

# A Quick Guide to UK Merger Assessment

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# 1. INTRODUCTION

- 1.1 Mergers can bring benefits to the economy and help businesses and markets grow. However, some can harm competition and result in, for example, higher prices, reduced quality or choice for consumers, or reduced innovation. The aim of merger review is to ensure that mergers do not substantially lessen competition and lead to worse outcomes for consumers, for example, through higher prices, lower quality or reduced choice.
- 1.2 This quick guide provides a simple overview of the merger regime in the UK and the approach of the Competition and Markets Authority (CMA) when reviewing mergers.
- 1.3 The CMA has published more detailed guidance on:
  - (a) the circumstances in which the CMA may review a merger, and its procedures for doing so ([Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#)), and
  - (b) the economic assessment of mergers ([Merger Assessment Guidelines \(CMA129\)](#)).

That guidance takes precedence in the event of any inconsistency with this guide.

## 2. MERGER REVIEW IN THE UK

### Who is responsible for UK merger review?

- 2.1 Merger review in the UK is primarily the responsibility of the CMA, which is an independent non-Ministerial Government Department and is the UK's principal competition and consumer protection authority. In exceptional cases the Secretary of State may intervene if the merger affects national security, media plurality, the stability of the financial system or public health emergencies.

### *What mergers may the CMA review?*

- 2.2 The CMA has the jurisdiction to examine a merger (which includes acquisitions and joint ventures) where:
- (a) two or more enterprises cease to be distinct
  - (b) and
    - (i) either the UK turnover of the acquired enterprise exceeds £70 million
    - (ii) or the two enterprises supply or acquire at least 25 per cent of the same goods or services supplied in the UK (or a substantial part of it) and the merger increases that share of supply.<sup>1</sup>
- 2.3 The term 'enterprise' may include whole businesses or parts of businesses, whether or not they operate for profit. Two enterprises cease to be distinct if they are brought under common ownership or control. This includes situations falling short of outright voting control, such as where one enterprise controls or has material influence over the policy of the other, even though it does not hold the majority of the voting rights in that other enterprise.
- 2.4 Further information is available in Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2).

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<sup>1</sup> For mergers involving an enterprise being taken over which is active in the following areas: a) the development or production of items for military or military and civilian use; b) the design and maintenance of aspects of computing hardware; c) the development and production of quantum technology; d) artificial intelligence; e) cryptographic authentication; and f) advanced materials specified, the CMA has jurisdiction to examine the merger if the UK turnover of the acquired enterprise exceeds £1 million or the relevant enterprise being acquired or merged has a share of supply or purchase of 25% or more of relevant goods or services in the UK or in a substantial part of it.

## How may the CMA come to review a merger?

2.5 There are two routes by which the CMA may come to review a merger:

- (a) **Notification.** Businesses can formally notify a merger to the CMA by completing a Merger Notice. A template Merger Notice, available at [www.gov.uk/cma](http://www.gov.uk/cma), sets out the categories of information required by the CMA, together with guidance notes to assist businesses in identifying the specific nature and extent of information required in their case. Before submitting a Merger Notice, businesses are strongly encouraged to approach the CMA to discuss their merger (and any drafts of the businesses' completed Merger Notice) on a confidential basis. Such pre-notification discussions can help to clarify the information and evidence that the CMA will require under the Merger Notice, discuss the approach to the assessment of potential competition concerns and, in some cases, discuss potential remedy options in the event that competition concerns are found. Pre-notification discussions can occur before a merger is public knowledge. Businesses cannot formally submit a Merger Notice until the merger has been made public.
- (b) **CMA own-initiative investigation.** The CMA has a responsibility to keep merger activity under review and can investigate mergers that have not been notified to it. The CMA obtains information about anticipated and completed mergers from a range of sources, including from third parties. The CMA also welcomes short briefings from merger parties about their transactions. Where the CMA learns of a merger that it thinks might harm competition, the CMA can open an investigation on its own initiative. The CMA may contact the businesses in order to establish whether the thresholds that trigger its jurisdiction are met and to obtain information about the merger. Further information is available in *CMA's mergers intelligence function* (CMA56).

## How long does the CMA's merger review take?

2.6 The CMA has a statutory deadline of 40 working days in which to complete the initial stage of its merger review process (Phase 1). That statutory period starts on the first working day after the CMA confirms (a) that it has received a satisfactory Merger Notice, containing the information it requires for its review, or (b) in the case of an investigation started on the CMA's initiative, that it has received sufficient information to enable it to begin its investigation. The CMA may 'stop the clock' in certain circumstances, in particular where information the CMA has formally requested remains outstanding.

- 2.7 At Phase 1, the CMA determines whether it believes that the merger results in a realistic prospect of a substantial lessening of competition (SLC). If so, the CMA has a duty to launch an in-depth assessment (Phase 2), although merging parties may offer to modify aspects of the transaction to ‘remedy’ any competition concerns identified (known as Undertakings In Lieu (UILs)), thereby obtaining a resolution at Phase 1, conditional on acceptance of the remedies (see **Does the CMA always launch a Phase 2 investigation into a problematic merger?** below).
- 2.8 At Phase 2, limited to 24 weeks (extendable by up to 8 weeks for special reasons), a CMA panel of independent Members conducts an in-depth investigation to assess if a merger is expected to result in an SLC. If an SLC is expected, the CMA decides upon the remedies required. Such remedies may include prohibiting the merger or requiring the divestiture (sale) of parts of the business (see **What remedies can the CMA apply at Phase 2?** below). Having issued a final report in which it has decided that a merger gives rise to an SLC, the CMA has a statutory deadline of 12 weeks (extendable by up to six weeks for special reasons) to make an order or accept undertakings to give effect to its Phase 2 remedies.

### **Do businesses have to pay a fee for the CMA’s merger review?**

- 2.9 Yes, a fee is payable by the notifying business for the CMA’s review, subject to some limited exceptions (including where the merger is found to be outside the CMA’s jurisdiction). The obligation to pay a fee is the same whether the merger is notified by the businesses or reviewed by the CMA on its own initiative.

### **Do businesses have to tell the CMA that they are merging?**

- 2.10 No. Although businesses often choose to do so, and there can be significant benefits to merger parties in notifying a merger to the CMA, there is no requirement that businesses seek the CMA’s approval before merging, even where the CMA would have jurisdiction to review the merger (see **What mergers may the CMA review?** above).

### **Why do businesses decide to tell the CMA they are merging?**

- 2.11 Approval before merging benefits businesses by giving legal certainty that the merger can proceed. In addition, there may be risks for businesses if they do not do so.

- 2.12 Not telling the CMA about a merger does not mean that it cannot or will not review it. As explained above, the CMA has a responsibility to keep merger activity under review and may investigate, on its own initiative, mergers that have not been notified. The CMA has four months from the merger being made public or it being completed (whichever is the later) to decide whether or not to launch an in-depth Phase 2 assessment.
- 2.13 Completing a merger without notifying the CMA before doing so can also result in significant additional costs for businesses:
- (a) First, the CMA has powers to impose restrictions (known as interim measures) on businesses to prevent them taking actions (for example, integration of the merging businesses) that might pre-empt the CMA's exercise of its merger review powers. For instance, the CMA can appoint a trustee to monitor these measures at the businesses' expense.
  - (b) Second, costs can arise from having to dispose of the merged business if the merger is prohibited (see **What remedies can the CMA apply at Phase 2?** below).
- 2.14 In light of the above, businesses should consider carefully whether to tell the CMA about their merger before completing. In particular, businesses are strongly encouraged to do so where the merger could give rise to possible competition concerns. As a guide, over the last five years around 25 to 30 per cent of the total number of Phase 1 cases, and around 35 to 40 per cent of Phase 1 cases where an SLC has been found, have been 'own-initiative' investigations rather than mergers that were notified.

### **Does the CMA always launch a Phase 2 investigation into a potentially problematic merger?**

- 2.15 If the CMA believes that the merger results in a realistic prospect of an SLC it has a duty to launch a more detailed Phase 2 assessment.
- 2.16 However, the CMA may decide not to launch a Phase 2 investigation where the merging businesses have, within 5 working days of receiving the CMA's reasons for its decision that there is a realistic prospect of an SLC, offered UILs (mainly offers to sell businesses or assets) that remedy in a clear cut manner the SLC that the CMA believes may occur.
- (a) Although UILs are offered formally by businesses only once the CMA has given its reasons for its decision that there is a realistic prospect of an SLC, this does not prevent businesses considering, and discussing with the CMA, possible UILs before then. Throughout the course of its

investigation, including during pre-notification discussions, the CMA will seek to give the businesses guidance on UILs they are considering. In cases where the merger parties accept at an early stage that there is sufficient evidence of a realistic prospect of an SLC, they may request that the case be fast-tracked to consideration of UILs. The fact that a business wants to discuss possible UILs with the CMA will not increase the likelihood that the CMA will decide there is a realistic prospect of an SLC.

- (b) The CMA may decide that the UILs offered by a merging business must include a commitment that, before the CMA formally accepts the undertakings, the merging business will enter into a sale agreement with an 'upfront buyer' for the business or assets that it is offering to sell. Businesses should consider this when deciding what to include in any offer of UILs at Phase 1. Further information is available in *Merger remedies guidance* (CMA87).

2.17 The CMA also has the discretion not to launch a Phase 2 investigation if it believes that:

- (a) the market is not of sufficient importance to justify a Phase 2 investigation;
- (b) there are benefits to customers arising from the merger that outweigh the effect of the SLC (see also Efficiencies below); or
- (c) the anticipated merger is not sufficiently advanced or likely to proceed to justify a Phase 2 investigation.

2.18 Further information is available in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2) and *Mergers: Exceptions to the duty to refer guidance* (CMA64).

## How does a Phase 2 review differ from a Phase 1 review?

2.19 The CMA is required to consider both at Phase 1 and at Phase 2 whether there is a relevant merger situation (see **What mergers can the CMA review?** above) and if so, whether it will result in an SLC. Although the CMA is responsible for both Phase 1 and Phase 2, the decision makers at Phase 2, comprising of a panel of independent Members, are different to the decision maker at Phase 1.

2.20 The CMA uses the same overall analytical approach in Phase 1 and Phase 2 when assessing the potential effects of a merger on competition. However, the CMA applies different thresholds as to the likelihood of an SLC at each phase. At Phase 1, the CMA considers whether there is a 'realistic prospect'

of an SLC; at Phase 2, the CMA decides whether the merger is more likely than not to lead to an SLC (that is, on the ‘balance of probabilities’).

- 2.21 Phase 2 is the final phase of the CMA’s investigation and so the actions that it may take at the end of that Phase are different from those at the end of Phase 1 (as described in **Does the CMA always launch a Phase 2 investigation into a problematic merger?** above). If the CMA finds after its Phase 2 investigation that the merger is not expected to result in an SLC, no further action is taken. But if the CMA finds at Phase 2 that a merger is expected to result in an SLC, it will decide what action should be taken to remedy, mitigate, or prevent that SLC, and can impose remedies by order if it is not able to agree them with the businesses, including prohibiting the merger (see **What remedies can the CMA apply at Phase 2?** below).

### 3. MERGER ASSESSMENT

#### What is a substantial lessening of competition (SLC)?

- 3.1 Competition is the process of rivalry over time between businesses seeking to win customers' business over time by offering them a better deal. Both price and non-price aspects of competition are often important parts of the competitive process. In some cases, non-price competition may be the primary focus: for example, when customers do not pay a monetary price for consuming digital services or content, where firms compete mainly by innovating, or where prices are regulated.
- 3.2 The CMA will consider any merger in terms of its effect on rivalry over time in the market or markets affected by it. When levels of rivalry are reduced, firms' competitive incentives may be dulled, to the detriment of customers.
- 3.3 Some mergers will lessen competition but not substantially, because sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of the merger firms. However, some mergers lead to a lessening of competition that is substantial.
- 3.4 The CMA does not apply any thresholds to market share, number of remaining competitors or on any other measure to determine whether a loss of competition is substantial.
- 3.5 Based on the evidence before it, the CMA will consider whether a merger would lead to:
  - (a) the merged entity being able to profitably and unilaterally raise its prices, worsen its quality or service and non-price factors of competition, or reduce innovation efforts at one or more of the pre-merger businesses;
  - (b) coordination occurring between some remaining suppliers or becoming more stable as a result of the merger; or
  - (c) the foreclosure of rivals when the merger is between firms at different levels of a supply chain or when the merger is between firms in different markets which are nevertheless related in some way.
- 3.6 These are the CMA's three main theories of harm which are discussed further below.

## How does the CMA determine whether there is an SLC?

### A *Examining the effects on competition*

#### *Horizontal unilateral effects*

- 3.7 One way a horizontal merger (that is a merger involving two competitors at the same level of the supply chain who compete to supply products that are substitutable for each other) can harm competition is if it removes an important competitive constraint on one or both merger firms, allowing the merged business profitably to raise prices or degrade non-price aspects of its competitive offerings including dampening its innovation efforts. This is known as a 'unilateral horizontal effect' and is the competitive effect that the CMA considers most frequently. The competitive constraint eliminated by a merger may be an existing constraint, or a potential or future constraint.
- 3.8 Unilateral effects are more likely if:
- (a) the merging businesses' products are close substitutes;
  - (b) the merging firms compete in innovating to develop and improve new products and services;
  - (c) customers will have little choice of alternative supplier after the merger, for example because the costs to them of switching from one to another are high or the merger will leave them with too few alternatives;
  - (d) competing firms facing capacity constraints may not be able to serve customers switching away from rivals and therefore may provide a less effective constraint after the merger;
  - (e) the merger eliminates an important competitive force in the market, for example a business with a novel commercial model; or
  - (f) there are already few significant businesses in the market.

#### *Potential competition*

- 3.9 Unilateral horizontal effects may also arise from the elimination of potential or dynamic competition. Potential competition is where, absent the merger, entry or expansion by either or both merger firms may have resulted in new or increased competition between them. In some sectors, an important aspect of how firms compete involves efforts or investments aimed at protecting or expanding their profits in the future. This includes efforts that may give firms the ability to compete in entirely new areas (i.e. to enter), or the ability to

compete more effectively in areas where they are already active (i.e. to expand).

3.10 Mergers involving a potential entrant can lessen competition in different ways.

(a) First, a merger involving a potential entrant may imply a loss of the future competition between the merger firms after the potential entrant would have entered or expanded.

(b) Second, existing firms and potential competitors can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic competition. For example, firms that are making efforts or investments that may eventually lead to their entry or expansion might result in incumbent firms making efforts to improve their own competitive offering to mitigate the risk of losing future profits to potential entrants. A merger may reduce the incentives of dynamic competitors to continue with efforts to enter or expand, or to mitigate the threat of future rival entry or expansion. The impact of such a reduction in efforts would affect customers in the present, rather than solely from the future point in time when entry or expansion has occurred.

#### *Coordinated effects*

3.11 A horizontal merger may also lessen competition by enabling or encouraging post-merger coordinated interaction amongst businesses in the market that harms customers.

3.12 Coordination may arise when businesses operating in the same market recognise that they can reach a more profitable outcome if they limit the extent to which they compete against each other.

3.13 Such coordination need not be explicit (collusion) but might emerge through implicit understandings and can take a number of forms. Businesses may be able to keep prices higher than they would otherwise be, if there is an implicit understanding between those businesses that they will not compete strongly against each other, for example, by dividing the market(s) up between them or allocating contracts amongst themselves in bidding competitions. For coordination to be effective:

(a) businesses need to be able to reach a common understanding and monitor compliance with such an understanding;

(b) businesses must have the incentive to stick to the coordinated outcome; and

- (c) there must be little chance of such an understanding being disrupted by other factors, such as entry or expansion by other businesses.

### *Vertical and conglomerate mergers*

- 3.14 Mergers are not always between rivals. Vertical and conglomerate mergers bring products together that do not themselves compete but may be related. In a vertical or conglomerate merger, the merging businesses may benefit from efficiencies that give them a greater incentive to compete (and therefore, for example, to lower prices).
- 3.15 Vertical mergers are those between firms active at different levels in the same industry (i.e. an upstream firm and a downstream firm), so competition in one market could be directly affected by outcomes in the other. Vertical mergers may damage competition if the merged business restricts downstream competitors' access to a key input or restricts upstream competitors from a key 'route to market'. Another possible concern is that the merged entity may gain access to commercially sensitive information of its rivals through its role as their supplier or customer.
- 3.16 Conglomerate mergers are those between firms that are not active within the same supply chain, and so cannot directly affect each other's markets, but which are nevertheless related in some way. For example, this may be because their products target similar customers or may be purchased alongside each other. These mergers raise the possibility that competition in one market may be indirectly affected by actions in the other. Conglomerate mergers may damage competition if the merged business can employ selling practices that link the products in the separate markets together (for example, through bundling the separate products).
- 3.17 These harmful effects of vertical or conglomerate mergers on competition will only arise if the merged business would have the ability and incentive to act this way and such a strategy results in harm to overall competition.

### ***B Assessing countervailing factors***

- 3.18 In some cases, the CMA will also consider any factors that might prevent or significantly reduce any harmful impact of the merger. There are two main factors — efficiencies, entry and expansion in the market.

## *Efficiencies*

- 3.19 While mergers can harm competition, they can also give rise to efficiencies that make the merged business a more effective competitor. Merger efficiencies fall into two categories:
- (a) **Rivalry-enhancing efficiencies:** Efficiencies that change the incentives of the merger firms and induce them to act as stronger competitors to their rivals—for example, by reducing their marginal costs giving them the incentive to provide lower prices or a better quality, range or service.
  - (b) **Relevant customer benefits:** Benefits to UK customers resulting from a merger, other than through improved competition in the market related to the SLC finding—for example, greater levels of innovation or reduced carbon emissions (to the extent firms do not normally compete on sustainability).
- 3.20 Rivalry-enhancing efficiencies may prevent an SLC by offsetting any anticompetitive effects.
- 3.21 While relevant customer benefits do not prevent an SLC, they may outweigh an SLC and any adverse effects of the SLC. While the CMA does not take relevant customer benefits into account in its competitive assessment, it may take them into account when considering whether to refer a merger for a Phase 2 investigation and the overall benefit to consumers of having such an investigation. Relevant customer benefits may also be taken into account when the CMA considers options to remedy competition concerns and whether any of the remedy options would result in relevant customer benefits being unrealised.
- 3.22 The CMA will use the following criteria when it assesses whether merger efficiencies mean that the merger does not result in an SLC. The merger efficiencies must:
- (a) enhance rivalry in the supply of those products where an SLC may otherwise arise;
  - (b) be timely, likely and sufficient to prevent an SLC from arising;
  - (c) be merger-specific; and
  - (d) benefit customers in the UK.
- 3.23 Most of the information relating to the synergies and cost reductions resulting from a merger is held by the merger firms. Merger firms who wish to make

efficiency claims are encouraged to provide verifiable evidence to support their claims early in the CMA's merger review process.

### *Entry and expansion*

- 3.24 In its competitive assessment, the CMA may take into account entry and/or expansion plans of rivals who will enter or expand irrespective of whether the merger proceeds. However, any analysis of a possible SLC includes consideration of the direct responses to the merger by rivals, potential rivals and customers. If effective entry and/or expansion occurs as a result of the merger and any consequent adverse effect (for example, a price rise), the effect of the merger on competition may be mitigated. In these situations, the CMA might conclude that no SLC arises as a result of the merger.
- 3.25 The CMA will use the following framework to determine whether entry or expansion would prevent an SLC. The entry or expansion must be:
- (a) timely;
  - (b) likely; and
  - (c) sufficient to prevent an SLC.

These conditions are cumulative and must be satisfied simultaneously.

- 3.26 Potential or actual competitors may encounter barriers which reduce or even severely hamper their ability to enter or expand in the market. Barriers to entry and expansion are specific features of the market that give incumbent firms advantages over potential competitors. Barriers to entry and expansion hinder the ability of potential entrants or firms looking to expand to constrain the exercise of market power by incumbents. The CMA will therefore identify barriers to entry and/or expansion in its analysis. Where barriers are low, and the costs of entry or expansion are not substantial relative to the profits that are available, entry and/or expansion might be expected to occur in order to capture sales from the merged entity if it were to increase prices and/or worsen non-price factors of competition. Conversely, this is less likely where barriers are substantial relative to available profits.

### ***C Identifying the relevant markets***

- 3.27 Where the CMA makes an SLC finding, the CMA needs to identify the market in which that SLC arises. The assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise.

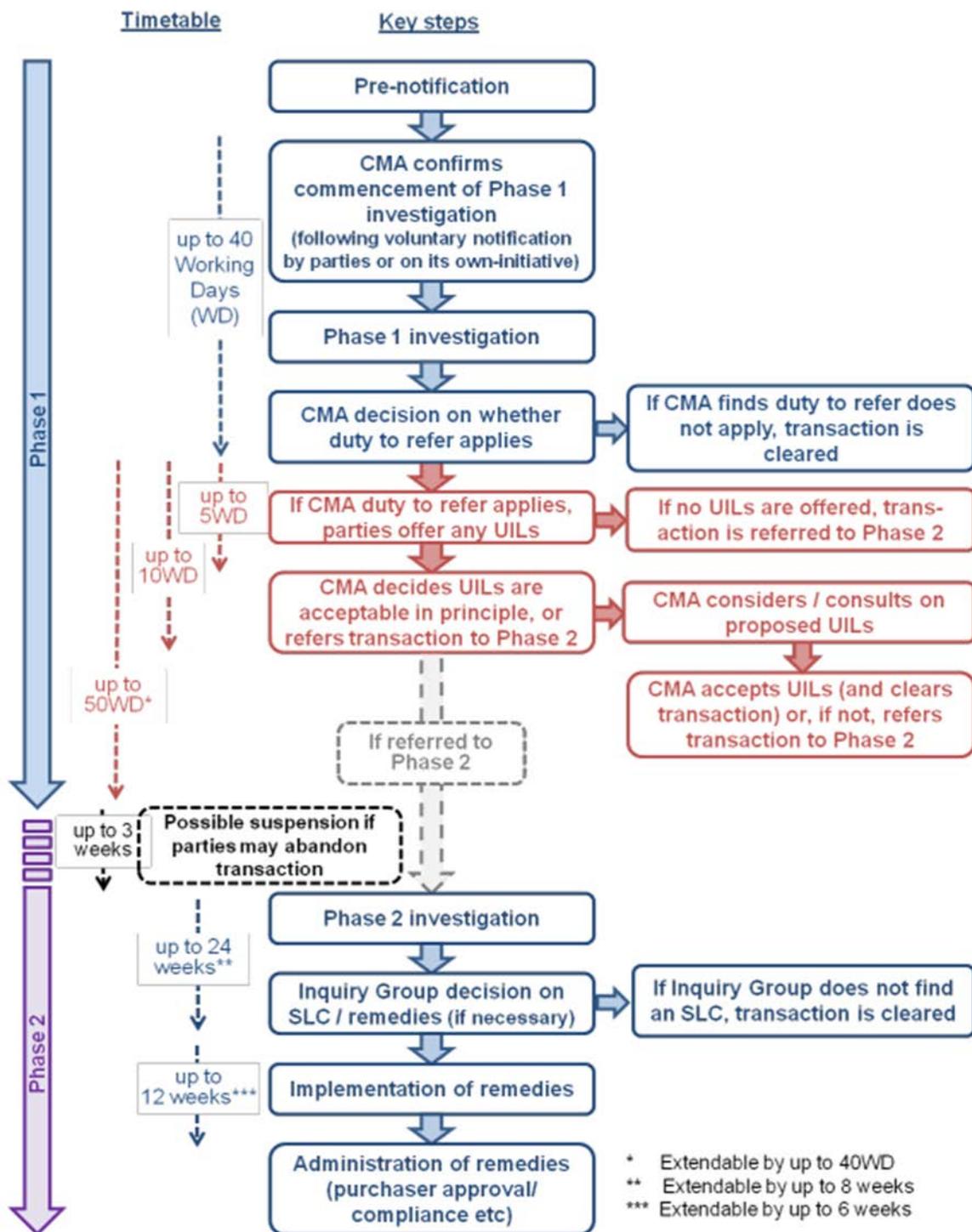
- 3.28 Market definition involves identifying the most significant competitive alternatives available to customers of the merger firms and includes the most immediate sources of competition to the merger firms. As such, the evidence gathered and developed for market definition will often be relevant for the CMA's competitive assessment.
- 3.29 The CMA will generally not need to come to finely balanced judgements on what is 'inside' or 'outside' the market. Not every firm 'in' a market will be equal and the CMA will assess how closely two merger firms compete. The constraint posed by firms 'outside' the market will also be carefully considered in the CMA's competitive assessment.
- 3.30 Market definition involves product markets and geographic markets. Product market definition starts with the relevant products of the merger firms. In identifying what other significant competitive alternatives should be included in the relevant market, the CMA will pay particular regard to demand-side factors (the behaviour of customers). The CMA may also consider supply-side factors. As with product markets, the CMA's focus in defining geographic markets is on demand-side factors and identifying the most important competitive alternatives to the merger firms.

## 4. REMEDIES

### What remedies can the CMA apply at Phase 2?

- 4.1 If, following a Phase 2 assessment, the CMA decides that a merger gives rise to an SLC, it will take steps to remedy the effects. For an anticipated merger, this will often mean that the merger is prohibited, although it could be allowed to proceed subject to suitable conditions, for example a divestiture (sale) of part of the business to be acquired. For a completed merger, the CMA will normally seek to divest all or part of the acquired business to a suitable purchaser who can provide effective competition. Undertakings as to future behaviour may be accepted in addition to, or occasionally instead of, divestiture.
- 4.2 Further information is available in [Merger Remedies guidance \(CMA87\)](#).

## 5. PRINCIPAL STAGES OF A CMA MERGER INVESTIGATION



## 6. FURTHER INFORMATION

### CMA publications

*Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*

*Guidance on the CMA's mergers intelligence function (CMA56)*

*Administrative penalties: Statement of Policy on the CMA's approach (CMA4)*

*Merger Notice for use by business for notifying an anticipated or completed merger to the CMA under Section 96 of the Enterprise Act 2002 (as amended)*

*Merger Assessment Guidelines (CMA129)*

*Mergers: Exceptions to the duty to refer guidance (CMA64)*

*Merger Remedies (CMA87)*

*Interim measures in merger investigations (CMA108)*

*Water and sewerage mergers: guidance on the CMA's procedure and assessment (CMA49)*

*Retail mergers commentary (CMA62)*

CMA publications are available at [www.gov.uk/cma](http://www.gov.uk/cma)

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