

To: Secretary of State for Business, Energy, and Industrial Strategy

**From: Simon Polito
Group Chairman
Competition and Markets Authority**

30 January 2017

Advice on the CMA's reviews of merger undertakings under the Fair Trading Act 1973

Purpose of this submission

1. This submission sets out the Competition and Markets Authority's (CMA) advice that, following a review and consultation, undertakings given in two past merger cases under the Fair Trading Act 1973 should be released.

Recommendation and timing

2. We recommend that you agree to release these undertakings. To meet the CMA's administrative timescales, we would welcome your decision being made and published by 3 March 2017.

Introduction

3. In its 2015/16 Annual Plan, the CMA committed to commence a programme of work systematically to 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.
4. In its 2016/17 Annual Plan, the CMA noted that it would build on this work in the coming year, launching further reviews of existing mergers or market remedies. On 14 June 2016, the CMA launched further reviews of 12 merger remedies put in place before 1 January 2006.
5. This submission concerns two merger remedies under the Fair Trading Act 1973.

Jurisdiction

6. 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 - (a) undertakings are no longer appropriate and need to be varied, superseded or released; or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.
7. 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.

Stakeholders' views on the remedies

8. No stakeholders provided views on the individual remedies following our invitation to comment on our decision to initiate a review of these remedies on 14 June 2016. On 31 August 2016, we consulted on our provisional advice on both of these remedies. We received no responses to this consultation.

Advice

9. The CMA's advice in relation to two merger remedies is set out in the following annexes. Our advice is that the undertakings should be released, rather than varied in both cases. Our advice concerns the following remedies:
 - (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.

Transparency

10. The CMA intends to publish this advice on 27 October 2016. In the event that the Secretary of State agrees the CMA's advice in whole or in part, following publication of the Secretary of State's decision, the CMA will publish a notice confirming the remedies that will be removed from its register of order and undertakings.

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 given¹

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.² By 2014, this total had fallen to 3 million tonnes, a reduction of over 98%.³
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.⁴
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.⁵ 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

¹ All information in this section is sourced from Companies House unless otherwise stated.

² See Table 2.1 in the MMC’s report.

³ See UK government [report into coal imports](#).

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

⁵ 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.⁶

15. The CMA considers that the very substantial changes in the supply and demand for coal in the UK to represent a change of circumstance relevant to the undertakings such that they are no longer appropriate.

CMA's advice

16. The CMA's advice to the Secretary of State is that the undertakings given by Charter Consolidated should be released.

⁶ 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).

Undertakings in lieu of a reference to the Monopolies and Mergers Commission (MMC)

4. Undertakings in lieu of reference to the MMC were 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 given⁷

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.⁸

⁷ All information in this section is sourced from Companies House unless otherwise stated.

⁸ 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%).⁹

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 advice

12. The CMA's advice to the Secretary of State is that the undertakings given by Serco should be released.

⁹ See the [NATS website](#).