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Ex-Post Assessment of Merger Remedies – Contribution from the United Kingdom

- Session IV -

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This contribution is submitted by the United Kingdom under Session IV of the Global Forum on Competition to be held on 7-8 December 2023.

More documentation related to this discussion can be found at: oe.cd/eamr.

Please contact Ms Lynn Robertson if you have questions about this document
[Lynn.Robertson@oecd.org]

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Ex-Post Assessment of Merger Remedies

- Contribution from the United Kingdom -

1. Introduction

1. In October 2023, the United Kingdom's Competition and Markets Authority (CMA) published the latest update in its merger remedy evaluation programme.¹ That update focussed on the learnings from a set of merger case studies where the CMA required 'carve-out' divestiture remedies to be implemented. As set out in more detail in paragraph 10 below, we refer to carve-out remedies as being a limited form of partial divestiture, but where the divestiture is limited to the divestment of a combination of assets, contracts and staff, which were not previously a self-standing business or business unit.

2. The remainder of this paper is structured as follows:

- a) The importance of ex-post reviews;
- b) An overview of the CMA's merger remedy evaluation programme; and
- c) The results of the 2023 update and lessons learned.

1.1. The importance of ex-post reviews

3. Evaluating the impact and implementation of interventions is an important aspect of public policy. Evaluations help policymakers understand what worked well and what has been less successful. They provide the basis for continuous improvement and can drive legislative reform and policy development, as well as informing future interventions.

4. The CMA undertakes a range of evaluation work across our different tools. As further explained below, CMA evaluations include:

- a) evaluations of the outcomes from our interventions;
- b) evaluations as to whether decisions not to intervene look, after the event, to have been appropriate;
- c) evaluations of our decision making in mergers; and
- d) evaluations of the economic impact of our work.

5. Taking each of these in turn:

1.1.1. Evaluations of the outcomes from our interventions.

6. This category of evaluations includes:

- Our ongoing programme of merger remedies evaluations, which is the focus of this paper. These assess whether the objective of the merger remedies, to preserve, or return the conditions of competition in a market where a merger is anticipated or has completed and where there is a substantial lessening of competition finding, has been achieved. These evaluations also look at the specifics of remedy design

¹ [Understanding past merger remedies – 2023 update](#)

and process issues to identify best practice and areas where improvements can be made.

- Our evaluations of interventions put in place following a market investigation, where the objective of remedies is to bring about improvements in competitive conditions within those markets that are the focus of the specific market investigation. We have undertaken three such market investigation evaluations to date:
 - Store Cards, published in 2011;²
 - Home Credit, published 2013;³ and
 - BAA Airports, published 2015.⁴

1.1.2. Evaluations of decisions not to intervene.

7. Our focus here is to consider whether non-intervention appears, after the event, to have been the appropriate decision such that pre-merger conditions of competition have been maintained. A 2017 report by KPMG reviewed eight merger clearance decisions where the reasons for the clearance decision included the assessment of the likelihood and impact of entry and expansion.⁵

1.1.3. Evaluations of our decision making in mergers

8. Two examples of such evaluations are:

- a 2022 report by E.CA Economics which reviewed four vertical mergers decisions from 2017.⁶ The review looked at contemporaneous evidence for each case to understand the reasoning behind the CMA's decisions based on desk research, stakeholder interviews and the latest academic thinking on vertical mergers; and
- a 2019 report by Lear which evaluated merger decisions in the digital sector.⁷ The objective of the study was in part to assess whether the decisions were reasonable based on the evidence and to evaluate market evolution following the mergers.

1.1.4. Evaluations of the economic impact of our work.

9. As part of the framework agreement⁸ between the CMA and the UK's Department for Business and Trade, the CMA is required to report annually on

- the delivery of a target of expected direct financial benefits to consumers of at least ten times its relevant costs to the taxpayer (measured over a rolling three-year period); and

² [Understanding past market investigation remedies - Store Cards](#)

³ [Understanding past market investigation remedies - Home Credit](#)

⁴ [BAA Airports: evaluation of remedies](#)

⁵ [Entry and expansion in UK merger cases](#)

⁶ [Ex-post assessment of merger control decisions involving vertically-related firms](#)

⁷ [Assessment of merger control decisions in digital markets](#)

⁸ [Competition and Markets Authority \(CMA\) framework document](#)

- the ratio of direct financial benefits to consumers and costs.

10. This annual evaluation of the economic impact of the CMA's work includes consideration of the impact of our merger remedy decisions.

1.2. The CMA's Merger Remedy Evaluation Programme

11. The CMA merger remedy evaluation programme is an established programme that evaluates a selection of merger remedies. These have been undertaken in seven tranches, starting in 2007.⁹ The 23 merger remedy evaluations conducted to date,¹⁰ including the five cases covered in the most recent update, were selected to cover a variety of remedy types, including structural remedies such as full divestiture and partial divestitures, behavioural remedies such as price controls and vertical separation, as well as intellectual property (IP) and licensing remedies. Following the creation of the CMA in 2014 bringing together the UK merger control regime in a single agency, we have sought to include merger remedies introduced at both phase 1 and phase 2.¹¹

12. The aim of this rolling programme of merger remedy evaluations is to help develop the CMA's expertise, policy and practice on merger remedies.¹² Publishing this research sets out some of the evidence underpinning the CMA's approach and provides a backdrop for wider policy and legislative discussions. The CMA is keen to learn both from remedies that have worked well and also from remedies which have been more problematic. Doing this work helps the CMA to develop and implement merger remedies that have an effective and timely impact on competition concerns, safeguarding the interests of UK consumers.

13. The research has captured learning points from the experience of choosing, designing, implementing and monitoring the remedies used in each merger case studied. In relation to each case study, the evaluation has sought to understand whether the chosen merger remedy had worked to address the competition concerns identified, whether the merger remedy had worked as expected, and if not, why not.

14. The learning points from our merger remedy evaluations have been used to inform the way in which the CMA approaches remedy design and implementation in subsequent cases. For example, partly as a result of lessons learned from this programme, the CMA has developed a more robust approach to interim measures in order to preserve the ability to secure effective structural remedies if needed (see Box). The evaluation programme has identified risk factors associated with both structural and behavioural remedies as well as highlighting the crucial role of effective implementation of merger remedies in securing desired outcomes.

⁹ The Competition Commission (CC), a predecessor organisation to the CMA, published 11 case studies in four tranches between 2007 and 2012. The CMA has since published 12 case studies in four tranches, in 2015, 2017, 2019 and 2023.

¹⁰ Details of the first 18 case studies can be found in Appendix 4 of the CMA report, while details on the five most recent case studies can be found in the report published by Aldwych Partners and NOCON. Both documents have been published on the case page: [Understanding past merger remedies – 2023 update - GOV.UK \(www.gov.uk\)](#).

¹¹ The case studies published by the CC only evaluated remedies put in place following a Phase 2 investigation.

¹² The CMA also has a statutory duty to keep under review the effectiveness of merger remedies (section 92(5) Enterprise Act 2002), and these evaluations enable the CMA to comply with that duty.

1.2.1. Impact on merger policy – interim measures

15. An example of the impact of the CMA’s merger remedy evaluation programme is the CMA’s evolving use of its interim measure powers.

16. Interim measures are measures designed to prevent any pre-emptive action from the main parties in a merger investigation, such that the parties cannot negatively impact the viability of a potential divestiture package that may compromise the CMA’s ability to remedy any substantial lessening of competition (SLC) identified.

17. The need for robust interim measures reflects an unusual aspect of the UK merger control regime by international standards, which is that the UK operates a voluntary and non-suspensory merger control regime. Even if the CMA has jurisdiction over a transaction, merger parties remain free to decide whether or not to notify the CMA for merger control clearance, and can proceed to closing without such clearance. This allows some flexibility for businesses but creates additional costs and risks for the overall merger control regime, including for the effectiveness of merger remedies.

18. The case studies from our merger remedy evaluation programme highlights the vital role interim measures have in managing these risks, and they also chart the progress that the UK competition regime has made in this area over the past 15-20 years. In some of the earliest case studies, where the statutory framework did not provide for a strong approach to be taken in relation to interim measures, the scope for effective remedial action was effectively precluded by post-merger integration. In the more recent cases, a more robust approach at Phase 1 and Phase 2 in relation to the use and enforcement of compliance with interim measures, underpinned by legislative changes and combined with the use of monitoring trustees and hold separate managers, have helped manage the risks associated with completed mergers much more effectively.

19. The lessons learned from this evaluation programme have thus had a direct impact on legislation, policy and practice in this critical area. This has been particularly apparent in the CMA’s use of interim measures during Phase 1 investigations, where it has now become standard practice to implement interim measures during completed Phase 1 merger investigations.¹³

1.3. The 2023 Merger Remedy Evaluation Research

20. As mentioned in paragraph 1, the most recent tranche of the merger remedy evaluation case studies focuses on carve-out remedies. When referring to carve-out remedies, we are describing divestitures that entail significant separation or ‘carving up’ of an existing business. The divestiture package is often just a limited group of customers along with some assets and does not resemble anything close to a standalone subsidiary or business unit. Purchasers are often expected to have significant complementary resources to enable these remedies to work.

21. We focused on looking at carve-out divestitures in our most recent tranche of evaluations given the recent frequency with which these have been proposed by merger parties to remedy the relevant SLCs and the subsequent need for decision makers to grapple with these types of merger remedy proposals.

¹³ The CMA might also consider interim measures necessary in relation to an anticipated merger where the steps which the merger parties are taking, or are about to take, would be prohibited if the standard [‘Interim Measures’ template](#) were in force. For example, the CMA imposed [interim measures](#) in the anticipated acquisition by S&P Global Inc. of IHS Markit Ltd.

22. In contrast to the first six tranches of evaluations, where the CMA has conducted the post assessment of merger remedies in-house, the CMA outsourced the merger remedies evaluations published in 2023 to a third party. The CMA considered that there would be significant benefits to doing this, including:

- a) Independence – providing increased transparency and confidence in the robustness of the learning points from the programme;
- b) Robust challenge – an external third party should be well placed to provide additional challenge to the CMA’s approaches on cases, strengthening the conclusions that can be drawn;
- c) Alternative perspective – this approach provides an opportunity for a fresh pair of eyes and to bring external experience to bear on evaluating CMA merger remedies.

23. Following a bidding process with multiple bidders, the CMA appointed Aldwych Partners¹⁴ and NOCON¹⁵ to conduct the 2023 merger evaluations, as part of a joint bid. The report submitted to the CMA by Aldwych Partners and NOCON can be found on the case page.¹⁶

1.3.1. The Case Studies

24. The new cases selected are set out below, alongside a brief summary of the SLC and remedy in each case. The details of the industry, the SLC and the merger remedy in each case is set out in much more detail in the report submitted to the CMA by Aldwych Partners and NOCON.

Electro Rent / Microlease (Phase 2 Final Report published 17 May 2018)

25. This was the acquisition of Microlease Inc and Test Equipment Asset Management Limited (Microlease) by Electro Rent Corporation (Electro Rent) in January 2017.

26. Both companies were global companies and were active in the market of renting, leasing and selling equipment that tests performance of electronic devices, and the CMA concluded that there would be an SLC in the UK market for the supply of testing and measuring equipment for rent. The remedy involved the divestiture of the Electro Rent UK business, which had been carved out from the wider Electro Rent business to a purchaser in the UK rental market.

Rentokil / Cannon (Phase 2 Final Report published 25 January 2019)

27. This was the acquisition of Cannon Hygiene Limited (Cannon) by Rentokil Initial plc (Rentokil) in January 2018.

¹⁴ Aldwych Partners is a competition consultancy firm with experienced personnel that provides advice and representation for merging parties on CMA merger investigations. Aldwych publishes its own internal research and offers clients the following services: (i) securing CMA clearance for M&A transactions; (ii) assessing CMA intervention risks; and (iii) advising on regulation and competition.

¹⁵ NOCON provides monitoring trustee services supporting companies and competition authorities with solution-oriented advice. As a monitoring trustee, NOCON has significant experience both in and out of the UK in overseeing the implementation of remedies, both structural and behavioural and monitoring merging parties’ obligations under the UK hold separate regime (Interim measures).

¹⁶ [Understanding past merger remedies – 2023 update - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/114444/Understanding_past_merger_remedies_-_2023_update.pdf)

28. The CMA found an SLC in relation to the supply of washroom waste disposal services to multi-regional and national customers where customers are: (1) located in eight or more regions of the UK and purchase directly from a washroom services supplier; or (2) purchasing through public and private framework arrangements. The remedy involved the divestiture of Cannon's customer contracts in the markets affected by the SLC, in addition to any infrastructure and operations needed by a prospective buyer. The relevant contracts, staff and assets had to be carved out from the wider Cannon business in the UK.

Rentokil / MPCL (Phase 1 UiLs accepted July 2019)

29. This was the acquisition of MPCL Limited (MPCL) by Rentokil in September 2018. The parties overlapped in the supply of pest control services, and the CMA concluded that there would be an SLC in the supply of pest control services to national customers in the UK.

30. The CMA accepted undertakings from Rentokil that involved the divestiture of all of MPCL's pest control contracts with national customers (with some exceptions), along with the staff and assets (eg vehicles, depots) necessary for servicing these customers. Similarly to *Rentokil / Cannon*, the relevant contracts, staff and assets had to be carved out from the wider MPCL business.

Stryker / Wright (Phase 1 UiLs accepted November 2020)

31. This was the acquisition of Wright Medical Group NV (Wright) by Stryker Corporation (Stryker) in November 2019. Both parties supplied orthopaedic medical devices, and particularly ankle replacement prostheses, finger joint arthroplasty products, foot plating products and synthetic bone graft substitutes.

32. The CMA concluded that the merger gave rise to an SLC in the supply of total ankle replacement prostheses products in the UK. The CMA accepted undertakings from Stryker that involved the divestment of Stryker's ankle replacement product, STAR, and its supporting staff and assets, including pipeline products, intellectual property, supplier contracts and a small number of staff. Stryker's STAR product, alongside its related staff and assets had to be carved out from the wider Stryker business.

Ecolab / Holchem (Phase 2 Final Report published October 2019)

33. This was the acquisition of The Holchem Group Limited (Holchem) by Ecolab Inc (Ecolab) in November 2018. The CMA concluded the merger would give rise to an SLC in the supply of formulated cleaning chemicals and ancillary services to food and beverage customers in the UK.

34. The remedy involved the divestment of the entirety of Holchem Laboratories, which comprised the vast majority of Holchem. This was not a carve-out remedy, though the merger parties proposed a carve-out remedy that involved divestment of a portfolio of customer contracts and the staff and assets necessary to deliver services to these customers, including manufacturing and warehousing facilities, and a proposal for encouraging customers to transfer to the purchaser of the divestment package. The CMA, however, rejected this proposal.

1.3.2. Case Study Results

35. A summary of the case study results has been set out below. A detailed description of the results from each case study can be found in the report submitted to the CMA by Aldwych Partners and NOCON.

Electro Rent / Microlease

36. The divestment package was acquired by MCS Rentals Ltd (MCS), a UK focused TME business. Following the divestment, MCS's customer base, revenues and profits increased. MCS's positive financial performance may have increased its attractiveness as an acquisition target, and in late 2022 MCS was purchased by TestEquity, a US business active in the sale, servicing, and rent of TME and now expanding into Europe. TestEquity continues to operate in the UK TME market.

Rentokil / Cannon

37. The divestment package was acquired by Citron Hygiene UK (Citron), a recent entrant in the UK market. Following this Citron has continued to serve a portfolio of national, regional and local customers across the UK but remains considerably smaller than Cannon was prior to its acquisition. Citron has made substantial losses since purchasing the divestment package and is not yet profitable.

Rentokil / MPCL

38. The divestment package was acquired by ServiceMaster Company LLC (Service Master), a US-headquartered company providing a range of household and business services. Service Master operated the divestment package under the Terminix brand. Similarly to Citron, Service Master made substantial losses and the divestment package was loss making on a standalone basis.

39. In the second half of 2022, ownership of the UK Terminix brand passed to Norvestor, a Norwegian private equity firm, and has rebranded to Vergo Pest Management. While it is too early to judge Vergo, it has inherited the same challenges that Terminix was facing.

Stryker / Wright

40. The divestment package, STAR, was acquired by Colfax Corporation, ie a supplier of shoulder, knee, and hip orthopaedic products. It has since been renamed to Enovis. STAR's market share has declined since the divestiture. This is because (i) unexpected delays in the launch of a cutting guide to accompany STAR, and (ii) a few months after the divestment package was sold, the FDA issued a safety alert for STAR. This related to an issue that first emerged in 2016, namely, the risk of the product's plastic component breaking. Enovis have worked with the FDA to address its concerns and have said that a new plastic component will soon be available.

Ecolab / Holchem

41. The divestment package was acquired by Kersia Group (Kersia), a multinational company focused on food safety that provides products and services across the food supply chain. Since being acquired by Kersia, Holchem has continued to supply cleaning chemicals and ancillary services in the UK as it had prior to being acquired by Ecolab. Holchem considers that the wider competitive landscape has not changed significantly since the remedy was put in place.

42. The four carve-out remedy case studies highlight the greater composition and purchaser risks that are present within carve-out remedies. The *Rentokil / Cannon* and *Rentokil / MPCL* case studies both contained a divestiture package that was loss making on a standalone basis. This is largely because the carve out divestment package included contracts national customers and supporting assets, but these were separated from the

regional and local customers, which meant unwinding economies of density resulting in higher costs. The purchasers in both cases were unable to recover these lost economies of density.

43. While the remedy in *Electro Rent / Microlease* has been effective, there were significant economies of scale in Electro Rent's European business prior to the merger (as it was using a single asset pool to serve customers across Europe) which the carve-out remedy unwound. This did not reflect in MCS' financial performance in the short term, as it acquired the divestment package at a significant discount, and in the longer term these lost economies of scale appear to have been recovered by TestEquity's acquisition of MCS. However, absent this, MCS is likely to have lacked the scale needed to invest profitably in new TME rental assets, and subsequently it is unlikely to have been an effective long-term competitor in the market.

44. The long-term success of the remedy in *Stryker / Wright* remains to be seen, however it is clear that the remedy has not been a success so far due to STAR's loss of strength as a competing product. Some of the reasons for this were present prior to the CMA's merger investigation, particularly with regards to the safety issues relating to the product. Neither the remedy process nor the purchaser were successful in identifying these factors, further highlighting the composition risks associated with carve-out remedies, as well as the difficulty of purchasers conducting due diligence on said packages.

45. The *Electro Rent / Microlease* and *Rentokil / Cannon* also involved a fallback remedy, which provide an alternative if a suitable purchaser cannot be found for the initial divestiture package. In the case of a carve-out remedy, this was designed to mitigate the risk that the package may not attract a suitable purchaser, and it may encourage the merged business to make concessions on the content of a divestiture package to ensure that a suitable purchaser is found, otherwise the fallback remedy would be implemented.

46. In both cases, the fallback remedy did not have to be used. Aldwych Partners & NOCON concluded that that the probability of using a fallback remedy is low, because the merger parties have the ability to influence the divestiture package and there is informational asymmetry between the purchaser (who is not made aware that there is a fallback remedy) and merger parties. These factors increase the merger parties' ability to amend the scope of the divestiture package as set out in the original remedy and reach an agreement with the acquirer. As such, in some cases the presence of a fallback remedy may provide limited assistance for prospective purchasers in negotiating improved divestiture packages (as seen in the case studies), and fallback remedies may not, in practice, provide the CMA with sufficient risk mitigation.

1.3.3. Implications of the CMA's latest case studies for policy and practice

47. Our primary learning points from the latest case studies indicate that carve-out divestitures are subject to increased composition and purchaser risks that have the potential to undermine the divestment business's ability to compete effectively. The research also concludes that:

- a) Purchasers face challenges in conducting robust due diligence on divestment packages in carve-out remedies. This limits the usefulness of such due diligence to the CMA as a safeguard against composition risks; and
- b) Fallback remedies (which have been a feature of some carve-out remedies) may not be an effective safeguard against the higher composition risks of initial divestiture packages and may play only a limited role in reducing the risk profile of poorly specified remedies.

48. In summary, this recent research highlights the generally higher risk profile of carve-out remedies compared to the divestiture of stand-alone business units, which decision makers will need to take into account before concluding whether such a remedy will be effective. The research highlights specific risk factors that must be considered in remedy design and implementation.