of supply by what it considers to be a 'reasonable description' of a set of goods or services (Merger Assessment Guidelines, section 3.3.5). It can apply any criteria it considers relevant in the circumstances (eg, value, cost, price, quantity, capacity, workers etc) and the criteria do not need to coincide with the relevant economic market by which the merger will be analysed. Accordingly, this gives the Authority a very wide discretion to establish jurisdiction over transactions.

In terms of what constitutes a 'substantial' part of the UK, the House of Lords has confirmed that a part of the UK will be 'substantial' for these purposes if it is of such a size, character, and importance to be worthy of consideration for the purposes of the merger control legislation.[14] This clearly supports the Authority's power to investigate local, as well as national, mergers.

(c) Special thresholds for national security mergers

In May 2018, the government published two orders[15] amending both the turnover test and the share of supply test for mergers with potential national security implications. The orders, which became effective on 11 June 2018, make the following amendments to the current jurisdictional thresholds (which will only apply to certain sectors):

- The UK turnover requirement of the target business is reduced to £1m (from the normal £70m); and
- The share of supply threshold remains at 25%, but there is no need for an incremental increase to be created as a result of the merger (ie, if the target already has a 25% share of supply, the threshold will be satisfied irrespective of whether the acquiring entity is active on the same market).

The new thresholds will only apply to mergers where the target being acquired is active in one of the following sectors:

- Military and dual-use: covers the development or production of military or dual-use items (ie, items which can be used for both military and civil purposes) and will also apply to entities which hold certain information capable of use in connection with such development or production.
- Computing hardware: covers businesses which own, supply or create intellectual property rights relating to the functional capability of multi-purpose computing hardware. It will also cover the design, maintenance or support for the secure provision or management of certain computer hardware.
- Quantum technology: covers businesses which research, develop, design or manufacture goods for use in, or supply services employing, certain quantum technologies (widely defined).

The Authority has indicated that it is unlikely to use the new thresholds to call in transactions on purely competition grounds (noting that horizontal mergers would already meet the existing share of supply test, and that competition concerns in vertical mergers are unlikely where the target's UK turnover does not exceed £70m). However, the Authority will nevertheless have to review transactions which fall under the new thresholds and which have

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

[15] The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 and the Enterprise Act 2002 (Turnover Test) (Amendment) 2018.

been voluntarily notified to it. Similarly, whilst mergers can be reviewed under the new thresholds on purely competition grounds or any relevant public interest consideration, the government has indicated that it does not expect to review mergers under the new thresholds unless they raise national security considerations.

3.2 Calculation of turnover

Turnover is the turnover of the preceding business year, derived from the sale of products/services to businesses or consumers in the UK falling within the ordinary activities of the enterprise, less sales rebates, VAT and other taxes directly related to turnover.

(a) Basic principles

The relevant turnover of an enterprise is the turnover from the previous business year, on a control group basis:

- from the sale of products and/or services made in the ordinary course of its business activities;
- to customers based in the UK;
- net of any sales rebate, value added tax and other taxes directly related to that turnover.[16]

In practice, the relevant turnover considered is that arising in the last completed business year before either the completion date (for completed mergers) or the notification date (for proposed mergers). However, the CMA can use an earlier date if it considers appropriate.

Where a target 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. In addition, where the applicable turnover includes turnover of a linked enterprise, in which the target has a less than a controlling interest – but has material influence, the whole of the turnover of the linked enterprise is included in analysing whether the jurisdictional test is met: there is no reduction because the interest is less than a controlling interest.[17]

(b) Industry specific principles

There are special provisions for companies which are (in whole or in part) credit or financial institutions, or insurance undertakings.

Credit or financial institutions: The turnover for these companies is the sum

[16] CMA Merger Guidance on jurisdiction and procedure (pp164–167).
[17] CMA Merger Guidance on jurisdiction and procedure (pp167–170).

of certain specified income received by the branch or division of the company in the UK, after the deduction of value added tax and other taxes directly related to those items. The types of income specified include:

- interest or similar income;
- income from securities;
- income from shares and other variable yield securities;
- income from participating interests;
- income from shares in affiliated undertakings:
  - commissions receivable;
  - net profit on financial operations; and
  - other operating income.[18]

Insurance: The turnover is the value of the gross premiums received from residents of the UK after deduction of taxes and certain other premium-related deductions. Gross premiums received comprises all amounts received, together with all amounts receivable in respect to insurance contracts issued by or on behalf of an insurance undertaking, including outgoing reinsurance premiums.[19]

3.3 Exemptions from filing obligations

Please see section 1.5 above (referrals to the EU).

3.4 Ancillary restraints

The Authority's approach to ancillary restraints follows that of the European Commission. In summary:

- Non-compete clauses are permitted if they are directly related and necessary to enable the purchaser to receive the full benefit of goodwill and/or know-how. However, they must be reasonable in time and scope. A three-year period is generally acceptable where both goodwill and know-how have been acquired, and a two-year period where only goodwill is involved.
- Licences of industrial property and know-how are permitted if they are necessary to implement the merger.
- Purchase and supply agreements are permitted between the new and former owners for transitional periods, if necessary for legitimate business purposes. But exclusivity is only acceptable in very rare circumstances.

[18] CMA Merger Guidance on jurisdiction and procedure (pp166–167).
[19] CMA Merger Guidance on jurisdiction and procedure (p167).

4. The filing and clearance process

4.1 Overview

The ERRA 2013 brought about a number of changes to the merger notification process. These included the introduction of a new statutory timetable for the notification process,[20] and a new requirement for merger notifications to be made using a prescribed Merger Notice.

Where a phase II review is required, the transition between the phase I and phase II review is smoother under the Authority than with its predecessors since there will likely be an overlap between the Authority review team members.[21] However, new team members will also join to provide the 'fresh pair of eyes' required to avoid bias.[22]

4.2 Timing

The merger review process is subject to a statutory timetable. It is no longer possible to make an informal submission.

The Merger Notice may only be submitted once the merger has been announced and is public, so that the Authority can consult with third parties.

Where the transaction or merger has not been completed, and agreements have not been signed, the Authority will want proof that there is a good faith or 'firm' intention to proceed. For example, this means adequate financing, 'heads of agreement' (non-binding memorandum of understanding or term sheet), or evidence of board-level consideration. For public bids, there should be at least a public announcement of a firm intention to make an offer or the announcement of a possible offer.

4.3 Who must file?

The Merger Notice must be signed by a duly authorised person or on behalf of each of the notifying parties. The actual filing with the CMA is invariably done by the purchaser or purchasers, or their representative.

4.4 Information gathering

All information prepared for submission should obviously be accurate. For an effective, efficient, and reliable collection of information, there is a strong recommendation to have a dedicated group at the client to ensure complete

[20] EA 2002, s 34ZA.

[21] In particular, 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" (CMA Merger Guidance on jurisdiction and procedure (p94)).

[22] Under the old regime, bias could not arise as the OFT and CC reviews were completely separate. But the review process was considered inefficient as the CC team had to be educated about the transaction from the start. Under the new regime, the addition of some fresh team members at the start of the phase II investigation is intended to alleviate any concerns that the phase II team might be pre-disposed to confirming the substantial lessening of competition finding from at phase I.

coverage. This group should ideally remain in place throughout the merger clearance process to ensure continuity.

4.5 Filing fees

Filing fees are not paid with the submission of a Merger Notice, but are payable on the publication of the Authority's decision whether or not to make a reference (except where the case is found not to qualify as a 'relevant merger situation').

The amount of the fee varies according to the value of the UK turnover of the enterprise being acquired.

The current fee levels are:

- £40,000 where UK turnover is £20 million or less;
- £80,000 where the UK turnover is over £20 million but not over £70 million;
- £120,000 where the UK turnover is over £70 million but not over £120 million; and
- £160,000 where the UK turnover is over £120 million.

Turnover for these purposes is determined the same way as the jurisdictional turnover test set out in the EA 2002, it is:

- the turnover of the preceding business year;
- derived from the sale of products/services to businesses or consumers in the UK;
- made within the company's ordinary course of business; and
- less sales rebates, VAT and other taxes directly related to turnover.

There is an exemption from the fee for acquisitions by small and medium sized enterprises.

4.6 Pre-filing contacts with the Authority

The UK merger control regime heavily encourages companies to contact the Authority well before the formal submission of a Merger Notice.

It offers informal advice, on a confidential basis, to possible competition issues in a future transaction. Any informal advice provided by the Authority is confidential; but it is also non-binding and does not guarantee a future outcome.

The Authority also offers pre-notification discussions about the contents of the draft Merger Notice itself before the formal submission. Pre-notification discussions are particularly important to ensure that the Merger Notice is complete at the time of submission, since the 40 working day time period does not start until the Authority has confirmed that it has received a complete notification.

Pre-notification discussions should also be used:

- to discuss the possibility of any information waivers for the information asked for in the Merger Notice; and
- to request guidance on ancillary restraints (this is specifically referred to by the Authority in its guidance because it involves additional time and resources).

4.7 Filing and its effects

(a) Overview

The completed Merger Notice may be delivered to the Authority by post, by hand, or by email.

If the Authority is satisfied that the Merger Notice is complete, it confirms this to the parties. The working day following the confirmation that the Merger Notice is complete marks the start of the Authority's statutory deadline clock to decide whether the test for reference is met (see section 1.3 above). If, for any reason, the Authority does not consider the Merger Notice to be complete, it will generally inform the parties within five to ten working days after receiving it.

(b) Information gathering powers of the Authority

The Authority has a range of information-gathering powers to be used in both phase I and phase II investigations.

At either stage, it may send the parties requests for additional information, even if a completed Merger Notice has already been submitted and accepted by the Authority. The Authority may also use its investigation powers before it formally begins a phase I merger investigation to prevent pre-emptive action being taken by the parties.

Information requests may be made either informally or, alternatively, the Authority can use section 109 of the EA 2002 to issue a formal notice requiring a person (including third parties) to provide information or documents, or to give evidence as a witness. The Authority is most likely to use its formal powers if, for example, it has doubts whether the recipient will comply with an informal request, or if it believes that there is a risk that relevant evidence may either be destroyed or not received in time to be analysed.

If a party does not comply with a formal information request notice, the Authority may extend the statutory deadline period to allow it to obtain all the information it needs, or it may reject a Merger Notice.

(c) Interim measures

To strengthen the voluntary regime, the Authority now has enhanced powers to impose 'interim measures' when it suspects that steps have been, or will be, taken that would be difficult to reverse if it later becomes necessary to unwind a transaction.

'Interim measures' can take the form of orders issued by the Authority, with immediate effect, and may be applied at both phase I and phase II of an investigation. Furthermore, the Authority has the power to impose these measures even where it is not clear whether the Authority has jurisdiction to review the transaction. Failure to comply with any interim measure order may result in significant financial penalties (up to 5% of worldwide group turnover). The risk of fines being imposed on a merging party for failing to comply with an interim measure is illustrated by the CMA's recent fine of £100,000 on Electro Rent Corporation in connection with its acquisition of Microlease Inc. Electro Rent failed to obtain the CMA's consent prior to serving notice to terminate a lease over its UK premises (which the Authority had identified as a component of a potential remedies package). The failure to obtain the CMA's prior consent was in breach of an interim measure imposed during the merger investigation.

The Authority can consider making an interim order as soon as it has reasonable grounds to suspect that merger arrangements are being contemplated or in progress, and that integration may occur before completion. It will almost certainly make an interim order suspending or preventing further integration in all completed merger cases that it investigates.

In anticipated merger cases, the Authority can impose interim orders and prevent the integration of the parties' businesses before closing (as with, for example, transfer of licences for value). The Authority is particularly likely to impose interim orders where commercially sensitive information is being exchanged between merging parties, or where the merging parties have started to conduct joint commercial negotiations with customers, or if suppliers or key staff have left the target business.

However, the Authority does recognise that, in some situations, integration steps may be necessary to maintain the viability of the acquired business. In those cases, the merging parties can request that the interim orders be varied or amended.

Interim measures made during phase I will continue during a phase II investigation unless released or modified by the Authority.

Once the Authority has published its phase II report and announced its decision, remedy commitments must be accepted or orders made within 12 weeks (extendable once by up to six weeks in special circumstances).

(d) Monitoring trustees or 'hold separate managers'

The Authority can appoint a 'monitoring trustee' or 'hold separate managers' (HSMs) during a phase I or a phase II investigation. In phase I, this would normally occur when there has been substantial integration of the merging parties or breaches of interim orders. But it may also be necessary when further integration has been allowed under the regulation of the Authority, or if a business is in decline due to the loss of customers or key staff.

(e) Failure to produce documents

The Authority has the power to fine a person who has:

- without a reasonable excuse, failed to comply with any requirement of a section 109 information request notice from the Authority; and
- intentionally obstructed or delayed an Authority official or other authorised person from taking a copy of the requested information.

The fine may be up to £30,000 for a fixed penalty, or £15,000 for a daily penalty. If the fine relates to a phase I information request, the Authority can only impose penalties in the first four weeks of its decision whether to make a reference to phase II.

Further, it is a criminal offence punishable by a fine or a maximum of two years imprisonment to:

- knowingly or recklessly supply false or misleading information to the CMA (or to give such information to a third party knowing that they will then supply it to the CMA); or
- intentionally alter, suppress or destroy any information that the CMA has required to be produced by an information request.

A failure to produce documents as required by a formal request for information can also cause the CMA to stop the clock (either the 40 working day period for phase I reviews or the four months within which to refer non-notified transactions to a phase II investigation).

4.8 Possibility of an exemption for partial closing before clearance

Not applicable because closing before merger clearance is permitted in the UK.

However, if the transaction raises potential competition concerns and gets investigated, then it is likely that the Authority will impose an order on the purchaser preventing it from integrating the target business within its group until the Authority has completed its investigation and cleared the transaction. The Authority could even order that integration which has already taken place is unwound if the integration might impede any remedial action required by the Authority after its investigation.

The Authority will generally not prevent a pre-clearance closing unless the closing would result in steps being taken that would frustrate a future remedy being imposed by the Authority. It is possible to seek exceptions, or 'derogations', from orders preventing integration of the businesses, but the negotiation of derogations can be lengthy, costly, and distract from the Authority's investigation phase, resulting in delays in getting clearance that might otherwise be readily obtained.

4.9 Phase I

(a) *Overview*

A phase I merger investigation is subject to a strict 40 working-day time limit. (This replaces the previous deadline of 30 working days under the pre-2014 regime.)

The clock starts when the Authority considers the notification to be complete. Where the parties have chosen not to notify the Authority of the merger, it starts from when the Authority receives enough information to begin its investigation. The clock can be stopped at any time during the 40 working day period if the Authority deems it necessary. Stopping the clock may occur, for example, when the parties fail to respond to an information request within a specified period of time. (Note: information requests will now state whether there are penalties for failing to respond.)

The 40-day deadline can also be extended in limited circumstances. However, this is rare and occurs mainly when formal requests for information are not met. It is not possible to stop the clock to consider complex issues or significant volumes of new information. Those elements should be considered in the pre-notification stage of the process, as discussed below.

The 40 working-day time period does not apply if the case has been referred to the UK by the European Commission under the EU Merger Regulation, or if the case has been referred by the Secretary of State after issuing a public interest intervention notice.

The Authority's guidance states that the 'fast track' procedure will continue to allow an acceleration to a phase II investigation in exceptional circumstances. These fast-track referrals may only be done at the request of the parties and when there is sufficient evidence to meet the Authority's statutory threshold for reference. The merger between Tesco and Booker, which was unconditionally cleared by the CMA at phase II, is a recent example of merging parties successfully requesting a fast track phase II referral.

(b) *Phase I and possible decisions*

The Authority will typically hold a 'state of play' conference call or meeting with the parties between 15 and 20 working days of the start of the phase I time period. The Authority will then indicate whether it plans to send an 'Issues Letter'[23] and, if so, what theories of harm it intends to include in this.

[23] CMA Merger Guidance on jurisdiction and procedure (p73): "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."

Towards the end of phase I, if the Authority sees complex or material competition issues, it will send an Issues Letter to the parties and hold an Issues Meeting to discuss the Issues Letter and the identified competition concerns, as well as whether potential remedies should be offered to correct those concerns. This meeting will be at least two working days after the parties have received the Issues Letter. The parties can respond to the issues orally, in writing, or both, and there will be a deadline given for any further written responses after the Issues Meeting but before the phase I decision is made.

The parties will have a time-limited opportunity to offer remedies in the form of commitments, or 'undertakings in lieu' ('UILs'), meaning in lieu of a phase II investigation. UILs must be offered to the Authority within five working days after receiving the Authority's decision to refer the transaction to an in-depth phase II investigation. (As indicated below, a decision to refer the transaction to a phase II investigation means that the Authority has identified a 'real prospect' of a substantial lessening of competition or SLC.) (NOTE: If the parties tell the Authority that they do not wish to offer any commitments, the phase II referral will be made immediately.)

After receiving the UIL remedy offer, the Authority has five more working days to decide whether the proposed UILs, or a modified version, might be sufficient to correct the competition concerns identified by the phase I investigation. If the Authority decides that the UILs are sufficient in principle (as offered or modified), it then has 50 working days from the SLC decision to market test the UILs and decide whether to formally accept them or make a referral for a phase II investigation. If the Authority does not accept the UILs, it issues a referral for phase II. The Authority applies a 'reasonable prospect' standard to this phase I decision when considering whether the merger will cause a substantial lessening of competition. (In contrast, the standard in phase II is a more stringent 'balance of probabilities'.)

All phase I decisions are published by the Authority, after considering confidentiality issues.

(c) Exemptions from the duty to refer

As mentioned before, the CMA has a duty to refer a merger for an in-depth phase II investigation if a relevant merger situation has been created (or is in progress or contemplation) and there is a reasonable prospect that it has resulted, or may be expected to result in, a substantial lessening of competition within a UK market.

However, there are three statutory exceptions to the duty to refer a merger to a phase II investigation, as follows:

- *De minimis* exception: where the market concerned is not of sufficient importance to justify making a reference.

  The Authority has discretion not to refer a merger for an in-depth investigation if it is *de minimis*. A UK market with an annual value of over £10 million is likely to justify a reference. Less than £3 million will not generally justify a reference. Between these two values, the Authority will consider whether consumer harm resulting from the merger is materially greater than the average public cost of a phase II reference.

- Customer benefits: in some cases, the Authority may consider that the merger's benefits to the consumer (lower prices, greater innovation, or choice or quality) outweigh the substantial lessening of competition.

  The Authority will consider the likelihood of the benefits/lessening of competition as well as their magnitude. In practice, this exception would require clear benefits substantiated with solid evidence.
- Insufficiently advanced merger: if the transaction is not sufficiently far advanced, or not sufficiently likely to proceed, then a reference might not be justified. However, a public announcement of a merger, or a 'firm intention' (eg, heads of agreement[24]) to make an offer in a proposed transaction, will be sufficient to justify making a reference.

Note that even if the merger is insufficiently advanced, it is often still worth commencing pre-notification discussions with the Authority as no statutory timetable applies to the pre-notification discussions.

On 11 June 2018, the CMA published new draft guidance on the exceptions to the duty to refer mergers and is currently seeking views from interested parties on the content of the draft guidance (deadline to respond is 20 July 2018).

4.10 Phase II

(a) *Overview*

Once the Authority has decided to carry out a phase II investigation, it has 24 weeks (which can be extended by up to a further eight weeks in special circumstances) within which to conduct the investigation and publish a report of its decision.

Phase II investigations can be suspended where the parties are likely to abandon a merger that has not yet been completed.

Following a phase II investigation, the Authority has 12 weeks (subject to a further six week extension) to make an order or accept remedy commitments.

(b) *Phase II and possible decisions*

The Authority has the power to suspend the start of a phase II investigation by

[24] Heads of agreement is a non-binding document outlining the main issues relevant to the anticipated transaction and only becomes binding when incorporated into the agreements or when it is acted on.

up to three weeks if there is a possibility that the merger will be abandoned by the parties. This may occur when the parties have premised their merger agreement on the fact that the transaction would not be referred to a phase II investigation (where a reference may cause the parties to abandon the merger).

Generally, the Authority has 24 weeks to consider and report on the following two questions:

- whether the transaction satisfies the UK jurisdictional thresholds; and, if so,
- whether, on the balance of probabilities, the transaction has resulted, or may be expected to result, in a substantial lessening of competition.

The balance of probabilities threshold is a higher level of probability than the 'reasonable prospect' test used during the phase I investigation to determine whether to refer the merger. As a result, a phase II investigation will be more thorough, have greater economic analysis, and will likely involve further requests for information.

Recent case law has confirmed that the word 'substantial' in the 'substantial lessening of competition' test does not require the lessening of competition to be substantial (or large) in absolute terms, only that it needs to be 'significant' (sufficiently important to be noteworthy).

An extension of the 24-week phase II period (by up to eight weeks) normally occurs where there are outstanding information requests or there has been a preliminary finding of a substantial lessening of competition and additional time is needed to consult on complex remedy proposals.

Once a phase II referral has been made, the parties are not permitted to deal in each other's shares or integrate the businesses without the consent of the Authority. The Authority may also add to any interim orders imposed on the parties during the phase I investigation.

A phase II investigation will require substantial written submissions from the merging parties and may include Authority visits to the companies' premises and lengthy oral hearings involving senior executives. After the Authority's initial investigations, it will send an Issues Letter to the parties outlining the issues that the Authority will be investigating. The parties may respond to the Issues Letter. The Authority will also notify the parties of its provisional finding, to which the parties will have at least 21 days to provide written responses. If the Authority has identified a potential anti-competitive outcome, it will hold a response hearing and consider remedies. A draft Remedies Working Paper will be sent to the parties for comment before the Authority publishes its final report.

The merging parties should consider the broader commercial implications of a phase II enquiry. The final report will contain a large amount of information about the merging companies (subject to requests for confidentiality), and the whole investigation will be accompanied by a great deal of publicity.

4.11 Potential remedies and commitments to remove concerns

As just indicated, after a phase I SLC (substantial lessening of competition) decision, the parties have five working days to offer remedy commitments ('UILs' or 'undertakings in lieu') to resolve the Authority's competition concerns. The Authority must decide within 10 working days of the SLC decision whether the UIL are in principle acceptable. If the UIL are acceptable, the Authority has a further 50 working days to decide whether to formally accept the UILs.

The acquiring company may propose UILs at any stage during a phase I or even during pre-notification. Parties will also be given the opportunity to discuss UILs with the Authority at the end of the Issues Meeting. Indeed, the parties should give consideration to possible UILs well before the announcement of the phase I decision, since a proactive approach to UILs increases the chances of the Authority accepting them.

The short time period within which the parties must submit their UILs, once the phase I decision has been made, means that it is advisable to submit only UILs that are clear cut and which fully correct the competition concerns. This helps ensure that the Authority has time to analyse and accept them.

UIL offers are made using the Authority's Remedies Form, though the level of information required will vary from case to case and guidance from the Authority should be sought. The parties should remember that a thorough and accurate completion of the Remedies Form makes it more likely that UILs will be acceptable to the Authority.

The Authority may propose modifications to UILs, which the parties will be required to agree to promptly if they expect the UILs to be accepted.

UILs are either structural or behavioural:

- Structural UILs include divesting part of the business to decrease the market strength of a merged entity, often within a specified period of time. This may include a requirement of advance notice of the proposed purchaser.
- Behaviour UILs include regulating the terms on which the merged entity conducts its business. The Authority has broad discretion to fashion behavioural remedies that may include pricing terms; an obligation to increase price transparency; a commitment to non-discriminatory behaviour; to refrain from specific activity; requiring third parties to have access to essential inputs or facilities; licensing know how or IP rights; ending exclusive distribution agreements; or removing non-compete clauses in customer contracts. Note, however, that the Authority is generally reluctant to accept behavioural UILs because they often require significant monitoring.

The Authority monitors compliance with UILs. It can make an enforcement order if it considers either that a UIL is not being fulfilled, or that it was accepted based on misleading information.

4.12 Rights of appeal from the Authority's decisions

Appeals in all competition and regulatory cases are made to the CAT. These must be filed within four weeks of the Authority's decision.

The response to the appeal must be filed four weeks after that. The CAT aims to conclude all merger appeals within six months.

The CAT can review the details of the investigation and evidence to determine whether the decision was reasonable and demonstrates sufficient grounds for the conclusions reached. In the last decade, there have been various appeals, by both the merging parties and third parties, with varying degrees of success.[25]

Further appeals can be made to the Court of Appeal and, on permission, to the Supreme Court. (In October 2009, the Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the United Kingdom.)

4.13 Failure to make a required filing

The UK merger regime is voluntary. But non-notification does not mean that the Authority may not investigate a merger if it learns of the transaction by other means (including from its own market-monitoring team).

(a) Potential de-merger remedies

If a company chooses not to notify, there is always a risk that the Authority will seek to undo the transaction after it has been completed (by requiring the divestiture of all or some of the acquired businesses or assets). Furthermore, the Authority will normally make interim orders in completed mergers to prevent preemptive action (please see section 4.7(c) above).

The Authority also has the power to order the parties to either restore the market to the condition that existed before the transaction, or to mitigate the effect of the transaction.

The Authority has four months from the date of the transaction having been made public or from the Authority being informed about the transaction to refer it to a phase II investigation.

[25] For example, see *Groupe Eurotunnel/SCOP* appeal (2014), where the CAT concluded that the CC's decision to review the transaction under EA 2002 and to require Groupe Eurotunnel to cease operations on the Dover-Calais route was not unreasonable; and *AC Nielsen Company v CMA* (2014), where the CAT concluded that new information that was not provided to the OFT during the investigation was relevant and the OFT's decision therefore contained material errors of fact which may have affected its decision as to whether to refer the merger to the CC (now a phase II investigation).

5. Filing documentation

5.1 The typical form and content of a UK filing document

If a party decides to notify a merger, it should contact the Authority and complete the merger case team allocation request form. The Authority will then discuss the information that should be provided in the merger notice form with the party.

The Authority has published a prescribed Merger Notice, which sets out the categories of information which must be provided with a filing. Though the precise nature of this information will vary on a case-by-case basis, key information required includes:

- key details about the transaction;
- a description of the businesses of the merger parties and brief details of any other transactions they have made in the last two years;
- an explanation why the transaction satisfies the UK jurisdictional thresholds and why it is not subject to the EU Merger Regulation;
- identification of the narrowest plausible product/service and geographic markets where the parties overlap or have a vertical relationship;
- information about the horizontal and vertical effects of the merger, for each product or service market, and each geographic market identified, as well as the impact on supply of inputs or access to distribution;
- a description of how competition works in the relevant markets (including, for example, a discussion of customer choice, pricing determination, and information on any competitive constraints imposed by any of the merger parties on each other or by other suppliers);
- information about any increase in the merger parties' buyer power;
- information about loss of potential competition;
- a discussion of any conglomerate effects;
- information on potential entry or expansion, including details of barriers to entry and/or expansion, and details of any expansion, entry or, exit which has taken place over the past five years, or which is anticipated to take place; and
- an explanation of efficiencies and customer benefits resulting from the merger.

When completing the Merger Notice, where possible, evidence should be provided in support of the statements made by notifying parties. This benefits the party filing the Merger Notice, since the Authority is likely to attach greater weight to supported statements.

5.2 Confidentiality: protection against disclosure of sensitive information

The Authority has a duty not to disclose confidential business information obtained in its investigation. However, there are exceptions where the disclosure of business information is necessary to allow the Authority's public conclusions to be understood. Generally, the Authority takes seriously all requests to exclude confidential commercial information from published documents.

There are various points in phase I and phase II investigations when the merging parties may find themselves part of unwanted publicity:

- The publishing of phase I decisions, phase II reports, issues statements, provisional findings, remedies statements, key party submissions and comments received from third parties (though some confidential information is excluded).
- Decisions not to refer mergers are announced on the Stock Exchange Regulatory News Service.
- Decisions to refer mergers to the European Commission are also announced on the Regulatory News Service and the Authority will issue a press release stating its main concerns. The full text of the reference decision will be published (though confidential information will be excluded).
- UILs (undertakings in lieu) and orders are published in full, following a public consultation on draft versions.

6. Substantive merger analysis

6.1 Overview

Under the EA 2002 regime, there are three stages to the Authority's investigation:

- it must confirm that a relevant merger situation has been created;
- it must reach a decision whether or not there is a risk of a substantial lessening of competition as a result of the merger; and
- if it has decided that the transaction raises substantial competition concerns, it must decide what to do to correct these concerns either with suitable remedies or by prohibiting the transaction.[26]

At the end of phase II, the Authority will apply a 'balance of probabilities'

[26] An example of a phase II prohibition decision is the CC's decision to prohibit the proposed acquisition by Akzo Nobel NV of sole control of Metlac Holding SRL (final report issued on 21 December 2012). The CC concluded that the merger would likely result in a substantial lessening of competition in the market for the supply of metal packaging coatings for beer and beverage cans in the UK. The merger would result in unilateral effects due to a loss of actual and potential competition. Subsequent appeals to the CAT and the Court of Appeal, arguing that the OFT did not have jurisdiction because this was a foreign-to-foreign merger, all failed.

test when deciding whether the merger has resulted, or may be expected to result, in a substantial lessening of competition in any UK market. It asks whether it is more likely than not that a substantial lessening of competition will result. (As discussed above, this is a higher level of probability than the 'reasonable prospect' standard used at the end of phase I.)

In carrying out the substantive merger analysis, the Authority will apply the Substantive Guidelines, published by the OFT and CC in September 2010. There are broadly two types of merger:

- horizontal (between firms that supply competing products); and
- non-horizontal mergers: this can either be between firms that operate at different levels of the supply chain (vertical mergers) or between firms supplying products at the same level that do not compete (conglomerate mergers).

The Authority generally conducts its analysis under the following headings (although these headings are not necessarily systematically followed in decisions or reports):

- market definition;
- measures of concentration;
- horizontal mergers – unilateral effects (including any vertical effects of horizontal mergers);
- horizontal mergers – coordinated effects;
- non-horizontal mergers – unilateral and coordinated effects;
- efficiencies;
- entry and expansion; and
- countervailing buyer power.

6.2 Horizontal mergers

In horizontal mergers, the Authority will generally focus on the impact of the merger on the markets where both merging firms supply goods or services.

In these cases, the Authority will be looking for two anti-competitive effects.

(a) Unilateral effects

These occur where the merger involves two competing firms and removes the rivalry between them, allowing the merged firm profitably to raise prices or otherwise worsen its offering. Unilateral effects generally apply to markets where the merger companies produce what are largely the consumers' first and second choices.

(b) Coordinated effects

These occur where the merger enables or increases the ability of several firms within the market (including the merged firm) jointly to increase prices or otherwise worsen their offerings because the merger creates or strengthens the conditions under which they can coordinate. Coordinated effects can result either from explicit agreements among competitors (which are probably illegal); or independent and self-interested behaviour (which is legal), that, because of a concentrated market, often encourages companies to minimise aggressive competition.

6.3 Vertical mergers

In vertical mergers, the Authority will primarily look at the impact of the merger on both the upstream and downstream markets and on any related markets.

In these cases, the Authority will be looking for coordinated effects, discussed above, and vertical or conglomerate effects. These arise when the merger creates or strengthens the ability of the merged firm to use its market power in at least one of the markets, thus reducing rivalry. For example, the merged company could control the supply of inputs necessary for its downstream competitors. By raising the cost of supplies, or restricting the availability of the supplies, the merged company could increase its rivals' costs and harm competition.

6.4 Conglomerate mergers

As with vertical mergers, the Authority will look at the impact of conglomerate mergers on both the upstream and downstream markets and on any related markets.

7. Practical guidance to counsel involved in potential merger review

7.1 The Competition and Markets Authority: recent developments

By Gianmarco Calanchi and Zoe Fiander, of the Competition and Markets Authority

(a) Introduction

As a result of the changes made by the Enterprise and Regulatory Reform Act 2013 (ERRA), from 1 April 2014 the merger control functions of the Office of Fair Trading (OFT) and the Competition Commission (CC) were merged into a single competition authority, the Competition and Markets Authority (CMA). The ERRA introduced several new features to the UK merger control regime which were designed primarily to further strengthen and streamline the process.

This paper summarises the key features of the regime that have been retained as well as the main changes that have occurred in the new regime, and provides a preliminary overview of practical implications of some of these changes.

(b) The features of the new regime

Voluntary nature and substantive test: Certain features of the UK merger control regime have not changed. In particular, notification remains voluntary and the legal tests for identifying competition concerns remain the same as when investigations were conducted separately by the OFT and CC. As such, the relevant test at phase I remains that of a 'realistic prospect' of a substantial lessening of competition whereas the phase II assessment is conducted on the basis of the 'balance of probabilities'.

Timing: However, the ERRA introduced several changes to the merger control regime. The introduction of several statutory timetables across the review process is an important factor designed to streamline the regime further. First, the OFT's 40 working day administrative timetable has been replaced by a statutory timetable of the same duration for all phase I investigations, whether 'called in' by the CMA's Mergers Intelligence Unit or voluntarily notified by the merger parties.

Also, a revised process is in place for the provision of undertakings in lieu of a reference (UILs) by the merger parties. There are now statutory deadlines for the merger parties to offer UILs, for the CMA to decide whether the UIL offer or a modified version of it might be acceptable as a suitable remedy and, if so, for the CMA then to conduct a detailed consideration of UILs before it can accept them. One of the main advantages of the new UIL process is that the parties have full visibility of the CMA's competition concerns as set out in the reasoning of the CMA's decision before they consider offering UILs, allowing for more targeted remedy proposals.

At phase II, parties to an anticipated merger can now request a suspension of the reference for up to three weeks if they consider abandoning the deal. This will prevent unnecessary work and has already been used. Also, there is now a statutory deadline for the implementation of remedies at phase II: undertakings must be accepted or an order made within 12 weeks of the final report. This can be extended by up to six weeks.

Other procedural changes and new powers: Where merger parties notify a merger, they must now do so via a Merger Notice Form. This is available on the CMA website and contains guidance to assist parties in assessing the nature and extent of the information that the CMA requires for its investigation. The CMA encourages parties to engage in pre-notification discussions with the case team at an early stage to identify the information that the CMA will need to commence its investigation and to clarify which sections of the Merger Notice Form are not relevant to the merger in question.

Other procedural enhancements arose from the objective to strengthen the

UK merger control regime and to tackle some of the perceived challenges inherent in a voluntary regime. By way of example, section 109 of the Enterprise Act 2002 now provides the CMA with information gathering powers across both phase I and II of its merger review process (which were previously solely available to the CC in phase II enquiries). The use of this formal power in phase I extends to third parties and may facilitate the gathering of information, including information that can be critical in reaching a clearance decision, for instance evidence of timely, likely and sufficient entry. The CMA can 'stop the statutory clocks' if the merger parties fail to comply with a request under section 109.

The reforms have also given the CMA the power to impose initial enforcement orders ('hold-separates') in phase I investigations, both in completed and in anticipated deals, to prevent the risk of 'gun jumping'. In addition, the CMA now has unwinding powers to require reversal of preemptive action at phase I.

Finally, merger parties are provided access to the Decision Maker at the phase I Issues Meeting, allowing them to present their arguments directly to the Decision Maker.

(c) Changes since the launch of the CMA

The new regime is less than a year old, so it is too early to draw firm conclusions about its impact. However, a few initial observations are set out below.

Outcomes: Since 1 April 2014, the number of phase I decisions has increased compared to 2013/14 (but was still lower than in some previous years). The proportion of reference and UIL decisions in phase I has been relatively low at the time of writing (mid-December 2014). There has been an increase in the proportion of decisions in which the CMA applied the *de minimis* exception: this was 10% since 1 April 2014, while it was 3.5% in 2012–2014 and 2.6% in 2005–2011. The CMA has proposed to review its policy relating to the use of the *de minimis* exception in the next financial year. The CMA completed only two phase II investigations, both of which had been started by the CC.

The CMA's Mergers Intelligence team has taken an increasingly targeted approach to own initiative investigations, including the use of informal questions about jurisdiction before a merger is 'called in'. As a consequence, the proportion of decisions in which a merger was found not to qualify for investigation has fallen significantly: from 21% in 2005–2011 and 22% in 2012–2014 to 13% since 1 April 2014.

Procedural matters: The CMA has used its power to impose an initial enforcement order in virtually all completed mergers. This represents a significant increase in the proportion of completed mergers to which hold-separate measures apply (compared with the initial undertakings that merged parties previously provided to the OFT). The number of hold-separate undertakings/orders in place has risen from around 20% of all cases to over 50% of all cases (ie, completed and anticipated mergers combined).

This reflects the CMA's policy that it expects to impose an order in almost all completed mergers. The CMA is mindful of the burden initial enforcement orders can mean for business, but considers that orders are generally necessary in completed mergers to mitigate the risk of pre-emptive action. However, in all cases the CMA will consider requests made by the merged parties for derogation from the order where this is necessary and proportionate. The first months of the regime in operation have shown that the CMA grants derogations from initial enforcement orders at great pace. The CMA will consider whether an order is in fact not required where the parties can provide the CMA with clear evidence that there is no risk of preemptive action, or it is self-evident that the merger does not give rise to competition concerns. In addition, a number of initial enforcement orders have been revoked prior to the phase I investigation having been finalised. This was at a relatively late stage of the investigation where the parties could show that the order continuing in place caused disproportionate harm.

To date, the CMA has not imposed any orders in respect of anticipated mergers nor imposed any orders to unwind pre-existing integration.

As regards to the overall time period for phase I investigations, the OFT did not routinely keep record of clock stopping under the old administrative system. However, it is already clear there has been a notable reduction in 'stopping the clock': statutory timetables were suspended on only very few occasions in the first eight months of the CMA's existence. In this period, the CMA took four days on average to allocate teams, and spent 26 working days on average in pre-notification discussions. This is in the context of the new regime seeking to establish greater legal certainty; although the pre-notification period may have increased in some cases, the clock is less likely to be stopped during the course of the investigation.

8. Documents

The following are links to important documents and forms available on the official website.

8.1 Statutory provisions and regulations

- The Enterprise Act 2002 (EA 2002), Merger Section:
  www.legislation.gov.uk/ukpga/2002/40/part/3
- The Enterprise Act 2002 (not updated to reflect recent amendments):
  www.legislation.gov.uk/ukpga/2002/40/contents
- The Enterprise and Regulatory Reform Act (ERRA 2013):
  www.legislation.gov.uk/ukpga/2013/24/contents/enacted

8.2 Guidelines and reports

- CMA Guidance on jurisdiction and Procedure: www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure
- Merger Assessment Guidelines (the 'Substantive Guidelines'): www.gov.uk/government/publications/merger-assessment-guidelines

8.3 Notification form

- Case Team Allocation Form and Merger Notice Template: www.gov.uk/government/publications/mergers-forms-and-fee-information

United Kingdom – quick facts

Snapshot	The UK has a voluntary filing system. Parties can close without filing or clearance subject to the risk that the transaction may be investigated and remedies imposed after closing. The UK antitrust authority can and does take enforcement action when it finds that a transaction could result in a 'substantial lessening of competition'. The authority will generally not prevent a pre-clearance closing unless the closing would result in steps being taken that would frustrate a future remedy being imposed by the Authority. Increasingly if there is any overlap in activities between the Parties the CMA will impose a 'hold separate' order preventing the integration of the businesses pending its investigation and decision.
What type of acquisitions can trigger a filing?	Filings are voluntary. *Please see section 2*
Thresholds that trigger a filing	The UK has a voluntary merger control regime: there is no obligation to notify any acquisition of control or acquisition of a material influence over a target. The UK antitrust authority has jurisdiction to review any transaction which it reasonably believes might result in a substantial lessening of competition when either of these conditions is met: • Turnover test: The target must have generated £70m of turnover in the UK in the last financial year; or • Share of supply test: the merger would either create (or enhance) a 25%+ share in the supply or purchase of goods or services in the UK (measured as a whole or in a substantial part of the UK). (NOTE 1: the share of supply test is broader than a market-share test, and the Authority's 'Merger Assessment Guidelines', section 3.3.5, state that the "goods and services to which the share of supply test is applied need

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	not amount to the market defined for the economic analysis.") (NOTE 2: separate thresholds apply to certain national security mergers.) *Please see section 3.1*
How are the sales-assets thresh-olds measured?	Thresholds are measured as follows: • Turnover test: measured at the control group level, and must include all the sales or assets controlled by the target. (There are special rules for calculating turnover in the case of credit, or financial institutions, or insurance companies.) • Share of supply test: measured by more than 25% of a purchase or sale market. The test is based on any 'reasonable description' of a market of services or goods (but is not necessarily an antitrust product market). *Please see sections 3.1 and 3.2*
Are foreign-to-foreign mergers covered?	Yes, but the UK thresholds have been formulated to only catch transactions that have an impact in the UK: the target needs to have sufficient UK sales (exceeding £70m) or the parties together must exceed the 25% share of supply test in the UK (and there is an incremental increase in that share of supply). As mentioned above, separate thresholds apply to nationals security mergers. *Please see section 2.8*
Are minority interests covered?	Yes (through the 'material influence' test). *Please see section 2.2*

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Do substantive antitrust laws apply to exempt transactions?	Yes. The authority has discretion to apply the exemption criteria where considering a transaction.
Are voluntary filings allowed for transactions that don't meet the thresholds?	Yes. The UK merger control regime is voluntary. If a transaction does not satisfy the jurisdictional thresholds the parties can: • file a Merger Notice: a fee will be payable to the Authority, and deadlines will apply for the Authority to make a decision; or • submit a briefing memorandum to the market intelligence team: this will describe the transaction and the reasons why it does not meet the thresholds. No fees or deadlines apply but no formal decision will be taken.
Are filings confidential?	Yes, filings are confidential. However, the fact that a filing has been made will be published on the UK authority's website. *Please see section 5.2*
Timing of the filing	No required timing. The decision to voluntarily notify is a commercial one based on the degree of risk that the purchaser is willing to take on the transaction being investigated. *Please see section 4.2*
Are any types of transactions exempt from filing requirements?	N/A. All filings are voluntary.

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Can any non-exempt transactions close without clearance?	Yes. There is no mandatory filing requirement. The Authority will generally not prevent a pre-clearance closing unless the closing would result in steps being taken that would frustrate a future remedy being imposed by the Authority. *Please see section 4.8*
Are there any exceptions?	It is possible to seek exceptions (or 'derogations') from the obligation not to integrate the businesses, but the negotiation of these can be lengthy, costly, and distract from the Authority's investigation phase, resulting in delays in getting clearance that might otherwise be readily obtained. *Please see section 4.8*
Waiting period	There is no obligation to suspend a closing (even during the authority's investigation). However, if the authority is investigating, the purchaser will typically not take any steps to integrate the businesses as the authority could impose interim measures, including unwinding merger steps that have already been taken. *Please see section 4.7(c)*
National security issues	Yes. The Secretary of State can intervene on the grounds of national and public security. *Please see sections 1.2(a) and 1.6*
Could successive merger filings be required?	Yes, for transactions involving the same parties occurring more than two years apart. All transactions between the same parties occurring within a two-year period are considered as one (and as having occurred simultaneously on the date of the latest transaction).

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