

Merger remedies

Draft for consultation

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Contents

	<i>Page</i>
1. PREFACE	2
2. INTRODUCTION	4
Scope of the guidance	4
Structure of the guidance	4
3. PURPOSE AND PRINCIPLES OF REMEDIAL ACTION	5
Objectives of remedial action	5
Effectiveness	6
Cost of remedies and proportionality	7
Relevant customer benefits	8
Undertakings in lieu of reference to Phase 1	11
Choice of remedies	14
4. REMEDIES PROCESS	21
Introduction	21
Phase 1	22
Phase 2	33
Completed mergers	37
5. DIVESTITURE REMEDIES	39
Introduction	39
Divestiture risks	39
Scope of divestiture packages	40
Suitable purchasers	43
Effective divestiture process	48
6. INTELLECTUAL PROPERTY REMEDIES	51
Introduction	51
Design factors	51
7. BEHAVIOURAL REMEDIES	53
Introduction and general principles	53
Enabling measures	56
Controlling outcomes	60
8. TRUSTEES AND THIRD-PARTY MONITORS	64
Appointment and responsibilities	64
Remuneration	64

1. PREFACE

- 1.1 This guidance forms part of the advice and information published by the Competition and Markets Authority (CMA) under section 106 of the Enterprise Act 2002, as amended (the Act).
- 1.2 This guidance is intended for merger parties and their advisers. The purpose of this guidance is to explain the CMA's approach and requirements in the selection, design and implementation of remedies in:
- (a) Phase 1 merger investigations, where the CMA must decide whether there is a realistic prospect that the merger gives rise to a substantial lessening of competition (SLC) and therefore, whether the merger should be referred for an in-depth Phase 2 investigation; and
 - (b) Phase 2 merger investigations, where the CMA must decide whether the merger has resulted, or may be expected to result, in an SLC and therefore, whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC.
- 1.3 This document seeks to provide a single source of guidance on remedies for Phase 1 and Phase 2 merger investigations. It therefore supersedes the Competition Commission (CC) guidelines on merger remedies,¹ Chapter 5 of the Office of Fair Trading (OFT) guidelines on undertakings in lieu of reference (UILs)² and Chapters 8 and 14 of the CMA's guidelines on merger jurisdiction and procedure.³
- 1.4 The approach outlined in this document is consistent with these previous documents, but has been updated and extended to take account of the CMA's experience of merger investigations in recent years, judgments of the Competition Appeal Tribunal (CAT) and the CMA's research into the outcomes of remedies.⁴ This guidance also takes into account the principles outlined by the International Competition Network, the work carried out by the Organisation for Economic Co-operation and Development and the European

¹ [Merger Remedies: Competition Commission Guidelines \(CC8\)](#) was originally published by the CC and has been adopted by the CMA.

² [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance \(OFT1122\)](#) was originally published by the OFT and was adopted by the CMA, but it was subsequently replaced by [Mergers: Exceptions to the duty to refer \(CMA64\)](#). Guidance on UILs (previously in Chapter 5 of [OFT1122](#)) is now included in this guidance on merger remedies and no longer in [CMA64](#). The CMA is consulting on [new draft guidance](#) on exceptions to the duty to refer to replace [CMA64](#).

³ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#) was published by the CMA in January 2014. This guidance on merger remedies replaces Chapter 8, Phase 1 remedies – undertakings in lieu of reference, and Chapter 14, Implementation of remedies, but the remainder of [CMA2](#) remains applicable.

⁴ See [Understanding past merger remedies. Report on case study research](#), 6 April 2017.

Competition Network and recent merger remedies guidance published by other international competition regulators.

- 1.5 This guidance reflects the views of the CMA at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgements and research. Where there is any difference in emphasis or detail between this guidance and other guidance produced or adopted by the CMA, the most recently published guidance takes precedence.
- 1.6 The CMA will have regard to this guidance in considering remedial action in merger investigations. However, in each investigation, the appropriate remedy will be determined having regard to the particular circumstances of the investigation. The CMA will therefore apply this guidance flexibly and may depart from the approach described in the guidance where there are appropriate reasons for doing so.⁵

⁵ In Phase 1 investigations, the decision on whether to refer, including any decision on UILs, is made by either the Senior Director of Mergers or another senior member of CMA staff (the decision maker). In Phase 2 investigations, the final decision-making authority is an independent group of experts selected from a panel appointed by the Secretary of State (the Inquiry Group) or, in public interest cases, the Secretary of State.

2. INTRODUCTION

Scope of the guidance

- 2.1 This guidance sets out the criteria that the CMA applies in determining the appropriate remedial action in Phase 1 and Phase 2 merger investigations.⁶
- 2.2 This guidance does not address whether the CMA has jurisdiction under the Act, and the policies and procedures that the CMA will use in discharging its functions under the Act.⁷ It also does not address the substantive ‘SLC’ test against which the CMA assesses mergers.⁸

Structure of the guidance

- 2.3 This guidance explains the purpose of remedial action and the process for the selection, design, implementation and monitoring and enforcement of remedies. To this end, it is structured as follows:
- (a) Chapter 3 explains the purpose and key principles of remedial action, including a summary of the various types of remedies available to the CMA.
 - (b) Chapter 4 outlines the process for remedial action in Phase 1 and Phase 2 merger investigations, from the merger parties’ initial contact with the CMA (prior to the commencement of a Phase 1 investigation), through to the implementation and monitoring of remedies following the outcome of a Phase 2 merger investigation.
 - (c) Chapters 5 to 7 provide more detailed guidance on divestiture remedies, intellectual property remedies and behavioural remedies respectively.
 - (d) Chapter 8 explains the CMA’s approach in relation to the use of trustees and third-party monitors.

⁶ Considerations regarding the use, design and implementation of interim measures, including interim orders, which are intended to prevent or unwind pre-emptive action which might prejudice the outcome of a reference and/or impede the CMA taking appropriate remedial action, are set out in [Guidance on initial enforcement orders and derogations in merger investigations \(CMA60\)](#). The CMA is consulting on [new draft guidance](#) on interim measures to replace [CMA60](#).

⁷ [CMA2](#) provides advice and general information on the procedures used by the CMA in operating the merger control regime set out in the Act, as amended, including guidance on when the CMA will have jurisdiction to review mergers under the Act.

⁸ Detailed information on the application of the substantive test for mergers is provided in [Merger Assessment Guidelines \(OFT1254/CC2\)](#), which has been adopted by the CMA.

3. PURPOSE AND PRINCIPLES OF REMEDIAL ACTION

Objectives of remedial action

- 3.1 At Phase 1, where the CMA decides that there is a realistic prospect that the merger gives rise to an SLC, the CMA has discretion to accept UILs instead of making a reference to Phase 2. In exercising this discretion, the CMA may accept from the merger parties undertakings to take such action as the CMA considers appropriate to remedy, mitigate or prevent the SLC concerned or any adverse effect resulting from it.⁹
- 3.2 At Phase 2, where the CMA concludes that a relevant merger situation has resulted, or may be expected to result, in an SLC, it is required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC.¹⁰ The CMA is also required to decide whether such action should be taken by itself or recommended for others, such as Government, regulators or public authorities. In either case, the CMA must state in its final report the action to be taken and what it is designed to address.
- 3.3 At both Phase 1 and Phase 2, 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'.¹¹
- 3.4 There are common principles that apply to the assessment of remedies at Phase 1 and Phase 2, although the application of these principles will take account of the relevant differences in the decisions to be taken at each phase. The CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects, and will then select the least costly and intrusive remedy that it considers to be effective. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. The CMA may also have regard, in accordance with the Act,¹² to any relevant customer benefits (RCBs) arising from the merger. In the following paragraphs, we consider these factors and their interaction in greater detail.

⁹ Section 73(2) of the Act

¹⁰ Sections 35 and 36 of the Act.

¹¹ Section 73(3) of the Act at Phase 1 and Sections 35(4) and 36(3) of the Act at Phase 2.

¹² Sections 22(2)(b) and 33(2)(c) of the Act at Phase 1 and Sections 35(5) and 36(4) of the Act at Phase 2.

Effectiveness

3.5 The CMA will assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies. Assessing the effectiveness of a remedy will involve several distinct dimensions:

- (a) Impact on SLC and resulting adverse effects. The CMA views competition as a dynamic process of rivalry between firms seeking to win customers' business over time. Restoring this process of rivalry through structural remedies, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at source. Such remedies are normally preferable to measures that seek to regulate the ongoing behaviour of the merger parties (so-called behavioural remedies, such as price caps, supply commitments or restrictions on use of long term contracts). Behavioural remedies are unlikely to deal with an SLC and its adverse effects as comprehensively as structural remedies, and may result in distortions when compared with a competitive market outcome.
- (b) Appropriate duration and timing. Remedies need to address the SLC effectively throughout its expected duration. Remedies that act quickly in addressing competitive concerns are preferable to remedies that are expected to have an effect only in the long term or where the timing of the effect is uncertain. The effect of a remedy should also be sustained for the likely duration of the SLC.
- (c) Practicality. A practical remedy should be capable of effective implementation, monitoring and enforcement. To enable this to occur, the operation and implications of the remedy need to be clear to the merger parties and other affected parties. The practicality of any remedy is likely to be reduced if elaborate and intrusive monitoring and compliance programmes are required. Remedies regulating ongoing behaviour generally are subject to the disadvantage of requiring ongoing monitoring and compliance activity.
- (d) Acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the CMA will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC or its adverse effects.

Cost of remedies and proportionality

- 3.6 Having decided which of the remedy options would be effective in addressing the SLC and resulting adverse effects, the CMA will then consider the costs of those remedies. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, of those remedy options that it considers will be effective. If the CMA is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.
- 3.7 The CMA's obligation to accept UILs at Phase 1 only in so far as they are necessary to remedy its competition concerns does not mean that it will accept a less effective remedy simply because its belief in the likelihood of an SLC is lower than in other cases. To the extent that the duty to refer is met, any UILs must remedy the competition concerns identified to the clear-cut standard. The CMA accepts that it may therefore require a greater set of remedies at Phase 1 through UILs than might be needed if the merger were to receive a detailed Phase 2 investigation.¹³
- 3.8 The costs of a remedy may be incurred by a variety of parties, including the merger parties, third parties, the CMA and other monitoring agencies. As the merger parties have the choice of whether or not to proceed with the merger, the CMA will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties, the CMA and other monitoring agencies.
- 3.9 In particular, for completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy, as it is open to the merger parties to make merger proposals conditional on competition authorities' approval.¹⁴ It is for the merger parties to assess whether there is a risk that a completed merger would be subject to an SLC finding, and the CMA would expect this risk to be reflected in the agreed acquisition price. Since the cost of divestiture is, in essence, avoidable, the CMA will not, in the absence of exceptional

¹³ The CMA is under a duty to refer where it believes that 'it is or may be the case that' a merger has resulted or may be expected to result in an SLC. See the OFT's investigation into [the anticipated acquisition by Co-operative Group Limited of Somerfield Limited](#), where the OFT took the view that 'it may be the case that' the merger may be expected to result in an SLC in '3 to 2' pharmacy overlap areas.

¹⁴ The CAT and the courts have upheld divestiture remedies in a number of investigations where this approach has been taken by the CC and the CMA. See [Groupe Eurotunnel S.A. v Competition Commission \[2013\] CAT 30](#), [Ryanair Holdings plc v Competition and Markets Authority \[2014\] CAT 3](#) and [Intercontinental Exchange, Inc v Competition and Markets Authority \[2017\] CAT 6](#).

circumstances, accept that the cost of divestiture should be considered in selecting remedies.

- 3.10 The costs of a remedy may arise in various forms. Remedies may result in costs through distortions in market outcomes. This is more likely to be the case where behavioural remedies are used, which intervene directly in market outcomes, especially over a long period. Remedies may also result in significant ongoing compliance costs. The CMA will endeavour to minimise such costs, subject to the effectiveness of the remedy not being reduced, and will have regard to the costs to the CMA and other monitoring agencies in ensuring compliance. At Phase 2, if remedies extinguish RCBs then, as we discuss below, the benefits foregone may be considered to be a relevant cost of the remedy.
- 3.11 In exceptional circumstances, even the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects (eg if the costs incurred by the remedy on third parties are likely to be greater than the likely scale of adverse effects). In these exceptional circumstances, the CMA will not pursue the remedy in question.
- 3.12 In unusual situations, it is possible that all feasible remedies will only be partially effective in remedying an SLC. In such cases, the CMA will select the most effective remedy or package of remedies that is available, provided that the costs of this remedy are not disproportionate (as described above) in relation to the SLC.
- 3.13 At Phase 1, the voluntary nature of the UILs process means that the CMA will not reject an offer of UILs on the basis that it forms too great a proportion of the wider transaction. The CMA would, in principle, be prepared to accept the abandoning or complete unwinding of a transaction if this were offered by the merger parties.¹⁵

Relevant customer benefits

- 3.14 At Phase 1, the CMA has a discretion not to make a reference to Phase 2 if it believes that any RCBs in relation to the creation of the relevant merger situation outweigh the SLC concerned and any adverse effects of that

¹⁵ However, for the purposes of determining whether clear-cut UILs are 'in principle' available as part of a 'de minimis' assessment, the CMA will not take account of a hypothetical remedy that would amount to the prohibition of a transaction and will have regard to the proportionality of the remedy.

SLC.^{16, 17} In addition, the CMA may have regard to the effect of Phase 1 UILs on any RCBs.¹⁸

- 3.15 At Phase 2, in deciding the question of remedies, the CMA is permitted to have 'regard to the effects of any action on any RCBs in relation to the creation of the relevant merger situation concerned'.¹⁹ At Phase 2, the CMA will normally take RCBs into account by considering the extent to which alternative remedies may preserve such benefits.²⁰
- 3.16 RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy by the CMA. The CMA may modify a remedy to ensure retention of an RCB or it may change its remedy selection, for instance, it may decide to implement a remedy other than prohibition²¹ or, in rare cases, it may decide that no remedy is appropriate.²²
- 3.17 RCBs²³ are limited by the Act to benefits to relevant customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not in the market(s) in which the SLC has occurred or may occur) or
 - (b) greater innovation in relation to such goods or services'.

¹⁶ Sections 22(2)(b) and 33(2)(c) of the Act. [CMA64](#) provides further information on the CMA's assessment of RCBs when considering whether an exception to its duty to refer applies. The CMA is consulting on [new draft guidance](#) on exceptions to the duty to refer to replace [CMA64](#).

¹⁷ See the CMA's investigations into [the anticipated merger between University Hospitals Birmingham NHS Foundation Trust and Heart of England NHS Foundation Trust](#) and [the anticipated merger between Derby Teaching Hospitals NHS Foundation Trust and Burton Hospitals NHS Foundation Trust](#).

¹⁸ Section 73(4) of the Act.

¹⁹ Sections 35(5) and 36(6) of the Act.

²⁰ Sections 35(5) and 36(4) of the Act.

²¹ See the CC's investigation into [the completed acquisition by Macquarie UK Broadcast Ventures Limited of National Grid Telecoms Investment Limited, Lattice Telecommunications Asset Development Company Limited and National Grid Wireless No.2 Limited](#). The CC concluded that a package of behavioural remedies had a high probability of being effective in addressing the adverse effects of the merger and would pass back to customers a significant proportion of the relevant merger synergies and substantial compensation in lieu of the loss of future competition.

²² See the CMA's investigation into [the anticipated merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust](#). The CMA found that the merger may be expected to give rise to an SLC in the provision of NHS elective and maternity services and NHS specialised services, and that prohibiting the merger was the only practicable and effective remedy. However, the CMA concluded that prohibition would result in the loss of substantial RCBs which may be expected to arise as a result of the merger. The CMA found that, when balanced against the nature of the SLC and its resulting adverse effects, the RCBs were likely to be more significant. The CMA therefore concluded that it would be disproportionate to prohibit the merger, and that it should be cleared.

²³ Section 30 of the Act.

- 3.18 Relevant customers for these purposes are direct and indirect customers (including future customers) of the merger parties, at any point in the chain of production and distribution and are therefore not limited to final consumers.²⁴
- 3.19 The Act provides that a benefit is only an RCB if it accrues from the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period from the creation of that merger situation and would be unlikely to accrue 'without the creation of that situation or a similar lessening of competition'.²⁵
- 3.20 The merger parties will be expected to provide convincing evidence regarding the nature and scale of RCBs that they claim to result from the merger and to demonstrate that these fall within the Act's definition of such benefits.
- 3.21 The following paragraphs provide examples of possible RCBs and how these will be considered by the CMA.
- 3.22 A merger may lead to economies of scale, for example, in production or distribution, but if this benefit just accrued to the merged firm it would not constitute an RCB. To qualify as an RCB, the prospective cost reductions must be expected to result in lower prices (or better quality, service, choice or innovation) than if the merger did not take place. In many instances, this may not be the case, as the parties may have scope to charge higher prices, or not pass on cost reductions, due to the reduction in competitive pressures resulting from the merger.
- 3.23 Where there are network effects, an increase in the number of access points to the network may result in an increase in the value of the network to customers. However, given that this would also be likely to increase the barriers to entry and expansion, the CMA would need to weigh up the effects.
- 3.24 Vertical mergers involve the merging of firms at different levels of the supply chain of a particular good or service. Vertical mergers may generate efficiencies²⁶ that could potentially result in benefits to customers, such as lower prices, improved quality or greater innovation, even when the merger also substantially lessens competition. Examples include improved coordination, for instance in marketing and product design, between firms at different stages of the supply chain, lower transaction and inventory costs and removal of possible 'double marginalisation' that may occur when two non-

²⁴ Section 30(4) of the Act.

²⁵ Section 30(2) and 30(3) of the Act.

²⁶ The extent to which efficiencies may also be taken into account by the CMA in determining whether a merger gives rise to an SLC is considered in [OFT1254/CC2](#), adopted by the CMA.

integrated firms both have significant market power.²⁷ However, as for all RCBs, it would be necessary for the CMA to be satisfied that these effects could not be achieved by plausible less anti-competitive alternatives to the proposed merger.

Undertakings in lieu of reference to Phase 1

- 3.25 Section 73(1) of the Act gives the CMA the power to accept UILs only where the CMA has concluded that the duty to refer is met and the CMA has decided not to apply any available exceptions to the duty to refer.²⁸ Any UILs accepted by the CMA must be for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effects identified.
- 3.26 The merger parties may be willing to resolve the problems identified by offering to divest part of the merged business (structural undertakings), or the acquirer may give a formal commitment about its future conduct (behavioural undertakings). However, it is always at the parties' discretion whether or not to offer UILs. The CMA cannot impose a remedy via an order at Phase 1.²⁹
- 3.27 In order to accept UILs, the CMA must be confident that all of the potential competition concerns that have been identified at Phase 1 would be resolved by means of the UILs without the need for further investigation. The need for confidence reflects the fact that, once UILs have been accepted, section 74(1) of the Act precludes a reference after that point. UILs are therefore appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear cut. Furthermore, those remedies must be capable of ready implementation.
- 3.28 The clear-cut requirement has two separate dimensions:
- (a) In relation to the substantive competition assessment, it means that there must not be material doubts about the overall effectiveness of the remedy. The more extensive the competition concerns, in terms of magnitude of potential customer harm, the more significant the error costs of an ineffective remedy, and hence the greater the belief must be that the UILs

²⁷ Double marginalisation may occur because, in the absence of price discrimination, each non-integrated firm has the incentive to raise prices above cost without taking account of the fact that this lowers the output of the other. The result is lower output and profits (and higher prices) than if the two firms pursued a policy of joint profit maximization.

²⁸ In making its decision as to whether its duty to refer applies, the CMA will also consider whether it should exercise its discretion to apply any available exceptions to that duty to refer, such as where the markets concerned are not of sufficient importance to justify the making of a reference (see [CMA64](#)). The CMA is consulting on [new draft guidance](#) on exceptions to the duty to refer to replace [CMA64](#).

²⁹ Unless the CMA has previously accepted UILs and, for example, those undertakings are not being or will not be fulfilled, in which case the CMA gains order-making powers under section 75 of the Act.

will comprehensively resolve those concerns. Whilst the CMA will require that the clear-cut standard is applied to any remedy where the test for reference has been met, in those cases where the potential magnitude of harm is especially large, the CMA will be particularly cautious in its approach to accepting UILs.

(b) In practical terms, it means that UILs of such complexity that their implementation may not be feasible within the constraints of the Phase 1 timetable may not be accepted. This practical requirement, in terms of assessment and implementation, may impact on the specifications of a divestment package in order to ensure it remains practicable.³⁰ Under these circumstances, the CMA case team may provide guidance to the merger parties on which of the possible remedies being considered by the parties might be suitable (see paragraphs 4.5 and 4.7).

3.29 In some cases, there may remain some doubt over the precise nature or likelihood of the SLC even though the test for reference is met.³¹ For example, it may be that the CMA cannot dismiss concerns based on each of unilateral effects and co-ordinated effects. This doubt may include uncertainty as to exactly how any merger effect would be likely to be felt. This in itself will not exclude the possibility of UILs being acceptable. The question for the CMA is whether the remedy proposed would act in a clear-cut manner to remove all competition concerns meeting the test for reference caused by the merger.

3.30 Section 73(2) of the Act provides the CMA with the ability to accept UILs 'for the purpose of remedying, mitigating or preventing' competition concerns. At the same time, the Act refers to the obligation on the CMA 'to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable' (section 73(3)). The CMA's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC.³² The objective is to ensure that competition following the implementation of the remedy is as effective as pre-merger competition.³³

³⁰ See the [UILs given by Boots Group plc](#) to the OFT in relation to its acquisition of Alliance UniChem plc, where the OFT required that 96 pharmacy stores be divested in no more than 25 packages, and the [UILs given by Co-operative Group Limited](#) to the OFT in relation to its acquisition of Somerfield Limited, where the OFT required that 109 grocery stores be divested in no more than 25 packages.

³¹ This reflects the fact that the CMA's test for reference at Phase 1 is whether there is a realistic prospect of an SLC, rather than establishing an SLC on the balance of probabilities, which is the test at Phase 2.

³² See [Co-operative Group \(CWS\) Limited v OFT \[2007\] CAT 24](#), where the CAT considered it was not unreasonable for the OFT to adopt as its starting point the objective of restoring competition to pre-merger levels.

³³ This is without prejudice in any given case to the ability of the merger parties to persuade the CMA that a proposed remedy that does not directly restore competition to pre-merger levels nevertheless clearly and comprehensively removes the SLC identified.

- 3.31 As a general rule, and in line with the CMA's starting point detailed above, the CMA considers that at Phase 1 it is appropriate for it to seek to remedy or prevent competition concerns rather than simply mitigate concerns. The CMA is mindful that at Phase 2 it has significant remedy powers under Schedule 8 of the Act, including the ability to prohibit a merger, and that it has increased time available in the context of a Phase 2 merger investigation to consider more detailed remedies. The CMA would therefore be extremely cautious before accepting a purely mitigatory remedy, and would be very unlikely to do so save where it was abundantly clear that at Phase 2, it would be materially no better placed than it had been at Phase 1 to achieve a remedy that would restore the levels of competition that existed pre-merger.³⁴
- 3.32 At Phase 1, the CMA is generally unlikely to consider that behavioural UILs will be sufficiently clear cut to address the identified competition concerns. Moreover, the CMA's experience (and that of its predecessor, the OFT) is that devising a workable and effective set of behavioural commitments within the context of a short, Phase 1 timetable is difficult. Nevertheless, despite its preference for structural remedies, the CMA does not inevitably refuse behavioural remedy offers, in particular where divestment would be clearly impractical or is otherwise unavailable.³⁵
- 3.33 In line with section 73(4) of the Act, the CMA may have regard to the effect of any UILs in relation to any RCBs (see paragraphs 3.14 to 3.24). In practice, this means that where there is a choice of two UILs offers that are equally effective in terms of remedying the SLC identified, the CMA will prefer the remedy that preserves any RCBs.

³⁴ See the OFT's investigation into [the anticipated acquisition by Co-operative Group Limited of Somerfield Limited](#), where the OFT, in its decision to accept the proposed UILs, stated that it approved a purchaser for one store, notwithstanding that it was a grocery retailer from outside the effective competitor set (as defined in the decision), given the demonstrable absence of any purchaser from within the effective competitor set. The OFT stated that approving that purchaser provided the most satisfactory and comprehensive means of restoring competition to pre-merger levels. The OFT stated that its decision was influenced by the fact that, were the merger to be referred to the CC for a Phase 2 investigation, the CC would be no better placed than the OFT to identify an effective purchaser to resolve competition concerns in that local area.

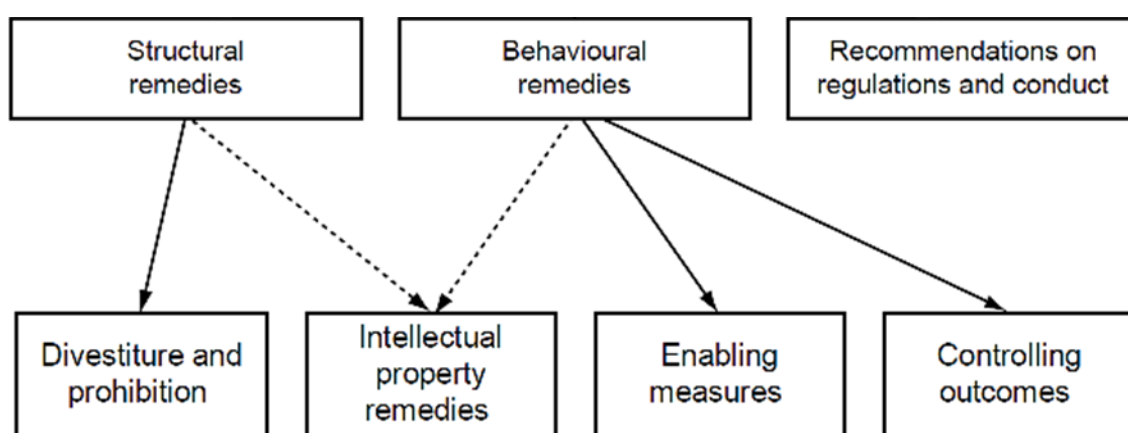
³⁵ See the OFT's investigations into [the completed acquisition by IVAX International GmbH of 3M Company's distribution business for certain asthma products](#) and [the completed acquisition by Arriva Plc of the Wales and Borders rail franchise](#). See the CMA's investigations into [the anticipated acquisition by Inter City Railways Limited of the InterCity East Coast rail franchise](#) and [the completed acquisition by Regus Group Limited of Avanta Serviced Office Group plc](#).

Choice of remedies

Types of remedies

3.34 Figure 1 below outlines the possible types of merger remedy. Remedies are conventionally classified as either structural or behavioural. Structural remedies, such as prohibition and divestiture, are generally one-off measures that seek to restore or maintain the competitive structure of the market by addressing the market participants and/or their shares of the market. Behavioural remedies are normally ongoing measures that are designed to regulate or constrain the behaviour of merger parties. Some remedies, such as those relating to access to intellectual property rights, may have features of structural or behavioural remedies depending on their particular formulation.

Figure 1: Possible remedies



Source: CMA.

Prohibition

3.35 Full prohibition of an anticipated merger will generally be an effective remedy as it necessarily maintains the competitive structure of a market that would have otherwise been changed by the merger.³⁶ Partial rather than full prohibition may be appropriate, if feasible, where the merger parties carry out activities in a market or markets other than those that are expected to give rise to an SLC.³⁷

³⁶ Mergers raising vertical concerns are potentially more suitable to some form of behavioural undertaking, as are mergers taking place in markets in which there already exists a significant degree of regulation.

³⁶ See the CC's investigations into [the proposed acquisition by Serviced Dispense Equipment Limited of the technical services function of Coors Brewers Limited and the anticipated acquisition by BOC Limited of the packaged chlorine business and assets of Ineos Chlor Limited](#).

³⁷ See the CC's investigations into [the proposed acquisition by Stena AB of certain assets relating to the supply of ferry services operated by The Peninsular and Oriental Steam Navigation Company on the Irish Sea between Liverpool to Dublin and Fleetwood to Larne, and the anticipated acquisition by The Rank Group Plc of Gala](#)

3.36 In some mergers, a party to the merger may have built up a minority shareholding in the party to be acquired. In such instances, a decision to prohibit a merger may require the party to divest such a shareholding (or to reduce its shareholding to below a specified maximum level at which the CMA judges that the SLC will be remedied).³⁸ Such measures are rare at Phase 1, given the requirement at Phase 1 for a divestment to act as a clear-cut remedy.

Divestiture

3.37 The aim of divestiture is to address an SLC through the disposal of a business or assets from the merger parties to create a new source of competition (if sold to a new market participant) or to strengthen an existing source of competition (if sold to an existing participant independent of the merger parties).

3.38 A successful divestiture will effectively address at source the loss of rivalry resulting from the merger by changing or restoring the structure of the market. Divestitures will generally not require detailed monitoring following implementation, although, in some cases, an effective divestiture may require supplementary behavioural measures for a specified period (eg to secure supplies of an essential input or service from the merger parties to the divested business).³⁹ The design and implementation of divestiture remedies are considered in Chapter 5.

Intellectual property remedies

3.39 Remedies that provide access to intellectual property (IP) by licensing or assignment of patents, brands, data or other IP rights may be viewed in general as a specialized form of asset divestiture. The parties acquiring the IP rights should be able to compete effectively with the merger parties as a result of the acquisition. Where the terms of an IP remedy result in a material ongoing link between the merger parties and the parties gaining the IP (eg providing access to new releases or upgrades of technology or data), the measure may take on some of the characteristics of a behavioural

[Casinos Limited](#), where the CC found that in one local area, the least costly and least intrusive effective remedy was partial prohibition through the divestiture of a 'cold licence'.

³⁸ See the CC's investigations into [the acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc](#) and [the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc](#).

³⁹ See the [UILs given by SRCL Limited](#) to the OFT in relation to the anticipated acquisition by SRCL Limited of Cliniserve Holdings Limited, and the [UILs given by Global Radio UK Limited](#) to the OFT in relation to the completed acquisition by Global Radio UK Limited of GCap Media plc.

commitment, which requires ongoing monitoring and enforcement.⁴⁰ The design and implementation of IP remedies are considered in Chapter 6.

Enabling measures

3.40 Certain forms of behavioural remedy operate principally to enable competition by removing obstacles to competition or stimulating potential competition.⁴¹ These include measures that seek to prevent merger parties from restricting access to their customers. Such measures may, for example, limit the merger parties' ability to:

- (a) require their customers to enter into long term or exclusive contracts;
- (b) create switching costs for customers; and/or
- (c) bundle or tie the sale of particular products.

3.41 In the context of vertical mergers, if the merged entity controls key facilities or inputs required by other firms to compete effectively, then enabling measures may include:

- (a) provisions governing access to and pricing of facilities and products (eg commitments from the merged entity not to discriminate in access to the facility or input as between itself and its competitors); and
- (b) restrictions of access to confidential information ('firewall provisions') generated by competitors' use of the merged companies' facilities or products.

3.42 A key question in evaluating the expected effectiveness of enabling measures is whether the response to these measures is likely to be of sufficient scale and timeliness to restore adequately the rivalry lost as a result of the merger. Enabling measures are likely to require ongoing intervention and monitoring and, in some instances, this may involve highly complex issues (eg the pricing of access to facilities). The design and implementation of behavioural remedies are considered in Chapter 7.

⁴⁰ See the CMA's investigation into [the anticipated acquisition by Reckitt Benckiser Group plc of the K-Y brand in the UK](#), where the CMA decided that completion of the transaction would be conditional on Reckitt Benckiser Group plc agreeing a licensing agreement in line with criteria set out by the CMA.

⁴¹ See the CMA's investigation into [the anticipated acquisition by Muller UK & Ireland Group LLP of the dairy operations of Dairy Crest Group plc](#), where the CMA accepted UILs by Muller UK & Ireland Group LLP that included arrangements to provide for the expansion of an existing supplier to serve national grocery retailers with fresh liquid milk in the areas where the CMA had found competition concerns.

Controlling outcomes

3.43 Certain types of behavioural remedy, such as price caps,⁴² supply commitments and service level undertakings, control or restrict the outcomes of business processes. These remedies aim to control the adverse effects expected from a merger rather than addressing the source of the SLC. This type of remedy may not only be complex to implement and monitor, but may also create significant market distortions. Further considerations regarding these types of remedy are outlined in Chapter 7.

Recommendations on regulations or conduct

3.44 In some situations, certain regulations or conduct may inhibit entry or restrict market outcomes (eg planning or certification requirements). In these rare situations, the CMA may recommend modifications of these requirements to the Government or other controlling body to help address an SLC or to control the adverse effects of a merger. For example, in a regulated sector, the CMA may seek to take steps to address the effects of a merger by recommending a modification to a licence condition.

Selection of remedies

3.45 The choice of remedies will reflect the particular circumstances of each investigation. The CMA will seek to select remedies that will effectively address the SLC and its resulting adverse effects in the least costly way.

3.46 The CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies, because:

- (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
- (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
- (c) structural remedies rarely require monitoring and enforcement once implemented.

⁴² See the CC's investigations into [the completed acquisition by Imerys Minerals Limited of the kaolin business of Goonvean Limited](#), where the CC concluded that the most effective and proportionate remedy was a price control remedy for five years for kaolin supplied for use in performance-mineral applications to existing Goonvean and Imerys customers, and [the completed acquisition by Breedon Aggregates Limited of certain assets of Aggregate Industries UK Limited](#), where the CC implemented a price control for asphalt produced in the Inverness area.

3.47 In practice, therefore, the CMA and its predecessors, the CC and OFT, have selected structural remedies in most merger investigations that have required remedies under the Act.⁴³ In some of these investigations, behavioural remedies have, however, been required in a supporting role, for example, to protect the divested entity for a limited period or to ensure continuation of key contracts or inputs.

3.48 Behavioural remedies can operate satisfactorily in limited circumstances, especially where the company operates in a regulated environment and where there are expert monitors. In general, one or more of the following conditions will normally apply in the limited circumstances where the CMA selects behavioural remedies as the primary source of remedial action in a merger investigation:

- (a) Divestiture and/or prohibition is not feasible, or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC.
- (b) The SLC is expected to have a relatively short duration (eg two to three years) due, for example, to the limited remaining term of a patent or exclusive contract.⁴⁴
- (c) RCBs are likely to be substantial compared with the adverse effects of the merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies.⁴⁵

3.49 In general, in the above circumstances, the CMA will prefer to use enabling measures that ‘work with the grain of competition’, such as access remedies and measures that remove obstacles to competition, rather than behavioural remedies that control market outcomes, such as price caps. The latter measures tend to be onerous to operate and monitor, may create significant

⁴³ As at October 2017, structural remedies involving prohibition or divestiture have been required by the CC and/or the CMA in 27 out of 34 Phase 2 merger investigations requiring remedies since the Act came into force. Almost all Phase 1 merger investigations involving UILs involve structural remedies.

⁴⁴ See the CC’s investigation into [the completed acquisition by Nufarm Crop Products UK Limited of AH Marks Holdings Ltd](#), where the CC concluded that a package of behavioural remedies, including supply agreements and the transfer of a registration of a product to a third party, would be more targeted in addressing the SLCs that the CC had identified than divestiture of the AH Marks business. The CC concluded that the behavioural remedies would: (a) not affect other markets where no SLC had been found; (b) directly address the key barriers to entry that the CC had found; and (c) have a fixed duration, appropriate to the limited expected duration of the SLCs that the CC had found.

⁴⁵ See the CC’s investigations into [the completed acquisition by Macquarie UK Broadcast Ventures Limited of National Grid Telecoms Investment Limited, Lattice Telecommunications Asset Development Company Limited and National Grid Wireless No.2 Limited](#), where significant RCBs contributed to the selection of a behavioural remedy, and [the completed acquisition by Imerys Minerals Limited of the kaolin business of Goonvean Limited](#), where the Inquiry Group, in selecting a behavioural remedy, noted that to the extent that efficiencies existed, these would be eliminated if full divestiture had been required.

market distortions and do not address the causes of an SLC. They are therefore unlikely to be appropriate other than for a limited duration, unless there is no effective or practical alternative.

- 3.50 Where behavioural remedies are needed, enabling measures may be expected to work relatively slowly in addressing an SLC. In these circumstances, measures that control market outcomes may be needed to supplement enabling measures for a limited period to provide protection to customers from the adverse effects of an SLC.
- 3.51 In relation to whether divestiture is feasible, substantial uncertainty as to whether a suitable purchaser will emerge will generally not be sufficient for the CMA to conclude that any form of divestiture remedy is not feasible. The CMA has found that it is normally possible to implement divestitures, despite such uncertainties, given flexibility in the disposal price.
- 3.52 Where vertical mergers are expected to result in substantial RCBs, the CMA could select enabling measures, such as access remedies and/or firewall provisions, rather than structural remedies. However, such cases are rare, as enabling measures are likely to be highly complex to set up or monitor and may be rendered ineffective by possible behaviour of the merger parties.
- 3.53 It is possible that, in unusual circumstances, any effective remedy will result in disproportionate costs that far exceed the scale of the SLC or a disproportionate loss of RCBs. In such circumstances, the CMA will select the effective remedy that minimises the level of costs or loss of RCBs. In cases where all feasible remedies are likely to be disproportionate, the CMA may conclude that no remedial action should be taken. In practice, such instances are expected to be extremely rare.

Recommendations

- 3.54 In deciding whether to make a recommendation to Government or other controlling body for remedial action, the CMA will consider the likelihood of whether its recommendation will be adopted. In view of this uncertainty, the CMA will generally only make recommendations for action by others where it lacks the ability to carry out relevant measures itself, and only after consultation with the organisations possessing the relevant powers.⁴⁶

⁴⁶ The CC's investigation into [the proposed acquisition of certain assets representing the Air-Shields business of Hill-Rom, Inc, a subsidiary of Hillenbrand Industries](#) is a rare example of the use of a recommendation.

International constraints

- 3.55 The CMA is permitted to impose remedies that extend to a person's conduct outside the UK if that person is a UK national, incorporated in the UK, or a person carrying out business in the UK.⁴⁷ This includes circumstances where that person is sufficiently involved in a business being carried on in the UK, despite being based overseas.⁴⁸
- 3.56 Where competition authorities in other jurisdictions are considering a merger which the CMA is also investigating, the CMA will consult with some or all of these authorities to seek consistency and effectiveness in the approach to remedies where relevant.⁴⁹ It will normally be in the interests of the competition authorities and the merger parties for such consultation to take place at an early stage to prevent inconsistent approaches or outcomes. The consultation will also generally be more effective if the merger parties give their consent to sharing relevant information between the CMA and other competition authorities at an early stage.⁵⁰

⁴⁷ Section 86(1) of the Act.

⁴⁸ See the CC's investigation into [the anticipated acquisition by Akzo Nobel N.V. of Metlac Holding S.r.l](#) and the [judgment of the Court of Appeal in Akzo v Competition Commission \[2014\] EWCA Civ 482](#).

⁴⁹ See the CMA's investigation into [the completed acquisition by Diageo plc of a shareholding and voting rights and other associated rights in United Spirits Limited](#), a company based in India. The CMA accepted UILs from Diageo plc, which involved the divestment of its Whyte & Mackay business (apart from 2 malt distilleries, Dalmore and Tamnavulin, and their associated brands) and was subject to a regulatory review by the Reserve Bank of India and the approval of United Spirits Limited's shareholders in line with Indian law. The CMA did not accept the UILs until all other third party steps had been completed.

⁵⁰ The International Competition Network has developed a [model form](#) that merger parties and competition authorities can use to facilitate waivers of confidentiality protection for information that merger parties submit during the merger review process.

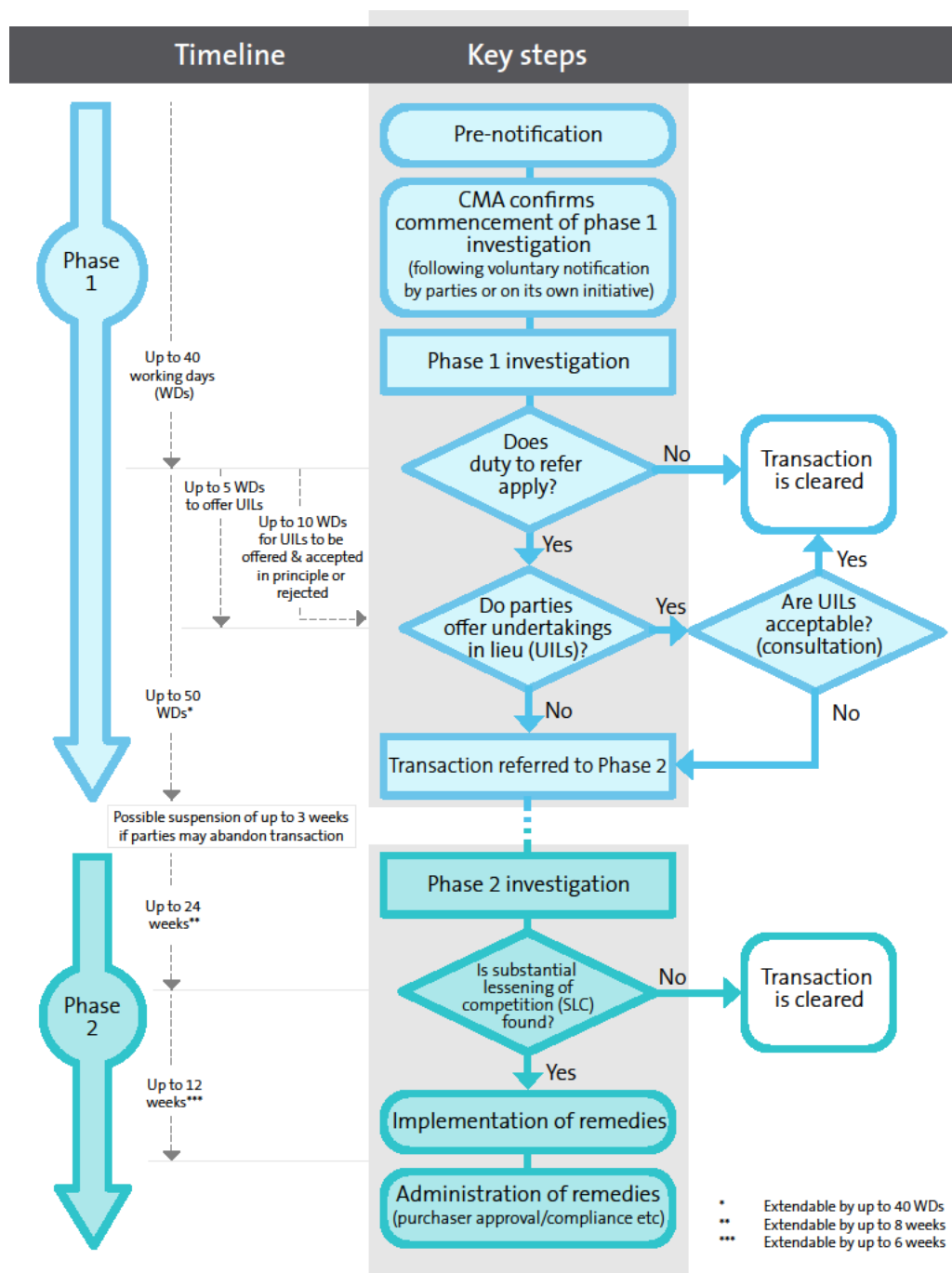
4. REMEDIES PROCESS

Introduction

- 4.1 Figure 2 below provides an overview of the key Phase 1 and Phase 2 remedies processes, from pre-notification prior to the commencement of a Phase 1 investigation to the implementation, monitoring and review of remedies⁵¹ following the outcome of a Phase 2 merger investigation.

⁵¹ The CMA's approach to the review of remedies is set out in [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#).

Figure 2: Remedies process



Source: CMA.

* This can be extended by up to 40 working days.

† This can be extended by up to eight weeks.

This can be extended by up to six weeks.

Note: The diagram provides a summary of the remedies process only, and it does not include processes that are relevant in only certain limited merger investigations, such as public interest cases or NHS mergers.

Phase 1

4.2 If the CMA finds that its duty to refer the merger for a Phase 2 investigation applies, section 73 of the Act allows the CMA (or the Secretary of State in

public interest cases)⁵² to accept from the parties concerned⁵³ binding UILs as an alternative to reference.

- 4.3 This guidance focuses on the CMA's principles and process for the offering and acceptance of UILs.

Procedure for submission of UILs

UIL proposals in advance of the SLC decision

- 4.4 Merger parties can put forward possible UILs to the CMA case team at any stage during the Phase 1 investigation or during pre-notification.⁵⁴ The CMA strongly recommends that merger parties and their legal advisers consider possible UILs early in the process, even if this is not communicated to the CMA. This ensures that, if an SLC decision is reached, the parties will be better able to submit their proposed UILs and engage in any related discussions with the CMA rapidly, maximising the chance of the CMA accepting UILs as an alternative to reference.
- 4.5 In advance of the SLC decision, the CMA case team will assist merger parties in understanding the function of UILs. They will also, where possible, provide guidance to parties on which of the possible remedies being considered by the parties might be suitable. However, these discussions will be conducted on a hypothetical basis, as the case team will not be able to inform the parties of the CMA's decision or direction of thinking on whether there is a realistic prospect that the merger gives rise to a SLC prior to the announcement of the decision. Any discussion of UILs prior to the SLC decision will not prejudice that decision.
- 4.6 The decision on the existence and scope of the SLC(s) precedes and is independent of the decision on whether any UILs offered address the competition concerns identified. The decision maker will not typically be involved in any discussions concerning UILs until the decision on the existence and scope of SLC(s) has been made.⁵⁵ In exceptional cases (eg

⁵² In public interest cases (described more fully in Chapter 16 of [CMA2](#)), the CMA will advise the Secretary of State whether UILs are appropriate to deal with the competition issues identified pursuant to section 44 of the Act. Any such UILs concerning competition issues are negotiated by the CMA and accepted by the Secretary of State. For mergers involving national security considerations, the Ministry of Defence will discuss any proposed public interest undertakings with the parties on the Secretary of State's behalf.

⁵³ Section 73(2) of the Act provides the CMA with the power to accept undertakings from 'such of the parties concerned as it considers appropriate'. The Act does not give the CMA the power to accept undertakings from unconcerned third parties.

⁵⁴ Such discussions with the case team will not impact on the prospect that the decision maker ultimately determines that the test for reference is not met; nor will they prejudice the parties' right ultimately to decide not to offer any UILs.

⁵⁵ Section 73(1) of the Act.

where the remedies are likely to be complex in design and/or implementation or where competition authorities in other jurisdictions are considering a merger which the CMA is also investigating), the decision maker may choose to be involved in any discussions concerning UILs.

- 4.7 If a Phase 1 investigation case proceeds to an issues meeting, the merger parties will be invited to raise possible UILs with the case team at the end of the meeting after the decision maker has left the room.⁵⁶

UIL offers following the SLC decision

- 4.8 Merger parties may wish to see the SLC decision before raising UILs with the CMA. The SLC decision will set out the CMA's competition concerns and should therefore provide the merger parties with sufficient information to assess whether they wish to offer UILs to provide a clear-cut remedy to those concerns.
- 4.9 Under the Act, notifying parties have up to five working days after receiving the CMA's reasons for its SLC decision to offer UILs formally in writing (the UIL offer).⁵⁷ During this period of time, the CMA case team will be available to discuss possible UILs with the parties (subject to the constraints described in paragraph 4.5). Although the parties will not have access to the decision maker, the case team will have, in advance of any discussions, an understanding of the decision maker's view on what might be an acceptable UIL offer.
- 4.10 Given that the period for making a UIL offer is short, merger parties should not expect to engage in iterative discussions or negotiations with the CMA. Parties may formally submit two or three versions of their offer,⁵⁸ if necessary, which the CMA will consider at the same time to select the least intrusive effective clear-cut remedy, but parties should be careful to include the offer they believe will address fully the competition concerns set out in the SLC decision.⁵⁹ Parties should also indicate clearly their preferred remedy, providing reasons.

⁵⁶ The Phase 1 decision maker will not be informed of whether any UILs were discussed until after the decision on the SLC has been made.

⁵⁷ Section 73A(1) of the Act.

⁵⁸ Parties should submit their best offer. However, on occasion, there can be uncertainty about what exactly needs to be included for the remedy to be fully effective in addressing the competition concerns identified. To avoid the unnecessary rejection of a UIL offer, the CMA is willing to consider two or three versions of an offer (eg including a smaller or larger package of assets).

⁵⁹ See the CMA's investigation into [the anticipated acquisition by John Wood Group plc of Amec Foster Wheeler plc](#), where the CMA did not take up the option of an upfront buyer, as it did not consider that this was necessary.

- 4.11 The Act does not allow the CMA to consider new UIL offers made after the five-working day deadline for the UIL offer.
- 4.12 If parties do not wish to submit a UIL offer, they may wish to inform the CMA (in writing) before the end of the five working day period so that it can proceed to make the reference to Phase 2 as soon as possible.

Remedies Form

- 4.13 UIL offers (accompanied by the parties' proposed draft text of their UILs) should be made formally in writing using the CMA's Remedies Form for Offers of Undertakings in Lieu of Reference ([Remedies Form](#)) and the CMA's [UIL template](#).
- 4.14 The Remedies Form provides details of the information that will assist the CMA in understanding clearly what the merger parties are offering (or not offering) in their UIL offer. Parties should bear in mind the following points when completing the Remedies Form:
- (a) A UIL offer merely to 'remedy the SLC', without specifying how this will be achieved, will be considered insufficiently clear-cut.
 - (b) A UIL offer which proposes a behavioural remedy rather than a structural remedy is generally less likely to be considered sufficiently clear-cut (though there are exceptions).⁶⁰
 - (c) A UIL offer to remedy the SLC through divestment of one of the overlapping businesses should make it clear which of the overlapping businesses the merger parties are proposing to divest (where the merger parties are equally willing to divest either business, they should state this in the UIL offer). Parties should be aware that, in certain cases, the CMA may consider that divestment of one particular business may not be sufficient to remove the competition concerns, given the need for the divestment to be a viable business and to be capable of attracting a suitable purchaser. In this situation, a UIL offer might include a fall-back proposal to divest another business should a buyer not be found quickly for the first business.

⁶⁰ See the OFT's investigations into [the completed acquisition by IVAX International GmbH of 3M Company's distribution business for certain asthma products](#) and [the completed acquisition by Arriva Plc of the Wales and Borders rail franchise](#). See the CMA's investigations into [the anticipated acquisition by Inter City Railways Limited of the InterCity East Coast rail franchise](#) and [the completed acquisition by Regus Group Limited of Avanta Serviced Office Group plc](#).

(d) Where parties are offering a divestiture remedy, they should state in their UIL offer whether they are proposing an upfront buyer.⁶¹

- 4.15 The level of information required by the CMA will vary according to the type and structure of the remedy proposed. Merger parties are encouraged to discuss with the case team the likely requirements of the CMA before completing the Remedies Form.
- 4.16 Merger parties are not obliged to complete all aspects of the Remedies Form, but providing all relevant information will enhance the CMA's ability to assess effectively the UIL offer.

The UIL 'acceptable in principle' decision

- 4.17 Where merger parties offer UILs, the CMA has until the tenth working day after the merger parties received the reasons for its SLC decision to decide whether the UIL offer (or a modified version of it) might be acceptable as a suitable remedy to the SLC or the identified adverse effects arising from it.⁶² This decision is taken by the Phase 1 decision maker.
- 4.18 Where the CMA decides that the UIL offer (or a modified version of it) might be acceptable as a suitable remedy, it will confirm this to the parties who offered the UILs, and issue a public announcement to that effect (the UIL 'acceptable in principle' decision).

CMA discretion to propose modifications to UIL offers

- 4.19 As the merger parties will have received the CMA's reasons for its SLC decision before submitting their UIL offer, the CMA expects that, in the vast majority of cases, the merger parties will be in a position to assess whether to make a UIL offer capable of providing a clear-cut remedy to the SLC within the five working day deadline. However, the CMA is mindful of the significant public policy benefits achieved through the UILs process. Therefore, the CMA reserves the right, where appropriate, to revert to the merger parties following receipt of their UIL offer to inform them that that it could be suitable to address the SLC identified, subject to specified modifications.⁶³ This can happen either before or after the UIL 'acceptance in principle' decision. These modifications will not amount to a different remedy, but minor modifications of the existing proposal.

⁶¹ This is a commitment to find a buyer which will be assessed and approved by the CMA, and to conclude an agreement with this buyer, prior to the CMA's final acceptance of UILs.

⁶² Section 73A(2) of the Act.

⁶³ Such modifications relate to the substance of the UIL offer and not to the text of the undertakings.

4.20 Where the CMA proposes modifications to a UIL offer, it will ask the merger parties whether they agree to the proposed modifications. The merger parties will be given a short period in which to state whether or not they wish to offer the modified UIL.

Procedure for acceptance of UILs

4.21 Having made the decision that the UIL offer (or a modified version of it) might be acceptable in principle as a suitable remedy, the CMA will then start the process of detailed consideration of the proposed UIL. This process also has statutory timeframes. Where the UIL is a divestment remedy, the process will differ depending on whether or not the UIL offer is based on an upfront buyer.

Timeframes

4.22 The CMA is required to decide whether to accept the offered UIL within 50 working days of providing the parties with the reasons for its SLC decision. This can be extended by up to 40 working days if the CMA considers that there are special reasons for doing so.⁶⁴

4.23 In considering whether an extension for special reasons may be appropriate, the CMA will have regard to:

(a) whether any delay may increase the risk of anticompetitive outcomes from the merger (eg where there is a risk that the target business may deteriorate pending the outcome of the merger investigation, or where any customer/consumer harm may be ongoing);⁶⁵

(b) the ability of the CMA and the parties to conclude the UIL acceptance process within the 50 working days; and

(c) the likelihood that the CMA will be able to accept UILs from the parties if an extension is granted.

4.24 As a UIL must be a clear-cut solution to the SLC identified, the CMA would not expect to have to extend the timeframe for final acceptance of UILs unless:

⁶⁴ Section 73A(4) of the Act. The CMA may also extend the period for considering UILs if it considers that a relevant person has failed to comply with a notice requiring evidence issued under section 109 of the Act.

⁶⁵ The CMA's assessment of this issue may be linked to the likelihood of it being able to agree acceptable UILs with the parties if an extension is granted. Where the CMA considers that there is sufficient likelihood of reaching agreement, it would be more likely to grant an extension, in order to avoid the delay associated with an in-depth Phase 2 investigation.

- (a) the case involves an ‘upfront buyer’ (see paragraphs 4.31 to 4.35 below);
- (b) it is necessary for the CMA to undertake a further consultation with interested third parties on a modified version of the UIL offer (see paragraph 4.29 below); or
- (c) there is some other exceptional circumstance, and the additional time will likely lead to acceptance of UILs.⁶⁶

4.25 Within the SLC decision, the CMA will, where necessary, under section 25(4) of the Act, extend its four-month statutory timetable for considering a completed merger. This period will end at the earliest of the following events:

- (a) the final giving of the UILs;
- (b) the expiry of a period of 10 working days beginning with the first day after the receipt by the CMA of a notice from the notifying party that it does not intend to give UILs; or
- (c) the cancellation by the CMA of the extension.

4.26 Throughout the process, the CMA remains under a statutory duty under section 103 of the Act to have regard to the need to make a decision as soon as reasonably practicable. It will therefore aim to accept the final form of the UILs as quickly as possible. In all cases, a reference may still be made if the CMA is unable to accept UILs within the statutory deadlines under the Act.

4.27 The CMA will agree with the merger parties a timetable of milestones through the UIL process to ensure that the merger parties are making timely progress towards the ultimate signing of an agreement with a suitable purchaser. This timetable will not be made public. However, failure by the merger parties to progress according to the timetable will be taken into account should the CMA need to consider whether to extend the 50-working day timetable for accepting UILs.

Consultation

4.28 In order to give interested third parties an opportunity to comment, the Act provides for third parties to be consulted prior to the CMA’s final acceptance

⁶⁶ In relation to (a) and (b), see the CMA’s investigation into [the anticipated acquisition by Muller UK & Ireland Group LLP of the dairy operations of Dairy Crest Group plc](#). In relation to (c), see the CMA’s investigation into [the completed acquisition by AMC \(UK\) Acquisition Limited of Odeon and UCI Cinemas Holdings Limited](#), where the period was extended to ensure that a required consent from a third party would be obtained.

of UILs.⁶⁷ The CMA will publish the draft of the provisionally agreed UILs⁶⁸ and will invite comments from third parties. The CMA is required by the Act⁶⁹ to give third parties a period of not less than 15 calendar days in which to respond with comments on the purpose and effect of the proposed UILs.

- 4.29 To the extent that, as a result of the consultation process or otherwise, the originally published UILs are modified, a second consultation period will be required unless such modifications are not material in any respect. In such cases, in accordance with the Act, the consultation period for third parties to respond will be no less than seven calendar days.⁷⁰

Acceptance

- 4.30 Following the necessary consultations, the CMA will ask the merger parties to sign the final version of the UILs, after which they will be formally accepted by the CMA. The CMA will announce publicly that it has formally accepted the UILs, thereby ending its duty to refer, and will publish the final version of the accepted UILs on the [CMA website](#).

Upfront buyer cases

- 4.31 Where the CMA decides that UILs will be accepted only where the merger parties have identified an upfront buyer, the CMA will not accept the UILs unless a sale agreement, generally conditional from the buyer's perspective only on acceptance of the UILs by the CMA (and the completion of the main transaction if it remains anticipated), has been agreed with a buyer for the divestment business and the CMA considers that the buyer would be acceptable.
- 4.32 Where merger parties wish to offer an upfront buyer in their UIL offer, they may either identify a proposed buyer straight away or make the offer on the basis that any divestiture would be to an upfront buyer. In the latter case, parties will be given a relatively short period after the CMA's UIL 'acceptance in principle' decision in which to identify the upfront buyer. After the merger parties have proposed their upfront buyer, the CMA will assess the suitability of the proposed buyer. The CMA will gain information from the buyer and, in most cases, will meet with the buyer. The CMA will specify the proposed buyer in the public consultation.

⁶⁷ Section 90 of, and Schedule 10 to, the Act.

⁶⁸ The CMA may also publish non-confidential parts of the merger parties' Remedies Form alongside the draft UILs.

⁶⁹ Paragraph 2(2) of schedule 10 to the Act.

⁷⁰ Pursuant to paragraph 2(5) of schedule 10 to the Act.

- 4.33 Once the merger parties have obtained provisional confirmation from the CMA that the buyer is likely to be acceptable, they will enter into the sale agreement on the terms set out in paragraph 4.31 above.
- 4.34 If, following the CMA's assessment and public consultation, the CMA considers that the proposed buyer is not suitable, the merger may either be referred to Phase 2 or the parties will be required to identify quickly a suitable alternative buyer. In either case, the principles set out in paragraph 4.29 above in relation to further public consultation will apply.
- 4.35 Given the statutory deadline by which UILs must be finally accepted, parties are advised to give early consideration to the possible need for, and identity of, an upfront buyer.

Following final acceptance of UILs in non-upfront buyer cases

- 4.36 Where no upfront buyer provision is required, the CMA will continue to have an active role to play after it has formally accepted the UILs from the parties.
- 4.37 Where the UILs are structural in nature, they will provide for a divestment period within which the merger parties must identify a suitable purchaser for the divestment business and conclude a sale agreement with that buyer. As for an upfront buyer case, the CMA will assess the suitability of the proposed purchaser (see paragraphs 4.40 to 4.42 below).
- 4.38 The CMA will again agree with the merger parties a timetable of milestones for this period (see paragraph 4.27).
- 4.39 Once a purchaser has been formally approved by the CMA, the merger parties are able to proceed with the divestment. Depending on the terms of the UILs, the merger parties may be required to enter into the relevant contractual document for the divestment and/or to complete the divestment by a date specified in the UILs.

Assessing the suitability of a purchaser

- 4.40 In a divestiture remedy, the merger parties must satisfy the CMA that their proposed purchaser is independent of the merger parties, has the necessary capability to compete, is committed to competing in the relevant market(s), and that a divestiture to this purchaser will not create further competition or regulatory concerns. Please refer to paragraphs 5.20 to 5.27 for more information on the purchaser suitability criteria.
- 4.41 In assessing whether a proposed purchaser should be approved, the CMA will examine information presented by the merger parties carefully and impartially,

but will only undertake a proportionate amount of investigation and analysis at this phase.⁷¹ If approval of a proposed purchaser requires a detailed investigation, it is likely that the CMA will choose not to approve that purchaser rather than to undertake an in-depth analysis.⁷²

- 4.42 In principle, divestitures as a result of UILs may result in the creation of a new relevant merger situation, which the CMA could investigate. However, in practice, where a proposed divestment to a purchaser raises competition concerns,⁷³ the CMA will notify the merger parties that the proposed purchaser does not satisfy the purchaser suitability criteria.

Monitoring trustee

- 4.43 The CMA will assess on a case-by-case basis whether a monitoring trustee should be appointed to oversee and report on the divestiture process.⁷⁴ The CMA may appoint a monitoring trustee at Phase 1 or Phase 2.
- 4.44 Monitoring trustees help ensure the CMA better understands the progress being made in a divestiture by reporting on parties' compliance with the agreed timetable. A monitoring trustee can also be used to review the separation of a business and ensure the divestiture package is as described in the proposed UILs.
- 4.45 The need for a monitoring trustee will depend among other things upon the nature of the divestiture package and the risk profile of the remedy. The need for a monitoring trustee in an upfront buyer case is likely to be lower than in a non-upfront buyer case, as the incentives for the parties to complete the divestment in good time is likely to be greater. However, a monitoring trustee is more likely to be appointed where:
- (a) the divestiture package is not an existing business;
 - (b) significant assets are to be excluded from the existing business;
 - (c) significant transitional arrangements are required; and/or

⁷¹ This is consistent with the requirement that UILs should provide a clear cut solution to the SLC identified at Phase 1.

⁷² See [Co-operative Group \(CWS\) Limited v Office of Fair Trading \[2007\] CAT 24](#).

⁷³ The fact that the acquisition by a proposed purchaser would qualify for investigation pursuant to the share of supply test does not necessarily mean that it would create substantive competition concerns; this will depend on the circumstances of the case and the market(s) in question.

⁷⁴ The parties will be responsible for the remuneration of the monitoring trustee. To ensure that the structure of such remuneration does not compromise the monitoring trustee's independence and provides sufficient incentive to perform the required function to an appropriate standard, the CMA must approve the remuneration agreement with the monitoring trustee.

(d) purchaser risks are particularly high.

- 4.46 If parties consider that a monitoring trustee is not required, they should include reasons for this in their Remedies Form.

Divestiture trustee and CMA intervention

- 4.47 In a non-upfront buyer case, if merger parties are unable to find a suitable purchaser capable of being approved by the CMA within the time period specified within the UILs, the UILs will typically provide for the CMA to be able to appoint a divestiture trustee to sell the divestment business on behalf of the merger parties at no minimum price, or for the CMA to direct the parties to sell at no minimum price.
- 4.48 Whether UILs are structural or behavioural in nature, if, after accepting the UILs, it becomes apparent to the CMA that the undertakings are not being or will not be fulfilled, section 75 of the Act gives the CMA the power to issue an order against the parties to ensure fulfilment of the UILs. Such orders are enforced in the High Court.

Ongoing role for the CMA in behavioural UILs

- 4.49 For behavioural undertakings, the CMA has an ongoing monitoring role for the duration of the UILs under section 92 of the Act.⁷⁵

Undertakings in lieu in public interest cases

- 4.50 In public interest cases, which fall to the Secretary of State for decision, the CMA considers at Phase 1 whether the competition issues that arise are such that the CMA would recommend a reference if there were no public interest issues. If the CMA would recommend a reference, the CMA will consider under section 44(4)(f) of the Act whether or not these concerns could be resolved by UILs and will advise the Secretary of State accordingly. To the extent that merger parties make it clear that they are not prepared to offer UILs, the CMA is likely to advise that it would not be appropriate to deal with the competition concerns arising from the merger situation by way of undertakings under paragraph 3 of Schedule 7 to the Act (or in the equivalent provisions in the Protection of Legitimate Interests Order).⁷⁶

⁷⁵ Note, however, that behavioural undertakings will not generally (absent particular facts) be considered to be a credible, clear-cut remedy suitable for UILs at Phase 1.

⁷⁶ See the anticipated acquisition by Lloyds TSB plc of HBOS plc, Report to the Secretary of State for Business Enterprise and Regulatory Reform, 24 October 2008, paragraph 381.

4.51 The Secretary of State must have regard to the CMA's view on competition issues, but may decide that public interest issues require a different outcome to that which would be required to address the competition issues. This could include a decision to clear the merger, a decision to make a reference, or a decision to accept undertakings, which might be different from those proposed by the CMA to resolve any competition concerns.⁷⁷

Remedies for breach of undertakings in lieu

4.52 Once UILs have been accepted, the CMA is released from its duty to refer by section 74(1) of the Act. UILs therefore become the definitive solution to any SLC. Section 74(1) of the Act precludes a reference to Phase 2⁷⁸ even where UILs are not fulfilled. In that situation, the CMA must rely on its order-making power under section 75 of the Act and, if necessary, invoke civil proceedings under section 94 of the Act to enforce the UILs and/or the order.

4.53 Under section 94 of the Act, third parties have the right to bring an action for breach of statutory duty against a party to a UIL where the third party has suffered loss or damage as a result of a failure to comply with the UIL. It is in part for this reason that it is important that the terms of UILs are clear and straightforward to assist with their enforceability.⁷⁹

Phase 2

4.54 At Phase 2, the CMA will start to gather information on possible remedies and consider relevant options after the basis of a possible SLC has been identified. In exceptional circumstances, the CMA may consider possible remedies prior to having identified the basis of a possible SLC.⁸⁰ Any consideration of remedies will not prejudice the SLC decision. The early consideration of possible remedies will typically only involve the CMA case team. The Inquiry Group will only consider possible remedies after it has reached its provisional finding on whether the merger is likely to give rise to an SLC. In exceptional cases (eg where the remedies are likely to be complex in design and/or implementation or where competition authorities in other jurisdictions are considering a merger which the CMA is also investigating),

⁷⁷ See Chapter 16 of [CMA2](#) for further information on public interest mergers.

⁷⁸ Unless material facts about the relevant arrangements or transactions in consequence of which the enterprises subject to the merger have or will cease to be distinct (or relevant proposed arrangements or transactions) were not notified to the CMA, or made public before the UILs were accepted (sections 74(2) to (4) of the Act).

⁷⁹ See [Administrative penalties: Statement of Policy on the CMA's approach \(CMA4\)](#) for further information.

⁸⁰ See the CMA's investigation into [the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited](#), where the CMA required the sale of 360 licensed betting offices to resolve the competition concerns it had found.

the Inquiry Group may choose to be involved in any discussions concerning remedies.

- 4.55 Where the Inquiry Group reaches a provisional finding of an SLC, at the same time as publishing its provisional finding, or as soon as practicable thereafter, the CMA will consult on possible remedies to address the SLC.⁸¹ The CMA's notice of possible remedies is a starting point for discussion with the merger parties and other parties, including customers, competitors and any relevant sectoral regulator.
- 4.56 The CMA will consider remedy options proposed by the merger parties and others in addition to its own proposals. The parties will be expected to demonstrate that their proposed remedy options will address effectively the expected SLC and the resulting adverse effects. The merger parties will also be expected to provide evidence to support any claims concerning RCBs and their potential for pass through to relevant customers.
- 4.57 Where the Inquiry Group reaches a provisional finding of an SLC, response hearings will take place. Response hearings will be held with the merger parties, and sometimes also with key third parties likely to provide useful evidence or views (eg potential buyers, significant customers or relevant sectoral regulators).
- 4.58 Response hearings may take place where the provisional finding is that no SLC arises as a result of the merger, although merger parties can waive their right to a response hearing under these circumstances.⁸²
- 4.59 The response hearing with the merger parties will be led by the Inquiry Group with case team support. Hearings with third parties may be led by the case team, and may be held face-to-face or by teleconference.
- 4.60 In a response hearing, parties are given the opportunity to comment orally on the provisional findings and the CMA may seek clarification on evidence previously provided. However, much of the focus of the hearing is on possible remedies.
- 4.61 A transcript of the hearing will be taken and will be sent to the relevant parties after the hearing for checking (the transcript is not published).⁸³ The CMA may sometimes prepare and publish a summary of evidence gathered through third party response hearings, but this will not typically be the case. The

⁸¹ See [CMA Rules for Merger, Market & Special Reference Groups \(CMA17\)](#), Rule 12.

⁸² Where the CMA reaches a provisional finding of no SLC, it will consider whether it is appropriate to have response hearings with any third parties.

⁸³ Intentional or reckless provision of false or misleading information is a criminal offence, and this includes where the information is provided during a hearing (Section 117 of the Act).

publication of a summary will depend on the circumstances of the case and will take into account confidentiality considerations. Where relevant, and subject to confidentiality considerations, comments from third parties will be incorporated into the remedies working paper that is disclosed to the merger parties.

- 4.62 Following the response hearings, the merger parties or other parties may submit further, or amended, proposals for remedies. Non-confidential versions of these proposals will be published on the [CMA website](#). There may also be further meetings with the merger parties at case team level.
- 4.63 A remedies working paper, containing a detailed assessment of the different remedies options and setting out the CMA's provisional decision on remedies, will be sent to the merger parties for comment following the response hearings. This paper will also set out the CMA's views on whether the merger gives rise to RCBs, and if so, whether the proposed remedy should be modified in order to preserve those benefits. The merger parties will typically have at least five working days to respond to the remedies working paper. Third parties may also be consulted about the proposed scope of remedies and their views on any RCBs, and the remedies working paper may in some cases be published on the [CMA website](#) if the CMA deems wider consultation to be necessary. In most cases, the remedies working paper is not published.
- 4.64 Following consultation on the remedies working paper and any further discussions and meetings with parties that the CMA considers necessary, the CMA will take its final decision on both the competition issues and any remedies.
- 4.65 The CMA will publish its final decision on the SLC and remedies, together with its supporting reasons and information, in a final report.⁸⁴ The report will contain sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation by the CMA.
- 4.66 Following publication of the final report, the CMA has the choice of implementing remedies by obtaining Final Undertakings from the relevant parties or making a Final Order, subject to the limitations set out in Schedule 8 of the Act. The CMA will consult with the merger parties and other parties affected by the remedies in determining the required Final Undertakings or Final Order. This will include a period of formal public consultation, as specified in Schedule 10 of the Act.

⁸⁴ Section 38 of the Act.

- 4.67 The CMA is subject to a statutory deadline of 12 weeks following its final report⁸⁵ to accept Final Undertakings⁸⁶ or to make a Final Order.⁸⁷ This period may be extended once by up to six weeks⁸⁸ if the CMA considers there are special reasons for doing so.⁸⁹⁹⁰
- 4.68 The CMA will normally seek to obtain Final Undertakings in an appropriate form from the merger parties. However, if agreement on Final Undertakings is not forthcoming on a timely basis, the CMA will have recourse to imposing a Final Order. The length of time required to obtain agreed Final Undertakings from the merger parties following the final report will reflect, inter alia, the complexity of the remedies involved and the variety of parties involved in the consultation.
- 4.69 The Inquiry Group will disband following its acceptance of Final Undertakings or the imposition of a Final Order to implement remedies. Responsibility within the CMA for any further implementation of remedies (eg overseeing any divestiture process) will pass to a Group appointed to oversee this part of the process (usually the original Inquiry Group).
- 4.70 The CMA will have an ongoing responsibility for the monitoring and enforcement of any behavioural remedies.⁹¹
- 4.71 The CMA will publish and update an administrative timetable regarding the implementation of remedies.
- 4.72 The action the CMA takes in implementing remedies must be consistent with the decisions in the final report unless there has been a material change of circumstances since the preparation of the report or the CMA has a special reason for acting differently.⁹²
- 4.73 If a person fails to comply with any Final Undertakings that it has given or any Final Order imposed on it by the CMA, compliance may be enforced by means of civil proceedings brought by the CMA for an injunction or for interdict or for any other appropriate relief or remedy in one of the UK courts.⁹³ In addition to enforcement by the CMA, any person affected by the contravention of Final Undertakings or a Final Order who has sustained loss

⁸⁵ Section 41A(1) of the Act.

⁸⁶ Section 82 of the Act.

⁸⁷ Section 84 of the Act.

⁸⁸ Section 41A(2) of the Act.

⁸⁹ For example, due to extensive discussions relating to behavioural remedies or a complex partial divestiture.

⁹⁰ These time limits may be further extended where a relevant party has failed to comply with the requirements of a notice requiring the submission of evidence issued under section 109 of the Act (Section 41A(3) of the Act).

⁹¹ Section 92 of the Act.

⁹² Section 41(3) of the Act.

⁹³ Section 94 of the Act.

or damage as a result of such contravention may also bring an action against the party bound by the Final Undertakings or Final Order.

- 4.74 The CMA has a statutory duty⁹⁴ to keep undertakings and orders under the Act under review. From time to time, the CMA must consider whether, by reason of a change in circumstances (eg significant changes in market structure or changes in laws and regulations affecting a market), the undertaking or the order is no longer appropriate and should be varied or terminated.⁹⁵ Responsibility for deciding on variation or termination of undertakings or orders lies with the CMA in all but a very limited number of cases.⁹⁶ Please refer to the [guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#) for further information.

Remedies implementation during litigation

- 4.75 Merger parties have the right to apply to the CAT for a review of a decision by the CMA. However, such an application does not suspend the effect of the decision, except insofar as a direction to the contrary is made by the CAT.⁹⁷
- 4.76 The effect of the statutory deadline for acceptance of Final Undertakings or the making of a Final Order is that, notwithstanding any such application, the CMA is required to accept Final Undertakings or make a Final Order whilst appeal proceedings are pending, unless there is some form of interim relief granted by the CAT or the courts.
- 4.77 The CMA will aim to progress as far as practicable the prompt implementation of remedies, while paying appropriate respect to merger parties' legitimate rights of defence and the role of the CAT and other courts. The particular approach to be taken on individual cases will generally be a matter for the Inquiry Group.

Completed mergers

- 4.78 The CMA's approach to remedies will follow similar principles for anticipated mergers and completed mergers. However, the remedies process in completed merger cases may often face circumstances in practice which

⁹⁴ Under sections 92(2) and 162(2) of the Act. There is a similar legacy duty under sections 88(4) and (5) of the Fair Trading Act 1973 (as preserved in Schedule 24 to the Act).

⁹⁵ The statutory language refers to the variation, release or superseding of undertakings and the variation or revocation of orders.

⁹⁶ Certain undertakings and orders originally given to the Secretary of State under the Fair Trading Act 1973 remain the responsibility of the Secretary of State.

⁹⁷ Section 120 of the Act.

increase the risks of not achieving an effective solution compared with equivalent anticipated mergers. For example, there may be greater difficulty in separating a divestiture package or the merger parties may have weaker incentives to pursue timely divestiture.

- 4.79 The CMA will take action to limit these risks and ensure an effective outcome. Completed merger cases therefore typically require interim measures, such as an interim enforcement order and the appointment of a monitoring trustee.⁹⁸ As noted in paragraph 3.9, the CMA will not normally consider the cost of divestiture to the merger parties in selecting appropriate remedies.

⁹⁸ Considerations regarding the use, design and implementation of interim measures, including interim orders, are set out in [CMA60](#). The CMA is consulting on [new draft guidance](#) on interim measures to replace [CMA60](#).

5. DIVESTITURE REMEDIES

Introduction

- 5.1 A divestiture seeks to remedy an SLC by either creating a new source of competition, through disposal of a business or set of assets to a new market participant, or by strengthening an existing source of competition, through disposal to an existing market participant independent of the merger parties.
- 5.2 To be effective in restoring or maintaining rivalry in a market where the CMA has decided that there is an SLC, a divestiture remedy will involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process.

Divestiture risks

- 5.3 Divestitures may be subject to a variety of risks that may limit their effectiveness in addressing an SLC. It is helpful to distinguish between three broad categories of risks that may impair the effectiveness of divestiture remedies, as follows:
- (a) 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.
 - (b) Purchaser risks: these are risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser.
 - (c) Asset risks: these are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example, through the loss of customers or key members of staff.
- 5.4 The incentives of merger parties may serve to increase the risks of divestiture. Although merger parties will normally have an incentive to maximise the disposal proceeds of a divestiture, they will also have incentives to limit the future competitive impact of a divestiture on themselves. Merger parties may therefore seek to sell their less competitive assets/businesses and target them to firms which they perceive as weaker competitors. They may also

allow the competitiveness of the divestiture package to decline during the divestiture process.⁹⁹

- 5.5 Divestiture risks can be overcome, at least in part, through the design of the divestiture package and by adopting protective measures, such as the appointment of a monitoring trustee (see paragraphs 5.37 to 5.39) and divestiture trustee (see paragraphs 5.43 to 5.44) and requiring an upfront buyer (see paragraphs 5.28 to 5.32).

Scope of divestiture packages

Package definition

- 5.6 In identifying a divestiture package, the CMA will take, as its starting point, divestiture of all or part of the acquired business.¹⁰⁰ This is because restoration of the pre-merger situation in the markets subject to an SLC will generally represent a straightforward remedy. The CMA will consider a divestiture drawn from the acquiring business if this is not subject to greater risk in addressing the SLC.^{101,102} In appropriate cases, the CMA may be willing to leave open to the merger parties which of the overlapping businesses they wish to sell, with the UILs or Final Undertakings stipulating that one of them must be sold.¹⁰³
- 5.7 In defining the scope of a divestiture package that will satisfactorily address the SLC, the CMA will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap. This may comprise a subsidiary or a division or the whole of the

⁹⁹ See the Federal Trade Commission's [A Study of the Commission's Divestiture Process](#) (1999), DG COMP's [Merger Remedies Study](#) (2005) and the CC's [Understanding past merger remedies: report on case study research](#) (2007).

¹⁰⁰ See [Somerville plc v Competition Commission \[2006\] CAT 4](#), where the CAT confirmed that it was reasonable for the CC, as a starting point, to consider that restoring the *status quo ante* would normally involve reversing the completed acquisition unless the contrary were shown.

¹⁰¹ See the CMA's investigation into [the anticipated acquisition by Celesio AG of Sainsbury's Supermarkets Limited UK Pharmacy Business](#), where the CMA concluded that, with the exception of Christchurch and Sandy, the divestiture of a particular Lloyds pharmacy in each of the areas where the CMA had found an SLC would be an effective and proportionate remedy to address the SLC that had been identified. The CMA found that in Christchurch and Sandy, the divestiture of either of two particular Lloyds pharmacies in these areas would be an effective and proportionate remedy to address the SLC that had been identified. The CMA also decided that a number of other safeguards were required to protect the pharmacies to be divested to ensure that there were no risks of asset deterioration occurring during the sale process.

¹⁰² The CMA will (in line with statements of the CAT in [Somerville PLC v Competition Commission](#)) not seek to prevent an acquirer from 'trading up' by selling its own business, but will consider whether a sale of the acquirer's own business raises its own competition concerns or issues of achievability of divestment.

¹⁰³ See the [UILs given by MRH \(GB\) Limited](#) to the CMA in relation to its acquisition of 78 petrol stations from Esso Petroleum Company Limited.

business acquired. Following discussion with the merger parties, the CMA may modify the scope of the proposed divestiture package, provided that the parties can demonstrate, to the CMA's satisfaction, that the modified package addresses the SLC and the modification does not create significant composition, purchaser or asset risks after taking account of protective measures.

- 5.8 The divestiture may comprise the sale of all relevant assets in one package or the sale of assets grouped together in a limited number of packages. The scope of the package will reflect the particular circumstances of the case.
- 5.9 The scope of a divestiture package will be outlined, with reasons, in the CMA's decision or final report, and will be specified in greater detail in the UILs accepted, the Final Undertakings accepted or the Final Order made by the CMA when implementing the remedy. The merger parties may subsequently add further assets to the specified package with the approval of the CMA, or may be required to do so by the CMA, to secure divestment to a suitable purchaser.
- 5.10 The merger parties will generally be prohibited from subsequently purchasing assets or shareholdings sold as part of a divestiture package or acquiring material influence over them. The CMA will normally limit this prohibition to a period of 10 years.
- 5.11 In appropriate cases, the CMA will consider other structural or quasi-structural remedies. A structural remedy other than divestiture might comprise, for example, an amendment to intellectual property licences to grant a divestment purchaser a perpetual and royalty-free licence.¹⁰⁴

Divestiture of an existing business or package of assets

- 5.12 The CMA will generally prefer the divestiture of an existing business that can compete effectively on a stand-alone basis, independently of the merger parties, to divestiture of part of a business or a collection of assets. This is because divestiture of a complete business is less likely to be subject to purchaser and composition risk and can generally be achieved with greater speed.

¹⁰⁴ See the OFT's investigations into [the anticipated acquisition by Tetra Laval Group of part of Carlisle Process Systems](#), where the OFT accepted UILs focused on an irrevocable, perpetual and exclusive licence of certain intellectual property rights, and [the completed acquisition by Unilever of Alberto Culver Company](#), where the OFT accepted UILs from Unilever to divest the bar soap business of Alberto Culver, including the divestment of the Simple brand, which was effected by a perpetual and royalty-free licence covering UK, Ireland and the Channel Islands.

- 5.13 Where a proposed divestiture comprises part of a business or specified assets, such as intellectual property rights, the capabilities and resources of prospective buyers are likely to be more critical to a successful outcome than for a standalone business. A package of assets proposed for divestiture may, for example, lack an established infrastructure and its viability may therefore be more dependent on an appropriate match with the capabilities of the purchaser.
- 5.14 A package of assets may also be far more difficult to define or ‘carve out’ from an underlying business,¹⁰⁵ and the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively. In such circumstances, the CMA is likely to require additional protective measures, such as the identification of an up-front buyer (see paragraphs 5.28 and 5.32) to mitigate increased purchaser and composition risk.¹⁰⁶ Where a package of assets is proposed for divestiture, the CMA will require the merger parties to specify the composition and operation of the package in detail.
- 5.15 In particular circumstances, merger parties may propose a ‘virtual divestiture’ consisting of the divestiture of production capacity¹⁰⁷ for a specified period rather than the conventional disposal of a business or package of assets. Such a proposal may have higher risks and costs than a conventional divestiture, and require ongoing monitoring and compliance activity. The CMA would need to satisfy itself that there was good reason to justify such a proposal in preference to a conventional divestiture and that the risks of the proposal could be appropriately contained.

Preference for avoiding ‘mix-and-match’ divestitures

- 5.16 Divestiture of a mixture of assets from both merger parties (a so-called ‘mix-and-match’ approach) may create additional composition risks such that the divestiture package will not function effectively. Therefore, if divestiture of a set of assets or parts of a business is proposed, it will normally be preferable for all the assets to be provided by one of the merger parties unless it can be demonstrated to the CMA’s satisfaction that there is no significant increase in risk from a mix-and-match alternative.

¹⁰⁵ DG COMP’s [Merger Remedies Study](#) found that carve out problems were a common cause of serious design and implementation issues in a significant proportion of divestiture remedies within its purview.

¹⁰⁶ See the CMA’s investigation into [the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited](#), where the CMA found there would be significant composition risk in the divestiture of several hundred licensed betting offices.

¹⁰⁷ So-called ‘virtual power plant’ remedies are examples of this type of remedy.

Alternative divestiture packages

- 5.17 In some circumstances, it may be appropriate to define a more extensive and/or more marketable divestiture package ('alternative divestiture packages'), which the CMA would require the merger parties to sell if the initially proposed divestiture package were not sold within a specified period.¹⁰⁸
- 5.18 Alternative divestiture packages may be appropriate if there is doubt as to the marketability of the initially proposed divestiture package or where a business is subject to major asset risks and the speed of divestiture is likely to be a critical requirement. In such circumstances, the prior identification of an alternative more extensive and more marketable package may be the most effective means of facilitating rapid disposal if the initial package cannot be sold to a suitable purchaser within a specified period.¹⁰⁹ Alternatively, the CMA may require that, in the event that the merger parties' preferred divestiture does not proceed to its satisfaction within the timescales set out in the UILs, Final Undertakings or Final Order, a divestiture trustee may be appointed to ensure the sale of an alternative package.
- 5.19 The alternative divestiture package will include all the core assets necessary to remedy the SLC. The CMA will wish to satisfy itself that the purchaser of such a package is committed to operating the core assets to compete effectively in the market(s) affected by the SLC, and is not primarily attracted by the additional assets. The CMA will identify the alternative package in its final report, but the existence of an alternative package will generally be excised from the published version of the final report to prevent the existence of the alternative package undermining the divestiture of the initial package.

Suitable purchasers

Criteria

- 5.20 The identity and capability of a purchaser will be of major importance in ensuring the success of a divestiture remedy. The merger parties will therefore need to obtain the CMA's approval of the prospective purchaser(s).
- 5.21 The CMA will wish to satisfy itself that a prospective purchaser is independent of the merger parties, has the necessary capability to compete and is

¹⁰⁸ Such packages are sometimes referred to as 'Crown Jewel' packages. However, in view of the wide variety of usage of this term, the CMA uses the more closely defined terminology of 'alternative divestiture packages'.

¹⁰⁹ See the CMA's investigation into [the completed acquisition by Euro Car Parts Limited of assets of the Andrew Page business](#), where the CMA reserved its right in each overlap area to require divestment of an alternative depot to those nominated by the merger parties.

committed to competing in the relevant market(s), and divestiture to the purchaser will not create further competition concerns. The relative importance that the CMA attributes to each of these criteria will depend on the circumstances of the inquiry. These criteria are considered in more detail below:

- (a) The acquisition by the proposed purchaser must remedy, mitigate or prevent the SLC concerned or any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable.
- (b) Independence. The purchaser should have no significant connection to the merger parties that may compromise the purchaser's incentives to compete with the merged entity (eg an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance).¹¹⁰ It may also be appropriate to consider links between the purchaser and other market players.¹¹¹
- (c) Capability. The purchaser must have access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor. For example, a highly-leveraged acquisition of the divestiture package which left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion. The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority.¹¹²
- (d) Commitment. The CMA will wish to satisfy itself that the purchaser has an appropriate business plan and objectives for competing in the relevant market(s), and that the purchaser has the incentive and intention to maintain and operate the relevant business as part of a viable and active

¹¹⁰ See [Co-Operative Group \(CWS\) Limited v OFT \[2007\] CAT 24](#), paragraph 195.

¹¹¹ See the CMA's investigation into [the completed acquisition by Hain Frozen Foods UK Limited of Orchard House Foods Limited](#).

¹¹² This is because the CMA wishes to be satisfied that the divestment to the proposed purchaser will in fact go ahead. To the extent that a divestment would face difficulties in obtaining such consents, this may call into question the clear-cut nature of the UILs.

business¹¹³ in competition with the merged party and other competitors in the relevant market.^{114,115}

(e) Absence of competitive or regulatory concerns. Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.

- 5.22 Except in circumstances where a divestiture trustee is in place (see paragraphs 5.43 to 5.44), the merger parties are responsible for securing a prospective buyer and demonstrating that it satisfies the CMA's criteria for a suitable purchaser. However, the CMA will keep the progress of the divestiture under close scrutiny.
- 5.23 Where the merger parties receive interest in the divestiture package from multiple prospective buyers, they may ask the CMA to evaluate the suitability of a small set of short-listed purchasers. This is to avoid the merger parties progressing one prospective purchaser, possibly through lengthy due diligence, but this purchaser then being found not to satisfy the CMA's purchaser suitability criteria, and the merger parties having to start the assessment process afresh.
- 5.24 In requiring that the proposed purchaser be independent of and unconnected to the merger parties, the CMA will pay close attention to any links that would exist between the merger parties and the purchaser following divestment. This includes any proprietary interest that the merger parties would retain in or over the divested business that could impede the successful, independent operation of the divested business.¹¹⁶
- 5.25 Purchasers may require access to key inputs or services at appropriate terms from the merger parties, on an interim basis, in order to enable the divestiture to operate effectively. Such arrangements may be permitted by the CMA for a limited period.¹¹⁷ The CMA may also permit or require non-solicitation clauses

¹¹³ The CMA will routinely ask to see the proposed purchaser's annual accounts and business plan for the proposed purchase in assessing whether this criterion is satisfied.

¹¹⁴ This approach was upheld by the CAT in *Somerfield plc v Competition Commission* (2006). The CC excluded limited assortment discount retailers from acquiring Somerfield stores on the basis that these were insufficiently close competitors to conventional supermarkets.

¹¹⁵ The CMA will normally require the selling merger party to require from the divestment purchaser a warranty reflecting this obligation, or a variant of it, in its sale and purchase documentation. Such wording is included in the CMA's [UIL template](#). See paragraph 2.5 and 3.1 of the [UILs given by Vision Express \(UK\) Limited](#) to the CMA on 15 November 2017 in relation to its acquisition of 209 Tesco Opticians outlets.

¹¹⁶ The CMA may require that such links be severed or otherwise addressed as part of the remedy. See paragraph 2.5 of the [UILs given by SRCL Limited and Cliniserve Holdings Limited](#) to the OFT on 31 March 2009, and paragraph 10.2 of the [UILs given by Co-operative Group Limited](#) to the OFT in relation to its acquisition of Plymouth and South West Co-operative Limited on 26 March 2010.

¹¹⁷ See the CMA's investigation into [the anticipated acquisition by Muller UK & Ireland Group LLP of the dairy operations of Dairy Crest Group plc](#), where the CMA accepted UILs by Muller UK & Ireland Group LLP that

or other measures to protect the purchaser from the merger parties for a limited period (eg up to one year) to enable the purchaser to become established as an effective competitor in the relevant market(s).

- 5.26 In terms of determining whether the proposed purchaser has the financial resources, expertise, incentive and intention to maintain and operate the divestment business, the CMA is seeking to assess whether the purchaser will compete vigorously in the future on the basis of what it has acquired to address the SLC or the adverse effect resulting from it. The CMA will consider carefully the evidential basis on which the merger parties (and the proposed purchaser) assert that the proposed purchaser will have an incentive to compete going forward.¹¹⁸
- 5.27 On the basis that the CMA will approve a divestment purchaser only where it is confident that the acquisition by that proposed purchaser does not itself create a realistic prospect of an SLC within any market or markets in the UK, the CMA would not expect to investigate this transaction. This is regardless of whether or not the transaction constitutes a relevant merger situation under the Act.¹¹⁹

Up-front buyers

- 5.28 Where the CMA is in doubt as to the viability or attractiveness to purchasers of a proposed divestiture package (ie composition risk) or believes there may be only a limited pool of suitable purchasers (ie purchaser risk),¹²⁰ it may require the merger parties to obtain a suitable purchaser that is contractually committed¹²¹ to the transaction before approving the UILs (at Phase 1) or it may accept Final Undertakings that the transaction will only proceed once a suitable purchase is contractually committed (Phase 2).¹²² This is because, while, at Phase 1 or Phase 2, undertakings given to the CMA without an

included arrangements to provide for the expansion of an existing supplier to serve national grocery retailers with fresh liquid milk in the areas where the CMA found competition concerns.

¹¹⁸ The CMA will scrutinise the purchaser's incentives particularly carefully in a situation in which the purchaser is paying no compensation for the divested assets or business or a price that is materially below market value.

¹¹⁹ The transaction could still require merger control filings outside the UK.

¹²⁰ See the CC's investigation into [the completed acquisition by Sports Direct International plc of a number of stores from JJB Sports plc](#). In assessing the need for an upfront buyer, the CMA will often consider the number of potential purchasers that could reasonably be expected to be able and willing to acquire the divestment business. See the CMA's investigation into [the completed acquisition by Immediate Media Company Bristol Limited of certain assets of Future Publishing Limited](#), where the CMA, in deciding that an upfront buyer condition was required, noted that the proposed divestment packages were not standalone businesses and the number of possible buyers was reduced.

¹²¹ Contractual commitment may occur, for instance, through exchange of contracts, subject to limited conditions.

¹²² See, the CC's investigations into [the anticipated joint venture between Kemira GrowHow Oyj and Terra Industries Inc](#) and [the proposed acquisition of a controlling interest in Academy Music Holdings Limited by Hamsard 2786 Limited](#).

upfront buyer will typically provide for the appointment of a divestiture trustee to sell the divestiture package (or greater if necessary) at no minimum price in the event that the parties do not achieve a sale within the stated divestment period, this ability is of limited benefit if there are no interested suitable purchasers.

5.29 The CMA generally adopts a more cautious approach with regard to these concerns at Phase 1 than at Phase 2. At Phase 1, the CMA will generally require an upfront buyer unless it considers that there are reasonable grounds for not doing so and, in particular, where the risk profile of the remedy does not require it. This may be the case where, for example, there is a liquid market for the assets or business, the assets or business are viable and profitable, there are a number of potential purchasers, and discussions with purchasers are at an advanced stage. To the extent that the merger parties are unable to identify a suitable purchaser at Phase 1 and so cannot offer an upfront buyer, the CMA can reactivate its duty to refer the merger to Phase 2, where the CMA has enhanced remedy powers.¹²³ This helps to align the interests of the merger parties with those of the CMA and customers, as the merger parties are motivated to achieve a sale swiftly to end their exposure to the possibility of a reference, minimising risks around deterioration of the divestiture package, and avoiding any continuation of the SLC in the market if the merger is completed.

5.30 At both Phase 1 and Phase 2, the use of an upfront buyer brings other advantages in reducing the risk of an unsuccessful remedy:

- (a) The CMA is able to consult publicly on the identity and suitability of the proposed purchaser prior to accepting the UILs or Final Undertakings. This is particularly important where the identity of the purchaser is critical to the success of the divestment remedy (eg where the purchaser will need to apply its existing resources and capability to exploit the divestiture package). The CMA is more likely to be confident to approve such a purchaser in cases where third parties have been formally given an opportunity to comment on that proposed purchaser.
- (b) The certainty provided for by an upfront buyer may provide latitude for the CMA to explore a remedy option that the CMA would not feel confident accepting in a non-upfront buyer context. Certainty around saleability becomes less important where this is going to be addressed prior to the

¹²³ For the merger parties, the upfront buyer mechanism provides them with the option of terminating divestment discussions at Phase 1 and continuing their case at Phase 2 where they experience difficulty in agreeing satisfactory commercial terms with a potential divestment purchaser. This is in contrast to offering UILs without an upfront buyer where those undertakings will typically provide for divestment in these circumstances even at no minimum price.

UILs or Final Undertakings being accepted. For this reason, the CMA is likely to be less prescriptive where an upfront buyer is used, possibly providing merger parties with greater flexibility in determining, for example, which of the overlapping assets they wish to sell.

- 5.31 Where the CMA considers that the competitive capability of the divestiture package may deteriorate pending the divestiture (ie asset risk) or completion of the divestiture may be prolonged, it may also require that the up-front buyer completes the acquisition of the divestiture package before the merger may proceed or, in the case of a completed merger, before the merger parties may progress with integration.
- 5.32 In cases involving the divestment of multiple discrete assets or businesses, of which only a minority raise divestment risks justifying the use of an upfront buyer, the CMA may consider requiring a partial upfront buyer solution. In this situation, the merger parties may be required to sell to an upfront buyer those assets or businesses that raise concerns of the type listed in paragraph 5.28 above, whilst the CMA will permit the remainder of the assets or businesses to be sold following acceptance of the UILs or Final Undertakings.¹²⁴

Effective divestiture process

Objective of process

- 5.33 An effective divestiture process will protect the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale. The process should also allow prospective purchasers to make an appropriately informed acquisition decision.

Protecting the divestiture package

- 5.34 The merger parties may have significant incentives to run down or neglect the business or assets of a divestment package in order to reduce future competitive impact. The resulting asset risk may also be influenced by such factors as the length and complexity of the divestiture process and the pace at which customer goodwill and employee relations may erode.
- 5.35 To protect against asset risk, the CMA will generally impose an Initial Enforcement Order at Phase 1, which will continue at Phase 2, or seek

¹²⁴ See the OFT's investigation into [the anticipated acquisition by Co-operative Group Limited of Somerfield Limited](#), where the OFT required divestment to an upfront buyer only in relation to those stores in which there were expected to be a limited number of potential effective purchasers.

Interim Undertakings or impose an Interim Order at Phase 2. This is to maintain the divestiture package and ensure the competitive position of the package is not undermined. Generally, it will require the divestiture package to be held and managed separately from the retained business.¹²⁵

- 5.36 The appointment of a 'hold-separate' manager, or management team, may also be required to manage the assets/business to be divested, in order to maintain their competitiveness and separation from the retained assets.

Use of monitoring trustees

- 5.37 For completed mergers where a monitoring trustee has not already been appointed, at the point at which UILs, Final Undertakings or a Final Order are put in place, the CMA will normally require the appointment of a monitoring trustee to oversee the merger parties' compliance and, if applicable, the performance of the hold-separate manager.
- 5.38 A monitoring trustee may also be required for anticipated mergers where the CMA determines that the risks associated with the divestment remedy warrant it.
- 5.39 The monitoring trustee will have an overall duty to act in the best interests of securing an appropriate divestiture. The trustee will monitor 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 UILs, Final Undertakings or Final Order. Considerations regarding the appointment of trustees are outlined in Chapter 8.

The divestiture period

- 5.40 At Phase 2, the CMA will state in its final report the period in which the parties should achieve effective disposal of a divestiture package to a suitable purchaser (ie the 'initial divestiture period'). However, this period may be excised from the final report if it is considered that disclosure to third parties may undermine the divestiture process.
- 5.41 The length of this period will depend on the circumstances of the merger, but will normally have a maximum duration of six months. The CMA, when determining the divestiture period, will seek to balance factors which favour a shorter duration, such as minimising asset risk and giving rapid effect to the remedy, with factors that favour a longer duration, such as canvassing a

¹²⁵ Considerations regarding the use, design and implementation of interim measures are set out in [CMA60](#). The CMA is consulting on [new draft guidance](#) on interim measures to replace [CMA60](#).

sufficient selection of potential suitable purchasers and facilitating adequate due diligence. The divestiture period may be extended by the CMA where this is necessary to achieve an effective disposal.

- 5.42 While the merger parties are responsible for securing a suitable purchaser in the divestiture period, the CMA will keep the progress of the divestiture process under close review, through regular reporting and, where applicable, the scrutiny of a monitoring trustee.

Use of divestiture trustees

- 5.43 If the merger parties cannot procure divestiture to a suitable purchaser within the terms of their UILs at Phase 1 in non-upfront buyer cases, or within the specified divestiture period at Phase 2, then, unless this period is extended by the CMA, an independent divestiture trustee may be appointed to dispose of the package within a specified period (the trustee's divestiture period). The divestiture will be at the best available price in the circumstances, but subject to prior approval by the CMA of the purchaser and the divestiture arrangements.
- 5.44 The CMA may require that a divestiture trustee is appointed before the end of the initial divestiture period (eg if the CMA is not satisfied that divestiture is likely to take place within that period) or, in unusual cases, at the outset of the divestiture process.¹²⁶ The role of a divestiture trustee is distinct from that of a monitoring trustee, but the two roles may be performed by the same person.

Review of divestiture documentation

- 5.45 The CMA will wish to ensure, before providing its final approval of any divestiture, that the divestiture agreement and relevant supporting documentation convey all assets required to be divested, and contain no provisions that are inconsistent with the remedial objectives of the divestiture.

¹²⁶ See the CC's investigations into [the acquisition of the Co-operative Group \(CWS\) Limited's store at Uxbridge Road, Slough, by Tesco plc](#) and [the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc](#).

6. INTELLECTUAL PROPERTY REMEDIES

Introduction

- 6.1 The licensing or assignment of IP, including patents, licences, brands and data, may be viewed generally as a specialised form of asset divestiture. However, in certain cases, the terms of a licence may contain ongoing behavioural elements such that the remedy is a structural/behavioural hybrid. The key element is the extent to which any material link between licensor and licensee will exist following award of the licence.
- 6.2 A remedy that requires an assignment or licence of an IP right that is exclusive, irrevocable and non-terminable with no performance-related royalties will effectively be treated by the CMA as structural in form and subject to similar consideration and evaluation as an asset divestiture. A licence that requires a licensee to rely on the licensor for updates of the technology or continuing access to specialist inputs or know-how will be regarded as a behavioural commitment, which is subject to significant risks of not being an effective remedy.
- 6.3 For licensing of IP alone to be effective as a remedy, it must be sufficient to enhance significantly the acquirer's ability to compete with the merger parties and thus address the SLC.¹²⁷ Such a remedy may not be effective if the IP needs to be accompanied by other resources (eg technical expertise and sales networks) to enable effective competition if these resources are unlikely to be available in potential purchasers of the IP.
- 6.4 In view of the possible risks to effectiveness that may result from using IP remedies, the CMA will generally prefer to divest a business including IP rights, where this is feasible, rather than rely on licensing IP alone. This is because divestiture of a business including IP rights is more likely to include all that the acquirer needs to compete effectively with the merger parties.

Design factors

- 6.5 The appropriate design of an IP remedy may be influenced by a number of case specific factors, such as:
- (a) the form and jurisdiction of the relevant IP (eg patent, exclusive licence and trademark). The CMA will wish to ensure that the IP to be divested is

¹²⁷ See the CC's investigation into [the completed acquisition of GV Instruments Limited by Thermo Electron Manufacturing Limited](#), where the CC rejected a licensing remedy proposed by the merger parties on the basis that it would not adequately restore competition lost as a result of the merger.

sufficient to enable a purchaser to compete effectively. This may sometimes include less easily transferable forms of IP (eg 'know-how').¹²⁸ Where there is uncertainty regarding the scope of a licence or its terms and conditions, the parties may be required to divest the underlying right and accept a licence back;

- (b) the relative specialisation of the IP. Highly specialised IP may impose particular constraints on selecting a suitable acquirer, as there may be few parties competent to use the IP;
- (c) the rate of innovation expected in the relevant market. A high rate of innovation may imply a shorter required duration for a licensing remedy than in a more stable market; and
- (d) forms of payment for IP. The form of payment (eg one-off payment, royalties or profit shares) may have an effect on competitive incentives.

6.6 IP rights generally enable the remuneration of investment in innovation by granting time-limited exclusivity. In considering the design and scope of IP remedies, the CMA will recognise the need for preserving incentives for innovation while addressing competitive concerns.

6.7 Mergers critically dependent on IP rights may have international repercussions due, for instance, to international filing and licensing of patent rights. International cooperation with other competition authorities is therefore often particularly necessary in these cases.

¹²⁸ See the European Commission's investigation into [the creation of a jointly controlled full function joint venture between Shell and BASF](#), where the European Commission found that certain difficulties in transferring 'know-how' and other types of IP could have significantly reduced the scope and effectiveness of a licensing commitment.

7. BEHAVIOURAL REMEDIES

Introduction and general principles

- 7.1 Behavioural remedies are designed to address an SLC and/or its adverse effects by regulating the ongoing conduct of parties following a merger.
- 7.2 The CMA will generally only use behavioural remedies as the primary source of remedial action where:
- (a) structural remedies are not feasible;
 - (b) the SLC is expected to have a short duration; or
 - (c) at Phase 2, behavioural measures will preserve substantial RCBs that would be largely removed by structural measures.
- 7.3 The CMA may also use behavioural measures as an adjunct to structural measures.

Design, monitoring and enforcement

- 7.4 Behavioural remedies seek to change aspects of business conduct from what may be expected, based on businesses' incentives and resources. The design of behavioural remedies should seek to avoid four particular forms of risk to enable these measures to be as effective as possible:
- (a) Specification risks: these risks arise if the form of conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance. The intended operation of the measure needs to be clear to the persons to whom it is directed and other relevant parties, so that it is apparent what conduct constitutes compliance and what does not. For example, a commitment to permit access 'on fair and reasonable' terms may create significant specification risk, as the provision may be insufficiently specific to allow effective enforcement. Markets that are subject to frequent change in products or supply arrangements may be particularly prone to specification risk if the definition of required conduct is vulnerable to such changes.
 - (b) Circumvention risk: as behavioural remedies generally do not deal with the source of an SLC, it is possible that other adverse forms of behaviour may arise if particular forms of behaviour are restricted.¹²⁹ For example, if

¹²⁹ This may be sometimes referred to as a 'waterbed effect'.

prices are controlled, a firm may reduce product quality. To avoid or reduce these risks, behavioural measures need to deal with all the likely substantial forms in which enhanced market power may be applied. In practice, this may not be feasible or may make the behavioural measures too complex to monitor.

- (c) Distortion risks: these are risks that behavioural remedies may create market distortions that reduce the effectiveness of these measures and/or increase their effective costs. Distortion risks may result from remedies overriding market signals or encouraging circumvention behaviour. For example, prohibiting the use of long-term contracts may result in a lack of incentives to compete for new business.
- (d) Monitoring and enforcement risks: even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement. This may be due to a variety of causes, such as the volume and complexity of information required to monitor compliance, limitations in monitoring resources, asymmetry of information between the monitoring agency and the business concerned, and the long timescale of enforcement relative to a rapidly moving market.

- 7.5 For behavioural remedies to have the desired impact, it is essential that there are effective and adequately resourced arrangements in place for monitoring and enforcement, so that there is a powerful threat that non-compliance will be detected and that action will be taken to enforce compliance where this is necessary.
- 7.6 The CMA is responsible for monitoring and enforcing compliance of remedies under the Act.¹³⁰ Customers and competitors of the merged entity may be in a strong position to report to the CMA on instances of non-compliance where they have appropriate resources and incentives. However, such persons may be inhibited from fulfilling this reporting role by lack of resources and verifiable information, lack of understanding of the measures, fear of reprisals and other disincentives. The likelihood of effective monitoring will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime.
- 7.7 In view of constraints on the CMA's resources and the possible limitations in the reliance that can be placed on the reporting role of customers and competitors, it may be necessary for the CMA to require the merger parties to

¹³⁰ Section 92 of the Act.

appoint and remunerate a third-party monitor to enable the CMA to fulfil its monitoring responsibilities effectively.¹³¹

- 7.8 If the merged entity is considered to have a dominant market position, then certain types of conduct that behavioural remedies may seek to prevent (eg predation or foreclosure of access) may already be prohibited under section 18 of the Competition Act 1998 or under Article 102 of the Treaty on the Functioning of the European Union (TFEU). Similarly, a behavioural remedy may seek to prevent the making of agreements that may be prohibited under section 2 of the Competition Act 1998 or Article 101 of the TFEU.
- 7.9 The CMA recognises the importance of ex-post competition enforcement. However, the CMA has an obligation to achieve as comprehensive a solution to the SLC and its adverse effects as is reasonable and practicable. The CMA will therefore normally prefer to specify its own remedial measures rather than rely on the general provisions of competition law, as this has the advantages that the CMA's measures can be designed to take account of the particular circumstances of the case, and the provisions for monitoring and enforcement can be fully defined.

Duration

- 7.10 As behavioural remedies are designed to have ongoing effects on business conduct throughout the period they are in force, the duration of these measures is a material consideration.
- 7.11 The CMA may specify a limited duration if measures are designed to have a transitional effect. Where measures need to apply as long as an SLC persists and as this period can rarely be predicted during the course of an investigation, the CMA will generally rely on the merged parties applying for variation or cancellation of the measures on the basis of a significant change of circumstances¹³² or possibly recommend that the CMA reviews the need for the measures after a given period. However, the CMA may, in addition, specify a long-stop date in a 'sunset clause' beyond which the measures will definitely not apply. The period used for the long-stop date will depend on the circumstances of the case.

¹³¹ See the OFT's investigation into [the completed acquisition by Macquarie UK Broadcast Ventures Ltd of National Grid Telecoms Investment Ltd, Lattice Telecommunications Asset Development Company Ltd and National Grid Wireless No.2 Ltd](#), where the merger parties undertook to remunerate an adjudicator responsible to the OFT to resolve contractual issues as part of a package of behavioural remedies.

¹³² Section 92 of the Act.

Types of behavioural remedy

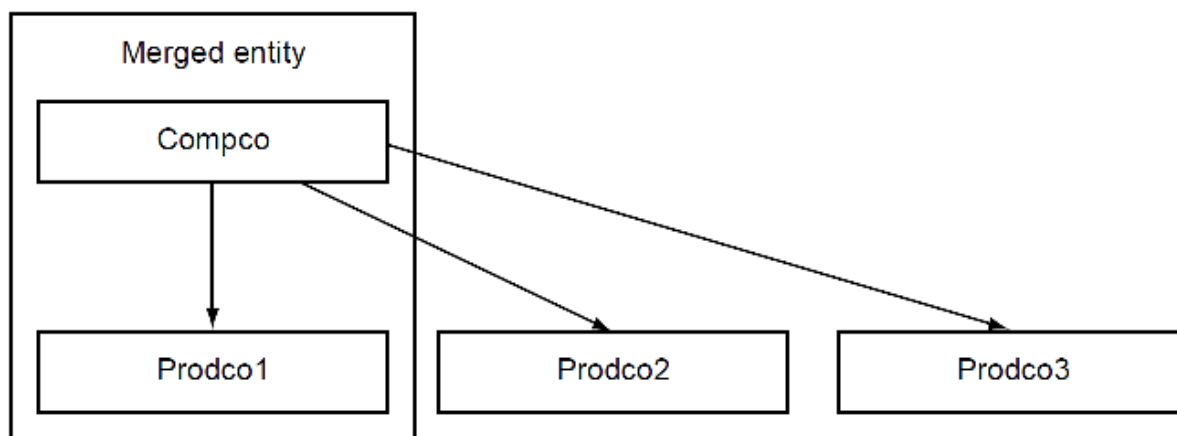
- 7.12 Effective remedy packages may require both enabling measures, which address an SLC by seeking to remove obstacles to competition or stimulating competition, and measures that control outcomes, which restrict the adverse effects of an SLC rather than address the SLC itself. Enabling measures may be further subdivided between measures that restrain the impact of vertical mergers and measures that restrain market power in a horizontal market context.
- 7.13 The variety of circumstances, conduct and possible behavioural measures that may be encountered on individual investigations is extensive. This guidance therefore seeks to outline the CMA's general approach rather than deal with all possibilities.

Enabling measures

Restraining the impact of vertical mergers

- 7.14 A vertical merger involves the merger of firms at different levels of the supply chain of particular goods or services. Where a party to such a merger has significant market power at one or more levels of the supply chain, the resulting merger may result in an SLC, typically through the incentive and ability of the merged entity to disadvantage competitors by foreclosing access to key inputs, facilities or customers and/or exploiting access to confidential information.
- 7.15 For example, if, as illustrated in Figure 3 below, the manufacturer (Compco) of most of a key industry component acquired a major user of this component (Prodco1) then the ability of other users (Prodco2 and Prodco3) to compete could be disadvantaged by the merged entity through restricting supply of this component to Prodco2 and Prodco3 or making use of information concerning component orders by Prodco2 and Prodco3.

Figure 3: Vertical merger configuration



Source: CMA.

- 7.16 An SLC arising from a vertical merger may be remedied effectively by structural measures. Such measures might involve reversing the merger, but could also involve reducing the market power that the merged entity has at the critical stage of the supply chain (eg partial divestiture of Compco). However, if divestiture is not appropriate or feasible (see paragraph 7.2), then behavioural measures may enable continued access to necessary products or facilities on appropriate terms, or prevent the merged entity exploiting privileged access to information.

Access remedies

- 7.17 Access remedies seek to maintain or restore competition by enabling competitors to have access on appropriate terms to the products and facilities of a merged entity that they require to remain competitive.
- 7.18 An access remedy will normally need to specify an access commitment by the merged entity to customers in significant detail so that customers and monitoring agencies can enforce the commitment effectively. This will include details of the product or facility to be provided, including quality and technical parameters, and the terms of supply of the product or facility, including service levels and the basis of pricing. The latter may be particularly complex and will be subject to many of the same issues that are encountered with price caps. If the access commitment is not specified or monitored in sufficient detail, then the measure will be vulnerable to specification risk and the merged entity may be able to avoid its obligations. In such circumstances, the CMA will consider alternative forms of remedy (eg divestiture) that are likely to be more effective.
- 7.19 To overcome specification risk, the CMA will generally require that an access remedy should make explicit provision for accommodating future changes, for example, in product specifications or supply arrangements. Where a market is

likely to be subject to frequent technological change or other wide-ranging market developments, there is likely to be a significant risk that an access remedy will become ineffective if the terms of the access commitment do not accommodate these changes. However, significant technological change might also reduce the market power that results in the SLC (eg effective substitutes are developed for the component supplied by Compco).

- 7.20 In some supply arrangements, certain factors may be particularly important for competitive access that are not easily specified (eg quality of product support, priority for system upgrades, or quality of management assigned to a customer's account). Such factors may result in 'soft biases' in access to supply that may generate significant circumvention risk and may significantly undermine the purpose and suitability of an access remedy.¹³³
- 7.21 In certain circumstances, it may be possible to simplify the specification of an access remedy by obliging the merged entity to supply a particular product on fair, reasonable and non-discriminatory (**FRAND**) terms, where supplies to external customers are provided on the same or similar terms as apply to its own businesses. For this to be effective, the nature of FRAND terms must deal adequately with the circumstances of external customers and must be transparent to customers and monitoring agencies in sufficient detail to enable effective enforcement.
- 7.22 The use of FRAND terms may still leave competitors vulnerable to a margin-squeeze by the merged entity as it may have an incentive to charge all downstream businesses, including its own, a uniformly high price since reduced profitability in its downstream business can be offset by higher profitability in its upstream business. The CMA may therefore require that use of FRAND terms is accompanied by provisions to protect against a margin squeeze (eg submission of regular reports demonstrating full cost recovery in the downstream business).
- 7.23 Where it is necessary to preserve access to a key facility owned or controlled by a vertically merged company, and the usage and capacity of the facility is readily assessed, the CMA may determine that the most practical and effective means of providing access to competitors is to cap usage of the facility by the merged company and require it to auction remaining capacity to

¹³³ See the CC's investigation into [the proposed acquisition of London Stock Exchange plc by Deutsche Börse AG or Euronext NV](#), where the CC rejected a solely behavioural access commitment to clearing and settlement services due, in part, to the likely difficulty of 'soft biases'.

third parties.¹³⁴ This would be effectively a form of ‘virtual divestiture’ as considered in paragraph 5.15.

‘Firewall’ measures

- 7.24 ‘Firewall’ measures¹³⁵ seek to prevent a vertically integrated company from accessing and using privileged information generated by competitors’ use of the merged company’s facilities or products. For example, in Figure 3, in the absence of firewall provisions, Prodco1 may be able to exploit privileged information regarding the orders and deliveries of key components from Compco to Prodco2 and Prodco3.
- 7.25 Firewall measures prevent access to privileged information by effectively insulating the firm or division generating the information from other group companies. This is generally achieved by restricting information flows and use of shared services, physically separating premises and staff, and regulating transfers of management and any permitted interactions between relevant staff.¹³⁶
- 7.26 To ensure effective compliance with firewall provisions, the relevant firm will normally need to commit significant resources to educating staff about the requirements of the measures and supporting the measures with disciplinary procedures and independent monitoring.

Restraining horizontal market power

- 7.27 Where a firm gains market power as a result of a horizontal merger, it may be able to use the strength of this position in a number of ways to limit or restrain competition, including by:
- (a) requiring customers to enter into long-term and/or exclusive contracts;
 - (b) creating switching costs for customers through, for example, volume discounts, contractual penalties or requiring complex switching procedures;
 - (c) bundling or tying the sale of particular products; and

¹³⁴ See the CC’s investigation into [the completed acquisition by Centrica of Dynegy Storage Ltd and Dynegy Onshore Processing UK Ltd](#), where the CC required Centrica to restrict its usage of the Rough Gas Storage Facility to a percentage of total capacity to prevent foreclosure of access.

¹³⁵ These may be referred to alternatively as ‘Chinese wall’ measures.

¹³⁶ See the CC’s investigation into [the completed acquisition by Centrica of Dynegy Storage Ltd and Dynegy Onshore Processing UK Ltd](#), which provides an example of the measures that may be required by the CMA to make firewalls effective.

(d) selective discounting or predation.

- 7.28 This category of remedies comprises measures that prohibit, restrict or discourage types of behaviour, such as those listed above, that may limit or restrain competition. The selection and design of these measures will depend critically on the circumstances revealed by the investigation and the need to avoid specification, circumvention, and monitoring and enforcement risks. Where circumstances point to the use of these measures, the CMA will follow the general approach of considering the likely anti-competitive behaviours that the merger parties may have an incentive and ability to engage in. It will then consider the measures that may be taken to prevent or limit these behaviours and the effectiveness and costs of these measures.
- 7.29 As an example of this approach, the use of long-term and/or exclusive contracts may create a significant barrier to entry or expansion. However, if, in the market in question, firms need to invest heavily to acquire new customers (eg by investing in new facilities or systems), then requiring that all contracts are short term in nature may generate significant distortion risks, as this would reduce incentives for firm to compete for new contracts due to insufficient opportunity to recoup their investment. In implementing a constraint on the use of long-term contracts, the CMA will therefore seek an appropriate balance between facilitating switching and permitting sufficient incentives to compete for new contracts.
- 7.30 Selective discounting or price discrimination can also have the effect of creating barriers to entry or expansion when used systematically to reduce prices to particular customers that are more likely to switch to other suppliers. Measures to restrict selective discounting or price discrimination may therefore be necessary where enabling entry and expansion is appropriate to address the SLC. However, such a restriction may only be necessary for a limited period until other sources of competition develop. Measures restricting selective discounting or price discrimination could generate significant distortion risk by adversely affecting the competitive dynamics of a market if maintained in the long term.
- 7.31 The CMA will have particular regard to avoiding circumvention risk in implementing measures limiting behaviour that would restrict competition. This is because firms with enhanced market power may readily evolve new forms of behaviour to replace restricted conduct.

Controlling outcomes

- 7.32 Remedies that control or restrict the outcomes of business processes, such as price caps, supply commitments and service level requirements, seek to

prevent the merger parties from exercising the enhanced market power that they are likely to acquire from a merger. As such, these remedies seek to restrict the adverse effects expected from a merger rather than addressing the source of the SLC.

- 7.33 In order to overcome specification risk, remedies that control outcomes normally need to specify in significant detail the products or services that are subject to control and the basis of the control (eg the application of price indices to a price cap). The remedy will generally also need to specify how the control will deal with changes, such as the introduction of new products.
- 7.34 This class of remedy is subject to several significant disadvantages regarding its effectiveness and cost:
- (a) Defining appropriate parameters for the control measure (eg the level of a price cap) may be complex and impractical and the measure may therefore be vulnerable to specification risks. This is especially likely where any of the following conditions apply:
 - (i) Pricing in the relevant market is volatile.
 - (ii) Products or services are differentiated rather than homogeneous.
 - (iii) Prices are individually negotiated.
 - (iv) Supply arrangements and products are subject to significant ongoing change.
 - (b) This class of remedy directly overrides market signals, with the result that it may generate substantial distortion risks over time, increasing the effective cost of the remedy or reducing its effectiveness. For example, a price cap may deter entry or a supply commitment may discourage product innovation.
 - (c) The control may be vulnerable to circumvention risks despite the addition of complex preventative provisions. For example, a price cap may be circumvented by a firm reducing the quality of controlled products or restricting the supply of controlled products.
 - (d) Monitoring and enforcement may be costly and intrusive and may lack effectiveness, especially where the form of remedy is complex.
- 7.35 In view of these disadvantages the CMA will only use remedies that control outcomes where other, more effective, remedies are not feasible or appropriate. In addition, where this class of remedy is employed, it is most

likely to be used on a temporary basis unless there is no alternative to a continuing regulatory solution.

Price caps

- 7.36 Price caps are likely to be the most common form of measure for controlling outcomes and illustrate many of the issues outlined above.
- 7.37 Different approaches may be adopted to defining the products and prices to be controlled depending on the circumstances of the case:
- (a) Prices of all affected products may be individually capped. This may be impractical where a large number of products are involved and may be inflexible in dealing with product changes.
 - (b) The average price of a basket of products may be capped. This allows greater flexibility in taking account of shifts in demand between products, but the weighting of the constituents of the basket may be problematic and subject to distortion (eg if revenue-weighting is used and the firm introduces a number of low cost product variants).
 - (c) The price cap may be restricted to key benchmark products. This approach could greatly simplify monitoring and compliance, but is only likely to be effective if a few key products continue to account for a large proportion of sales, and the pricing of other products is expected to remain closely related to the benchmark products.
- 7.38 The CMA will seek a basis for the price cap which will prevent the enhanced market power acquired through the merger from being reflected in prices. The basis of a price cap may take a variety of forms:
- (a) Prices may be benchmarked to the prices of products in analogous markets that are determined by competition. In practice, this may only be feasible in limited circumstances due to the lack of an analogous market.
 - (b) Prices may be determined on the basis of input cost data and an approved return on capital. This resembles the approach adopted by many sectoral regulators, but generally requires a highly resource-intensive regulatory process backed by extensive information gathering and enforcement powers to be effective.
 - (c) The price cap may be indexed to pre-merger prices using an index that is representative of input cost changes after incorporating current productivity gains. The CMA will wish to use an index which has robust data sources and is constructed independently of the merger parties. Use

of such an index may provide a broad approximation to a competitive price outcome in the short term, but is at risk of departing significantly from such an outcome in the medium to long term.

- 7.39 The CMA will generally require that price caps are accompanied by measures to prevent circumvention risk that may arise, for example, through the merged entity restricting the supply or service levels of price-controlled products or reducing product quality.

8. TRUSTEES AND THIRD-PARTY MONITORS

Appointment and responsibilities

- 8.1 Trustees or third-party monitors (collectively ‘trustees’) may be used by the CMA in a variety of circumstances to assist in the monitoring and implementation of UILs, Final Undertakings or Final Orders.
- 8.2 Trustees should always be independent of the parties, have appropriate qualifications and capacity for the task, and should not be subject to conflicts of interest. Trustees may be part of an accounting firm, management consultancy or other professional organisation. Trustee candidates may be proposed by the merger parties, but can only be appointed by the parties following approval by the CMA.
- 8.3 The CMA may set a timetable for the appointment of trustees and would normally expect a trustee to be nominated and approved before UILs or Final Undertakings are accepted or a Final Order made. Typically, only the CMA can terminate the appointment of trustees before completion of their responsibilities. However, the merger parties can make representations to the CMA to replace the trustees if they have good cause.
- 8.4 The trustee’s responsibilities will be specified in the trustee mandate/letter of engagement, which will be approved by the CMA. The trustee will perform the directions of the CMA in accordance with the mandate/letter and will not be permitted to accept instructions from the merger parties. The mandate/letter will also have appropriate clauses governing conflict of interest, trustee liability and confidentiality.

Remuneration

- 8.5 The merger parties are responsible for the remuneration of trustees. The structure of remuneration must not compromise a trustee’s independence and must provide sufficient incentive to perform the required function to an appropriate standard. To ensure that this is so, the CMA must approve the remuneration agreement.