

Unclassified

DAF/COMP/WP3/WD(2016)71

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

10-Nov-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

Cancels & replaces the same document of 08 November 2016

### **Working Party No. 3 on Co-operation and Enforcement**

#### **AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE**

-- Note by the United Kingdom --

**28-29 November 2016**

*This document reproduces a written contribution from the United Kingdom submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm](http://www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm)*

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: [despina.pachnou@oecd.org](mailto:despina.pachnou@oecd.org)].

**JT03405092**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/WP3/WD(2016)71  
Unclassified

English - Or. English

-- UNITED KINGDOM --

**Executive Summary**

1. The UK's merger control regime follows a two-phase process. If at the end of an initial Phase 1 investigation, the Competition and Markets Authority (CMA) finds that a merger gives rise to a substantial lessening of competition (SLC), the CMA will refer the merger for in-depth Phase 2 investigation unless the merging parties can offer remedies (referred to as undertakings in lieu (UILs)) which address the CMA's competition concerns in a clear-cut manner. If the CMA proceeds to a Phase 2 investigation, the CMA may ultimately clear the merger without remedies, clear it subject to remedies, or prohibit it. Procedurally, prohibition is one form of remedy amongst many. In general, the CMA prefers structural remedies over behavioural remedies, as they are more likely to be effective and require little ongoing monitoring or enforcement.

2. When considering what remedy is appropriate, the CMA is required to have regard to the need 'to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.<sup>1</sup> Over the years, merging parties (and interested third parties) have challenged remedies decisions taken by the CMA and its predecessor, the Competition Commission. Frequently, these challenges have focused on the proportionality of the authority's approach in requiring certain remedies packages, or rejecting others. While the authority's approach has been upheld in each case, the case law has developed a number of important principles which the UK authorities must adhere to when considering the proportionality of the remedies which it accepts or imposes in merger investigations. These include that the remedy must be no more onerous than is required to achieve the authority's legitimate aim, and be the least onerous if there is a choice of equally effective measures. As prohibition is likely to be considered a particularly onerous remedy, the CMA will carefully consider whether there is any lesser remedy which would be equally effective in remedying the identified SLC.

3. Remedies are, by their very nature, forward looking. When designing remedies, the CMA therefore faces an element of future uncertainty, not only in relation to the implementation of the remedy in the short term, but also the ongoing effective operation of the remedy in the longer term. The CMA has identified a number of factors which may increase the successful implementation of remedies,<sup>2</sup> such as the use of effective interim measures in completed mergers and giving appropriate incentives for parties to implement remedies. In all cases, the CMA will seek views on the likely effectiveness of its proposed remedies by consulting publicly and, where appropriate, will approach stakeholders directly to encourage their engagement. Where the CMA has particular concerns regarding the implementation of a chosen remedy (for example, regarding the viability or attractiveness to a purchaser of certain divestment assets, or the deterioration of those assets during the divestment process), the CMA has various tools at its disposal. For example, it may require the appointment of a monitoring trustee to report on the ongoing management of the divestiture package, or impose an 'upfront buyer' condition, requiring the merging parties contractually to commit to sell the assets to a CMA-approved purchaser before proceeding with the merger.

---

<sup>1</sup> s.73(3) (Phase 1) and s.35(4) (Phase 2) Enterprise Act 2002.

<sup>2</sup> [Understanding past merger remedies: report on case study research](#), CMA, July 2015

## 1. Introduction

4. The CMA has carefully considered its practices in remedying competition concerns in mergers in recent years. This has been facilitated across the organisation, since the combination of the Competition Commission (CC) and the Office of Fair Trading (OFT) to form the CMA in 2014, by a dedicated team of specialists who advise on the CMA's remedies work.

5. Merger notification in the UK is voluntary, although the CMA can open merger investigations on its own initiative. At the end of an initial Phase 1 investigation, if the CMA finds that the transaction under review may give rise to a substantial lessening of competition (an SLC), the CMA may refer the merger for in-depth Phase 2 investigation. Parties may propose remedies at this stage (undertakings in lieu (UILs)), which the CMA may accept in lieu of a referral to Phase 2. If the CMA proceeds to a Phase 2 investigation (because UILs were not offered, or were not accepted by the CMA), the CMA may ultimately clear the merger without remedies, clear it subject to remedies (which may be offered by the parties, or imposed by the CMA by way of an order) or prohibit it. Procedurally, prohibition is one form of remedy amongst many.

6. Due to the UK's voluntary merger notification regime, mergers can complete before the conclusion of an investigation. In this context, prohibition can constitute the divestment of the target company or a more extensive remedy (see the example of the divestment required in the Eurotunnel/SeaFrance, discussed under '*Mergers prohibited in the past five years*' below).

7. The CMA's approach to remedies is set out in published guidance documents. *Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122)<sup>3</sup> sets out the CMA's position with respect to UILs at Phase 1. *Merger Remedies: Competition Commission Guidelines* (CC8)<sup>4</sup> sets out the CMA's position with respect to remedies at Phase 2.

## 2. Mergers prohibited in the past five years

8. The CMA and its predecessors have prohibited four mergers in the last five years.

### 2.1 ICE/Trayport (2016)<sup>5</sup>

9. In 2016, the CMA concluded that the completed acquisition of Trayport Inc. (Trayport) by Intercontinental Exchange, Inc. (ICE) gave rise to an SLC in the market for the supply of trade execution services and trade clearing services to energy traders. The CMA found that ICE could use its ownership of Trayport's platform to reduce competition between itself and its rivals which could lead to increased fees for execution and clearing, and worse terms offered to traders. The CMA also found that the merger would likely result in a loss of competition between ICE and its rivals to launch new products, find innovative trading solutions and enter markets with new offerings. The CMA required ICE to make a full divestment of Trayport, thereby effectively prohibiting the merger.

<sup>3</sup> Originally issued by the OFT in December 2010 and subsequently adopted by the CMA board. <https://www.gov.uk/government/publications/mergers-exceptions-to-the-duty-to-refer-and-undertakings-in-lieu>.

<sup>4</sup> Originally issued by the Competition Commission in November 2008 and subsequently adopted by the CMA board. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/510513/cc8.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510513/cc8.pdf).

<sup>5</sup> [A report on the completed acquisition by Intercontinental Exchange, Inc. of Trayport](#), CMA, 17 October 2016.

10. The CMA also considered a range of other remedy options, including partial divestiture of certain Trayport software; commitments to provide Trayport products and services on fair, reasonable and non-discriminatory (FRAND) terms; and a measure to open up Trayport's once closed network and IT platform to third party competitors. The merged parties had also proposed an alternative remedy option which primarily consisted of a FRAND commitment, as well as the creation of a new Trayport Board (with minority ICE representation), and confidentiality firewalls.

11. The CMA concluded that the merged parties' remedy proposal would not be an effective solution to the competition problems it had found. In particular, it was not persuaded that under their proposal, Trayport would be completely free from any direct or indirect influence from ICE to pursue its own competitive strategies, which prior to the merger had conflicted with those of ICE. In addition, the CMA was concerned that the FRAND commitments would not be able to address all of the possible ways that ICE could use Trayport to harm its rivals. The CMA therefore concluded that complete divestiture was the only effective remedy.

## **2.2 *The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust/ Poole Hospital NHS Foundation Trust (2013)*<sup>6</sup>**

12. In 2013, the CC prohibited the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust, concluding that the merger would result in an SLC across 55 different clinical healthcare services. The CC noted that UK healthcare policy has emphasised patient choice as a means of incentivising hospitals to maintain and increase quality.

13. The merging parties proposed a behavioural remedy in which they would be measured against a 'friends and family test', to prevent a reduction in quality. The CC did not consider that this would be an effective remedy, in part due to uncertainty about the reliability of the test as a measure of quality. Structural remedies were considered unfeasible, given the scope of the competition concerns. The CC concluded that prohibition would be the only effective remedy.

## **2.3 *Eurotunnel/SeaFrance (2013)*<sup>7</sup>**

14. In 2013, the CC prohibited the completed acquisition by Groupe Eurotunnel S.A. (Eurotunnel) of certain assets of former SeaFrance S.A. (SeaFrance), concluding that the merger would result in an SLC in the markets for the supply of transport services to passengers and freight customers on certain routes across the English Channel. The CC found that Eurotunnel decided to acquire the SeaFrance ferries in order to prevent ferry operator DFDS/LD from buying them. The CC also found that one of the three current ferry operators on the Dover–Calais route was likely to exit in the short term if the CC took no action, in which case Eurotunnel could gain an even larger share of the cross-Channel market.

15. The CC considered a wide range of possible remedies. Eurotunnel proposed a structural remedy to, in effect, divest part of the capacity of the ferry services of its subsidiary MyFerryLink SAS, but the CC rejected this due to practical concerns and doubts about the proposal's ability to remedy its competition concerns. Eurotunnel also proposed behavioural remedies to operate its Eurotunnel and MyFerryLink SAS businesses independently, but the CC did not consider that this would remedy its competition concerns.

---

<sup>6</sup> [A report on the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust](#), CC, 17 October 2013.

<sup>7</sup> [A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A.](#), CC, 6 June 2013.

16. The CC had provisionally considered that selling the three acquired vessels would be an effective remedy, but found that the Commercial Court of Paris had prohibited the sale of the vessels. Given this constraint, the CC ultimately decided to prohibit Eurotunnel from operating ferry services at the port of Dover.

#### 2.4 *AkzoNobel/Metlac (2012)*<sup>8</sup>

17. In 2012, the CC prohibited the proposed acquisition by Akzo Nobel N.V. (AkzoNobel) of Metlac Holding S.r.l. (Metlac), concluding that the merger would result in an SLC in the supply of metal packaging coatings for beer and beverage cans in the UK.

18. The CC considered various behavioural remedies proposed by AkzoNobel, such as licensing technologies to alternative suppliers of metal packaging coating. However, the CC concluded that these would not remedy its competition concerns, in particular because they would not prevent the loss of Metlac as a constraint on AkzoNobel. The CC therefore decided that prohibition would be a proportionate remedy given the absence of effective alternatives and the absence of any evidence that relevant customer benefits would arise from the merger.<sup>9</sup>

### 3. Mergers cleared subject to remedies in the past five years

19. In the last five years, the CMA and its predecessors have cleared 31 mergers subject to UILs at Phase 1, and seven mergers subject to remedies at Phase 2.<sup>10</sup> Summary descriptions of three notable cases from Phase 2, and one case from Phase 1, are set out below.

#### 3.1 *Celesio/Sainsbury's Pharmacy Business (2016)*<sup>11</sup> [Phase 2]

20. In 2016, the CMA concluded that the anticipated acquisition by Celesio AG (Celesio) of 277 Sainsbury's pharmacies would give rise to an SLC in 12 areas in England and Wales where the two companies' pharmacies were close competitors. The CMA required Celesio to sell its Lloyds-branded pharmacies in each of the 12 areas to a suitable purchaser to maintain the level of competition for local customers that would have prevailed absent the merger situation.

21. Celesio had initially proposed a behavioural remedy consisting of an undertaking not to reduce the opening hours at any of its Lloyds pharmacy in the affected 12 areas, and later added that the remedy could be expanded to cover the range of pharmacy services offered at Lloyds' stores in the SLC areas and suggested that such a remedy would be proportionate. The CMA considered that a behavioural remedy would be difficult to specify and that there would be no obvious end-date for the remedy. The CMA was concerned that the behavioural remedy might cause significant market distortions over time, such as inhibiting innovation. The CMA concluded that either prohibition of the merger or a local divestiture in each of the 12 local markets where it had found an SLC would be effective. The CMA concluded that the latter would represent a more proportionate remedy and decided to apply this remedy.

<sup>8</sup> [A report on the anticipated acquisition by Akzo Nobel N.V. of Metlac Holding S.r.l.](#), CC, 21 December 2012.

<sup>9</sup> In assessing the costs to the merging parties in completed mergers, the CC will not normally take account of the costs or losses that will be incurred as a result of a divestiture remedy. *Merger Remedies: Competition Commission Guidelines* (CC8), paragraph 1.10. See further under 'The key principles of the CMA's remedies guidance' below.

<sup>10</sup> As at 27 October 2016.

<sup>11</sup> [A report on the anticipated acquisition by Celesio AG of Sainsbury's Pharmacy Business](#), CMA, 29 July 2016; [Final Undertakings given by Lloyds Pharmacy Limited to the Competition and Markets Authority](#), 30 September 2016; [Final Undertakings given by Celesio AG to the Competition and Markets Authority](#), 30 September 2016; [Notice of acceptance of Final Undertakings](#), CMA, 18 October 2016.

### 3.2 *Ryanair/Aer Lingus (2013-15)*<sup>12</sup> [Phase 2]

22. In 2013, the CC concluded that Ryanair's minority shareholding in Aer Lingus gave rise to an SLC between the airlines on routes between Great Britain and Ireland, and required Ryanair to divest its 29.8% minority stake in Aer Lingus to 5% and undertake not to seek or accept board representation or acquire further shares in Aer Lingus.

23. Ryanair had proposed various remedies in an attempt to address the CC's concerns, and although Ryanair's proposed remedies sought to address some of these concerns, they did not address all of them. The CC considered that in a dynamic and uncertain sector such as the airline industry, it was inherently difficult to design behavioural remedies that would cater for all eventualities. The CC considered that either a full divestiture of Ryanair's 29.8% shareholding or a partial divestiture to reduce its shareholding to 5% accompanied by an obligation on Ryanair not to seek or accept board representation in Aer Lingus, would be effective in remedying the SLC. The CC concluded that partial divestiture would be an effective and proportionate remedy.

### 3.3 *Reckitt Benckiser/K-Y brand (2015-2016)*<sup>13</sup> [Phase 2]

24. In 2015, the CMA concluded that Reckitt Benckiser's anticipated acquisition of the K-Y brand could lead to an SLC, making customers buying personal lubricant products in grocery retailers and national pharmacy chains worse off due to higher prices. To remedy the competition concerns of higher prices and preserve the benefits of competition in this market, the CMA required Reckitt Benckiser to license the K-Y brand in the UK to a competitor for 8 years, allowing time for it to develop a new brand to rival the Reckitt Benckiser's Durex range that could gain access to supermarkets and national pharmacy chains.

25. Reckitt Benckiser had proposed two potential remedies: a short-term licence and a behavioural remedy. The CMA concluded that licensing would be an effective and proportionate remedy in this case, and decided the licensing terms that would be needed to ensure the effectiveness of this remedy. The CMA decided that completion of the transaction would be conditional on Reckitt Benckiser agreeing a licensing agreement in line with the criteria set out in the CMA's final decision.

---

<sup>12</sup> The CC's final report was issued in 2013 however, due to legal challenge (see further under '*Remedies decisions challenged in the courts*' below), the remedy was implemented in 2015. [A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc](#), CC, 28 August 2013; [Notice of making of Final Order](#), CMA, 11 June 2015; [The Ryanair Holdings Plc and Aer Lingus Group Plc Inquiry Order 2015](#), 11 June 2015.

<sup>13</sup> The CMA's final report was issued in 2015 and the remedy was implemented in 2016. [A report on the anticipated acquisition by Reckitt Benckiser Group plc of the K-Y brand in the UK](#), CMA, 12 August 2015; [Undertakings given to the Competition and Markets Authority by Johnson & Johnson](#), 9 October 2015; [Undertakings given to the Competition and Markets Authority by Reckitt Benckiser](#), 9 October 2015; [Acceptance of Final Undertakings from Reckitt Benckiser](#), CMA, 4 November 2015; [Acceptance of final undertakings from Johnson & Johnson](#), CMA, 4 November 2015.

### 3.4 *Muller/Dairy Crest (2015)*<sup>14</sup> [Phase 1]

26. In 2015, the CMA concluded that the completed acquisition by Muller UK & Ireland Group LLP (Müller) of Dairy Crest's UK dairy business would result in an SLC in the supply of fresh liquid milk in the catchment area of Dairy Crest's Severnside dairy, especially in the South West and Wales. In lieu of a reference to a Phase 2 merger inquiry, the CMA accepted Müller's proposed undertakings to sell a toll processing arrangement option (toll option) to Medina Dairy, on the basis of which Medina Dairy would acquire the option to require Müller to process up to 100 million litres a year of fresh milk from the Severnside dairy for the purpose of supplying this milk to national grocery retailers. The toll option would have an initial term of five years plus the option to extend by up to three years to fulfil any remaining contractual commitments.

27. Prior to this case, whilst a toll processing/manufacturing agreement had been accepted as a remedy at Phase 2, it had never been accepted at Phase 1. The remedy was also an innovative solution to the SLC as it was quasi-structural. The remedy was designed to provide a structural solution by enabling a new entrant to use the volumes under the toll option to compete such that the constraint of the Severnside dairy was replaced. However, it also involved arrangements of a behavioural nature during the life of the toll option that regulates the conduct of Müller in processing fresh milk for supply. The decision to accept Müller's undertakings required a detailed and fairly resource-intensive assessment of the effectiveness of the remedy, which was made possible in the context of the CMA's institutional framework as a single competition authority. The process benefited from the expertise of its remedies, business and financial advisors from the CMA's dedicated Remedies team, and the flexible allocation of resources between Phase 1 and Phase 2.

## 4. The key principles of the CMA's remedies guidance

28. Section 8 of the CMA's Jurisdictional and Procedure Guidance (CMA2) sets out the process by which parties to a merger can offer UILs following a Phase 1 investigation to avoid a reference to Phase 2. Sections 12 to 14 of CMA2 discuss the process by which Parties can offer (or the CMA can impose) remedies at Phase 2.

29. The substantive principles which the CMA applies in determining what remedies to accept are set out in further detail in the following guidance documents:

- Specific to Phase 1: Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance<sup>15</sup> (OFT1122)
- Specific to Phase 2: Merger Remedies: Competition Commission Guidelines<sup>16</sup> (CC8).

30. When considering remedies, whether at Phase 1 or Phase 2, the CMA is required to have regard to the need 'to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it'.<sup>17</sup>

<sup>14</sup> [Anticipated acquisition by Muller UK & Ireland Group LLP of the dairies operations of Dairy Crest Group plc](#), CMA, 17 July 2015; [Undertakings to be given by Muller to the Competition and Markets Authority](#), 19 October 2016; [Acceptance of final undertakings](#), CMA, 19 October 2016.

<sup>15</sup> Originally issued by the OFT in December 2010 and subsequently adopted by the CMA board. See link in footnote 3 above.

<sup>16</sup> Originally issued by the Competition Commission in November 2008 and subsequently adopted by the CMA board. See link in footnote 4 above.

31. In line with this requirement, the CMA applies the following key principles when considering remedies across both phases:

- **Effectiveness.** The remedies proposed must be effective in addressing the SLC and the resulting adverse effects. This will most often be achieved through the implementation of a structural divestment, rather than behavioural remedies. At Phase 1, given the more limited time available to the CMA to investigate the competition concerns and the UILs offered to resolve them, any remedies must also be ‘clear cut’. This means that the CMA must be confident that the UILs will resolve all potential competition concerns and there must be no material doubts regarding their effectiveness. The CMA is more likely to accept UILs which remedy or prevent the competition concerns, rather than simply mitigate them.
- **Proportionality.** The scope of the remedies should not go beyond what is necessary in order to remedy the identified competition concerns in any particular case. Where several alternative remedies are available, the CMA will typically consider the least costly, and least intrusive, option.<sup>18</sup>
- **Practicality.** The remedy should be capable of effective implementation, monitoring and enforcement. Particularly at Phase 1, the ‘clear cut’ standard also requires that UILs will not be accepted where they are of such magnitude in absolute terms and/or complexity that implementation would require unworkable resources.
- **Relevant customer benefits.** The CMA may have regard to any ‘relevant customer benefits’ arising from the merger, in the form of (i) lower prices, higher quality or greater choice of goods or services or (ii) greater innovation in relation to such goods or services. A benefit is only a ‘relevant customer benefit’ if the benefit has accrued, or will accrue, as a result of the merger; and the benefit was, or is, unlikely to accrue in the absence of the merger situation. The CMA may modify or alter its choice of remedies in order to preserve such benefits. Any relevant customer benefits foregone as a result of a remedy are considered as costs in the CMA’s remedy proportionality assessment.

## 5. Challenges in designing remedies

32. Remedies are, by their very nature, forward looking. When designing remedies, the CMA therefore invariably faces an element of future uncertainty, not only in relation to the implementation of the remedy in the short term, but also the ongoing effective operation of the remedy in the longer term.

33. The CMA’s guidance, *Merger Remedies: Competition Commission Guidelines (CC8)* sets out a framework for assessing the relevant design considerations that go towards the final determination of an appropriate remedy. In practice, the particular challenges and complexities faced by the CMA during a Phase 2 remedies process will vary depending on the specific facts of the case, including the complexity of the merging parties’ markets and the possible remedy solutions available to the CMA.

---

<sup>17</sup> With respect to Phase 1, s.73(3) Enterprise Act 2002; with respect to Phase 2, s.35(4) Enterprise Act 2002.

<sup>18</sup> As the merger parties have the choice of whether or not to proceed with the merger, in considering the costs of a remedy, the CMA will generally attribute less significance to the costs that will be incurred by the merger parties, than costs that will be imposed on third parties, the CMA or other monitoring agencies.

34. Whilst the CMA generally prefers structural remedies, such as divestiture, to behavioural remedies, there are a number of challenges to designing structural remedies. For example, the CMA will assess the likelihood that suitable purchasers would be available without a formal market testing process. In situations where it might be appropriate to divest only a part of the acquired target business, this could give rise to questions over whether this would first address the CMA's competition concerns, or whether such a divestiture package would be viable on its own, or attractive to potential purchasers.

35. The challenges are often even greater when designing behavioural remedies. Designing these types of remedies is usually accompanied by the CMA looking at whether such a remedy could be clearly and comprehensively specified, and then effectively monitored and enforced. Other risks of such a remedy include the risk that controlling certain behaviours might result in unintended market distortions. In assessing, and taking account of these risks in the design of any behavioural remedy, the CMA will invariably be required to form a view on the likely effects of the behavioural remedy on the merged entity's behaviour and on the wider market.

36. In situations where the CMA considers it appropriate to implement a package of remedy measures, then the design of each individual remedy measure will require the CMA to assess not only its individual impact on the competition problem, but also the interaction and any interdependence of each remedy measure. The complexity and challenges of such an assessment would vary depending on the specifics of the case.

## **6. Effectiveness of different remedies**

37. In 2015, the CMA evaluated the remedies it had implemented on 13 Phase 2 merger inquiries.<sup>19</sup> This evaluation involved initial desk research into each case followed by a series of interviews with those involved in implementing the remedy, as well as those affected by the remedy, including customers and competitors, and those involved in any ongoing monitoring.

38. Broadly, the studies highlighted the importance of effective interim measures in completed mergers (e.g. to prevent further integration or any pre-emptive action that could undermine the merger inquiry or the remedies process); the need for parties to have appropriate incentives to implement remedies; the key success factors in implementing an effective divestiture remedy; and the limited circumstances in which behavioural remedies might be effective.

39. Specifically in relation to divestiture remedies, the study showed: the need to be clear about the constituents of the divestiture package and ensure that it is maintained until the divestiture is complete; the importance of a thorough assessment of potential purchasers; and the importance of including provision for sale of the package by divestiture trustees at no minimum price.

40. Specifically in relation to behavioural remedies, the study showed that: behavioural remedies were more complex and resource-intensive than divestiture remedies but that they could operate satisfactorily in limited circumstances, especially where the company operates in a regulated environment and where there are expert monitors. The study also showed that in relation to intellectual property/licensing remedies, that these can be a form of structural and/or behavioural remedy and while these are relatively unusual in merger control cases, they are common in commercial contexts in certain sectors (e.g. fast moving consumer goods) and are well-understood by market participants and can be effective in certain circumstances.

---

<sup>19</sup> *Understanding past merger remedies: report on case study research*, CMA, July 2015.

41. By way of a recent case example, in 2016 the CMA decided to release FirstGroup plc from its 2002 behavioural remedy undertakings (imposed pursuant to the completed acquisition by FirstBus plc of SB Holdings Ltd in 1996).<sup>20</sup> The CMA concluded that having carried out its review, the undertakings were no longer appropriate due to a change in circumstances. This example highlights that with behavioural undertakings, and in contrast to structural remedies, there is higher risk that whilst such behavioural measures may have been effective at their point of implementation, their effectiveness may gradually erode over time.

## 7. Remedies decisions challenged in the courts

42. The Enterprise Act 2002<sup>21</sup> allows any party aggrieved by a decision of the CMA in connection with a merger enquiry to apply to the Competition Appeals Tribunal (the CAT) to review that decision. The CAT does not have the power to conduct a ‘merits-based’ review (i.e. to substitute its own view for that of the CMA) but may review the CMA’s decision on administrative law principals of judicial review. The key grounds for judicial review are (i) illegality or error of law; (ii) unreasonableness or irrationality; (iii) proportionality; and (iv) procedural fairness.

43. With respect to decisions of the CMA (and previously CC) with regard to remedies, the most frequent ground of challenge before the CAT (and on occasion, on appeal to the UK’s Court of Appeal) has been the proportionality of the authority’s approach. Broadly speaking, the case law has confirmed that the principle of proportionality requires that remedies must: (i) be effective to achieve the legitimate aim in question; (ii) be no more onerous than is required to achieve that aim; (iii) be the least onerous, if there is a choice of equally effective measures; and (iv) in any event, not produce adverse effects which are disproportionate to the aim pursued.<sup>22</sup>

44. Set out below is a brief overview of a number of key decisions in which the CC’s approach to remedies has been challenged in the courts. In each case, the approach of the CC has been upheld.

45. In *Somerfield v CC* (2006),<sup>23</sup> Somerfield challenged the CC’s decision that Somerfield must divest 12 grocery stores to suitable pre-approved retailers. In particular, Somerfield claimed that the CC acted unreasonably in specifying which stores must be divested (in some local areas, Somerfield was required to divest the acquired stores and not its existing stores) and in placing restrictions on the identity of the purchasers. The CAT concluded that CC had a ‘clear margin of appreciation’ to decide what action was appropriate for remedying, mitigating or preventing the SLC identified. Further, the CAT concluded that the CC had acted ‘entirely reasonably’ in following its own guidelines to use divestment of the target (and therefore the restoration of the pre-merger position) as the starting point. The onus was on the merging parties to provide the CC with evidence that an approach different to the CC’s starting point would be as effective.<sup>24</sup>

<sup>20</sup> [Review of FirstGroup undertakings: Final report](#), CMA, 20 April 2016.

<sup>21</sup> Section 120.

<sup>22</sup> These principles were first articulated by the CAT in *Tesco v Competition Commission* [2009] CAT 6, judgment of 4 March 2009, which concerned Tesco’s appeal against the CC’s final report on its market investigation into the supply of groceries. The same principals have subsequently been reiterated in a number of appeals relating to merger investigations.

<sup>23</sup> *Somerfield plc v Competition Commission* [2006] CAT 4, judgment of 13 February 2006. The CC’s investigation concerned the completed acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc.

<sup>24</sup> The CAT found that the CC had acted lawfully in comparing the acquired and existing stores to determine whether the existing store would be less attractive to a potential purchaser, and so would not attract a purchaser with a competitive offering capable of remedying the competition concerns identified. It was sufficient that there was a real risk that the sale of an existing store would be more problematic or take longer.

46. In *BskyB v CC and Secretary of State* (2008),<sup>25</sup> BSkyB challenged the decision of the Secretary of State (recommended by the CC) that BSkyB must divest its 17.9% shareholding in ITV to below 7.5%, along with a number of behavioural undertakings. BSkyB claimed that the remedy was disproportionate and that a lesser behavioural remedy was more appropriate.<sup>26</sup> Upholding its decision in *Somerfield v CC*, the CAT held that it was not unreasonable for the CC to have considered, as a starting point, a remedy that restored the pre-merger position. While this did not mean that divestiture would be the starting point in every case, the CC was entitled to take that approach as appropriate. Further, the CC was entitled to take a cautious and conservative approach in considering what level of divestiture would be effective in remedying the SLC. Meanwhile, none of the CC's reasons for rejecting BSkyB's proposed behavioural remedies were irrational. The CC was entitled, for example, to take the view that the proposed remedies gave rise to monitoring and enforcement concerns and would not remove the possibility of indirect influence by BskyB in ITV. Having concluded that neither of BSkyB's proposed remedies would be effective, there was no need for the CC to consider the proportionality of those remedies as against divestiture.

47. In *SRCL Limited v CC* (2012),<sup>27</sup> Stericycle challenged the CC's decision that only the complete divestment of Ecowaste (the entity acquired by Stericycle pursuant to the transaction under investigation) to an approved purchaser would be an effective and comprehensive remedy. The CAT stated that, where the CC has taken as intrusive a step as requiring divestment, the CAT will expect the CC to have exercised particular care in its analysis of the problem and the remedies imposed. The CAT found that, in this case, there was nothing to suggest that the CC had assumed that only full divestment would be an effective remedy, or that it had failed to give proper consideration to other options proposed. Further, the CAT found that the CC had not erred in failing to take into account the costs of the remedy that would be incurred by Stericycle in divesting Ecowaste. The CC was only required to consider the comparative costs of different remedies where it identified a number of remedies which would each be effective. Having concluded only full divestment would be effective, no such comparison was required. Finally, the CC was entitled to require the appointment of a divestment trustee to oversee the sale without a minimum price, if Ecowaste was not sold by a certain date. Such a requirement was within the CC's discretion, bearing in mind its aim to ensure the entity was sold quickly, so as to allow a new purchaser to establish itself before certain key contracts came due for tendering.

48. In *SCOP v CC and Eurotunnel v CC* (2013)<sup>28</sup>, both Eurotunnel and a workers cooperative formed by former SeaFrance employees (SCOP) challenged the CC's prohibition decision (described under '*Mergers prohibited in the past five years*' above). The CAT found that, in deciding on an effective

<sup>25</sup> *British Sky Broadcasting plc v Competition Commission and Secretary of State and Virgin Media Inc. v Competition Commission and Secretary of State* [2008] CAT 25, judgment of 29 September 2008.

<sup>26</sup> Virgin Media, a third party, also challenged the decision on the basis that the chosen remedy did not go far enough and that BSkyB should have been required to divest its entire shareholding.

<sup>27</sup> *SRCL Limited v Competition Commission* [2012] CAT 14, judgment of 24 May 2012.

<sup>28</sup> *The Société Coopérative de Production Sea France S.A. v Competition Commission and Groupe Eurotunnel S.A. v Competition Commission* [2013] CAT 30, judgment of 4 December 2013. While the CAT dismissed the parties' challenge with respect to remedies (and several other grounds of challenge) in this judgment, the CAT queried whether Eurotunnel had acquired an 'enterprise' for the purposes of the Enterprise Act 2002 and therefore whether the CC had jurisdiction to review the merger. The CAT remitted this question to the CC for its reconsideration and on 27 June 2014, the CMA (which had since succeeded the CC) found that the CC did have the necessary jurisdiction. This decision was the subject of further appeals before the CAT, Court of Appeal and finally the Supreme Court, which found in its decision handed down on 16 December 2015 that the CC and subsequently CMA did have jurisdiction to review the merger: *Société Cooperative De Production Seafrance SA v The Competition and Markets Authority and another* [2015] UKSC 75, judgment of 16 December 2015.

remedy, the CC must comply with principles of proportionality; however, it was also entitled to a margin of appreciation. In particular, the CC had not acted disproportionately in requiring the divestment of two vessels and the prohibition of ferry services at Dover in their entirety. It was entirely reasonable, on the basis of the material before it, for the CC to conclude that the potential adverse effects on competition arising from the transaction may be reduced but not eliminated by a remedy which required a smaller divestment. The CC's detailed assessment of numerous remedy options indicated that it had borne in mind its duty to 'achieve as comprehensive solution as is reasonable and practical'. It had conducted an assessment of effectiveness, practicability and risk and concluded that the chosen remedy was the least costly which was likely to be effective. Regarding SCOP's challenge that the CC had erred in its proportionality assessment by failing to take into account the irremediable damage the remedy would do to SCOP's business, CAT concluded that SCOP was in a similar position to that of a main party, whose cost of the remedy are avoidable. SCOP could have decided not to contract with Eurotunnel, or made its contract conditional on competition clearance, thereby avoiding those costs.

49. In *Ryanair v CC* (2014),<sup>29</sup> Ryanair challenged the CC's remedy decision, described under '*Mergers prohibited in the past five years*' above, on the basis that the remedy was disproportionate. The CAT dismissed Ryanair's appeal (a decision upheld in the Court of Appeal).<sup>30</sup> In particular, the CAT found that the CC had acted reasonably and proportionately in rejecting the behavioural remedies proposed by Ryanair. The CAT found that the CC was entitled to take into account that it was difficult to design behavioural remedies that would cater for all possible eventualities, and to instead opt for a one-off structural remedy which is more likely to be comprehensive and did not need ongoing monitoring. The CAT also rejected Ryanair's argument that it would make a loss on the divestment: as long as Ryanair was given the opportunity to receive fair market value for its asset, then the proportionality test was satisfied. The costs which Ryanair may occur were in reality avoidable, as it had chosen to acquire the shares in the first place. Finally, the CAT also found that the CC was entitled to take a cautious approach in requiring a divestment trustee be appointed from the outset.

## 8. Third party consultation in the remedies process

50. At Phase 1, before the CMA accepts UILs it is required to consult publicly for a minimum of 15 calendar days. The CMA publishes a draft of the proposed undertakings along with a consultation document explaining the proposal, and invites comments from third parties which participated in its initial investigation. If the proposed undertakings include CMA approval of an upfront buyer of the businesses or assets being divested,<sup>31</sup> the CMA also consults on the suitability of the proposed purchaser(s). To the extent that the originally published draft undertakings are modified in a material respect, a second consultation period will be required.

51. At Phase 2, if the CMA provisionally finds that the merger gives rise to an SLC, then at or around the same time it publishes its provisional decision, the CMA will also publish a notice containing the various remedy options the CMA is considering to remedy the provisional SLC it has identified. The merging parties and third parties are invited to comment on the remedy options set out in this notice, as well as propose any other remedies. These parties are also invited to provide their views on any relevant customer benefits arising from the merger. The CMA will then hold oral hearings with the merging parties and, if appropriate, a select number of third parties. These hearings provide the CMA and parties with the opportunity to discuss the various remedy options in further detail, and a summary of these response hearings are published on the CMA website.

<sup>29</sup> *Ryanair Holdings PLC v Competition Commission* [2014] CAT 3, judgment of 7 March 2014.

<sup>30</sup> *Ryanair Holdings Plc v The Competition and Markets Authority & Anor* [2015] EWCA Civ 83, judgment 12 February 2015.

<sup>31</sup> Regarding upfront buyers, see further '*Minimising risk in remedy implementation*' below.

52. Taking into account the responses it receives to the remedies notice, the CMA will prepare a remedies working paper, containing a detailed assessment of the different remedies options and setting out a provisional decision on remedies. This remedies working paper is sent to the merging parties to provide them with the opportunity to comment on the CMA's provisional decision on remedies.

53. In some cases, the CMA may also consult further with third parties at this stage. This was done, for example, in the recent *ICE/Trayport* merger.<sup>32</sup> In that case, following the publication of the CMA's remedies notice, the main parties provided the CMA with details of their own remedy proposal. Given the complexity of the case, and in the interests of greater transparency and in order to give full consideration to the merging parties' proposed remedy, the CMA published and invited views from interested third parties on the merging parties' proposal. The views the CMA received were taken into account in reaching its provisional decision on remedies set out in its remedies working paper. Adopting enhanced transparency during the remedies process is generally considered appropriate where complex remedies are involved, and where the input of third parties is required in a similar way to that of the merging parties.

54. The CMA can implement remedies by obtaining an undertaking from the relevant merger parties or by making an order. The process of agreeing undertakings or making an order will involve informal consultation between the CMA and the merging parties, and third parties may also be consulted where relevant. Once a version of the undertakings has been provisionally agreed on, the CMA will then publish a notice of intention to accept final undertakings or a notice of intention to make an order. A minimum consultation period (15 days for undertakings and 30 days for an order) is allowed for interested parties to comment on the notice. If material changes are required, a further seven day consultation period is required.

55. The various consultation processes during the remedies determination process provides the CMA, the merging parties and third parties with the opportunity to engage in detailed discussions on appropriate remedies. The CMA considers that an effective market test for remedies is more likely to be achieved where there is greater involvement and effective engagement from a wide range of third parties, which capture a range of views on remedy effectiveness. To this end, in the past the CMA has prompted responses to the remedies notice and arranged response hearings with a wide range of third parties, including regulators and trade bodies. Whilst the extent to which third parties wish to engage with the CMA remedies process may be beyond the CMA's control, the CMA will approach third parties or relevant stakeholders directly where appropriate to do, and encourage their engagement, either by way of a written submission or a focused oral hearing.

## **9. Minimising risk in remedy implementation**

56. The CMA will seek to identify the key remedy implementation risks and address these when designing (or, in Phase 1, considering whether to accept) remedies.

57. In the case of divestiture remedies, the key risks include (i) the deterioration of the divestiture package during the remedy implementation process, and (ii) the risk that the divestiture fails to complete within the timescales decided by the CMA. With respect to (i), the CMA will assess whether a monitoring trustee should be appointed to report to the CMA on the ongoing management of the divestiture package and the conduct of the divestiture process. The CMA will have the right to propose and direct measures necessary to ensure compliance with the agreed remedies. With respect to (ii), the CMA will consider whether to appoint a divestiture trustee. In the event that the merging parties are unable to make the divestment within the specified period, the divestiture trustee may be mandated to dispose of the package within a specified period at the best available price in the circumstances.

---

<sup>32</sup> See further under 'Mergers prohibited in the past five years' above.

58. Where, on the other hand, the CMA is in doubt as to the viability or attractiveness to purchasers of a proposed divestiture package or believes there may be only a limited pool of suitable purchasers, it may mitigate this risk by requiring the merging parties to obtain a suitable purchaser that is contractually committed to the transaction before permitting a proposed merger to proceed or a completed merger to progress with integration. The CMA refers to this as an upfront buyer requirement.<sup>33</sup> This means that the proposed buyer will be required to have committed contractually, subject to formal CMA approval of the undertakings, to acquiring the relevant divestment businesses before the CMA accepts the undertakings. When considering whether to require an upfront buyer, the CMA will take into account the nature of the assets being divested (including whether the assets comprise a stand-alone business), the regularity with which these assets are traded and the scale or complexity of the transaction. Where, as a result of these factors, the CMA considers that finding a purchaser for the assets may be challenging, it is more likely to impose an upfront buyer condition.

---

<sup>33</sup> Note that the definition of upfront buyer differs slightly between jurisdictions. In some jurisdictions, the CMA's upfront buyer condition may be seen as more akin to a fix-it-first solution.