

## **Notice of consultation on provisional advice to the Secretary of State for Business, Energy and Industrial Strategy from the CMA's review of merger undertakings under the Fair Trading Act 1973**

31 August 2016

### **Introduction**

1. In its 2015/16 Annual Plan, the CMA committed to commence a programme of work to systematically review our existing remedies to seek to remove measures that are no longer necessary. As part of this, in April 2015, the CMA launched reviews of 71 structural merger remedies that had been put in place before 2005. These reviews resulted in 51 remedies subsequently being removed.
2. In its 2016/17 Annual Plan, the CMA noted that it will build on this work in the coming year, launching further reviews of existing mergers or market remedies. This would include a further tranche of 30 to 40 old merger remedies that are more than ten years old. Following this commitment, on 14 June 2016, the CMA launched reviews of 12 merger remedies put in place before 1 January 2006. This notice concerns three of the 12 merger remedies, which are assessed under the Fair Trading Act 1973. The CMA's decisions on merger remedies assessed under the Enterprise Act 2002 are considered in a separate document.
3. This notice concerns three merger remedies under the Fair Trading Act 1973.

### **Jurisdiction**

4. The CMA has a statutory duty under sections 75J, 88(4) and 88(5) of the Fair Trading Act 1973 to keep under review undertakings and orders made under the Fair Trading Act 1973. The CMA must, from time to time, consider whether, by reason of any change of circumstances:
  - (a) undertakings are no longer appropriate and need to be varied, superseded or released; or
  - (b) an order is no longer appropriate and needs to be varied or revoked.

5. Where the CMA considers a remedy under the Fair Trading Act 1973 is no longer appropriate it is the CMA's role to advise the Secretary of State for Business, Energy and Industrial Strategy on whether to release or vary the remedy.

### **Undertakings which have lapsed**

6. This review has found that one merger remedy has lapsed, specifically, undertakings given by Hartley Industrial Trust Ltd on 7 July 1992 concerning its acquisition of Jarman and Son Ltd on 24 December 1990. In this case, the CMA will not be providing advice to the Secretary of State for Business, Energy and Industrial Strategy, but will remove this case from the CMA's register of undertakings and orders.

### **Provisional advice**

7. The CMA's provisional advice in relation to two cases is provided below:
  - (a) Annex 1: undertakings given by Charter Consolidated plc, on 21 December 1982, concerning its offer, on 13 May 1982, to acquire Anderson Strathclyde plc.
  - (b) Annex 2: undertakings given by Serco Group plc, on 5 March 2001, concerning its proposal to acquire a 46% share in National Air Traffic Services Ltd.
8. The CMA's provisional advice is that the undertakings should be released in both cases.

### **Consultation on the CMA's provisional advice**

9. The CMA is now consulting on its provisional advice to the Secretary of State for Business, Energy and Industrial Strategy.
10. This consultation will close on **30 September 2016**. If you wish to respond to this consultation, please contact the CMA as follows:

Peter Hill  
7th Floor North  
Competition and Markets Authority  
Victoria House  
37 Southampton Row  
London WC1B 4AD

Email: [remedies.reviews@cma.gsi.gov.uk](mailto:remedies.reviews@cma.gsi.gov.uk)

11. Following this consultation, the CMA will consider the responses received and the evidence and views presented and will assess the impact of these responses on its provisional advice before advising the Secretary of State for Business, Energy and Industrial Strategy of its final advice in these cases.
12. The decisions in these cases will be taken by the Secretary of State for Business, Energy and Industrial Strategy.

## **Annex 1: Charter Consolidated plc/Anderson Strathclyde plc**

### **Undertakings given by**

1. Charter Consolidated plc (Charter).

### **Jurisdiction**

2. Fair Trading Act 1973.

### **Details of the transaction**

3. On 13 May 1982, Charter offered to acquire Anderson Strathclyde plc (Anderson).

### **Monopolies and Mergers Commission (MMC) report published**

4. *Charter Consolidated PLC and Anderson Strathclyde PLC: a report on the proposed merger* (MMC Report Cmnd 8771) was published on 21 December 1982.

### **The market concerned**

5. Both companies supplied underground coal-mining equipment. Charter also supplied equipment for open-cast mining.
6. The MMC said that the proposed merger would not in itself have a direct effect upon competition in the UK. The only one of Charter's subsidiaries at the time which supplied mining equipment was Perard Torque Tension, and that company's product lines were almost entirely distinct from those of Anderson. The only overlap was in chainless haulage gear; and the gear which Perard Torque Tension made was typically supplied for the modernisation of coal face equipment whereas Anderson supplied gear as an integral part of its power loaders (a particular type of mining equipment).

### **Theory of harm**

7. The MMC concluded that the proposed merger, 'may be expected to have an adverse effect upon the management effectiveness and labour relations of Anderson Strathclyde, and that this would tend to diminish effective competition in the supply of goods, would be contrary to the interests of purchasers of goods in the UK and would not promote competitive activity by Anderson Strathclyde in markets outside the UK.'
8. The MMC also concluded that, 'both because it would affect employment within Anderson Strathclyde and because it would detract from the dynamism

of business in the region’, the merger ‘may be expected to have an adverse effect upon employment in a relatively depressed part’ of the UK.

### **Description of the undertakings**

9. The undertakings (given on 21 December 1982) required Charter to ensure that, if Anderson became its subsidiary, it would remain a Scottish company, with its registered Office in Scotland.

### **History of the companies since the undertakings were given<sup>1</sup>**

10. Charter (company number 00831751) changed its name to Charter Consolidated Limited on 18 August 2010. It is still active.
11. Anderson Strathclyde plc (company number SC005574) changed its name to Anderson Group plc on 2 October 1989 and changed it again to Soltero Limited on 22 September 1992. The company was dissolved on 4 May 1999. However, as a result of action in the Scottish Court of Session, the company was restored to the register of companies on 25 October 2013. It is listed as ‘active’ on the Companies House register.

### **Change of circumstances**

12. The underground coal-mining market in the UK has changed considerably since the time of the proposed merger. In 1980, the UK produced around 113 million tonnes of coal from underground mines.<sup>2</sup> By 2014, this total had fallen to 3 million tonnes, a reduction of over 98%.<sup>3</sup>
13. The demand for coal had also fallen significantly over the same time frame, due in part to the changes in the fuels used in the UK’s electricity generation plants. In order to meet this reduced demand for coal, the UK imports a significant volume of coal, and in 2015, such imports accounted for 25.5 million tonnes.<sup>4</sup>
14. A number of companies involved in the supply of coal mining equipment currently are also involved in supplying equipment for mining other materials, and some are now global in the scale of their operations.<sup>5</sup> The CMA considers it likely that the supply of this equipment may well have become more international in scope. This is illustrated by the fact that the Association of British Mining Equipment was formed in 1978 with a mandate which expressly

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<sup>1</sup> All information in this section is sourced from Companies House unless otherwise stated.

<sup>2</sup> See Table 2.1 in the MMC’s report.

<sup>3</sup> See UK government [report into coal imports](#).

<sup>4</sup> See the [UK Association of Coal Importers and Producers](#).

<sup>5</sup> Details of [global organisations](#) and one [website from a global firm](#).

includes promoting the export of coal mining equipment from the UK to other countries.<sup>6</sup>

15. The MMC's concerns with the transaction and the undertakings are related to a number of public interest concerns arising from the transaction, specifically the desire to ensure the combined business remained a Scottish company, and concerns around management and labour relations.
16. The present merger control legislation, as described in the Enterprise Act 2002, is based on an assessment of whether a merger or acquisition may lead to a substantial lessening of competition, rather than an assessment of the public interest, under the previous legislation, the Fair Trading Act 1973.
17. The CMA considers that the very substantial changes in the supply and demand for coal in the UK, taken together with the change in relevant legislation covering merger control, to represent a change of circumstance relevant to the undertakings such that they are no longer appropriate.

#### **CMA's provisional advice**

18. Based on the information available, the CMA's provisional advice to the Secretary of State is that the undertakings given by Charter Consolidated should be released.

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<sup>6</sup> See the [ABMEC website](#).

## **Annex 2 – Serco Group plc/National Air Traffic Services Limited**

### **Undertakings given by**

1. Serco Group plc (Serco).

### **Jurisdiction**

2. Fair Trading Act 1973.

### **Details of the transaction**

3. Serco proposed to acquire through its subsidiary, Nimbus Holdings Limited (Nimbus), a 46% share in National Air Traffic Services Limited (NATS).

### **Monopolies and Mergers Commission (MMC) report published**

4. Undertakings in lieu of reference to the MMC were instead given on 5 March 2001.

### **The market concerned**

5. Both companies supplied air traffic control services in the UK.

### **Theory of harm**

6. N/A.

### **Description of the undertakings in lieu of reference**

7. The undertakings (given on 5 March 2001 in anticipation of a successful bid) require Serco and Nimbus to ensure that, for as long as it controls NATS and provides air traffic control training services, it would provide such services on fair and reasonable terms to other air traffic control operators.

### **History of the companies since the undertakings were given<sup>7</sup>**

8. Serco (company number 02048608) is still active. Serco was one of three businesses that bid for a share of NATS after it was part-privatised in 2001. Its bid failed, and the Airline Group (a consortium of seven airlines) was successful in its bid.<sup>8</sup>

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<sup>7</sup> All information in this section is sourced from Companies House unless otherwise stated.

<sup>8</sup> See details from the [Wall Street Journal website](#).

9. Nimbus (company number 04007730) was renamed Firecats Limited on 29 June 2002, Serco NLR on 12 April 2004 and Serco Corporate Services Limited on 6 September 2006. It is still active and is still owned by Serco.
10. NATS (company number 03155567) changed its name to NATS Limited on 6 April 2006. It is still active and provides air traffic navigation services to aircraft flying through UK controlled airspace and at 13 UK airports, controlling some 2.4 million flights each year in UK airspace. NATS was part-privatised in 2001 by the government, and is a company part-owned by the Airline Group (42%), NATS staff (5%), LHR Airports Ltd (4%), and the government (49%).<sup>9</sup>

### **Change of circumstances**

11. Serco's bid for a share in NATS failed and since the undertakings were given it has not acquired a shareholding in NATS. Consequently, the CMA considers that these undertakings, given in anticipation of a bid which subsequently failed, are no longer relevant to the current operation and ownership of NATS and have no effect. In the event that Serco sought to acquire part or all of NATS in the future, this could be better considered under the existing merger control legislation, and relevant aviation-specific legislation, than through the use of undertakings designed for a transaction in 2001 but which never took place. The CMA considers this to be a change of circumstances relevant to these undertakings, and that the undertakings are no longer appropriate.

### **CMA's provisional advice**

12. Based on the information available, the CMA's provisional advice to the Secretary of State is that the undertakings given by Serco should be released.

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<sup>9</sup> See the [NATS website](#).