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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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**Roundtable on the Extraterritorial Reach of Competition Remedies - Note by the
United Kingdom**

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

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United Kingdom

1. Executive summary

1. This submission considers the role of extraterritorial remedies in UK merger control.
2. As the submission explains, the UK Courts have confirmed that the CMA is able to extend its jurisdiction in relation to remedies over conduct outside the UK in certain defined circumstances. This supports the CMA's ability to protect UK consumers in a globalised economy.
3. Notwithstanding these powers, the CMA may take the additional risks that can arise around the implementation of extraterritorial remedies into account, where relevant, when designing remedies. In the CMA's experience, the challenges involved in designing and implementing extraterritorial remedies can best be addressed by close co-operation between different jurisdictions' competition authorities.

2. Introduction

4. The CMA has a duty to promote competition, within and outside the UK, for the benefit of consumers.¹
5. This submission (i) summarises the UK merger remedies framework, (ii) describes the circumstances under which the CMA has jurisdiction over foreign conduct for merger remedy purposes and (iii) considers impact of extraterritoriality in merger remedies design.

3. UK merger remedies framework

6. Merger notification in the UK is voluntary, although the CMA can open merger investigations on its own initiative. The CMA has jurisdiction to investigate mergers which have a UK turnover exceeding £70 million, or a combined share of supply in the UK of more than 25%,² and to refer mergers for a Phase 2 investigation if they create a realistic prospect of substantial lessening of competition within any market(s) in the UK.³ Parties may voluntarily 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 agreed with the parties, or imposed by the CMA by way of an order) or prohibit it.

¹ s.25(1) Enterprise and Regulatory Reform Act 2013.

² s.23 Enterprise Act 2002.

³ s.22(1) (completed mergers) and s.33(1) (anticipated mergers) Enterprise Act 2002.

7. In designing remedies, 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’.⁴ Under UK case law remedies 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.

8. For the majority of merger cases in which the CMA finds concerns (including mergers between international companies), the remedies put in place relate exclusively to the merging parties’ conduct in the UK. In many of these mergers⁵, remedies consisting of the divestment of UK assets are sufficient to address the competition concerns identified by the CMA, without the need to consider assets and activities outside the UK. However, in some circumstances, merger remedies may need to attach to merging parties’ conduct outside the UK in order to effectively protect UK consumers.

4. UK jurisdiction over foreign conduct in merger control remedies

9. The CMA can, both at Phase 1 and at Phase 2 of its investigations, agree with parties final remedies (undertakings) which relate to their conduct outside the UK. As such remedies are entered into with the agreement of the merging parties they should not, in principle, expose those parties to potentially conflicting demands from other competition authorities.

10. Section 86(1) of the Enterprise Act provides that the CMA can impose final remedies⁶ which extend to a person’s conduct outside the UK if that person is a UK national, incorporated in the UK, or a person carrying on business in the UK.⁷ This last criterion (‘carrying on business in the UK’) was considered in *AkzoNobel NV v Competition Commission (2013)*⁸ and *AkzoNobel NV v Competition Commission (2014)*.⁹

11. In 2012, the CC investigated the proposed acquisition by Akzo Nobel N.V. (AkzoNobel) of Metlac Holding S.r.l. (Metlac), which were incorporated in the Netherlands and in Italy respectively. The CC found that the merger would result in an SLC in the supply of metal packaging coatings for beer and beverage cans in the UK. These concerns arose from both a loss of actual competition and a loss of potential competition, as Metlac was in the process of becoming qualified to supply customers with additional products. The CC therefore decided to prohibit the merger.

12. The decision to prohibit was upheld at the Court of Appeal. The parties argued that the UK competition authorities did not have jurisdiction because the AkzoNobel group was only active in the UK through certain subsidiaries of AkzoNobel that were not involved in acquiring Metlac. However, the CC considered that the ultimate parent company (ie AkzoNobel itself) should be considered to be carrying on a business in the

⁴ s.73(3) (Phase 1) and s.35(4) (Phase 2) Enterprise Act 2002.

⁵ For example: [Dover/Wayne](#) (2016); [Wood/Amec](#) (2017).

⁶ Usually at Phase 2, but also at Phase 1 if a UIL has been breached.

⁷ s.86(1) Enterprise Act 2002.

⁸ [Akzo Nobel NV v Competition Commission \[2013\] CAT 13](#).

⁹ [Akzo Nobel NV v Competition Commission \[2014\] EWCA Civ 482](#).

UK, because the AkzoNobel Group's business structure centralised decision-making through its Exexecutive Committee, which was an organ of the parent company.

13. The court held that AkzoNobel was sufficiently involved in the strategic and operational management of the UK business owned by its subsidiaries to be carrying on business in the UK. At paragraphs 34-35 of the Court of Appeal judgment the court said: '[34]... it is legitimate to approach Section 86(1)(c) by asking (i) is there a business being carried on in (or partly in) the UK? (ii) is the target person sufficiently involved in that business that it can be said to be carrying it on, whether alone or with others? If the answers to those two questions are affirmative, then the target falls within Section 86(1)(c).'

14. The court noted that 'it would cast the net too wide to say that any involvement in such a business, such as the supply of goods to it from abroad, amounts to carrying it on' and that 'what does or does not amount to carrying it on in any particular case will be a fact-intensive question.' The court further clarified that 'conducting strategic and operational management of a business carried on here clearly amounts to carrying it on, because it supplies an appropriate connecting factor between the manager and the UK to justify the exercise of jurisdiction over it, even if that manager performs its role offshore. Were that not so, modern methods of communication would permit effortless evasion of the Commission's regulatory jurisdiction, which Parliament is unlikely to have intended.'

15. The court also stated that this approach gives 'proper effect to the purposes both of the Act as a whole and of Section 86(1) in particular. It enables the Commission to regulate the behaviour abroad of a person engaged in the carrying on a business here.'

16. The ability to impose final remedies on a person's conduct outside of the UK under these circumstances allows the CMA to protect UK consumers in a globalised economy.¹⁰

5. Impact of extraterritoriality on remedies design

5.1. Practical issues in the design of extraterritorial remedies

17. In evaluating the effectiveness of remedies, the CMA seeks remedies that have a high degree of certainty of achieving their intended effect.¹¹ Challenges around monitoring and enforcing remedies outside the UK can introduce uncertainty into an otherwise effective remedy. Where the CMA has jurisdiction over only a small segment

¹⁰ During the 2013 appeal at the Competition Appeal Tribunal (CAT), in interpreting the statutory language of 'carrying on a business' the CAT considered the extent to which an 'enforcement gap' could arise if the CC was unable to impose a remedy in this context. AkzoNobel argued that voluntary undertakings and behavioural remedies would still be available, although the CAT noted that voluntary undertakings' usefulness would be curtailed without the threat of a compulsory order, and that the CC had concluded that behavioural remedies would not be fully effective at remedying its concerns. AkzoNobel also made what the CAT described as a 'more radical suggestion' that the enforcement gap could be fixed, at least with respect to mergers within the EU, if the authorities had referred the merger to the European Commission under Article 22 of the EC Merger Regulation. However, the CAT noted that the Office of Fair Trading (the CMA's predecessor) could only request, not require, review by the European Commission.

¹¹ [CC8](#), paragraph 1.8(d).

of an international merger, the CMA might choose to modify its remedies to take account of the additional risks that can arise around the implementation of extraterritorial remedies.¹²

18. This was the case in Draeger/Air-Shields¹³, which was the subject of a Phase 2 CC investigation in 2004. Draeger and Air-Shields produced neonatal warming therapy products, designed to keep newborn babies in a thermally controlled environment. Competition concerns were found in relation to markets for closed care incubators, open care incubators and transport incubators. Draeger was a German company, and the CC had doubts concerning the practicability of a structural remedy, inter alia, because of the overseas location of the parties and their manufacturing facilities.¹⁴ There was also an increased risk of enforceability associated with behavioural undertakings that relied heavily on commitments from the overseas parent companies.¹⁵ Rather than pursue prohibition or divestment remedies, the CC made a series of recommendations to UK health departments and their agencies, aimed at strengthening the exercise of buyer power and facilitating entry. The CC also sought undertakings from Draeger and its UK subsidiary to protect customers in the short-term by protecting the prices and ranges of products supplied.

19. An extraterritorial remedy was also considered in Eurotunnel/SeaFrance¹⁶, which was the subject of a Phase 2 investigation in 2013. The CC concluded 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 considered a divestment remedy and decided that it would be possible under s.86(1)(c) of the Act to enforce a remedy which extended to Eurotunnel's conduct outside the UK. The CC looked at a number of factors before concluding that Eurotunnel was carrying on business in the UK. This included that Eurotunnel invoiced its UK-incorporated subsidiaries for its services, and was therefore carrying out a 'business' (within the statutory definition of goods or services being supplied otherwise than free of charge) in the UK and that Eurotunnel and its directors were directly involved in the operations of subsidiaries in the Eurotunnel group that operated in the UK (whether alone or in combination with other group companies or related entities). However, in the context of Eurotunnel's acquisition of three vessels during the liquidation of SeaFrance, the Commercial Court of Paris had placed restrictions on Eurotunnel's ability to subsequently sell SeaFrance's vessels. Although this would not necessarily have prevented a divestment, it created uncertainty, particularly as this restriction could only be lifted through a process involving consultation with relevant French government ministers. Rather than impose an uncertain remedy or one that could have risked placing inconsistent demands on the parties, the CC prohibited Eurotunnel from operating ferry services at the port of Dover, absent an

¹² [CC8](#), paragraph 2.24.

¹³ [A report on the proposed acquisition of certain assets representing the Air-Shields business of Hill-Rom, Inc., a subsidiary of Hillenbrand Industries, Inc.](#), CC, 19 May 2004.

¹⁴ *Ibid*, paragraph 10.44

¹⁵ [Understanding past merger remedies](#) (CMA48), 6 April 2017, paragraph 111.

¹⁶ [A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A.](#), CC, 6 June 2013.

appropriate divestment. The CC's remedy therefore ultimately only extended to Eurotunnel's conduct in the UK.¹⁷

5.2. Defining the geographic scope of remedies

20. In practice, remedies limited to parties' UK businesses are typically the least onerous effective remedy, and therefore the CMA has not often been required to consider the design of extraterritorial remedies.

21. Even where the production facilities of the merging parties are based outside the UK, it may be possible to design effective remedies that do not have extraterritorial application. This was the case, for example, in the CMA's investigation into the anticipated acquisition by Reckitt Benckiser Group plc of the K-Y brand in the UK, in which the CMA found competition concerns in the market for the supply of personal lubricants to the grocery retailers and national pharmacy chain market. Within this market, the brand of the products concerned, rather than production facilities, was the key asset that would enable the divestment business to be able to compete effectively. On this basis, the CMA found that the competition concerns would be effectively solved by facilitating the entry of a new competitor through a brand licensing requirement, clearly circumscribed to the UK, therefore avoiding the issues of extraterritorial enforcement.

22. As in all investigations of international mergers, when extraterritorial remedies are a possibility CMA practice is to consult competition authorities in other jurisdictions to seek consistency and effectiveness in approaches to remedies.¹⁸ The early exchange of confidentiality waivers is an important step towards ensuring alignment of authorities' remedies. Discussion and cooperation with other national competition authorities on the design of the remedies and on the suitable purchaser (eg requiring a common purchaser) has proved important (and in most cases sufficient) to achieve an effective and enforceable solution to cross-border competition issues through the combination of the remedies adopted in each and within the limits of each jurisdiction.¹⁹

5.3. The risk of inconsistent demands on merging parties

23. By promoting competition within their jurisdictions, competition authorities' enforcement efforts are typically complementary. The CMA has not in practice found that its merger remedies have come into conflict with the policies of other jurisdictions. This may, in large part, reflect the convergence of merger control policies across the world and the well-understood rationales behind competition authorities' interventions, although it is clear that there remains some possibility that enforcement efforts in relation to a merger being assessed in multiple jurisdictions can come into conflict.

24. In the CMA's experience, the likelihood of divergent outcomes increases where parties notify multiple competition authorities on a 'staggered' basis, which can lead to

¹⁷ Important context for the appropriateness of this remedy was the CC's finding 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. If Eurotunnel had not ceased its ferry services, one of its competitors was likely to have exited, further reducing competitive pressure on Eurotunnel.

¹⁸ [Merger Remedies: Competition Commission Guidelines](#) (CC8), paragraph 2.23.

¹⁹ For example, [GTCR/PR Newswire](#) (2016), [Iron Mountain/Recall](#) (2016), [Lafarge Tarmac](#) (2014) and [Nufarm/AH Marks](#) (2009).

different authorities' assessments of substance and remedies taking place at materially different times. In practice, the voluntary nature of the UK merger control regime can lead to transactions being subject to review at a later stage in the UK compared to other jurisdictions. National competition authorities should try to avoid this staggering of investigations wherever possible, in particular through effective information sharing arrangements. Merging parties should also try to facilitate the coordination of investigations, as such staggering risks delaying investigations, and therefore timely completion of transactions, as well as the possibility of potentially duplicative remedies packages. When 'staggered' investigations do occur, close co-operation between the investigating competition authorities is essential to avoid inconsistent remedies or contradictory demands on parties. In GTCR/PR Newswire,²⁰ for example, the parties did not notify their merger to the UK until some time after the US DoJ's investigation had commenced. This created a risk that separate remedies processes in the US and UK could come into conflict, as the parties might have become subject to a hold-separate order in the UK, whilst needing to complete their merger to fulfil a divestment settlement in the US. GTCR conceded that the merger gave rise to a realistic prospect of a substantial lessening of competition in the UK, absent the divestment of the Agility business, which enabled the CMA to accelerate its Phase 1 investigation of the transaction. In this way, GTCR helped the UK and US authorities to align their remedies processes to a coordinated timetable.

25. In the context of UK merger remedies at Phase 1, since UILs are proposed by merging parties rather than the CMA, it is especially important for merging parties themselves to coordinate with investigating authorities in other jurisdictions. The CMA considers that UILs should be not only effective but 'clear cut', ie, they should provide a solution which obviously resolves the competition issue which has been identified and should be readily capable of implementation, in terms of scale and complexity, at Phase 1. This may be difficult to achieve if a proposed remedy is at risk of conflicting with another authority's enforcement efforts.

26. The desirability of consistency with the approaches adopted by other national competition authorities may add a further constraint to the selection of remedies when the CMA is imposing them.²¹

6. Conclusion

27. Under appropriate circumstances, if a merger raises competition concerns, the CMA may impose final remedies which extend to merging parties' conduct outside the UK. This includes those circumstances where the merging parties are sufficiently involved in a business being carried on in the UK, despite being based overseas, as in AkzoNobel/Metlac.

28. The CMA enjoys close working relationships and has often cooperated closely with many competition authorities, and has found cooperation to be essential in ensuring that competition remedies in international mergers are effective and enforceable. The CMA is keen to learn from other authorities' views on extraterritorial remedies.

²⁰ [GTCR/PR Newswire](#) (2016).

²¹ [CC8](#), paragraph 2.24.