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Disentangling Consummated Mergers – Experiences and Challenges – Note by the United Kingdom

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This document reproduces a written contribution from the United Kingdom submitted for Item 6 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documents related to this discussion can be found at https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

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United Kingdom

1. Introduction

1. Under the Enterprise Act 2002 (the **Act**) there is no mandatory notification requirement, or automatic bar to parties completing transactions before or during a review by the Competition and Markets Authority (**CMA**).[1] The United Kingdom (**UK**) has therefore a voluntary, non-suspensory merger control regime. Merging parties may choose to complete transactions before seeking or obtaining clearance from the CMA, and the CMA reviews many completed transactions every year.[2] Where the CMA finds that a transaction gives rise to competition concerns, whether that transaction is anticipated or completed, the CMA is required to take action to remedy any such concerns.

2. There is a time limit on the CMA's review of completed transactions: the CMA can only refer a transaction for an in-depth phase 2 review within 4 months from the later of the date of completion or the date that material facts relating to the transaction are given to the CMA or made public. In practice this means that in most cases where the CMA has reviewed a completed transaction, that transaction had completed a short time prior to the commencement of the CMA's review.

3. To protect the CMA's ability to address any substantial lessening of competition (**SLC**) that may result from a transaction, the CMA has tools at its disposal to prevent or unwind integration during the course of its review (ie interim measures).

4. Reviewing completed transactions and remedying any competition concerns resulting from them gives rise to certain challenges. The CMA does not, however, consider that remedies relating to completed transactions should in principle be different from remedies relating to anticipated transactions.

5. This paper sets out the approach of the CMA when reviewing completed transactions and implementing remedies to address competition concerns resulting from completed transactions. Additionally, this paper discusses the CMA's use of interim measures, which are a fundamental element of the UK's voluntary, non-suspensory merger control regime.

6. The paper is structured as follows:

- Section 2 provides a general overview of the merger control regime in force in the UK. This is considered under the following headings:
  - Merger review process
  - Voluntary, non-suspensory nature of the UK merger control regime
- Section 3 explains the use and importance of the CMA's interim measures powers against the backdrop of the UK merger control regime. This is considered under the following headings:
  - The concept of pre-emptive action

[1] Except following a reference for an in-depth phase 2 review, where the acquirer must not acquire any more shares in the target without the CMA's prior consent. See section 78(2) of the Act.

[2] The CMA considers "completed transactions" to have the same meaning as "consummated mergers".

- Forms of interim measures
- Derogations
- Unwinding powers
- Monitoring Trustees (**MTs**) and Hold-Separate Managers (**HSMs**)
- Enforcement

- Section 4 explains the CMA's approach to remedies to address competition concerns resulting from completed transactions. This is considered under the following headings:
  - Identifying appropriate remedies in completed transactions
  - The implementation of remedies in completed transactions
- Section 5 discusses the lessons which the CMA has learned from its experience of implementing remedies across merger review cases involving competed transactions.

2. UK merger control regime

2.1. Merger review process

7. The UK merger control regime follows a two-phase review process. If at the end of a phase 1 review, the CMA believes that a transaction gives rise to a realistic prospect of an SLC within a market or markets in the UK, the CMA has a duty to refer that transaction for an in-depth phase 2 review,[3] subject to certain exceptions.[4] Where the CMA finds that it is under a duty to refer, it may accept undertakings in lieu of reference (**UILs**)[5] from merging parties to remedy, mitigate, or prevent the SLC or any adverse effect of the SLC.[6] It is always at merging parties' discretion whether or not to offer UILs and the CMA cannot impose a remedy via an order at phase 1.[7]

8. Should UILs not be offered by merging parties, or if the CMA considers that any UILs that are offered are not acceptable,[8] the CMA will refer the transaction for an in-depth phase 2 investigation. At phase 2, the CMA will conduct a more detailed analysis to determine whether, on the balance of probabilities, the transaction has resulted, or may be expected to result, in an SLC.[9] Where the CMA finds that a transaction (be that a completed or anticipated transaction) has resulted in an SLC following a phase 2 review,[10] the CMA

[3] Sections 22 and 33 of the Act. See also Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised), January 2021, paragraph 3.8.

[4] Guidance: Mergers: Exceptions to the duty to refer (CMA64), December 2018.

[5] Under the UK merger control regime, UILs are phase 1 remedies.

[6] Section 73 of the Act 2002.

[7] Guidance: Merger remedies (CMA87), December 2018, paragraph 3.26.

[8] Guidance: Merger remedies (CMA87), December 2018, paragraph 3.27.

[9] Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised), January 2021, paragraph 2.7.

[10] The Act in all cases requires that the CMA find an SLC within any market or markets in the UK. Any references to an SLC finding by the CMA in this paper are by implication a reference to such a finding with respect to one or more markets in the UK.

has a statutory duty to decide what, if any, action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC.[11]

9. Decisions in phase 2 investigations are taken by an Inquiry Group, selected from a panel of independent experts appointed by the Secretary of State.[12] Should the Inquiry Group find an SLC, and that a particular remedy is needed to remedy that SLC, merging parties will typically offer undertakings to implement the required remedy.[13] In the event that merging parties fail to offer appropriate undertakings within the CMA's statutory deadlines, the Inquiry Group will have recourse to imposing an order implementing the required remedy.[14]

2.2. Voluntary, non-suspensory nature of the UK merger control regime

10. The UK is one of the few jurisdictions in the world which operates a voluntary, non-suspensory merger control regime. There is no mandatory notification requirement even where transactions clearly meet the jurisdictional thresholds set out in the Act.[15] There similarly is no general bar to parties completing transactions before or even during the CMA's review.[16] The policy rationale for this approach is that it gives merging parties greater flexibility, while reducing regulatory obstacles to those transactions which are clearly unproblematic.[17] The CMA does not, for the purposes of its substantive competition assessment, treat completed acquisitions any differently to anticipated transactions.[18]

11. The CMA has the authority to review and refer completed transactions for an in-depth phase 2 investigation within four months from the later of the date of completion or the date that material facts relating to the transaction are given to the CMA or made public.[19] This four-month deadline may be extended in certain circumstances, including where merging parties have not satisfactorily responded to a mandatory CMA request for information.[20]

12. The CMA reviews a number of completed transactions every year. For instance, 16 of 45 phase 1 reviews in 2020, and 9 of 46 phase 1 reviews in 2021, involved completed

[11] Section 73(2) of the Act for phase 1 reviews and sections 35 and 36 of the Act for in-depth phase 2 reviews.

[12] Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised), January 2021, paragraph 2.8.

[13] Guidance: Merger remedies (CMA87), December 2018, paragraph 4.69.

[14] Guidance: Merger remedies (CMA87), December 2018, paragraph 4.69.

[15] Under the Act, the CMA has jurisdiction to review transactions meeting either of the following jurisdictional thresholds: (a) the UK turnover associated with the enterprise which is being acquired or the enterprises being merged exceeds £70 million (this is referred to as "the turnover test") or (b) the enterprises which are ceasing to be distinct supply or acquire goods or services of any description and, after the transaction, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The transaction must also result in an increment to the share of supply or acquisition (this is referred to as "the share of supply test").

[16] Except following a reference for an in-depth phase 2 review, where the acquirer must not acquire any more shares in the target without the CMA's prior consent. See section 78(2) of the Act.

[17] Interim measures in merger investigations (CMA108), December 2021, paragraph 1.5.

[18] Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2revised), January 2021, paragraph 6.1.

[19] Section 24 of the Act.

[20] Section 25 of the Act. See sections 42 and 122 of the Act for other examples of circumstances where the four-month deadline may be extended.

transactions. These include transactions that were voluntarily notified to the CMA, but which were completed before or even during the CMA's review.[21] These also include completed transactions which the CMA became aware of through its mergers intelligence function and decided to "call in"[22] for a merger investigation.[23]

13. Where the CMA finds that a completed transaction has resulted in an SLC within any UK market, it takes action to remedy, mitigate, or prevent the SLC resulting from that transaction. For instance, the CMA took action to remedy 8 completed transactions in 2020 and 4 completed transactions in 2021.[24]

2.3. Interim measures

14. Where the CMA is investigating a completed transaction, it is critical that any business which has been acquired continues, during the CMA's investigation, to compete independently with the acquiring business and is maintained as a going concern.[25] This is to ensure that the viability and competitive capability of each of the merging parties is not undermined pending the outcome of the CMA's investigation, which would risk prejudicing the ability of the CMA to achieve an effective remedy if it were to find that the transaction gives rise to an SLC,[26] or affect the competitive structure of the market during

[21] For example, Hasbro / Entertainment One merger inquiry (2020); Circle Health / BMI Healthcare merger inquiry (2020); TVS Europe Distribution Limited/ 3G Truck & Trailer Parts merger inquiry (2020); viagogo/StubHub merger inquiry (2020); Aragorn (KKR & Co Inc) / OverDrive Holdings Inc merger inquiry (2020); Breedon Group plc / Cemex Investments Limited merger inquiry (2020); Ardonagh Group / Bennetts Motorcycling Services merger inquiry (2020); Bellis Acquisition Company 3 Limited / Asda Group Limited merger inquiry (2021); NCR Corporation / Cardtronics plc merger inquiry (2021); National Grid / PPL WPD Investments merger inquiry (2021); CHC / Babcock merger inquiry (2021); Veolia / Suez merger inquiry (2021).

[22] One of the CMA's duties under the Act is to track merger activity to determine whether any unnotified transaction may give rise to an SLC. The CMA's mergers intelligence function carries out this monitoring. For instance, the CMA's mergers intelligence function considered approximately 600 transactions from 1 April 2020 to 31 March 2021. Where the mergers intelligence function decides the CMA should commence an investigation of any unnotified merger, the merger is called in for review. See Section 5(1) of the Act and Guidance on the CMA's mergers intelligence function (CMA 56 revised), December 2020, paragraph 1.2.

[23] For example, Danspin A/S / Lawton Yarns Limited merger inquiry (2020); Google LLC / Looker Data Sciences, Inc merger inquiry (2020); Hunter Douglas NV / 247 Home Furnishings Ltd merger inquiry (2020); FNZ / GBST merger inquiry (2020); Takeaway.com N.V./Just Eat plc merger inquiry (2020); ION Investment Group Limited / Broadway Technology Holdings LLC merger inquiry (2020); Elis UK Limited / Central Laundry Limited merger inquiry (2020); Sonoco Products Company / Can Packaging SAS merger inquiry (2020); Facebook, Inc (now Meta Platforms, Inc) / Giphy, Inc merger inquiry (2021); Sony Music Entertainment / AWAL and Kobalt Neighbouring Rights businesses merger inquiry (2021); Dye & Durham (UK) Limited / TM Group (UK) Limited merger inquiry (2021).

[24] These include UILs accepted in phase 1 as well as prohibitions and remedies accepted in phase 2, ie Danspin A/S / Lawton Yarns Limited merger inquiry (2020); Circle Health / BMI Healthcare merger inquiry (2020); ION Investment Group Limited / Broadway Technology Holdings LLC merger inquiry (2020); Breedon Group plc / Cemex Investments Limited merger inquiry (2020); Ardonagh Group / Bennetts Motorcycling Services merger inquiry (2020); Bauer Media Group merger inquiry (2020); Tobii AB / Smartbox Assistive Technology Limited and Sensory Software International Ltd merger inquiry (2020); Hunter Douglas NV / 247 Home Furnishings Ltd merger inquiry (2020); Bellis Acquisition Company 3 Limited / Asda Group Limited merger inquiry (2021); TVS Europe Distribution Limited/ 3G Truck & Trailer Parts merger inquiry (2021); viagogo/StubHub merger inquiry (2021); FNZ / GBST merger inquiry (2021).

[25] Interim measures in merger investigations (CMA108), December 2021, paragraph 1.7.

[26] Interim measures in merger investigations (CMA108), December 2021, paragraph 1.7.

the CMA's investigation.[27] For the same reasons, in certain circumstances, the CMA may consider it necessary to use its powers to unwind integration that has already occurred prior to interim measures coming into force.[28] The CMA's use of its interim measures powers is therefore critical to its ability to impose effective remedies in completed transactions and maintain the competitive structure of the market during its merger investigation. The CMA has resources dedicated to managing the interim measures aspects of cases.

15. The CMA carries out regular studies to understand the effectiveness of its past work. A recent review of the CMA's past decisions on remedies has confirmed the fundamental role played by interim measures in enabling the CMA to implement effective remedies in completed transactions.[29] In particular, the CMA notes that a more robust approach at both phase 1 and phase 2, combined with the use of MTs and HSMs, has helped manage the risks associated with completed transactions much more effectively.[30]

16. The CMA's earlier merger evaluation studies demonstrated the problems with taking too little action on interim measures, for example, the risk of allowing merging parties to run their business in such a way as to undermine the effectiveness of a divestiture package.[31] This highlights the importance of not only putting interim measures in place but ensuring that compliance with interim measures is actively monitored and where breaches are uncovered, there is an active enforcement programme.[32]

17. The lessons learned by the CMA through its merger evaluation studies has had a direct impact on interim measures legislation, policy, and practice.[33]

2.3.1. The concept of pre-emptive action

18. As explained above, when the CMA is investigating a completed transaction, the Act enables it to take steps to prevent or unwind 'pre-emptive action'.[34]

19. Pre-emptive action is a broad concept,[35] and it concerns conduct which might prejudice the CMA's investigation or impede any remedial action that may be justified by the CMA's decisions on the investigation.[36] The word 'might' means that it is the *possibility* of prejudice to the reference or an impediment to justified action which the CMA can address through interim measures.[37] As confirmed by the Court of Appeal, the concept of pre-emptive action includes 'activity which the merging parties might take in connection

[27] The concept of pre-emptive action includes 'activity which the merging parties might take in connection with or as a result of the merger that had the potential to affect the competitive structure of the market during the CMA's investigation.' *Facebook v CMA* [2021] EWCA Civ 701, paragraph 56.

[28] Interim measures in merger investigations (CMA108), December 2021, paragraphs 5.1 – 5.4.

[29] Merger Remedy evaluations, report on case study research, June 2019, paragraph 1.4, bullet 4.

[30] Merger Remedy evaluations, report on case study research, June 2019, paragraph 1.12.

[31] Merger Remedy evaluations, report on case study research, June 2019, paragraph 5.5.

[32] Merger Remedy evaluations, report on case study research, June 2019, paragraph 5.5.

[33] Merger Remedy evaluations, report on case study research, June 2019, paragraph 1.12.

[34] Interim measures in merger investigations (CMA108), December 2021, paragraph 1.3.

[35] *Intercontinental Exchange Inc v CMA and Nasdaq Stockholm AB* [2017] CAT 6 at paragraph 220.

[36] Section 72(8) of the Act.

[37] *Intercontinental Exchange Inc v CMA and Nasdaq Stockholm AB* [2017] CAT 6, paragraph 220.

with or as a result of the merger that had the potential to affect the competitive structure of the market during the CMA's investigation.'[38]

20. There is no exhaustive list of the kinds of conduct that may amount to pre-emptive action. Depending on the nature of the business, pre-emptive action might include actions such as closing or selling sites; selling or failing to maintain equipment; degrading service levels; failing to retain key employees; integrating IT systems; failing to compete at arm's length for tenders; integrating customer-facing functions; weakening the independence of brands; discontinuing competing products; or exchanging confidential or commercially sensitive information.[39]

21. The CMA's initial focus when imposing interim measures is to 'hold the ring'[40] and prevent further integration, which in practice means that the CMA can act quickly in imposing template interim measures (see paragraphs 22 and 24 below for further details) at the outset of a merger investigation when it may lack any real information on merging parties,[41] the transaction itself, any integration which has taken place and any substantive competition concerns that the transaction may give rise to. As the case proceeds and the CMA receives further information, interim measures may be adapted to reflect the requirements of the case.

Forms of interim measures

22. Interim measures typically require merging parties to (broadly) and subject to CMA consent, hold their businesses separate and to not take any action that might impair their respective ability to compete independently. In particular, the CMA's template IEO[42] requires:

- that merging parties do not take any action without the CMA's consent which would *(a)* lead to the integration of the target business with the acquirer's business, *(b)* transfer the ownership or control of the acquirer's business or the target business and *(c)* impair the ability of either business to compete independently in any of the markets affected by the transaction;[43]
- that both the acquirer and target businesses be maintained as going concerns with sufficient resources made available for the development of both businesses, on the basis of their respective pre-transaction business plan;[44]
- that the nature, description, range, and quality of goods and/or services supplied in the UK by each of the acquirer and target, are maintained and preserved;[45] and

[38] *Facebook v CMA* [2021] EWCA Civ 701, paragraph 56.

[39] Interim measures in merger investigations (CMA108), December 2021, footnote 1.

[40] *Facebook v CMA* [2020] CAT 23, paragraph 122.

[41] *Facebook v CMA* [2021] EWCA Civ 701, paragraph 59: '*The regime envisaged by the legislation requires the CMA to act fast to hold the ring at the outset without any real information.'*

[42] See the CMA's template IEO for merger control cases involving completed transactions.

[43] See the CMA's template IEO for merger control cases involving completed transactions, paragraphs 4(a), 4(b) and 4(c).

[44] See the CMA's template IEO for merger control cases involving completed transactions, paragraph 5(b).

[45] See the CMA's template IEO for merger control cases involving completed transactions, paragraph 5(d).

- that no changes are made to key staff of either business, key staff are not transferred between the acquirer and target and that all reasonable steps are taken to encourage all key staff to remain with the target business and the acquirer business.[46]

23. The CMA keeps interim measures under review throughout the course of its merger review process, and additional measures may replace, amend, or supplement measures already in place at any stage of the process.[47]

Derogations

24. The CMA can alter the requirements of its standard form IEO either by amending the text of the IEO before or after it is imposed, or by granting derogations to the requirements of the IEO after it has been imposed. Given the need to impose an IEO quickly in completed transactions, any IEO imposed when a transaction has already completed will almost always take the form of the standard IEO template and amendments will be made by way of derogations.[48]

25. Where merging parties seek to amend the terms of an IEO, the CMA will balance the need to guard against pre-emptive action against the burdens that interim measures can place on the parties to the transaction.[49] Given the precautionary purpose of interim measures, all requests for derogations to be scrutinised carefully.[50]

26. There are derogations which the CMA may be more likely to grant than others. For example, the CMA has previously granted derogations in relation to the provision of certain essential services by the acquiring business to the target business, and access for the acquiring firm to certain financial information from the target business for the purpose of financial oversight.[51]

27. IEOs can be imposed on non-UK entities where the acquirer or target business's ultimate parent company is an overseas company.[52] The CMA may agree to exclude any non-UK activities from the scope of the IEO, where those activities have no relevance to merging parties' relevant activities in the UK.[53]

Unwinding powers

28. In certain circumstances, the CMA may consider it necessary to use its powers to unwind integration that occurred prior to interim measures coming into force.[54] Unwinding may be undertaken either voluntarily following discussion with the CMA, pursuant to a

[46] See the CMA's template IEO for merger control cases involving completed transactions, paragraphs 5(i), 5(j) and 5(k).

[47] Interim measures in merger investigations (CMA108), December 2021, paragraph 2.8.

[48] Interim measures in merger investigations (CMA108), December 2021, paragraph 2.33.

[49] Interim measures in merger investigations (CMA108), December 2021, paragraph 2.5.

[50] Interim measures in merger investigations (CMA108), December 2021, paragraph 1.9.

[51] Interim measures in merger investigations (CMA108), December 2021, paragraph 3.24(a) to (c).

[52] Interim measures in merger investigations (CMA108), December 2021, paragraph 2.10.

[53] Interim measures in merger investigations (CMA108), December 2021, paragraphs 3.49 to 3.56.

[54] Interim measures in merger investigations (CMA108), December 2021, paragraph 5.1.

CMA order to unwind (**Unwinding Order**),[55] or pursuant to directions issued under interim measures to ensure compliance by merging parties.[56]

29. The typical situation in which the CMA would use its unwinding powers would be a case where, based on the CMA's own risk assessment, merging parties have engaged in integration which directly affects competition between them, and / or which would increase the risk of pre-emptive action unless immediate unwinding action were taken.[57] Such circumstances may arise, for instance, where merging parties have discontinued some of their pre-transaction products or services in anticipation or as a result of the transaction,[58] where they are engaging in joint-branding,[59] or have otherwise taken action which affects the way in which customers and suppliers engage with, or perceive the independence of merging parties.[60]

30. While the CMA's use of its formal unwinding powers (pursuant to an Unwinding Order) is relatively rare, the CMA has issued two Unwinding Orders[61] in the last three years, demonstrating that the CMA will take action where it considers that pre-transaction integration has resulted in pre-emptive action.

Box 1. Unwinding Order – Tobii AB / Smartbox Assistive Technology Limited and Sensory Software International Ltd merger inquiry (2019)

In October 2018, Tobii AB (**Tobii**) completed its acquisition of Smartbox Assistive Technology Limited and Sensory Software International Limited (together, **Smartbox**).[62]

The CMA called in the transaction for review through its mergers intelligence function, and imposed interim measures during pre-notification, shortly before completion of the transaction. In the course of the CMA's phase 1 investigation, an MT was appointed to oversee the merging parties' compliance with the interim measures.[63] Tobii AB / Smartbox Assistive Technology Limited and Sensory Software International Ltd merger inquiry was the first case in which the CMA issued an unwinding order.

[55] Unwinding Orders are issued by the CMA pursuant to sections 72(3B) and 81(2A) of the Act.

[56] Interim measures in merger investigations (CMA108), December 2021, paragraph 5.3.

[57] Interim measures in merger investigations (CMA108), December 2021, paragraphs 5.4(a) and (b).

[58] Interim measures in merger investigations (CMA108), December 2021, paragraph 5.4(a)(i).

[59] Interim measures in merger investigations (CMA108), December 2021, paragraph 5.4(a)(ii).

[60] Interim measures in merger investigations (CMA108), December 2021, paragraph 5.4(a)(iv).

[61] See Unwinding Orders made by the CMA in Tobii AB / Smartbox Assistive Technology Limited and Sensory Software International Ltd merger inquiry (2019) and Bottomline Technologies (de), Inc / Experian Limited merger inquiry (2019).

[62] See final report of 15 August 2019, page 4, paragraph 3.

[63] See Directions issued on 18 February 2019 pursuant to paragraph 13 of the interim order imposed by the Competition and Markets Authority on Tobii AB and Smartbox Assistive Technology Limited and Sensory Software International Ltd on 18 February 2019.

In August 2018, approximately two months before completing the transaction, and three months before the CMA imposed interim measures, the merging parties entered into a reseller agreement whereby Smartbox agreed to act as a reseller of Tobii products in the UK and Ireland.[64] At around the same time, some of Smartbox's hardware products were withdrawn from sale in the UK and Ireland and Smartbox also discontinued several research and development projects.[65]

In February 2019, shortly after the commencement of its in-depth phase 2 review of the transaction, the CMA imposed an Unwinding Order on the merging parties.[66] This order required (i) the merging parties to terminate the reseller agreement, and (ii) Smartbox to begin re-supplying the products it had stopped supplying in August 2018, and to reinstate the research and development projects it had discontinued in August 2018. The Unwinding Order was to restore Smartbox to the position it would otherwise have been in, in order to ensure that the CMA would be able to impose an adequate remedy at the end of its investigation if it found an SLC. The Unwinding Order was accompanied by directions[67] which required the merging parties to amend the terms of the mandate governing the appointment of the MT. This enabled the MT to take any steps which the CMA considered reasonable and necessary for the purpose of ensuring the merging parties' compliance with the Unwinding Order. The merging parties worked with the MT in designing, implementing and monitoring a plan to comply with the Unwinding Order.[68]

In August 2019, the CMA published its final report, concluding that the transaction gave rise to competition concerns, and that Tobii must sell Smartbox to a purchaser approved by the CMA.[69]

In this case, the CMA's use of its interim measures powers (and in particular, the Unwinding Order) was necessary in order to preserve the whole of the Smartbox business as a viable potential divestiture package by maintaining it as an independent business.

In October 2020, Tobii completed its sale of Smartbox to CareTech Holdings Plc, a purchaser approved by the CMA.[70]

Monitoring Trustees (MTs) and Hold-Separate Managers (HSMs)

31. The CMA may require the appointment of an MT and/or an HSM for the purposes of ensuring compliance with its interim measures.

[64] See paragraph (b) of Unwinding order made by the Competition and Markets Authority.

[65] See paragraph (c) of Unwinding order made by the Competition and Markets Authority.

[66] See Unwinding order made by the Competition and Markets Authority.

[67] See Directions issued on 28 February 2019 pursuant to paragraph 17 of the unwinding order imposed by the Competition and Markets Authority on Tobii AB and Smartbox Assistive Technology Limited and Sensory Software International Ltd on 28 February 2019.

[68] See paragraphs 8 to 11 of the Unwinding order made by the Competition and Markets Authority.

[69] See case closure summary.

[70] See case closure summary.

32. An MT may be required by the CMA in order to monitor and report on the compliance by merging parties with interim measures (including Unwinding Orders). The involvement of an MT may also assist the CMA in considering more complex derogation requests, as well as speed up the CMA's decisions on whether to grant derogation requests.[71]

33. At phase 1, the CMA may consider it necessary to appoint an MT where the CMA finds that there is a particular risk of pre-emptive action, for example where there are concerns that there have been breaches of interim measures or there is a risk of deterioration of the target business. Even if the CMA decides not to appoint an MT at phase 1, the CMA will normally require an MT to be appointed in completed transactions at the start of a phase 2 investigation unless merging parties can provide compelling evidence as to why there is little risk of pre-emptive action.[72] This is mainly due to (i) the heightened probability that remedies will be required, and (ii) the risk of deterioration of the target business given the typical duration of an in-depth phase 2 investigation (which can run for over a year until a final disposal is completed).

34. Once appointed, an MT will be required to provide to the CMA reports on merging parties' compliance with interim measures (typically every two to four weeks).[73] As part of this, an MT will monitor the operational and financial performance and viability of the acquired company to ensure that it is not weakened as a potential remedy package. An MT will engage with merging parties and the CMA regularly, including when issues relevant to interim measures compliance arise. An MT will gather all the relevant details from merging parties and present the CMA with a recommendation on how to mitigate the risk of pre-emptive action.[74] For instance where the target business risks losing key staff, an MT will provide the CMA with its assessment of the importance to the target business of those individuals, and it may work with the parties and the CMA to design an incentives package.

35. Where the target business has lost, or is likely to lose, key managerial and / or strategic input (for instance where senior management have left on completion or where a target business has lost key strategic input from managerial staff at the seller who have not transferred over), the CMA may require merging parties, again through directions, to appoint an HSM.[75] The role of an HSM is to operate the target business separately from the acquiring business and in line with interim measures for the duration of a merger investigation.[76] An HSM's role is a day-to-day management role in the target business, reporting to the CMA rather than the acquiring firm.[77] This role is distinct from that of an MT.[78]

36. An HSM can be either an internal or external appointee.[79] When weighing up candidates, the CMA will consider their relevant experience and suitability, their

[71] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.1.

[72] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.6.

[73] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.1.

[74] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.2.

[75] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.2.

[76] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.13.

[77] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.13.

[78] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.13.

[79] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.15.

independence from the target and acquirer, and the complexity of the hold separate requirements.[80] In cases where an HSM is employed by the acquiring business, the CMA may require an undertaking that they will not return to the acquiring business if the transaction is prohibited, or if a divestment of the target business is later required, that an HSM would transfer with the divestment business.[81]

Enforcement

37. The CMA takes merging parties' compliance with their obligations under interim measures very seriously.[82] Failure to comply with interim measures without reasonable excuse may result in the CMA imposing a penalty of up to 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by the person on whom the penalty is imposed.[83]

38. To date, the CMA has issued ten penalty notices across eight cases[84] where the CMA has found that merging parties have failed to comply, without reasonable excuse, with the requirements imposed on them by interim measures. The largest of these penalty notices was £50.5m.[85]

3. The CMA approach to remedies in completed transactions

39. In both phase 1 and phase 2 investigations, the Act requires that the CMA, when considering remedies, shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.'[86,87]

40. The CMA's approach to remedies will follow similar principles for anticipated and completed transactions. However, the simple remedy of an order prohibiting merging parties from proceeding with a transaction is not available in completed transactions.

41. As a result, the remedies process in completed transactions may face challenges which, in practice, increase the risks of not achieving an effective solution. For example, there may be greater difficulty in separating a divestiture package, particularly if some integration steps or other pre-emptive action took place ahead of the CMA imposing

[80] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.15.

[81] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.15.

[82] Interim measures in merger investigations (CMA108), December 2021, paragraph 7.77.

[83] Interim measures in merger investigations (CMA108), December 2021, paragraph 7.77.

1. [84] See **Electro Rent Corporation / Test Equipment Asset Managements and Microlease merger inquiry** (two penalty notices: one penalty notice of **£100,000** in 2018 and another penalty notice of **£200,000** in 2019); **Nicholls' (Fuel Oils) Limited /DCC Energy Limited in Northern Ireland merger inquiry** (one penalty notice of **£146,000** in 2019); **Vanilla Group / Washstation merger inquiry** (one penalty notice of **£120,000** in 2019); **PayPal Holdings, Inc / iZettle AB merger inquiry** (one penalty notice of **£250,000** in 2019); **Ausurus Group / Metal & Waste Recycling merger inquiry** (one penalty notice of **£300,000** in 2019); **ION Investment Group Limited / Broadway Technology Holdings LLC** (one penalty notice of **£325,000** in 2021); **Facebook, Inc (now Meta Platforms Inc) / Giphy, Inc merger inquiry** (two penalty notices: one penalty notice of **£50.5m** (2021) and another penalty notice of **£1.5m** in 2022); and **JD Sports Fashion plc / Footasylum plc merger inquiry** (one penalty notice of **£4.3m** in 2022).

[85] See decision to impose a penalty on Facebook, Inc., Tabby Acquisition Sub Inc., and Facebook UK Limited under section 94A of the Enterprise Act 2002 on 20 October 2021.

[86] Section 73(3) of the Act for phase 1 investigations and Sections 35(4) and 36(3) of the Act for in-depth, phase 2 investigations.

[87] Merger remedies (CMA87), December 2018, paragraph 3.3.

interim measures, or merging parties may have weaker incentives to pursue a timely divestiture.[88]

3.1. Identifying appropriate remedies in completed transactions

42. As explained above in section 3, interim measures seek to preserve the CMA's remedial options notwithstanding the challenges noted in paragraph 41 above. As such, the CMA's approach to identifying appropriate remedies follows the same principles whether the transaction is completed or not.

43. The CMA's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the transaction, thereby comprehensively remedying the SLC. The CMA's first consideration when identifying appropriate remedies is therefore effectiveness. The CMA will seek remedies that are effective in addressing the SLC.

44. The CMA's framework for assessing effectiveness involves several distinct dimensions that are set out in its published guidance:[89]

- Impact on SLC and resulting adverse effects
- Appropriate duration and timing
- Practicality
- Acceptable risk profile

45. Divestiture remedies are pursued in over 90% of CMA merger remedy cases, whether the transaction is anticipated or completed. These involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process. In designing a divestiture remedy, the CMA will take into consideration three broad categories of risk that might impair the effectiveness of a remedy:[90]

- **Composition risks**: these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.
- **Purchaser risks**: these are risks that a suitable purchaser is not available or that merging parties will dispose to a weak or otherwise inappropriate purchaser.
- **Asset risks**: these are risks that the competitive capability of a divestiture package will deteriorate before completion of the divestiture, for example, through the loss of customers or key members of staff.

46. In completed transactions that are remedied through a divestiture, the composition and asset risks can often be higher as the target business may no longer be a stand-alone business and will have been operating under hold separate measures – and possibly interim leadership – for the duration of the investigation, which can impact staff morale. Accordingly, the CMA would pay particularly close attention to these two risk categories in completed cases although it will generally have sought to mitigate these risks as far as possible through interim measures.

47. In completed transactions, full divestiture (economically equivalent to prohibition) remains a remedial option for the CMA. The CMA's merger remedy guidelines state that

[88] Merger remedies (CMA87), December 2018, paragraph 4.79.

[89] Merger remedies (CMA87), December 2018, paragraph 3.5.

[90] Merger remedies (CMA87), December 2018, paragraph 5.3.

in identifying a divestiture package, the CMA will take, as its starting point, divestiture of all or part of the acquired business. This is because restoration of the pre-transaction situation in the markets subject to an SLC will generally represent a straightforward remedy.[91] It is important to note that unlike other merger control regimes, the voluntary nature of the regime in the UK means that full divestiture in a completed transaction is akin to prohibition, and therefore requires the CMA to oversee its implementation.

Box 2. Restoration of pre-transaction competition in a completed transaction – viagogo / StubHub merger inquiry (2020)

The acquisition by PUG LLC (**viagogo**) of the StubHub business of eBay Inc. (**StubHub**) was notified to the CMA. During pre-notification discussions, the merging parties advised the CMA that they were planning to complete the transaction. The CMA imposed interim measures shortly before the transaction completed in February 2020. Following the referral of the transaction to an in-depth phase 2 review, an MT was appointed[92] to oversee the merging parties' compliance with the interim measures.[93]

The CMA dedicated substantial resources to various interim measures issues, including assessing numerous derogation requests submitted by the merging parties. The CMA granted over 30 derogations during the merger review process.[94]

The CMA's merger review took place during the Coronavirus (COVID-19) pandemic, where the market for live events and tickets was effectively closed. The closure of the live events market gave rise to risks around the viability of the merging parties, which required close monitoring from the MT to ensure that StubHub was receiving sufficient resources to be able to continue to develop and compete independently. Where the CMA imposes interim measures, it can require the acquiring company to provide resources to ensure the continued operation of the acquired company.

Following an in-depth phase 2 review, the CMA found that the completed transaction resulted in an SLC within the supply of certain secondary ticketing (or ticket reselling) services in the UK.[95]

The CMA required viagogo to divest the StubHub business outside of North America (the StubHub International business) in order to remedy this SLC.[96] The divestment was subject to the CMA's approval of the identity of the purchaser and the terms of the transaction.[97] The purchase of the StubHub International business by Digital Fuel Capital LLC was approved by the CMA around 6 months after the completion of its phase 2 investigation.[98]

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[91] Merger remedies (CMA87), December 2018, paragraph 5.6.

[92] See directions to appoint a monitoring trustee.

[93] See directions to appoint a monitoring trustee.

[94] Derogations are published on a dedicated case page on the CMA's website.

[95] See final report of 2 February 2021, paragraph 1.

[96] See final report of 2 February 2021, paragraph 10.327.

[97] See final report of 2 February 2021, paragraph 81.

[98] See case closure summary.

Note:
Source:

48. In order to satisfy the principle of proportionality, the CMA will select the least costly and intrusive remedy that it considers to be effective. Once the CMA has identified what it considers to be an effective remedy, it will separately consider the costs of that remedy to the parties to the transaction in the context of its proportionality assessment.[99] However, for completed transactions, the CMA will not normally take account of costs or losses that will be incurred by merging parties as a result of a divestiture remedy, as it is open to merging parties to make their transaction conditional on the approval of the relevant competition authorities (including the CMA).[100] It is for merging parties to assess whether there is a risk that a completed transaction would be subject to an SLC finding, and the CMA would usually expect this risk to be reflected in the agreed acquisition price.[101] Since the cost of divestiture is, in essence, avoidable, the CMA will not, in the absence of exceptional circumstances, accept that the cost of divestiture should be considered when selecting remedies.[102]

3.2. The implementation of remedies in completed transactions

49. UILs are only accepted in phase 1 if they are "clear cut".[103] A remedy which requires complex untangling is unlikely to be accepted by the CMA unless merging parties can persuade the CMA that the challenges can be overcome and implemented within our statutory phase 1 timetable.[104] As such, merging parties that complete and undertake some level of integration may be limiting their ability to offer clear cut UILs (and accordingly avoid an in-depth phase 2 review).

50. For phase 2 remedies, the CMA will set out in the final report how it expects the remedy to be implemented.[105] For completed transactions, this would typically include a description of how the two businesses are to be separated, as well as of the CMA's expectations for any overlapping business operations.

51. Any hold separate measures in place will remain until the remedy has been implemented.[106] These will take the form of specific provisions within the interim measures documents, and comparable provisions in the UILs, phase 2 final undertakings accepted or order imposed by the Inquiry Group.[107] The CMA will usually grant a derogation for a

[99] Merger remedies (CMA87), December 2019, paragraph 3.5.

[100] Merger remedies (CMA87), December 2018, paragraph 3.9.

[101] Merger remedies (CMA87), December 2018, paragraph 3.9.

[102] Merger remedies (CMA87), December 2018, paragraph 3.9.

[103] Merger remedies (CMA87), December 2018, paragraph 3.27.

[104] Merger remedies (CMA87), December 2018, paragraph 3.28(b).

[105] Merger remedies (CMA87), December 2018, paragraph 4.66. See also section 35(3) of the Act.

[106] Merger remedies (CMA87), December 2018, paragraph 4.80. See also Guidance on initial enforcement orders and derogations in merger investigations (CMA60), 5 September 2017, paragraph 4.5.

[107] Derogations granted under an IEO/IO will typically be 'carried over' so that they apply also to the remedy undertakings / order.

clean team from the acquiring entity to help run the sales process and provide another derogation for information from the target to be passed to decision makers within the acquirer for the purposes of overseeing the sales process. Any such information needs to be strictly limited to that which is necessary for the intended purpose and merging parties will be required to put procedural safeguards in place (such as non-disclosure agreements, IT ring-fencing etc).[108]

52. Where an MT is already in place, the CMA is also likely to alter an MT's mandate so that it includes additional obligations to assist the CMA by overseeing the sales process and providing expert advice to the CMA on the sales process itself, including with respect to purchaser suitability and the transaction documents, in addition to continuing to monitor compliance with hold separate measures. Where there is no MT already in place, the CMA may issue directions to appoint an MT to help oversee the sales process.

53. The CMA's interim measure tools are effective at preventing, or significantly reducing the frequency of, situations where the CMA has complex transactions to untangle. For those cases that do require the CMA to manage the reversal of a certain level of integration which has taken place, the CMA has generally been able to effectively overcome these hurdles for instance through:

- the use of Unwinding Orders which, as discussed above, may be issued during the course of the CMA's merger investigation, and which require the unwinding of certain integration that occurred before the CMA reached a final decision on whether or not the case gave rise to substantive concerns; or
- careful specification of the remedy package, including potentially the addition of certain assets or staff to a divestiture package, or by clearly outlining what actions we expect the merging parties to take in order to render the remedy package effective.

54. While there may be specific issues to overcome in completed transactions (see paragraph 41), robust application of interim measures and careful specification of the remedy package render these challenges manageable, and ensure a consistent approach in how the CMA implements remedies in completed cases compared to anticipated cases.

Box 3. Identifying an effective remedy in a completed merger – Facebook, Inc (now Meta Platforms, Inc) / Giphy, Inc merger inquiry (2022)

Facebook, Inc (now Meta Platforms, Inc) (**Facebook**) completed the acquisition of Giphy, Inc (**Giphy**) in May 2020, but has been required to hold the businesses separate since 9 June 2020, when the CMA an IEO during pre-notification.[109]

Significant integration of the businesses had taken place before the CMA started its investigation. This included the integration of Giphy into Facebook's operations, the transfer of almost all Giphy staff onto Facebook employment contracts and the

[108] See procedural safeguards for the legitimate disclosure of information between the parties to the transaction. Guidance on initial enforcement orders and derogations in merger investigations (CMA60), 5 September 2017, paragraphs 3.14(a) to (d).

[109] See initial enforcement order made on 9 June 2020, as amended by a variation order made on 29 June 2021.

disbanding of Giphy's sales team and related termination of its revenue-generating activities.[110]

a) At phase 1, in addition to the imposition of the IEO, the CMA considered it necessary to require the merging parties to appoint an MT[111] and an HSM[112] to ensure the merging parties' compliance with the IEO. However, during its investigation, the CMA did not order any unwinding of the above-mentioned integration which had already taken place on completion of the transaction.

Following an in-depth phase 2 review, the CMA found that the transaction resulted or would result in an SLC in the supply of display advertising in the UK, and in the supply of social media services worldwide (including in the UK).[113]

After a thorough assessment of the remedy options put forward by Facebook, the CMA concluded that full divestiture of Giphy was an effective remedy to the SLCs found.[114] While divestiture of an acquired business is not an uncommon outcome when the CMA finds an SLC, divestiture of the Giphy business posed particular challenges, namely as a result of the integration which had taken place on completion (as detailed above) which resulted in Giphy being in a significantly weaker position than it was pre-transaction.

In order to overcome these challenges, the CMA required Facebook to reinstate certain of Giphy's activities and assets and to ensure that Giphy has the necessary management, technical and creative personnel to enable it to compete effectively throughout and following the divestiture.[115] The CMA also anticipated that Facebook would need to provide appropriate financial and other incentives to encourage former Giphy employees to transfer back to Giphy, and to recruit appropriate replacements for any key Giphy staff who choose not to do so.[116] We also considered that Giphy would need to be divested with sufficient financial resources to allow it to operate and compete as it would have done had it not been acquired by Facebook.[117]

Given that Facebook has filed an application for review by a UK court of certain decisions contained in the CMA's final report,[118] and the outcome of the appeal is not yet known, the divestiture of the Giphy business has not yet commenced.

4. Lessons learned

1. Each completed transaction will present a unique risk profile when it comes to preserving remedial options and implementing effective remedies. The CMA will use interim

[110] See remedies notice, paragraph 20.

[111] See directions to appoint monitoring trustee.

[112] See directions to appoint a hold separate manager.

[113] See summary of final report,paragraphs 65(a) and (b).

[114] See final report of 30 November 2021, paragraph 11.296.

[115] See summary of final report, paragraph 63.

[116] See summary of final report, paragraph 63.

[117] See summary of final report, paragraph 63.

[118] See 1429/4/12/21 Meta Platforms, Inc. v Competition and Markets Authority - Summary of application | 05 Jan 2022.

measures in accordance with each case's unique risk profile. Below are the key lessons which the CMA has learned from its experience of applying interim measures and implementing remedies across completed cases.

- **Resource appropriately** – The CMA is able to implement interim measures effectively only because it has an in-house team of dedicated and specialised experts with sufficient time to deal with derogation requests, MT appointments, enforcement action and other resource-intensive work streams associated with implementing interim measures.
- **Timely intervention** – The longer the combined entity carries on its business unchecked, generally, the greater the risk of pre-emptive action. For this reason, the CMA deploys interim measures as promptly as possible. In phase 1, the CMA will impose an IEO in completed transactions and sometimes in anticipated transactions if such transactions give rise to a risk of pre-emptive action. The CMA may deploy further interim measures (eg the appointment of an MT and/or an HSM) if certain risk factors are present and where the CMA is concerned about the ability or willingness of the merging parties to comply fully with the interim measures.[119] The UK experience of merger control before the competition agencies had robust interim measures powers shows that the ability to put in place effective remedies was sometimes lost as a result of integration and deterioration of the target business.[120]
- **Consistency in remedy implementation** – It is important to ensure that the CMA uses the same analytical framework for deciding on an appropriate remedy regardless of whether a transaction is completed or anticipated. The CMA must be able to effectively exercise its statutory duty to remedy, mitigate or prevent the SLC concerned regardless of the actions of the parties to a transaction.
- **Scope of remedy packages** – In the context of completed transactions, it is critical that the CMA carefully consider the scope of remedy packages to ensure that they are effective and viable on a standalone basis. This may require the CMA potentially to include additional assets or staff in remedy packages, and/or to require merging parties to take certain steps in order to render a remedy package effective.

5. Conclusion

55. The UK's voluntary merger control regime gives merging parties greater flexibility and reduces regulatory obstacles for those transactions which are clearly unproblematic from a competition perspective. However, the CMA does still investigate completed transactions if it considers that any such transactions warrant a merger investigation. In such cases, merging parties which complete a transaction without first seeking clearance from the CMA are likely to be subject to interim measures. The burden of the interim measures on the respective businesses of merging parties will largely depend on the extent

[119] Interim measures in merger investigations (CMA108), December 2021, paragraph 4.5.

[120] See for example, Merger remedy evaluations appendices (CMA110), June 2019, paragraphs 67 and 68. A key factor in the Competition Commission's choice of remedies in the Ano-Coil / Alanod merger inquiry (1999) was the fact that the substantial integration of the Ano-Coil business into Alanod had meant that no viable standalone divestiture package existed. As a result, the Competition Commission relied on a package of seven behavioural remedies in order to address the competition concerns identified. These behavioural remedies were found to have been of limited effectiveness.

to which they have already integrated. In certain cases, the CMA may require merging parties to unwind integration steps and, should it identify an SLC after an in-depth phase 2 review, the transaction itself through a forced divestment.

56. The CMA's interim measures are an effective tool for preserving its remedial powers in the event that the CMA ultimately identifies an SLC. These tools allow the CMA to use the same analytical framework when assessing remedies regardless of whether a transaction is completed or not. The CMA is able to effectively implement interim measures in large part due to having a dedicated internal team of experts who allocate considerable resources towards this end. This is supported by the CMA's robust enforcement action, which effectively deters non-compliance.