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Practical cross-border insights into merger control issues

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Expert Analysis Chapters

1 **Increased Scrutiny for Tech Mergers: What You Need to Know**
Esther Kelly, Fiona Garside & Nadja Waksman, Ashurst LLP

13 **Assessing the Risk of a Merger Being Found to Be Anti-Competitive in the UK: All Change or Business as Usual?**
Jules Duberga, Ben Forbes & Mat Hughes, AlixPartners UK LLP

Q&A Chapters

22 **Albania**
Schoenherr: Srđana Petronijević, Danijel Stevanović & Minela Šehović

31 **Argentina**
Bomchil: Marcelo den Toom

39 **Austria**
Herbst Kinsky Rechtsanwälte GmbH: Dr. Valerie Mayer

47 **Bosnia & Herzegovina**
Schoenherr: Srđana Petronijević, Danijel Stevanović & Minela Šehović

56 **Brazil**
Gentil Monteiro, Vicentini, Beringhs e Gil – GVBG Advogados: Pedro C. E. Vicentini

62 **Canada**
Stikeman Elliott LLP: Mike Laskey, Peter Flynn & Laura Rowe

72 **China**
DeHeng Law Offices: Ding Liang

86 **Croatia**
Schoenherr: Ana Mihaljević

95 **Cyprus**
Trojan Economics Consultants Ltd: Dr Panayiotis Agisilaou

102 **European Union**
Sidley Austin LLP: Steve Spinks & Ken Daly

118 **Finland**
Dittmar & Indrenius: Ilkka Leppihalme

130 **France**
Ashurst LLP: Christophe Lemaire & Guillaume Vatin

143 **Germany**
BUNTSCHECK Rechtsanwaltsgesellschaft mbH: Dr. Tatjana Mühlbach & Dr. Andreas Boos

153 **Greece**
MSB Associates: Efthymios Bourtzalas

163 **India**
Lakshmikumaran & Sridharan: Neelambera Sandeepan & Charanya Lakshmikumaran

171 **Ireland**
LK Shields Solicitors LLP: Marco Hickey & Michael Cunningham

181 **Japan**
Nagashima Ohno & Tsunematsu: Ryohei Tanaka, Nobuaki Ito & Keiichiro Ikawa

190 **Korea**
Shin & Kim LLC: John H. Choi & Sangdon Lee

198 **Mexico**
OLIVARES: Gustavo Alcocer & Luis E. Astorga

205 **Montenegro**
Moravčević, Vojnović i Partneri AOD Beograd in cooperation with Schoenherr: Srđana Petronijević, Danijel Stevanović & Zoran Šoljaga

213 **North Macedonia**
Schoenherr: Srđana Petronijević & Danijel Stevanović Attorney at Law Martin Ivanov Skopje in cooperation with Schoenherr: Martin Ivanov

223 **Norway**
Advokatfirmaet Grette AS: Odd Stemsrud & Marie Braadland

231 **Portugal**
Morais Leitão, Galvão Teles, Soares da Silva & Associados: Pedro de Gouveia e Melo & Dzhamil Oda

244 **Serbia**
Moravčević, Vojnović i Partneri AOD Beograd in cooperation with Schoenherr: Srđana Petronijević & Danijel Stevanović

254 **Singapore**
Drew & Napier LLC: Lim Chong Kin & Dr. Corinne Chew

266 **Slovakia**
URBAN STEINECKER GAŠPEREC BOŠANSKÝ: Ivan Gašperec & Jozef Boledovič

274 **Slovenia**
Zdolšek – Attorneys at Law: Stojan Zdolšek & Katja Zdolšek

283 **Sweden**
Hannes Snellman Attorneys Ltd: Peter Forsberg & Philip Thorell

Q&A Chapters Continued

291 **Switzerland**
Schellenberg Wittmer Ltd.: David Mamane & Amalie Wijesundera

300 **Taiwan**
Lee and Li, Attorneys-at-Law: Stephen Wu & Yvonne Hsieh

308 **Thailand**
Anderson Mōri & Tomotsune (Thailand) Co., Ltd: Pitch Benjatikul

317 **Turkey/Türkiye**
ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnanılır

329 **United Kingdom**
Ashurst LLP: Nigel Parr, Duncan Liddell & Steven Vaz

348 **USA**
Sidley Austin LLP: James W. Lowe & Elizabeth Chen

358 **Vietnam**
LNT & Partners: Dr. Nguyen Anh Tuan, Tran Hai Thinh & Tran Hoang My

United Kingdom


Nigel Parr


Duncan Liddell


Steven Vaz

Ashurst LLP

1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Competition and Markets Authority ("CMA") is the primary merger enforcement body in the UK. The CMA is a non-ministerial government department, governed by an independent board, which combines executive and non-executive officers. In addition, the CMA has a Panel of Independent Members, selected for their senior-level experience in relevant areas of business, economics, law or competition policy. Groups of Panel Members are appointed to be the decision-makers in specified areas of UK competition law, including Phase 2 merger investigations.

The CMA is the investigatory body and decision-maker for both Phase 1 and Phase 2 of UK merger control, although there is a formal separation of powers within the CMA between the two phases. Phase 1 decisions on whether to clear a merger outright, clear it subject to conditions, or refer it for a full Phase 2 investigation are taken by the CMA Board (in practice, the Board's Phase 1 decision-making powers are normally delegated to the Executive Director of the CMA's Mergers and Markets Directorate, or one of the Senior Directors or Directors of Mergers). The CMA is under a duty to trigger a Phase 2 investigation into any relevant merger situation that it believes has resulted or may be expected to result in a substantial lessening of competition, or it may accept remedies that address the substantial lessening of competition *in lieu* of a reference for a Phase 2 investigation.

Phase 2 decisions are taken by an inquiry group, comprising a panel of at least three and no more than five CMA Panel Members ("Inquiry Group"). The Inquiry Group conducts a detailed investigation, reaches a final determination on whether a merger should be permitted or prohibited, and adopts remedies as required. In addition, government ministers have the power to intervene in relation to certain cases that raise issues relevant to the UK public interest (see further below). This role is usually exercised by the Secretary of State ("SoS") for Business, Energy & Industrial Strategy ("BEIS") (formerly Business, Innovation and Skills or "BIS") although, since December 2010, the SoS for Digital, Culture, Media and Sport has been responsible for reviewing the public interest aspects of mergers in the media and broadcasting sectors. The CMA is under a duty to advise the SoS of any mergers that may raise public interest issues (see below).

The SoS has the power to take over the role of decision-maker from the CMA in relation to mergers that have a potential impact on the UK public interest ("public interest mergers").

The sectors to which these powers apply are limited by legislation and cover the media sector (including newspapers, television and radio), the need to maintain the stability of the UK financial system and the need to combat public health emergencies. The SoS has the power to extend these categories (for example, the financial stability criterion was added during the global financial crisis of autumn 2008 and the public health emergency ground was added in June 2020 in response to the COVID-19 crisis). There is a new and separate review regime in relation to national security established by the National Security and Investment Act 2021 ("NSI Act"), under which the SoS can investigate transactions on national security grounds. The NSI Act, which came into force on 4 January 2022, has replaced the previous provisions for public interest intervention in merger cases on the ground of national security. The Investment Security Unit ("ISU") of BEIS and the SoS for BEIS exercise the supervisory powers under the NSI Act. Experience to date indicates that a far greater number of transactions will be scrutinised under this regime than under the previous public interest regime. As the NSI regime is separate from the merger control regime, a detailed overview of the regime is beyond the scope of this chapter.

Under the remaining public interest merger regime, the CMA is responsible for investigating the impact of the merger on both public interest and competition issues. However, the CMA is not the decision-maker, and reports its Phase 1 and Phase 2 findings to the relevant SoS, who will make the final decision. The SoS is required to follow the CMA's advice in relation to competition issues but can reach his/her own conclusions on any wider public interest issues. The SoS will also be advised on relevant public interest aspects of the transaction by the Office of Communications ("Ofcom"), the sectoral regulator for the media, broadcasting and communications sector and/or any other relevant government departments or public bodies (for example, the Bank of England, the Financial Conduct Authority and HM Treasury might be involved where financial stability issues are at stake).

Where a merger has no adverse impact on competition but is nevertheless found to be against the public interest, the SoS has the power to prohibit it or to make clearance conditional on

remedies to remove the public interest concerns. Public interest merger cases are relatively rare, with typically only one to three cases arising each year. Under the regime, merging parties and their advisers must consider the possibility of an intervention notice being issued, particularly where the target is active in the media sector.

Even where the public interest provisions are engaged, the SoS does not necessarily intervene. Public interest intervention powers have historically been used in relation to mergers in the defence, media and broadcasting sector, and to permit two major UK retail banks to merge during the 2008 financial crisis. Equally, there have been a number of cases where the SoS could have intervened but did not.

The SoS is also able to intervene in "special public interest" cases. These are cases where the jurisdictional thresholds for competition-based merger control are not met (see question 2.4) but the merger nevertheless raises wider public interest concerns. These provisions are outlined in response to question 2.7.

1.2 What is the merger legislation?

The UK merger control legislation is contained in Part 3 of the Enterprise Act 2002 ("Enterprise Act"), which entered into force on 20 June 2003. Various guidance documents have been published by the CMA (or published by its predecessor bodies, the Office of Fair Trading ("OFT") and the Competition Commission ("CC") and adopted by the CMA from 1 April 2014). Two key guidance documents are "Mergers: Guidance on the CMA's jurisdiction and procedure" (CMA2 revised, January 2022), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf and "Merger Assessment Guidelines" (CMA129, 18 March 2021), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986475/MAGs_for_publication_2021_-.pdf.

After expiry of the Brexit Transition Period on 31 December 2020, the EU Merger Regulation regime ceased to apply to the UK, other than in relation to certain transactions "in flight" prior to that date. Transactions can now be subject to EU and UK merger control in parallel.

1.3 Is there any other relevant legislation for foreign mergers?

The NSI Act has fundamental implications for deal-planning in the UK and means, in particular, that national security considerations must be assessed in addition to, but separately from, the merger regime. However, the ISU will liaise closely with the CMA where a transaction is being considered under the NSI Act and the Enterprise Act.

Separately, the Industry Act 1975 contains provisions to enable the UK Government to prohibit the transfer into foreign ownership of important UK manufacturing businesses. However, these provisions have never been used and there is no suggestion that they might be revived as part of the current government's new foreign investment policy.

1.4 Is there any other relevant legislation for mergers in particular sectors?

Water and sewerage

The Water Industry Act 1991 (as amended by the Water Act 2014) governs water and sewerage mergers. It provides that the CMA has jurisdiction to examine a water merger where two or more water businesses have or intend to merge(d) and the turnover of the water business being taken over is at least £10 million (approximately €11.7 million or US$13.6 million at 2021 European Central Bank exchange rates), unless the only water enterprises already owned by the acquirer each have a turnover below £10 million. Only the turnover from regulated water or sewerage services is taken into account. Water mergers are not subject to the usual substantive test for assessment (see question 4.1), but instead the assessment considers whether, after the merger, sufficient water businesses would remain to enable the Water Services Regulation Authority ("Ofwat") to make comparisons between them.

In considering a water merger, the CMA must request, and Ofwat must provide, its assessment of the impact of the merger on its ability to regulate the water sector through such comparisons, as well as how any adverse impact weighs against the potential customer benefits flowing from the merger.

Energy

The Electricity Act 1989 regulates the UK electricity industry, and the Gas Act 1986 regulates the UK gas industry. Mergers in these sectors are reviewed under the Enterprise Act in the normal way, although the Office of Gas and Electricity Markets ("Ofgem") (the UK electricity and gas sector regulatory body) will typically hold its own public consultation about the merger and report its views on the impact of the merger to the CMA at Phase 1 and, where a reference is made, Phase 2. Ofgem may also impose licence conditions or require licence modifications in light of the merger.

Rail

The Railways Act 1993 provides that the award of a franchise agreement to operate rail services may be considered a relevant merger situation for the purposes of the Enterprise Act. Where the relevant thresholds are met, therefore, the CMA is responsible for the assessment of such mergers under the normal Enterprise Act regime. On 15 March 2018, the CMA published revised guidance for the evaluation of competition issues in rail franchise awards. The Office of Rail Regulation (the UK rail sector regulatory body) would normally also provide its views on the competitive impact of the merger to the CMA at Phase 1 and, where a reference is made, Phase 2.

Airports and aviation

Mergers involving airports, airlines or other aspects of aviation are reviewed in the normal way under the Enterprise Act, although the views of the Civil Aviation Authority (the UK airports and aviation sector regulator) on the competitive impact of a merger will normally be sought by the CMA at Phase 1 and, where a reference is made, Phase 2.

Financial services

In addition to the general merger control provisions of the Enterprise Act, mergers in the financial services sector are subject to the requirements of the Financial Services and Markets Act 2000 as regards notification to, and approval by, the Financial Conduct Authority and/or Prudential Regulation Authority. Failure to follow these requirements may be a criminal offence.

As noted above (see question 1.1), the public interest provisions of the Enterprise Act have been extended to apply in the financial services sector where there is a need to maintain the stability of the UK financial system. Moreover, and also in response to the global financial crisis of 2008, the Banking (Special Provisions) Act 2008 and the Banking Act 2009 both make provision for legislation to be disapplied or modified by the UK Government where necessary to ensure financial stability.

Healthcare
On 1 July 2022, the Health and Social Care Act 2012 was amended to remove transactions between National Healthcare Service ("NHS") foundation trusts from the CMA's power of review. The intention is to promote collaboration within the NHS. NHS England will continue to provide the CMA with information and assistance where relevant to the wider healthcare sector.

Public interest issues
As noted above, the Enterprise Act creates provision for the SoS to intervene on public interest grounds in relation to mergers that may impact the media and broadcasting sectors (including newspapers, television and radio), mergers that may affect the financial stability of the UK and mergers that affect the UK's ability to combat public health emergencies.

National security
As noted in response to question 1.1 and considered further below in response to question 1.5, the NSI Act enables the SoS to review transactions on national security grounds and has removed the SoS's ability to intervene in merger reviews conducted by the CMA on national security grounds.

Takeovers of listed public companies
See question 3.14 below.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

As noted above, on 4 January 2022 the NSI Act came into force, establishing a new national security review regime for transactions with a UK nexus. The NSI Act contains a mandatory notification regime, requiring prior notification and clearance if a qualifying transaction relates to specified activities in one or more of 17 key sectors (including, but not limited to, artificial intelligence, civil nuclear, critical suppliers to government, data infrastructure, defence, energy, military and dual-use, satellite and space technologies, and transport). This is underpinned by a call-in power, which enables the SoS to call in transactions for review where it considers that national security concerns may arise, based on a number of risk factors. To reduce uncertainty surrounding the risk of a potential call-in and the consequential impact on the transaction timetable, parties have the option to submit a voluntary notification.

Please also refer to the responses to question 1.1 above in respect of public interest mergers.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

UK merger control applies to "relevant merger situations":

- A merger situation will be "relevant" where it meets the jurisdictional thresholds (see further question 2.4).
- A "merger situation" occurs where two or more "enterprises" cease to be distinct (i.e. they are brought under common ownership or "control").

An "enterprise" is defined as comprising "the activities or part of the activities of a business". Broadly speaking, an enterprise comprises the assets needed to carry on the business, usually together with the benefit of existing key contracts and/or goodwill. In other words, the collection of assets and other elements must amount to a going concern, with a revenue stream directly derived from it. The Supreme Court has clarified that a transfer of a bundle of physical assets may be sufficient to constitute an enterprise where:

- the acquirer gains something more than if the same assets had been purchased individually; and
- the extra "something" is attributable to the fact that the acquired bundle was previously used for the activities of the target business (*SCOP v CMA* (2015)).

It should also be noted that a business that has recently ceased trading (for example, because it is insolvent) can also amount to an "enterprise" for merger control purposes.

As regards the concept of "control", the Enterprise Act provides for three levels:

- *De jure control* – this corresponds to legal control, where an outright controlling interest is acquired. Generally, a person will be considered to have *de jure* control where it has a shareholding of at least 50% plus one vote of all issued shares.
- *De facto control* – this corresponds to a situation where a person does not have *de jure* control of the business through a majority shareholding but, in practice, is able to control the policy of the business because, for example, the structure of the shareholdings means that such person typically controls a majority of the votes actually cast at a shareholders' meeting. *De facto* control is determined on a case-by-case basis and can be conferred by shareholdings of 25–30% in certain circumstances, particularly if the remainder of the shareholder base is highly fragmented. "Policy" in this context (and in relation to material influence) essentially refers to the competitive conduct of the business, its strategic direction and commercial objectives.
- *Material influence* – this corresponds to a situation where a person is not able to control the policy of a business but is able to materially influence it. A shareholding above 25% gives rise to a presumption of material influence, as such a shareholding will generally enable the holder to block special resolutions. As in the case of *de facto* control, however, material influence is determined on a case-by-case basis and a shareholding of around 15% has, in certain circumstances, been considered sufficient to constitute material influence, for example, where a shareholder in practice has the ability to block special resolutions due to the spread of other shareholdings and general patterns of attendance at shareholders' meetings. Other factors that will often point towards material influence include where the shareholder has the right to nominate a director of the business, or where the shareholder has key contracts with the business or key industry knowledge and insight, which means that its views will typically be carefully listened to (whether by the board or by other shareholders). Conditional rights to equity, such as convertible warrants, options, etc., can lead to a conclusion that the holder has material influence over the business. This will be analysed on a case-by-case basis, although it is relatively rare that such rights on their own will be considered to confer material influence until such time as they are exercised. Material influence is a lower level of control than decisive influence under the EU Merger Regulation.

Note that various shareholders can simultaneously have various levels of control. Thus, the fact that one party has *de jure* or *de facto* control of a business does not rule out the possibility that one or more others may have material influence over the same business.

A "merger situation" will occur for the purposes of UK law where one of these levels of control is acquired or when a shareholder moves from one level of control to a higher level of control, e.g. from material influence to *de facto* control or *de jure* control.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

UK merger control does capture the acquisition of minority stakes, and action has been taken in past cases by the competition authorities in relation to competition concerns arising from such acquisitions. Both "*de facto* control" and "material influence" constitute minority levels of control, the acquisition of which can be sufficient to trigger the application of UK merger control (provided the relevant jurisdictional thresholds are met – see further question 2.4). The meaning of "*de facto* control" and "material influence" is explained in response to question 2.1 above.

An important point to note is that material influence is a lower level of control than decisive influence under the EU Merger Regulation.

2.3 Are joint ventures subject to merger control?

A joint venture will constitute a merger if the assets, etc. being put into the joint venture are sufficient to constitute an "enterprise" (see question 2.1) and those assets satisfy the jurisdictional thresholds (see question 2.4, which also describes the particular rules for applying the turnover test to joint ventures). Whether the acquisition of joint control or a minority stake in a joint venture amounts to a merger situation for the purposes of UK merger control will often turn on the facts of the case and may require careful analysis. For example:

- A joint venture that will only supply goods and/or services to the parent businesses and has no "presence" on the wider market or dealings with third parties might be caught by UK merger control rules if the businesses making up the joint venture constitute enterprises (see question 2.1) that have ceased to be distinct from another (i.e. they are brought under common ownership or control – again, see question 2.1). Note that the application of UK merger control to joint ventures is very different in this respect to the approach of the EU Merger Regulation and there is no equivalent to the EU concept of a "full-function joint venture".
- A joint venture that is a brand-new start-up business that has not previously traded and is not acquiring an existing business from its parents (or an independent vendor) is unlikely to be subject to UK merger control, as there is no target enterprise that amounts to a going concern; therefore, no enterprise will have ceased to be distinct from its new owners. This might be the case where a joint venture is created for a brand-new production business being built from scratch.
- A joint venture that is purely contractual with no creation of a new legal entity as the vehicle for the joint venture activities could be subject to UK merger control. There is no requirement that a joint venture must take a structural form to be subject to merger control. The key issue is whether there is an enterprise that has ceased to be distinct as a consequence of the joint venture. If the joint venture takes the form of a sale of assets from A to B and a supply contract from B back to A, for example, it is likely that (subject to the jurisdictional thresholds) UK merger control would apply, particularly if goodwill is included in the assets being transferred. Outsourcing arrangements can therefore potentially be considered mergers, depending on the structure of the arrangements (for example, where a business, which is outsourcing functions that were previously provided in-house, transfers the relevant assets and staff to the future provider of the outsourced functions).

2.4 What are the jurisdictional thresholds for application of merger control?

A merger that is proposed or in contemplation, or that has already taken place (subject to certain time limits), will qualify for investigation under the UK merger control regime if either of the following criteria is satisfied:

- as a result of the merger, a share of at least 25% of the supply or purchase of goods or services of any description in the UK or a substantial part of it will be created or enhanced ("share of supply test"); or
- the value of the turnover in the UK of the enterprise being taken over exceeds £70 million (approximately €81.9 million or US$95.2 million at 2021 European Central Bank exchange rates) ("turnover test").

It is only necessary to meet one of these thresholds.

The share of supply test is not a market share test; it is not necessary to define the relevant product and geographic markets in order to assess whether the share of supply test is satisfied. The share of supply corresponds simply to a particular category of goods or services, regardless of whether that category would form a relevant product market for market analysis purposes, and the CMA has taken a broad approach to the share of supply test. It is not unusual for the economic market definition to be different from the category of goods or services by reference to which the share of supply test is assessed. For example, in *Sabre/Farelogix* (2020), the CMA asserted jurisdiction over the proposed acquisition of Farelogix by Sabre (both US technology and software companies that supplied technology solutions to the travel industry). Jurisdiction was established on the basis that Sabre's share of the relevant services to UK airlines was above 25% and Farelogix supplied the relevant services to one UK airline (British Airways), which British Airways used to market interline segments in the context of its interline arrangement with American Airlines, even though the revenue received for interline bookings with a British Airways segment was small and British Airways paid no fees to Farelogix. The CMA's assertion of jurisdiction was upheld by the Competition Appeal Tribunal ("CAT").

Note that the test can also relate to a share of 25% of *purchases* being created or enhanced, as well as supplies.

Where there is no aggregation of share, the share of supply test will not be satisfied, regardless of the level of existing shares (this test will, therefore, never be met by mergers that do not involve a horizontal overlap). The concept of a "substantial part" of the UK has been generously interpreted, with areas as small as the UK towns of Slough (with a population of 122,000 inhabitants at the time of the transaction in question) and Eastbourne (population of 95,000) being held to be "substantial" (although in the case of Eastbourne, at least, the tourist economy of some four million visitors each year was taken into account).

Note that the alternative supply-based tests under the public interest regime (see above and question 3.3 below) do not require an increase in the parties' share of supply; accordingly, this test can be satisfied by a merger that does not involve a horizontal overlap.

In relation to the turnover test, turnover is assessed in a manner broadly similar to the methodology used under the EU Merger Regulation. Note, however, that only the UK turnover is relevant and only the turnover of the target business(es) must

be assessed. In relation to joint ventures, where both/all parents are contributing assets to the new joint venture, the turnover for each of the businesses being put into the joint venture is aggregated and the turnover test is assessed by reference to the total turnover of the businesses going into the joint venture.

Turnover will generally be considered UK turnover where customers are located in the UK or when the purchase or procurement decision is taken in the UK. In *Sabre/Farelogix* (2021), the CAT found that British Airways received the benefit of the service through its agreement with American Airlines, which was sufficient to conclude that Farelogix's services were supplied in the UK.

Where a merger does not meet the jurisdictional thresholds of the UK, it is possible, in certain circumstances, for the SoS to intervene on public interest grounds (see question 3.3).

2.5 Does merger control apply in the absence of a substantive overlap?

UK merger control can be triggered when there is no substantive overlap (and the share of supply test is not therefore satisfied) but the turnover threshold is met (see question 2.4). However, there is no obligation to notify or to obtain clearance, so it is essentially a question of risk assessment whether to do so in such circumstances (see question 3.4).

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

The Enterprise Act does not specifically require that any of the parent companies or the merging entities themselves should be UK-registered companies or carry out business in the UK. It has been confirmed by the UK's Court of Appeal that the CMA has jurisdiction to prohibit a foreign-to-foreign merger where the potential purchaser, although physically located outside the UK, carries out business in the UK (see *Akzo Nobel v CC* (2014)). For example, this occurred in the *Diebold/Wincor Nixdorf* case (2017), which involved a US company and a German company. The transaction was investigated by the CMA, and only cleared subject to divestment of one of the parties' customer-operated ATM businesses in the UK to a purchaser approved by the CMA.

However, the manner in which the jurisdictional thresholds operate (see question 2.4) means that at least the target must be active in the UK, whether through a subsidiary or cross-border sales, and the substantive assessment test (see question 4.1) focuses on the competitive impact of the merger in the UK.

Moreover, since notification/clearance is not compulsory, it is often the case that a foreign-to-foreign transaction that meets the jurisdictional thresholds but has no substantive impact on competition in the UK would not be notified.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

A merger that falls below the jurisdictional thresholds of the Enterprise Act may nevertheless be reviewed by the UK authorities where the SoS considers it to be potentially against the public interest; these are referred to as "special public interest" cases. As with public interest mergers (see question 1.1), the categories of cases to which these powers apply are limited by legislation, and currently cover mergers involving government contractors and certain media mergers. In such cases, the SoS may take into account media or other considerations as they apply to public interest cases. It should be noted that the public interest consideration of the stability of the UK financial system does not apply to special public interest cases. In special public interest cases, there is no jurisdiction to review any competition issues arising out of the merger; however, the SoS is able to take action in relation to any wider public interest concerns, including imposing conditions on the transaction or prohibiting it altogether. At the time of writing, there have been two such special public interest cases, both concerning the defence sector.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

As noted above, UK merger control recognises three levels of control: material influence; *de facto* control; and *de jure* control (see question 2.1). Where a purchaser acquires control in stages, each acquisition that takes the purchaser to the next level of control triggers the CMA's jurisdiction (potentially, therefore, a staggered acquisition of outright control could result in three separate merger control reviews). Moreover, where a series of transactions takes place between the same parties within a period of up to two years, the series will be treated as a single transaction occurring cumulatively on the date of the last step. These provisions mean that it is not possible to avoid UK merger control by dividing an acquisition into a series of small share purchases.

Where there is a series of connected transactions between various parties, the CMA will treat each separate change of control as a distinct merger. Thus, for example, if party A is transferring business X to party B and, in exchange, party B is transferring business Y to party A, this will constitute two distinct mergers:

- the change of control of business X; and
- the change of control of business Y.

If business A is being acquired by a consortium of X, Y and Z with a view to dividing the assets up, the CMA will typically treat the transaction as three distinct mergers:

- the transfer of control of part of A's assets to X;
- the transfer of control of part of A's assets to Y; and
- the transfer of control of part of A's assets to Z.

On the other hand, if parties A and B are both selling a business to new joint venture vehicle C, which they will in turn jointly control, this will typically be considered a single transaction – the creation of joint venture C – notwithstanding that, technically, there are two changes of control. In practice, the CMA will tend to analyse transactions in the manner that best reflects the reality of the situation, with the same Case Team reviewing all connected transactions in parallel, if appropriate.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Notification of a merger that meets the jurisdictional thresholds is not compulsory in the UK. Accordingly, there is no deadline for notification, and the decision of whether to notify is a commercial one (see question 3.4).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Except as described above in relation to mergers that impact national security, notification is not mandatory in the UK and clearance is not required in order to complete a transaction (see questions 3.3 and 3.7). Where the CMA investigates a merger and identifies material competition concerns, there are limited exceptions to its duty to refer the merger for a Phase 2 investigation (see question 4.1).

3.3 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

Where a merger does not meet the jurisdictional thresholds of the UK, it is possible, in certain circumstances, for the SoS to intervene on public interest grounds if the merger would fall within the scope of the UK merger control regime if the usual share of supply and turnover thresholds (set out above) were disregarded, and the merger involves either:

- the share of newspapers of a particular description; or
- broadcasting of any description, carried out in the UK or a substantial part of it, and at least 25% of the media is supplied by the person or persons by whom one of the enterprises concerned is carried on. (There is no requirement that the share of supply must increase as a result of the merger.)

Where these conditions are met, a "special merger situation" arises. There is no competition assessment in such cases, and no merger fee is payable to the CMA. The only question is whether the creation of the special merger situation operates or may be expected to operate against one or more of the public interest considerations set out in section 58 of the Enterprise Act. Special public interest interventions are not common, and to the extent they have arisen, they have generally related to government contractors in the defence sector.

See also question 2.4 on the broad approach that the CMA has taken to the share of supply test.

3.4 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The parties to a qualifying merger are not under any obligation to notify it to the CMA and there are no sanctions or black-listing-type consequences of not filing.

It is perfectly acceptable not to notify a merger that meets the jurisdictional thresholds. However, anticompetitive mergers that are completed without notification and clearance can create difficulties for the parties if the CMA ultimately decides that the merger should be prohibited and subject to divestment, although this is a risk that the parties are entitled to take.

The fact that a merger is not notified by the parties does not, however, mean that it will not be scrutinised under the merger control regime. The CMA has the power to review mergers regardless of whether they are notified, and has a dedicated Mergers Intelligence Committee responsible for monitoring merger activity in the UK. It obtains information about mergers from a variety of sources, including the press (national, local, trade and business), government, regulatory and other public bodies (including the ISU, if a notification is made under the NSI Act) along with third parties (typically, customers and competitors). The CMA may also learn about a cross-border merger through liaison with other national competition authorities who have received a (very often mandatory) notification of the merger in question.

Where the CMA hears about a non-notified merger, the Mergers Intelligence Committee may contact the parties and ask them about the merger in order to establish whether the jurisdictional thresholds are met and, if so, to enquire about the competitive impact of the merger. This preliminary investigation is undertaken using the CMA's general powers to keep itself informed, rather than its merger control powers. This approach enables the CMA to avoid commencing a merger investigation unless it considers that there is merit in devoting resources to the merger – even if the jurisdictional thresholds are met. If the Mergers Intelligence Committee considers that there are potential competition issues that warrant investigation, the CMA will ask the parties to notify the transaction. There is no stigma attached to not notifying and if the CMA subsequently learns about the merger and takes the initiative to ask the parties about it, it will not view the absence of notification as a negative factor. Updated guidance about the CMA's mergers intelligence function was published in December 2020 (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947380/CMA56_dec_2020.pdf).

It should be noted that the CMA has powers to impose an "initial enforcement order" ("IEO") (often also referred to as a "hold separate" interim order) on completed (and in more limited circumstances, anticipated) mergers to prevent any (further) integration or other pre-emptive action from taking place, and potentially to reverse any integration steps already taken (see question 3.8). In practice, IEOs are imposed on substantially all completed mergers as soon as the CMA opens an investigation, usually in the form of a standard template order. Depending on the circumstances of the case, it may be possible to negotiate derogations from some aspects of the IEO, or release from the order prior to formal clearance being granted (see further the response to question 3.7 below).

The use of IEOs in anticipated mergers was historically less common, but has become increasingly frequent. Such an order will not normally prevent formal legal completion of the transaction, but it will restrict any integration steps being taken either before or after completion.

Finally, the CMA can order the reversal of any integration steps that may already have been taken. These powers must be taken into account in considering whether to proceed with the merger without notification and/or clearance, and are discussed further in response to question 3.7 below.

A further point to note is that the CMA's guidance on its jurisdiction and procedure warns that mergers that are completed without notification may have to be reviewed within a shorter period than the full 40 working days, if the long-stop deadline for a Phase 2 reference of four months is approaching (see question 5.11). If the Phase 1 review is curtailed to the extent that the CMA cannot gather sufficient evidence to satisfy itself that the merger does not give rise to competition concerns, it may take the cautious approach and refer it for a Phase 2 investigation in circumstances where, had there been more time, a Phase 2 reference would not have been necessary.

3.5 Is it possible to carve out local completion of a merger to avoid delaying global completion?

Since prior clearance is not mandatory in the UK, there is no need to delay completion to await UK clearance, or to carve out

the UK aspects of the transaction pending UK clearance. The factors to be taken into account in deciding whether to notify in the UK are discussed above (see question 3.4).

In some situations, it may be possible to complete the transaction in other jurisdictions and carve out the UK part of the deal pending competition clearance (as occurred in relation to *Diebold/Wincor Nixdorf* (2017), for example). This will depend on the structure of the transaction and of the businesses concerned. It is also important to note that the CMA has powers to require and enforce the continued separation of the merging businesses globally pending the conclusion of its investigation (see question 3.8).

3.6 At what stage in the transaction timetable can the notification be filed?

Mergers caught by UK merger control can be notified before or after completion, since there is no requirement to seek clearance prior to completion.

The merger or the merger plans must, however, be considered to be in the public domain before a notification is filed, as the CMA will need to publicise the notification and will consult third parties. A planned merger can be notified from the point at which the structure is reasonably clear and stable, and confidentiality about the planned merger is not a concern.

As regards public offers, notification can be made at any point after the intention to bid has been announced – there is no requirement to wait until the offer itself has been made (indeed, with a pre-conditional public offer, announcement of the intention to make an offer is made before the offer document has been posted to shareholders, because the offer cannot be formally made until and unless competition clearance is received – see question 3.14). Furthermore, the CMA has discretion not to refer a proposed merger for a Phase 2 investigation where it considers that the merger is not sufficiently advanced or is not sufficiently likely to proceed.

Where a merger remains confidential, it is possible to seek "informal advice" from the CMA in relation to the likelihood of a Phase 2 investigation being required. This process is conducted in strictest confidence, without third-party consultation. It is not possible to use the informal advice process simply to gain reassurance from the CMA that a proposed merger does not give rise to competition concerns – there must be a genuine issue on which the CMA's advice is sought, whether relating to jurisdictional issues or the substantive assessment of the merger. Parties are, therefore, expected to articulate to the CMA the potential jurisdictional or substantive concern.

Informal advice is not binding on the CMA. For example, if subsequent third-party consultation reveals competition concerns of which the CMA was not previously aware, its ultimate decision on whether to refer may differ from the informal advice previously given.

It is also possible, once a merger agreement has been signed, to seek guidance from the Mergers Intelligence Committee on whether a merger is likely to be investigated. Following submission of a briefing note, the CMA will either follow up with further questions, open an investigation or indicate that it does not have any further questions. This can be a useful source of reassurance for the parties to qualifying mergers that do not raise material competition concerns about the risk of deciding not to notify. Nonetheless, this does not preclude further questions at a later stage and, if further information comes to light, the CMA may open an investigation at any point until the expiry of the four-month statutory period set out in section 24 of the Enterprise Act.

3.7 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Phase 1

Since 1 April 2014, there has been a statutory timeframe for all Phase 1 investigations. The statutory timetable starts to run the day after the CMA notifies the parties that the notification (see question 3.10 below) is complete or that it has received sufficient information in response to its own-initiative enquiries. The CMA then has a period of 40 working days within which to decide whether to refer the merger for a Phase 2 investigation (the CMA's "Phase 1 decision"), after which time it will usually lose the ability to refer. However, the CMA considers it best practice for parties to engage in "pre-notification discussions", which will involve the CMA reviewing the parties' draft submission and requesting additional information until it considers the notification complete. This period can last a couple of weeks or a number of months, depending on the complexity of the competition issues and markets affected by the merger.

Practical guidance on how to notify the CMA of a merger is available on the CMA's website (https://www.gov.uk/guidance/mergers-how-to-notify-the-cma-of-a-merger). Where parties wish to proactively notify a merger to the CMA, it is necessary to submit a Merger Case Team Allocation Request Form (available at the previous webpage (updated December 2020)).

If the CMA decides that its statutory duty to refer the merger for a Phase 2 investigation has been engaged, the parties then have a period of five working days from the Phase 1 decision within which they may propose remedies to remove the competition concerns. The CMA must decide whether Phase 1 remedies (known as "undertakings *in lieu*", see question 5.4) are acceptable in principle within 10 working days of its Phase 1 decision. If it decides that they are, it has a period of up to 50 working days from the Phase 1 decision to consider, consult and accept the undertakings. This period can be extended by a further 40 working days, such that the CMA has a maximum of 90 working days from the date of its Phase 1 decision within which to accept undertakings *in lieu*.

If a Phase 2 reference is made, for anticipated transactions, the timetable can be suspended by up to three weeks if the parties are considering whether to abandon the transaction (in which case, the Phase 2 investigation will not proceed). If, on the other hand, the parties clearly wish to proceed, Phase 2 can commence without any suspension of time.

Phase 2

Once it is clear that the parties wish to proceed, the CMA Inquiry Group has 24 weeks to complete its Phase 2 investigation (although it has stated that it will aim to complete its review more quickly than that). This period may be extended at the CMA's discretion by up to eight weeks for special reasons. Extensions have become fairly common in more complex cases where additional time is required by the Inquiry Group and CMA staff to complete the competition analysis.

The CMA Inquiry Group then has a further 12 weeks from the date of the Phase 2 decision within which it must take any decision on remedies. This period can be extended by no more than six weeks where the CMA considers there to be special reasons for doing so (see further question 5.4). The maximum duration of Phase 2 is, therefore, 50 weeks.

Suspension of time limits

All the above time limits (Phase 1, Phase 2 and remedies) can be suspended where the parties fail to respond in time, or fully, to

a formal information request. Time will cease to run until the parties have provided the required information. This power to "stop the clock" is regularly used. Further information on the CMA's powers to gather information is set out in question 4.5.

The timeframe for assessment may also be extended where the public interest provisions of the Enterprise Act are triggered (see further question 1.1).

3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?

As explained above in response to questions 3.1 and 3.3, notification is not compulsory under UK merger control rules and there is no prohibition on completing before receipt of clearance.

However, the CMA has extensive powers to prevent the integration of merging businesses pending clearance, which can be used in relation to both completed and anticipated mergers:

- an IEO can be imposed without negotiation on the parties at Phase 1 of a CMA investigation;
- an interim order ("IO") can be imposed at Phase 2 (which replaces any IEO imposed at Phase 1); and
- "interim undertakings" can be agreed with the merging parties at Phase 2 (typically after provisional findings in relation to an anticipated merger) (which also replace any IEO imposed in Phase 1), together known as "Interim Measures".

In addition:

- where the CMA believes that some integration has already taken place, it can order it to be reversed, i.e. by imposing an Unwinding Order on the parties; and
- the CMA can impose fines of up to 5% of the total worldwide turnover of an infringing business's group for failure to comply with Interim Measures without reasonable excuse.

Since 1 April 2014, the CMA has imposed IEOs very swiftly at the outset of Phase 1 on almost all completed mergers that it is considering (one notable exception is *Atos Medical/Countrywide Supplies* (2015)). Such orders will usually follow the CMA's standard template order, which was updated in December 2021 and is available on the CMA's website at: https://www.gov.uk/government/publications/interim-measures-and-derogations-guidance-and-templates. IEOs are kept in place throughout the investigation for more complex cases (or replaced with IOs during Phase 2) but are frequently released during the course of Phase 1 in cases where the CMA becomes satisfied that the merger in question is likely to be cleared unconditionally.

As noted above in response to question 3.3, the use of IEOs in anticipated mergers (i.e. those that have not been completed) was historically less common, but has recently become increasingly frequent. Such an order will not normally prevent formal legal completion of the transaction, unless there are unusual circumstances that could mean that the act of completion itself would constitute pre-emptive action. The CMA's guidance suggests that this might be the case where, for example, the act of completion would directly lead to the loss of key staff or management or operational capability for the acquired business. It notes that this is more likely to occur in an asset acquisition than where a functioning business is being acquired. However, the order will restrict any integration steps being taken either before or after completion.

Businesses that are subject to an IEO (whether in relation to an anticipated or completed merger) can apply to the CMA for a derogation from the order for specific actions pending the conclusion of the CMA's investigation. The CMA has published guidance on the use of IEOs and derogations (https://www.gov.uk/government/publications/interim-measures-and-derogations-guidance-and-templates), which emphasises that derogation requests should be sufficiently specified, reasoned and evidenced. It also provides some useful examples of the types of derogation requests that will typically be granted (such as the provision of back office support services by the acquirer to the target) and the types of derogation requests that will typically not be granted (for example, the transfer of sales functions from the target company to the acquirer). In relation to derogation requests relating to the flow of information between the target and the acquirer, ring-fencing arrangements may be required to limit the potential impact of granting the derogation request. For example, where a listed company requires certain monthly financial information about the target business, a derogation may require this information to be disclosed only to individuals who do not have any involvement in the day-to-day commercial activity of the parent business. Any request for a derogation should be made using the template request form available on the CMA's website (https://www.gov.uk/government/publications/interim-measures-and-derogations-guidance-and-templates). Where more than one derogation is being requested, all the requests should ideally be collated and submitted together, rather than submitting separate requests over a period of time.

At Phase 2, an existing Phase 1 IEO may be adopted and extended (and amended if required), i.e. into an IO. The CMA's policy of imposing IEOs on nearly all completed mergers means that it would be very unusual for the parties to a completed merger not to be subject to a Phase 1 IEO. There is, additionally, a general provision under the Enterprise Act that operates to prevent any further integration steps from being taken in relation to a completed merger during Phase 2 without the CMA's consent.

As regards anticipated mergers, even if no order is in place, the statutory restriction under the Enterprise Act on "dealing in shares" will apply, preventing the parties from completing a merger by share acquisition, subject to an important exception. The purchaser is permitted to complete and take legal title to shares where it is legally obliged to do so pursuant to an obligation assumed before the Phase 2 reference was made – e.g. where a conditional share purchase agreement entered into *before* the reference becomes unconditional *after* the reference. The prohibition on dealing does not apply to anticipated asset purchases.

Generally, the CMA will reach a decision on a case-by-case basis as to whether Phase 2 hold separate arrangements are required (including where an anticipated merger is completed during the reference period, or where the merger will take the form of an asset purchase). As mentioned above, Phase 2 hold separates can be imposed by way of an IO or can be given voluntarily by the parties in the form of undertakings. As at Phase 1, such provisions would typically be aimed at preventing the parties from proceeding with the transaction (if not already completed), preventing the exercise of any voting rights already acquired, and/or preventing any integration of the merging businesses pending conclusion of the Phase 2 investigation.

The powers to impose administrative penalties for breach of an IEO/IO were first used in mid-2018, with Electro Rent being fined £100,000 for breach of an IO. The CMA found that Electro Rent had failed to notify it of action it had taken in breach of the IO, namely the termination of the lease over its UK premises. The breach was considered particularly serious because one of the remedies being considered by the CMA was the sale of Electro Rent's UK business, including the lease of its UK premises. Electro Rent unsuccessfully appealed this decision to the CAT. These fining powers have since been used on a number of further occasions. Until October 2021, the maximum fine imposed for breach of an IEO was £325,000. In October

2021, the CMA imposed a fine of £50.5 million for breach of an IEO in *Facebook/GIPHY*. The penalty decision, which was upheld on appeal to the CAT, concerned the submission of fortnightly compliance statements with significant qualifications, not informing the CMA that a supplier had experienced a loss of service exceeding 24 hours, and changes to key staff without the CMA's prior consent. The CMA has subsequently imposed two further substantial penalties in 2022 for breach of an IEO/IO, including a fine of £1.5 million in *Facebook/GIPHY* for not seeking prior consent for changes to key staff and a fine of nearly £4.7 million in *JD Sports/Footasylum* for sharing commercially sensitive information, not self-reporting exchanges of confidential information to the CMA, and not establishing appropriate safeguards to ensure compliance with the IO.

The CMA updated its guidance on Interim Measures on 21 December 2021. The revised guidance emphasises the steps that the CMA considers necessary, at a minimum, to ensure effective compliance with Interim Measures, including tailored guidance and staff training, periodic internal written communications and clear governance structures to oversee compliance.

On 28 February 2019, the CMA imposed an Unwinding Order for the first time on Tobii AB, Smartbox Assistive Technology Limited and Sensory Software International Limited in relation to Tobii's completed acquisition of Smartbox and Sensory Software. This was due to concerns that action taken prior to the imposition of the IO in this matter might have prejudiced the CMA's investigation and/or ability to take any required action. An Unwinding Order was also imposed in relation to *Bottomline/Experian* (2019). Following Phase 2 investigations, the CMA has also required the parties to unwind transactions in, for example, *TVS Europe Distribution/3G Truck and Trailer Parts* (2021), *Facebook/GIPHY* (2021) and *Veolia/Suez* (2022).

In addition, on 15 January 2019, the CMA published guidance setting out a tightening-up of the CMA's approach to requests for internal documents fully and accurately. The guidance makes clear that the CMA is likely to use its compulsory information-gathering powers as standard in future where internal documents are requested in merger investigations (see further: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925400/Internal_documents_in_merger_investigations.pdf). The CMA has issued penalties on several occasions in this regard.

3.9 Is a transaction which is completed before clearance deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?

As explained above (see question 3.4), it is not necessary to obtain clearance prior to completing a merger in the UK. However, the CMA has discretionary powers to suspend all integration steps from the outset of a Phase 1 inquiry in respect of both anticipated and completed mergers, as well as powers to reverse any integration steps that have already been taken (see questions 3.8 and 5.6). See question 3.8 for penalties that have been imposed for breaching IEOs/IOs.

3.10 Where notification is required, is there a prescribed format?

All notifications must be made using the prescribed CMA Merger Notice (updated in November 2017), which is available here: https://www.gov.uk/government/publications/mergers-forms-and-fee-information.

In addition (given that notification is not compulsory), the CMA's Mergers Intelligence Committee may find out about a merger through a third party or on its own initiative and send an enquiry letter to the parties to a merger. The enquiry letter is likely to commence by requesting information to enable the CMA to establish whether it has jurisdiction over the transaction, and whether there are likely to be competition concerns arising from the merger. If the Mergers Intelligence Committee reaches the view that the CMA has jurisdiction and that there is merit in devoting resources to investigating the merger, further questions will be asked. Ultimately, the information requested will be similar to what the parties would have provided had they notified the merger voluntarily using a Merger Notice. In particular, the statutory timetable (see question 3.7) does not start to run until the CMA confirms that it has received all necessary information.

The Merger Notice requires information about:

- the parties and their representatives;
- the arrangements that will bring about the merger, including the parties, the type of transaction, the amount and form of the consideration (i.e. price), the key terms, the timing, the strategic and economic rationale for the merger, which other jurisdictions it is being notified in and the ownership structure both before and after the merger;
- a brief description of the businesses of the merging parties and their groups;
- information about any other transactions between the parties in the last two years, or any transactions by any of the parties that involved the same market sectors as the present merger;
- information explaining why the jurisdictional thresholds are met, including turnover information;
- certain supporting documentation, including press releases, the merger transaction documents, published annual accounts, the business plans of each party and any documents prepared for the board of directors or senior management which set out the rationale for the transaction or analyse the competitive impact of the merger;
- any reports, presentations, studies, internal analyses, industry/market reports or analysis (including customer research and pricing studies) from the last two years in either party's possession which were prepared for the board of directors or senior management and which consider the competitive conditions in markets where there is a horizontal overlap between the parties;
- a description of the "counterfactual" – i.e. likely market conditions in the absence of the merger;
- information on the markets where there is a horizontal and/or vertical overlap between the purchaser and the target and where they supply related products or services;
- a description of the narrowest and any plausible alternative relevant economic product/service market(s) where there is a horizontal or vertical overlap between the parties or where they supply related products or services;
- share of supply for the parties in each of the possible markets;
- as regards horizontal overlaps:
  - a discussion of the conditions of competition in each of the relevant markets, including the degree of rivalry between the parties and other principal suppliers in the market;
  - in bidding markets, bidding data about past contract tender processes;
  - discussion of any increase in the merged entity's buyer power; and
  - information about loss of potential competition between the merging parties;
- as regards any vertical overlaps, discussion of any vertical effects of the merger, including any foreclosure effects;

- as regards conglomerate effects, details of any related products or services produced or supplied by the merging parties;
- information on the extent of any barriers to entry;
- information on the extent of any countervailing customer power;
- discussion of any efficiencies or customer benefits arising out of the merger; and
- contact details for both merger parties' relevant customers, competitors, suppliers and any potential new market entrants, as well as for any regulatory authorities and trade associations relevant to the markets concerned.

Where supporting documentation is in a foreign language, it would usually be appropriate to provide a translation. There are no documentation formalities, such as a requirement for copies or translations to be notarised, etc.

The information requirements of the CMA Merger Notice are fairly onerous. However, the CMA may be willing to grant derogations from the obligation to provide certain pieces or categories of information required in the Merger Notice, particularly in cases that are unlikely to give rise to substantive competition concerns. This can be discussed with the Case Team.

As noted in the response to question 3.6, the CMA encourages pre-notification discussions on the basis of a draft notification submitted by the parties to the Case Team. This is at the parties' discretion; however, the CMA considers it best practice. As noted, requests for derogations from the information requirements in the Merger Notice can also be made during pre-notification discussions. Depending on the complexity of the merger, the number of markets potentially affected and the extent of possible competition concerns, pre-notification discussions can take a number of weeks or even months.

3.11 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

As there is no obligation to seek clearance prior to completion of a merger, the question of whether to seek prior clearance, particularly in relation to a "no issues" transaction, is a purely commercial decision (see question 3.4). Accordingly, there is no "fast-track" CMA clearance process for mergers that meet the jurisdictional thresholds but raise no competition concerns: such mergers can simply proceed without notification or prior clearance.

The CMA does, however, offer a fast-track reference to a Phase 2 investigation for cases where the CMA finds a concern with the merger that affects the whole (or substantially all of) the transaction and not just one part (which could be dealt with by undertakings *in lieu*). This procedure accelerates the process leading up to a Phase 2 reference and is not available in relation to a Phase 1 clearance. The parties are expected to waive their normal Phase 1 procedural rights and (absent any issues relating to public interest intervention – see further question 1.1) the CMA would expect to make a fast-track reference within 10 to 15 working days (although the CMA took slightly longer, 18 working days, to make a fast-track reference in *Sainsbury's/ASDA* (2018)). This procedure is not often used in practice. At the time of writing, fast-track references have been sought from the CMA, and granted, in only eight such cases: a telecoms sector merger, *BT/EE* (2015); a merger of bookmakers and betting shops, *Ladbrokes/Coral* (2016); a merger concerning vertical links in the groceries/supermarket sector, *Tesco/Booker* (2017); an NHS healthcare merger, *Central Manchester University Hospitals/University Hospital of South Manchester* (2017); a merger concerning horizontal links in the groceries/supermarket sector, *Sainsbury's/ASDA* (2018); a merger concerning horizontal links in the equity crowdfunding platforms sector, *Crowdcube/Seedrs* (2020); a joint venture concerning the telecoms sector, *Liberty Global/Telefónica* (2020); and a merger concerning horizontal risks in the container handling equipment sector, *Cargotec/Konecranes* (2021). A request for a fast-track reference is made without prejudice to the parties' view that the merger would not lead to a substantial lessening of competition in any market in the UK. Accordingly, requesting a fast-track reference does not involve any admission in relation to the merits of the case; it is simply an acknowledgment that the case is too complex to resolve within the limitations of the Phase 1 process.

Parties can also submit a request for a fast-track consideration of undertakings *in lieu* with the objective of proceeding more quickly to a Phase 1 clearance decision with remedies. Such a request would typically be made early during the Phase 1 investigation or during pre-notification discussions. However, in contrast to the process for a fast-track reference to a Phase 2 investigation, the parties are required to accept in writing that the test for a Phase 2 reference is met (i.e. it may be the case that the merger may result or has resulted in a substantial lessening of competition – see question 4.1). The parties must also agree to waive their normal Phase 1 procedural rights.

In addition, in a Phase 2 investigation, parties may "concede" that a merger leads to a substantial lessening of competition within (a) specific market(s) for goods or services in the UK, by waiving their right to challenge that position, in order to facilitate the efficient conduct of the case. In its guidance, the CMA indicates that it is likely to consider such requests where the "concession" would aid the alignment of the CMA's remedies process with proceedings in other jurisdictions or where it enables the CMA and parties to focus their efforts during the remainder of the CMA's substantive assessment on other areas.

3.12 Who is responsible for making the notification?

No party is responsible for notifying as there is no obligation to notify (see question 3.1). Where the merger situation is an acquisition, the acquirer will typically take the lead in preparing any notification. Where two enterprises are merging or forming a joint venture, the parents will typically prepare a joint notification. The CMA Merger Notice (see question 3.10 above) can be prepared and submitted by any person carrying on one of the businesses to which the notified merger relates, or by the authorised representative of such a person (e.g. their lawyers). The Merger Notice must be signed by the notifying person (or its authorised representative), and if the notification is made jointly, by both/all of the notifying parties.

3.13 Are there any fees in relation to merger control?

Merger fees are levied by the CMA and are as follows:

- where the target's UK turnover is £20 million (approximately €23.4 million or US$27.2 million at 2021 European Central Bank exchange rates) or less, the filing fee will be £40,000 (approximately €46,800 or US$54,390);
- where the target's UK turnover is greater than £20 million (approximately €23.4 million or US$27.2 million) but less than or equal to £70 million (approximately €81.9 million or US$95.2 million), the filing fee will be £93,600 (approximately €89,900 or US$108,800);
- where the target's UK turnover is over £70 million (approximately €81.9 million or US$95.2 million), but less than or equal to £120 million (approximately €140.4 million or US$163.2 million), the filing fee will be £120,000 (approximately €140,400 or US$163,200); and

- where the target's UK turnover is over £120 million (approximately €140.4 million or US$163.2 million), the filing fee will be £160,000 (approximately €187,200 or US$217,500).

Subject to some limited exceptions, the fee is payable in relation to all mergers that meet the jurisdictional thresholds and on which the CMA reaches a decision, regardless of whether the transaction is notified by the parties or whether Phase 2 is launched. The main exception is where the interest acquired or being acquired is less than a controlling interest (e.g. where only material influence is acquired – see question 2.1). In addition, businesses that qualify as small- or medium-sized enterprises within the definitions of the Companies Act 2006 are currently exempt from paying merger fees. No fee is payable in relation to special public interest mergers (see question 2.7).

The fee will normally be levied at the time the CMA announces its decision whether to refer. Where undertakings *in lieu* are required, fees are not payable until the undertakings are finalised and formally accepted by the CMA. Fees are payable by the person (or group of people) submitting the CMA Merger Notice or, if the CMA launches an own-initiative investigation, by the person(s) acquiring control.

3.14 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The City Code on Takeovers and Mergers ("Code") primarily applies to takeovers and mergers of any UK company listed on the London Stock Exchange or other regulated market or other multilateral trading facility in the UK (such as AIM).

Previously, the Code differentiated between offers that fell within the jurisdiction of the CMA or the European Commission and those that fell within the jurisdiction of another regulatory authority. This distinction has been removed for firm offers announced on or after 5 July 2021 and all regulatory clearances are treated consistently under the revised Code. As a result, conditions relating to clearances from the CMA and the European Commission are now subject to the same "material significance" test as other offer conditions and to the oversight of the Takeover Panel.

The revised Code permits the suspension of an offer timetable if a condition relating to an official authorisation or regulatory clearance has not been satisfied or waived. The timetable may be suspended at the joint request of the parties or at the request of either party if a condition relating to a "material" official authorisation or regulatory clearance has not been satisfied or waived.

While the requirement for an offer to lapse if a reference is made for a Phase 2 CMA inquiry has been removed, offerors may (and in practice usually will), subject to consent being provided by the Takeover Panel, continue to make the offer conditional on a formal decision being obtained that there will be no Phase 2 UK reference. Such a condition may include a requirement that the clearance decision must be on terms satisfactory to the offeror (for example, an unconditional clearance without remedies or that any Phase 1 conditions are commercially acceptable).

The previous rules continue to apply to offers that were ongoing at 5 July 2021 and any subsequent offers that compete with firm offers announced before 5 July 2021.

Where the proposed takeover is prohibited by a regulatory authority (or the SoS in public interest cases – see question 1.1), the offeror is prohibited from making a new offer for a period of six months.

3.15 Will the notification be published?

Phase 1 notifications made to the CMA are not published; however, the CMA will publish an "invitation to comment", stating that it is considering whether the transaction gives rise to a qualifying merger situation (and if so, whether it has resulted or may be expected to result in a substantial lessening of competition within any market(s) in the UK for goods or services), and inviting comments from any interested parties. The invitation to comment is based on standard wording and does not include detailed information about the transaction. During its investigation, the CMA will actively contact third parties (such as customers and suppliers) (see question 4.4). A non-confidential version of the Phase 1 decision will be published.

At Phase 2, there is a much higher degree of transparency regarding the parties' and others' submissions to the CMA and non-confidential versions of the majority of submissions will be published on the CMA's website. The CMA will also publish various papers and findings during the course of the investigation, as well as a non-confidential version of its final decision. In a number of cases, the CMA has published the non-confidential Phase 1 notification in Phase 2.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test against which a merger will be assessed under the Enterprise Act by the CMA is whether it has resulted or may be expected to result in a substantial lessening of competition. Very broadly, the UK test is applied in a similar manner to the substantive assessment test under the EU Merger Regulation and to analysis under the US merger control regime.

In relation to public interest mergers (see question 1.1), the merger will also be reviewed by reference to its impact on public interest. Special public interest mergers (see question 2.7) will be considered by reference only to public interest considerations, excluding any competition-related issues. Water mergers are assessed by reference to a different test (see question 1.4).

The CMA is under a duty to refer mergers for a Phase 2 investigation where it believes that it may be the case that the merger may result or has resulted in a substantial lessening of competition. The CMA will refer a merger where it has a reasonable belief, objectively justified by relevant facts, that there is a "realistic prospect" that the merger will substantially lessen competition. The courts have clarified that this threshold is met where there is a "more than fanciful" prospect of a substantial lessening of competition. This is a materially lower threshold than the standard of proof at Phase 2, where a merger will be assessed on the basis of the balance of probabilities, i.e. whether it is "more likely than not" that the merger will give rise to a substantial lessening of competition.

There are limited circumstances where, even though the duty to refer is triggered, the CMA nevertheless has discretion to clear the merger:

- first, where the merger has not yet been completed, the CMA does not have to refer the merger if it believes that the merger plans are not sufficiently advanced or not sufficiently likely to proceed;
- second, regardless of whether the merger has been completed, the CMA's duty to refer will not apply if the competition concerns it has identified are outweighed by

relevant consumer benefits that are expected to result from the merger. However, the evidential burden of proving that benefits generated by the merger qualify as relevant customer benefits is high, and even if the benefits are accepted, the CMA rarely accepts that they outweigh any substantial lessening of competition. There are only two examples to date of mergers being cleared at Phase 1 on this basis (*University Hospitals Birmingham/Heart of England* (2017) and *Derby Teaching Hospitals/Burton Hospitals* (2018), which involved mergers between public sector hospital groups, generating customer/patient benefits that were very specific to the healthcare sector); and

- third, and again regardless of whether the merger has been completed, the CMA has discretion not to refer if the merger involves markets that are of insufficient importance to warrant reference – the *de minimis* or small-scale mergers exception. The CMA considers that this exception will not usually be applied if the aggregate annual value of the markets in which the merger is expected to generate competition concerns is more than £15 million (approximately €17.6 million or US$20.4 million at 2021 European Central Bank exchange rates). On the other hand, it will usually be applied where the aggregate annual value of the markets concerned is £5 million or less (approximately €5.9 million or US$6.8 million at 2021 European Central Bank exchange rates). The market share figure is adjusted in various ways to try to capture the likely adverse impact of the merger; therefore, the "market value" figure can be significantly different from the full value of sales in the market concerned. However, even in mergers where this exception is potentially in play (on the basis of small market sizes), the CMA will consider the facts of the merger to determine whether application of the exception is appropriate. It will review the strength of the competition concerns, the magnitude of competition that would be lost, the likely duration of the expected harm to competition, and the wider implications of exercising the discretion beyond the case concerned.

Guidance on the use and application of these exceptions to the duty to refer is available at: https://www.gov.uk/government/publications/mergers-exceptions-to-the-duty-to-refer-and-undertakings-in-lieu (this guidance has been adopted by the CMA and was updated in December 2018).

The CMA is responsible for considering both Phase 1 and Phase 2 cases, and some of the Phase 1 staff will transfer to the Phase 2 investigation to ensure continuity and avoid duplication of work. However, the decision-makers will be different (see question 1.1).

The published non-confidential versions of merger decisions provide a useful source of guidance as to the approach taken by the CMA to a range of substantive and procedural matters, including market definition, together with insights into the weighting applied to different types of evidence, such as internal documents and economic analysis.

4.2 To what extent are efficiency considerations taken into account?

Where merger efficiencies lead to increased rivalry between the merged entity and third-party competitors, this will lead to the question of whether the merger will lead to a substantial lessening of competition at all.

The Enterprise Act also makes specific provision in cases where the merger is found to give rise to a substantial lessening of competition. As explained in question 4.1, the CMA's duty to refer a merger will be overridden where it believes that the damaging impact of any substantial lessening of competition will be outweighed by the positive impact of relevant customer benefits arising out of the merger. There are, however, only two cases in which a merger has been cleared at Phase 1 on the basis of this exception (i.e. *University Hospitals Birmingham/Heart of England* (2017) and *Derby Teaching Hospitals/Burton Hospitals* (2018), both on facts very specific to the healthcare sector).

Relevant customer benefits can also be taken into account at Phase 2. Where a merger will reduce rivalry, but efficiencies are likely to lead to customer benefits, such as lower prices, better quality or greater innovation, this will go to the assessment of how to remedy the adverse effects of the merger. Relevant customer benefits were relied upon by the CMA at Phase 2 to clear a merger between two hospital trusts, despite having concluded that the merger would *prima facie* give rise to a substantial lessening of competition (*Central Manchester University Hospitals/University Hospital of South Manchester* (2017)). This was the first merger to be cleared unconditionally at Phase 2 on the basis of relevant customer benefits following a finding of a substantial lessening of competition. However, as with the other hospitals merger referred to above in relation to Phase 1, the facts of this case were very specific to the healthcare sector.

Relevant customer benefits must also be taken into account in designing Phase 1 or Phase 2 remedies.

4.3 Are non-competition issues taken into account in assessing the merger?

As noted above, the impact of a merger on the public interest may be taken into account in public interest merger cases (in addition to competition issues) (see question 1.1). Special public interest mergers (see question 2.7) will be considered by reference only to public interest considerations, excluding any competition-related issues.

Water mergers are assessed by reference to a different test (see question 1.4), which focuses on whether the merger will result in the loss of a comparative efficiency benchmark.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

The involvement of third parties is key to testing and verifying the statements of the merging parties. The CMA issues press releases at the outset of both Phase 1 and Phase 2 investigations, inviting third parties to comment on the merger. In addition, it actively contacts third parties to seek their views on a merger generally and on specific aspects of the assessment. At each stage of the process, the parties will be required to provide contact details for major customers and competitors, who will be contacted for their views.

The level of involvement is largely for the third party to decide. Where it has substantial objections to a merger, it may decide to prepare detailed submissions to the competition authority. Third-party rights as such are not clearly defined in the legislation. At Phase 2, however, there is a high degree of transparency and a third party will be able to access many of the key documents and submissions from the CMA's website and may also be invited to attend a hearing with the CMA (not usually in the presence of the merging parties).

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The prescribed Merger Notice requires the parties to provide a substantial amount of information when notifying a merger, and

the notification will not be considered "complete" until all that information has been provided, subject to any exceptions agreed with the CMA (see question 3.10). Where the CMA's Mergers Intelligence Committee investigates a merger on its own initiative, it will initially send an enquiry letter requesting information about the merger, and may subsequently request further details.

The CMA has powers to issue a notice requiring any person (including third parties) to appear before it as a witness or to provide information or documents at any stage of the merger investigation, including before any notification has been made, during Phase 1 or Phase 2, during the process of identifying and negotiating Phase 1 or Phase 2 remedies, and in connection with the variation, replacement or release of agreed remedies. Such a notice can also be issued in connection with a public interest case or a special public interest case (see questions 1.1 and 2.7, respectively). The CMA guidance on requests for internal documents in merger investigations (published in January 2019) makes clear that it is likely to use notices as standard in investigations where internal documents are requested from main parties in both Phase 1 and Phase 2 merger investigations.

Where such a notice has been issued, the CMA can impose fines on parties or third parties who fail to supply information or who supply incomplete information, or who obstruct or delay the provision of a document which the CMA has required to be produced. The fines are currently set at £30,000 (approximately €35,100 or US$40,800 at 2021 European Central Bank exchange rates) for each such failure, plus a daily fine of £15,000 (approximately €17,600 or US$20,400 at 2021 European Central Bank exchange rates) for continuing delay. More generally, the CMA considers that it is not obliged to have regard to any information received after the date reasonably specified for its receipt. The CMA uses these formal powers to require information or documents to be provided primarily where it is encountering resistance from the parties in relation to an informal request.

On 22 November 2017, the CMA made use of its fining powers for the first time, imposing a fixed penalty of £20,000 on Hungryhouse for failing to disclose documents during the *Just Eat/Hungryhouse* merger inquiry. The documents were responsive to a compulsory information request and were only provided to the CMA at a later stage in the inquiry, resulting in a delay to the enquiry timetable. These fining powers have since been used on a number of further occasions.

In addition, it should be noted that a merger decision based on incomplete information may also be vulnerable to challenge. In 2014, the CAT quashed the Phase I clearance of the *IRI/Aztec* merger as the parties had failed to disclose material information to the OFT. The case was reinvestigated and cleared 12 months later. In November 2020, the CAT quashed the CMA's decision prohibiting the completed acquisition of Footasylum by JD Sports. The CAT concluded that the CMA had not gathered sufficient information on the impact of the COVID-19 pandemic. In March 2021, the CMA was refused leave to appeal by the Court of Appeal and the case was remitted to the CMA for reconsideration. On 2 September 2021, the CMA announced its provisional view that the acquisition gives rise to competition concerns and could lead to higher prices, less choice and a worse shopping experience for customers.

The CMA also has the power to "stop the clock" on the timeframe for assessment where the parties fail to provide requested information by the specified deadline (see question 3.7). In general, it is a criminal offence to knowingly or recklessly supply false or misleading information to the CMA in connection with a merger investigation. This offence is wide enough to extend to the parties to the merger, third parties and the advisers to either of those groups, and is punishable by a fine and/or up to two years' imprisonment. The criminal and civil sanctions are alternatives and cannot both be used in relation to the same actions.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

It is not possible to withhold information from the CMA on the basis that it is confidential. However, the CMA is fully aware of the commercial sensitivity of much of the information which is submitted to it and has strict confidentiality policies. Information leaks of sensitive material are extremely rare in practice. The CMA is, moreover, subject to an obligation under the Enterprise Act to maintain confidentiality and must have regard, in relation to information that it proposes to publish or otherwise disclose, to the extent to which disclosure could be prejudicial to the person or business concerned. There are a number of provisions to permit disclosure, including, in particular:

- with consent; or
- where disclosure is necessary to facilitate the exercise of certain of the CMA's or another body's statutory functions. For example, the CMA's 2017 infringement decision in the specialist laundry market concerned a market sharing arrangement that came to the CMA's attention in the context of a merger review.

The parties (and third parties) will typically be given an opportunity to request excisions from the CMA's final Phase 1 and Phase 2 decisions prior to publication, in order to protect confidentiality.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

Where the CMA decides there is no realistic prospect of a substantial lessening of competition arising from the merger, or where it does identify competition concerns but concludes that one of the exceptions to the duty to refer applies (see question 4.1), Phase 1 will end with an announcement that the merger will not be referred to Phase 2.

Where the CMA concludes that there is a realistic prospect of a substantial lessening of competition and that none of the exceptions to the duty to refer applies, it will announce that it is intending to refer the merger unless undertakings *in lieu* of a reference can be agreed with the parties. This triggers the period for negotiating Phase 1 remedies (see question 5.2). Once the discussion of remedies has concluded (or the parties have declined to offer them), the CMA will announce either that remedies have been agreed, closing Phase 1, or will refer the merger for a Phase 2 investigation.

Where a merger is referred for a Phase 2 investigation, the process ends with a decision by the CMA Inquiry Group on whether to clear the merger, whether remedies are required for conditional clearance, or whether to prohibit the merger outright. The CMA publishes the non-confidential version of the report containing the reasons for its decision on the same day that the decision is announced.

Where Phase 2 clearance is conditional on remedies being implemented, the required remedies will be stated in outline terms in the CMA's decision. The negotiation of the detail of the remedies will then commence between the CMA on the one hand and the parties on the other.

The statutory deadlines for the acceptance of Phase 1 or Phase 2 remedies by the CMA are discussed in question 5.4.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Where competition problems are identified, remedies in the form of structural, behavioural, or a combination of structural and behavioural undertakings may be negotiated at both Phase 1 and Phase 2.

At Phase 1, undertakings may be offered *in lieu* of reference, but must be "clear cut" solutions to the competition concerns. As such, structural remedies (in particular, divestments) are likely to be considered more suitable than behavioural remedies. At Phase 2, there is also a stated preference for structural remedies. In practice, however, there are examples at both Phases 1 and 2 of behavioural remedies being accepted. It should be noted that, particularly at Phase 1, it is up to the parties to take the initiative in suggesting potential remedies to identified concerns. The CMA will not take the lead in this regard.

Remedies will usually take the form of legally binding "undertakings" given to the CMA and signed by the parties. Where the parties are not prepared to give undertakings, or where they are not appropriate, the CMA has powers at Phase 2 to impose remedies on the parties by way of an administrative order (or at Phase 1, negotiation of the proposed remedies can simply be abandoned in favour of making a Phase 2 reference). If remedies cannot be secured within the Phase 1 deadline, the merger will be referred to Phase 2.

The full text of undertakings and orders (subject to redaction of confidential information) will be published on the CMA's website and entered in the Register of Undertakings and Orders, which is maintained by the CMA.

Liaison by the CMA with other national competition authorities also reviewing the merger, in order to coordinate the process of identifying appropriate remedies, is possible in principle, although in practice this depends to a large degree on whether the timeframes for assessment of the various authorities make liaison and discussion practical. Particularly where a merger is subject to a Phase 2 investigation in the UK, national timeframes may differ to a sufficient degree that liaison with other national competition authorities over remedies becomes difficult.

In 2018, the CMA published updated guidance on its approach to remedies in Phase 1 and Phase 2, which is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

As noted above, the manner in which the jurisdictional thresholds operate mean that foreign-to-foreign mergers will often fall outside the jurisdiction of the UK merger control regime (see questions 2.4 and 2.6). Where the parties are based outside the UK, but either the turnover test or share of supply test is met, the CMA has the same powers to investigate the transaction and impose remedies, as in cases involving UK-based companies.

The Court of Appeal has confirmed that remedies can extend to a business's conduct outside the UK, provided the business is being carried out in the UK. There does not have to be a link between its UK activities and the markets being considered in the merger analysis (*Akzo Nobel v CC* (2014)). This means that remedies can be (and regularly are) imposed on parent companies outside the UK as well as on its subsidiaries that are directly involved in the merger (provided the parent business has some involvement in UK business activities).

However, remedy selection may be limited in a foreign-to-foreign merger by the constraints of extra-territorial enforcement. For example, in *Dräger Medical/Air Shields* (2004) (involving the acquisition of a US business manufacturing neonatal warming therapy products by a German manufacturer of similar products, which were supplied to hospitals in the UK), the CC noted in its report that given the global nature of the merger and the fact that manufacturing took place overseas, it was likely that prohibition of the merger would be impractical (i.e. unenforceable), even if the CC found it to be an appropriate remedy. In that case, undertakings were secured to maintain current product levels and prices until the end of 2007, when recommendations to relevant third parties to encourage new entry of foreign products, and to strengthen the potential for UK hospitals to increase their buyer power, were expected to have had an impact. These issues are likely to become more relevant following the end of the Brexit Transition Period, as the CMA is now required to review foreign-to-foreign transactions that have hitherto been reviewed by the European Commission.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

It is possible to commence a dialogue on possible remedies from the outset of the CMA's investigation, or even during pre-notification discussions ahead of the commencement of the Phase 1 investigation, if the parties so wish. However, the question of possible remedies is not required to be discussed until after the CMA has taken its Phase 1 decision on whether the test for reference to Phase 2 is satisfied. This enables the parties to wait to see whether the CMA considers that its duty to make a Phase 2 reference has been engaged – if not, the issue of remedies does not need to be addressed. Some parties prefer this approach, since discussing remedies in advance of knowing whether the CMA has identified a potential substantial lessening of competition is sometimes considered a tacit acknowledgment of potential competition concerns, particularly in finely balanced cases.

Phase 1

If the CMA decides at the end of Phase 1 that its duty to refer applies, the parties have five working days after receiving the CMA's reasoned decision in which to make their offer of undertakings *in lieu*. In practice, this means that planning for possible Phase 1 remedies must be well advanced before the CMA's Phase 1 decision. The submission must include a written response addressing the various points set out in the CMA's Remedies Form, and a draft text of the undertakings, which should be based on the CMA's undertakings *in lieu* template (both of these documents are available at: https://www.gov.uk/government/publications/undertakings-in-lieu-of-reference-form). The CMA must decide whether to pursue such undertakings no more than 10 working days after announcement of its Phase 1 decision. If it decides to proceed down this route, the CMA has a period of 50 working days from the announcement of its Phase 1 decision to negotiate the text of the undertakings with the parties, consult and announce the acceptance of the undertakings. It may extend the 50-working-day period by up to 40 working days where there are special reasons for doing so.

Phase 2

At Phase 2, the question of remedies has previously not normally been raised until the CMA has issued its provisional findings. If the CMA provisionally concludes that the merger is unobjectionable, then the question of remedies does not need to be

considered at all. Where the CMA provisionally concludes that the merger will have an adverse effect on competition, proposed remedies will then be outlined in the provisional findings, or more often in a separate remedies notice. The proposals will then be discussed with the parties (and third parties). Where the CMA decides to grant conditional clearance, the outline of the required remedies will be announced with the CMA's decision.

As noted above, however, in a Phase 2 investigation, the parties may now "concede" that a merger leads to a substantial lessening of competition within (a) specific market(s) for goods or services in the UK, by waiving their right to challenge that position. Parties may consider this approach to facilitate the efficient conduct of the case by, for example, aligning the CMA's remedies process with proceedings in other jurisdictions. In addition, as noted below, a number of reforms have also been proposed to improve the efficiency of the merger review process, including enabling the CMA to accept binding commitments earlier in a Phase 2 investigation.

The detail of Phase 2 remedies must be negotiated, consulted on and implemented (by way of order or acceptance of undertakings) within 12 weeks of the publication of the CMA's final report following its Phase 2 review. This deadline is extendable by a further six weeks where the CMA considers there to be special reasons for doing so.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The CMA's website provides a template for Phase 1 divestment undertakings (see question 5.4). There is no corresponding *pro forma* for Phase 2 undertakings, although accepted remedies are published and provide precedents. The CMA published a consolidated guidance document on merger remedies on 13 December 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764372/Merger_remedies_guidance.pdf.

At both Phase 1 and Phase 2, the key provisions in divestment undertakings include the following:

- a commitment to sell the business to be divested (in some cases, an alternative business or set of assets may have to be sold if no purchaser can be found for the initial divestment business). It is preferred that an existing business be sold, rather than a bundle of assets selected for the purpose of the divestment;
- a requirement to obtain the prior approval of the CMA for the nominated purchaser of the divested business. Such consent will be in addition to any merger notifications and clearances the divestment may trigger. In some cases, where divestment is considered risky due to a small number of potential purchasers, the CMA may require the purchaser to be identified and approved before the divestment undertakings can be approved (i.e. an "up-front purchaser" requirement);
- a fixed deadline within which the business must be sold – this is typically kept confidential to avoid weakening the negotiating position of the seller, but will usually be in the range of three to six months;
- where the fixed deadline for divestment cannot be met, the undertakings will include the provision for a divestment trustee to be appointed by the CMA (at the expense of the parties) to oversee the sale of the business on the best terms that can be achieved;
- a commitment to maintain the business to be divested as a going concern, to try to ensure that its employees remain, maintain and preserve its assets and to ensure no degradation in the goods and services it supplies;
- a post-divestment commitment to remain separate from the divested business and not to have any interest in it;
- provisions dealing with the appointment, functions and mandate of any trustee; and
- various information and compliance obligations to facilitate monitoring of compliance with the undertakings. In some cases, a monitoring trustee may be appointed to report on compliance, particularly where "hold separate" undertakings are required to keep the merging business separate from the business to be divested.

5.6 Can the parties complete the merger before the remedies have been complied with?

As explained above (see question 3.4), it is not necessary to obtain clearance prior to completing a merger in the UK. However, the CMA has discretionary powers to suspend all integration steps from the outset of a Phase 1 inquiry in respect of both anticipated and completed mergers, as well as powers to reverse any integration steps that have already been taken (see question 3.8). For example, in February 2019, the CMA served an Unwinding Order on Tobii AB, Smartbox Assistive Technology Limited and Sensory Software International Limited in relation to the completed acquisition by Tobii of Smartbox and Sensory Software. It is standard practice for an IEO to be issued in relation to all completed mergers at Phase 1 (which will be kept in place throughout the Phase 1 investigation unless it becomes clear that there are no competition concerns).

Once a reference for a Phase 2 review has been made, the general position is that completion (or any further integration) may not take place without the consent of the CMA (although the parties will be able to complete an acquisition by share purchase if legally obliged to do so (see question 3.8)). The CMA will typically impose an IO on the parties, which usually adopts and continues the Phase 1 IEO in respect of completed mergers (again, see question 3.8).

In relation to a merger that has not been completed, where:

- the CMA decides not to refer but to accept undertakings *in lieu* of reference; or
- Phase 2 clearance is granted conditional on certain remedies being given,

integration of the merging businesses can usually commence once the detail of the remedies has been agreed and they have been formally signed by the parties and accepted by the CMA.

Similarly, formal completion of the transaction is not normally required to be delayed until the remedies have been fulfilled; however, this clearly depends on the terms of the undertakings (some remedies operate on a "fix it first" basis such that the parties must have entered into legally binding arrangements to fulfil the remedies before completion of the merger itself can occur).

In any case, completion must be in accordance with the terms of the undertakings. Thus, if it has been agreed that a particular business will be divested, it is likely that the remedies will include holding separate undertakings to prevent the business due to be divested from being integrated into the merged business post-completion. Completion of the transaction must therefore take those commitments into account and ensure they are satisfied.

5.7 How are any negotiated remedies enforced?

Where undertakings given to the competition authorities are not complied with, an order can be issued to require the parties to fulfil their commitments. The CMA has powers to make an IO to ensure that the effectiveness of the eventual order is not prejudiced

in the interim. Civil proceedings may also be used to enforce an undertaking or order, and the CMA could, for example, seek an injunction from the High Court to enforce compliance.

Third parties have rights under the Enterprise Act to bring an action for breach of statutory duty against a party to an undertaking or order who does not comply with it, where the third party has suffered loss or damage.

5.8 Will a clearance decision cover ancillary restrictions?

Ancillary restrictions agreed as part of a merger or acquisition (for example, a restrictive covenant to protect the goodwill acquired by the purchaser) are not subject to wider competition law controls, provided they are directly related and necessary to the merger transaction. The CMA considers that it is no better placed than the parties to assess whether a competition restriction in the legal arrangements surrounding the merger is directly related to and necessary for the transaction. Parties seeking confirmation of the ancillary nature of a restriction must therefore expressly request the review of a restriction by the CMA and explain why the request raises novel or unresolved questions giving rise to genuine uncertainty. Given the statutory deadline for Phase 1 reviews by the CMA, it will not usually agree to a request to review an ancillary restraint unless the matter has been explored to a sufficient degree during pre-notification discussions.

As noted above in response to question 4.6, information provided to the CMA pursuant to its merger functions may be shared with other parts of the CMA. An agreement that includes excessive or disproportionate ancillary restrictions may therefore result in enforcement action being taken by the CMA.

5.9 Can a decision on merger clearance be appealed?

The Enterprise Act gives both the parties and third parties aggrieved by a decision taken by the CMA or the SoS in connection with merger control under the Enterprise Act, the right to seek judicial review of that decision by way of an application to the CAT. Judicial reviews focus on the legality of the decision-making process and do not amount to a full appeal on the merits. "Persons aggrieved" can appeal all or part of the decision, including any remedies. The parties to the merger would normally qualify as persons aggrieved, as will third parties who can demonstrate that their interests have been prejudicially affected or that they have a direct interest in the outcome of the application.

The UK legal system is made up of three separate legal jurisdictions: England and Wales; Scotland; and Northern Ireland, which each have a separate court system and apply their own legal principles. Review of a merger decision will be undertaken by the CAT on the basis of the judicial review principles of the appropriate jurisdiction. To date, however, all reviews of merger decisions by the CAT have been conducted on the basis of the principles of judicial review of the law of England and Wales. This may change in the medium term, in light of the recent expansion of the CMA's Edinburgh office.

Statistically, it remains the case that few merger decisions are appealed in the UK; however, the number of challenges has increased significantly by comparison to the previous UK merger control regime (before June 2003).

5.10 What is the time limit for any appeal?

Any application to appeal a decision of the CMA or the SoS in connection with a reference (or possible reference) in respect of a relevant merger situation must be made within four weeks of the date on which the applicant was notified of the disputed decision.

In very exceptional circumstances, this deadline may be extended; however, the CAT has previously indicated that instances where such circumstances exist are likely to be rare. One example is the *BSkyB/ITV* case (2008), where the deadline for BSkyB to lodge an application to appeal against the CC's report was extended in order to be coterminous with the deadline for appealing against the SoS's decision on the CC's report, given the interlinked nature of the report and the SoS's decision in this case (which was the first Phase 2 public interest case – see question 1.1).

5.11 Is there a time limit for enforcement of merger control legislation?

The CMA can refer a merger situation for a Phase 2 inquiry at any time up to four months from the date of completion of the transaction, or from the date on which facts about the transaction became public (e.g. when it is announced, or when it receives significant press coverage in the national or trade press), whichever is later. Thereafter, the CMA is time barred and no Phase 2 reference is possible. There are limited circumstances under which this time limit can be extended. For example:

- where a series of transactions between the same parties takes place over a period of up to two years, it may be possible to treat the whole transaction sequence as having occurred on the date of the final stage, and thereby to refer the whole series for a Phase 2 inquiry (see question 2.8); and
- where the CMA has issued a formal statutory request for information in relation to its inquiries about a merger and a sufficient answer has not been received, time will be suspended in relation to the four-month reference deadline.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

It is common for the CMA to engage in case-specific liaison with competition authorities in other jurisdictions that are reviewing the same merger. The extent of this liaison depends on the timeframes for assessment and whether there are any formal cooperation agreements in place with other competition authorities.

Since the UK left the EU, the CMA has ceased to be a member of the European Competition Network, which comprises the national authorities of all EU Member States, together with the European Commission – members of which receive notice of all transactions notified to the authorities of other Member States and of those notified to the European Commission. However, in practice, the CMA continues to cooperate closely with the European Commission.

However, the CMA participates in the International Competition Network, particularly as regards the development and promotion of best practice. In addition, in September 2020, the CMA signed new framework agreements with five of its international counterpart competition authorities to improve cooperation on investigations: the Australian Competition and Consumer Commission; the New Zealand Commerce Commission; Competition Bureau Canada; the United States Department of Justice; and the United States Federal Trade Commission.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

In recent years, the CMA has reviewed approximately 60 cases per year (2021/2022: 55, 2020/2021: 38, 2019/2020: 62, 2018/2019:

57, 2017/2018: 63, 2016/2017: 58), of which around six to 13 Phase 2 reviews have been opened. The lower number of cases for 2020/2021 reflects the impact of the COVID-19 pandemic.

Between 1 April 2021 and 31 March 2022, the CMA issued 55 Phase 1 merger decisions. The CMA gave clearances at Phase 1 to 34 mergers, accepted undertakings *in lieu* in six cases, and referred 10 cases to Phase 2. In the same period, eight Phase 2 reviews were completed, of which two were unconditionally cleared, two were cleared subject to remedies, three were prohibited and one case was abandoned by the merging parties.

The CMA has become more robust in the use of its procedural fining powers in the last few years, with fines imposed for breaches of Interim Measures and information requests (see further questions 3.7 and 4.5).

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

In July 2021, BEIS published a consultation on reforming competition and consumer policy. The consultation followed a number of reports (including the Furman Report, a report by a panel of experts in the digital competition sphere, chaired by Jason Furman, and the Penrose Report), which recommended wide-ranging reforms. In April 2022, BEIS published the UK Government's response to its consultation on reforming competition and consumer policy. As proposed in the consultation, the UK Government plans to amend the jurisdictional merger control thresholds as follows:

- the target turnover threshold will be increased from £70 million to £100 million (in line with inflation);
- a safe harbour will be introduced to exempt mergers from review where each party's UK turnover is less than £10 million; and
- a third limb will be added, which would permit the CMA to assert jurisdiction over a merger where any party has at least a 33% share of supply and has a UK turnover of more than £350 million. This is designed to enable the CMA to review potential "killer acquisitions" (acquisitions of small challenger start-up businesses by large incumbents) more easily.

A number of reforms have also been proposed to improve the efficiency of the merger review process, including:

- enabling the CMA to accept binding commitments earlier in a Phase 2 investigation; and
- enhancing and streamlining the merger "fast-track" procedure by enabling parties to request a fast-track referral at any stage during pre-notification discussions and Phase 1, and removing the requirement that the parties accept that the merger may create a substantial lessening of competition.

In addition, in May 2022, BEIS published its response to its consultation on a new pro-competition regime for digital markets (see section 7 below).

6.4 Please identify the date as at which your answers are up to date.

The answers are up to date as at 13 October 2022.

7 Is Merger Control Fit for Digital Services & Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

There has been a significant amount of debate in this area over the past couple of years, calling for reform and for the establishment of a separate digital regulator. Several reports on competition and digital markets have been published, including the Furman Report, the LEAR Report on digital merger review (commissioned by the CMA) and advice by the CMA's Digital Markets Taskforce.

The Furman Report (titled "Unlocking Digital Competition") was published in March 2019 and included a number of proposals to the UK Government, including:

- the CMA should further prioritise the scrutiny of mergers in digital markets and closely consider harm to innovation and impacts on potential competition in its assessment of those mergers;
- digital companies of key strategic importance should be designated with a "strategic market status" ("SMS") and should be required to make the CMA aware of all intended acquisitions;
- the CMA's Merger Assessment Guidelines should be updated to reflect modern digital markets; and
- changes should be made to legislation to permit the CMA to use a "balance of harms" approach which takes into account the scale, as well as the likelihood of harm, in merger cases involving potential competition and harm to innovation.

The LEAR Report was published on 3 June 2019 and considered three key areas:

- how potential competition theories of harm are generally assessed under the current merger control framework;
- whether the assessment undertaken in five recent digital merger clearance decisions was reasonable based on the evidence available at the time; and
- whether, with the benefit of hindsight, clearance in those cases led to a detrimental outcome, given the way the market subsequently evolved.

The LEAR Report concludes that there were certain gaps in the way the selected previous cases were analysed, although these gaps do not undermine the legitimacy of the clearance decisions and it is not always clear whether competitive harm has arisen as a result of such gaps. The LEAR Report made a number of recommendations for best practice when considering similar issues in the future, including adjustments to the definition of the counterfactual (by accepting more uncertainty and using a longer timeframe for the assessment of future market developments), enriching the information set relied upon (including through possible use of dawn raids), and developing a better baseline understanding of key markets in the digital sector, in particular likely entry strategies.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

In November 2020, the UK Government announced that it would set up a Digital Markets Unit ("DMU") to oversee a pro-competitive regime for digital platforms. The DMU is part of the CMA and was launched in April 2021.

In February 2021, the CMA published its second Digital Markets Strategy, noting the significant amount of work undertaken in the digital sphere since July 2019. Since its first Digital Markets Strategy in 2019, the CMA has published revised Merger Assessment Guidelines to ensure the process for assessing whether a merger could harm competition reflects the impact of digital technologies on how businesses compete.

The CMA's Digital Markets Taskforce published its advice on a pro-competitive regime for digital markets in December 2020 and in July 2021, BEIS launched a consultation building on this advice. As part of this, BEIS consulted on a new

pro-competitive regime for digital markets, which includes proposals for new merger control rules for digital companies that have been designated as having SMS. The DMU will have the ability to designate firms with SMS if it concludes that a firm has substantial and entrenched market power in at least one activity which gives it a strategic position. Specifically, the proposed new merger control regime would require firms designated with SMS to inform the CMA of their most significant mergers. BEIS has indicated that this would apply to transactions where the SMS firm acquires over 15% of the equity or voting rights after the transaction, the value of the SMS firm's holding is over £25 million and the transaction meets a UK nexus test. Following consultation, BEIS has decided not to proceed with proposals to lower the threshold for intervention at Phase 2 for such cases to "a realistic prospect of a substantial lessening of competition".

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

The LEAR Report considered several recent merger decisions taken by the UK authorities in the digital services industry: *Facebook/Instagram*; *Google/Waze*; *Priceline/Kayak*; *Expedia/Trivago*; and *Amazon/The Book Depository*.

In particular, the LEAR Report notes that during consideration of the *Facebook/Instagram* merger (which was cleared by the OFT in August 2012), the OFT did not precisely define the relevant market of either undertaking. For this and other reasons, the LEAR Report concludes that there were a number of gaps in the analysis carried out regarding the proposed merger. BEIS also refers to the *Facebook/Instagram* merger in its consultation on a pro-competitive regime for digital markets to illustrate why it may be beneficial to amend the threshold for intervention at Phase 2; in that case, the evidence suggested a realistic but uncertain chance that Instagram would grow and compete with Facebook, which would not have enabled the OFT to intervene.

Digital mergers have also previously given rise to questions over jurisdiction; for example, the *Sabre/Farelogix* merger (see further question 2.4 above), where the CMA used its broad discretion when applying the share of supply to assert jurisdiction.

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He is listed as a band 1 adviser for competition law and competition litigation in the major directories, and is listed in *The Legal 500* Hall of Fame for EU and Competition. He was listed as one of the top 30 antitrust lawyers in the world in *Expert Guides*' "Best of the Best" 2018, as an *Acritas* "Star Lawyer" 2018 (independently nominated by clients) and was awarded 2019 Lawyer of the Year for Competition Law in London in *Best Lawyers*' seventh edition.

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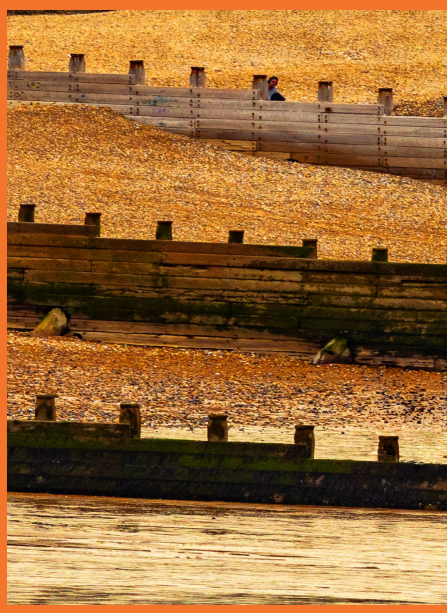

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