Merger remedy evaluations

Appendices

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Contents

Appendix 2: Summary of remedies used in merger inquiries with a final reporting date of between 1 April 1999 and 31 March 2019

Table 1: Remedies put in place under the FTA (excluding seven prohibitions)

Merger (final report date)	*Summary of remedies*	*Category of remedies*
1. CityFlyer and British Airways—BA's acquisition of CityFlyer's slots. (July 1999)	Cap on the share of slots used by BA at Gatwick airport. Cap on the share of slots held by BA in any 1- and 2-hour periods (to ensure that appropriate capacity was available to BA competitors in the peak operating periods).	Divestiture
2. Transfer of newspaper titles and related assets owned by Mirror Group plc to Trinity plc and Regional independent Media Holdings Ltd. (July 1999)	Disposal of some of the acquired titles and related newspaper assets.	Divestiture
3. Acquisition of Metalloxyd Ano-Coil Ltd (Ano-Coil) by Alanod Aluminium-Veredlung GmbH & Co (Alanod). (January 2000)	Maximum prices. Commitment to continuing supply of existing grades of aluminium. Removing links between sales of MIRO and sales of anodized aluminium. Commitment to supply MIRO products to competitors. Cancelling agreement with a manufacturer of plant for the MIRO process. Commitment not to give retrospective rebates. Maintenance of arm's length business relationships with Jordan Reflectors Limited which had ownership links with Alanod.	Controlling outcomes Enabling measures
4. Proposed merger between Carlton Communications Plc and United News Media plc. (July 2000)	Recommended divestiture of: Meridian TV, a holding in GMTV Limited, Tyne Tees Television Ltd and other divestitures.	Divestiture
5. The JV Pentre Askern Group Limited was formed by combining businesses of Askern Group Limited (Askern) and Pentre (Holdings) Limited (Pentre). (November 2000)	Divestiture of a division of Pentre Askern and commitment to return the businesses to the separate ownership of Sylvan and Locker.	Divestiture
6. The proposed acquisition by British United Provident Association Limited (BUPA) of Community Hospitals Group plc (CHG) and the acquisition by Salomon International LLC (SIL) of 26.8 per cent of the ordinary share capital of CHG. (December 2000)	It was recommended that SBUKE reduce its holdings within six months and that for so long as SBUKE held CHG shares it should be prohibited from exercising its voting rights without the consent of the DGFT.	Divestiture
7. The acquisition by Interbrew SA (Interbrew) of the brewing interests of Bass PLC (Bass). (January 2001)	Interbrew was required to divest the UK business of Bass Brewers to a buyer approved by the DGFT. CC decision overturned on judicial review.	Divestiture
8. The acquisition of Fife Silica Sands Ltd (FSS) and Fife Resources Ltd (Fife Resources) (referred to together as 'the Fife companies') by SCR-Sibelco SA (Sibelco). (July 2001)	Sibelco was required to divest the Fife companies to a suitable purchaser within six months.	Divestiture
9. The completed acquisition by Coloplast A/S of the continence care business of SSL International plc. (June 2002)	The Secretary of State accepted undertakings requiring Coloplast to renegotiate the exclusive distribution agreement with the Mentor Corporation but later on the Secretary of State following a change in circumstances announced that she had accepted undertakings imposing a	Enabling measures Controlling outcomes

	cap on the price Coloplast could charge NHS hospitals for supply of non-latex sheaths.	
10. Proposed acquisition by Vivendi Water UK PLC (VWUK) of First Aqua (JVCo) Limited (JVCo) from First Aqua Holdings Limited (First Aqua). (November 2002)	The CC recommended that VWUK was required to divest its 31.4 per cent stake in South Staffs Group, thereby securing the independence of that company as a comparator. The Secretary of State disagreed and VWUK undertook to limit voting shares in Southern Water Investments Ltd to no more than 25 per cent and to restrict numbers of its board appointees.	Divestiture
11. The acquisition by Scottish Radio Holdings plc (SRH) and GWR Group plc (GWR), through the joint venture company Vibe Radio Services Ltd (VRSL), of Galaxy Radio Wales and the West Limited (Galaxy). (May 2003)	The CC recommended that GWR should reduce interest in Vibe 101 to a level at which the OFT was satisfied it had no material influence. Opus, the GWR advertising sales house, should no longer sell Vibe 101 advertising. Failing these undertakings being given, GWR should divest all its shareholding in VRSL. GWR in fact sold all of its holding in VRSL to SRH.	Divestiture Enabling measures
12. The acquisition by Centrica plc (Centrica) from Dynegy Inc (Dynegy) of two companies which owned and operated the Rough gas storage facility and associated assets. (August 2003)	Centrica should sell all Rough's capacity and do so on non-discriminatory terms. It should auction all remaining capacity no less than 30 days before the start of each storage year. It should not participate in the primary sale process but reserve no more than 20 per cent of Rough's capacity for itself in the first year, falling to 15 per cent over a five-year period and remaining at 15 per cent thereafter. Ensure separation of its storage business from all other parts of the group. Facilitate secondary market for Rough capacity. Offer a minimum of 20 per cent of Rough capacity on annual contracts. Arrange independent review of compliance.	Controlling outcomes Enabling measures
13. The proposed acquisition of Safeway plc (Safeway) by each of Asda Group Limited (owned by Wal-Mart Stores Inc (Wal-Mart)) (Asda); Wm Morrison Supermarkets PLC (Morrisons); J Sainsbury plc (Sainsbury's); and Tesco plc (Tesco).(September 2003)	Asda, Sainsbury's and Tesco prohibited from acquiring all or part of Safeway (other than Safeway stores divested by Morrisons as part of remedy for its acquisition). Morrisons acquisition permitted on condition of divestiture of one-stop grocery stores in 48 localities where there would be adverse effects and a further five smaller stores where acquisition would have damaged innovation and diversity.	Divestiture
14. The proposed merger between Carlton Communications Plc (Carlton) and Granada plc (Granada). (October 2003)	Carlton-Granada should agree a package proposed by the ITC, safeguarding interests of other ITV licensees. Carlton-Granada's combined advertising sales house should give other ITV licensees the right to carry forward current terms enjoyed with Carlton and Granada's sales houses separately. All existing customers of Carlton and Granada's advertising sales houses should have the right to renew their 2003 contracts on current terms. Carlton-Granada to fund an independent adjudicator to oversee remedy.	Controlling outcomes Enabling measures

Source: CMA analysis.

Table 2: Remedies put in place under the Enterprise Act 2003

Merger (final report date)	*Summary of remedies (date finally determined by CC)*	*Category of remedies*
1. Stena AB and the Peninsular and Oriental Steam Navigation Company: A report on the proposed acquisition of certain assets relating to the supply of ferry services on the Irish Sea between Liverpool-Dublin and Fleetwood-Larne (6 February 2004)	Prohibition of acquisition of Liverpool–Dublin route (15 May 2004)	Prohibition
2. Dräger Medical AG & Co KGaA and Hillenbrand Industries, Inc: A report on the proposed acquisition of certain assets representing the Air-Shields business of Hill-Rom, Inc., a subsidiary of Hillenbrand Industries, Inc.(19 May 2004)	Recommendations to UK Health Departments plus temporary price control (21 June 2004)	Recommendation Controlling outcomes in the short term.
3. FirstGroup plc and the Scottish Passenger Rail franchise: A report on the proposed acquisition by FirstGroup plc of the Scottish Passenger Rail franchise currently operated by ScotRail Railways Limited. (28 June 2004)	Behavioural remedies regarding fares, ticket types, frequency and capacity (15 October 2004)	Controlling outcomes
4. Knauf Insulation Limited and Superglass Insulation Limited: A report on the proposed acquisition of Superglass Insulation Limited by Knauf Insulation Limited. (26 November 2004)	Blocked (11 March 2005)	Prohibition
5. Emap plc and ABI Building Data Ltd: A report on the acquisition of ABI Building Data Ltd by Emap plc. (26 January 2005)	Divestiture of ABI (3 March 2005)	Divestiture
6. Serviced Dispense Equipment Limited and the Technical Services function of Coors Brewers Limited: A report on the proposed acquisition by Serviced Dispense Equipment Limited of the Technical Services Function of Coors Brewers Limited. (11 March 2005)	Block on acquisition of Coors technical services business (12 September 2005)	Prohibition
7. Somerfield plc/Wm Morrison Supermarkets plc: A report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc. (2 September 2005)	Divestiture of 12 stores to address reductions in competition in local markets (9 March 2006)	Divestiture
8. Deutsche Börse AG, Euronext NV and London Stock Exchange plc: A report on the proposed acquisition of London Stock Exchange plc by Deutsche Börse AG or Euronext NV. (1 November 2005)	Combination of structural measures (eg limits on shareholdings and board membership in clearing houses) with supporting behavioural undertakings to facilitate competition. (14/15 March 2006)	Divestiture Enabling measures
9. Vue Entertainment Holdings (UK) Ltd and A3 Cinema Limited: A report on the completed acquisition of A3 Cinema Limited by Vue Entertainment Holdings (UK) Ltd. (24 February 2006)	Divestiture of one cinema (18 May 2006)	Divestiture
10. Railway Investment Limited and Marcroft Holdings Limited: A report on the completed acquisition by Railways Investments Limited of Marcroft Holdings Limited. (12 August 2006)	Divestiture of part of Marcroft's outstation business, including relevant bases, contracts and employee. (5 January 2007)	Divestiture
11. Stagecoach and Scottish Citylink: A report on the completed joint venture between Stagecoach Bus Holdings Limited and Braddell PLC in relation to megabus.com, Motorvator and Scottish Citylink. (23 October 2006)	Divestiture of Citylink Saltire bus business (29 May 2007)	Divestiture
12. Stericycle International LLC/Sterile Technologies Group Limited: A report on the completed acquisition by Stericycle International LLC of Sterile Technologies Group Limited (12 December 2006)	Divestiture of part of STG's clinical waste business, including relevant plants, contracts and employees. Also a recommendation to Government (30 January 2007)	Divestiture

13. Hamsard and Academy Music: A report on the acquisition of a controlling influence in Academy Music by Hamsard 2786 Ltd. (23 January 2007)	Divestiture of relevant music venues (22 February 2007)	Divestiture
14. SvitzerWijsmuller A/S and Adsteam Marine Limited: A report on the proposed acquisition by SvitzerWijsmuller A/S of Adsteam Marine Limited. (9 February 2007)	Divestiture of a Liverpool harbour towage business to address local competition issues (30 April 2007)	Divestiture
15. Clifford Kent Holdings Limited and Deans Food Group Limited: A report on the completed merger of Clifford Kent Holdings Limited, parent company of Stonegate Farmers Ltd, and Deans Food Group Ltd. (20 April 2007)	Divestiture of Stonegate eggs business to a suitable purchaser (8 October 2007)	Divestiture
16. South East Water Limited and Mid Kent Water Limited: A report on the completed water merger of South East Water Limited and Mid Kent Water Limited. (Reference made under Water Industry Act 1991). (1 May 2007)	Price reductions to address prejudice to regulator's ability to make comparisons. (29 November 2007)	Controlling outcomes
17. Thermo Electron Manufacturing Limited and GV Instruments Limited: A report on the completed acquisition of GV Instruments Limited by Thermo Electron Manufacturing Limited. (30 May 2007)	Divestiture of two product lines (31 July 2007)	Divestiture
18. Kemira GrowHow Oyj/Terra Industries Inc merger inquiry: A report on the anticipated joint venture between Kemira GrowHow Oyj and Terra Industries Inc. (11 July 2007)	Partial divestiture plus detailed commitments regarding CO2 contract with affected customer (Air Liquide) (11 September 2007)	Divestiture Controlling outcomes
19. Tesco plc and the Co-operative Group (CWS) Limited: A report on the acquisition of the Co-operative Group (CWS) Limited's store at Uxbridge Road, Slough, by Tesco plc. (28 November 2007)	Divestiture of Slough store (23 April 2009)	Divestiture
20. Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc: Report sent to Secretary of State (BERR). (14 December 2007)	Divestiture of part of shareholding in ITV (8 February 2010)	Divestiture
21. Macquarie UK Broadcast Ventures Limited and National Grid Wireless Group: A report on the completed acquisition by Macquarie UK Broadcast Ventures Limited of National Grid Wireless Group. (11 March 2008)	Behavioural remedies controlling outcomes including a price reduction, service-quality guarantees and fair, reasonable and non-discriminatory (FRND) terms. (1 September 2008)	Controlling outcomes Enabling measures
22. BOC and Ineos Chlor: A report on the anticipated acquisition by BOC Limited of the packaged chlorine business and assets of Ineos Chlor Limited. (18 December 2008)	Prohibition (19 March 2009)	Prohibition
23. BBC Worldwide Limited, Channel Four Television Corporation and ITV plc: A report on the anticipated joint venture between BBC Worldwide Limited, Channel Four Television Corporation and ITV plc relating to the video on demand sector. (4 February 2009)	Prohibition (25 June 2009)	Prohibition
24. Nufarm and AH Marks: A report on the completed acquisition by Nufarm Crop Products UK Limited of AH Marks Holdings Ltd. (10 February 2009)	Remedies to facilitate entry (1 June 2009)	Enabling measures (Hybrid IP type remedies)
25. Capita and IBS: A report on the completed acquisition by Capita Group plc of IBS OPENSystems plc. (4 June 2009)	Divestiture of Revenue and Benefits business (30 July 2009)	Divestiture
26. Stagecoach Group plc and Preston Bus Limited: A report on the completed acquisition by Stagecoach Group plc of Preston Bus Limited. (11 November 2009)	Divestiture of Preston Bus Limited (2 February 2010; and amended 15 July 2010)	Divestiture

27. Stericycle, Inc and Ecowaste Southwest Limited: A report on the completed acquisition by Stericycle, Inc of Ecowaste Southwest Limited. (21 March 2012)	Divestiture of Ecowaste Southwest (7 June 2012)	Divestiture
28. Anglo American PLC and Lafarge S.A.: A report on the anticipated construction materials joint venture between Anglo American PLC and Lafarge S.A. (1 May 2012)	Divestiture of an extensive package of operations by Anglo American and Lafarge (27 July 2012)	Divestiture
29. VPS Holdings Limited and SitexOrbis Holdings Limited: A report on the completed acquisition by VPS Holdings Limited of SitexOrbis Holdings Limited (17 August 2012 (amended on 31 August 2012))	Divestiture of SitexOrbis's business in Great Britain (19 October 2012)	Divestiture
30. Akzo Nobel N.V./Metlac Holding S.R.L.: A report on the anticipated acquisition by Akzo Nobel N.V. of Metlac Holding S.r.l. (21 December 2012)	Prohibition (1 October 2015) Final undertakings by merger parties not to acquire and sell shares, valid during the prohibition period (1 January 2015)	Prohibition Controlling outcome
31. The Rank Group Plc/Gala Coral Group: A report on the anticipated acquisition by The Rank Group Plc of Gala Casinos Limited (19 February 2013)	Prohibition of the acquisition of the Gala Coral Group unless specified casinos are excluded from the sale and Rank divests the cold licence it holds in Edinburgh (2 April 2013)	Prohibition and divestiture
32. Global Radio Holdings Limited and GMG Radio Holdings Limited: A report on the completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited (21 May 2013)	Divestiture of radio stations in seven areas of the UK by Global (3 February 2014)	Divestiture
33. Ryanair Holdings plc and Aer Lingus Group plc: A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc (28 August 2013)	Divestiture of Ryanair's 29.8% shareholding in Aer Lingus (11 June 2015)	Divestiture
34. Cineworld Group plc and City Screen Limited A report on the completed acquisition by Cineworld Group plc of City Screen Limited (8 October 2013)	Divestiture of three cinemas by Cineworld (31 January 2014, varied on 22 October 2014)	Divestiture
35. Completed acquisition by Imerys Minerals Limited (Imerys Minerals), a subsidiary of Imerys S.A. and Imerys UK Limited (Imerys UK) (together, Imerys), of the kaolin business of Goonvean Limited (Goonvean) (10 October 2013)	Price-capping of Imerys's products (19 December 2013)	Controlling outcomes
36. The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust/Poole Hospital NHS Foundation Trust: A report on the anticipated merger of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust (17 October 2013)	Prohibition (19 December 2013)	Prohibition
37. Completed acquisition of Breedon Aggregates Limited of certain Scottish assets of Aggregate Industries Limited (27 June 2014)	Divestiture of Breedon's asphalt operations at either Craigenlow or Tom's Forest and its RMX operations at either Peterhead or Stirlinghill. Breedon also subject to a price control for the sale of asphalt from its operations at Daviot and Mid Lairgs in the Inverness area. (26 June 2014)	Divestiture, controlling outcomes
38. Groupe Eurotunnel and Sea France (SA). A report on the completed acquisition by Groupe Eurotunnel SA of certain assets of Sea France (SA) (27 June 2014)	Prohibition of the operation of ferry services in Dover and divestment of Berlioz and the Rodin (18 September 2014).	Prohibition and divestment

39. Reckitt Benckiser and Johnson & Johnson: The anticipated acquisition by Reckitt Benckiser of the K-Y brand from Johnson & Johnson (12 August 2015)	Licensing of the K-Y brand to Thornton & Ross for 8 years (4 November 2015)	Enabling measures
40. Iron Mountain Incorporated and Recall Holdings Limited: A report on the completed acquisition by Iron Mountain Incorporated of Recall Holdings Limited (16 June 2016)	Divestiture of the entire share capital of C21 Data Services Limited (7 September 2016)	Divestiture
41. Ladbrokes Plc and Gala Coral Group Limited. A report on the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited (26 July 2016)	Divestiture of 360 licensed betting offices (12 October 2016)	Divestiture
42. Celesio AG and Sainsbury's Supermarkets Limited: A report on the anticipated acquisition by Celesio AG of Sainsbury's Pharmacy Business (29 July 2016)	Divestiture of Lloyds pharmacies (18 October 2016)	Divestiture
43. Arriva Rail North Limited and Northern Rail Franchise: A report on the completed acquisition by Arriva Rail North Limited of the Northern Rail Franchise. (2 November 2016)	Rail fare increase control (22 December 2016)	Controlling outcome
44. Diebold/Wincor (March 2017)	Diebold Nixdorf to sell either Diebold's or Wincor's customer-operated ATMs business in the UK to a new owner	Divestiture
45. Cygnet Health Care and Cambian Adult Services: A report on the completed acquisition by Cygnet Health Care Limited and Universal Health Services, Inc. of the Cambian Adult Services Division of Cambian Group plc (16 October 2017)	Divestiture of one of the Parties' four sites: The Limes, Storthfield House, Sherwood House or Derby (15 December 2017)	Divestiture
46. Euro Car Parts and Andrew Page: A report on the completed acquisition by Euro Car Parts of the assets of the Andrew Page business (31 October 2017)	Divestiture of the Andrew Page depots in nine local areas (12 December 2018)	Divestiture
47. Electro Rent Corporation of Microlease, Inc. and Test Equipment Asset Management: A report on the completed acquisition by Electro Rent Corporation of Microlease, Inc. and Test Equipment Asset Management Limited (17 May 2018)	Partial divestiture of Electro Rent Europe which operates in the UK (27 July 2018)	Divestiture
48. JLA and Washstation: A report on the completed acquisition by JLA New Equityco Limited of Washstation Limited (11 October 2018)	Divestiture of the Washstation business (13 December 2018)	Divestiture
49. Ausurus Group Ltd and Metal & Waste Recycling: A report on the completed acquisition by Ausurus Group Ltd of Metal & Waste Recycling (14 August 2018)	Partial divestiture of Metal and Waste Recycling Limited (5 November 2018)	Divestiture
50. Rentokil Initial and Cannon Hygiene: A report on the completed acquisition by Rentokil Initial plc of Cannon Hygiene Limited (25 January 2019)	Divestiture of the contracts of Cannon UK's customers affected by the SLC and any operations and infrastructure required by a prospective purchaser (16 April 19)	Divestiture

In addition, in June 2018 the CMA looked at the Fox News/Sky News merger proposal – the CMA report to DCMS recommended that the anticipated acquisition was not in the public interest due to media plurality concerns, DCMS accepted the CMA's recommendation that the most effective and proportionate remedy was for Sky News to be divested to a suitable third party (recommendation).

Source: CMA analysis.

Table 3: Remedies established through Undertakings in Lieu (UiLs) agreed at Phase 1 between November 2016 and March 2019

The following remedies were agreed with the CMA at Phase 1 of the merger review and thus avoided the need for a full in-depth Phase 2 investigation.

Merger (full text decision date)	*Summary of remedies (UIL acceptance decision date)*	*Category of remedies*
Completed acquisition by Novo Invest GmbH acting through Novomatic UK Ltd of Talarius Limited (8 November 2016)	Novomatic offered undertakings to divest either the Talarius AGC in Chesterfield, Dartford and Grimsby (Freeman Street) and the Novomatic AGCs in Clapham and Darlington (Northgate) or to divest the Talarius AGC in each of the five SLC local areas (11 January 2017)	Divestiture
Acquisition by Co-operative Foodstores Limited of 8 or more My Local grocery stores from ML Convenience Limited and MLCG Limited (10 November 2016)	Divestiture of 2 convenience stores in Widnes – CGL Hough Green and CGL Farnworth – to an approved buyer or buyers (23 January 2017)	Divestiture
Completed acquisition by AMC (UK) Acquisition Limited of Odeon and UCI Cinemas Holdings Limited (17 January 2017)	Divestment of the Odeon Printworks cinema together with the relevant leases, licences, assets and employees as permitted by law (17 May 2017)	Divestiture
Anticipated acquisition by MasterCard UK Holdco Limited, an affiliate of MasterCard International Incorporated, of VocaLink Holdings Limited (30 January 2017)	The UILS offer a package of three measures, consisting of: the Network Access Remedy; the LIS5 Remedy; and the Switching Fund Remedy (21 April 2017)	Behavioural
Completed acquisition by SSCP Spring Topco Limited, providing fostering services in the UK inter alia through its affiliated entity the National Fostering Agency Limited, of Acorn Care 1 Limited (20 February 2017)	Divestiture of three Acorn businesses (9 June 2017)	Divestiture
Completed acquisition by Menzies Aviation plc and Menzies Aviation Inc. of ASIG Holdings Limited and ASIG Holdings Corp. from BBA Aviation plc (3 March 2017)	Divestment of ASIG's ground handling business at ABZ (24 April 2017)	Divestiture
The award of the South Western rail franchise to FirstGroup plc and MTR Corporation (24 April 2017)	Price cap on fares on the London to Exeter flow (24 August 2017)	Behavioural
Anticipated acquisition by David Lloyd Clubs Limited of 16 Virgin Active Limited gyms (26 May 2017)	David Lloyd will not acquire the SLC Gyms for a period of ten years in lieu of reference (13 June 2017)	Controlling outcomes
Completed acquisition by Solera Holdings, Inc. of Autodata Publishing Group Limited (16 June 2017)	Divestment of the E3 Technical Business by way of an Asset Purchase Agreement (27 September 2017)	Divestiture
Anticipated acquisition by Heineken UK Limited of Punch Taverns Holdco (A) Limited (11 July 2017)	Divestment of certain pubs offered by Heineken (23 August 2017)	Divestiture
Completed acquisition by Origin UK Operations Limited of assets comprising the business of Bunn Fertiliser Limited (10 August 2017)	Divestiture of the assets and transfer the staff and customer and supply contracts that comprise the operations of Bunn in Montrose (3 November 2017)	Divestiture
Anticipated acquisition by John Wood Group plc of Amec Foster Wheeler plc (15 August 2017)	Divestiture of Amec's Upstream Offshore oil and gas business located in the UK and serving UK customers (14 September 2017)	Divestiture
Anticipated acquisition by Vision Express (UK) Limited of Tesco Opticians (20 October 2017)	Divestment of three Vision Express stores (17 November 2017)	Divestiture
Completed acquisition by Refresco Group N.V. of the traditional non-alcoholic beverage business of Cott Corporation Inc (8 February 2018)	Divestiture of Cott's APET facility in Nelson, Lancashire, the APET production line, all associated facilities and personnel responsible for APET production in the UK and all existing APET UK customer contracts and revenues (3 April 2018)	Divestiture

Anticipated acquisition by Tarmac Trading Limited of certain assets of Breedon Group plc (15 May 2018)	Tarmac has offered not to acquire the SLC RMX plants for a period of 10 years (15 June 2018)	Behavioural
Completed acquisition by Clayton Dubilier & Rice Fund IX, L.P., a fund which includes in its portfolio the Motor Fuel Group, of MRH (GB) Limited (31 August 2018)	Divestiture of agreed sites (20 November 2018)	Divestiture

Appendix 3: Research methodology

1. This appendix sets out how the case studies were chosen and the tools that were used to carry out the evaluation.

Selection of case studies

2. It was intended that the chosen case studies should fulfil a number of requirements. In particular, they should:

   (a) be sufficiently far in the past to allow meaningful analysis on their results, but sufficiently recent to ensure they are relevant;[1]

   (b) cover different types of remedies, and especially those remedies most frequently used by the CMA;

   (c) include remedies that were thought to be successful and unsuccessful; and

   (d) include both relatively straightforward and relatively complex remedies.

3. As set out in Table 1, the CC/CMA completed 161 Phase 2 merger cases from 1 April 1999 to 31 March 2019, of which 71 cases required remedies. Further details of the remedies are provided in Appendix 2.

Table 1: Use of remedies in Phase 2 inquiries, 1 April 1999 to 31 March 2019

	FTA 1 April 1999 to 31 March2003	*Enterprise Act 1 April 2003 to 31 March 2019*	*All mergers*
Total number of merger inquiries	47 (100%)	114 (100%)	161 (100%)
—of which cleared unconditionally	26 (55%)	64 (56%)	90 (56%)
—of which required remedies (including prohibition and full divestiture)	21 (45%)	50 (44%)	71 (44%)

Source: CC and CMA analysis.
Note: Excludes cancelled references.

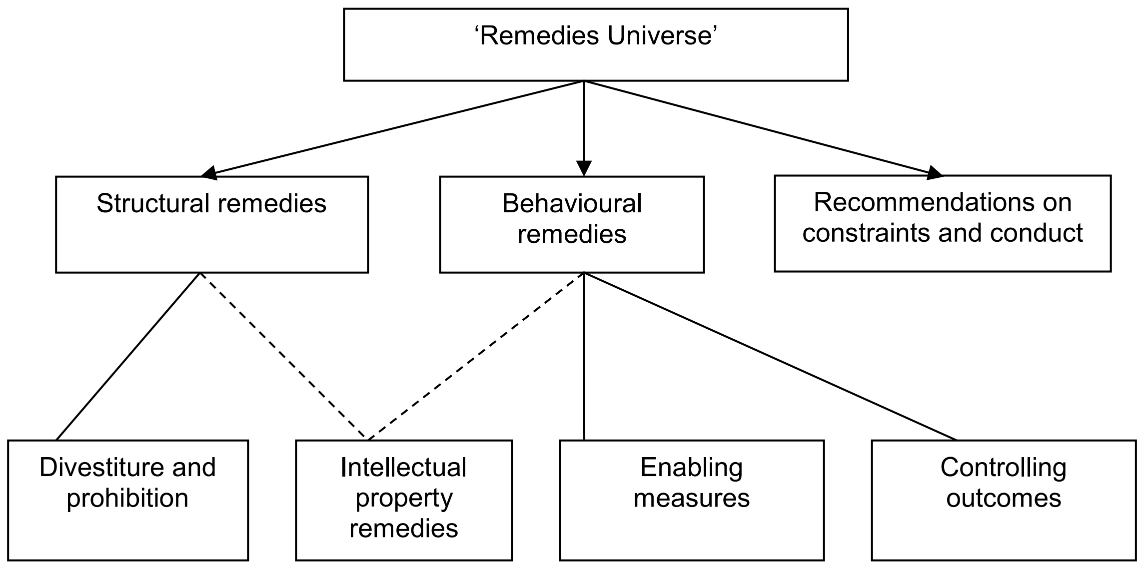
4. It is possible to categorize remedies between structural, behavioural or recommendations to a third parties (see figure 1). Within behavioural remedies, we make a further distinction between:

[1] In practice, this implied that the first six cases evaluated (first published in January 2007) were restricted to cases considered under the FTA as cases under the Act were too recent to be considered.

(a) enabling measures, whose aim is to facilitate competition; and

(b) measures to control outcomes (such as price caps), whose aim is to prevent the exploitation of market power.

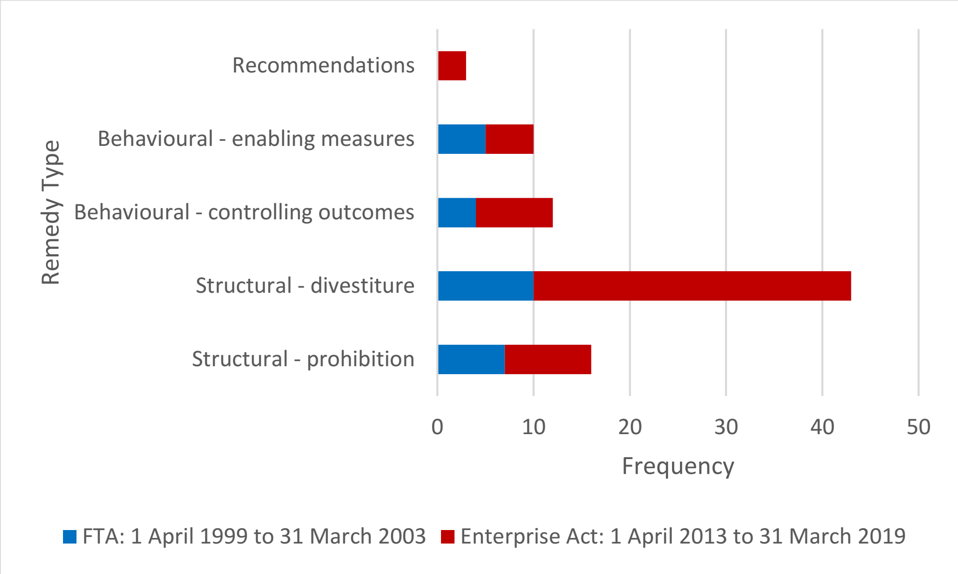
Figure 1: Categorization of remedies by type



Source: CMA87 – Merger Remedies: Competition Commission Guidelines.

5. By applying the above mentioned remedy categories for the period from 1 April 1999 to 31 March 2019, it is evident (see figure 2) that structural remedies have been more frequently used than behavioural remedies (in 59 and 22 inquiries respectively). Within behavioural remedies, enabling remedies to facilitate competition (in particular by restricting vertical behaviour) and remedies to control outcomes (such as price controls) have been used to a similar extent (10 and 12 inquiries respectively). During this period only three merger remedies (*Draeger,Stericycle and Fox/Sky*) included a recommendation to Government and only four enabling measures (on *Nufarm/AH Marks*, *Unilever/Alberto Culver, Global and RB/K-Y*) have had elements of an intellectual property remedy (eg licensing of a patent or brand).

Figure 2: Frequency of Phase 2 merger remedies by type, 1 April 1999 to 31 March 2019



Source: CMA analysis.
Note: Number of remedies do not sum to the totals in Table 1 because some inquiries used more than one type of remedy.

6. In order to ensure adequate coverage of the categories of remedies, it was clear that the case studies used for remedies evaluations needed to include a mix of divestiture remedies, enabling measures (including remedies to restrict vertical behaviour) and remedies to control outcomes.

7. All relevant remedy types have been covered using the 15 inquiries evaluated to date:

   (a) Structural remedies including prohibition and divestiture (Sibelco, Emap, Stericycle, Somerfield, Noble, Stagecoach, Unilever, Rank and Global);

   (b) behavioural remedies including controlling outcomes or enabling competition (*Alanod*, *Coloplast, Centrica*, *Draeger, Arqiva* and *Nufarm)*; and

   (c) recommendations (*Draeger* and *Stericycle*).

8. The case studies also include remedies that were expected to be relatively straightforward (*Sibelco, Alanod, Emap, Stericycle, Somerfield, Noble, Stagecoach, Unilever* and *Rank*) and remedies that were expected to be relatively complex (*Centrica, Coloplast, Draeger, Arqiva, Nufarm* and *Global*).

9. In line with requirements set out in paragraph 2 (of appendix 2), the CMA's most recent remedy evaluations case studies are the:

   (a) anticipated acquisition by The Rank Group Plc of Gala Casinos Limited; and

(b) completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited.

Research tools

10. We have undertaken extensive background research into each case study. This CMA staff:

    (a) reviewed the final report and inquiry files (in particular, submissions from and transcripts of hearings with parties to be contacted in the research);

    (b) discussed issues with the Inquiry Director or other members of staff involved on the case; and

    (c) consulted the relevant staff responsible for the implementation of the remedies.

11. Once this background research was completed, we selected relevant contacts for interview. In each case, interviewees included representatives of:

    (a) CMA staff;

    (b) the party subject to the remedies;

    (c) key competitors; and

    (d) key customers.

12. Where possible and appropriate, we also interviewed:

    (a) suitable purchasers of the divestiture package;

    (b) the monitoring trustee

    (c) the divestiture trustee;

    (d) industry regulators;

    (e) government departments; and

    (f) trade associations.

13. All interviewees received a formal invitation to participate in the study from a CMA Director of Remedies. Interviews were conducted by two members of staff, with one member of staff involved in all interviews to provide continuity. A note was taken of each interview, and this was agreed with the interviewee.

14. Each interviewee was sent a tailored topic guide in advance of the interview. In addition, interviewees were asked broadly similar sets of questions in relation to:

(a) their views on any interim measures;

(b) their understanding of the reasons for the choice of remedy;

(c) their understanding of what had happened since the undertakings had been put in place;

(d) whether the undertakings appeared to be constraining the company subject to them in the way originally intended (for behavioural remedies only);

(e) whether the remedies had had any side effects;

(f) whether the remedies was working in the way that they had expected; and

(g) what, if anything, they would like to see done to improve the way in which the remedies worked or works.

Assessment of methodology

15. The methodology used in this research has been working well. We note that the chosen methodology could be subject to various risks. However, we have taken steps to mitigate such risks. For example:

(a) Concern that it might be difficult to identify suitable candidates for interview and to secure their participation in the study: We sent formal letter of invitations from a senior member of CMA staff that communicated the importance of the study, a process that encouraged participation. We also managed to secure interviews with all of those identified as suitable candidates;

(b) Concern that interviewees might be reluctant to freely share their views on the remedies with the CMA: We found that interviewees were forthcoming in their comments on the remedies in question once they had been assured that their comments would not be made public. The topic guides helped ensure that the interviewers covered the relevant issues. But the interviewers' wider knowledge of the inquiry and a willingness to pursue other lines of questioning as they arose were also important in getting maximum value from these interviews.

Appendix 4: Comparisons with other remedies research

16. Other competition authorities have undertaken studies into the effectiveness of past merger remedies but relatively few have been published.[2] We have summarised the findings of studies by three other authorities. First we have summarised two studies from the FTC, one published in 1999, which looked at its divestiture process and the second published in 2017 which followed up the 1999 study. This again focussed on divesture remedies, but additionally included non-structural remedies. Second we have summarised a study in 2005 by DG Comp of the European Commission, which looked at the effectiveness of a large sample of merger remedies. Third we have summarised a study published in 2011 by the Canadian Competition Bureau (CCB), which looked at the effectiveness of both structural and behavioural remedies. We consider how the learning points from our case study research relate to those learnings from these studies in other jurisdictions.

The Federal Trade Commission

1999 Divestiture study

17. In 1999 the FTC published the results of an extensive study of divestiture remedies.[3] The study looked back at 37 (out of a total of 50) divestiture remedies that had been implemented between 1990 and 1994 and attempted to assess whether the divestiture had been an effective remedy, and whether there were systemic reasons why some of the divestitures had not been effective. The research was conducted mainly by means of interviews with purchasers, although a relatively small number of other parties were also interviewed. It concluded with a series of recommendations as to how the FTC's divestiture process might be improved.

18. The divestitures studied covered a wide variety of industries and included a variety of divestiture packages from virtually autonomous (stand-alone) subsidiaries to non-exclusive licences, to patents and know-how. The study showed that almost all of the required divestitures actually occurred. The study did not attempt to assess the impact of the divestitures on the process of competition in the relevant markets. However, on the basis that a divestiture was effective if the divestiture package was bought by an approved

[2] There are, however, some published academic articles assessing remedy choices, see for example, *UK Merger Remedies: Convergence or Conflict with Europe? A Comparative Assessment of Remedies in UK mergers,* Hoehn and Rab, 2009.
[3] *A Study of the Commission's Divestiture Process*, prepared by Staff of the Bureau of Competition of the Federal Trade Commission, 1999. The full study is available at https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

purchaser who began operating it viably in the market within a reasonable period and continued to do so, 28 out of the 37 divestitures studies, ie approximately three-quarters, were effective.

19. In looking for systemic reasons for why some divestitures failed while others were successful, the study generated the following findings:

(a) Divestiture packages must include all the assets that a purchaser needs to compete effectively in the market—this may be greater than the area of overlap or an asset, access to which constitutes a barrier to entry.

(b) Divestitures of existing ongoing (stand-alone) businesses tended to be more successful than divestitures of selected assets (eg intellectual property, technology, brand names).

(c) Divesting parties tend to look for purchasers who will not be strong competitors and may engage in strategic conduct to reduce the purchaser's chances of success.

(d) Purchasers do not have sufficient information to prevent mistakes in the course of their acquisitions.

(e) 'Continuing entanglements and relationships' between the divesting party and the purchaser post-divestiture (eg where the divesting party supplies a key input to the purchaser) tend to increase the vulnerability of the purchaser and can dull the incentive to compete.

(f) Smaller firms have the same rate of success as larger firms in operating divestiture packages effectively and should not be presumed to be less suitable purchasers.

20. The study made various recommendations with the aim of increasing the effectiveness of the FTC's divestiture process. These are set out in Table 5.

Table 5: Recommendations for the FTC divestiture process

Aim	*Recommendations*
Increase the divesting party's incentives to achieve an effective divestiture	— Appoint monitoring trustees — Require divestiture of a 'crown jewel' if divesting party fails to achieve a sale within the specified period — Require consequential damages for failure to deliver supplies
Facilitate the success of the purchaser	— Ensure purchaser has access to accurate information — Require purchaser to submit to the FTC an acceptable business plan for the assets — Require purchaser before approval to have executed contracts with third parties who will supply any key inputs or service it will not be providing itself — Ensure that purchaser fully understands the order implementing the remedy — Select appropriate purchasers, on grounds that include knowledge and experience and their commitment to the market, but not necessarily their size
Facilitate transfer of business information	— Ensure that purchaser has: — Rights to all related technology — Rights to technical assistance — The right to inspect the facilities in operation — The right to hire selected people from the merged entity that have important knowledge

Source: CMA, material from FTC divestiture study.

2017 Merger remedies study

21. The 2017 study is a review of all of the FTC's merger orders from 2006 through to 2012.[4] The study evaluated both i) the success of each remedy in maintaining or restoring competition in the relevant market where the merger had resulted in competition problems and ii) the FTC's remedy process more generally. The study examined 89 of the FTC's orders using a variety of methods. 50 orders were analysed using a case study methodology. This included interviewing staff of the merged firms, of the acquirers of the diverted assets and of other market participants, as well as analysing sales data. A further 15 orders were assessed by examining responses to questionnaires from the buyers.[5] 24 further orders were evaluated using internal and publicly available information.[6]

22. The FTC's study found that all of the remedies which involved the divestiture of assets comprising ongoing businesses were successful. The FTC concludes that such divestitures poses little risk. In contrast, the study found that where divestitures involved the sale of selected assets of a merging business, these divestments did not always succeed in maintaining competition. Further, the report found that requiring an upfront buyer of more limited asset divestment packages does not always eliminate the risks associated with such divestments.

[4] *The FTC's Merger Remedies 2006-2012*, A report of the Bureau of Competition and Economics, 2017. The full study is available here.
[5] These orders affected supermarkets, drug stores, funeral homes, dialysis clinics and other healthcare facilities.
[6] These orders affected the pharmaceutical industry.

23. The report summarised the success of the 50 case study orders according to whether they were a success, a partial success or a failure. This found that overall 69% of orders were a success, 14% were a partial success and 17% were a failure.[7] The FTC found that success rates tended to be higher for non-consummated mergers. This reflected that for these mergers there was a lack of integration of assets post-merger and that there was an ability to alter contracts to facilitate the entry of the buyer of the divested assets. The FTC also noted that in contrast for consummated mergers, it could be much more difficult to separate the pre-merger business and this meant that the divestiture remedy could often fail.

24. In terms of the evaluation of the FTC's remedy process, the study identified a number of concerns relating to designing, drafting and implementing its remedies. The study found that while these concerns did not generally prevent the effect of the remedy in maintaining competition in the relevant market, addressing the concerns would improve the process and could improve the success rate of the FTC's orders.

25. The main issues identified by the study fell into three categories:

(a) Scope of the asset package that was required to be divested. Where the merging party offers a package of assets short of a full ongoing business, for example excluding a manufacturing facility as the buyer already operates such a facility, or only includes intellectual property as that is what the buyer requires to overcome barriers to entry, this can extend the time required for the buyer to replace the lost competition.

(b) The ability of the buyer to conduct adequate due diligence. As the seller and the buyer will be rivals post divestment this can mean the seller has a reduced incentive to facilitate adequate due diligence, particularly with access to data, facilities and employees during the divestiture process.

(c) The transfer of back-office functions to the buyer. Where a buyer does not have the capability to perform the required back-office functions or will not be able to access them through, for example third parties, the seller will be required to provide them on a transitional basis or to divest these functions as part of the divestment package.

26. The study found that these (and other) concerns raised may not have interfered with buyers' ability to compete over the longer term. The study

[7] A remedy was judged a success if competition remained at its pre-merger level or returned to that level with two to three years. A remedy was judged a partial success if it took more than two to three years to restore competition to its pre-merger state, but ultimately did so. A remedy was judged to have failed if it did not maintain or restore competition in the relevant market.

recognises that they could introduce additional challenges that buyers needed to overcome. The FTC has already taken various steps to address these, including:

- Asking additional targeted questions about remedy proposals to divest limited asset packages;
- Asking more focussed questions to buyers about their financial position;
- Monitoring the due diligence process even more carefully; and
- More closely scrutinising buyers' back-office needs and considering additional requirements in orders.

27. The study also found that there was a continued reluctance on the part of some buyers to raise concerns with FTC staff and independent monitors during the divestment process. The FTC is taking action to emphasise to buyers the importance of ongoing communication with the FTC staff. Buyers, or other affected parties, should raise issues or concerns with staff or the independent monitor, where appointed, when they arise.

The DG Comp study

28. The DG Comp study was published in October 2005.[8] It analysed 96 remedies used in 40 cases over the five-year period 1996–2000[9] with the aim of identifying serious issues in the design and implementation of remedies, assessing the effectiveness of the European Commission's policy on remedies and recommending areas for improvement. Like the FTC study, DG Comp used interviews mostly with the divesting parties and purchasers but also with trustees and other parties to gather qualitative data. Unlike the FTC, it also issued follow-up questionnaires to a limited number of interviewees as a means of gathering quantitative data. Of the 96 remedies it examined, 84 were divestitures, ten were access commitments, and two were other types of remedy. A wide variety of divestitures was covered, including sale of a stand-alone business, sale of package of assets constituting a 'carve out'[10] from a business, 'mix and match' divestitures, exits from a joint venture and licensing. Access commitments covered access to infrastructure, access to technology and termination of exclusive agreements.

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[8] *Merger Remedies Study*, DG Comp, European Commission, October 2005. The full study is available at: http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf
[9] The 40 decisions selected accounted for 44 per cent of the 91 merger decisions involving remedies over the five-year period.
[10] The term 'carve out' was applied to assets that were split out of a business for divestiture.

29. The study considered the effectiveness of the remedies:

(a) 'Fully effective' remedies: a fully effective divestiture remedy would have resulted in a sale where the divestiture package remained a viable and effective competitor; a fully effective access remedy was considered to be one which had eliminated foreclosure concerns.

(b) 'Partially effective' remedies: a partially effective divestiture remedy was one in which there were still (ie at the time of the study) 'unresolved issues' and a partially effective access remedy was one in which access had not been granted to the extent determined in the decision.

(c) 'Ineffective' remedies: ineffective divestiture remedies had failed to restore competition either because the divested business had ceased to operate or had not begun operating three to five years after the decision. Access remedies were ineffective where no access had been granted.

30. On this basis, the study concluded that 57 per cent of the 96 remedies had been fully effective, 24 per cent partially effective and 7 per cent ineffective. The effectiveness of the remaining 7 per cent could not be judged because the remedy had been proved unnecessary.

31. The study also provides a breakdown of effectiveness by broad type of remedy, as shown in Table 6.

Table 6: DG Comp study: effectiveness of remedy by type

per cent

	Fully effective	*Partially effective*	*Ineffective*	*Unclear*
Asset divestitures	56	25	6	13
Exit from a JV	77	8	0	15
Access commitments	40	40	20	0

Source*:* DG Comp study.

Divestiture remedies

32. In relation to divestitures, the main findings of the study can be grouped by reference to:

(a) scope of package;

(b) interim asset preservation;

(c) suitable purchasers; and

(d) the transfer process.

Scope of package

33. The inadequate scope of the divested business was the most frequent of all design and/or implementation problems (identified in 79 per cent of the 84 divestiture remedies). The main issue was the omission of key assets necessary for the viability and competitiveness of the divested business. The study categorized issues of scope into five key issues:

(a) upstream/downstream links (between the divested business and parts of the retained business);

(b) geographic limitations;

(c) business below a critical size;

(d) product cycle effects;[11] and

(e) unresolved intellectual property rights (IPR) issues.

34. Carve-out divestiture remedies experienced issues in relation to separating tangible and intangible shared assets, including networks, IPRs and the allocation of personnel.

35. The study also found that divestitures of packages of assets that dealt only with the competition ‘overlap’ were as likely not to be fully effective (43 per cent) as to be effective (43 per cent). Divestitures of packages of less than the ‘overlap’ fared even worse with 72 per cent classed as ‘risky/doubtful’ and only 14 per cent as fully effective. However, divestitures of packages comprising more than the ‘overlap’ were far more likely (86 per cent) to be fully effective.

36. The study identified that in 10 per cent of all divestiture remedies, an alternative divestiture package could have potentially improved the remedy by increasing parties’ incentives to divest and by reducing implementation risks. The study also noted that an upfront buyer provision could have been a viable option where there were serious asset risks during the divestiture process.

Interim asset preservation

37. The study found that asset preservation during the divestiture process had been a significant problem in a number of cases. The study found that:

[11] For example, if a business is sold at a stage in the product cycle when demand is low the purchaser may have to withstand a period of low sales before business picks up later in the product cycle.

(a) Asset preservation was more complex when the business to be divested was not stand-alone.

(b) The divesting party often attempted:

   (i) to degrade tangible and intangible assets;

   (ii) not to maintain investment and customer service levels;

   (iii) to put in place inadequate personnel retention schemes; and

   (iv) 'front loading'.[12]

(c) Asset preservation measures are difficult to monitor, even by experienced trustees, and success or failure often only becomes apparent after the divestiture.

(d) Monitoring trustees should be appointed in all divestiture remedies and to be effective they should:

   (i) be appointed as soon as possible;

   (ii) have trustee mandates that are very clear on their functions;

   (iii) follow a detailed workplan and keep in regular contact with DG Comp;

   (iv) have the requisite qualifications and experience; and

   (v) have and maintain their independence of the divesting party.

(e) HSMs, with responsibility for asset preservation and holding separate the divested business, would have been beneficial in virtually all divestiture remedies, particularly where there was significant risk of asset degradation.

Suitable purchasers

38. In relation to suitable purchasers, the study found that 48 per cent of divestiture remedies had concerns raised regarding the purchaser selection and approval process. The study noted the existence of a strong link between the availability of suitable purchasers and the scope of the asset package, and that a more limited asset package (as well as introducing the risk that the purchaser would not have everything it needed to compete) could reduce the

[12] This term was used to describe a process of selling sufficient quantities of product on to the market before the divestiture such that the purchaser faced a period of very low demand just after having acquired the assets.

pool of potential purchasers making it more likely that an unsuitable purchaser would be approved. It also noted that the risk of not finding a suitable purchaser could be reduced by use of ‘upfront buyers’.

39. Specifically in relation to the requirements of a suitable purchaser, the study concluded that these requirements should include:

(a) proven expertise (especially in innovation-driven industries);

(b) financial resources;

(c) incentives to compete;

(d) independence from and no connections to the divesting party; and

(e) no risk of creating new competition problems or other regulatory concerns.

40. The study found that the length of the average divestiture period granted to divesting parties was 7.6 months and that a deadline of 6 months was given in 60 per cent of cases. Extensions were granted in some cases but the average divestiture period was only 6.2 months (ie shorter than the average divestiture period allowed).

Transfer process

41. The study noted that after approving the sale and purchase agreement, DG Comp rarely intervened in the transfer process. It suggested that DG Comp might be able to intervene more often to check that the terms of the sale and purchase agreement are complied with and perhaps to help resolve any outstanding issues (eg IPRs) that could damage the effectiveness of the remedy.

Access commitments

42. In relation to access commitments, the study found that they had only worked in a very limited number of instances. The study concluded that:

(a) determining the nature of the commitments up front is inherently difficult:

(i) their effectiveness will depend on who is using the access, and this might not be known at the time; and

(ii) it is difficult to determine what ‘non-discriminatory’, ‘fair’ and ‘reasonable’ terms actually are;

(b) access fees can convey sensitive market information and/or dull incentives to compete;

(c) there may be a failure to transfer all the know-how necessary effectively to use the access;

(d) monitoring is often inadequate; and

(e) review clauses should be included.

The Canadian Competition Bureau's study

43. The CCB's study was published in August 2011.[13] It analysed the effectiveness of remedies on 23 cases over the period 1999 to 2005. The research was conducted by sending questionnaires to the merged entity, customers, purchasers of divested assets and other market participants affected by a remedy. Where possible, respondents were also interviewed (a total of 135 interviews were conducted). The study covered 20 structural (divestiture) remedies and three quasi-structural[14] or behavioural remedies.

Divestiture remedies

44. The CCB study found that in the majority of cases the divestiture was viewed as having been effective in achieving its aim of eliminating a substantial lessening of competition.

45. The study identified two out of 20 cases where divestitures were not completed. Key reasons for this failure were:

(a) unattractive assets;

(b) minimum pricing provisions in the divestiture order; and

(c) a limited pool of potential purchasers.

46. The study identified the following key learning points:

(a) divestiture of a non-stand-alone operating business worked when bought by a trade buyer with an existing infrastructure;

[13] *Competition Bureau Merger Remedies Study*.
[14] This was defined as a change to the structure of the market accomplished by means other than a divestiture (eg granting access rights to networks).

(b) where there was some concern regarding the quality or viability of the assets for sale, there would have been merit in market testing the proposed divestiture package so as to identify likely purchasers;

(c) existing contracts that are part of the divestiture package need to be reviewed to assess change of control provisions;

(d) a longer sale period was associated with degradation of assets or market changes that affected the saleability of the assets in some cases. Initial sale periods varied from 3 to 24 months and divestiture trustee periods from 3 to 12 months;

(e) a divestiture was more likely to be seen to be successful where a purchaser was financially stable and had prior industry experience; and

(f) significant issues were raised regarding interim arrangements and the maintenance of assets pending their divestiture. The absence of monitoring and oversight during the interim period was linked to the degradation of assets in some (but not all) cases.

Quasi-structural or behavioural remedies

47. The CCB study found it very difficult to draw general conclusions regarding the effectiveness of quasi-structural or behavioural remedies because only three cases with such remedies were evaluated. However, a few observations were drawn, including:

(a) a need for behavioural remedies to be monitored by a monitoring trustee;

(b) a reluctance to use arbitration processes due to the need to maintain business relationships; and

(c) stand-alone behavioural remedies may not anticipate future conditions at the time the remedy is designed.

Comparison with the CMA study

48. In contrast to the UK system, the US, EU and Canadian systems all require mandatory pre-notification of mergers. This has several implications:

(a) They are very unlikely to need to force the divestiture of the whole of the acquired business, as the Secretary of State did in *Sibelco* and the CC did in *Noble*, as these transactions would simply have been prohibited.

(b) Situations in which the ‘eggs’ have been ‘scrambled’ prior to a decision on the merger so that an effective divestiture is infeasible (as in *Alanod*) or

that integration requires unwinding (as in *Noble* or *Stagecoach*) are very unlikely to occur. Similarly, they encounter fewer issues in relation to the need to hold separate and maintain the acquired business than do the UK authorities.

49. An important difference between the US/Canadian and EU systems is that DG Comp can only consider remedy proposals offered by the parties. It has the ability to decline those proposals but the only alternative is prohibition, which could be disproportionate. This system therefore makes DG Comp potentially more likely to experience problems related to an inadequate scope of divestiture packages and perhaps also to a lack of suitable purchasers.

50. These differences in merger regime have influenced the aims and approaches of the merger remedy studies. The FTC's 1999 study covered 37 divestitures and its 2017 study all 89 orders issued between 2006 and 2012, the DG Comp study covered a total of 96 remedies and the CCB study 23 cases involving remedies. The number of remedies covered allowed both the FTC and DG Comp to provide statistical overviews of the success of different types of remedy and instances of different types of failure. Our study, in contrast, covers just 15 sets of remedies, so that any statistical overview would have no value. However, the CMA's smaller number of case studies means that it is possible to get an in-depth view of the remedies from the Final Report through the implementation process.

51. The FTC, DG Comp and CCB studies were based largely on interviews. The FTC's 1999 study was heavily based on interviews with the divesting party, the purchaser. The DG Comp study used interviews with the party committing to the remedy, any purchasers, licensees or companies granted rights as a result of the remedy, and any trustees. The CMA case studies were also based largely on interviews but, in contrast, also included interviews with customers and competitors and, where relevant regulators. Case studies conducted prior to the creation of the CMA also included interviews with the OFT (as ongoing monitoring body, as well as the implementing body under the FTA). This approach allowed the CMA access to different perspectives on the effectiveness of the remedies. The CCB and the 2017 FTC study adopted the same approach as the CMA. Approximately half of the CCB's interviews were with customers and one-fifth were with third parties (eg suppliers and industry associations). The case studies in the 2017 FTC study involved interviews with the divesting party, the purchaser and other market participants. The FTC also evaluated some cases using responses to questionnaires sent to buyers, and others using internal expertise, information and data and information from publicly available sources.

52. The differences in merger control regimes and the differences in research methodology notwithstanding, the results of the CMA study in relation to interim remedies and divestiture remedies are broadly in line with those of the FTC, DG Comp and CCB studies.

53. On interim measures, the experience in *Alanod* of firms pressing ahead with integration to the detriment of a divestiture package and in *Sibelco* of the divesting party degrading the asset package closely echo the findings of the DG Comp study on interim preservation measures. The approaches used in *Stericycle* and *Noble* have shown how such risks have been mitigated.

54. On divestiture, the results of the *Sibelco, Emap, Stericycle* and *Noble* case studies are similar to the findings of the DG Comp and CCB studies on the difficulties involved in assessing the suitability of purchasers, the risks of not finding a suitable purchaser and the links between those risks and the scope of the divestiture package. Further, the *Sibelco* experience strongly supports the warning from the FTC studies that divesting parties will look for purchasers who will not be strong competitors. It is difficult, however, to find any echo of the UK approach of using 'back-up' remedies in either the DG Comp, CCB or FTC studies, since none of those institutions use 'back-up remedies' in such a way.

55. The findings of the CMA case studies in relation to behavioural remedies differ from those of the DG Comp study (and the CCB study did not draw firm conclusions given the sample size). The DG Comp study included only behavioural remedies in the form of access commitments (and did not include any behavioural remedies aimed at controlling outcomes such as the *Alanod* and *Coloplast* price controls) and found that such remedies were more likely to be ineffective or only partially effective than fully effective. This contrasts with the results of the CMA's case studies which suggest that those behavioural remedies examined have been largely effective due to the specific circumstances in which they have been implemented and the attention to detail in remedy design, implementation and monitoring. In particular, the *Centrica* remedies, which include access commitments, and the *Arqiva* remedies appeared to be working well.

56. Although the CMA has undertaken relatively few case studies, the greater level of success associated with its behavioural remedies is perhaps not surprising. The UK authorities, not least because of the differences in its merger control system, have more experience of behavioural remedies than DG Comp. It also seems likely to be important that the UK is relatively well-resourced for ongoing monitoring and, in particular in relation to regulated sectors, can draw on the expertise of existing institutions to act as effective monitors. The experience from the behavioural remedies studied for this

research suggests that, although they are only appropriate in limited circumstances, if designed carefully and monitored well, they can be effective.

Appendix 5: Case study results

57. Building on earlier work by the Competition Commission (CC) and the Office of Fair Trading (OFT), the CMA is committed to a rolling programme of review into past remedies, with the aim of ensuring that learning points are captured and fed into the development of remedies policy and practice. The CMA has evaluated the remedies from 18 merger inquiries to date.

58. The 18 merger remedies were evaluated in seven tranches:

- *Alanod*, *Sibelco*, *Coloplast* and *Centrica.* Unlike the other remedies in this evaluation (which were put in place under the Enterprise Act 2002 (the Act)), these four merger remedies were put in place under the Fair Trading Act 1973 (ie prior to the majority of decisions about remedies being made by an independent competition authority). They covered three sets of behavioural remedies and a divestiture. The evaluation of these remedies was first published in January 2007.

- *Draeger* and *Emap*. The *Draeger* remedy comprised a recommendation to health service purchasers combined with a time-limited price cap. *Emap* involved a divestiture following a completed merger. The evaluation of these remedies was first published in August 2008.

- *Stericycle* and *Somerfield*. The *Stericycle* inquiry involved complex interim measures and a partial divestiture. The *Somerfield* remedy required divestiture of 12 stores but difficulties in the sale of certain stores led to the appointment of a divestiture trustee. The evaluation of these remedies was first published in September 2010.

- *Arqiva*, *Nufarm* and *Noble*. The *Arqiva* inquiry involved a complex behavioural remedy. The *Nufarm* remedy comprised a hybrid package of structural and behavioural measures to facilitate entry—some aspects were similar to the licensing of intellectual property. The *Noble* inquiry involved complex interim measures followed by a challenging divestiture process that included the appointment of a divestiture trustee. The evaluation of these remedies was first published in September 2012.

- *Stagecoach* and *Unilever.* The *Stagecoach* inquiry involved a divestiture remedy and the appointment of a hold separate manager following a completed merger. The *Unilever* inquiry involved the divestiture at Phase 1 by the OFT of intellectual property rights, through the royalty-free licensing of various brands of soap. The evaluation of these remedies were first published in July 2015.

- *Rank* and *Global*: The *Rank* inquiry involved the prohibition of the acquisition of the Gala casinos in Aberdeen, Bristol, Cardiff and Stockton-On-Tees and the divestiture of Rank's cold licence in Edinburgh. The *Global* inquiry involved a partial divestiture of stations in seven overlap areas, involving a brand-licence arrangement. The evaluation of these remedies were first published in April 2017.

- *Müller, Reckitt Benckiser* and *ICAP*: The *Müller* inquiry involved understanding in Lieu (UiLs) which were agreed at Phase 1 which removed the requirement to move onto Phase 2. The *Reckitt Benckiser* case was an international merger which was passed in 50 countries with New Zealand and the UK requiring remedies. The merger in the UK involved licensing of intellectual rights for a fixed period. The *ICAP* remedy was proposed by the merging parties at Phase 1 and involved transfer of staff to a competitor who were the main assets of the business. The evaluation of these remedies was first published in June 2019.

59. This appendix presents the main factual findings of the research in relation to each of the first six tranches of case studies in turn. The following aspects of each study are discussed:[15]

    (a) the main facts of the inquiry;

    (b) key factors in relation to the choice and design of the recommended remedy; and

    (c) what happened after the Final Report.

60. Following the presentation of the factual findings in relation to each case study, an assessment of the effectiveness of the remedies and a summary of the main learning points from that case study is provided.

Alanod

Main facts of the inquiry

61. The acquisition of Metalloxyd Ano-Coil Ltd (Ano-Coil) by Alanod Aluminium-Veredlung GmbH & Co (Alanod) was referred to the CC in July 1999.

62. Both Alanod and Ano-Coil processed sheet aluminium in coil form, which was used for its reflective qualities in commercial lighting units (known as

[15] The seventh tranche case studies are included as an Appendix to the main remedy evaluation document published alongside this set of Appendices.

luminaires). The companies anodized the aluminium to produce reflectivities of around 85 per cent, though higher levels could be achieved (at higher cost) using the process of vacuum deposition through which Alanod produced its MIRO product range.

63. Alanod was a technologically advanced, profitable company with a strong market presence in the UK and Europe. Ano-Coil, by contrast, was financially weak and its parent company had been under bank control since 1997. Alanod had strong links with Jordan Reflectors Ltd (Jordan), a specialized manufacturer of louvres for ceiling light fittings, with Jordan's parent company being owned by two individuals who also owned a joint share in Alanod. Shortly before the merger Ano-Coil had restructured itself and was budgeting for a small pre-tax profit in 1999. Its owners said that they did not have the financial resources to secure Ano-Coil's medium- to long-term future and had decided that their best course of action was to sell the business as a going concern. The effect of the merger was to increase Alanod's share of the UK market for anodized aluminium coil for use in lighting from about 35 per cent to about 75 per cent.

64. The OFT did not become aware that the merger had been completed until sometime after the event. The OFT was left with only two months in which to complete its phase 1 investigation of what was now a completed merger. Under the FTA, the OFT could not put in place interim undertakings until after a reference to the CC had been made. Following the reference, the OFT sought interim undertakings from Alanod, but Alanod responded by noting that Ano-Coil had already been integrated with Alanod. Eventually, very limited interim undertakings were put in place, which obliged Alanod to maintain the Ano-Coil name and product codes.

65. The CC concluded that the merged entity would have the ability and the incentive to raise prices for specular anodized aluminium in the UK. It also noted that the merged entity would be the sole supplier of the high reflective quality 'MIRO' range and that it could tie sales of MIRO to sales of more basic products, thereby damaging competition in the supply of those more basic products. Customers were highly fragmented, with the largest accounting for around 20 per cent of anodized aluminium usage in the UK and the next largest accounting for around 7 per cent of usage. Luminaire manufacturers also bought ready-made louvres, but in the UK Jordan (which was linked to Alanod) was the largest supplier.

66. In its final report, the CC noted that the amount of the start-up costs a new entrant would need to incur relative to the size of the market constituted a barrier to entry. However, the CC also noted that other barriers to entry also existed. Notably these included exclusive distribution arrangements that

Alanod had with key distributors, initially with Thyssen. In addition, a deal with Von Ardenne Anlagentechnik GmbH (Von Ardenne) effectively prevented others from using the method of manufacturing the MIRO product which been partly developed by Von Ardenne. Alanod also used retrospective rebates to customers that would have had the effect of deterring customers from switching. It concluded that the strength of the merged entity in the EU market, together with a 7 per cent EU tariff on imports from third countries, would deter entry from outside the EU. The CC also noted that a strong independent distributor sector would have increased the scope for inter-brand price comparisons, thereby helping to facilitate competition. However, the independent distributor sector was not strong, and Alanod's exclusive distribution arrangements militated against its development.

Choice and design of remedy

67. The CC recommended a package of seven behavioural remedies:

(a) maximum prices (to be reviewed after five years);

(b) continuing supply of existing grades of specular anodized aluminium;

(c) not linking sales of MIRO products to sales of lower-grade anodized aluminium products;

(d) an obligation to supplying MIRO products to competitors;

(e) cancelling its exclusive distribution agreement with Von Ardenne;

(f) not giving retrospective rebates; and

(g) maintaining an arm's length relationship with Jordan.

68. The key factor in the CC's choice of remedies was the fact that the substantial integration of the Ano-Coil business into Alanod had meant that no viable stand-alone divestiture package existed. At the time of the reference to the CC, when the OFT wrote to Alanod's advisers seeking interim undertakings, it became apparent that Ano-Coil's technical, sales and marketing functions had already been dismantled. Given that Ano-Coil was no longer a business by this stage but only a production plant, only other manufacturers would have been interested in it as a divestiture package. The CC had identified SACALL (an Italian manufacturer) as a possible purchaser but when the CC visited SACALL it made clear that it was not interested. On this basis, the CC considered divestiture too uncertain a remedy.

69. The CC's final report notes that other more radical structural remedies were also considered. These are not specified but might have included requiring Alanod to sell some other, stand-alone, part of its business outside the UK. However, since Alanod was incorporated outside the UK, controlled by foreign nationals and had no business in the UK other than Ano-Coil, the CC concluded that this was not practicable.

70. The CC then considered behavioural remedies and in particular a price control, effectively as a second-best solution. It noted that there would be difficulties in operating a price control across a multiplicity of products and it noted the scope for avoidance of a control through redefinition of existing products.

71. Alanod suggested a price control on a per-customer basis, under which the price a customer paid in the future would be linked to the prices it had paid from Alanod and Ano-Coil in the past. The CC accepted that this had merit. However, it noted that not all those customers whose aluminium coil was supplied by Alanod bought directly from Alanod; some bought indirectly through another company, Thyssen Garfield Ltd (Thyssen), a metals stockholder and distributor. Alanod would not be aware of the prices they had paid and these customers would not be protected by the control. It also attempted to ensure that Alanod did not avoid the control by redefining grades, and specified that it should continue to supply existing grades.

72. As well as controlling outcomes, the CC also recommended putting in place measures to protect and facilitate competition. Recognizing that Alanod would be a powerful supplier to companies that were downstream competitors, the CC recommended that Alanod should continue to supply its competitors with MIRO products. The CC also attempted to ensure that the market was not foreclosed to entry by recommending that Alanod should not tie sales of MIRO to sales of other more basic products and should not give retrospective rebates to customers. The recommendation that Alanod should cancel its exclusive distribution agreement with Von Ardenne was also intended to remove a significant barrier to entry. The CC also recommended that Alanod maintain an arm's length relationship with Jordan.

What happened after the CC's final report?

73. With the publication of the CC's final report in January 2000, the Secretary of State asked the DGFT to consult on the nature of the price control remedy. In April 2004 the OFT proposed a modified version of the remedy to the Secretary of State. The OFT's recommended remedy initially included a published price list rather than a price control, although after consultation the OFT reverted to recommending a price control.

74. During negotiations with the OFT, Alanod requested that the price control include an RPI escalator. It argued that this was necessary to protect it from unforeseen cost increases, including the impact of the Climate Change Levy. The OFT linked the level of the price control to the market price of aluminium on the London Metal Exchange, since aluminium was the main input into Alanod's luminaires and was expected better to reflect any changes in cost (decreases as well as increases) than would the RPI.

75. Alanod also argued that the undertakings should be time limited, but the OFT did not agree to the inclusion of such a 'sunset clause' in the undertakings.

76. In order to monitor compliance with the price control, the OFT used information provided by Alanod, Ano-Coil, Thyssen and their customers to compile a schedule of prices paid by customers immediately prior to the merger. This was a difficult task because prices were individually negotiated, so that the schedule had to contain separate prices for each customer and some customers had no record of the price they had paid. One hundred and thirty-three pages of schedules (one for each customer) were prepared as an appendix to the undertakings.

77. In general, it appears that Alanod's customers sell their products in an aggressively competitive market, which compels them to keep input costs to a minimum. This in turn appears to have resulted in pressure on Alanod to reduce prices. The pressure appears to stem from:

(a) customers switching away from Alanod to other suppliers of anodized aluminium luminaires;

(b) luminaire manufacturers using non-anodized (raw) aluminium, producing substitutes for low-specification anodized aluminium luminaires; and

(c) customers moving their production facilities from the UK to lower-cost countries such as China and therefore looking for suppliers in these areas instead.

78. In addition, consolidation among downstream lighting manufacturers has resulted in those manufacturers enjoying a more powerful position in negotiations with suppliers such as Alanod.

79. Alanod has said that this pressure has meant that it has been unable to raise prices up to the level permitted by the control. Although aluminium prices have risen from $1,500 per tonne in 1999 to $1,900 per tonne in 2005, Alanod has not been able to pass these increases on to customers (although the control would have enabled it to do so). It has maintained margins by driving down processing costs.

80. The exception to these factors is the MIRO high-specification luminaire, for which there is no close substitute and in which Alanod continues to have 100 per cent of the supply in the UK. It also appears that no other manufacturer can supply material of equal quality to Alanod's MIRO product. It appears that Alanod could have market power in the supply of the MIRO product, and that that price control is a biting constraint. Evidence from customers suggested that Alanod has not tied sales of other products to sales of its MIRO product.

81. Alanod faces a price control that controls prices on a per-customer basis by reference to the prices paid by each customer for products from Alanod and Ano-Coil separately, before the merger. The price control does not apply to new customers (although it is possible that if prices to new customers drifted far out of line with prices to existing customers, existing customers might take advantage of an arbitrage opportunity). The fact that the downstream market has been characterized by consolidation and exit rather than entry has therefore been important for the control's effectiveness, although it was not something that was explicitly foreseen in the CC's final report.

82. In relation to the other undertakings under which Alanod operates (ie an obligation to supply MIRO to competitors, the cancellation of the exclusive distribution arrangement with Von Ardenne, an obligation not to give retrospective discounts and the maintenance of an arm's length relationship with Jordan), the OFT has received no complaints.

Summary of key learning points

83. The key learning points from this case study can be summarized as follows:

(a) Even where there is no specific intention to undermine any divestiture package, pursuing the normal course of integration following completion of a merger might remove any scope for an effective divestiture remedy. The lack of effective interim remedies could therefore seriously constrain the CC's choice of final remedy for completed mergers.

(b) It can be difficult to control prices in industries where input costs are subject to major changes. Even where attempts are made to tie prices to changes in key costs, if other costs fall significantly the control might not be a biting constraint.

(c) In markets where there is substantial churn (or substantial market growth), controlling the prices paid by each customer by reference to the prices they paid previously is unlikely to be effective.

(d) In markets where there is significant innovation and/or new product development price controls might be eroded as the controlled products become a smaller part of the market.

(e) Price controls, by holding down a firm's prices, can increase the controlled firm's market share and perhaps help it expand its share of other markets (or market segments) beyond that for the controlled product. Ultimately, price controls might force firms that are unable to compete with the controlled price out of the market.

Sibelco

Main facts of the inquiry

84. The acquisition of Fife Silica Sands Ltd (FSS) and Fife Resources Ltd (referred to together as 'the Fife companies') by SCR Sibelco SA (Sibelco) was referred to the CC in January 2001.

85. Sibelco was a global supplier of silica sand, which is used mainly in the manufacture of glass containers. It had bought the UK's principal supplier, Henderson Minerals and Chemicals (HMC), in July 2000. The Fife companies were bought in September the same year. These acquisitions gave Sibelco 86 per cent of the UK market by volume.

86. The merger was completed at the time of reference. As noted in relation to *Alanod* above, under the FTA, the OFT could not put in place interim undertakings until after a reference to the CC had been made. Thirteen days after the reference the OFT accepted interim undertakings, in which Sibelco agreed to take no action that would reduce the ability of the Fife companies to be run as a going concern 'without accepting any duty to make any substantial capital investment'.

87. The CC considered whether the Fife companies constituted a failing firm, but concluded that they did not. The CC concluded that horizontal concentration created by the merger was expected to act against the public interest.

Choice and design of remedy

88. The CC recommended that Sibelco be required to divest the Fife companies to a purchaser approved by the OFT within six months of the publication of the CC's final report.

89. The CC had considered behavioural remedies and specifically price regulation as an alternative to divestiture. However, it had concluded that price

regulation would be difficult to operate because of the many different grades of product and the difficulty of unbundling transport costs from the cost of the product. The CC was also reluctant to introduce price regulation in an unregulated industry. In addition, Sibelco itself had argued in favour of divestiture over price control.

90. Key factors in the CC's choice of remedy were:

(a) the CC's view that possible purchasers would be attracted by the size of the silica sand reserves which the Fife companies had access to and would be willing to invest in the business on that basis; and

(b) the fact that during the inquiry two companies had said that they would be interested in acquiring the Fife companies.

91. However, one of the companies that expressed interest in acquiring the Fife companies qualified its interest emphasizing that the price would need fully to reflect the business problems that it perceived were experienced by the Fife companies. The other company that expressed interest in acquiring the Fife companies qualified its interest by making clear that it would need to be satisfied that such a purchase would add shareholder value.

92. Furthermore, the CC was told at a very late stage in the inquiry by two directors of Fife Silica Sands that the company was in a sufficiently weak financial position that, without a significant injection of finance, the quarry would almost certainly be placed on 'a care and maintenance basis'. They also told the CC that much of the equipment at FSS was coming to the end of its working life, by which time known reserves would also be exhausted.

What happened after the CC's final report?

93. Following the publication of the CC's final report in July 2001, the OFT recommended to the Secretary of State that undertakings should be sought from Sibelco implementing the CC's recommended remedy. In addition, he recommended that the undertakings should allow for the appointment of an independent divestiture trustee in the event that a sale by Sibelco had not taken place within six months. This recommendation was accepted in July 2001. It was the first time that a divestiture trustee provision had been used in the UK.

94. During the negotiations with the OFT, Sibelco sought to argue that the divestiture package was not clearly defined in the final report, for example as to whether it should include licences and options held by FSS. The OFT noted that, although the CC had suggested possible purchasers, it had not provided a set of criteria that could be used to assess the suitability of purchasers.

Sibelco argued that neither of the companies that expressed interest in acquiring the Fife companies was suitable because their main interests were in construction materials.

95. The Secretary of State accepted undertakings from Sibelco at the end of October 2001. The undertakings required Sibelco to divest the Fife companies to an approved purchaser by 18 January 2002 and also 'without accepting any duty to make any substantial capital investment additional to investment arrangements in place at the time of acquisition' to maintain the Fife companies as a going concern, and 'except with the prior written consent of the Director General of Fair Trading' to maintain and preserve the assets of the Fife companies.

96. The undertakings also provided for the OFT to require Sibelco to appoint a divestiture trustee. The trustee would monitor Sibelco's compliance with its obligations under the undertakings. However, since Sibelco was not required to appoint a divestiture trustee until after it had failed to meet the deadline for divestiture of the Fife companies, it is not clear how effectively compliance with the undertakings—in particular, those provisions relating to the maintenance of the business as a going concern—could have been monitored.

97. Sibelco appointed an investment bank to sell the Fife companies by the 18 January 2002 deadline. The bank identified 35 potential purchasers and by November 2001 had three indicative offers of quite different amounts, one of which was negative. The OFT approved the bank's long list and in early January, approved the highest bidder as a suitable purchaser. The following week, that bidder withdrew.

98. This meant that Sibelco had failed to sell the Fife companies by the 18 January deadline. However, on the basis that there were several other possible purchasers still in discussion with the investment bank, the OFT delayed the appointment of the divestiture trustee for a month to allow time for further negotiations.

99. In January 2002, the Fife companies wrote to their two largest customers telling them that it could no longer supply them with sand to their specification and that unless they were prepared to change their specification they should source supplies from elsewhere. One of these customers withdrew its business and the other significantly reduced its business. On the same day as the companies wrote to these customers, they also wrote to the OFT arguing that the loss of these customers would affect the sales process. At about the same time (ie between the withdrawal of a possible purchaser's offer and the

appointment of a divestiture trustee), we were told, FSS cancelled leases on land it had earmarked for future exploitation of silica sand reserves.

100. No purchaser having been secured during the month's extension, a divestiture trustee was appointed on 19 February 2002. The trustee was a partner with the accountancy firm that had been FSS's auditors, and the firm resigned the audit role on his appointment. The trustee retained the investment bank that had been employed by Sibelco during the initial divestiture period as an adviser.

101. In early March the trustee reported to the OFT that FSS was cash positive, but that any further reduction in sales or the need for further investment would change this. In the report the trustee also stated that he believed that his obligation was to sell the Fife companies at the highest price attainable and he asked whether he could sell the quarry for landfill as this could secure a better price. The OFT made clear to the trustee that his role was to sell the Fife companies in order to remedy the CC's adverse finding and that a sale for use as landfill would not achieve this.

102. By this time a possible purchaser had emerged. There were suggestions from Sibelco that this purchaser actually wished to use the quarry for landfill and the OFT received several letters of protest from concerned local residents about possible usage of the quarry as landfill. The OFT wrote to the possible purchaser asking in some detail what its intentions for the business were. Issues explored included likely customers, intentions to open reserves, and plans to tackle quality problems. In mid-March the OFT approved this purchaser.

103. At a meeting with the OFT a week later (followed up by a letter in early April), Sibelco argued that the loss of business from its two largest customers because of 'unavoidable quality problems' constituted a material change of circumstance that necessitated its release from the undertakings. The OFT did not accept these arguments.

104. The Fife companies were bought by this last possible purchaser for a nominal sum in June 2002. The new owner of the Fife companies has invested in the site, installing new technology to address the quality problems. It also negotiated a new contract with one of the major customers that took its business elsewhere after receiving the letter from the previous FSS management and on the strength of that contract it increased the quarry's capacity. In addition, the new owner succeeded in re-establishing the lease that was terminated by FSS and has secured planning permission to exploit reserves on that land.

105. We were told that in 2002 Sibelco offered some of its major customers contracts of between three and five years. The new owner is competing with Sibelco for that business as the current contracts expire. The new owner acknowledged that it would in principle be able to make more money by using the quarry for landfill, but it would not be able to obtain planning permission for this.

Summary of key learning points

106. The key learning points from this case study can be summarized as follows:

(a) In the absence of restrictions on behaviour, firms may attempt to undermine the effectiveness of a divestiture package. It is important to ensure that measures are put in place to protect against this. In particular, it is necessary to ensure that final undertakings include measures to ensure that a divestiture package is maintained until divestiture. It is important that compliance with such measures is actively monitored.

(b) It is important to be clear about all those elements that should be included in a divestiture package, and all the key criteria that should be used in assessing the suitability of purchasers.

(c) Approval of only the favoured bidder for a divestiture package increases the riskiness of the remedy by introducing the potential for delay should the purchase by the approved purchaser fall through. It is better to approve several purchasers (eg those shortlisted). Although it involves more work, it increases the chances of successful completion.

(d) Potential bidders for a divestiture package should be assessed thoroughly. High-level statements of interest are not sufficient indicators of genuine interest in a divestiture package and it is important to take account of a firm’s incentives and the information available to it in gauging whether it is likely to be a willing and able purchaser.

(e) The interests of the management of a business to be divested should be taken into account in the design of a divestiture remedy. Were the management of a business being divested opposed to the divestiture, this may increase the risk of an ineffective sale process. In such circumstances it might be appropriate to consider the use of a monitoring (and ultimately divestiture) trustee.

(f) It is important to retain the option of appointing divestiture trustees to sell the divestiture package at no minimum price. Where this fails to provide an adequate incentive on the parties to manage an effective sale process themselves, it can provide the sole means of implementing the remedy.

Although it is important to maintain the divestiture package, the effectiveness of a divestiture remedy can be preserved even with a damaged divestiture package if it is sold at the right price to a purchaser who will use it to compete.

(g) It might not always be clear to trustees that, although they are remunerated by the parties, they are working for the competition authorities. This should be made clear from the outset.

(h) Where (under the FTA) the CC handed over implementation of remedies to the OFT, there was a risk that the OFT would not have the benefit of the full understanding of the issues that the CC had gained during its inquiry. Parties to the negotiation could use this to reopen arguments during the negotiation. There was also a risk that negotiations might take longer and might be less effective because the parties had to 'start again' with the OFT.

Coloplast

Note: the CMA reviewed these undertakings as part of its wider review of merger undertakings given before 1 January 2006 and concluded that the undertakings had lapsed on 5 January 2017.

Main facts of the inquiry

107. The acquisition of the continence care business of SSL International plc (SSL) by Coloplast A/S (Coloplast) was referred to the CC on 14 January 2002.

108. Coloplast was a Danish company that developed, manufactured and marketed ostomy, continence care and dressings for chronic wounds. It had subsidiaries in 22 countries, including Coloplast Ltd in the UK. Coloplast Ltd marketed Coloplast's products through its own subsidiary Coloplast Direct, a dispensing appliance contractor (DAC)[16] which dispensed appliances direct to clients via a home delivery service. By acquiring SSL, Coloplast raised its shares of the markets in the UK for intermittent catheters to 26 per cent, for urobags to 58 per cent and for sheaths to 92 per cent. The merger was completed at the time of the reference.

109. The two companies supplied these products both to hospitals and to the community sector (primary healthcare). Prices in the community sector were determined by the Drug Tariff negotiated between suppliers and the

[16] DACs are dispensers of appliances but also offer value-added services such as home delivery in excess of those services offered by pharmacists.

Department of Health (DH). Prices in the hospital sector were determined through a process of open competitive tendering administered by the NHS Purchasing and Supply Agency (PASA).

110. The CC noted that Coloplast supplied the market-leading non-latex sheath, Clear Advantage, in the UK under an exclusive distribution agreement with a US company, Mentor. Coloplast was also the only distributor of the Conveen Security+ sheath, the closest competitor to its own Clear Advantage product. The CC was concerned that the merger would result in a horizontal concentration of supply of non-latex sheaths to the hospital sector. There were other non-latex sheaths in the market, manufactured in the USA and distributed by Jade and Sims Portex, but these were not seen as significant competitors. Although the parties had argued that the geographical market was at least as wide as the European Economic Area, the CC concluded that regulatory and patent restrictions would make it difficult for overseas firms to supply the UK market. It concluded that three relevant markets were affected by the merger: the supply of sheaths in the UK, the supply of urobags in the UK, the supply of intermittent catheters in the UK.

111. In relation to urobags, the increase in Coloplast's market share from 6 to 58 per cent was not considered sufficient to cause a problem. In relation to intermittent catheters, an increase from 19 to 26 per cent was similarly not considered problematic because of the existence of a strong competitor. The CC was concerned about the horizontal concentration that the merger would create in sheaths, in which Coloplast's share would rise from 34 to 92 per cent. The CC considered that the NHS might be expected to exercise countervailing buyer power but that the importance of clinical freedom in determining the products prescribed would prevent the NHS from exercising buyer power. In the community sector, prices were determined by the Drug Tariff and there was no evidence of suppliers forcing price increases (eg by threatening to withdraw products), so no adverse effect was expected. In the hospital sector, since PASA had an established alternative provider of latex sheaths with a significant market share, the CC concluded that it did not expect the merger to result in an adverse effect in the supply of latex sheaths to the hospital sector. However, it did expect an adverse effect in the supply of non-latex sheaths to the hospital sector.

112. An expected adverse effect was identified in relation to prices. Innovation was not expected to be adversely affected because, although the distribution agreement with Mentor could have dampened innovation, this agreement was due to expire in 2007 (Coloplast did not plan to renew it) and innovation was thought to be driven by longer-term goals. Coloplast was not thought to face an incentive to reduce quality because this would reduce the clinical

performance of the product, having a negative impact on Coloplast's reputation more widely.

113. The CC was also concerned about the vertical effects of the merger. In particular, it was concerned that the merger would increase Coloplast's presence in the supply of sheaths in the community sector as a result of its increased ownership of DACs. Post-merger Coloplast-owned DACs would account for 78 per cent of all sheaths, 48 per cent of all urobags, and 57 per cent of all intermittent catheters supplied through DACs in England. There was concern that this could increase barriers to entry, give Coloplast access to information not available to its competitors, and allow Coloplast DACs to favour Coloplast products over those of competitors, both directly and through its funded continence care nurses (although there were so few of these nurses the effect was not considered likely to be major).

Choice and design of remedy

114. The CC recommended that Coloplast should undertake to renegotiate its contract with Mentor to secure either the divestiture of the Clear Advantage brand *without* the product or a divestiture of the Clear Advantage brand *with* product. The CC said specifically in its report that, if these negotiations resulted in an unsatisfactory outcome, the OFT should consider a price control remedy. In addition, the CC was aware that the DH was reviewing DAC remuneration. The CC noted the distortive effect of the two-tier (hospital and community sector) pricing on competition and urged the Department to conclude its review as soon as possible. It also encouraged the OFT to consider a review of the anti-competitive effects of the rules in relation to the supply of appliances.

115. Coloplast had suggested that the CC should recommend that it issue a temporary licence (until 2007) to another supplier to distribute Conveen sheaths in the UK. The CC rejected this suggestion on the grounds that:

(a) another supplier would not have competed as effectively as Coloplast itself would have absent the merger;

(b) finding a licensee might be difficult given the short-term nature of the licence; and

(c) Conveen product distributed by Coloplast in the rest of Europe might find its way into the UK through secondary markets, confusing prescribers.[17]

[17] This could also have undermined any licensee, although this was not referred to in the CC's final report.

116. The CC also considered a price control on non-latex sheaths supplied to the hospital sector until the expiry of the agreement with Mentor. However, this was rejected for two reasons: first, because this market was characterized by competitive tendering and was one of the few areas in the NHS that appeared to be open to price competition, which could be undermined by a price control; and second, because the continued existence of the Mentor agreement, with its minimum volume obligations, could represent a disincentive for Coloplast to introduce its new product, since this could harm sales of Clear Advantage. By contrast, the removal of the exclusive agreement with Mentor would not affect price competition in the competitive tenders and would increase Coloplast's incentive to bring on its new product range.

117. The CC did consider a remedy involving the divestiture of the SSL business. However, it noted that the adverse effect expected related to just one product type in one part of the market. If an effective remedy could be crafted that affected only that product in that part of the market, a divestiture of the whole of the SSL business would, by implication, be disproportionate.

What happened after the CC's final report?

118. At the end of May 2002, the OFT advised the Secretary of State that it should be instructed to seek undertakings from Coloplast that it would renegotiate its contract with Mentor and that if this could not be achieved within six months it would consider other appropriate remedies. The OFT also said that it would reflect on the CC's invitation to review the supply of appliances.

119. At the beginning of August 2002, the OFT reported that it had agreed undertakings with Coloplast. Coloplast undertook to renegotiate its contract with Mentor to divest either the Clear Advantage brand alone (which would have allowed Coloplast to market the product under another name) or the Clear Advantage brand and product.[18] The undertakings set out that the renegotiation should be completed within six months of the publication of the CC's report, with a deadline of mid-December 2002. This deadline would allow the new arrangements to be settled in advance of the next round of competitive tendering. The undertakings also set out that if this deadline were not met, the OFT would advise the Secretary of State to seek other remedies. Coloplast was required to provide the OFT with progress reports every two weeks. Mentor was not subject to any undertaking because it was not one of the parties to the merger.

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[18] The undertakings obliged Coloplast to renegotiate the agreement and not simply to use best or reasonable endeavours. The undertakings do not state whether the divestiture of brand or brand and product was to be preferred.

120. By January 2003, it was clear that negotiations had reached an impasse and that agreement was highly unlikely. In the interview for this research, Coloplast argued that the obligation to renegotiate the agreement with Mentor to a deadline that had entered the public domain had severely damaged its ability to negotiate an acceptable outcome. This notwithstanding, it could also be argued that acknowledgement in the CC's report of the fact that if Coloplast were not to fulfil its obligations to Mentor it would be open to litigation in the New York courts for breach of contract might have signalled to Coloplast a low likelihood of action to enforce the renegotiation undertaking. The CC's report had also made clear that the most likely alternative to renegotiation was a price control. Thus, in theory, if Coloplast had preferred a (temporary) price control to renegotiation, it could have achieved its preference by failing to renegotiate. In practice, Coloplast told us that it would have preferred the CC's first choice of remedy to a price cap.

121. The failure to renegotiate constituted a change of circumstance under section 88(4) of the FTA and the OFT advised the Secretary of State that the undertakings in place needed to be varied.

122. The OFT had considered enforcement of the existing undertakings by means of an order. Coloplast reiterated strongly to the OFT the argument that enforcement would leave it open to litigation in the courts. Ultimately, the Secretary of State was advised that an order would not be enforceable and declined to attempt to enforce the remedy in this way.

123. The OFT had considered other appropriate remedies. It considered Coloplast's offer to waive the exclusivity provisions of the Mentor agreement in relation to supply to the hospital sector. However, the OFT pointed out that for this remedy to be effective, Mentor would need to have sufficient incentive to compete with Coloplast in this sector, even though it would have no expectation of follow-up sales in the—much larger—community sector. The OFT thus had serious reservations about this remedy.

124. The OFT also considered a temporary control on prices of non-latex sheaths in the hospital sector, as outlined in the CC's final report, which would remain in place until the Mentor agreement expired in 2007. On balance, because the CC's adverse effects finding related only to prices (and not quality or innovation), the OFT accepted that a price control could be considered more proportionate than a structural alternative. It therefore recommended a price control on both Clear Advantage and Conveen Security+ until 2007 and an undertaking not to renew the agreement with Mentor after its expiry in 2007.

125. The OFT was successful in putting in place the price control in advance of the next round of competitive tendering by PASA. The OFT negotiated with

Coloplast a control that was set close to its costs of production. Indeed, the control was so close to its costs that Coloplast sought, at a late stage, an exemption from the Competition Act 1998 if the price control resulted in predatory behaviour. The request was refused. In line with its recommendation, the undertakings agreed with Coloplast by the OFT also obliged Coloplast not to renew its agreement with Mentor after its expiry in 2007.

126. Notwithstanding the CC's concerns about the potential of the price control to undermine price competition in the competitive tendering process, the level of the control was made public. In the interview for this research, Coloplast said that it had bid into the tender at exactly the level of the control. However, despite the level of the control being public knowledge, Coloplast's competitors entered bids close to their pre-inquiry levels, ie above the level of Coloplast's control. As a result, Coloplast's share of supply in the hospital sector grew significantly. Given that the hospital sector acts as a 'gateway' into the community sector, this is likely to mean that Coloplast could enjoy a stronger position in the community sector where prices—though controlled by the Drug Tariff—are higher.

127. The OFT noted that in a recent tendering round Coloplast had overshot its price control. Coloplast wrote to the OFT informing it of the inadvertent breach. Coloplast told the OFT that the price control had been breached because of the action of a new member of staff who was unaware of it. This had been an oversight and Coloplast was taking steps to ensure that this did not happen again.

128. It appears that the obligation on Coloplast not to renew its agreement with Mentor could have been providing a disincentive for it to expand into the community sector with Clear Advantage. This was because, from 2007, Coloplast would no longer be distributing Clear Advantage so it would not be in Coloplast's interest to grow the brand's long-term strength. In interviews for this research, it was suggested that Coloplast had switched its emphasis to the Conveen brand in the community sector. However, Mentor has been marketing its Transfix product (a self-adhesive sheath that is virtually identical to Clear Advantage) very aggressively. Coloplast confirmed that it has been losing market share in the community sector to Mentor, but said that it hoped to recapture lost ground in the future. In 2005, the DH started a review of Chapter 9 of the Drug Tariff, which deals with continence care products.

129. On 2 June 2006, Coloplast announced that it had acquired the urology business of Mentor. However, in accordance with the undertakings it had given to the Secretary of State in 2002, Mentor's urisheath business in the UK

was not part of the deal. It signed an agreement giving Rochester Corp the rights to distribute Mentor's urisheath products in the UK.

Summary of key learning points

130. The key learning points from this case study can be summarized as follows:

(a) The existence of a contingency remedy option is important in ensuring that parties will give effect to a remedy. Such contingency options might include enforcement of the remedy by order or the implementation of a 'back-up remedy' that is more intrusive for the parties than the initial remedy.

(b) If remedies set out a preferred remedy but also include a 'back-up remedy' that can be implemented if the preferred remedy is not implemented, it is important to ensure that the parties have appropriate incentives to implement the preferred remedy.

(c) Where the effectiveness of a remedy depends on action by a third party that is not subject to the remedy, there is a risk that the remedy will not be effective.

(d) The publication of a time period within which a divestiture must be completed can weaken the bargaining power of the divesting party. Revealing the required outcome of negotiations might have the same effect.

(e) If sufficient care is taken over the design of behavioural remedies and in particular if active and informed monitoring takes place, they can be effective.

(f) In markets where bidding is involved there is a risk that revealing the level of a price cap will result in bids coalescing around that level (even though in fact in this case, when the level of the cap was revealed this did not occur).

(g) When choosing and designing a price control remedy, it is necessary to take account of the effect of a price control on products that are related to controlled products.

(h) Price controls, by holding down a firm's prices, can increase the controlled firm's market share and perhaps help it to expand its share of other markets (or market segments) beyond that for the controlled product. Ultimately, price controls might force firms that are unable to compete with the controlled price out of the market or deter entry.

(i) Where remedies remain in place over a period of time and there is a risk that parties might overlook them, it might be necessary to remind parties periodically of their obligations.

Centrica

Note: in 2015 the CMA commenced a review of these undertakings. This was in response to a request from Centrica Storage Limited (CSL) to vary the undertakings due to a change in circumstances, namely a reduction in the physical capabilities of the Rough gas storage facility and that the facility's performance could be expected to become less predictable. The CMA published its final decision in April 2016 to vary the undertakings. In May 2016 the CMA varied the undertakings to introduce an adjustment mechanism which provides for Ofgem, the sector regulator to vary the capacity obligations in the undertakings, if the need can be demonstrated by CSL.

Main facts of the inquiry

131. The acquisition by Centrica plc (Centrica) of Dynegy Storage Ltd and Dynegy Onshore Processing UK Ltd (together the Dynegy companies) was referred to the CC on 25 February 2003.

132. Centrica was formed by the 1997 demerger of British Gas plc into two parts: Centrica and BG plc. Centrica includes CEMG, which sources the gas and electricity that is used to supply British Gas residential and Centrica business customers. CEMG was responsible for Centrica's own gas production. Dynegy, a US company, had acquired the Rough gas storage facility from BG plc in 2001. As part of its purchase of the Dynegy companies Centrica acquired Rough, which subsequently reported into CEMG.

133. Rough was by far the UK's largest gas storage facility. It accounted for 76 per cent of gas storage capacity and represented a significant source of flexibility for the UK gas industry, which is particularly important for the domestic market in winter. The merger was completed at the time of the reference.

134. The CC was concerned that the merger would further enhance the vertical integration of Centrica. It would mean that Centrica had a portfolio that was unmatched by any other player, including upstream production, gas storage, and retail domestic, industrial and commercial supply of gas.

135. The CC considered whether Centrica would use this enhanced position to drive up the wholesale gas price, and then either pass on the increase to domestic consumers or, by restraining its own domestic prices, squeeze the margins of its downstream competitors. However, it concluded that although Centrica might have the ability to do this, it did not have a strong incentive to

behave in this way because the potential gain was small in relation to the costs and commercial risks involved. The CC also noted that there was a significant reputational risk for Centrica of being discovered to manipulate the market.

136. The CC noted that there might be benefit to the public interest in Centrica owning Rough as it was a known quantity with regard to operational experience, reputation and financial strength, whereas the alternative to the merger was uncertain. However, it concluded that this benefit was outweighed by the public interest detriment it expected to result from the merger. In particular, the CC concluded that the Centrica would be expected to:

(a) discriminate between customers in giving access to capacity at Rough;

(b) use to its advantage sensitive information gained from the operation of Rough;

(c) withhold information about the operation of Rough;

(d) be less innovative in marketing Rough's products; and

(e) invest less in expanding Rough's capacity.

Choice and design of remedy

137. The CC recommended a package of behavioural remedies. This comprised:

(a) non-discriminatory terms for Rough customers;

(b) auctioning off all remaining capacity at Rough prior to the start of the gas year with no reserve price;

(c) restricting the amount of storage that Centrica could reserve for its own use at Rough to 20 per cent in year 1 (slightly less than its pre-merger usage level), decreasing by 1 per cent a year thereafter to a minimum of 15 per cent;

(d) maintaining the separation of its storage operation from other parts of the group;

(e) facilitation of the development of the secondary market; and

(f) offering at least 20 per cent of Rough's capacity on annual contracts.

138. Compliance with these undertakings was to be monitored by means of an independent review by Centrica's Audit Committee with annual reports to the OFT and Ofgem.

139. The CC had considered a divestiture remedy. By the end of the inquiry Ofgem had adopted a position in favour of divestiture. However, this appeared mostly to reflect its concerns about Centrica's ability and incentive to manipulate the wholesale gas price, which the CC did not include in its adverse finding. Very few other parties unequivocally favoured divestiture. The CC acknowledged that divestiture could be a feasible remedy—it considered that there were suitable potential purchasers—but it appeared to be aware of the risk that divestiture would open the possibility of a key strategic asset being owned by a less reputable player than Centrica. Ultimately, the CC concluded that the adverse effects identified did not justify the divestiture of the acquired assets because it appeared that those adverse effects could be effectively addressed by behavioural remedies. However, the CC concluded in its final report that if Centrica were not willing to give the full set of behavioural undertakings recommended then divestiture of the acquired assets remained a possible remedy.

140. In considering behavioural undertakings, the CC took account of the fact that Rough had previously been required by undertakings not to discriminate between its customers. It also noted that undertakings as to the amount of Rough storage Centrica could reserve for itself should be capable of being monitored relatively easily. The fact that there had been a separation regime, backed up by statutory undertakings, in place while Dynegy owned Rough also lent support to the idea of behavioural undertakings.[19]

What happened after the CC's final report?

141. The OFT recommended to the Secretary of State that it be instructed to seek 'wide-ranging' behavioural undertakings from Centrica. But it noted that there appeared to be 'considerable challenges' in implementing the remedies recommended by the CC effectively and it stressed the CC's acknowledgement that divestiture remained a possibility. At the beginning of August 2003 the Secretary of State accepted the OFT's recommendation. She asked the OFT to secure behavioural undertakings by 1 December, noting that if the OFT were not able to secure behavioural undertakings she would ask for advice on other remedies, including structural remedies. The

[19] Dynegy gave undertakings in lieu of a reference to the Secretary of State when it purchased Rough. These replaced those given by British Gas previously. These undertakings in lieu were sought partly on the advice of Ofgem, and were aimed at ensuring that there was no price discrimination and that Dynegy could not use information gained in the storage business for energy trading.

OFT had already noted in its advice to the Secretary of State that the CC acknowledged the possibility of divestiture in the event of failure to secure satisfactory behavioural undertakings. On the same day as the Secretary of State accepted the OFT's recommendations, Ofgem put out a press release, stating that it intended to increase its scrutiny of Centrica's wholesale business to ensure that it did not abuse its market power.

142. The negotiation of behavioural undertakings was to some extent tripartite, involving not only the OFT and Centrica but also Ofgem. The involvement of Ofgem helped the OFT in its understanding of the market and was appropriate in particular because Ofgem would play a key role in monitoring compliance.

143. Centrica said that throughout the negotiation of the final undertakings it was very much aware of the threat of divestiture should acceptable behavioural undertakings fail to be agreed. It told us that consideration of this threat had been instrumental in Centrica's offering various undertakings which it considered might be difficult to make work (eg in relation to certain shared services).

144. Undertakings were accepted by the Secretary of State at the end of November 2004. The CC's 20 linked behavioural restrictions had become a legal document of 130 pages, half of which related to the standard storage contract. Since behavioural undertakings had been secured, it was not necessary to revisit any possible divestiture remedy.

145. Under the terms of the undertakings, Centrica prepares compliance reports detailing injections into and withdrawals from Rough, capacity sales, failures (outages) and an inventory report. Centrica sends these reports to Ofgem and the OFT and meets with Ofgem quarterly to discuss them. Ofgem scrutinizes these reports in some depth. Several members of staff at Ofgem are involved in assessing these reports, all of whom have other roles in the organization and wider expertise to bring to their monitoring role. Together the Ofgem's monitoring team probably amounts to slightly less than one full-time equivalent.

146. The capacity report that Ofgem received in October 2005 showed that capacity at Rough had increased by 5 per cent compared with the time of the CC's inquiry. This suggests that by limiting Centrica's access to Rough to a lower percentage of the total than it had prior to the merger, the undertakings have been successful in encouraging Centrica to invest in new capacity at Rough.

147. The capacity sales reports help Ofgem to ensure that Rough is being marketed appropriately and in accordance with the undertakings on third party access. The inventory report shows who has gas in storage at Rough allowing Ofgem to see how quickly and effectively Centrica is selling its capacity, whether 100 per cent of capacity has been sold before withdrawal commences and whether Centrica is discriminating between its customers. Centrica is required to include in its report on operational failures, outages as short as 15 minutes. It must distinguish between planned and unplanned outages and, in the case of the latter, it must state what remedial action has been taken. Significant outages must be notified by Centrica to all customers at the same time, and while Ofgem is not in a position to verify whether this has taken place it will monitor Centrica's trading activity around the time of the outage for evidence of prior knowledge.

148. In implementing the structural separation provisions of the undertakings, Centrica has put in place a company-wide compliance programme. Compliance officers have been appointed on both sides of the Chinese wall and they report to the company's Audit Committee. The compliance reports are also audited quarterly by KPMG, Centrica's external auditors. At the end of each year, the Audit Committee presents an annual report on compliance to the main board, who in turn report to the OFT and Ofgem. All Centrica employees who have to deal with Centrica Storage Ltd (the owner of Rough) have to confirm quarterly that they are complying with the code. Managers of shared service departments have to submit reports quarterly confirming that their staff are complying. In all, some 2,500 employees a year are required to confirm their compliance with the code of conduct. In addition, staff are reminded periodically of their compliance obligations via emails and articles are posted on the company Intranet stressing the importance that Centrica attaches to compliance.

149. In interviews for this research, Centrica said that placing the Audit Committee at the apex of the compliance structure gave added authority to the process and made it more rigorous because managers have to convince the independent directors on the committee that they are complying. Centrica said that its compliance model had been adopted as good/best practice by the European Commission in regulating gas storage.

150. Centrica estimated that the compliance programme cost around £2,000,000 to set up and costs between £250,000 and £350,000 a year to run. It also noted the intangible costs of compliance. It described the structural separation as more of an 'Iron Curtain' than a Chinese wall and suggested that employees of Centrica Storage Ltd did not feel part of the overall business. It also noted

that a recent restructuring plan had necessitated its seeking a variation of the undertakings, which was a protracted process.[20]

151. Nobody interviewed for this research, including Centrica's customers and competitors, could point to any complaints about Centrica's compliance with the undertakings. Neither Ofgem nor the OFT have evidence of non-compliance.

Summary of key learning points

152. The key learning points from this case study can be summarized as follows:

(a) The existence of a contingency remedy option is important in ensuring that parties will give effect to a remedy. Such options might include enforcement of the remedy by order or the implementation of a 'back-up remedy' that is more intrusive for the parties than the initial remedy.

(b) If sufficient care is taken over the design of behavioural remedies, and in particular if active and informed monitoring takes place, they can be effective.

(c) Chinese walls can be used effectively if sufficient priority is assigned to this function and this is backed up with effective external monitoring. In order to ensure their effectiveness, it is necessary for the firm to educate its staff as to the existence of the Chinese walls, make clear what they can and cannot do, and establish an effective deterrence mechanism for those who breach (eg through internal disciplinary processes).

(d) Where a regulator is involved in an industry, and in particular where that regulator will be involved in monitoring the remedy, there are advantages in involving the regulator in the negotiation process. There is also a risk that increasing the number of parties in the negotiation will add to their complexity.

(e) The existence of a 'back-up remedy' which is not preferred by the parties can be useful in focusing their minds on the need to offer suitable undertakings to make their preferred remedy work.

(f) Where a regulator exists in an industry there might be advantages in involving that regulator in ongoing monitoring. First, the regulator might have relevant expertise that allows it better to monitor compliance.

[20] The CC decided to accept varied undertakings from Centrica on 2 April 2006. The decision can be found on the archived CC website: Decisions of the Remedies Standing Group.

Second, the firm’s ongoing and multi-dimensional relationship with the regulator might provide an additional incentive for it to comply.

(g) Sign-off by a company’s audit committee can provide a useful discipline on compliance reports. The duties of the non-executive directors on the committee and their independence mean that they can provide useful internal scrutiny of compliance reports before they are submitted to the authorities.

(h) Ensuring effective compliance with behavioural remedies is easier for firms with an established compliance culture and the internal capacity to implement a compliance programme. It seems that larger firms are more likely to have this capacity than smaller firms. It also seems likely that regulated firms are more likely to have this capacity than unregulated firms.

(i) Where the CC handed over implementation of remedies to the OFT, there was a risk that the OFT would not have the benefit of the full understanding of the issues that the CC had gained during its inquiry. Parties to the negotiation could use this to reopen arguments during the negotiation. There was also a risk that negotiations took longer and might be less effective because parties had to ‘start again’ with the OFT.

Draeger

Note: the CMA reviewed these undertakings as part of its wider review of merger undertakings given before 1 January 2006 and concluded that the undertakings had lapsed on 5 January 2017.

Main facts of the inquiry

153. On 18 December 2003 the OFT referred to the CC the anticipated acquisition by Draeger Medical AG & Co KGaA (Draeger) of certain assets representing the Air-Shields business of Hill-Rom Inc (Hill-Rom), a subsidiary of Hillenbrand Industries (‘Hillenbrand’). Draeger was a company incorporated in Germany. On 1 July 2003 Draeger became a joint venture between Draegerwerk AG and Siemens AG. The reference was made under section 33 of the Enterprise Act 2002.

154. Draeger and Air-Shields produced neonatal warming therapy products, designed to keep newborn babies in a thermally controlled environment. Their product ranges included:

(a) closed care incubators: these provided a closed environment in which temperature and humidity could be controlled;

(b) open care incubators: comprising a bed warmed either by a heated mattress or by a radiant warmer, providing easy access, but no humidity control;

(c) transport incubators: self-contained incubators on trolleys and with their own power sources; and

(d) phototherapy lights: lights used for the treatment of jaundice.

155. These products were, essentially, bespoke. Customers would specify what additional features/components they required, such as lids, screens or indicators along with the basic equipment.

156. Draeger manufactured neonatal warming therapy products in Lübeck, Germany. Air-Shields manufactured warming therapy products in Hatboro, Pennsylvania. Both firms sold their products worldwide. In some countries, including the UK, they both had their own, wholly-owned, distribution arms while in others they sold through independent distributors.

157. The deal qualified as a relevant merger transaction by virtue of the share of supply test. The CC estimated that the combined share of the merging parties exceeded 25 per cent. Since the share of supply test was met the CC was not required to consider whether the turnover test was met.

The CC's analysis

158. Worldwide revenues from the sale of warming therapy products in 2002 were estimated at £130–£160 million. UK sales in 2003 were £7–£10 million.

159. The CC concluded that separate relevant markets existed for each of the types of warming therapy products considered, ie closed care incubators, open care incubators, transport incubators and phototherapy lights. Accessories, spares and after-sales support were considered to be in the same markets as the products to which they related. For each product, the relevant geographical market was the UK.

160. In closed care incubators, open care incubators and transport incubators the merged entity would have a market share in excess of 60 per cent (in transport incubators close to 100 per cent). In phototherapy lights its combined market share was lower and had been falling for some time.

161. There were few existing competitors in the UK to the merger parties in the supply of open care, closed care and transport incubators. A New Zealand firm, Fisher Paykel Healthcare (FPH), was present in the UK but with only open care incubators. A Japanese firm, Atom, had entered the UK market but with limited success. A substantial US firm, GE Medical (GE) through its Ohmeda subsidiary that the merging parties regarded as their principal competitor, existed and had been growing market share in both open and closed care markets. There were no competitors in the supply of transport incubators. In contrast, there were significant other suppliers of phototherapy lights.

162. Evidence from purchasers revealed a strong preference for standardization and single manufacturer supply: if a hospital had purchased equipment from a particular supplier in the past it was much more likely to purchase from that supplier in the future.

163. Both companies published itemized price lists running to hundreds of pages, listing the various additional elements and features that could be added to the basic product. However, these prices were never paid in practice as purchasers negotiated discounts from them.

164. Success in the UK market appeared strongly related to the supplier having an in-house distribution arm based in the UK. Distributors were responsible for after-sales care and purchasers made clear that after-sales care was important to them and that in-house UK distribution arm was important in[21] providing reassurance about the availability and standards of that care. Purchasers told the CC that they would not consider buying from a supplier without a UK distributor with an established reputation. This seemed to be a contributing factor in the limited penetration achieved by competitors in this market. While there were no absolute barriers to market entry,[22] the need for an in-house UK distributor was considered a significant barrier to expansion.

165. The NHS accounted for a very large percentage of total purchases and seemed to have the potential to exert buyer power. But the fragmented nature of purchasing and lack of information sharing meant, the CC concluded, that this latent buyer power had not been realized.

166. SLCs were expected to result from the merger in respect of closed care incubators, open care incubators and transport incubators, but not in

[21] The ability to offer training was also important, see transcript of Dr Ducker hearing, p22.
[22] Clinicians, however, had concerns regarding the ability of staff to operate equipment with which they were not familiar, which may have favoured incumbent suppliers.

phototherapy lights. These SLCs were expected to result in higher prices, and a reduction in choice in the affected products.

167. Innovation and product development were not expected to be affected since they were largely driven by the US market and the parties would not have an incentive to withhold new or improved products from sale in the UK.

168. It was not thought that the quality of products or after-sales service would deteriorate following the merger. This was because Draeger and Air-Shields sold other products into UK hospitals beyond those affected by the merger. They would thus not be likely to risk the damage to their overall reputation by offering poorer quality warming therapy products/services.

Choice and design of remedies

169. There were significant constraints on the remedies available in this inquiry. Orders made by the CC may extend to a person's conduct outside the UK if and only if they are a UK national, a body incorporated under law in the UK, or a person carrying on business in the UK. It is possible for the CC to accept undertakings from persons not meeting the criteria set out above, but if such undertakings were not forthcoming, it is not clear whether the CC could make an order. These issues were important in the consideration of remedies. Furthermore, there was an increased risk of enforceability associated with any behavioural undertakings that relied heavily on commitments from the overseas parent companies.

170. The creation of an independent distributor, through divestiture of one of the parties' existing UK distribution arms, was seriously considered. Although this would, at best, have been a partial solution to the SLC expected to result from the merger, the advantage of this remedy would have been that competition would at least have been preserved at the 'retail level', ie sales by distributors to hospitals. But in order to facilitate that competition, commitments would have been needed from the merged manufacturer/wholesale supplier to continue to supply the independent distributor on FRND terms. In order to prevent the manufacturer/wholesale supplier simply taking its monopoly profit upstream by charging the same (high) price both to its own distributor and the independent distributor, a price cap at the wholesale level, and possibly at the retail level too, would have been necessary. To make this structural remedy work, a raft of behavioural commitments would have been needed from the overseas parent company—precisely that part of the merged entity against which the CC might not have been able to bring enforcement action. It was also not clear that the divestiture of a UK distribution business could be implemented successfully. It was far from clear that the business that would need to be divested was viable or that a purchaser could be found or acceptable

commercial terms agreed, given the dependence of that business on good relations with the upstream arm of its closest competitor being an important consideration. The Group therefore rejected a remedy based on the introduction of competition at the 'retail level'.

171. The Group also considered whether a price control at the retail level was an appropriate remedy, but was concerned that the bespoke nature of the products, the way in which prices were negotiated, and any innovation and new product development would make it very difficult to design a cap that would be robust over time.

172. The Group was keen to adopt a remedy that would improve the functioning of the affected markets, rather than one that addressed only the adverse effects resulting from the SLC. It sought to do this by means of a series of recommendations to the four UK health departments and their procurement agencies, aimed at strengthening the exercise of buyer power and facilitating entry.[23] It was recommended that the health departments and their agencies should:

(a) strengthen the buyer power of the NHS by establishing a series of framework agreements which would include maximum prices. In doing this they should also facilitate the sharing between NHS trusts of (suitably anonymized) information on the prices negotiated by those trusts;

(b) investigate potential entrants into the UK market, share information about the UK market with such firms, and in particular provide information on potential UK distributors; and

(c) facilitate the development of a stakeholder network to allow for information sharing between professional associations, clinicians and purchasing departments.

173. Although these recommendations were in line with the approach already being taken by the health departments and their agencies, the Group had not been able to expect that they would in any event have occurred (ie that they provided a reason not to find an SLC). The Group was also very concerned about the uncertainty associated with them as a remedy. There were extensive discussions with the departments and their agencies and the Group was encouraged by the constructive response it received to its proposals. In addition, to encourage implementation, these elements of the remedy were expressed in such a way as to make clear, as far as possible, what action was

[23] For a more general discussion see Assessing the impact of public sector procurement on competition, OFT, 2004.

required by whom and by when. It was also made clear in the report that these recommendations had been reached in discussion with the health departments and their agencies and had been agreed by them.

174. While the Group expected these remedies to be effective in facilitating entry and encouraging the exercise of buyer power in the long term, it recognized the need to safeguard customers in the short term. The Group therefore sought undertakings from Draeger that it would, until the end of 2007:

(a) continue to supply to UK hospitals the full range of closed care incubators and open care incubators, related spares and accessories and after-sales support services;

(b) maintain 2003 list prices in nominal terms (no adjustment was made for inflation because it was considered that the efficiency savings the parties had said would result from the merger would, broadly and over such a short period, offset unit cost increases);

(c) not charge any customer more than the sum of the 2003 list prices for the relevant products (to comply with the 'individual cap'); and

(d) ensure that the average percentage discount off list price it gave in any year (across all its customers) was no less than the average percentage discount off list price (across all its customers) given in 2003 (to comply with the 'overall cap').

175. The price control was expressed in terms of percentage discounts off list price, to reflect the nature of price negotiations in this market. The Group was concerned not to undermine the competition which took place between suppliers in bidding for contracts with hospitals. This is why the individual cap was expressed in terms of the total price paid by a customer for whatever products it bought in any given year, effectively creating a basket of such products. It is also why the tighter cap was an overall cap across all products and all customers, and why the price lists and discount percentages were not made public.

176. The Group was also concerned that its price control should not work against the remedies designed to facilitate competitive entry/expansion in this market through, for example, a control which would have held prices down at such a level that the UK market would be unattractive to potential entrants. This is why the control was based on prices at 2003 levels, rather than being cost based[24] which would have encouraged the firms to pass on any cost

[24] Cost-based price controls were adopted in the *Coloplast* case, for example.

reductions they expected to arise from the merger. It is also why the price control remedy was strictly time limited and publicized as such. In addition, the Group was aware that imposing too stringent a remedy on Draeger might result in its (the parent's) pulling out of the UK altogether, which, notwithstanding the supply commitments, the CC might not be able to prevent. The Group rejected a number of requests from Draeger for mechanisms to be included in the price cap to allow it to be revised upwards, believing that any cost pressures over the lifetime of the cap should be offset by merger-related savings.

177. Although an SLC was found in relation to transport incubators, the price control and supply commitment excluded one of the parties' transport incubators that it had already decided to withdraw from the market.

178. The Group required the parties to put in place a monitoring trustee to oversee the price control and supply commitments. This reflected the fact that, although the price cap put in place was relatively simple, its monitoring would still require the processing of a considerable volume of information and that this would be better done by a monitoring trustee than by the OFT. It was agreed in the undertakings that the monitor would be appointed by Draeger from a short list approved by the OFT and would be remunerated by Draeger. The functions of the monitor were agreed in the undertakings.

What happened after the CC's final report?

The remedies process

179. The remedies process in this inquiry was unusual. The UK element of Draeger's purchase of Air-Shields was a small part of a larger transaction and was in itself worth only a small amount. Throughout the inquiry the parties had been keen to encourage an expedited process and, notwithstanding their arguments that the merger would not lead to an SLC, they were keen to discuss remedies from the very beginning. The parties themselves undertook a considerable amount of work fleshing out the remedies proposals and attended numerous meetings with staff to keep the process moving forward.

180. Given the need to follow proper process, there was a limited amount that could be done to reduce the time spent on the inquiry. In particular, the ability of the CC only to put in place remedies to address the SLC it has identified, and the need therefore to identify an SLC before undertaking much consideration of remedies, meant that it was not possible to accede to the parties' desire to go straight to a discussion of remedies. However, there were meetings between staff and the parties to discuss remedies early on in the

inquiry. This meant that by the time the members concluded that there was an SLC, work on the different remedy options was already at an advanced stage.

181. The Group was aware that the success of its remedies in the long term would depend on their successful implementation by the four UK health departments and their procurement agencies of the recommendations to encourage buyer power and stimulate entry/expansion. A considerable amount of time was therefore spent in discussing proposals with these bodies. This ensured that what was recommended in the report was practicable, and was expressed in such a way as to maximize the incentive on the relevant bodies to implement the recommendations. Crucially, agreement from the departments of health and their procurement agencies to implement the recommendations had been secured in writing before the publication of the final report.

182. The price control and supply commitments were given effect by means of undertakings obtained both from the UK arm of Draeger *and* its German parent. This was in recognition of the fact that the UK distribution arm would only be able to fulfil its commitments on price and range if its parent continued to supply it with products at a price which allowed it to do so. Counsel had advised that the CC should be able to enforce the undertakings given by the German parent.

183. Unusually, the negotiation of the undertakings was well under way by the time the final report was published. In the light of the CC's limited power to make orders in this case, the Group wanted to satisfy itself that agreement could be achieved on undertakings before the final report was published. If the Group had not managed to satisfy itself of this, it had signalled to Draeger that it would need to reconsider its position on remedies, thereby extending the timescale of the inquiry. It was only possible to reach an advanced stage of negotiation of undertakings with the cooperation of the parties, who acted in good faith, and the small number of (active) third parties. Even so, negotiating undertakings while finalizing the final report represented a significant additional burden on the staff team.

184. It is worth noting that the Group maintained throughout the inquiry that, if the parties sought to complete the deal prior to final determination (acceptance of undertakings) an interim order would be obtained to prevent them from doing so. Even if this were only possible in relation to the UK part of the merger, it would have prevented the transaction from being completed. If the transaction was not completed by a given date (not long after the final report was published) Draeger would have incurred significant commercial penalties under the terms of its agreement.

185. In the context of the undertakings negotiations, a policy paper was produced setting out what the remedies were aimed at achieving, and, in quite some detail, how they were expected to work. Although the policy paper went into considerably more detail, there was a close relationship between the policy paper and the remedies text in the final report. The first stage of negotiation saw agreement reached on the issues set out in the policy paper. At this stage, further information was requested from the parties, in particular to aid the design of the price control. This involved the parties supplying the CC with full price lists for their products (each running into hundreds of pages) so that the CC could ensure that the price control was designed in such a way as to work effectively across the affected markets. The design of the price control involved significant input not only from the business advisers on the staff team but also from the economists.

186. The OFT was consulted on both the policy paper and on the undertakings. The tightness of the overall timescale meant that the OFT was often given short periods in which to respond.

Remedies implementation: the price control

187. Following the acceptance of final undertakings Draeger proposed that Robson Rhodes be appointed as the monitoring trustee and the OFT approved the appointment. Robson Rhodes provided the OFT with an annual report which examined each individual sale in the UK and compared prices with the relevant list price, noting discounts provided. Robson Rhodes then examined discounts in aggregate to establish whether the appropriate discount had been applied, taking into account the previous year’s performance. Robson Rhodes would highlight cases where Draeger would be required to make a refund and would include in its report a draft letter to Draeger informing it of any such cases. Draeger has occasionally breached the price cap, mainly due to technicalities surrounding prices charged for after-sales service and a financial systems change implemented by the German parent. None of these breaches has been significant.

188. Robson Rhodes also monitored the other elements of the price control undertakings, including the range of products supplied. In 2006 the OFT drew the monitoring trustee’s attention to Draeger’s withdrawal of the Versalet model. The monitoring trustee approached Draeger to establish whether, in compliance with the undertakings, Draeger had withdrawn the product in the whole of the European Economic Area and not just the UK. Draeger confirmed that it had done so. The OFT pointed out to Draeger that, under the undertakings, it was required to notify the OFT prior to any product withdrawal and that it was thus technically in breach of the undertakings.

189. The OFT told us that it was not required to review the undertakings and that they would lapse at the specified date—the end of 2007. These undertakings have now lapsed.

Remedies implementation: recommendations to the UK health departments

190. NHS PASA had already developed a new approach to procurement using National Framework Agreements (NFAs). NFAs had been established for selected medical devices such as ultrasound scanners. As a result of the CC's recommendations the Chief Executive of PASA agreed to the establishment of an infant warming framework agreement (IWF). PASA staff were also tasked by their Chief Executive with investigating other ways of encouraging further competition.[25]

191. In August 2004 the designated PASA buyer assembled a working group of user experts. This included representatives from the Neonatal Nurses Association and British Association of Perinatal Medicine, technical specialists in neonatal care devices, the head of Clinical Engineering Device Assessment and Reporting (CEDAR),[26] and the Device Evaluation Service programme manager for CEDAR.

192. The working group's review of infant warming products supplied in the UK revealed that some models of infant radiant warmers were sold as fully integrated units with neonatal phototherapy lamps. Neonatal phototherapy lamps were therefore added to the scope of the IWF.

193. In October 2004 the working group met to agree the tendering programme and the key factors to be included in the invitation to offer document. Encouragement of competition from new manufacturers took three forms. The steering group pooled their knowledge of existing and potential manufacturers and suppliers. All were contacted and advised of the IWF initiative. Second, the PASA buyer directly contacted all existing UK suppliers of neonatal care and related products, encouraging them to consider extending their portfolio through new marketing arrangements with global manufacturers. In addition, two members of the working group attended Medica, a large international trade fair for medical devices in Germany, and met with all manufacturers exhibiting infant warming equipment. These manufacturers were made aware of the IWF initiative and the advantages that this would offer for manufacturers seeking to gain a foothold in the UK market. They were also

[25] See 'Establishing an infant warming and phototherapy procurement framework', *Journal of Neonatal Nursing*, 2005, vol 11 part 3.
[26] CEDAR is an evaluation centre for general medical equipment funded by the DH, within the Cardiff and Vale NHS Trust.

notified when an advertisement was placed in the Official Journal of the European Union inviting potential suppliers to tender.

194. On 1 March 2005 the infant warming and phototherapy national framework was published on the PASA website. The contract agreement was available to all NHS trusts in the UK. Trust procurement staff were able to place an order directly without going through a tendering process, which speeded up the procurement process significantly and allowed them to benefit from PASA nationally negotiated discounts. Nine suppliers were listed offering products from 14 manufacturers. The number of manufacturers offering nursing (closed) incubator equipment nearly doubled including two manufacturers from France and Brazil who had not previously supplied the UK. Two new suppliers of transport incubators were listed.

195. In January 2006, the Centre for Evidence-based Purchasing (CEP)[27] published a comparative report on 45 infant warming products commissioned from CEDAR. The report was described as ‘an extensive information resource to help purchasers identify the full range of products and issues that can influence suitability’. The information presented comprised comparative tables and features and specifications. List prices were quoted in the tables but the report noted that NHS organizations could obtain discounts via the NHS PASA IWF. The document was updated in September 2006.[28]

196. On 1 October 2006, PASA’a procurement function, including that for infant warming equipment, were handed over to NHS Supply Chain, a ten-year contract for the procurement and delivery of products for NHS trusts, hospitals and other healthcare organizations operated by DHL Logistics on behalf of the NHS Business Services Authority. NHS Supply Chain told us that there had been limited uptake of the IWF, which it attributed to the suppliers’ view that it was too restrictive and did not allow for negotiation at local level. It told us that it intended to develop a new, more flexible agreement that would better reflect the requirements of customers.

Assessment of effectiveness of remedies

Market entry and expansion

197. It is clear that PASA invested significant time and effort in seeking to implement the CC’s recommendations immediately following the publication of its report. PASA staff met with many if not all potential suppliers, encouraging them to enter the UK market; it commissioned and published a comparative

[27] Part of PASA.
[28] Market survey: infant warming and phototherapy (update).

report on the equipment available; and it negotiated a framework agreement which obviated the need for trusts to engage in lengthy and time-consuming tender arrangements. Virtually all of the CC's recommendations were thus adopted by PASA.

198. As regards the impact of these activities on choice in the market and market shares, what evidence there is, derived from interviews with the parties themselves,[29] suggests that GE Medical may have increased its share of supply at the expense of Draeger.[30] FPH's position has remained static though it should be noted that, unlike GE and Draeger, it does not supply closed incubators, which tend to be preferred in special care units, only open incubators. Atom, the Japanese product, has remained in the market. Sales of Atom equipment have remained stable since 2003, and its market share has stayed at about 10 per cent. Atom's distributor confirmed that GE was gaining share from Draeger, which had begun making 'two for one' offers. Fanem, however, the Brazilian product which entered the UK market directly as a result of PASA's activities, has now exited.

199. It would appear that PASA's initiatives, modelled on the CC's recommendations, may have been effective in expanding the choice of incubators available to trusts. On the other hand there were constraints on market expansion which would tend to impede the translation of increased choice into major or rapid changes in shares of supply. We were told, for example, that clinicians, who have a large say if not the last word on the choice of equipment, may have concerns that staff, particularly when under severe pressure, may make mistakes if using new or unfamiliar equipment. This factor would tend to favour incumbent suppliers.[31]

200. There is also some evidence that NHS Supply Chain may not have sustained the original momentum of the PASA initiative, following internal reorganization which may have temporarily blurred responsibility for aspects of the project.[32] As noted earlier, however, NHS Supply Chain is currently in the process of negotiating a new framework agreement which may signal fresh momentum.

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[29] NHS Supply Chain was unable to provide us with market share information.
[30] Draeger estimated GE's market share at 35 to 40 per cent compared with its share of 50 per cent. GE confirmed that it had grown its share of supply but did not attribute this entirely to PASA's efforts, instead citing its marketing skills and product innovation.
[31] See the comments of the Medway NHS Trust, Key Arguments and Views of Third Parties, paragraphs 49 to 54.
[32] In September 2006 DHL won the right to operate the—outsourced—NHS Supply Chain contract. In October 2006 PASA's responsibility for managing the infant warming and phototherapy equipment contract passed to NHS Supply Chain.

The price control

201. The aim of the price control was to provide a safeguard for customers during the period of the implementation of changes in purchasing practices, which it was envisaged would take three or four years. It was not intended to constrain prices to the competitive level, just to stop them rising.

202. Suppliers of neonatal warming equipment that we spoke to told us that the price cap might not have, in itself, constrained price increases. Draeger told us that it was not achieving the prices that it had in 2000 partly because trusts were running on very tight budgets and partly because prices for electro-medical equipment generally had been falling as manufacturing efficiencies reduced production costs. For these reasons Draeger concluded that the price control had had little or no effect on its equipment prices.

203. GE also told us that, because of constraints on NHS budgets and price pressure from purchasers, its prices too had been falling. FPH told us that its prices had not fallen but that increases for equipment had been kept to inflation. Atom’s distributor did not raise its list prices until mid-2007.

204. In previous research into past cases we have seen that firms subject to price controls may have an incentive to argue that the price control is ineffective and that, if prices have remained stable during the period of price control, this may be as a result of market forces or the economic environment. Their incentive derives from a desire to have the control lifted: if the price control is redundant the case for lifting it is stronger. Firms not subject to the price control, but operating in the same market, may have a similar incentive, particularly if the firm controlled is the market leader, whose prices they will have to compete with.

205. In this particular case it is not completely clear whether the price control did, in fact, constrain Draeger’s equipment pricing or whether it was, as some suppliers have argued, pressure on NHS budgets. However, it is clear that the price control, absent the alleged tightening of budgets, would indeed have acted as a ‘safety net’ to prevent Drager using its market power to raise prices.

206. Finally, Draeger did concede that the price control had restricted increases in its servicing charges, which may represent a significant proportion of the lifetime costs of ownership to a trust. The monitoring trustee also suggested to

us that the price control had bitten on Draeger's service charges which, it noted, were rarely discounted.[33]

Summary of key learning points

207. The remedies in this case comprised recommendations to the UK health departments and their purchasing agencies together with a time-limited price cap, which was overseen by the OFT with the assistance of a monitoring trustee.

208. The recommendation to UK health departments and their purchasing agencies was acted upon by PASA. However, one important learning point is that in cases where the CC recommends action to be taken by others, an element of ongoing oversight by the OFT is likely to be desirable. From our research it appeared that the changes of responsibility associated with the creation of NHS Supply Chain may have had adverse effects on activities aimed at stimulating market entry and expansion by other suppliers of infant warming equipment. Although the OFT was not under a specific duty to make itself aware of PASA's activity, and, indeed, the discussions with PASA took place with the CC rather than the OFT, the case highlights the fact that such recommendations may need to be nurtured and followed through, in order to have a continuing positive effect.

209. The appointment of a third party monitor to oversee the Draeger price control and associated measures was essential to ensure that they were effectively applied. Monitoring Draeger's prices was made complex by the bespoke nature of the products and the fact that variable discounts were offered to customers. The third party monitor was able to apply sufficient and appropriate resource to the task of analysing Draeger's pricing and discounts. The third party monitor was also able to investigate a product withdrawal which, contrary to the undertakings, the OFT had not been notified of in advance.

210. A subsidiary learning point on the appointment of monitoring trustees, arising from Draeger, is that the CC should ensure that the fees proposed by the parties are adequate to enable the monitor to fulfil its role and that appropriate resources are deployed by the monitoring trustee. The team acting as monitors on a day-to-day basis should, for example, be suitably experienced and drawn from a relevant area of practice in the firm.

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[33] The MT also suggested that Draeger could keep within the requirements on discounts by offering deep discounts on ex-demonstration equipment but lower discounts on brand new equipment.

Emap

Main facts of the inquiry

211. On 1 July 2004 the OFT referred to the CC the acquisition by Emap plc (Emap) of ABI Building Data Ltd (ABI). The original deadline for the inquiry was 15 December 2004. This was subsequently extended to 8 February 2005.

212. Emap was a multimedia company with interests including consumer magazines, radio stations and business-to-business (B2B) information companies. Included in its B2B operations was a group of companies which provided news and information to the construction industry. One of these was Glenigan, based in Bournemouth, which provided project information and contact details (PICD) to firms supplying goods and services to the construction industry. This information was collected from published sources (the planning register and tenders published in the OJEU) and from inquiries made to industry participants by its researchers. Emap had completed the acquisition of ABI.

213. ABI, based in the Wirral, operated in a very similar way to Glenigan, supplying project information and details of building and construction contracts to firms serving the industry. In both cases the companies would report the location and stage of the project along with the contact details of the main and subcontractors plus professional advisers such as architects, engineers and surveyors. Firms purchasing this information could specify the types of projects in which they were interested and then use the contact details to pitch for business.

214. ABI was owned by Bertelsmann, which had bought it from McGraw Hill in 1993. In 2003, Bertelsmann sold its science and trade publishing unit, Springer, to a buyout vehicle owned substantially by private equity companies Candover and Cinven. The new owners of Springer wished to focus the business on scientific information and so decided to sell ABI. Emap completed the purchase on 4 May 2004.

The OFT inquiry

215. When news of the acquisition was made public, a number of complaints were made to the OFT on the basis that these two firms were the only suppliers of this type of information in the UK. The OFT began an inquiry. The OFT accepted undertakings from Emap on 4 June 2004. These required Emap to hold separate and maintain the two businesses but permitted them to continue with certain steps to prepare for integration of the project and contact

databases of the two companies. They could build a combined database but it must be held separately from the ABI and Glenigan databases and should not be used by either party.

The CC inquiry

Interim undertakings

216. When the merger reference was received, the RSG adopted the OFT undertakings, on 5 July.[34] The CC then considered whether further measures were needed to prevent pre-emptive action by the parties which might prejudice the reference or impede the application of effective remedies, should there be an adverse finding. As a result, on 21 July the CC accepted new, interim, undertakings from Emap which contained a number of additional obligations to ensure that the ABI and Glenigan businesses would not be integrated during the CC's investigation and that the ABI business would be operated at arm's length and in a manner that would minimize the risk of loss of competitive potential. In particular, the CC required Emap to cease any further work on combining project information and customer lists and to return any customer data to ABI.

217. The CC did not require Emap to appoint an HSM: ABI's managing director was still in place and the Group judged that his interests were not aligned with Emap's. Indeed, he was hostile to the merger and reported to the CC on several occasions when he felt the undertakings may have been breached by Emap. For similar reasons the Group did not consider it necessary to appoint a monitoring trustee.

What the CC was told

218. Emap planned, in effect, to close ABI and migrate its customers to Glenigan. It said that by doing this it would free up substantial costs that would be re-invested in the business and would generate customer benefits, post the merger.

219. Emap identified a broad product category of construction sales and marketing information services, including static lists of contacts (directories), marketing and competitor intelligence and customer relationship management software. On the basis of its market definition it estimated that the share of supply of the combined businesses was 40 per cent.

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[34] These initial undertakings would automatically lapse seven working days after the date of the reference unless adopted by the CC.

The CC's reasoning

220. The CC considered whether other suppliers of project information and contract details provided services similar to those of Glenigan and ABI. It concluded that none of them provided as comprehensive a service as either ABI or Glenigan nor operated on the same scale as these two firms.

221. The CC considered whether other forms of marketing which a supplier to the construction industry may use to generate sales leads, such as advertising or direct mail, would be likely to constrain the merged entity. It acknowledged that such suppliers may have available to them a range of marketing channels and that not all industry suppliers used such data to identify contract leads. However, it noted that certain suppliers who chose to operate in the systematic and focused manner enabled by the Glenigan and ABI data would have no comparable substitute source following the merger. It concluded provisionally, on 11 November, that the merger would result in an SLC and that the possibility of new entry, expansion or countervailing buyer power was not sufficient to be a constraint on the lessening of competition.

Choice and design of remedies

Remedy proposals

222. The CC's remedies notice invited views on two possible remedies: a behavioural remedy based on licensing and divestiture. It referred to other possible behavioural remedies including a price control, supply and quality commitments but said that the Group had concerns that these remedy options would not be effective in addressing the SLC or its adverse effects.[35]

223. The notice invited views on a variety of licensing options. It said that the remedy might consist of the licensing to one or more firms:

(a) ABI project data as at a particular date;

(b) combined Glenigan/ABI project and contact data as at a particular date;

(c) ABI project and contact data as at a particular date plus new data supplied on an ongoing basis;

(d) combined Glenigan/ABI project and contact data as at a particular date plus new data on an ongoing basis;

[35] It was agreed with the OFT to trial a new consultation process on this inquiry: the OFT remedies hearing was deferred to two weeks after provisional findings and the OFT was provided with more documentation beforehand, including a draft of the remedies working paper.

(e) customer data (ABI or combined ABI plus Glenigan); and

(f) software applications: that used by ABI to create and deliver its products.

224. The notice said that in addition to any licensing remedy it might be necessary to put other measures in place, for example a price floor to prevent Glenigan from responding aggressively on price in an attempt to eliminate the licensee.

Response of the parties

225. Following the publication of the Group's provisional findings and remedies notice, Emap submitted a further set of behavioural remedies consisting of Emap publishing basic planning data and either freely allowing or licensing its use by competitors, together with price and quality controls. These new proposals were significantly different from those contained in the CC's remedies notice as, although they both involved licensing, they concerned only the planning register element of the commercial databases operated by the two companies. In order to allow adequate time for consultation on the enlarged set of remedy proposals the Group applied for and was granted an eight-week extension of its reporting deadline.

226. Emap also argued that a divestiture remedy would be disproportionate. It said that it was unlikely to recover the purchase price on divestiture and that this cost should be considered in assessing the proportionality of any remedy. The Group considered this in the context of its guidance[36] and in addition sought advice from counsel. It concluded that it was not appropriate to include the cost incurred by Emap as a result of it failing to recoup the purchase price on divestiture of ABI.

227. Emap further proposed that if the divestiture did go ahead it should be permitted to first put in place a joint venture agreement with ABI. This would see the creation of a joint Glenigan-ABI research unit which would collect and process project information and contact details and then supply this information to the two independent downstream competitors. The Group did not accept this proposal as it would be likely to blunt rivalry between the parties, including as regards innovation in the way data was collected.

228. The Group, having considered the various proposals concluded that none of the behavioural remedies would be effective in addressing the SLC. It concluded that only a divestiture remedy would be effective in addressing the SLC.

[36] CC2, paragraph 4.10.

229. The Group considered, briefly, whether it would be more appropriate, effective and proportionate to divest Glenigan rather than ABI. Divesting Glenigan, it reasoned, might present the risk that Emap, which on this scenario would be operating ABI, would have in-depth knowledge of the Glenigan business and customer base and could exploit this knowledge against its new owner. Equally, Glenigan was a larger business than ABI and requiring Glenigan's disposal would be disproportionate.

Final report

230. The Group's final report was published on 26 January 2005 but, prior to this, Emap told the CC that, as it was clear that a divestiture remedy was to be adopted, it wished to begin the sale process immediately. It wanted to complete the sale by 15 May in order that it would know the value achieved for the ABI business in time for its annual report, due on 22 May. Varied undertakings, to facilitate the sale process, were accepted on 28 January. These named four individuals who would be permitted access to such information as they needed to prepare the sale. Emap appointed Citigroup to handle the sale.

231. The Group accepted final undertakings from Emap on 3 March 2005.

What happened after the CC's final report?

Implementation

232. Having received indicative offers, Emap short listed five potential purchasers.

233. On 21 March the RSG discussed the staff's proposals for the process of evaluating potential purchasers. Subsequently, CC staff met with all the potential purchasers in order to understand their plans for the business and how they would fund the purchase.

234. The RSG considered the staff assessment of these potential purchasers, on which the OFT had already been consulted, on 22 April. The RSG approved two potential purchasers as suitable.

235. Emap proceeded with negotiations with the two potential purchasers approved by the RSG. On 10 May Emap announced that CMPi had bought ABI for £13 million.

Post divestiture

236. CMPi had told us at the time of the divestiture process that it intended to place ABI, organizationally, as a subsidiary of its Barbour Index business and that it

would fold certain ‘back office’ functions into the relevant CMPi departments, aligning their processes at the same time. It did so, renaming the business Barbour ABI. Subsequently, this arrangement was changed, with ABI reporting directly to the Managing Director of CMPi’s Built Environment division.

237. After divestiture there was a period of about a year during which an assessment was made of ABI’s growth potential and investment requirements. Subsequently, CMPi invested some £800k in the business allowing the resumption, for example, of the Internet product development programme that Emap had halted. In 2006/07 ABI’s revenue grew by 15 per cent and it added 24 per cent to its customer base compared with the 4 per cent revenue growth it achieved under Emap. ABI increased its prices by 10 per cent in 2006 and 7 per cent in 2007, though has not followed Glenigan’s strategy of bundling different elements of its service offering. ABI is aiming to target the large number of small businesses in the construction sector with entry level products, as well as winning national, multi-site/multi-user contracts with the larger players.

238. From the limited number of customer interviews that we were able to conduct, ABI and Glenigan appear to continue to compete for business and customers see the two businesses as providing virtually identical services. Switching remains common, sometimes as a result of the appointment of a new sales manager who had previously used the other PICD service. None of the (small number of) customers we spoke to referred to price increases by either party. One said she could not recall what the increase was but if it had been significant she would have remembered and would probably have cancelled her subscription.

239. Glenigan does not appear to have changed its business strategy. It has, as it told us that it aimed to at the time of the inquiry, become a partner in the Direct.gov Planning Portal.

240. No new, direct competitor has emerged though Reed Business Information has launched a sales lead service called i-Triggers based just on planning information. This service contains none of the added value information provided by Glenigan and ABI and is not solely for use in the construction industry: it may be used by salespeople in any sector where the grant of planning permission may signal potential purchases, for example by firms expanding and seeking new staff through an employment agency.

Emap

241. Emap told us that its ability to negotiate the divestiture agreement was not hampered by the parties’ knowledge that a divestiture trustee could be appointed if it failed to reach a binding agreement within the initial divestiture period. Emap was able to maintain competitive tension in the process. Conclusions on Remedies Effectiveness

Assessment of effectiveness of remedies

242. The divestiture remedy appears to have been fully effective. The ABI business was sold to a corporation which has backed it with sufficient resources and management attention to act as a continuing competitive constraint on Glenigan. Since divestiture the Barbour ABI business has grown and it has, it claims, taken market share from Glenigan. Unlike ABI’s previous owner, CMPi is focused on the UK construction industry allowing the acquired business to benefit from synergies and knowledge sharing with CMPi’s other construction information businesses.

243. The interim undertakings appear to have generally been effective though we noted earlier the issue raised by ABI over Emap’s refusal to sanction certain expenditures on marketing and product development. As regards the marketing expenditure, at the time, the CC was told that Emap was allowing any budgeted expenditure to take place and they repeated this to us during this research. They argued that they were not obliged by the undertakings to fund longer-term projects, including new product development.

244. The Group decided not to require the appointment of a monitoring trustee on the grounds that ABI’s management was not aligned with Emap’s interests. Had the Group required the appointment of a monitoring trustee it could have referred the question of marketing expenditure to the trustee in order to ascertain whether the disputed expenditure was or was not in ABI’s budget. The learning here may be that, even if the management of the target may be expected to hold the business separate from the acquirer, there may still be grounds for the appointment of a monitoring trustee. This may, for example, help the CC to better understand the conduct of the parties during the course of the inquiry without placing an additional burden on a management team receiving little or no support from the acquirer.

Summary of key learning points

245. As this was a completed merger, interim measures were put in place. The CC recognized that ABI management had no incentive to impede the interim ‘hold separate’ measures. However, our review of the case suggests that the

appointment of a monitoring trustee could have assisted the CC in obtaining an independent assessment of certain decisions taken by Emap during the course of the inquiry, for example in connection with expenditure requested by ABI. Overall, the appointment of a monitoring trustee in this case could have reduced asset risk during what proved to be an attenuated inquiry process.

246. As regards the final divestiture, the main learning point is that it is important for the CC to understand the intentions of potential purchasers, to talk through with them their specific plans for the business they wish to acquire and how the acquisition fits into their overall strategy. It became apparent to staff conducting the interviews with potential purchasers that, in certain cases, their plans would not have resulted in ABI acting as a competitive constraint on Glenigan. CMPi in particular, also told us that it greatly appreciated the willingness of CC staff to meet with them to discuss their plans for the integration and development of ABI in some detail.

Stericycle

Main facts of the inquiry

247. On 28 June 2006, the OFT referred to the CC the completed acquisition of Sterile Technologies Group Ltd (STG) by Stericycle International LLC (Stericycle International). The acquisition had been completed on 27 February 2006.

248. Stericycle International was an international company, incorporated on 27 August 2003 and headquartered in the USA.[37] In the UK, Stericycle International had one subsidiary, which was Stericycle International Limited (Stericycle). Stericycle provided healthcare risk waste disposal services to a range of NHS and other customers in Great Britain.

249. STG provided healthcare risk waste disposal services to healthcare risk waste producers in the UK and Ireland. STG comprised Sterile Technologies (Ireland) Limited, Transafe Limited and Sterile Technologies (NI) Limited. Sterile Technologies (NI) Limited owned Sterile Technologies (UK) Limited (ST(UK)). The principal part of the acquired business involved in supplying the UK was ST(UK).

250. Prior to the merger, Stericycle and STG were the first and second largest suppliers of healthcare risk waste disposal services in Great Britain by total revenue, together accounting for 55 per cent of the healthcare risk waste

[37] Stericycle International LLC was a wholly-owned subsidiary of Stericycle Inc, North America’s largest provider of regulated medical waste services.

disposal market. The third ranked firm, Polkacrest, had revenues of less than half those of STG, the second ranked firm.

251. Subsequent to the referral to the CC, the CC adopted on 3 July 2006 the initial undertakings given to the OFT. Given the level of integration that had already taken place between the two entities, the CC considered there was a need for further interim measures to protect the STG business for any possible future remedial action. The CC was unable to agree interim undertakings with Stericycle and so made an interim order on 18 July 2006 requiring separate operation of the two businesses. At the same time, the CC also issued an Order requiring the parties to appoint a monitoring trustee.

252. On 25 August 2006, the CC made a further Order requiring the parties to put in place certain organizational arrangements and to appoint an HSM for STG within seven days. This was the first time that interim measures had been used to unwind a business integration that had already been started rather than simply holding separate the existing two businesses. This was also the first time that an HSM from outside the merged businesses had been used and the first time that both an HSM and a monitoring trustee had been used together.

253. The parties applied to the Competition Appeal Tribunal (CAT) for judicial review of the CC's interim order and 25 August 2006 directions. The parties' application was dismissed on 19 September 2006.

254. The CC found that the acquisition of STG by Stericycle International may be expected to result in an SLC in the market for healthcare risk waste requiring high-temperature treatment in the geographical areas of northern England, the north Midlands, north Wales, the West Midlands and south-east Wales.

Choice and design of remedies

255. In its Remedies Notice, the CC invited views on three divestiture remedy packages which it considered would be effective in addressing the SLC identified:

(a) divestiture of the whole of the STG business to one or more buyers;

(b) divestiture of all STG incinerators; and

(c) divestiture of those incinerators which serviced customers in the affected area; these were located in Salford, Wrexham and Redditch.

256. The CC also invited views on whether an alternative divestiture package could be equally as effective.

257. In response to the Remedies Notice, Stericycle proposed two alternative divestiture packages:[38]

(a) the treatment facilities at Salford, Redditch and Wrexham; or

(b) the incinerators at Hillingdon, Salford and Redditch, its Avonmouth site and its contracted capacity at Tyseley.

258. The CC considered that divestiture of the whole of ST(UK)[39] would have provided an effective remedy to the SLC identified, as ST(UK) was close to being a stand-alone business and the CC was confident that it had the scale and complementary capabilities to enable it to compete with Stericycle. It was therefore confident that, were ST(UK) to be marketed, and especially with no minimum price, a suitable purchaser could be identified within a reasonable period of time and the divested entity could compete effectively with Stericycle.

259. The CC accepted that the parties' proposed divestiture package of the treatment facilities at Salford, Redditch and Wrexham would be less intrusive than divestiture of the whole of ST(UK). The CC considered that its concerns about composition risk and purchaser risk in this case could be tested in the market. The CC's chosen remedy was therefore to require the divesture by the merged entity of the STG treatment facilities at Salford, Redditch and Wrexham, as this divestiture was expected effectively to undo the merger in respect of high-temperature treatment in the affected areas.

260. Stericycle argued that it would be impractical to separate the alternative technology treatment (ATT) plant at Wrexham from the incinerator, since the two were co-located and shared staff. Thus, the divestiture package also included the ATT plant at Wrexham, despite the fact that the CC had not found an SLC in ATT (as the barriers to entry were much lower than for incineration plants).

261. In its assessment of different divestiture packages, the CC decided that Stericycle should be given an initial divestiture period of approximately two months (until 28 February 2007[40]) within which to sell its preferred package to

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[38] In both cases these packages were accompanied by the offer of subcontracts with Stericycle and a vendor financing scheme.
[39] On the basis that ST(UK) was a stand-alone, viable business that was separate and easily distinguished from Sterile Technologies (NI) Limited, the CC considered that a remedy based on divestiture of 'the STG business as a whole' should mean a divestiture of ST(UK).
[40] This period was redacted from the published version of the final report in order to avoid potential purchasers taking advantage of this knowledge.

a suitable purchaser, after which time a divestiture trustee would be appointed.[41]

262. As a further way to facilitate competition between healthcare risk waste service providers by removing a potential barrier to entry, the CC recommended to the UK Health Departments, the NHS Purchasing and Supply Agency (PASA) and its equivalents in Northern Ireland, Scotland and Wales that they:

(a) continue to encourage trusts to let contracts for a maximum of seven years (five-year contracts with a possible two-year extension); and

(b) encourage trusts to ensure that the period between announcing the award of the contract and its commencement be set at a minimum of 12 months.

What happened after the CC's final report?

263. Stericycle was required to provide the CC with a timetable for completion of the divestiture and the monitoring trustee was asked to provide fortnightly progress reports on the divestiture process. After agreement of the final undertakings on 30 January 2007, the divestiture process was overseen by the RSG which approved the sale & purchase agreement and business transfer agreement on 16 February 2007.

264. Stericycle received interest from a number of possible purchasers. Final offers were received from two parties. Following its approval as a suitable purchaser by the RSG, the divestiture package was sold to Polkacrest on 19 February 2007.

265. Regarding the recommendations made, the Department of Health (DH) told us that it had continued to recommend to NHS trusts that they do not let contracts for periods of more than three to four years, although it cannot enforce this as the NHS trusts are legally autonomous bodies. Some contracts can reasonably be in excess of five to ten years where the waste contractor is expected to invest in new more efficient plant or better waste receptacles, for example.

[41] On 11 January 2007, Stericycle submitted an application to the CAT to appeal the CC's decision. Its application noted that, although it objected to the CC's SLC decision on principle, it would seek to implement the remedy provided that it was not required to widen the divestiture package beyond the plants at Salford, Redditch and Wrexham. Stericycle therefore submitted an application to stay the appeal until such time as the CC decided to widen the divestiture package. The CAT would not agree to stay the application indefinitely and set a date for a hearing on the appeal (21 March 2007) which it considered to be sufficiently far in the future for the outcome of the sale process to be known. The appeal was withdrawn following the divestiture.

Changes to the healthcare market since our inquiry

266. In this section we consider changes in demand, supply and regulation since the inquiry.

Changes in demand

267. The healthcare risk waste disposal market is considered to be relatively mature. Since our inquiry the volume of healthcare risk waste generated by producers had remained at around 230,000 tonnes a year.

268. The key themes from our interviews were that NHS Trusts appeared to have improved segregation practices (ie separating out less hazardous waste from risk waste more efficiently, enabling less hazardous waste to be disposed of through less expensive processes) and that they were prioritizing categories of waste more efficiently in terms of cost of disposal, which had offset any increases in activity, leaving volumes stable on a net basis. Some NHS trusts had also made investment in their own recycling of non-hazardous waste. The DH told us that waste disposal costs within the NHS in England had nevertheless continued to increase as a consequence of the impact of new regulations.

Changes in supply

269. Total treatment capacity had stayed roughly the same since our inquiry at approximately 270,000 tonnes which, with 85 per cent availability of treatment capacity, meant that the demand for healthcare waste treatment and available capacity was approximately in balance. As at July 2009, no new incineration capacity had come on stream in the geographical areas where the CC identified an SLC.

270. Despite the overall stability in total capacity in the market, since the inquiry there had been new entry, exit and some consolidation between suppliers using existing incinerators, in both the geographical areas in which the CC found an SLC and also other geographical areas in the UK.

271. There had been three particular events which had affected the supply side of the market since the inquiry:

(a) *Stericycle International's acquisition of Cliniserve in early 2009.* This acquisition was subject to an OFT investigation which focused on the treatment of healthcare risk waste in the South-East of England. Undertakings in lieu were accepted by the OFT to divest Cliniserve's Littlehampton plant to Ethos Recycling. As Cliniserve was a competitor to

Stericycle, this acquisition reduced the number of competitors in the UK (although not in the South-East of England, where Ethos was not active prior to the undertakings in lieu).

(b) *The initially successful entry and subsequent exit into administration of Medical Waste Solutions (MWS)*. MWS started business in May 2008 and was successful in winning work in Nottingham. In the first round of the London Procurement Project Framework Agreement project (LPP), MWS bid competitively and won the contracts for five out of nine Acute Trusts. However, as MWS had no local plant, it was shipping the related waste from London to Nottingham, which reduced its profit margins. To address this issue, MWS intended to open a new treatment plant in the London area. However, before it was able to do this, financing for the investment was withdrawn leaving it unable to service profitably its LPP contracts. MWS went into administration and was acquired in May 2009 by GW Butler, an existing competitor.

(c) *Issues concerning Polkacrest's Edmonton plant.* Polkacrest told us that, following the introduction of more stringent regulation of processes in 2007 (see paragraph 276), it could no longer obtain regulatory approval for operation of its Edmonton plant. It therefore had to cease waste treatment at its Edmonton plant whilst it re-engineered the processes. Polkacrest closed the plant for six months from February to September 2008 and the change to processes reduced the capacity of the plant.

272. The CC did not find an SLC in the South-East of England but did note that competition in the South-East and eastern England was weaker than in some other areas. It appeared from our interviews that this was still the case and that the problem had become more acute, particularly in the London area. LPP told us that as at July 2009 there was a significant need for new plants to service London as there was insufficient processing capacity.

273. Despite the problems at its Edmonton plant, Polkacrest had retained the contracts at the incinerators divested in the areas where the CC found an SLC and Polkacrest told us that it was performing ahead of expectations.

274. Stericycle told us that since the inquiry, its market share had not changed significantly on a net basis. It said that, whilst it had suffered some contracted losses in various geographic areas across the UK during 2008 and 2009, these had been offset by some contracted gains (on a lesser scale) and acquisition.

275. The Environment Agency (EA) provided us with market share data which indicated that Stericycle's current UK market share was approximately 51 per

cent whilst Polkacrest's current market share was 19 per cent. This compared to a 55 per cent combined share for STG and Stericycle at the time of the inquiry and a 10 per cent share for Polkacrest. Whilst regional data was not available, this indicated that Polkacrest had gained market share in certain areas of the UK outside the South-East of England. However, we did not have sufficiently robust and comprehensive data to determine whether this increase in market share was as a result of the additional capacity that it acquired with the divested incinerators, or whether some of this was organic growth.

Changes in regulation

276. Overall, our interviews indicated that regulatory requirements in this market appeared to have become more stringent and onerous and that this was also an area of focus for the EA which had demonstrated a willingness to prosecute companies in breach of regulatory standards. These regulatory changes have included a move from a system of waste management licences to Pollution Prevention Control (PPC) permits at the end of 2007. This change in particular affected Polkacrest at its Edmonton plant although this did not yet appear to have affected other large competitors in the market to any significant extent.

Assessment of effectiveness of remedies

277. Based on the discussions we had with parties, we concluded that the interim measures put in place by the CC were effective in holding separate and maintaining the acquired business. Had these measures not been taken, it would have been significantly more difficult to implement the final remedies that the CC went on to adopt.

278. Overall, we found that the divestiture package had been effective in addressing the SLC we found by increasing competition in the supply of healthcare risk waste disposal services within the affected areas. This was demonstrated by the fact that Polkacrest had retained its contracts at the divested incinerators and was performing ahead of expectations.

279. However, Polkacrest had encountered compliance problems in other geographical areas, primarily in London, where it had significant issues with its Edmonton plant. We note that this was not an area in which the CC found an SLC. We could not judge whether the acquisition of the Stericycle assets had any impact on Polkacrest's management of its other assets and it may be in any case that these difficulties were temporary, such that it may be a more effective competitor in the future, including in London and the South-East.

Summary of key learning points

Interim measures

280. We identified three main learning points in relation to interim measures.

(a) First, it is important for the CC to move quickly in cases where a HSM is to be appointed as a result of firms having already begun integrating the acquired business prior to a reference to the CC: in this case the CC identified, reviewed and approved candidates for the HSM role within seven days of the CAT's ruling.

(b) The parties in this inquiry repeatedly stated at the time that the initial undertakings and the interim measures that the CC sought to impose were 'meaningless' because the businesses could not be 'held separate' as they had already been integrated together. The CC moved decisively to halt and reverse the process, to ensure a meaningful separation.

(c) Subsequent commentators noted that 'purchasers must carefully evaluate the benefits of completing a merger before receiving OFT clearance, against the risk of later disruption and additional costs to the business, in the event of a reference being made to the CC and a monitoring trustee and/or a HSM being appointed'.[42] The CC's actions may therefore have signalled that attempts to pre-empt CC remedial action by accelerating the target integration process may present significant risks.

(d) Commentators have also noted that, in any event, 'if the benefits of integration outweigh the disadvantages, then the merging parties would be well-advised to appoint a separate person to manage the acquired business. This would help address the key concern, identified in Stericycle, of having a single 'directing mind' managing both the acquiring and acquired businesses and may mean that the parties are less likely to have to bear the cost of paying for a monitoring trustee and/or HSM later on'.[43]

(e) Second, the CAT's ruling on the Stericycle inquiry demonstrated that the CC has the discretion to use hold separate arrangements if, in a particular case, it considers that this is appropriate.

(f) The CC's guidance states that: 'Additional safeguards beyond those envisaged in the template Undertakings may involve the appointment of a

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[42] www.pinsentmasons.com/media/1471631980.pdf.
[43] www.pinsentmasons.com/media/1471631980.pdf.

HSM with executive powers to operate the acquired business separately from the acquirer and in line with the interim measures for the duration of the investigation.'[44] It goes on to refer to the CAT judgement in the Stericycle case which confirmed that: 'Section 81 gives the CC wide powers for the purposes of preventing pre-emptive action, including 'the appointment of a person to conduct or supervise the conduct of any activities'—i.e. including an HSM. Moreover, the word 'might' used in section 80(10) implies a low threshold of expectation that the outcome of the reference might be impeded.'[45]

(g) Third, it is important to work closely with the monitoring trustee during any divestiture process and to ensure that they in turn are engaged with the parties' advisers. We discussed the monitoring trustee's role with the monitoring trustee, which noted that some difficulties occurred in communication between the monitoring trustee and Stericycle's lawyers, for example, during the transition from the monitoring to the divestiture phase. The CC should be aware of any friction developing as the process proceeds and ensure there is clarity between all parties.

Final remedies

281. The final remedies in Stericycle were a fairly straightforward application of our guidelines to a divestiture remedy: we identified the least intrusive divestiture package that would be effective in addressing the SLC, considered the risk profiles of divestiture packages and prospective purchasers and made our decision accordingly. We noted that this would not have been possible without the interim measures we put in place, as without them we could not have implemented the final remedies effectively, as the two businesses would have become so integrated that they could not have, realistically or practicably, been separated.

282. It is important for the CC to test that a potential purchaser's business strategy fits with that of the divested business and that it has the resources available to run the acquired business as an effective competitor to the main party. CC staff held interviews with possible purchasers at the early stages of the divestiture process and engaged with them more closely at the later stages, in particular to clarify the degree of fit of the assets to be divested to the acquirer's business.

[44] *CC8*, p36.
[45] CAT judgement: Stericycle International LLC, Stericycle International Limited, Stericycle Technologies Group Limited/Competition Commission, paragraph 129.

283. The experience of Polkacrest also demonstrates that it is important for the CC to be aware of the potential impact of any proposed regulatory or other changes to the market which may compromise the future effectiveness of its chosen remedy in an inquiry. However, Polkacrest's difficulties in the South-East and the consequent effects on its ability to focus on competing with Stericycle in other areas of the UK could not have been reasonably foreseen at the time of the inquiry.

Somerfield

Main facts of the inquiry

284. The acquisition of 115 stores by Somerfield plc (Somerfield) from Wm Morrison plc (Morrison's) in October 2004 was referred to the CC in March 2005.[46]

285. The Somerfield group at the time had almost 750 mainly mid-range stores (280 to 1,400 sq. metres) operating under the Somerfield fascia and almost 500 stores under the Kwik Save fascia. At the time it was the fifth largest supermarket group in the UK with annual turnover of approximately £4.7 billion. Morrisons was the fourth largest grocery retailer in the UK, operating about 500 stores.

286. There were no national competition concerns identified from the acquisition of the 115 stores but the CC noted that there was a considerable diversity in characteristics of mid-range stores at the local level. A two-stage process was used to assess whether there was a substantial lessening of competition in any local markets.

(a) In Stage 1, local markets were established with reference to isochrones based on a 5-minute drive-time around stores in urban areas and 10 minutes in rural areas.[47] Any local areas where the number of competing fascias of effective competitors would be reduced to three or below as a result of the merger were identified for further analysis.

(b) In Stage 2, the degree of rivalry between existing stores and the acquired stores in the identified local markets was examined through diversion ratios.[48] In addition the gross margins of those stores and the potential for

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[46] The CC accepted Interim Undertakings from Somerfield and did not require any further interim measures.
[47] Additional isochrones were also analysed based on relevant local population centres and on all other competitor stores over 280 sq metres in the original isochrone.
[48] Diversion ratios measure the extent to which a customer would chose Firm B (as opposed to Firm C, D etc) if its first choice Firm A was not available (customer diversion) and the proportion of revenue from those customers that would be diverted to Firm B (revenue diversion ratio). In this case the ratios were established through a survey by NOP World.

a profitable increase in price or equivalent deterioration in quality, range or service (collectively PQRS) was examined.

287. The CC concluded that the acquisition may be expected to result in an SLC in each of the local markets served by 12 stores. The stores were mostly mid-range stores with the exception of one convenience store and one ‘one-stop shop’, as shown in Table 1:

Table 1: Local markets where an SLC was found and nature of acquired store

	Store location	*Store type*	*Location*
1	Littlehampton	Mid range	Urban
2	Peebles	Mid range	Rural
3	South Shields	Mid range	Urban
4	Yarm	Mid range	Urban
5	Pocklington	Mid range	Rural
6	Newark	Mid range	Urban
7	Filey	Convenience	Rural
8	Johnstone	One stop	Urban
9	Middlesbrough Linthorpe	Mid range	Urban
10	Poole Bearwood	Mid range	Urban
11	Kelso	Mid range	Rural
12	Whitburn	Mid range	Urban

Source: CC analysis.
Note: One-stop stores have sales area over 1,400 sq. metres; mid-range stores 280 sq. metres to 1,400 sq. metres and convenience stores below 280 sq. metres.

Choice and design of remedy

288. Somerfield proposed a two-year behavioural remedy in which it would undertake not to vary the elements of PQRS in the problem stores generally from that applying in the rest of its estate. In addition any existing store (in the local market) that had been a Kwik Save would not be converted to Somerfield or closed or materially reduced in size. The CC noted that it would be difficult to monitor quality and service and to verify monitoring data and detect breaches of compliance. The CC concluded that ‘behavioural remedies would be complex and unclear and difficult if not impossible effectively to monitor and enforce’.[49]

289. As a result the CC decided that only a structural remedy would be effective. The CC noted the general diversity of store characteristics in this inquiry and that the location and nature of facilities were important. This led to the natural choice of the acquired store for divestment in order to remedy effectively the SLC.

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[49] Final report, paragraph 11.6. http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2005/fulltext/501.pdf

290. Somerfield disagreed with this principle and it specifically requested the divestment of an existing store in nine of the local markets. The position in each of these local markets was assessed by the CC as follows:

(a) In Kelso and Littlehampton the existing store had already been closed. The CC decided that there would be less disruption to shoppers and Somerfield if the closed existing stores were sold to another grocery retailer.

(b) In Johnstone, Peebles and Yarm analysis suggested that sale of the existing store would also remedy the SLC as there was little material difference between it and the acquired store. Therefore, Somerfield was to be able to divest either the acquired store or the existing store.

(c) In South Shields it was agreed that if Somerfield was unable to sell the store then a Divestiture Trustee could also look to sell the existing stores.

(d) For the other local markets (Middlesbrough, Newark and Pocklington) there was a greater risk of not attracting a suitable purchaser for the existing store due to the considerable differences in their size and/or performance and/or condition.

291. With respect to suitable purchasers for the stores the CC stated that:

> Each store will be divested to a suitable purchaser that is independent of Somerfield and has the resources, expertise and incentive to maintain and develop the divested store as a viable and active competitor to the stores in the relevant local market, and that would not be likely to recreate the expected adverse effects as a result of the divestiture.[50]

292. In general the preference was for purchasers to be from a 'competitor set' (Tesco, Sainsbury, Asda, Morrison's, Waitrose, Budgens, Co-op) together with suitable regional retailers that could demonstrate they could offer a comparable PQRS. However, the competitive significance of any member of the competitor set in each local market was assessed and as a result some were excluded from the sales process in certain local markets.

293. The limited assortment discounters (LADs) such as Aldi, which had smaller ranges, were excluded as suitable purchasers for the first eight weeks of the divestiture process (the Initial divestiture period) but were allowed to be included by Somerfield thereafter.

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[50] Final report, paragraph 11.24.

294. The undertakings specified a First divestiture period of six months from date of acceptance of undertakings (inclusive of the Initial divestiture period). Unless extended, a Divestiture Trustee could then be appointed.

295. Any divestment was to be subject to the agreement of the CC and each purchaser would be required to agree not to divest the store for two years from the date of purchase.

296. Throughout the divestment process Somerfield was required to maintain the competitive capability of the stores to be divested and to report on this and the progress of the divestment on a periodic basis. The CC retained the option of requiring the appointment of a monitoring trustee should it not be satisfied that the undertakings were being complied with or if the progress of divestment was insufficient.

What happened after the CC's final report?

Appeal to CAT

297. The CC's final report was published on 2 September 2005. Somerfield then made an appeal to the CAT. In respect of remedies, Somerfield submitted that the CC acted unreasonably and without foundation by:

(a) requiring Somerfield to divest of specified acquired stores in 7 of the 12 local markets rather than leaving the decision to Somerfield of which store to divest; and

(b) wrongly placing restrictions on the ability of Somerfield to sell to the LADs during the Initial divestiture period.

298. The CAT judgment[51] stated that both limbs of this ground for appeal failed. As a result there was no change to the design of the remedy. However, the appeal had postponed the process of implementing remedies and as a result undertakings were not agreed with Somerfield until 9 March 2006, six months after publication of the CC's final report.

Implementation milestones

299. Somerfield appointed agents for sale and by the end of the Initial divestiture period (September 2006) had received firm offers on a total of seven stores, (including two offers on six of those stores). It requested permission to sell six of the stores to members of the competitor set (Sainsbury's and Co-op) and

[51] CAT judgement: Somerfield plc/Competition Commission.

these were approved by the CC as they clearly met the suitable purchaser criteria that had been established. Somerfield also requested to sell the convenience store at Filey to Mills Group, a substantial convenience store operator, which was assessed as a suitable purchaser by the CC against the criteria.

300. Given the progress made by Somerfield on divesting seven of the stores, the appointment of a Divestiture Trustee was seen as inappropriate in these particular circumstances. Instead a two-month extension to the First divestiture period to November 2006 was agreed by the CC. This was to allow the sale of the remaining five stores, namely Johnstone, Middlesbrough, Poole, Kelso and Whitburn.

301. During this first extension period the sale of the Johnstone store to Lidl was agreed. Lidl was to be allowed to knock down and rebuild the store with broadly the same sales area but to its specifications and was assessed as meeting the criteria for a suitable purchaser.

302. A further two-month extension to January 2007 was agreed to allow progress on the remaining four stores with the proviso that at the end of the period a Divestiture Trustee would be appointed. The CC continued to maintain active contact with Somerfield and agreed to two requests from Somerfield:

(a) Middlesbrough—to release undertakings to divest this store on the basis that Somerfield had sold both Kwik Saves in the area as part of a wider disposal[52] and that a 3,000 sq. ft. Sainsbury's was opening within a two-minute drive-time.

(b) Poole—to allow divestment of this store to Southern Co-op which wanted to operate part of the store but would still be a mid-range operator.

303. By the end of the second extension period, two stores remained (Kelso and Whitburn) with renewed interest apparent in both. A further two-month extension to March 2007 was granted on the basis that candidates for a Divestiture Trustee be identified as a fall-back.

Divestiture Trustee

304. The interest in the stores waned and a Divestiture Trustee was appointed in April 2007 (13 months after the final undertakings were signed) to divest the

[52] The Kwik Save brand and 171 stores were sold to BTTF, a new company financed by private equity in February 2006 and a further 45 stores (including those in Middlesbrough) were sold to BTTF in October 2006.

Kelso and Whitburn stores. This was the first time since the Act that the CC had required the appointment of a Divestiture Trustee.

305. Despite extensive marketing and some interest no sale was achieved by the Divestiture Trustee. On the basis of there being no realistic prospect for sale Somerfield was released from the undertaking to sell stores in Kelso and Whitburn and the Divestiture Trustee was stood down in November 2007 (20 months after the final undertakings were signed).

306. Table 2 below summarizes the outcome for the stores in each local market:

Table 2: Summary of result of remedy implementation

	Store location	*Date position resolved by*	*What happened to the store and the impact on the local market*
1	Littlehampton	May 2006	Sold to Sainsbury's—part of competitor set and still trading
2	Peebles	May 2006	Sold to Sainsbury's—part of competitor set and still trading
3	South Shields	May 2006	Sold to Sainsbury's—part of competitor set and still trading
4	Yarm	May 2006	Sold to Sainsbury's—part of competitor set and still trading
5	Pocklington	May 2006	Sold to Sainsbury's—part of competitor set and still trading
6	Newark	May 2006	Sold to Co-op—part of competitor set and still trading
7	Filey	May 2006	Sold to Mills Group—still trading
8	Johnstone	September 2006	Sold to Lidl—store was rebuilt and is still trading
9	Middlesbrough Linthorpe	September 2006	Released from undertakings given changes to local competitive conditions
10	Poole Bearwood	February 2007	Sold to Southern Co-op on basis of part-utilisation of space—still trading
11	Kelso	November 2007	Released from undertakings as no likely purchaser—now a factory outlet
12	Whitburn	November 2007	Released from undertakings as no likely purchaser—still trading

Source*:* CC analysis.

Assessment of effectiveness of remedies

307. In assessing the effectiveness of the remedy we grouped the stores into one of three categories; those where divestment was straightforward; those where there was a change of circumstances (see paragraph 302); and finally those 'problem stores' that were not sold (see paragraph 305). We examine the latter two categories in more detail so as to establish why the stores were difficult to sell and what the current competitive position is.

Straightforward divestments

308. For the first six stores in Table 2, we considered that the remedy was effective as these were still trading and were purchased by members of the competitor set. We were not aware of any other specific competitive developments in these markets which would affect that assessment.

309. We additionally satisfied ourselves that the stores in Filey and Johnstone which were purchased by companies outside of the competitor set were competing as expected when divestment was agreed. Again we considered the remedy was effective in these two local markets.

Change of circumstances

310. The store in Middlesbrough was perceived to be in a poor condition and did not attract any serious interest. Given the two Kwik Save stores in the area had been sold and given the unsuccessful marketing efforts relating to the existing store, the CC's change in approach seems a pragmatic decision. A number of Sainsbury's local stores have subsequently opened in the area.

311. The Poole Bearwood store is located in the middle of a housing estate. The store is large in relation to its catchment size. It was only when the store was offered for sale as a freehold and with the related potential for development that interest was generated. To date the store has been traded from the original footprint.

Problem areas

312. Kelso is a remote rural Scottish town with a small population. The existing store was closed and was on the edge of the town centre having been purpose built around 20 years previously as a Kwik Save. There was little interest in the site and we understood this was partly due to a new large supermarket that was likely to be built out of town. Again we were satisfied that all efforts were made to sell the existing store and that there was no real interest. Following release from the undertakings the store was sold to the Original Factory Shop which continued to trade from the site. A planning application for an out of town supermarket was still being discussed. In addition, following the decision by the OFT on the anticipated acquisition by Cooperative Group of Somerfield,[53] undertakings in lieu required Co-operative to sell the Somerfield store and this was purchased by Haldanes.[54]

313. Whitburn is a small Scottish town which we were told does not feature on maps that retailers use to assess the potential of areas.[55] The acquired store was in a high street location but had no parking. The existing store was 200 metres away and had parking. Some interest in the acquired store was generated but was ruled out as it either came from an existing competitor in the area or a business that would not be an effective competitor. We were satisfied that all efforts were taken to sell the store within the parameters set. There had been no other competitive developments in the area and both the existing and acquired stores continued to trade.

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[53] OFT: Anticipated acquisition by Co-operative Group Limited of Somerfield Limited.
[54] Haldanes is a relatively new local supermarket group operating 25 mid-size stores across Great Britain.
[55] These are known as Goad maps and are large-scale maps showing individual shops and businesses and their names.

Summary of key learning points

314. We identified a number of learning points as part of our assessment of the effectiveness of the remedies in this inquiry. These cover the nature of the divested stores; the design of the remedy; the length of the divestment process; and the appointment of a Divestiture Trustee.

315. It was anticipated that it could be challenging to sell some of the stores and this was proved by experience:

(a) The stores to be divested were of mixed quality and had been bought as part of a divested portfolio, in which some had low or zero consideration.

(b) Certain stores were in locations that would be highly unlikely to warrant new investment albeit that it might make sense to carry on trading them.

(c) Certain locations were also unlikely to be able to support additional fascias.

(d) There were a limited number of potential buyers (from the competitor set) in several areas, particularly in Scotland.

316. With this in mind the implementation of the remedy in all but three areas can be seen to have been effective. The process demonstrated that it is not always possible to divest a business, even where a reverse premium is available, if this does not accord with a purchaser's business plan.

317. Three areas had specific features that eventually made implementation of the remedy or a variant not feasible. Any alternative behavioural remedy was ruled out as impractical and ineffective.

(a) In Middlesbrough, only sale of the acquired store would have addressed the SLC. In any event circumstances changed such that a divestment was no longer required.

(b) In Whitburn, whilst the acquired store appeared to have been the less attractive store, the CC adopted the principle that the sale of the acquired store was the appropriate starting point to restore the status quo and also Somerfield did not put forward a case to consider the existing store.

(c) In Kelso, it was only realistic to try to sell the existing, closed store.

318. This case study determined that the stores were extensively marketed both by the original agents and, where appropriate, the Divestiture Trustee. Hindsight tends to support the initial timescales provided as part of the remedy which

are reflected in the 2008 merger remedy guidelines.[56] It could have been quite appropriate for a Divestiture Trustee to be appointed after the end of the six-month First divestiture period. This would have concluded the process earlier and there was no evidence that any opportunities would have been lost through this approach. It may be appropriate in future for fewer, if any, extensions to be provided.

319. To support this approach it may be appropriate in future to identify a suitable Divestiture Trustee earlier in the process and to clarify details of his/her appointment to avoid the need for further delays. In this case the fact that a Divestiture Trustee had not been appointed before under the Act made this a further challenge. Experience has shown that it is also important to maintain an ongoing dialogue between the Divestiture Trustee and the CC.

Noble

Main facts of the inquiry

Background

320. On 13 September 2006 the OFT referred to the CC the completed merger of Deans Food Group Limited (Deans) and Clifford Kent Holdings Limited (Clifford Kent), the parent company of Stonegate Farmers Limited (Stonegate). The two groups merged under a new holding company, Noble Foods Limited (Noble). The principal shareholders in Clifford Kent and Deans prior to the transaction (respectively, Mr Michael Kent and Mr Peter Dean) each received 50 per cent of the ordinary shares of Noble. The transaction was completed on 23 June 2006.

321. Deans and Stonegate were the largest suppliers of shell eggs and processed eggs in the UK.

[56] *CC8*, paragraph 3.24, suggests that the maximum divestiture period is normally six months.

(a) Shell eggs are fresh eggs in their shells and are categorized according to different processes of production: cage (battery) eggs,[57] barn eggs,[58] free range eggs[59] and organic eggs.[60]

(b) Processed eggs are usually second quality eggs that have been broken and pasteurized to supply to food manufacturers in liquid or powdered form; and small eggs which have been hard-boiled.

322. It was estimated that the merger gave Noble around 60 to 70 per cent of the supply of shell eggs to retailers and over half the supply of liquid eggs.

323. The stages of egg supply are *(a)* the production of eggs at farms; *(b)* the sorting, grading and packing of eggs; *(c)* the supply of eggs to retailers, catering and wholesale customers, or their use in processing to be sold on as processed eggs; and *(d)* the sale of eggs or egg products by those retailers, by caterers and wholesalers to their end-customers, or by users of processed eggs to their end-customers.

324. Deans was a company with national coverage, operating at almost all levels of the shell and processed egg supply chain. In 2004/05, Deans had a turnover of £314 million and an operating profit of £7.2 million.

325. Stonegate was less vertically integrated than Deans (for example, it did not have any breeding farms or hatcheries, nor any spent hen facilities, nor its own egg processing facilities). In 2004/05, Stonegate had a turnover of £103 million and an operating profit of £2.4 million.

Findings

326. On 20 April 2007, the CC published its final report.

327. The CC identified the following relevant markets:

(a) For shell eggs: (i) the supply to retailers of each of the three categories of: cage and barn eggs, non-organic free range eggs, and organic eggs; and (ii) the supply of all shell eggs to catering and wholesale customers.

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[57] In 1999, the European Union Council Directive 1999/74/EC banned the conventional battery cage in the EU from 1 January 2012, after a 12-year phase-out. The EU Directive allows enriched or 'furnished' cages to be used. Enriched cages must be at least 45 cm high and must provide each hen with at least 750 cm² of space; 600 cm² of which must be 'usable area' and the other 150 cm² is for a nest-box. The cage must also contain a perch and litter, among other things.

[58] Barn eggs are produced by hens in enclosed barns without access to outdoor areas.

[59] Free range eggs are from those hens that have continuous daytime access to runs which are mainly covered with vegetation and with a specified maximum stocking density per hectare.

[60] Organic eggs are produced in similar conditions to free range eggs but on land free from chemicals for the previous two years and which meets other organic certification standards.

(b) For processed eggs: (i) the supply of liquid eggs; (ii) the supply of powdered eggs; and (iii) the supply of hard-boiled eggs.

Shell eggs

328. The parties argued that the bargaining power of multiple retailers together with the presence of other suppliers would be sufficient to ensure that the merged company would not have market power in supply to any category of retailer. However, the CC did not find this argument persuasive because it found that:

(a) the merger would significantly reduce the ability of retailers to switch to alternative suppliers of all three categories of shell eggs;

(b) entry and expansion of other suppliers was constrained, primarily by the availability of eggs to pack; and

(c) imports were unlikely to offset any reduction in competition in the supply of shell eggs to retailers.

329. The CC was also concerned about the increased upstream bargaining power of the merged entity because it would give it the ability as well as the incentive to buy from producers on less favourable terms. The CC did not believe that such lower prices would be passed on to consumers and would be more likely to result in a reduction in the quantity of eggs produced.

330. The CC therefore concluded that the merger may be expected to result in an SLC in:

(a) the supply of cage and barn eggs, free range eggs and organic shell eggs to retailers; and

(b) the procurement of shell eggs from producers in the UK.

331. The CC concluded that the merger may not be expected to result in an SLC in the supply of shell eggs to catering and wholesale customers, where the merged company's market shares were significantly below that to retailers.

Processed eggs

332. The only overlap between the parties in processed eggs was in pasteurized liquid eggs. Although the CC found that some loss of competition may result from the merger, the threat by customers in aggregate to switch to imported liquid eggs or to other UK suppliers was sufficient to conclude that the merger may not be expected to result in an SLC in the supply of liquid eggs. The CC

found no concerns in relation to the supply of powdered eggs or the supply of hard-boiled eggs.

Choice and design of remedy

Interim measures

333. On 22 August 2006, the OFT had accepted initial undertakings from the parties. These initial undertakings were subject to a number of derogations for action that had already taken place or were planned. This action included the transfer of Michael Kent as CEO of Stonegate to become CEO of Deans (following the stepping back of Peter Dean, the previous CEO of Deans) and integration of some operational functions.

334. On 20 November 2006, having reviewed the extent of integration, the CC issued directions for the appointment of a monitoring trustee[61] and accepted interim undertakings from the parties. These interim undertakings halted integration and separated certain key functions (IT, accounting, production and operations) in order to preserve the CC's ability to take appropriate remedial action in the event of an SLC. At the time, the CC's directions to undo aspects of integration were a significant development of CC procedure. The CC also required that the person who had hitherto overseen much of Stonegate's operations would take up the role of Managing Director of Stonegate.

335. In early July 2007, several weeks after publication of the CC's final report and during the negotiations of final undertakings, the interim Managing Director of Stonegate resigned. This led to the CC directing Noble to appoint an HSM for the Stonegate business. By the start of August 2007, Pam Corbett had been appointed as HSM for Stonegate. Prior to the merger, Pam Corbett had been co-owner[62] of Church Farm Eggs Ltd (Church Farm Eggs) and was working for Stonegate. She had become Commercial Director of Deans immediately following the merger. She had also established STC Packers Ltd (STC), an egg packing company, which packed for Stonegate and Deans and was now run by her son. At the time of her appointment, the CC was told that neither Pam Corbett nor her husband had any serious intention of acquiring Stonegate.

[61] In this case, the monitoring trustee was a former partner of a big four accounting firm who was now acting as a sole practitioner.
[62] Co-owner with her husband, Richard Corbett.

Final remedies

336. The CC's Remedies Notice sought views on *(a)* a divestiture of either Stonegate or Deans, and *(b)* behavioural remedies.

Divestiture remedies

337. The CC found that divestiture of Stonegate was likely to be the most effective remedy for addressing the SLC. However, it identified a number of composition, purchaser and asset risks which it sought to overcome through the design of the divestiture package and process:

(a) Noble was given a period of three months (with the possibility of an extension to six months) to sell Stonegate to a suitable purchaser so as to mitigate the risk that the business of Stonegate could deteriorate during the divestiture process.

(b) The business of Stonegate could be supplemented with additional assets from Deans if required by a prospective buyer and considered reasonable by the CC.

(c) If a suitable purchaser could not be found, the CC reserved the right to implement an alternative behavioural remedy (see paragraph 338).

Behavioural remedies

338. Noble responded to the Remedies Notice by proposing three behavioural remedy proposals. In the first of these proposals, Noble was willing to commit to release any current Stonegate producer from its contract with Stonegate on providing three months' notice so as to permit it to supply another packer/processor. Noble said that this would make it easier for other packers to supply retailers at short notice and hence enable retailers to switch supplier. Subsequent revisions to this proposal extended it *(a)* to all Stonegate's third party producers being able to give three months' notice to switch and *(b)* to Deans' third party eggs.

339. The CC concluded that none of the behavioural remedies put forward by Noble would be as comprehensive a solution as divestiture of Stonegate in remedying the SLC because, among other reasons, they did not overcome the problems associated with the size of Noble relative to its remaining competitors. Nevertheless the CC considered that, in the event that the divestiture of Stonegate did not prove to be possible, a behavioural remedy could to some extent effectively address the SLC. It therefore retained as a fall-back option a behavioural remedy which would enable producers to switch

more easily. This behavioural remedy would require Noble to allow all of its third party producers (both existing and new) to give six weeks' notice to terminate their contract with Noble.[63]

What happened after the CC's final report?

Implementation of remedies

Terms of the final undertakings

340. On 8 October 2007, just under six months after the final report, the CC accepted final undertakings from Noble.

341. The initial divestiture period in the final undertakings was for three months from the acceptance of the final undertakings (ie to 8 January 2008). The final undertakings allowed for the possibility that this period might be extended once by up to three further months (ie to 8 April 2008) if heads of terms had been agreed but disposal not completed. The final undertakings also gave the CC the option of *(a)* appointing a divestiture trustee if disposal of Stonegate had not been completed at the end of the initial divestiture period, and *(b)* putting in place the behavioural remedy in paragraph 338 had the divestiture trustee been unable to sell the business.

The divestiture process prior to 3 April 2008

342. The marketing process for Stonegate had begun in advance of the agreement of the final undertakings so as not to delay the process. Final offers were received from five bidders in November 2007 and the CC met relevant bidders in order to assess whether they would satisfy the CC's suitable purchaser criteria.

343. There was some concern that one of the bidders was Pam Corbett, the HSM, and that the CC needed to be sure that she would present the company properly to other bidders in the management presentations. The CC mitigated this risk by requiring the monitoring trustee to attend all the management presentations to ensure that the company was being adequately presented to all bidders.

344. On 26 November 2007, the CC informed Noble that three bidders had a reasonable prospect of being suitable purchasers and expressed concerns about two other bidders. Pam and Richard Corbett's (the Corbetts) bid was

[63] Notwithstanding the longer notice periods specified in contracts which producers would still be entitled to rely upon. The final undertakings also allowed for a shorter than six-week notice period to be agreed.

Noble's preferred bidder. Although there had been some concern about the Corbetts' independence from Michael Kent, this was allayed by meetings with Pam Corbett, and advice from the monitoring trustee regarding the Corbetts' intentions and their experience and expertise in the egg market.

345. There followed a protracted period during which the Corbetts substantially revised the basis of their offer which led to further discussions about their suitability as a purchaser.

346. On 12 February 2008, the Corbetts were accepted as bidders that had a reasonable prospect of being suitable purchasers. However, there was a further period of delay in February and March 2008 when the Corbetts were preparing for exchange of contracts and its lender was performing due diligence. On 2 April 2008 the CC was informed that the Corbetts' lender was no longer willing to finance some of the finance facility that the Corbetts were proposing to use to finance their acquisition of Stonegate. The withdrawal of the lender was thought to be a direct result of the credit crunch. This placed significant doubts on the financeability of the Corbetts' bid at that time.

The divestiture process after 3 April 2008

347. On 3 April 2008, following significant delays in the divestiture process (which had at that time been ongoing for almost six months and was coming to the end of the period laid down in the undertakings) and uncertainty over the completion of the divestiture, the CC directed Noble to appoint a divestiture trustee. A divestiture trustee was appointed on 22 April 2008.

348. The divestiture trustee focused on two main areas of work: *(a)* sounding out other approved bidders about whether they were still interested in acquiring Stonegate; and *(b)* evaluating the progress made by the Corbetts in advancing their bid (specifically, in their progress in replacing the financing package) and reassessing their bid.

349. Other bidders, when contacted by the divestiture trustee, expressed considerable frustration with the delays to the divestiture process and were cautious in their expressions of continuing interest in the context of an increasingly difficult financial climate. One of the three other bidders that were contacted, who was a strong alternative purchaser, told the CC that he no longer wished to acquire Stonegate.

350. In April 2008, the Corbetts received an offer of financing from another lender that was broadly similar to that offered by its original lender. The Corbetts also presented the CC with a detailed business plan and financial model.

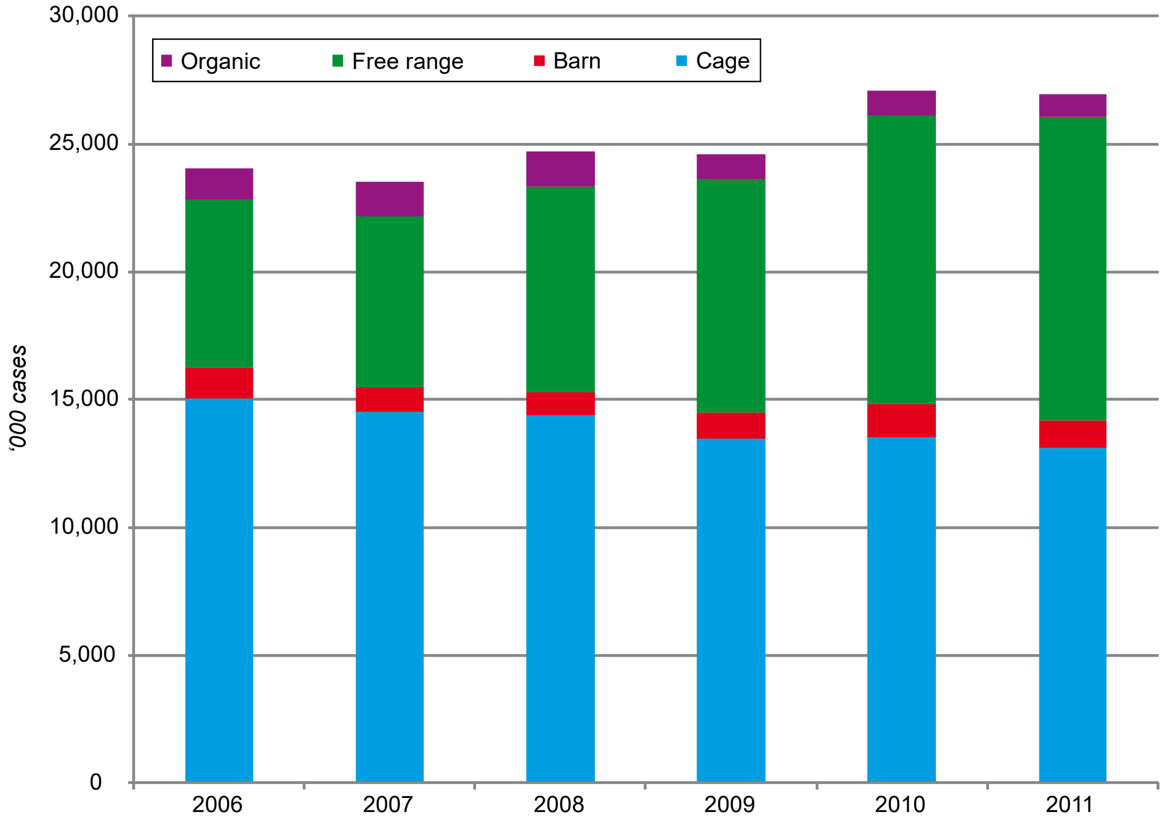
351. On 12 June 2008, following an in-depth review of the Corbetts' revised financing arrangements and their business plan by the divestiture trustee, the CC approved the Corbetts as suitable purchasers of Stonegate.

352. Contracts were exchanged on 18 June 2008 and the divestiture of the Stonegate business to the Corbetts was completed on 27 July 2008, nine and a half months after the undertakings were accepted and 15 months after the CC's final report.

The egg market since the divestiture was completed

353. Figure 1 shows UK packing station egg throughput for the period 2006 to 2011.

Figure 1: UK packing station egg throughput, 2006 to 2011



Source: Department for Environment, Food and Rural Affairs (Defra).

354. Figure 1 shows that egg production has increased from around 24 million cases in 2006 to around 27 million cases in 2010 and 2011. Free range egg production has increased significantly with around 12 million cases packed in 2011 compared with 6.5 million in 2006. The growth in free range eggs has been at the expense of intensive eggs, which have reduced from 15 million cases packed in 2006 to 13 million in 2011.

355. Domestic supply of eggs has not kept up with demand, which has grown since 2006 (attributed in part to a revival in home cooking and in part to a growing awareness of the health properties of eggs).[64] Imports of shell eggs have grown from around 3 million cases in 2006 to just over 4 million in 2010.[65]

356. Tables 3 and 4 set out the trends in turnover and operating profit since 2004/05 for each of the five largest egg suppliers.

Table 3: Turnover of five largest egg suppliers, 2004/05 to 2010/11

£ million

	2004/05	*2007/08*	*2008/09*	*2009/10*	*2010/11*
Deans/Noble	313.8	467.8	533.5	558.8	594.7
Stonegate	103.4	130.4	134.5	123.3	103.7
Glenrath	24.3	39.5	42.6	44.9	43.0
Oaklands	n/a	41.9	44.6	24.3 (6 months)	44.8
Fridays	26.2	42.3	44.9	43.7	-

Source: CC analysis of statutory accounts.
Note: The companies' period ends differ: Deans/Noble year end is 30 September; Stonegate accounting period ends were 1 October 2011, 2 October 2010, 3 October 2009 and 30 September for earlier periods; Glenrath year end is 31 May; and Fridays is 31 December (ie the figure for 2009/10 is therefore that for the year ended 31 December 2010). Oaklands accounting period ends were 3 October 2008, 2 October 2009, 2 April 2010 and 31 March 2011 (the figure for 2009/10 therefore only covers six months).

Table 4: Operating profit of five largest egg suppliers, 2004/05 to 2010/11

£'000

	2004/05	*2007/08*	*2008/09*	*2009/10*	*2010/11*
Deans/Noble	7.2	20.0	22.9	25.4	15.3
Stonegate	2.4	2.4	2.9	6.4	2.7
Glenrath	5.0	7.0	7.7	7.3	4.4
Oaklands	0.9	1.9	4.8	3.4 (6 months)	2.9
Fridays	0.5	3.2	6.3	4.6	-

Source: CC analysis of statutory accounts.
Note: The companies' period ends differ: Deans/Noble year end is 30 September; Stonegate accounting period ends were 1 October 2011, 2 October 2010, 3 October 2009 and 30 September for earlier periods; Glenrath year end is 31 May; and Fridays is 31 December (ie the figure for 2009/10 is therefore that for the year ended 31 December 2010). Oaklands accounting period ends were 3 October 2008, 2 October 2009, 2 April 2010 and 31 March 2011 (the figure for 2009/10 therefore only covers six months).

357. We consider Stonegate's performance in detail in paragraphs 377 to 380. In the remainder of this section we comment on the performance of Noble and Stonegate's other competitors since the CC's final report.

Noble

358. Noble has grown substantially in the period since 2004/05, nearly doubling its turnover and increasing its operating profits almost four-fold. This growth and improvement in profitability has been achieved in part through increasing

[64] Source: Mintel report on Eggs, Market Intelligence, June 2010.
[65] Source: Defra.

demands in the egg market and in part through innovative expansion into other food products. Noble has expanded its egg product portfolio since 2008, launching The Happy Egg Company, a premium free range brand, and Ecowise, an eco-friendly range of eggs that use recyclable and compostable packaging. The Happy Egg Company now has an annualized retail value of £65 million. Noble has also expanded into other foods, including the acquisitions of two premium desserts businesses: Gu Chocolate Puds in 2010 and Serious Desserts in 2008 (at the time of their acquisitions these businesses had turnover of £25 million and £3 million respectively).

Stonegate's other competitors

359. Stonegate's other competitors have also increased their turnover and profits but from a lower starting point. The relative sizes of Glenrath Farms (Glenrath), Oaklands Farm Eggs Ltd (Oaklands) and Fridays Ltd (Fridays) have remained stable since the CC's inquiry.

(a) Glenrath continues to be Scotland's largest egg producer and packer. It has little supplies outside of Scotland. Glenrath invested £50 million in new enriched cages in order to comply with the new EU regulations. This has meant that 85 per cent of Glenrath's production is now in-house.

(b) Oaklands, based in Shropshire, completed an investment in a Tecno-enriched colony system in 2009 in order to meet the EU requirements.

(c) Fridays, based in Kent, continues to supply organic and free range eggs under own brands and retail brands.

Assessment of the effectiveness of the CC's remedies

360. In order to assess the effectiveness of the remedies, we interviewed ten parties: representatives of four of the five largest egg suppliers, two retailers, the monitoring trustee, the divestiture trustee, and two individuals that had been involved at Noble at the time of the investigation. We tried to contact other retailers but without success.

Interim remedies

361. In assessing the effectiveness of the interim remedies, we have considered *(a)* the role of the monitoring trustee; *(b)* the unwinding of integration and the hold separate arrangements; and *(c)* the appointment of the HSM.

Role of the monitoring trustee

362. The appointment of a sole practitioner as monitoring trustee initially created doubts regarding the availability of back up and whether he would have sufficient resources. However, in this case the monitoring trustee worked closely with the management and was able to provide good insights into the business, in particular working hard to ensure that the CC had access to sufficiently detailed financial information. The monitoring trustee also played a significant role in reassuring key management at Stonegate during what was a protracted period of uncertainty for staff, particularly during the divestiture process. The need for such a 'softer' role may be less important in larger, more complicated businesses.

363. The main downside of having a sole practitioner is that he or she may be unable to be as involved in the divestiture process given the greater workload and the need for different skills. In the event that a divestiture trustee different to the monitoring trustee is appointed, it is important to ensure that the two work closely together.

Unwinding integration and the hold separate arrangements

364. The CC's directions to unwind integration in this case, following the pattern of the *Stericycle* case at around the same time, were important in retaining the option of divestiture of the Stonegate business at the end of the process. Interviewees involved with Noble at the time said that the interim measures had been 'tough and uncomfortable'.

365. The main issue of concern to those at Noble had been the ring-fencing of information about Stonegate's financial performance. Noble had one combined banking facility for the former Deans business and the Stonegate business. Noble therefore had responsibility for the debt of Stonegate but under the CC's directions only the Finance Director of Noble was able to review Stonegate's finances. Although this is undoubtedly disconcerting for those involved in the parent company, this type of measure is essential for the preservation of the acquired business. This type of risk should be factored into the buyer's assessment when completing transactions rather than fettering the competition authority's ability to ensure a viable remedy package can be retained.

366. One point raised by one interviewee was whether the CC could have done more to communicate the situation to Stonegate staff and to retailers during the inquiry. Whilst the CC is concerned about staff and customer retention, the responsibility for such communication should fall on the management of the business wherever possible.

Hold separate manager

367. The most difficult aspect of the hold separate arrangements was the role of the HSM. The departure of the interim Managing Director of Stonegate created a period of uncertainty and the CC had to move quickly to find an HSM to manage the business until the end of the divestiture process.

368. The appointment of Pam Corbett as HSM proved controversial when she and her husband emerged first as bidders for and then as successful purchasers of Stonegate. Whilst this created some potential for conflict (for example, in the management presentations to other bidders), in general it seems to have been well-handled. It is not unusual for the CC to face a situation where management of the business being divested is involved in a bid for the business because this can occur in any management buyout (MBO) situation. The difference in this case was that the CC appointed Pam Corbett as HSM and it did not expect her also to become a bidder for the Stonegate business.

369. There was a general view among interviewees that Pam Corbett had proven to be the right person for the HSM job. There were few other suitable candidates because the role needed industry experience (and in particular relationships with egg suppliers). In particular, neither Peter Dean nor Michael Kent could have operated in that role given the changes that had occurred following the merger.

Final remedies

370. In assessing the effectiveness of final remedies we have considered both the divestiture process and the performance of Stonegate since the divestiture.

Effectiveness of divestiture process

371. All stages in the divestiture process took longer than expected. The 15-month period between the CC's final report and the completion of the divestiture was significant and created uncertainty for Stonegate, Noble, retailers and the bidders for the Stonegate business. Many of the reasons for this delay seem to have been factors outside the CC's control (for example, the Corbetts' original lender's decision to withdraw funding from the Corbetts late in the process). However, there are areas in the process which merit discussion: *(a)* the scope of the divestiture package, *(b)* the assessment of suitable purchasers, *(c)* the management of the divestiture process, and *(d)* the appointment and role of the divestiture trustee.

- *Scope of the divestiture package*

372. Two interviewees commented on the CC's requirement that the whole of the Stonegate business be divested. The Corbetts had wanted to acquire only parts of the Stonegate business—they did not want to buy Stonegate's disused farms. The consequence of including these assets in the bid was that the Corbetts had to increase their leverage, which increased the concerns the CC had about the financeability of the Corbetts' bid. These two interviewees felt that the CC had not sufficiently explained the reasons why these disused farms had to form part of the bid. Having purchased the assets, the Corbetts simply sold the farms on at break-even price, so it is not clear that including these assets in the divestiture package served much purpose in enhancing the competitiveness of the eventual purchaser. However, at the time, the CC was sceptical about 'cherry picking' proposals and whether these would provide a comprehensive solution to the SLC.

- *Assessment of suitable purchasers*

373. Several interviewees remarked that the CC's decisions to accept or not accept a purchaser as suitable were not always clear. For example, interviewees associated with Noble questioned whether the CC had enough information in assessing the suitability of the Corbetts' bid. Yet the CC had significant information on the Corbetts' bid and undertook a detailed analysis of the financeability of the bid. The key issues here are *(a)* making the criteria for suitable purchasers clear at the outset so analysis of financeability, for example, is robust; and *(b)* considering how best to communicate this in a transparent way without revealing commercially confidential information.

- *Management of the divestiture process*

374. There was a tension between allowing Noble to progress matters with its preferred bidder, the Corbetts, and not discounting other potential bidders. Indeed, at one point the CC had to issue an order preventing the vendors from entering into exclusive arrangements with the Corbetts. This tension was created by the fact that the Corbetts' bid took time to be accepted by the CC. By the time the divestiture trustee was appointed, other potential bidders were becoming frustrated with the process and one expressed no further interest in the acquisition. This suggests that the CC needs to ensure that where concerns remain about a vendor's preferred bidder, the divestiture process cannot be allowed to put off other bidders who have been approved by the CC as suitable purchasers.

- *Appointment and role of divestiture trustee*

375. There was considerable frustration and confusion among those interviewees associated with Noble as to why the divestiture trustee had been appointed when Noble thought it was close to completion with the Corbetts. The undertakings clearly specified that divestiture needed to be completed by 8 January 2008, with a possible one-off extension of up to three months, otherwise the CC could appoint a divestiture trustee. However, these interviewees said that Noble should have been given clearer time frames and more warning before a divestiture trustee was appointed.

376. The CC considered a number of extensions before the decision to require the appointment of a divestiture trustee was made:

(a) On 8 January 2008 the CC agreed to extend effective disposal to 13 February 2008 (from 8 January) if heads of terms were agreed by 23 January 2008.

(b) On 15 January 2008 the CC agreed to a further extension to 22 February if nominations for a divestiture trustee were submitted to the CC by 23 January.

(c) A further request from the parties to extend to 28 March was refused.

(d) A further request from the parties to extend to 14 March was refused, however, the CC indicated it would extend for a short period (a few days) if a transaction was close to being achieved.

(e) The CC was sensitive to the parties' progress and it was only after the Corbett's original lender notified the CC on 31 March that it had declined to fund the transaction that the decision to appoint a divestiture trustee was made. The parties were notified about the decision on 3 April.

Effectiveness of Stonegate as a competitor since divestiture

377. As shown in Tables 3 and 4 above, since divestiture, Stonegate has performed in line with its competitors and remained profitable. At the end of 2011 Stonegate had net assets of over £19 million. Despite the CC's concerns regarding financing of the Corbetts' bid, there appear to have been no financing issues since the divestiture. Stonegate has been able to invest in operational improvements and make an acquisition: in May 2011, Stonegate acquired Farmhouse Freedom Eggs, a free range and organic egg packer, in order to increase its geographic presence in Wales; and Stonegate invested £17 million in new enriched cages and also introduced an egg tracing system in 2009.

378. Retailers that we spoke to commented that the remedy was the right choice and had been successful. We were told that Stonegate had both won and lost contracts to supply retailers since the CC's final report in 2007. There was no evidence that Stonegate had significantly lost ground since the divestiture nor that it had weakened as a competitor.

379. Some competitors felt that the remedy had not been effective because Noble still had a strong market position. However, the purpose of the remedy was not to address the pre-merger size of Deans, it was to prevent an SLC arising from the merger of Stonegate and Deans. Noble's strength in the market today does not therefore appear to be due to any failure of the CC's remedy, nor does it appear to have resulted from any of its competitors failing.

380. One competitor expressed concerns about the independence of Stonegate from Noble, primarily due to the relationships between producers and packers. However, packing relationships are not unusual in this industry. Stonegate continues to have contracts to pack some eggs for other packers but these contracts do not seem to have affected Stonegate's ability to compete independently. In relation to independence, the Corbetts considered that Stonegate had everything it needed to operate independently at the time of the divestiture. There was no need for transitional arrangements as many back office functions (HR, finance, IT) had been effectively held separate during the CC's inquiry.

Summary of key learning points

381. The remedy in this case involved a difficult and protracted divestiture process. It required extensive involvement from CC staff throughout the process despite the involvement of both a monitoring trustee and ultimately a divestiture trustee. The main implementation difficulties encountered were in the evaluation of suitable purchasers amidst changing financial conditions. Overall, it seems the divestiture has been successful. Stonegate has come through an uncertain period and continues to compete effectively retaining its relative position in the market.

382. The evaluation has highlighted learning points in relation to both interim measures and final remedies.

383. In relation to interim measures:

(a) The 'softer' role of the monitoring trustee can be valuable in smaller company monitoring and separation. A suitably skilled sole practitioner can, as in this case, bring significant focus and involvement to the monitoring role. However, use of a sole practitioner does carry risks of not

having sufficient back-up and normally does not have the capacity either to expand to monitor the divestiture process or to become divestiture trustee. In these circumstances, it is essential that the role of monitoring trustee expands to include effective monitoring of the divestiture process.

(b) To ensure that commercially sensitive information about the acquired firm is not gained by a competitor it is essential to ring-fence financial information. Where the acquirer has responsibility for the debt in the acquired firm, the CC needs to allow some flow of information but this should be no more than is absolutely necessary and limited to as few individuals as possible. Although this creates awkwardness for the acquirer this is a risk that the acquirer takes on when completing the transaction.

(c) When selecting an HSM, the CC should conduct full interviews with them, as it did in this case. It is preferable for the HSM not to become a bidder for the business in the event a divestiture is required, but in the event this situation does arise it creates additional risks such that it is necessary to put in place measures to ensure that conduct of the HSM is appropriate. This requires greater scrutiny from the monitoring trustee (for example, when attending site visits and management presentations) and is no different to the measures required when an MBO is being pitched against other bids.

384. In relation to final remedies:

(a) A fall-back remedy was necessary given the extent of concerns about the likelihood of finding a suitable purchaser. There was no evidence that this encouraged the vendors to delay the divestiture process but the CC does need to be mindful that a fall-back remedy that is preferred by the parties risks creating perverse incentives. In this case the credible threat of a divestiture trustee prior to implementation of the fall-back remedy ensured that the CC's preferred remedy was implemented.

(b) The process of disposing of a business can be time consuming and the CC needs to make sure that parties are progressing in line with clearly defined timetables and are not ruling out other potentially suitable purchasers if there is a risk with the vendor's preferred bidder.

(c) The purchaser selection assessment needs to be sufficiently detailed and robust and must be capable of being communicated clearly to the bidder. The purchaser assessment must include a full assessment of financial viability and independence of the purchaser.

(d) Parties would appreciate the CC providing as much clarity and transparency as it is able to on both the divestment process and the reasoning behind the decisions made by the CC. The CC needs to balance this with its other obligations including the confidentiality of other bidders.

(e) The CC should make clear the deadlines for appointment of a divestiture trustee and set out progress milestones that if missed would indicate an appointment is more likely than not. The appointment of a divestiture trustee should not be a surprise and the reasons should be apparent to vendors on communication of the decision. While the CC should allow some flexibility, for example if a transaction is clearly close to being agreed, the CC should also be careful to account for undue optimism of sellers and buyers that a transaction is close to fruition and should err on the side of caution in requiring a divestiture trustee to be appointed.

(f) The process of appointing a divestiture trustee should be made as streamlined as possible (for example, requiring nomination of prospective divestiture trustees as soon as progress milestones are missed even if appointment is not necessarily actioned). In retrospect, it may have been appropriate to appoint a divestiture trustee at an earlier stage in this inquiry but faced with a potentially protracted appointment process and the possibility of progress without appointment, the decision to appoint was triggered at a relatively late stage.

Arqiva

Main facts of the inquiry

Background

385. On 8 August 2007 the OFT referred to the CC the completed acquisition by Macquarie UK Broadcast Ventures Limited (MUKBV) of National Grid Telecoms Investment Limited, Lattice Telecommunications Asset Development Company Limited and National Grid Wireless No.2 Limited. MUKBV, owned Arqiva Limited (Arqiva) and the acquired companies, together with their subsidiaries, made up the National Grid Wireless Group (NGW). The acquisition had been completed on 3 April 2007 for £2.5 billion.

386. Arqiva and NGW overlapped in:

(a) The provision of Managed Transmission Services (MTS) and Network Access (NA) to sites and associated facilities to terrestrial television and radio broadcasters:

(i) MTS is a package of services including some or all of network design, procurement and installation of transmitters, network monitoring, quality assurance of the signal and maintenance of transmission equipment.

(ii) NA is the provision of access to sites and associated facilities, notably transmission masts, to enable broadcast transmission.

The CC found that in practice all television broadcasters and most radio broadcasters purchased NA bundled together with MTS, through an MTS provider, with MTS providers competing (among other factors) on the basis of site access solutions in which the price and quality of the total offering depended upon the selection of sites and the way in which sites were used. The industry was characterized by long-term contracts between MTS/NA providers and their broadcasting clients. Provision of NA was regulated by the Ofcom—Arqiva and NGW were required to provide NA on FRND terms and to publish reference offers setting out terms on which access could be granted.

(b) The provision of infrastructure systems and services to Mobile Network Operators (MNOs) and other wireless communication service providers, including access to sites and masts, and the provision of ancillary services, such as site installation and rigging and portfolio management and site-marketing services.[66]

387. At the time of the merger the industry was engaged in a major process of re-engineering broadcast transmission sites to enable a complete switchover from analogue television to digital (ie DTT) by 2012, under a process known as Digital Switchover (DSO).

388. Terrestrial broadcast transmission services are provided from a network of sites across the UK. At the time of the inquiry there were 1,154 sites for television, with the main sites divided between Arqiva and NGW. Radio (both digital and analogue) was also broadcast from the main television broadcast transmission sites and 'in-filled' from radio-specific sites.

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[66] Arqiva was also involved in the distribution of signals via satellite and the provision of multiplexing services, and NGW operated two Digital Terrestrial Television (DTT) multiplexes, but the parties did not overlap in these areas.

Services to television and radio broadcasters

389. The CC found that:

(a) prior to the merger, Arqiva and NGW were the only active providers of national MTS/NA to UK television broadcasters, and that each exercised a competitive constraint upon the other;

(b) prior to the merger, Arqiva and NGW were the most significant providers of national MTS/NA to UK radio broadcasters, with a combined market share exceeding 85 per cent, and that each exercised a competitive constraint upon the other;

(c) the threat of entry was insufficient to prevent the parties from exercising market power; and

(d) the presence of large informed customers did not provide a sufficient constraint in relation to the supply of MTS/NA to television or radio broadcasters to prevent the exercise of market power by the merged entity in the relevant market, due to the lack of credible alternative providers.

390. The CC concluded that the merger may be expected to lead to an SLC as a result of the loss of rivalry between Arqiva and NGW, leading to a worsening in the price and non-price factors (service quality and innovation) on which the parties competed in the provision of MTS/NA to television broadcasters and to radio broadcasters.[67]

Site access to MNOs

391. The CC did not form an expectation of an SLC in the markets for site access to MNOs, as the merged entity's market share was relatively low and there were significant competitive constraints in the market.[68]

[67] Following an extension, due to the complexity of the remedies stage, the final decision was published on 11 March 2008.
[68] The CC estimated the combined market share of Arqiva and NGW in the provision of site access to MNOs to be in the range of 14 to 19 per cent, depending on how it was measured. The CC estimated that they had a smaller combined share of sites for use by other wireless communication service providers. The CC concluded that, whilst some of the features of the merged entities' portfolio of sites may be a source of competitive strength, their importance in the future was unclear.

Interim measures

392. The CC adopted the initial undertakings given to the OFT on 27 April 2007 and accepted revised interim undertakings on 15 October 2007 and issued directions pursuant to these.[69] These interim measures permitted some confidential information to flow between the parties in relation to DSO and existing site access arrangements but required the adoption of certain safeguards. The parties were required to appoint a 'Technical Monitor'[70] to monitor compliance by the parties with the undertakings including monitoring of interaction between the parties in relation to DSO and existing site access arrangements, monitoring of communications both for the purpose of financial reporting and in general (including written and electronic communications, telephone conversations and meetings as necessary on a sample basis to ensure protocols and procedures functioned as intended).

Choice and design of remedy

Key remedy issues raised by parties

393. The merging parties and all principal television and radio broadcast customers considered that a suitable package of behavioural measures was their preferred remedy. Two specific issues were raised: *(a)* relevant customer benefits (RCBs) and *(b)* costs on third parties.

Relevant customer benefits

394. The merging parties submitted that the merger would give rise to significant RCBs which would not be achieved if the CC were to impose a substantial structural remedy. These benefits were expected to arise as a result of various cost savings, including operational synergies, capital expenditure synergies and savings with regard to the roll-out of DSO.

395. The CC considered detailed evidence which indicated how much of these savings would be passed through to customers following the merger due to the existing arrangements for the regulation of NA and due to pre-existing gain-share agreements between Arqiva and some of its customers.

396. The CC believed that significant RCBs would result from the merger. The RCBs were recognized to be significant cost savings (which in part would be

[69] CC (2007), Completed merger between Macquarie UK Broadcast Holdings and National Grid Wireless - Directions.

[70] The Technical Monitor acted in effect as a monitoring trustee, however, he had experience in broadcasting and so was considered to be expert in the field. This contrasts to other cases where the monitoring trustee has been from an accounting firm.

passed back to customers) and the de-risking of the DSO process in particular reducing the risks of delay and disruption due to better communication between the parties and the better coordination of resources. These latter RCBs were considered difficult to quantify but likely to be significant.

Costs on third parties

397. Some third party benefits were also considered such as reduced risk of delay to the release and auction of radio frequency spectrum (which was to become available as a result of the DSO process). The CC said that whilst the avoidance of these costs might not fit the definition of an RCB arising from the merger, these costs were relevant in determining the appropriate remedy option.

Final remedies

398. The CC considered a number of possible remedies, ranging from structural measures of full divestiture of NGW or partial divestiture (through which MTS/NA could be supplied for television and for radio) to behavioural measures to reduce barriers to entry in MTS/NA for television and radio[71] and to reduce the adverse effects of the SLC.[72]

Divestiture remedy options

399. In terms of a full divestiture, the CC concluded that the divestiture of NGW as a whole would effectively address the SLC and, whilst recognizing that there may be risks associated with this remedy, the CC concluded that a suitable purchaser was likely to be found who would operate the business as an effective competitor to Arqiva. However, the CC acknowledged that full divestiture would remove all the RCBs arising from the merger and might impose costs on third parties through increased risk to the DSO process. It also noted that full divestiture would include the divestment of significant business activities where no SLC was found.

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[71] Including: *(a)* provision for transfer of stranded MTS assets at the conclusion of MTS/NA contracts in order to ease switching; and *(b)* a requirement for the merged entity to make its field force available to existing or potential MTS providers.
[72] Including: *(a)* changes to existing contracts; *(b)* at contract termination, the renewal of the merged entity contracts with customers on like (or improved) terms; and *(c)* modification to the system of economic regulation, including price regulation of MTS/NA, possibly supported by functional separation of the price regulated elements of the business.

400. The CC considered several possible partial divestiture packages, the main options were:

(a) Divestiture of NGW's MTS/NA business. The CC concluded that this remedy was likely to be effective in addressing the SLC, and was likely to be as effective as full divestiture yet less intrusive; accordingly it preferred this remedy to full divestiture.

(b) Divestiture of NGW's television MTS business and some radio MTS business made up of parts of NGW and/or Arqiva, supported by a package of behavioural remedies. The CC concluded that while this partial divestiture option might in principle address the SLC, as well as the adverse effects, it believed that there were considerable risks regarding the operation of the divested business as a competitive entity,[73] which, in combination, were likely to result in this option not being an effective remedy. This remedy option was therefore rejected.

Behavioural remedy options

401. Arqiva proposed a detailed package of behavioural remedies which provided for future regulation, enhanced contractual provisions and dispute resolution mechanisms including an independent adjudicator paid for by Arqiva. (Full details of the final package are set out in paragraph 404 below.)

402. The CC concluded that the context of the merger, within the critical time frame of the DSO programme, was unique and that the market was relatively amenable to regulation.[74] As behavioural remedies would allow the merger to proceed, they would preserve the RCBs and would reduce the risk of costs being imposed on third parties. The remedies were designed to pass back approximately £165 million to broadcast customers (over 80 per cent of the present value of relevant merger synergies). This was significantly above what would have been passed to customers under existing gain-sharing provisions and included an amount to compensate customers for potential reductions in innovation as a result of the merger.

Conclusion on remedies

403. The CC concluded that the proposed package of behavioural remedies had a high probability of being effective in addressing the adverse effects of the

[73] The CC found that this partial divestiture option would require extensive behavioural remedies, including the implementation of functional separation, which in many respects would be as extensive, complex and intrusive as the measure required in a package of behavioural remedies without any divestment.
[74] Features noted included: small set of large customers, limited number of contracts, limited services, well-established regulator.

merger, and would also preserve the RCBs and reduce the risk of costs being imposed on third parties. The CC therefore preferred the proposed behavioural remedies package to divestiture alternatives in the particular context of this case. However, at the time of its final decision the CC retained a number of concerns with regard to ensuring that the proposed behavioural measures gave customers and regulators certainty and clarity. The CC noted that if the parties were unable to propose a package of behavioural remedies to the CC's satisfaction then it would require the parties to implement the divestiture of NGW's entire MTS/NA business. The interim undertakings were to continue until a set of behavioural undertakings from Arqiva were accepted, or until Arqiva achieved a divestiture which would be effective in remedying the SLC.

What happened after the CC's final report?

Implementation of remedy

404. Accepted final undertakings were published on 1 September 2008. The package of behavioural remedies that was agreed with Arqiva included:

(a) a guaranteed and immediate 17 per cent price discount on all existing radio MTS/NA contracts (with the discounted price maintained upon renewal);

(b) a guaranteed and immediate 3.25 per cent price discount on all existing analogue television and low-power DTT MTS/NA contracts;

(c) guaranteed fixed-sum price reductions on all high-power DTT MTS/NA contracts, together worth £44 million to 2020 or £72 million to 2032[75] (net present values);

(d) the option for contract renewals to be based on the same prices and terms as the existing contract or to be determined on cost-oriented and FRND terms;

(e) new contracts, for new or existing services, to be determined with cost-oriented pricing and on FRND terms or, if they are for similar services to an existing contract, the option for them to be based on the same terms as the existing contract;

(f) enhanced service level and service credit provisions for all customers;

[75] Estimated at the time of the CC's final report (March 2008).

(g) a 'super credit' regime to compensate for customers' inability to move to an alternative provider in the event of persistent poor performance;

(h) an independent adjudicator, paid for by Arqiva but accountable to the OFT and under the guidance of Ofcom, to resolve disputes between Arqiva and its customers and to ensure that new services and contract variations are provided on cost-oriented and FRND terms;

(i) the preparation and audit of separate regulatory accounts for Arqiva's MTS and NA operations;

(j) an annual audit of the DSO programme;

(k) provisions to ensure the confidentiality of information which is provided to Arqiva for one purpose but which could be used by it in another part of its business to its competitive advantage; and

(l) the option, at the end of an MTS/NA contract, for the customer to acquire 'stranded assets', so as to facilitate future new entry in MTS.

405. We assess the implementation of each of these measures when assessing the effectiveness of the remedies.

The DSO process

Television

406. In 2008, the DSO process for television was seen as critical[76] and there were major concerns that this process would be delayed significantly if divestiture was required.

407. At the time of our interviews, we were told that the DSO process had, so far at least, gone better than expected—subsequent to our interviews, the switchover of the London area completed on 4 April 2012. In delivering the DSO programme, the merging parties were required to coordinate programme delivery and although there were some difficulties with this prior to the merger it appears that the integration of MUKBV and NGW has resolved these. Television companies told us that the relatively seamless process was likely to have been aided by Arqiva/NGW being one company. It was noted by some that the successful completion of the DSO process had been in danger

[76] The scheduled completion date for London coincided with its staging of the Olympic Games.

of being taken for granted and that the complexity of the operation that took place should not be underestimated.

Radio

408. At the time of the merger the commercial radio sector was a diverse group of around 300 companies with different company size, geographic reach and commercial interests (large national commercial groups versus small local community radio). Since the merger, there has been some consolidation in the commercial radio sector.[77] At the time of our interviews, there was no national plan for a radio DSO process although the BBC was required to increase its digital footprint.

Assessment of effectiveness of remedies

409. In order to assess the effectiveness of the remedies, we interviewed a range of market participants including the merged business, regulators, television and radio customers (large, small and mid-sized), and a potential new entrant. In this section, we discuss the effectiveness of *(a)* the interim measures and *(b)* the final remedies.

Interim measures

410. The CC allowed the DSO process, which required interaction between the two merging parties, to continue during the inquiry subject to certain safeguards including the appointment of a Technical Monitor. This appears, on the basis of our interviews, to have worked well; meetings and communications between the two parties were effectively supervised. The interim arrangements meant that the DSO process continued but that the option of a divestiture remedy was maintained.

411. We were told by one party that the appointment of a Technical Monitor had been helpful and that without this DSO may have faced a delay of up to a year. However, we were told that despite this the DSO process did slow during the CC's investigation as both parties were nervous of breaching the interim undertakings.

[77] See Enders|Analysis: UK Commercial Radio Consolidation | Sep 2007.

Final remedies

412. In this section we consider the effectiveness of the final remedies. We examine each aspect of the package of remedies:

(a) price discounts (paragraph 404*(a)* to *(c)*);

(b) contract renewals (paragraph 404*(d)* and *(e)*);

(c) service levels (paragraph 404*(f)* and *(g)*);

(d) the independent adjudicator (paragraph 404*(h)*);

(e) compliance with audit regimes (paragraph 404*(i)* and *(j)*)

(f) confidential information (paragraph 404*(k)*); and

(g) acquiring assets to facilitate entry (paragraph 404*(l)*).

Price discounts

413. Arqiva was required to provide a guaranteed and immediate price reduction on radio MTS/NA contracts of 17 per cent[78] and on analogue television and low-power DTT MTS/NA contracts of 3.25 per cent. It was also required to give guaranteed fixed-sum price reductions on all high-power DTT MTS/NA contracts (together worth £44 million to 2020 or £72 million to 2032).

414. Overall, we found that the package of behavioural remedies had been effective in passing the agreed cost synergies back to the industry, as radio and television customers did receive these immediate price discounts.

415. Some radio customers expressed concern because they had anticipated receiving price discounts on all their contracts with Arqiva. However, the Undertakings provided for price reductions only on the contract price for Transmission services (ie a service consisting of NA and MTS) and not on other services provided by Arqiva (for example, contribution, distribution and multiplexing). This was because the SLC did not relate to other services provided by Arqiva. Most interviewees were clear that Arqiva had applied the discounts consistently with the Undertakings.

416. The concerns of these radio customers appear to be a misunderstanding of the purpose of the remedies, not a defect in the remedies: a number of radio

[78] As the NA part of the Transmission contract is set by reference to a regulated rate card, the 17 per cent discount was in effect applied to the MTS part of the Transmission contract.

companies may have focused on the headline reduction and not fully appreciated the detail of the remedy package.

417. The 17 per cent price discount was originally welcomed by the radio industry (particularly given the advertising climate in 2008).[79] The radio industry had believed that the merger would be allowed to proceed on the basis of the risks to DSO should it be blocked and had therefore sought the best deal on price reductions for radio companies that it could obtain. Radio customers were unable to pinpoint clear omissions/weaknesses in the Undertakings when we interviewed them.

Contract renewals

418. Arqiva is required to provide a reminder to customers 12 months in advance of the current contract expiring. It is then required to provide a detailed Reference Offer six months prior to contract expiry. Customers have the right to renew on existing terms or to renew using the Reference Offer.[80]

419. There have been no television renewals in the period since the merger (and none are due until 2030) and so we have focused on the terms on which radio contracts have been renewed.

420. To date the majority of radio contracts have been renewed on their existing terms. It is not straightforward to assess what this pattern tells us about the relative attractiveness of the two options offered to Arqiva's customers—their existing terms (ie their original contract rate discounted by 17 per cent) or the Reference Offer. The Adjudicator explained to us that whilst the Reference Offers were calculated on FRND terms, comparing these with the price of contract renewals would not be on a fully like-for-like basis. For example, the Reference Offer will take into account changes in the number of users at a site and charges may have increased or decreased in line with this as some costs are allocated on the basis of number of users at a particular site. If the number of users has gone down then rolling over may well be the least expensive option.[81]

421. Some parties considered that the base case of straight contract rollover was too generous to Arqiva as they considered that the value of the asset base

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[79] At the time of the merger, commercial radio was experiencing an advertising downturn. Advertising revenues of £488 million in 2008 as a whole were down from £522 million in 2007. Radio's share of the advertising market had also declined from 2.9 per cent in 2007 to 2.8 per cent in 2008 (a downward trend in share had been seen from at least 2005). (Ofcom Communications Report: UK (4 August 2011), Figures 3.1 & 3.2).
[80] There is also a third option of purchasing the equipment and finding a third party to provide MTS (see paragraph 437).
[81] We were contacted by a participant after the interviews who considered that the Reference Offers for analogue radio were driven by high NA charges that were difficult to understand.

would reduce over time and that this should be reflected in lower charges. We heard two arguments that contract prices should reduce on renewal and neither seems to hold:

(a) First, there is a view in the radio industry that the charges paid in the first contract period (of 12 years) will have fully paid for the capital equipment such that contract prices should fall on renewal. However, this appears to be a misunderstanding, as (i) asset life is 24 years; (ii) the Adjudicator has not been provided with evidence to show that Arqiva recovers the full costs over 12 years; and (iii) such a view does not take account of the need for equipment replacement in the future. It appears that a significant reduction in contract prices should not therefore be expected after the first contract period.

(b) Second, prices would reduce at contract renewal if technology costs were reducing over time. However, for the regulated business (ie transmission equipment) we understand that costs have not been declining sharply (we note that this is not the case for the unregulated multiplex operations).

422. Customers were also concerned that Arqiva lacked incentives to push third party suppliers (eg electricity providers) for the best value as they were able to pass on input costs. This issue was also mentioned in the context of site-by-site provision, as sometimes it will be better for a site's costs to be negotiated for that site alone, and other times getting a bulk deal with other sites may be more efficient. As Arqiva is required to pass through some third party costs with no mark up, the price reduction cannot be acting as a direct incentive for it to get the best deal for its customers on these costs. However, the extent of concern in this area is unclear because electricity costs (which were mentioned to us a number of times) have not been raised with the Adjudicator, even on an informal basis.

Information provision

423. Customers now have access to greater levels of information than they had previously. This is generally but not universally believed to be a benefit of the Undertakings. However, we were told of several concerns:

(a) many companies (particularly the smaller ones) felt that they did not have the internal resources or expertise either to be able to understand or to challenge the information provided by Arqiva;

(b) some companies said that they had insufficient time to assess the data and negotiate effectively with Arqiva; and

(c) other companies (including some large radio groups) said that they had faced issues in receiving enough data supporting the Reference Offer to be able to reverse engineer the rate card.

424. Some of these issues may have been teething problems as parties adjust to negotiation under the protections of the Undertakings. Following some initial delays in sending out contract renewal reminders, it appears that information is now being provided on time and to an appropriate level of detail. Arqiva has a system in place to monitor information requests and report the timeliness of their responses to the Adjudicator.

Service levels

425. The remedy package includes undertakings for Arqiva to give enhanced service level for all customers and a ‘super credit’ regime to compensate for customers’ inability to move to an alternative provider in the event of persistent poor performance.

426. We heard very few complaints about service levels and there have been no serious issues of non-compliance. Some service issues were raised by radio customers who felt that such issues were a result of the integration phase at Arqiva, whereas Arqiva told us that any issues were non-merger related.

427. Whilst the Undertakings provided additional pass-back to reflect the anticipated reduction in Arqiva’s incentives to innovate, innovation was raised as a concern by a number of parties. However, a number of the issues raised related to innovation on the multiplex side of Arqiva’s business which sits outside of the Undertakings. Parties (particularly large television and radio groups) noted that they had to remain vigilant in pressing Arqiva to adopt the latest technologies.

428. The ‘super credit’ regime in the Undertakings has never been invoked. This is consistent with the Undertakings providing an effective constraint on Arqiva.

The independent adjudicator

429. The Undertakings gave provision for appointment of an independent adjudicator, paid for by Arqiva but accountable to the OFT and under the guidance of Ofcom, to resolve disputes between Arqiva and its customers and to ensure that new services and contract variations are provided on cost-oriented and FRND terms.

430. The Office of the Adjudicator is seen by all the parties we spoke to as a clear success.

431. No formal disputes have been taken to the Adjudicator—formal adjudication is seen as a serious issue that should be avoided if at all possible.[82] The Adjudicator has a website that sets out guidance and the dispute process.[83] Arqiva's customers are willing and able to discuss issues with the Adjudicator to understand whether they have grounds for concern. We were told that the Adjudicator has worked hard with the radio sector where there has been contract renewal since the merger. The Adjudicator does not get involved in negotiation on behalf of radio companies; his role is to advise them of their rights and the options available to them. The Adjudicator is able to raise issues informally with Arqiva and help to resolve issues between the parties.

432. The lack of disputes could be seen as part of the success of the Undertakings and the presence of the Adjudicator. It appears that the Adjudicator is respected by all sides of the industry, has a detailed understanding of the sector and has focused on resolving disputes without resort to the formal adjudication process. We did hear of some nervousness among some customers about using the formal adjudication process given the effect this could have on their working relationship with Arqiva going forward, however this was not universal and some interviewees saw the threat of regulatory intervention as a key protection in the Undertakings.

Compliance with audit regimes

433. Arqiva is required to prepare and audit separate regulatory accounts of the MTS and NA operations and to audit annually the DSO programme.

434. Audit and compliance requirements have been successful—both NGW and Arqiva were familiar with compliance regimes prior to the merger; they were both regulated by Ofcom on their NA businesses.

Confidential information

435. Arqiva was required to ensure confidentiality of information provided by its customers for one purpose but which could be used by Arqiva in another part of its business to its competitive advantage. At the time of the merger Arqiva was involved in the distribution of signals via satellite and the provision of multiplexing services. NGW had two multiplexing licences whereas Arqiva was not a multiplex operator. No SLC was found in respect of vertical issues. Since the merger Arqiva has bought the D1 multiplex and has therefore moved into radio multiplex operations. This transaction was cleared by the

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[82] The Office of the Adjudicators' budget is set accordingly with the majority forming a contingency budget which will only be used if there is a formal adjudication.
[83] The Office of The Adjudicator - Broadcast Transmission Services.

OFT and at the moment there is no separation between the radio transmission and multiplex operations.

436. We are not aware of any issues concerning Arqiva using confidential information in an inappropriate manner. Television companies are cautious about Arqiva’s position in multiplex operations and raised concerns regarding the need for strong Chinese walls particularly in light of the upcoming spectrum auction. However, interviewees noted that Ofcom and Arqiva appear to be aware of these concerns and that they are being addressed. Indeed, following a review by the Adjudicator, Arqiva has ensured physical separation on the television side between the multiplex and transmission businesses. The Adjudicator noted that the Undertakings allowed him to request a change to Arqiva’s Information Security Strategy but did not explicitly allow him to audit these procedures. In this case Arqiva had been willing to allow the Adjudicator to do this without question; however, explicit rights to do this may have been helpful.

Acquiring assets to facilitate entry

437. The Undertakings required Arqiva to give its customers the option to acquire ‘stranded assets’ at the end of a contract so as to facilitate new entry in MTS. However, the CC recognized that new entry was unlikely on any significant scale in the short to medium term. The CC also said that requiring Arqiva to make available its maintenance/engineering field force to potential new entrants would not have a significant effect in encouraging new entry.

438. Possible new entrants include equipment manufacturers and international transmission providers seeking out new markets. It appears that there is some interest particularly on the digital side and there are ways in which a company could outsource some services to give it suitable scale.[84] We were told by one party that it was unlikely that there would be much uptake of the option in the remedies because most companies were not able to provide suitable engineering resource (and so would still need maintenance from Arqiva). In addition, if maintenance were to be provided by a third party (such as a mobile telecoms company) then Arqiva had the right to charge a supervision fee which added to the cost of taking this option. The Adjudicator explained that the supervision fee was to protect Arqiva and its customers as there was a risk if access was unsupervised that the wrong equipment may be altered

[84] We were told of three reasons for this: *(a)* there was a view that Arqiva’s prices were relatively higher on digital than on analogue so there was more scope for price competition in this area; and *(b)* that digital would require installing new kit so the incumbent advantage of already owning the kit was lower; and *(c)* if the BBC expanded its digital footprint this would provide a new entrant in digital with a scale opportunity.

inadvertently as all equipment was housed together. The Adjudicator considered it was appropriate that there should be some level of supervision to ensure compliance with health and safety and to make sure the right equipment was being maintained. He would be alert to supervision charges exceeding these basic requirements.

439. At the time of our interviews, this option had only been taken up by one small company (and it provides its own MTS), so it remains unclear whether this option will facilitate new entry. Since the completion of our interviews, VDL won a contract to provide transmission services to the London 2 DAB multiplex (January 2012). This is VDL's first contract in the UK digital radio transmission market. The time frames (see paragraph 440) provided for transition from Arqiva to VDL will now be put to the test.

440. There was also a view among those trying to enter/facilitate entry that the time frames set in the Undertakings for provision of both Reference Offers and Transition Agreements favour Arqiva. Arqiva is required to produce its Reference Offer six months before a contract expires and the Transition Agreements three months before a contract expires. A new entrant would need to be able to operate from the first day that the original Arqiva contract expired. This length of time available to operationalize is tight and we heard that Arqiva has been taking the full time allowed to produce the required documents. This has squeezed the time frame, increasing risk to the customer and reducing the likelihood that a new entrant would win a contract. These time frames will be tested as the BBC starts its tender process for radio contracts.

Summary of key learning points

441. On the one hand, it may be a little premature to draw conclusions about the effectiveness of remedies in this case because the remedies have not been 'stress tested' (there have been no television contract renewals and many radio customers have yet to go through the process of contract renewal) and the DSO process has only just completed.

442. On the other hand, there are still a number of learning points that we can take from this evaluation in terms of both interim measures and final remedies.

Interim measures

443. This inquiry illustrated that, subject to suitable interim measures and oversight, flexibility on the part of the CC in consenting to certain forms of interaction between the merging parties during its inquiry may be appropriate. However, some loss of momentum compared with the situation pre-hold-

separate arrangements should be anticipated as parties seek to ensure compliance.

Final remedies

444. This evaluation has shown that, if properly designed and monitored, introduced into a suitable industry environment, and provided the parties are suitably incentivized to comply, behavioural remedies can be reasonably effective in the short term in protecting customers from the main adverse effects of an SLC. However, the circumstances in which behavioural remedies are appropriate are likely to be unusual.[85]

445. In this particular case, on balance all major stakeholders were content with the merger proceeding, subject to the safeguards the CC put in place, despite the fact that this would result in a monopoly supplier to broadcasters of a function critical to their business. The prospect of a smooth DSO process for television customers was perceived as outweighing the risks of permitting the merger, and radio customers benefited at a time when they were particularly cost sensitive from guaranteed cost reductions resulting from the merger.

446. In cases where behavioural remedies are being considered, stability of the industry is relevant to the consideration of remedies: behavioural measures may be more likely to be effective if the pace of change in the industry concerned is both relatively slow and predictable. The changes in NA/MTS have been small since the merger which may have helped the success of the remedies to date. However, this might change if new technologies were to become available in future.

447. The evaluation has highlighted a number of effective parts of the remedy design:

(a) *The use of a divestiture remedy as a fall-back option from a behavioural remedy*. The fall-back option of a divestiture remedy provided incentives to ensure remaining, unresolved aspects of the remedies specification were agreed to the CC's satisfaction. Faced with the prospect of a divestiture, Arqiva worked hard to ensure that behavioural remedies (including significant price discounts) were acceptable to the industry and regulators.

(b) *The use of appropriate adjudicator arrangements.* The use of an adjudicator function can introduce flexibility, monitoring resources and compliance incentives into the operation of behavioural undertakings. To

[85] The circumstances under which a behavioural remedy may be selected are set out in CC8, paragraph 2.16.

be successful, the adjudicator has to have appropriate scope, powers and resources. If an adjudicator is required, the choice of adjudicator can be a key factor in the success of the remedies: industry experience, strong relationships and being respected by all sides helps to facilitate the role. There has been general satisfaction with the adjudicator arrangements in this case.

(c) *Contract roll-forward provisions.* If the cost of servicing the contract is falling, contract roll-forward provisions might not offer customers sufficient protection. In this case, the remedies package addressed this through the requirement to provide a reference offer and it looks as if this 'belt and braces' approach has worked reasonably well although not without some concern from affected parties.

448. Our evaluation has also indicated some areas of the remedy design where we could have included stronger provisions in the Undertakings:

(a) explicitly granting the Adjudicator permission to audit confidential information compliance (see paragraph 435);

(b) longer time frames for information provision to help enable parties to negotiate more effectively and to facilitate potential new entry (see paragraph 440);

(c) promoting incentives to reduce third party costs which are directly passed through to customers (see paragraph 422). However, implementing such a requirement would not be without its difficulties; in the case of MTS/NA assessing the efficiency (or otherwise) of a particular third party cost would be subjective (for example, through benchmarking) and a much more detailed level of regulation than was envisaged under the regime; and

(d) requiring Chinese walls to increase stakeholders' comfort that confidential information will not be shared inappropriately. Chinese walls were not a specific requirement of the Arqiva remedies package; however, the implementation of them by Arqiva with regard to its television multiplex and transmission businesses has allayed industry concerns.

Nufarm

Main facts of the inquiry

Background

449. On 29 August 2008, the OFT referred to the CC the completed acquisition of the phenoxy herbicides business of AH Marks Holdings Ltd (AH Marks) by Nufarm Crop Products UK Limited, a wholly-owned subsidiary of Nufarm UK Limited whose ultimate parent company was Nufarm Limited, a company listed on the Australian Stock Exchange (together, Nufarm). The acquisition had been completed on 5 March 2008.

450. Phenoxy herbicides were used as a low-cost method of broadleaf weed control in grassland and cereals. The leading phenoxy herbicides globally were 2,4-D,[86] MCPA[87] and MCPP/MCPP-p.[88] In the UK MCPP-p was used most frequently, followed by MCPA and then 2,4-D. The parties overlapped in the production of technical acids, manufacturing concentrates and formulated products.[89]

451. AH Marks manufactured and supplied six phenoxy technical acids including MCPA, 2,4-D and MCPP-p,[90] as well as manufacturing concentrates and formulated products based on these technical acids. It sold formulated products in bulk to third party intermediaries which sometimes process the products further (making their own formulated products) before branding, packaging and selling to distributors. It did not sell direct to distributors. AH Marks operated from a single plant at Wyke, near Bradford in Yorkshire.

452. Nufarm manufactured and sold worldwide a variety of herbicides, insecticides, fungicides and other related products, including the manufacture of both 2,4-D (in Austria) and MCPA (in the Netherlands), technical acids (MCPP-p technical acid for UK usage was sourced from AH Marks[91]), manufacturing concentrates and formulated products. Nufarm sold branded products direct to distributors.

453. The overlap that existed in technical acid, manufacturing concentrate and formulated product between Nufarm and AH Marks is shown in Figure 2.

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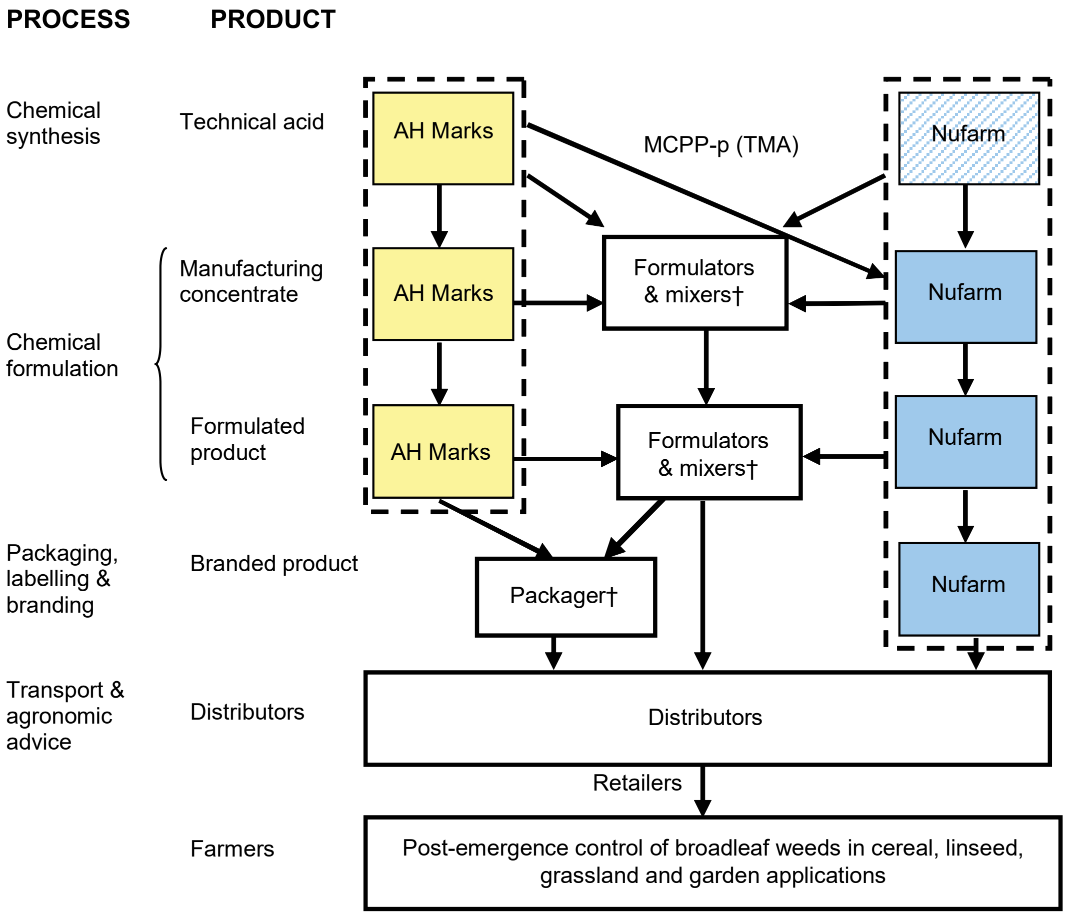
[86] 2,4Dichlorophenoxyacetic acid.
[87] 2-methyl-4-chlorophenoxyacetic acid.
[88] 1-(3-Chlorophenyl) piperazine (or *meta*-chlorophenylpiperazine).
[89] A technical acid is produced either as a flake or as a molten liquid, both of which can be used to make a manufacturing concentrate. The manufacturing concentrate is further diluted and, in some cases, mixed with other chemicals to produce formulated products.
[90] The other phenoxies were 2,4-DP/2,4-DP-p, MCPB and 2,4-DB.
[91] Nufarm also sourced MCPB, 2,4-DP-p technical acid and 2,4-DB for non-UK use from AH Marks.

Figure 2: The supply structure pre-merger for MCPA, 2,4-D and MCPP-p*



Source: CC.
*For MCPP-p the relevant differences were that Nufarm did not produce MCPP-p technical acid, it purchased it from AH Marks; as such, the blue hatched Nufarm box in the top right-hand corner of the supply chain was removed. AH Marks and Nufarm did not supply MCPP-p technical acid to UK customers.
†May or may not be vertically integrated.

Interim measures

454. As the merger was completed the CC put in place interim undertakings on 19 September 2008 and required that a monitoring trustee be appointed to prevent any pre-emptive action taking place. In particular, the CC wanted to preserve AH Marks's existing customer base (both in the UK and overseas) and to prevent any further integration.

Findings

455. The CC's final report was published on 10 February 2009.

456. The CC found that Nufarm and AH Marks were competing directly in the relevant markets before the merger.[92]

457. The CC found that the main barrier to producing formulated products in the UK was access to technical acids and manufacturing concentrates approved for use in the UK. At the technical acid level, the CC found that access to protected data[93] was the key barrier to entry. Where data protection was in force the barriers to an entrant were sufficiently high to mean that the entrant was more likely to wait until the data protection expired than incur the expenditure otherwise necessary to enter the market.

458. The CC considered the likelihood of entry. It found that:

(a) In 2,4-D, where data protection had expired, it found evidence of several manufacturers looking to supply the UK market.

(b) In MCPA, it identified one alternative source within the EU following the merger (Zaklady Chemiczne 'Organika-Sarzyna' SA (Sarzyna[94]), a Polish manufacturer), but it found no evidence that it was likely to seek actively to enter the UK market and found no evidence of other potential entry in the period before data protection expired in May 2011.

(c) In MCPP-p, it found no evidence of potential entry in the period prior to the expiry of data protection (June 2009) but some evidence of possible entry following its expiry.

459. The CC concluded that the merger may be expected to result in an SLC for:

(a) MCPA at the technical acid, manufacturing concentrate and formulated product levels of the supply chain and that this SLC would last until at least one year after MCPA lost data protection in May 2011 (ie until at least May 2012, just over three years after the date of the CC's final report); and

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[92] There were two exceptions to this: *(a)* In MCPP-p Nufarm purchased its technical acid from AH Marks under the terms of a toll manufacturing agreement, which allowed Nufarm to compete with AH Marks in the manufacturing and supply of MCPP-p-based manufacturing concentrates and formulated products; and *(b)* competition in formulated products was indirect because AH Marks sold bulk formulated products to packagers (such as Headland Agrochemicals), which were then sold to distributors, or it sold technical acids and manufacturing concentrates to formulators (such as United Phosphorus Limited), which produced formulated products and then sold them to distributors.

[93] To comply with an EC Directive, manufacturers of technical acids must register their product with data demonstrating environmental and biological safety. Generating this data is costly and can take a significant period of time. Suppliers that have submitted this data benefit from a period of 'data protection' and the data can only be obtained at low cost once this period has expired. Data is sometimes produced by a 'task force', which is a group of companies that share the burden of producing the data required to show that an active substance has met the standards of the EC Directive.

[94]Z Ch 'Organika-Sarzyna' SA is a subsidiary of Ciech SA. It produced MCPA as technical acid and as a formulated product under the brand name CHWASTOX.

(b) MCPP-p at the manufacturing concentrate and formulated product levels of the supply chain and that this SLC would last until at least 18 months after MCPP-p lost data protection in June 2009, and possibly significantly longer given the lower incentives for entry into the MCPP-p market (ie until at least December 2010, just under two years after the date of the CC's final report).

460. The CC found that there was insufficient evidence to conclude that the merger may be expected to result in an SLC for 2,4-D at the technical acid, manufacturing concentrate or formulated product levels of the supply chain.

International investigations into the merger

461. The merger was also examined by the FTC in the USA, the CCB, the Australian Competition and Consumer Commission (ACCC) and the Bundeskartellamt in Germany. The merger was not opposed by either the Bundeskartellamt[95] or by the ACCC[96] but competition concerns were identified by the FTC and the CCB:

(a) The FTC announced on 28 July 2010 (17 months after the CC's final report) that it had reached a settlement with Nufarm Limited under which in relation to the USA Nufarm would divest AH Marks's MCPA rights and assets to a new competitor, Albaugh Inc, and AH Marks's MCPP-p rights and assets to another new competitor, PBI Gordon Co. In addition, Nufarm would modify its current agreements with The Dow Chemical Company and Aceto Corporation related to MCPA and 2,4-DB, in order to allow them to compete in the US markets for these two herbicides.[97,98]

(b) The CCB announced on the same day that commitments made by Nufarm to the CCB and a consent decree between Nufarm and the FTC adequately resolved competition concerns in Canada.[99]

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[95] The Bundeskartellamt published its decision on 7 February 2009 and was the only one of the four competition authorities to publish its position before the CC's final report.
[96] The ACC published its decision on 19 August 2009.
[97] FTC press release 28 July 2010.
[98] Nufarm told us that the FTC was proposing the sale of Task Force seats for MCPA and MCPP-p as a remedy to address competition problems in the USA.
[99] CCB press release 28 July 2010.

Choice and design of remedies

Remedies Notice and Nufarm's proposed remedy package

462. In its Remedies Notice, the CC invited views on: full divestiture of the AH Marks business; whether there was an alternative partial divestment package[100] which was as effective as full divestiture; and whether enabling measures (such as access to protected data in regard to MCPA and/or MCPP-p) could be adopted to facilitate new entry.

463. In response to the Remedies Notice, Nufarm proposed a hybrid structural and behavioural package of measures to facilitate entry *(a)* by providing specific competitors with the product formulations and registrations necessary to achieve regulatory approval to supply in the UK[101] and *(b)* by entering into toll manufacturing agreements and/or supply agreements with specific competitors to enable them to supply UK customers ('Nufarm's proposals'). Further details of the relevant products and agreements and the specific competitors affected by the remedy package are set out in paragraphs 466 and 469 below.

Conclusion on final remedies

464. The CC's final package of remedies[102] was a set of measures based on Nufarm's proposals. It was a hybrid package of remedies with some structural aspects through the transfer of intellectual property (including the transfer of certain formulated product registrations) and some behavioural aspects (including long-term toll manufacturing agreements which needed to be made and honoured). Although some monitoring of implementation of the remedies was required (for example, in approving terms of the supply agreements), ongoing monitoring costs were expected to be low because the supply and toll manufacturing agreements were commonly used in industry and would become largely self-enforcing once they had become legally binding between the relevant parties.

465. The CC found that this package of remedies would be effective because it would result in an increased competitive constraint combined with an

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[100] Partial divestment options included: the divestiture of the entire Phenoxy business of AH Marks (excluding its inhibitors business); or only the assets associated with AH Marks's MCPA and MCPP-p business. The CC also considered whether the divestment package needed to include non-UK sales as well as UK sales. In addition the CC asked whether any such divestment was practicable given the integrated nature of AH Marks's Wyke site and whether any partial divestment package constituted a viable stand-alone business.
[101] Providing access to these formulations and registrations was similar in some ways to the licensing of intellectual property.
[102] There were some differences between Nufarm's proposed remedies and the final remedies implemented by the CC. These differences are set out in the CC's final report.

independent new entrant. The CC judged that the increase in competitive pressure created by these measures would be sufficient to remedy the loss of competition resulting from the merger. The CC said that in considering the effectiveness of these measures, it had to be satisfied that actual entry would occur in a sufficiently short timescale, and that it would be able to be put in place in a similar time frame to divestment.

MCPA

466. For MCPA, the remedy package was:

(a) an extension and amendment of Nufarm's current supply agreement with Dow AgroSciences (Dow) for MCPA technical acid (which was due to expire on 31 December 2009).[103] The amendments to the supply agreement were aimed at improving the terms on which Dow obtained technical acid from Nufarm;

(b) the transfer to Dow of an MCPA Amine 50 (a formulated product) registration; as Dow did not have any registered formulated products in the UK, the inclusion of a formulated product registration was designed to allow Dow to compete at technical acid, manufactured product and formulated product levels with Nufarm; and

(c) the creation of a new MCPA 500 straight formulated product, obtaining the necessary regulatory approval and transferring the registration to Sarzyna. Sarzyna had in 2008 obtained equivalence[104] for the sale of MCPA acid in Poland and as such could register MCPA for use in the UK but had not done so due to additional investment and regulatory costs. The remedy was designed to enable Sarzyna to supply MCPA to UK customers.

467. The CC found that:

(a) the measures affecting Dow would increase its incentives to supply MCPA in the UK, but they would not be sufficient on their own to remedy the SLC. The CC noted that Dow would be dependent on Nufarm for its raw material, the technical acid and that this created some uncertainty as to

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[103] Dow was a member of the MCPA Task Force along with Nufarm and AH Marks which produced the protected data package. As a result Dow could supply MCPA technical acid in the UK. Dow though did not manufacture MCPA technical acid. Instead it had a supply agreement with Nufarm for MCPA.

[104] Equivalence is the process of establishing that a new source of manufacture (eg a source other than from the original notifying parties) of an active substance is equivalent to an existing source that has already been approved. Equivalent is not synonymous with identical. It means that the product is within the parameters set by the regulatory requirements.

how vigorously Dow would compete in the market, even with increased incentives; and

(b) the transfer of a product registration to Sarzyna would allow it to enter the UK market and compete at all levels of the supply chain.

468. The CC concluded that Sarzyna would be more likely than Dow to compete vigorously due to its independence from, and lack of pre-existing and continuing relationship with, Nufarm. The CC concluded that, given the risks associated with each part of the package of remedies, measures in relation to both Dow and Sarzyna were needed for it to have sufficient confidence that the market structure arising would be sufficiently competitive to remedy the SLC.

MCPP-p

469. For MCPP-p, Nufarm was required to:

(a) enter into toll manufacturing agreements for manufacturing concentrate and formulated product with Headland Agrochemicals (Headland)[105] and United Phosphorous Limited (UPL);[106]

(b) transfer the registration of an MCPP-p formulated product to Headland;

(c) provide access to Headland and UPL to AH Marks's 'Go-Low' technology; and

(d) give a commitment to allow Headland and UPL to rely upon those MCPP-p formulated product registrations (or their developments) which they currently use for as long as Nufarm maintains those registrations for its own use.

470. The CC found that the MCPP-p remedy would provide for competition at the manufacturing concentrate and formulated product levels and would mirror the counterfactual position of at least two suppliers to distributors of formulated products, both straight and mixed. The CC found that the remedy would provide Headland and UPL with sufficient certainty about the terms on which they would have access to formulated product and manufacturing concentrate, and confidence that their formulations would not be side-lined by technological developments. The CC found it was not necessary to transfer a

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105 Headland was a packager which took formulated product from AH Marks and sold to distributors either under the AH Marks brand or its own.
106 UPL is a formulator and a packager. It purchased technical acid from AH Marks for the production of formulated straight and mixed herbicides as well as ready-formulated products in bulk for sale to distributors.

straight MCPP-p registration to UPL because UPL only had a small amount of MCPP-p sales and so any such extension would not have an appreciable effect on competition.

Divestiture remedy as a fall-back option

471. The CC concluded that full divestiture would also be effective because it would restore the competitive structure of the market and could be achieved in around six months.

472. The CC considered that given the specific circumstances of the case including: the time-limited nature of the SLC; the fact that only a relatively small subset of the products produced at Wyke were involved in its SLC finding; the absence of an effective partial divestiture option;[107] and comparing the effectiveness of the two remedies as a whole, that the package of measures based on Nufarm's proposals were more targeted to the markets in which it had found an SLC[108] and were therefore preferred to divestiture.

473. However, Nufarm's proposed remedy depended on the successful conclusion of agreements with third parties and regulatory approval of product transfers and if these did not happen it would undermine the effectiveness of the remedy. As such, the CC retained the option of full divestment should Nufarm fail to agree satisfactory undertakings with third parties or fail to meet the timetable for implementation. To maintain divestment as a feasible option the CC included the interim undertakings in the final undertakings and retained the monitoring trustee in place until all elements of the remedies package had been implemented.

Views of interviewees on remedy choice

474. Interviewees told us that behavioural remedies were the only viable remedy. One interviewee believed that as AH Marks's plant was old and would have required significant expenditure it would not have been attractive and plants may have been closed. There were no other European manufacturers so Nufarm was the only one that could have got the required cost savings out of any acquisition. This interviewee also considered that in this case the fall-back (divestiture) remedy may not have been needed as Nufarm was incentivized to make the market work as the fixed costs of the production make it essential

[107] The CC found that partial divestment in any form would not be an effective remedy because a viable partial divestiture package could not be identified, due to the integrated nature of the Wyke site and various complications associated with a Sale and Leaseback Agreement and the legal charges over the land on which the Wyke site was situated.
[108] Full divestiture would necessarily affect activities unconnected to the SLCs

to have as many distribution channels as possible to sell these 'old' chemicals.

What happened after the CC's final report?

Implementation of remedy

475. The CC accepted final undertakings from Nufarm on 27 May 2009. The CC's RSG was responsible for overseeing the implementation of the remedy following acceptance of the final undertakings.

476. Table 5 explains how the implementation process fared against the implementation timetable set out in the final undertakings.

Table 5: Nufarm/AH Marks remedies and implementation dates

Remedy and action	*Target date per undertakings*	*Implementation date and details*
MCPA		
Extension and amendment of supply agreement with Dow	10 June 2009 (had been 17 April 2009 in CC's final report)	Signed by Nufarm on 16 July 2009 (effective date) and by Dow on 22 July 2009
Transfer of registration of MCPA Amine 50 formulated product to Dow	5 June2009	5 June 2009
Creation of registration of MCPA 500 straight product and transfer to Sarzyna	Registration approved by Pesticide Safety Directorate (PSD) 3 July 2009 Transfer 28 August 2009	Registration 13 May 2009 Transfer 5 June 2009
MCPP-p		
Conclude toll manufacturing agreement and other remedies with Headland	10 June 2009 (had been 17 April 2009 in CC's final report)	Signed by Nufarm on 15 April 2009 and by Headland on 30 April 2009
Conclude toll manufacturing agreement and other remedies with UPL	10 June 2009 (had been 17 April 2009 in CC's final report)	Signed by Nufarm on 12 May 2009 and by UPL on 19 May 2009
Transfer of registration of MCPP-p formulated product to Headland	5 June 2009	12 February 2009

Source: CC analysis.

MCPA

477. With regard to MCPA, the creation and transfer of product registrations were completed in a timely manner (and in the case of Sarzyna, ahead of schedule). Dow's MCPA Amine 50 Straight and Sarzyna's MCPA 500 product are both registered to March 2014.

478. The revised supply agreement with Dow was completed about one month behind schedule. Nufarm had reached a Memorandum of Understanding with Dow on April 10, but was unable to meet the original proposed timeline of 17 April (set out in the CC's final report and the draft undertakings) to conclude this agreement. The final undertakings allowed a two-week period for conclusion of the agreement and this date was not met either. The main cause of the delay appeared to have been Dow's desire to complete negotiations of the terms of global MCPA supply agreements with Nufarm. Negotiations had been initiated prior to the CC's investigation. Dow communicated to the CC in January 2009 that it was not prepared to rush into an agreement to create a remedy due to what Dow considered to be its obligations to third parties (such as growers and farmers) who would be affected by the supply arrangements. There was an adjustment to the pricing mechanism as set out in the final report. The revised mechanism (which was agreed with the CC) achieved the same average price as set out in the final undertakings.

MCPP-p

479. All MCPP-p remedies were implemented in advance of the dates specified in the final undertakings. The remedies were fully implemented by 16 July 2009, five months after the CC's final report and one and a half months from the acceptance of final undertakings. This was ahead of the expectations of the CC in its final report, in which the CC was expecting full implementation by 11 September 2009.

Product demand since 2009

480. At the time of our report both MCPA and MCPP-p had two spraying seasons: spring and autumn. However, both chemicals are now only approved to be used in the spring (autumn approval had been withdrawn). The length of the spring spraying season has though been extended by two months. We were told that MCPA remains the most widely used grassland herbicide in the UK. Demand for MCPA was relatively unchanged from 2009 if not slightly increasing as a result of broadleaf weeds becoming increasingly resistant to alternative herbicides. MCPP-p demand was noted as also being similar to 2009 levels by the majority of interviewees, although one considered that it had declined by around 20 per cent since the merger inquiry and would continue to follow this trend. It said that this was due to the regulatory approvals now being limited to spring and newer chemicals being introduced.

Assessment of effectiveness of remedies

481. In order to assess the effectiveness of the remedies, we questioned four of the five entities which were party to the remedies: Nufarm, Dow, Headland and UPL. We did not receive a response from Sarzyna. In addition we spoke with HL Hutchinson, a UK distributor.[109] We considered the effectiveness of the package of remedies for each of MCPA and MCPP-p against the CC's expectations, as described in paragraphs 467, 468 and 470.

MCPA

Dow

482. Dow told us that the remedy relating to the supply agreement for MCPA technical acid and the transfer of the registration of the MCPA formulated product had not yet afforded Dow a viable commercial opportunity in relation to MCPA business. From a cost versus net unit price perspective, the supply position secured by Dow did not provide it with sufficient margin to compete with the UK market leaders, Nufarm and Headland. While Dow has attempted to market MCPA products in the UK, the available margin would not cover its selling costs. This contrasted with higher margins achieved in some other countries where Dow has been successful in marketing MCPA under the same supply conditions. From a global perspective, the agreement with Nufarm has provided Dow with a relatively favourable supply and cost position and enabled it to expand its participation in the MCPA market. While the agreement has not enabled Dow to materialize straight MCPA sales in the UK, Dow was of the view that UK growers are receiving the benefit of the combined actions of the CC and agreements concluded by Dow and Nufarm.

483. Dow said that with hindsight it should have been given a choice between access to technical acid and access to formulated product. Dow also said that based on its experience since the remedy was implemented, the CC may need to look at the timing of remedies when other jurisdictions were examining a merger but considered that if decisions were provisional with a review after a period of time it would lead to uncertainty in the interim period.

Sarzyna

484. Following the transfer of registration of MCPA 500, Sarzyna entered the MCPA market in the UK in 2011. We have been unable to ascertain what volumes it supplied in 2011 or whether it has continued to supply the UK

[109] HL Hutchinson presented evidence at a hearing during the Nufarm/AH Marks merger inquiry.

market in 2012. Sarzyna MCPA 500 remains registered until March 2014 so there is potential for Sarzyna to continue to supply MCPA to the UK market at least until that date.

Our assessment

485. We have assessed the effectiveness of the MCPA remedies against the aims set out in the CC's final report, namely to increase the ability and incentive for Dow and Sarzyna respectively to compete in the MCPA market in the UK at the various levels of the supply chain. Although Dow has not supplied MCPA into the UK market, it seems that Sarzyna has entered the market and has been supplying MCPA formulated product. Noting that the CC recognized when accepting this package of remedies the risk that Dow may not enter the MCPA market (see paragraphs 467 and 468), this would suggest that the MCPA remedies have been at least partially effective in achieving their aim. We have heard no evidence of Nufarm being able to exploit its market position post-merger. We note that MCPA requires re-registration in Europe in 2016 and the current task force comprises Dow, Sarzyna and Nufarm.

486. We considered Dow's view that it could have been given a choice between accessing either the technical acid or the formulated product. The SLC related to all aspects of the supply chain and hence the remedy package gave incentives for Nufarm and Dow to manufacture products from technical acid. A choice between access to technical acid and formulated product would have created a significant risk that the SLC across the supply chain would not have been addressed because Dow could have simply then chosen to distribute formulated product from Nufarm rather than manufacturing it.

487. With regard to Dow's suggestion of delaying UK remedy implementation to fit with other jurisdictions, we note that the US remedies, which had implications for MCPA, were implemented 17 months after the CC's final report. This would be too significant a delay for remedy implementation, especially in the context of a time-limited SLC. However, there may be some circumstances in which some alignment can be made with other jurisdictions.

MCPP-p

488. Both Headland and UPL told us that the MCPP-p remedies relating to them had been effective:

(a) UPL told us that the remedies had maintained the status quo and put Nufarm under pressure to deliver MCPP-p to competitors both in terms of pricing and supply chain. UPL told us that although prices had risen since the merger, these were considered to be not out of line with inflation and it

had had no reasons to believe they were higher than allowed in the supply agreement.

(b) Headland told us that its agreements with Nufarm were working well.

489. In relation to the transfer of the MCPP-p registration, Headland told us that there were no issues with this remedy.

490. The Go-Low technology was not commercialized by Nufarm (because it proved unpredictable) and as a result has not been a factor in the agreements.

491. HL Hutchinson (a UK distributor) also considered that the remedies were working well and the market was working effectively. It told us that it bought its MCPA and MCPP-p from both Nufarm and Headland and that it had no issues in obtaining product and that Headland was able to compete with Nufarm on price.

Our assessment

492. We have assessed the effectiveness of the MCPP-p remedies against the aims set out in the CC's final report, namely to provide for competition at the manufacturing concentrate and formulated product levels; and to provide Headland and UPL with sufficient certainty about the terms on which they would have access to formulated product and manufacturing concentrate, and confidence that their formulations would be maintained and would not be side-lined by technological developments.

493. Although there has been no new entry in MCPP-p, this is consistent with the CC's expectation in its final report. The remedies do seem to have enabled Headland and UPL to compete with Nufarm in the MCPP-p market and Headland appears to have gained market share. We have heard no evidence of Nufarm being able to exploit its market position post-merger. This suggests that the remedies for MCPP-p have been effective.

Summary of key learning points

494. This case has shown that access remedies in merger cases can work in certain circumstances but their effectiveness is difficult to predict and may not turn out in the way the authority expects. In this case, a technology did not evolve as expected (although this did not adversely affect the remedies) and entry did occur but from only one out of two parties in the MCPA market. This suggests that removing entry barriers may be a necessary but not sufficient condition of facilitating entry.

495. The evaluation has highlighted the following learning points:

496. Access remedies are likely to be most successful where the SLC is time-limited (as was the case in this merger) and the future is not too uncertain. In these circumstances, the remedy must be capable of quick implementation.

497. When dealing with this type of remedy it is important to develop a clear understanding of the regulatory framework to ensure that, as a result of the remedy, the suppliers to which the product registrations are transferred have all the necessary approvals to supply UK customers. The need to obtain such regulatory clearance also creates a regulatory risk that needs to be built into assessment of the remedy choice and remedy design.

498. The retention of a fall-back remedy of full divestiture can create strong incentives on the parties to agree undertakings and implement preferred remedies promptly. Although there was a slight delay in remedy implementation in this case, it could be argued that the fall-back remedy kept the parties focused on a swift implementation.

499. There are risks associated with remedies that depend on cooperation with third parties. All elements of the CC's remedies package depended upon Nufarm reaching agreement with another specific party (Dow, Sarzyna, Headland or UPL). This created a risk that the remedies might not be implemented as a result of the behaviour of one or more of these parties. It also created incentives for opportunistic behaviour by these parties, which may take the view that the existence of a fall-back divestiture gives them additional negotiating leverage with the party that has given undertakings. In relation to Sarzyna, Headland and UPL, Nufarm was able to manage this risk effectively and reach agreements in good time. Negotiations with Dow took longer in large part because Dow sought to widen the scope of negotiations.

500. Where mergers have international aspects to them (and remedies may be implemented in other jurisdictions) it is helpful where possible to assess that the remedies are compatible and do not work against one another. The Act allows for the possibility of reviewing remedies for changes of circumstances so to the extent that subsequent changes affect a remedy, it is always open to parties to request that the remedy is reviewed.

Stagecoach

Main facts of the inquiry

Background

501. Stagecoach is an international public transport group with bus and rail operations in the UK and North America. The operating unit relevant to this merger, Stagecoach Northwest, operated bus services from seven depots across Lancashire and Cumbria, including from a freehold depot in Preston.[110]

502. PBL was formed as Preston Transport Ltd in 1986 to take over Preston Borough Council's Transport Department. In 1993 the company was sold to its employees, but over time employee ownership declined and by 2008 only 94 employees still held shares, representing 37.7 per cent of the ordinary shares in issue.[111] PBL provided intra-urban bus services in the Preston area. It operated 125 buses from a freehold depot and employed approximately 300 people before the merger.

503. The events that concluded with the acquisition of PBL by Stagecoach began in 2006. Shortly after a meeting between Stagecoach and PBL in July 2006, at which PBL rejected Stagecoach's expression of interest in an acquisition of PBL, Stagecoach developed a plan for expansion in the Preston area. Less than one year later it launched a number of intra-urban services in Preston which were in direct competition with PBL.[112]

504. Up to June 2007, PBL was profitable, averaging profits of £157,000 in the four years to March 2007. The period of intense competition in Preston led to the financial health of PBL deteriorating rapidly from June 2007 and by September 2008 PBL was in severe financial difficulties. PBL's financial difficulties forced it to seek a buyer. The profitability of Stagecoach's Preston depot also worsened significantly during this period and it made operating losses in both 2008 and 2009. [113]

505. A share purchase agreement providing for the sale to Stagecoach Bus Holdings Ltd of all the share capital of PBL was signed on 23 December 2008. The merger was completed on 23 January 2009 and the OFT referred it to the CC on 28 May 2009.

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[110] CC Final Report, paragraph 2.6
[111] Ibid, paragraph 2.8
[112] Ibid, paragraph 5.4 – 5.6
[113] Ibid, Summary paragraph 2 - 3

506. Immediately after the merger had completed, Stagecoach performed a reconfiguration of PBL. This involved the transfer and re-registration of a number of commercial services between the two businesses. These changes had the effect of substantially reducing the commercial services operated by PBL.[114]

507. Post completion and prior to the OFT reference Stagecoach also carried out a partial integration of PBL into its own operations. This included the departure of key management at PBL (Managing Director and Finance Director), and the Stagecoach shared service centre taking over responsibility for day to day finance and administration. The second tier of PBL's management was retained by Stagecoach.[115]

Findings

508. The CC's Final Report was published on 11 November 2009. Some of its main conclusions were:

(a) The abnormal market conditions prevailing at the time of the merger were not an appropriate counterfactual. The most recent period of normal competition should instead form the basis of the counterfactual (that is late 2006 and early 2007).

(b) The market for tendered and commercial bus services was distinct. The merger resulted in an SLC for commercial bus services, but not tendered bus services, in the Preston area.

(c) Due to the extensive post-merger changes made by Stagecoach, PBL as constituted was not capable of competing with Stagecoach. However, reversing these changes was practicable and with a new owner PBL was capable of being reconfigured as a commercially viable business.

(d) A proposed partial divestiture and a behavioural remedy were not appropriate. The effective and proportionate remedy would be the divestiture of a reconfigured PBL to a suitable purchaser.

Stagecoach appeal

509. Stagecoach appealed the Final Report on 8 December 2009. The CAT issued its judgment on 21 May 2010 and the order disposing of the litigation was made on 15 July 2010.

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[114] Ibid, paragraph 10.27
[115] Ibid, Appendix L

510. The CAT judgment allowed Stagecoach's appeal in part. It agreed with the CC that the merger had given rise to an SLC, but it also found that a number of the CC's findings of fact relevant to the choice of counterfactual were not supported by the evidence and could not stand.

511. The CAT judged that this may also affect the decision on the appropriate remedy and it therefore upheld in part Stagecoach's challenge to the proportionality of the CC's remedy.

512. Following the CAT's judgment, the CC and Stagecoach agreed to proceed with the divestment of PBL as set out in the Final Undertakings, but with a slightly reduced package (the exclusion of one route) to that which had been originally accepted by the CC.

The remedies decision

513. The Final Report examined a number of structural remedies:[116]

(a) A partial divestiture of a subset of routes with no bus depot;[117]

(b) Divestiture of a reconfigured PBL;[118]

(c) Divestiture of Stagecoach's Preston business.[119]

514. Stagecoach proposed a partial divestiture comprising a set of routes.[120] The CC concluded that a partial divestiture would not be effective in addressing the SLC. The CC also concluded that a third alternative, the divestiture of Stagecoach's Preston business, would be impractical due to its interdependency with the broader Stagecoach network and the absence of a track record of operational independence from Stagecoach Northwest.

515. The CC concluded that the divestiture of a reconfigured PBL was an effective and proportionate remedy. This selected remedy specified the reconfiguration that Stagecoach would need to carry out, including details of commercial routes that would need to be re-registered by PBL.[121] The assessment was supported by financial analysis, including a projection of the financial profile

[116] Ibid, paragraph 10.10
[117] Ibid, paragraphs 10.11-10.20
[118] Ibid, paragraphs 10.21-10.49
[119] Ibid, paragraphs 10.50-10.59
[120] Ibid, paragraph 10.12
[121] Ibid, paragraphs 10.60 – 10.64

and market share of the reconfigured business, and comparison with the pre-merger financial profile and market share.[122]

516. The divestiture package was specified to provide sufficient scale to address the SLC, compete effectively, attract suitable purchasers, and demonstrate a viable commercial profile (including the capability to fund associated pension contributions). The Final Report also provided "some flexibility in the final configuration of the divestiture package".[123]

517. Stagecoach expressed a preference to implement the required reconfiguration prior to launching the sales process to potential purchasers. This was because it would provide more evidence to potential purchasers of the recent financial performance of the reconfigured business. Stagecoach also indicated that such a track record would enable potential purchasers to value the business.

Choice and design of remedies

Interim measures

518. Interim measures were used by the CC to preserve the PBL business during the merger inquiry and remedies implementation. These included the:

(a) adoption of Interim Undertakings;

(b) appointment of a Monitoring Trustee[124] and Industry Adviser[125];

(c) directions made in relation to management arrangements; and

(d) the appointment a Hold Separate Manager (HSM)[126].

Adoption of Interim Undertakings

519. The CC adopted the initial undertakings given to the OFT (Interim Undertakings). The purpose of the Interim Undertakings was to preserve the

[122] Ibid, Appendix L
[123] Ibid, paragraph 10.64
[124] Where concerns exist about potential integration of an acquired business subject to a merger inquiry a Monitoring Trustee may be appointed to assess what integration has taken place, recommend any additional steps required to preserve the ability to implement effective remedies and monitor compliance with interim undertakings and any directions subsequent to them.
[125] An Industry Adviser provides expertise in a specific industry, sometimes in support of a monitoring trustee
[126] If concerns arise about compliance with hold separate undertakings a HSM can be appointed to run the business until a merger inquiry has been completed.

business, prevent further integration of PBL into Stagecoach, preserve PBL's ability to compete independently and avoid prejudicing the CC's actions.

Appointment of a Monitoring Trustee and Industry Adviser

520. Subsequently the CC issued directions requiring Stagecoach to appoint a Monitoring Trustee (MT). Stagecoach first suggested appointing an industry expert as MT. The CC was not satisfied that this was appropriate. Stagecoach then selected an accounting firm as the MT.

521. In light of the CC's decision not to allow the appointment of an industry expert as MT, Stagecoach requested that a person with industry expertise be appointed to assist the MT during the inquiry. The CC accepted this request and the role of the MT's Industry Adviser was built into the terms of appointment of the MT.

522. The MT's Industry Adviser was an individual identified by Stagecoach who had previously held a number of management positions and provided management and operations consultancy services to the bus industry. The MT's Industry Adviser attended company meetings, and assisted in the preparation of the minutes for these meetings. He did not provide any direct written or oral reports to the CC.

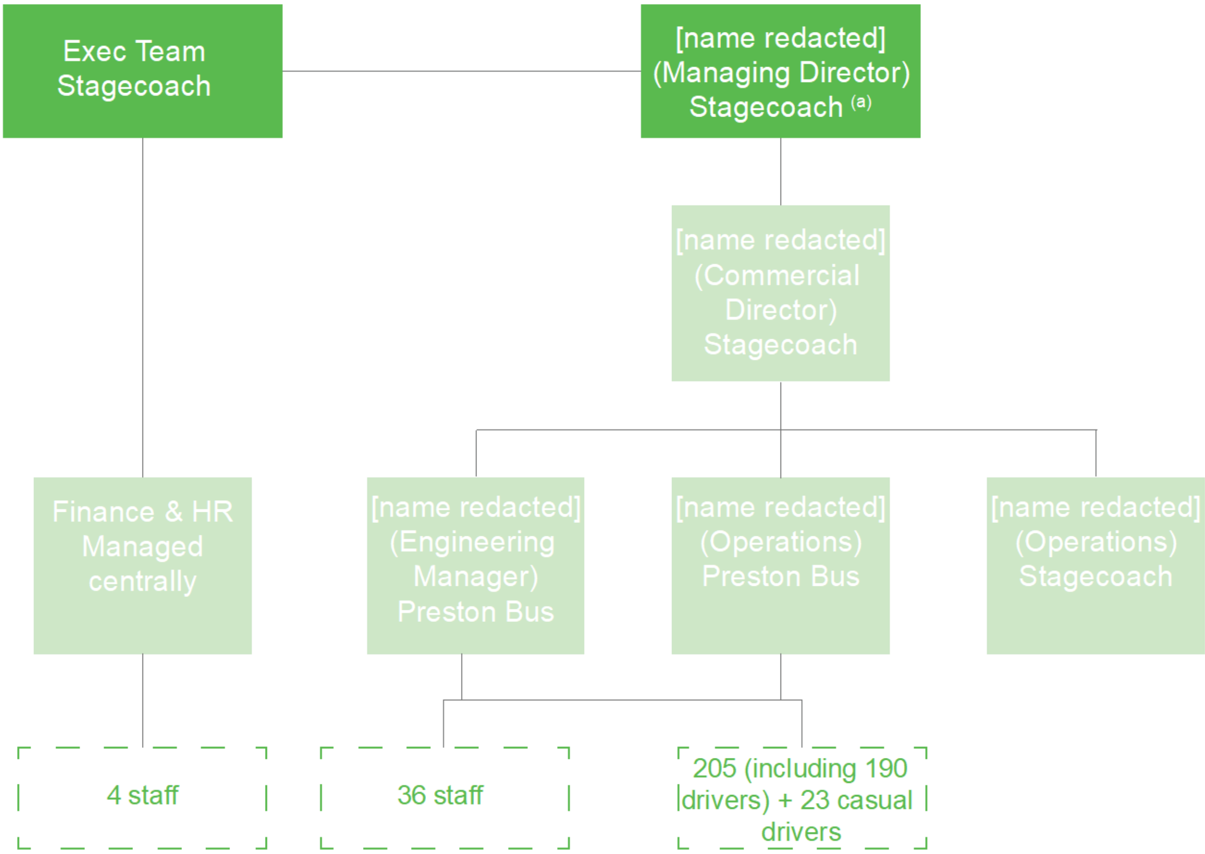
523. In addition to regular reports and maintaining contact with various parties during the inquiry, the MT provided specialist support to address a number of issues during the inquiry and subsequent divestiture period that were of direct relevance to securing the CC's ability to ensure an effective disposal. For example, it provided advice on the PBL pension scheme and local authority guarantee.

Directions in relation to management arrangements

524. When Stagecoach acquired PBL the Managing Director and Finance Director left the company, but the second tier management remained (Operations Director and Engineering Director). Stagecoach appointed a regional director to take on the MD role at PBL.

525. The MT initially recommended that it was not necessary to appoint a HSM at PBL. It recommended that the Industry Adviser should attend fortnightly management meetings between Stagecoach and PBL, to monitor and report on commercial activities on behalf of the MT. The structure recommended by the MT, which was accepted by the CC, is shown in the chart below.

Figure 3: Post-acquisition management structure



Source: 1st MT report.
[a] Stagecoach North West

526. Under these directions, a Stagecoach regional director was appointed as the MD of PBL, his communications with the PBL management were to be shared with the MT, and commercial information was not to be shared with other Stagecoach senior management. These directions also required that PBL bid independently for tendered services.

527. CC staff observed a pattern in the MT reports between July and August 2009 that showed the financial performance of PBL was deteriorating and exhibited unusual negative trends which suggested that PBL was not recording or collecting all the revenue that was attributable to it. At the same time, the financial performance of Stagecoach's Preston operations showed considerable improvement. In addition, it was also reported via the MT that some routine commercial decisions were not being taken effectively and / or proactively (e.g. failing to meet tender deadlines).

528. It became evident to the CC that the Stagecoach reconfiguration in January 2009 was a major cause of a significant deterioration of PBL's performance, and also that there was no one at PBL to take actions to address issues arising from this, or to make other commercial actions independently. There was also no one with suitable financial and commercial expertise properly to

review the management accounts (supplied by the Stagecoach shared services centre) for accuracy and completeness.

529. For a brief period, the former PBL FD was rehired on a temporary basis to assist the MT in resolving a number of basic accounting issues relating to invoicing and recording of financial information at PBL.

530. The management arrangements were kept under review, and it became clear that asset risk was increasing due to gaps in commercial leadership of PBL under the interim management arrangements.

Directions to appoint a Hold Separate Manager

531. The partial integration of PBL into Stagecoach had left gaps which reduced its independence and the CC had also identified warning signals and found that the management arrangements were not working well. A HSM was therefore appointed to provide independent hands-on business leadership and take responsibility for commercial decisions at PBL. At the time Stagecoach submitted that it would not be necessary to appoint an HSM, and proposed an extension of the role of the Industry Adviser as an alternative.

532. The CC's provisional SLC finding further reinforced the importance of having the appropriate management arrangements in place at PBL so as to preserve the ability to take remedial action which was now more likely (ie divestment).

533. On 14 October 2009 (139 days after reference) the CC issued directions requiring Stagecoach to appoint a HSM within 9 days of the directions.

534. The HSM played an important role in stabilising the business, including returning it to profit following the reconfiguration of the business. He also played an important role in the divestiture process, including writing the business plan and building the financial model, leading management presentations and facilitating access for potential purchasers to perform due diligence.

Final remedies

535. There were two distinct phases of the divestiture process: pre- and post- the CAT's judgment. The PBL divestiture process started after the Final Report, was then suspended until after the CAT had made its judgment, and recommenced in a new phase after the appeal decision, with a fresh divestiture period.

536. The pre-appeal phase attracted several bidders, although some of these dropped out or were not fully engaged in the process. One of the bids was employee led.

537. The post-appeal phase attracted a number of bidders from the pre-appeal process, plus a further bidder that arrived late in the process. The winning bidder was Rotala PLC (Rotala), an operator of local bus services with operations in the midlands and south west. Its shares are listed on the Alternative Investment Market (AIM).

538. Meeting the obligations arising from PBL's pension fund was a significant issue for buyers to consider during the bidding process. Preston City Council (PCC), as guarantor of the scheme, was similarly concerned about the quality of the covenant which would be provided by any purchaser.

539. Following the CC's provisional decision that an employee-led bid was not a suitable purchaser the leader of the employee bid team complained about the provisional decision to the CC's Chairman and Chief Executive, and alleged that there were errors in the analytical work. This led to a number of additional actions, including a call between the leader of the employee bid team and the Chairman of the Inquiry Group, following which the employee bid was invited to make further submissions to address the concerns that were identified in the provisional decision document. Following this, a revised assessment document was prepared, incorporating the additional information supplied. The revised assessment document did not change the CC's suitable purchaser decision with regard to the suitability of the employee bid.

540. Exchange of contracts with Rotala took place on 23 December 2010, which was 3 weeks after the revised divestiture deadline, and the transaction completed 1 month later, on 25 January 2011.

Assessment of effectiveness of remedies

541. In order to assess the effectiveness of the remedies, we interviewed seven parties: Stagecoach, Rotala, the HSM, the MT, Lancashire County Council, Preston City Council and the leader of the employee bid. We are grateful for the assistance they have provided in this review.

Interim remedies

542. In assessing the effectiveness of the interim remedies, we have first considered what hold separate risks were created by the merger. We then considered how effective the appointment of the MT, HSM and Industry Expert were in addressing those risks.

Hold separate risks

543. Stagecoach had partially integrated PBL in January 2009, five months before the CC appointed a MT (in June 2009).

544. One interviewee told us that when Stagecoach was told to hold separate PBL, Stagecoach became reluctant to engage with the PBL business, as it was concerned about its relationship with the CC.

545. Interviewees were of the view that the operational risk to PBL created by the partial integration was low. This was for two reasons. First, because the process of transferring assets or reconfiguring routes between bus operators is relatively easy. Second, because there had been significant rivalry between PBL and Stagecoach, which meant that PBL staff and managers were likely to continue to see PBL as a separate business and to compete with Stagecoach. Interviewees were also of a common view that PBL was not well managed prior to its acquisition by Stagecoach.

546. The main hold separate risk identified was a breakdown in accurate financial record keeping due to the absence of financial and commercial expertise within PBL. Interviewees said that this was caused by the departure of PBL's accountant and that the Stagecoach shared service centre was not able to replicate this role.

547. This had led to concerns that the MT did not have sufficient visibility of all relevant developments at PBL and that this could risk permanent damage to the business. For example, there was a concern that PBL had insufficient management information about its cost base for tenders and that this could result in PBL bidding at the wrong levels or damaging its relationship with the local council. Interviewees thought that there was a real risk that misleading or inaccurate financial information could be used to make decisions, which could harm the business.

548. The MT told us that to begin with it thought that if PBL was stable it would be financially sound in the short term. However, by its third or fourth report it became clear that it could not rely on the financial information provided by PBL. As a consequence, following discussions with the CC, the situation was re-appraised; this was ultimately the trigger for the appointment of the HSM.

549. Four months elapsed between the appointment of the MT (in June 2009) and the appointment of the HSM (in October 2009). The CC had concerns during this period that the MT needed to be more visible within PBL. Both the MT and the HSM told us that in hindsight it would have been better if these issues had been addressed sooner. It was noted that the situation became more

urgent when it was clear that the inquiry was likely to go to remedies and that to successfully divest PBL accurate records might be necessary.

550. Given the risks to the hold separate arrangements caused by the absence of appropriate financial and commercial expertise it would have preferable if these issues had been identified sooner. Addressing them effectively was critical in being able to retain remedial options.

Effectiveness of appointing the MT

551. Stagecoach told us that very little thought was given by the CC to the cost involved in appointing an MT / HSM and that the response of the CC was not appropriate to the risk in this case. In its view this may have been caused by a policy drive due to the Stericycle case, which was not a comparable situation. The MT said that its total cost was in the region of £250-300k. This was over 18 months and split approximately 50:50 between holding the businesses separate and helping the CC with the divestment process.

552. While the costs of appointing an MT can be high, it is clear that in this case the MT's role was a difficult one and was crucial in ensuring the CC had remedial options open to it when it found an SLC.

553. Stagecoach also said that the MT did not engage properly with the process and did not understand nor appear to learn about the bus business.

554. We note that there were a large number of requests for derogations in this case. Unusually, these were sent straight to the CC rather than being handled through the MT. These took up a significant amount of staff time to get up to speed with the local detail needed to evaluate these requests. A more efficient route for dealing with derogation requests is generally for these to be handled in the first instance by the MT, who is on the ground and should be closer to the day to day requirements of the business, and for the CC to take decisions in the light of the recommendations from the MT.

Effectiveness of appointing the HSM

555. The HSM was generally thought to have been effective in the role and resolved the financial reporting issues which had been identified. This enabled accurate financial data to be available for the divestiture process.

556. The HSM told us that the role could have been done by somebody less experienced but they would probably have had to call more on the skills and the support of others. Someone with a pure financial background would have

probably needed help with the additional process and management aspects of the role.

557. The HSM thought that his skills and experience were very transferable to the bus industry and as a result he was able to get to the key drivers of the business quickly. In particular his experience in plant hire was relevant as vehicle scheduling and maintenance was a key part of the business. PBL was a small business – if it had been larger he may have required more direct support.

558. The MT told us that if the HSM had not performed the role then the oversight required by the MT would have been much more significant and this would have been less cost effective.

559. We consider that the appointment of the HSM was successful in addressing the principal hold separate risk in this case. In our view accurate and reliable financial information is critical for potential buyers and it was essential that these issues were resolved as quickly as possible.

Effectiveness of appointing an Industry Expert

560. Interviewees generally agreed that the Industry Expert had played a minor role in the process. This is because the principal hold separate risks in this case did not relate to day to day operational functions of the bus business but rather to financial and commercial reporting processes. In addition the Industry Expert did not report directly to the CC. With the benefit of hindsight and given the nature of the risks identified in this case it seems likely that this role was unnecessary.

Final Remedies

561. In assessing the effectiveness of final remedies we have considered both the divestiture process and the performance of PBL since the divestiture.

The divestiture process

- *Assessment of suitable purchasers*

562. Interviewees generally found the CC process for assessment of suitable purchasers was straightforward.

563. The leader of the employee bid told us that it seemed that the CC looked at all the bidders on the same basis and that the CC process was clear and

transparent; he told us that nevertheless the CC got its purchaser assessment decision wrong for the employee bid.

564. The MT said that, whilst the process was effective, some bidders perhaps did not understand how important the purchaser assessment process was – it was unsure whether this was because the CC, MT or Stagecoach had not communicated this effectively to the bidders.

565. It is clearly important in every case that the importance of the suitable purchasers' assessment is made very clear to prospective buyers: it is not a rubber stamping exercise and prospective buyers can sometimes be rejected (as the employee bid was in this case). It requires well-reasoned assessments to be made.

- *Management of the divestiture process*

566. Most interviewees found the CC remedies process was clear and transparent.

567. One interviewee told us that it felt that the CC's relationship-building and exchange of information could have been better.

568. Stagecoach told us that it appreciated the CC being pragmatic about the final divestiture date as at the time it had become concerned that if it ran past this date it would result in the appointment of a divestiture trustee.

569. At an advanced stage of the divestiture process, another team within the MT was approached to provide transaction services advice to a potential purchaser. Upon notification of this potential conflict of interest, the CC confirmed that this assignment should not be accepted. Stagecoach was informed about this and confirmed that it was content to proceed on this basis.

570. Rotala suggested that it would have been much more effective to have an identified preferred bidder in the process. If it was going through the process now it would probably have dropped out due to the amount of management time which was taken up and the cost of the up-front legal and accounting fees in a situation where there was no defined preferred bidder.

571. Whilst in some cases a preferred bidder may be acceptable, in this case it seems that given the uncertainty over the outcome of the sale process, having multiple bidders was an effective way of ensuring a divestiture could be completed to a suitable purchaser within the relevant timescales.

572. Stagecoach told us that in its view existing members of the CC continuing to have a role in remedies implementation, when a case was being appealed, was wrong. This would never happen in an employment tribunal appeal for

example. It recommended that in cases where there is a CAT appeal the same members of the CC should not be used. It recognised the efficiency of using the same members in remedies cases where there had not been an appeal.

573. The composition of the Group in a remedies process is assessed on a case by case basis. Usually there are significant synergies to be gained by using the same members in remedies implementation. We have not found any evidence that the outcome of this case was altered due to the composition of the Group overseeing the remedies implementation.

574. Stagecoach said that the remedies process was not two-way enough and there was no opportunity other than the remedies hearing to interact properly and tease out issues. Even at the remedies hearing, although Stagecoach had attempted to raise some of the issues which subsequently led to its appeal, this had not been permitted beyond a few minutes. This was in contrast to the bus market inquiry which it said was much more of a two-way process and meaningful exchange of views. Parties are looking for their views to be taken into account and given appropriate consideration, not necessarily that they be agreed with.

575. The remedies process is not a negotiation. Parties should be given opportunities to make their case to the CC but ultimately the CC must put in place as comprehensive a solution as is reasonable and practicable to the SLC. The hearing process was not found to be insufficient during the appeal to the CAT and in this case it seems that Stagecoach and other parties were given both oral and written opportunities to set out their case.

Performance of PBL since divestiture

- *The Preston Bus market*

576. All parties that we spoke to said that there had been very little change in the structure of the Preston bus market since the divestiture (as compared to the situation prior to the merger). PBL and Stagecoach were still the main operators and there were a few much smaller businesses which continued to operate in the tendered bus services market (for example, Fishwicks).

577. Similarly, PBL continued to mainly run intra-urban services and Stagecoach continued to run mainly inter-urban services. Stagecoach and PBL had only made minor changes to their routes and services.

578. One interviewee told us that price rises on commercial routes and bids submitted for tendered services had both risen at slightly above inflation – but

these rises were in line with those seen by other operators nationally. We were told that both companies continued to compete on tendered services.

579. Stagecoach told us that the possibility of making connecting journeys between the intra-urban (PBL) and inter-urban (Stagecoach) using a single ticket had disappeared once it divested PBL. It noted that the desirability of such multi-operator tickets and this was an important recommendation of the CC local bus market inquiry. Another interviewee agreed that this had been one major downside of moving back to two operators.

580. We note that these potential benefits of the merger had been fully considered by the CC in its Final Report when assessing Relevant Customer Benefits (RCBs). The CC found that, even on very cautious assumptions, the benefits of remedying the SLC through an effective divestiture remedy were likely to outweigh any RCBs associated with network ticketing that might be lost as a result of the divestiture. In addition, there remains scope for the development of an effective multi-operator ticketing scheme in Preston in line with the recommendations of the CC's market investigation.

- *PBL*

581. Financial performance information provided to the CMA by Rotala showed that the performance of PBL has improved significantly since the period following the merger with Stagecoach. PBL is profitable and makes a respectable EBIT margin.

582. Rotala said that PBL was a good business and Preston was an attractive bus market, but that the financial performance had not been as good as it had hoped. For example, the EBIT margin had not reached Rotala's pre-merger expectations.

583. The performance and profitability in the period following Rotala's acquisition had mainly been impacted by changes to bus subsidies, some reduction in passengers and one-off local effects such as significant road works in the area.

584. Overall we consider that, while the performance of PBL has not been quite as good as Rotala had hoped, it is making positive and reasonably healthy EBIT margins against the backdrop of a difficult operating environment. We would expect that it will continue to function as an effective competitor.

Summary of key learning points

585. The interim measures were eventually successful in maintaining PBL as a separate entity. However, there was an extended period during which accurate financial reporting and management information were not available. It is likely that this increased asset risk to the PBL business. Most interviewees found the divestiture process clear and transparent. It seems that the divestiture of PBL to Rotala has been successful. PBL operates profitably in a difficult market; it is competing successfully and it appears to have retained its position in the Preston bus market.

586. The evaluation has highlighted learning points in relation to both interim measures and final remedies.

587. In relation to interim measures:

(a) The CC was concerned about the lack of MT presence on the ground. It is important to question the MT and where necessary request additional resource and active involvement at the businesses' offices.

(b) The financial reporting issues which emerged from the partial integration process increased asset risk and had the potential to significantly impede a future sale of PBL. These issues took some time to be identified, despite the presence of the MT. Three learning points emerge here:

(i) This issue could have been identified and addressed earlier with stronger hold separate arrangements at phase 1.

(ii) Where there has been a partial integration, it is crucial that both the CMA and the MT quickly understand the operation of the business and monitor the financial performance for signs of stress or other issues. This is especially necessary when layers of operational or financial management have been removed (as in this case). This ensures appropriate financial / management processes can be put in place.

(iii) At Phase 2, the CMA should not necessarily wait until it expects a remedy to be put in place if the issues are potentially threatening the viability of the business. Acting quickly once the situation has been understood can make the remedies process more effective.

(c) Where an external HSM is put in place, it is important that relationships are developed with the acquirer sufficient to ensure effective operation of the business. Some of this relationship-building should come from the CMA and any MT.

(d) The appointment of a HSM was effective in addressing the main divestiture risks. It was also likely to have been more cost effective than using the MT for this role. The CMA should be willing to use HSM where appropriate and backed by evidence.

(e) With the benefit of hindsight, it was probably unnecessary to have an industry expert role. This was requested by the parties in this case but it seems to have caused more confusion than assistance.

(f) Derogation requests are generally best screened by the MT (when one is place) who can then provide advice to the CMA, rather than coming direct to CMA. Coming direct to the CC used significant CC resource and was less efficient (as the MT is on ground and could provide a first stage review).

588. In relation to final remedies:

(a) It is critical to communicate the importance of the CMA's purchaser assessment to all purchasers at the start of the sale process – many are unlikely to have been through this type of process before. Moreover, it is important that the CMA's reasons for rejecting purchasers are clear and those purchasers are given opportunities to address those concerns.

(b) Purchaser suitability. Under the Final Undertakings, the MT's role excluded the provision of advice in relation to purchaser suitability (e.g. reviewing financial capability). The resources required at the CC to perform this assessment were substantial. If the MT had a wider remit, this may have also provided assistance in ensuring that the CC's assessments were made by reference to the most up to date information in the data room.

(c) Conflicts of interest for the MT. This was avoided but it highlights the need to keep potential conflicts under close scrutiny throughout the inquiry.

(d) Pragmatic approach to final divestiture date. Stagecoach and other divesting parties had significant concerns about the potential appointment of a divestiture trustee. This highlights the incentives created by such a clause in the final undertakings. However, this case also shows that some pragmatism is helpful because the divestiture was sufficiently well progressed to mean that it could be completed shortly after the end of the divestiture period, and without the need for a divestiture trustee. Such pragmatism requires good communication between divesting parties and the CMA, so that the CMA can have enough confidence that any short delays do not compromise the need to achieve a timely divestiture.

Unilever

Main facts of the inquiry

589. On 27 September 2010, Unilever[127] agreed to acquire The Alberto Culver Company ('Alberto Culver') for US$3.7 billion.

590. Unilever is an Anglo-Dutch company dual-listed on Euronext Amsterdam, through Unilever N.V., and the London Stock Exchange, through Unilever plc. Each entity exists as a separate company but they operate together as a single economic unit. Unilever is active in the development, manufacture, distribution and marketing of fast moving consumer goods products, principally in the food, home care and personal care product categories through a wide range of brands. Unilever's group turnover in the 2009/10 financial year was £35.5 billion, of which the UK accounted for £1.8 billion.

591. Alberto Culver was a publicly listed US-based company active in the development, manufacture, distribution and marketing of fast-moving consumer goods, principally in the food, home care and personal care product categories through a wide range of brands. Alberto Culver's turnover for the year ending September 2009 was £961 million, of which £154 million was in the UK.

592. The parties overlapped in a number of personal care product categories in the UK, including hair care, hair styling, and skin cleansing. The overlaps were small in other categories (hand and body care, face care, lip care, and deodorants) so the OFT focused its investigation on the hair care, hair styling and skin cleansing categories.

593. Following its investigation, the OFT concluded that there was not a realistic prospect of a substantial lessening of competition in either the hair care or the hair styling categories. However, within skin cleansing the OFT did find that there was a realistic prospect of a SLC in bar soaps on the basis of unilateral effects. It found that, post-merger, the parties would have a combined market share of 35% by volume and 47% by value. In particular, it was concerned that Unilever's Dove cleansing bar and Alberto Culver's Simple soap bar were close competitors, as they shared 'skin care' characteristics,[128] and that there was a limited number of competitors in a market which was anyway in decline, as consumers gradually moved away from bar soaps to liquid soap and

[127] Unilever N.V. and Unilever plc acting through affiliate companies Conopco, Inc. and Ace Merger, Inc.
[128] Simple soap contains no perfume or colouring and is targeted at customers with sensitive skin. Dove is a detergent bar enriched with one-third moisturiser.

shower gels. It was less concerned about Alberto Culver's other bar soap brands (Wright's and Cidal), both of which were relatively small.

Choice and design of remedies

594. In light of the OFT's finding, Unilever decided to offer undertakings in lieu of a reference to the Competition Commission. The package of undertakings comprised the following main elements:

(a) the divestment of the Cidal and Wright's soap brands. The manufacture of the products supplied under both brands was outsourced and Unilever undertook to use reasonable endeavours to ensure that its third party manufacturing contracts were transferred to the purchaser; and

(b) the divestment of the Simple brand, to be effected by a perpetual and royalty-free licence of the Simple brand for bar soaps in the UK, Ireland and the Channel Islands. Again, the manufacture of Simple soap was outsourced and Unilever undertook to use reasonable endeavours to transfer the relevant manufacturing contracts to the purchaser.

595. The reason for using a perpetual and royalty-free licence to effect the divestment of Simple soap was that the Simple brand encompassed a range of products and bar soaps represented only a relatively small part (less than 10%) of the overall revenues for Simple. To require divestment of the whole of the Simple brand would have been disproportionate.

596. Undertakings in lieu of reference are appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear cut[129]. Furthermore, those remedies must be capable of ready implementation.

597. The OFT considered that the divestment as described in paragraph 594 replicated the full constraint in bar soaps which would be lost as a result of the merger and therefore addressed the competition concerns identified. There was no incentive for the parties to downgrade the Simple brand following the divestment of Simple soap, and the proposed licence incorporated terms designed to ensure a level of coherence in the brand identity for Simple and to prevent the licensee taking steps that may harm the brand, such as offering products for sale that did not meet quality or safety standards. The terms of the licence would allow the licensee autonomy in relation to key aspects of commercial policy, in particular on pricing and promotional behaviour.

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[129] See OFT 1122: Mergers – Exceptions to the duty to refer and undertakings in lieu guidance, paragraph 5.7

598. The OFT considered that the nature of the remedy, which involved the splitting of the Simple brand, had a higher risk profile than a straightforward divestment remedy and that there was therefore a need for it to approve the purchaser. It decided to require Unilever to find a purchaser upfront, to be approved by the OFT, before it would finally accept the undertakings.

What happened after the OFT's decision document?

599. The OFT's decision document was issued on 18 March 2011. Unilever then entered into negotiations with Lornamead. Lornamead is a global personal care company and, at the time, had a portfolio of over 36 brands including 'Vosene', 'Witch' and 'Rapid White', as well as 'CD' brand, one of the leading branded bar soaps in Germany. Unilever agreed to sell Wright's and Cidal, and licence Simple soap, to Lornamead, subject to OFT approval. The OFT was satisfied that Lornamead met the criteria to be approved as a purchaser of the Alberto Culver bar soaps business, and the undertakings were accepted on 15 June 2011.

600. Lornamead took control of the Simple soap brand, as well as ownership of the Wright's and Cidal brands. A supermarket chain told us that there were some initial, short-term problems but that things swiftly settled down.

601. A competitor told us that both the Dove and Simple brands were managed professionally by their respective owners, although it considered that the two brands were positioned differently in the market, occupying two different categories. In its view, Dove was a more upmarket, cosmetic soap brand. Another competitor told us that, in its view, Simple soap and Dove did compete with each other as they both targeted a female demographic of similar age groups, even if Simple and Dove were different products with different features.

602. A further competitor told us that the UK bar soap market was very stable, and that there was not much consumer switching between bar soaps and liquid soaps / shower gels. However, over time, liquid soaps and shower gels were gradually taking over from bar soaps. It said that liquid soaps now controlled the kitchen, but that bar soaps still retained a steadfast share of the bathroom market, even though shower gels had gained in popularity over the last 20 years.

603. A supermarket chain told us that discounters were growing their share of the bar soap market aggressively, although it still carried a similar range of Simple soap stock keeping units (SKUs) as it had done prior to the merger.

604. We were provided with market share data for Dove and Simple soaps for each four-week period from week ending 15 October 2011 to week ending 11 October 2014. Analysis of this data showed that the market shares for both brands had remained relatively stable over the period.

605. One competitor told us that, while the undertakings probably had addressed any competition concerns arising from the merger, it was concerned more generally when it saw its largest competitor get bigger. It said that increased size made a manufacturer more powerful in the eyes of the retailers and the ability to enter into joint business plans with retailers with a portfolio of brands cutting across product categories was not helpful to smaller manufacturers. It said that this was especially true for sales promotions. A large manufacturer with several brands could promote one brand after the other throughout the year, such that a smaller manufacturer with only one brand could almost never promote its product without facing a simultaneous promotion for a brand owned by its larger rival.

606. Another competitor told us that retailers did not particularly focus on who owned a brand, but rather looked at the rate of sales through different size categories of stores within their portfolio. When talking to sales representatives from the manufacturers, they would share this data and look at the manufacturer's plans for both promotional expenditure and above the line brand support. It said that what mattered to the supermarkets was how the brand performed in store, not who owned the brand.

607. None of the parties we contacted during this research said that they were aware of any unintended consequences arising from the OFT's decision to accept the undertakings in lieu.

Effectiveness of the remedy

608. Although the undertakings were slightly unusual in the context of merger control cases, in that they included a behavioural remedy (to enter into a perpetual, royalty-free licence for the intellectual property involved in Simple soap) rather than the more usual structural remedy of straightforward divestment, the outcome was effectively the same as a divestment while avoiding requiring the divestment of the entire Simple brand. We noted that licensing of brands, or products within brands, to other companies was not unusual in the fast-moving consumer goods industry and was a well-understood process.

609. The remedy appears to have been effective. The market shares of both soap brands has remained relatively stable since the transaction took place,

indicating that, to the extent that Simple soap exerted a constraint on Dove soap, it has continued to do so.

610. None of the parties who spoke to us raised any concerns about the effectiveness of the remedy, or mentioned that they were aware of any unintended consequences arising as a result of the remedy.

Lessons learned

611. All of the parties who commented on the transparency of the OFT's process were complimentary. The general feeling was that the OFT had been open and communicated well, that the questions it had asked had been appropriate, and that opinions voiced by parties (such as competitors) had not been ignored. The CMA should do its best to continue to be open and transparent during merger inquiries and to ensure that its processes are as user-friendly as possible for those parties involved while being consistent with carrying out its function of inquiring properly into the possible impact on competition of a merger.

612. As stated in paragraph 608, the licensing of brands, or products within brands, to other companies is not unusual and is a well-understood process in the fast-moving consumer goods industry. While this case may have been unusual for the OFT in that it involved the licensing of intellectual property, the CMA should be open to adopting a similar approach in future cases where it is appropriate to do so.

Rank

Main facts of the inquiry

613. On 20 August 2012, the Office of Fair Trading (OFT) referred the anticipated acquisition by The Rank Group Plc (Rank) of Gala Casinos Limited (Gala) (the merger parties) to the Competition Commission (CC) for investigation and report.

614. The proposed acquisition included 23 bricks-and-mortar casinos in Great Britain and three cold licences.[130] Gala's casinos in Gibraltar and Dundee, a cold licence in London (Westminster) and other activities operated by Gala

[130] A licence allows a casino to operate in a certain local authority area. Where a casino is closed, or a licence has been obtained but the casino not built, this may be retained by the operator for the payment of an annual fee and is termed a cold licence.

Coral Group Limited (Gala Coral),[131] including its online casino business, were excluded from the transaction.

615. Rank and Gala both operated standard casinos in the UK.[132] There were 133 standard casinos in operation in the UK at the time of the proposed merger. The largest casino operator (by number of casinos) was Genting Casinos UK Limited (Genting) with 40 UK casinos, followed by Rank with 35 casinos and Gala with 24 casinos. The other casino operators were significantly smaller.

616. The CC published its final report on 19 February 2013.

617. The CC found that in four areas, Aberdeen, Bristol, Cardiff and Stockton-On-Tees (the prohibited areas), the merger would be expected to result in a substantial lessening of competition (SLC) due to a reduction in existing competition between casinos.

618. The CC also found that the merger would result in an SLC in Edinburgh, where Gala operated a casino and where the CC considered it more likely than not that, in the absence of the merger, Rank would have developed its cold licence into a casino, which would have increased competition in the area.

Choice and design of remedy

619. The CC consulted on three possible structural remedies to address the SLC it had identified:

(a) Prohibition of Rank's acquisition of Gala in its entirety (full prohibition);

(b) Prohibition of the acquisition by Rank of the Gala casinos and cold licences in those local areas where the CC had identified an SLC (partial prohibition); and

(c) Divestiture by Rank of the casinos and cold licences in those local areas where the CC had identified an SLC before being permitted to complete the acquisition of Gala (upfront buyer remedy).

620. For the casinos in the prohibited areas, the CC considered that all three of the possible structural remedies would effectively address the SLC. However, the CC considered that full prohibition would be significantly more intrusive than partial prohibition, and that an upfront buyer remedy would be more intrusive

[131] Gala Coral merged with Ladbrokes in November 2016, forming Ladbrokes Coral Plc.
[132] These differ from so-called 'high-end' casinos that offer substantially higher levels of gambling; often have restrictive membership requirements; provide a range of additional free services; and attract high-spending, often international, clients.

than a partial prohibition. Therefore, the CC concluded that the least costly, least intrusive, effective remedy was partial prohibition.

621. For Edinburgh, the merger parties suggested an alternative remedy, which would require the divestment of the cold licence owned by Rank. This would take place after Rank completed the acquisition of the Gala casino in Edinburgh. The CC considered that there were substantial purchaser risks[133] with allowing the divestiture of the cold licence in Edinburgh after the acquisition of the Gala casino in Edinburgh. The CC concluded that the least costly, least intrusive, and most effective remedy would be the divestiture of Rank's cold licence in Edinburgh via an upfront buyer process.

622. The final remedies package was:

(a) the prohibition of the acquisition of the Gala casinos in Aberdeen, Bristol, Cardiff and Stockton-On-Tees;[134]

(b) the divestiture of Rank's cold licence in Edinburgh to a suitable purchaser approved by the CC. In the event that the Rank cold licence was not sold to a suitable purchaser, Rank was not permitted to acquire the Gala casino in Edinburgh.[135] Rank or Gala were not permitted to appeal against any planning application or other licensing requirements needed by a purchaser of the cold licence in Edinburgh to develop a casino in Edinburgh, and Rank was required to take all steps required to maintain the licence before its sale to a suitable purchaser; and

(c) Rank was allowed six months from the publication of the final report (i.e. until 19 August 2013) to dispose of the cold licence in Edinburgh to a suitable purchaser. The CC noted that it may have considered a short extension to this process (to 30 September 2013) if Rank was able to demonstrate that it had made good progress in finding a suitable purchaser.

623. The CC decided not to appoint a divestiture or monitoring trustee to oversee the disposal of the cold licence in Edinburgh, because the CC considered that there was sufficient incentive for Rank to find a suitable purchaser of the licence, as doing so would enable it to acquire the Gala casino in Edinburgh.

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[133] The CC considered that there was a risk that a suitable purchaser would not be available or that there may only be a limited pool of suitable purchasers.
[134] A ten-year sunset clause applied to this remedy.
[135] A ten-year sunset clause applied to this remedy.

What happened after the CC's final report?

624. Following the acceptance of final undertakings on 2 April 2013, the merger parties agreed new terms on the 18 casinos and 3 cold licences not subject to the CC's remedies.

625. Rank sold the Edinburgh licence to Global Gaming Ventures Limited (GGV) on 4 April 2013. The transaction value was £179 million. The process to divest the cold licence in Edinburgh lasted six weeks. Rank proposed one purchaser and therefore there was no auction. The process is summarised in paragraphs 627 to 631.

626. Gala sold the four casinos subject to the partial prohibition remedy to Double Diamond Gaming Group (trading as Rainbow Casino) (Double Diamond) on 11 December 2013. Prior to the sale, the CC had assessed that these four casinos were financially viable.

Divestment of the cold licence in Edinburgh

627. Table 1 below summarises the process for the divestment of the cold licence in Edinburgh.

Table 1: Timeline for the divestment of the cold licence in Edinburgh

Event	*Date*
Publication of final report	19 February 2013
Purchaser suitability assessment	26 February 2013 – 28 March 2013
Publication of consultation on undertakings	11 March 2013
Acceptance of undertakings	2 April 2013
Purchaser approval	2 April 2013
Signing of sale and purchase agreement	4 April 2013

Source: CC.

628. In order to assess the suitability of GGV as the proposed purchaser of the cold licence in Edinburgh, the CC:

(a) obtained written confirmation that GGV had no significant connection with the merger parties, in order to determine GGV's independence;

(b) assessed whether GGV had sufficient management experience and capacity to develop the cold licence. For example, the CC assessed the reasonableness of GGV's business plans and the strength of its commitment to Edinburgh, and checked GGV's track record with regard to previous licence bids;

(c) satisfied itself that planning permission for the development of a casino in Edinburgh was likely to be obtained;

(d) checked that GGV had sufficient financial resources to develop a casino in Edinburgh, recognising that GGV was a new entrant with limited existing capital to invest in the project. For example, the CC obtained bank letters and reviewed GGV's financial projections; and

(e) obtained written confirmation to ensure that the divestiture to GGV would not create a realistic prospect of further competition concerns.

629. Subsequently, in 2016, GGV sold the cold licence in Edinburgh, which it had acquired from Rank as part of the CC's remedies package, to G1 Group (G1)[136] We understand that GGV and G1 had originally intended to partner to develop the cold licence into an operating casino. However, G1 subsequently decided to pursue the venture alone. We further understand that G1 has yet to seek planning permission for the site or permission from the local authority to amend the location of the licence.

630. GGV told us that the sale of the cold licence to G1 was due its desire to free up management resource for the development of other casino sites.

631. GGV told us that it had made references to the CC of its partnership with G1 during the remedy implementation. However, at that time, GGV did not consider selling the cold licence to G1.[137]

Remedy evaluation

632. To assess the effectiveness of the remedies, we interviewed a range of market participants, including the merger parties, regulators and competitors.

633. We did not interview individual customers. Instead, we sought the views of the market participants on the effect of the CC's final remedies package on customers.

Remedy design

634. Our evaluation of the CC's remedy design process concerned events leading up to and including the publication of the CC's final report in February 2013. We focussed on the divestiture of the cold licence in Edinburgh as this was the element of the remedies package that required most careful consideration by the CC.

635. The selection of the upfront buyer remedy by the CC to address the SLC in Edinburgh incentivised the merger parties to cooperate with the CC and to

[136] G1 is a privately owned hospitality group based in Scotland with approximately 50 leisure venues.
[137] Call with GGV on 12 December 2016.

remain engaged with the remedies process. This was because clearance of the revised merger transaction was dependent on the divestment of the cold licence in Edinburgh.

636. We considered that this approach:

(a) was effective, as demonstrated by the timely divestment of the cold licence in Edinburgh within six weeks of the final report and the subsequent completion of the transaction; and

(b) enabled the remedies to be implemented and the transaction to be completed without requiring the services of a divestiture trustee or a monitoring trustee.

Remedy implementation

637. Our evaluation of the CC's remedy implementation process concerned events following the publication of the CC's final report and up to and including the signing of the sale and purchase agreement for the cold licence in Edinburgh in April 2014.

638. The prompt implementation of the CC's final remedies package, in particular the divestiture of the cold licence in Edinburgh, reflected the clear design of the remedy and the extensive purchaser suitability criteria laid out in Appendix J of the final report.

639. We also consider that that the timely divestment of the cold licence in Edinburgh and subsequent completion of Rank's acquisition of Gala reflected an efficient remedy implementation process. In particular:

(a) the CC conducted a Group hearing with GGV shortly after the publication of the final report, in order to enquire about, and test the credibility of, its plans to develop a casino in Edinburgh;

(b) the consultation on the undertakings took place in parallel with the purchaser suitability assessment; and

(c) the continuity of inquiry Group Members and CC staff ensured that the implementation process could be conducted effectively.

640. A number of parties commended the remedy implementation process. For example:

(a) the Gambling Commission told us that the remedy implementation process was open and clear and that it had opportunity to contribute; and

(b) GGV told us that the CC staff were professional and skilful, and displayed a good understanding of the industry.

641. Both Rank and Genting expressed some criticisms of the upfront buyer remedy (ie the divestiture of the cold licence in Edinburgh):

(a) Rank told us that it sold the Edinburgh licence at a substantial loss. It said that the loss on disposal reflected the market's view that the divestment was a distressed sale, driven by the six months deadline to avoid the prohibition of the revised transaction (see paragraph 635). Rank also told us that if the CC had allowed the sale of the cold licence after the acquisition of the other Gala casinos, this would have averted the extent of the loss on disposal.

(b) Genting concurred with Rank's view that the divestiture of the licence was effectively a distressed sale.

642. We noted these conflicting views, but considered that the upfront buyer remedy mitigated the substantial purchaser risks associated with allowing the divestiture of the cold licence in Edinburgh after the acquisition of the Gala casino in Edinburgh. Further, it avoided the need for the CC to appoint a divestiture trustee or a monitoring trustee, which would have increased the cost to the merger parties of the remedy implementation process.

643. GGV told us that the CC's purchaser suitability assessment was adequate, but it considered the administrative process was burdensome for a relatively small operator such as itself.

644. Whilst acknowledging the demands placed on GGV by the CC, the assessment was largely an exercise to verify existing information with regards to: GGV's financial viability and ability to develop the casino; and the proposed transaction. Further, we considered that the scale of the assessment undertaken by the CC to satisfy itself that GGV was a suitable purchaser of the cold licence in Edinburgh was necessary to ensure that the upfront buyer remedy was effective in addressing the SLC identified in Edinburgh. This was particularly important, as the divestment of the cold licence in Edinburgh was the sole remedy to address the SLC in the area.

Impact of remedy

645. We assessed the effectiveness of the CC's final remedies package by considering its impact on the structure of the UK casino market including in the four prohibited areas and Edinburgh; and on the strategy of the leading UK casino operators.

646. There was general consensus among the parties whom we interviewed that there had been no significant changes to the UK casino market and also in the strategy of the largest casino operators in the UK since the publication of the CC's final report, including in the prohibited areas and in Edinburgh, and that market shares had remained relatively stable.

647. The relative stability of the market (in terms of the number of operators and casinos) since 2013 reflects the strict regulation of the casino market in the UK, specifically with regard to the issuance of new casino licences.

Prohibited areas

648. With the exception of the casino in Stockton-On-Tees, which closed in September 2016, the casinos in the prohibited areas remain in operation and under the control of Double Diamond.

649. We understand that the closure of the casino in Stockton-On-Tees reflected both:

(a) Local market conditions, where the local area has been unable to support more than one casino; and

(b) The wider economic climate, which has subdued demand.

650. Regarding the closure of Double Diamond's casino in Stockton-On-Tees, the lack of demand in the local area suggests that Gala may have faced similar problems to Double Diamond if they had retained the casino. This lack of demand also suggests that the failure of Double Diamond's casino in Stockton-On-Tees does not reflect any significant deficiencies in the CC's assessment of Double Diamond as the purchaser of the Gala casinos in the prohibited areas. This is supported by Double Diamond's continued presence in the other prohibited areas.

651. We consider that the partial prohibition has been effective in addressing the SLC in the prohibited areas, with there being little change in market conditions when comparing conditions prior to and after the acquisition.

Edinburgh

652. The divestiture of the cold licence in Edinburgh was intended to result in the development of an operational casino that would have competed with the Gala casino, which Rank had proposed to acquire. The subsequent failure of both GGV and G1 Group to develop the cold licence in Edinburgh suggests that the remedy has not been effective in addressing the SLC in Edinburgh.

653. We do not think that this reflects a failure in the processes of the CC in determining the suitability of GGV as the purchaser of the cold licence. Based on the facts available to the CC at the time, as a result of its thorough purchaser suitability assessment, the decision to allow Rank to sell the licence to GGV was appropriate.

Learning points

654. The CC's effective implementation of the remedies was aided by the CC:

(a) Clearly setting out in the final report its purchaser suitability criteria, which aided GGV in fulfilling its obligations in relation to the purchaser suitability assessment in a timely manner;

(b) Running its purchaser suitability assessment and consultation on undertakings in parallel. We note that this approach required careful coordination, which may not be appropriate for all inquiries;

(c) Ensuring continuity of the inquiry Group Members and CC staff;

(d) Ensuring it invested time and resource adequately to engage with GGV, for example by holding a Group hearing with it, which aided the CC's assessment of its suitability as the purchaser of the Edinburgh cold licence; and

(e) Requiring there be an upfront buyer of the cold licence in Edinburgh. This increased the incentives on the merger parties to cooperate with the CC and to remain engaged with the remedy implementation process. Additionally, this approach reduced the requirement for the use of a monitoring trustee or a divestiture trustee.

655. As noted above, GGV and subsequently G1, has yet to develop the cold licence in Edinburgh. This underlines the need for the CMA, when developing its remedy proposals, to be thorough in its assessment of the likelihood of acquirers developing and implementing such plans. Doing so would allow the CMA to consider the effectiveness of remedies and their competitive effects both in the short and longer term.

Global

Main facts of the inquiry

656. On 24 June 2012, Global Radio Holdings Limited (Global) acquired the entire issued share capital of GMG Radio Holdings Limited (GMG Radio) for £71

million. After the acquisition, GMG Radio was renamed Real and Smooth Limited (RSL).

657. On 11 October 2012, the Office of Fair Trading (OFT) referred the completed acquisition of GMG Radio by Global to the Competition Commission (CC) for investigation and report.

658. At the time of the inquiry:

(a) Global was a privately-owned company, and the largest UK commercial radio operator. It had one national station (Classic FM) and several local stations broadcasting under the following brands: Heart, Capital, Choice, LBC, Xfm and Gold; and

(b) RSL was part of Guardian Media Group plc, and was the third largest UK commercial radio operator. It had regional and local stations broadcasting under the following brands: Real, Real XS and Smooth.[138]

659. The CC published its final report on 21 May 2013. It found that the interests of listeners were largely protected from the potential adverse effects of the merger. Therefore, it focused on the effects of the merger on radio advertising.

660. The CC considered the effects of the merger on non-contracted advertisers purchasing airtime and sponsorship and promotion (S&P) on a campaign-by-campaign basis directly from local and regional stations, or indirectly through small, local or regional agencies.

661. The CC concluded that there was some loss of competition as a result of the merger for the mainly national advertisers buying airtime, and S&P through contracted agencies. It did not, however, consider the effects of the loss of competition on these advertisers to be significant. The CC identified seven geographic areas where the merger parties' stations overlapped, resulting in the CC concluding that the merger was likely to lead to a substantial lessening of competition (SLC). These areas were the East Midlands; Cardiff; North Wales; South and West Yorkshire; Greater Manchester; the North-East; and Central Scotland (the overlap areas). It further concluded that the significant adverse effects in Cardiff, South and West Yorkshire and Greater Manchester were likely to contribute to a loss of competition across the wider areas of South Wales, Yorkshire, Humberside and Lincolnshire and the North-West respectively.

[138] The second largest commercial operator at the time of the inquiry was Bauer Radio, which owned 42 stations, including Kiss and Magic.

662. The CC concluded that the loss of competition in the overlap areas was likely to lead to a significant change in the balance of negotiating advantage between Global and its non-contracted customers such that prices in each of the seven areas would be higher on average.

Choice and design of remedy

663. The CC consulted on the following remedies:

   (a) Full divestiture of RSL to a suitable purchaser;

   (b) Divestiture of RSL, excluding its operations in London and the West Midlands (where the CC had found no SLC); and

   (c) Partial divestiture requiring the sale of individual Global or RSL stations within each of the overlap areas.

664. Global proposed an alternative remedy: a sales agency agreement for non-contracted airtime and local S&P for one or more of the stations within each of the overlap areas. Global would also retain the relevant analogue licences and control over RSL’s brands, programming output and its contracted airtime and national S&P.

665. The CC concluded that Global’s proposed remedy would be subject to the following significant risks and therefore, it would be unlikely to effectively address the SLC:

   (a) Time period over which the remedy was likely to be required: Global suggested that the time period for an initial sales contract should be around five years, which would have aligned the agreement length with digital switchover.[139] The CC concluded that there was a high degree of uncertainty in relation to the date at which the digital switchover criteria would be met and whether digital switchover would address the SLC.

   (b) Risks borne between the third party sales agent and Global: the CC concluded that under a sales agency agreement, nearly all risk lay with the sales agent. The sales agency arrangement would involve significant and ongoing interdependence between Global and the sales agent, which would create significant specification risk in drafting the agreement.

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[139] Digital switchover refers to the point at which analogue radio transmissions would be permanently replaced by digital radio. At the time of the inquiry, the Government stated that a date for switchover would be set once all listening and coverage criteria was met. The criteria was: 50 per cent of all radio listening being via digital platforms; national DAB coverage to be comparable with FM; and local DAB reaching 90 per cent of the population and all major roads.

(c) Ability of the sales agent to compete effectively in the markets for non-contracted revenue and S&P: the CC concluded that Global's proposal for specifying a maximum contracted airtime level would have, in effect, capped the market share of the sales agent. This would have represented a substantial restriction on competition and a major constraint on the effectiveness of the remedy.

(d) Risk that the contract was terminated early by either party: the CC concluded that early termination of the agreement would have resulted in, for a certain time period, the remedy ceasing to apply and the SLC no longer being addressed.

666. The CC concluded that partial divestiture of stations within the overlap areas was the least costly, least intrusive, effective remedy, as it was more closely targeted on the areas in which the CC had identified significant adverse effects on competition.

667. The CC also concluded that a partial divestiture of one or more stations involving a brand-licence arrangement between the acquirer and Global (whereby the acquired stations would operate under the relevant Global brand)[140] was a credible divestiture mechanism and was capable of being effective in addressing the SLC.

668. Table 1 below summarises the divestitures that the CC concluded would be effective in addressing the SLC in each of the overlap areas. The CC noted that the flexibility over the divestiture options within the remedy would allow Global to retain some RSL stations post-divestiture.

Table 1: Summary of potentially effective divestiture options

Overlap area	*Divestiture options*
East Midlands	Smooth or Capital
Cardiff and South Wales	Real or Capital
North Wales	Real or Heart
Greater Manchester and the North-West	Capital or Real XS with either Real or Smooth
North-East	Real or Smooth or Capital
South and West Yorkshire	Real or Capital
Central Scotland	Real or Capital

Source: CC.

669. At the time of the publication of the final report, the specific stations to be divested had not been confirmed. Therefore, to maintain the necessary flexibility in the sale process, the CC required that the RSL stations in the overlap areas should be held separately from Global, until they were sold to a

[140] In effect, this meant that Global would provide programming content to the divested stations and manage their non-contracted sales on an arm's length basis.

suitable purchaser. The CC required that the Monitoring Trustee, Baker Tilly,[141] appointed to oversee the interim undertakings, remain in place to monitor the hold-separate arrangements and to oversee the separation of divested from retained operations.

What happened after the CC's final report?

670. Table 2 summarises the process for the implementation of remedies following publication of the CC's final report on 21 May 2013.

Table 2: Remedy implementation process

Event	*Date*
Publication of final report	21 May 2013
Global appealed CC decision	14 June 2013
Agreement with Global on draft undertakings	21 December 2013
Agreement with Global on final undertakings	3 February 2014
Divestment	31 March 2014

Source: CC.

671. The CC granted Global a maximum period of six months from the final determination of the report to divest itself of the stations in the overlap areas.

672. The final determination (ie the agreement and acceptance of undertakings) was delayed by Global's decision to appeal the CC's final decision. Global was unsuccessful in its appeal.

673. The CC managed the remedy implementation process in parallel with the appeal. The CC assessed the suitability of four potential purchasers of the stations in the overlap areas and concluded that they all satisfied the CC's purchaser suitability criteria in respect of their independence, financial capability and commitment to the relevant market.

674. Global sold the stations to Communicorp UK[142] on 31 March 2014 under a brand licencing agreement. Table 3 below summarises the stations included in the final divestiture package.

675. From our discussions with relevant parties, we understand that the length of time between the publication of the final report and the acceptance of undertakings by Global was due to Global's appeal of the CC's final decision.

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[141] In April 2014, Baker Tilly became the UK member firm of RSM International and in October 2015, it changed its name to RSM UK.
[142] Communicorp UK is part of Communicorp Group Limited, Ireland's largest media company. Communicorp UK operates the Capital networks in Scotland and South Wales; the Heart networks in Yorkshire and North Wales; the Smooth Radio networks in the North East, North West and East Midlands; and XS Manchester.

Table 3: Final divestiture package

Overlap area	*Divestiture options*	*Final divestiture*
East Midlands	Smooth or Capital	Smooth
Cardiff and South Wales	Real or Capital	Capital
North Wales	Real or Heart	Heart
Greater Manchester and the North-West	Capital or Real XS with either Real or Smooth	Real XS and Smooth
North-East	Real or Smooth or Capital	Smooth
South and West Yorkshire	Real or Capital	Real/Heart
Central Scotland	Real or Capital	Capital

Source: CC/Ofcom.
Notes:
1. Real XS rebranded to XS Manchester in 2016.
2. Real Radio merged with the Heart network in 2014

Remedy evaluation

676. To assess the effectiveness of the remedies, we interviewed a range of market participants, including the main parties to the merger; competitors;[143] the regulator; and the monitoring trustee, RSM Corporate Finance LLP (RSM).

677. We were unable to obtain the views of non-contracted advertisers or those contracted advertisers who sell some non-contracted advertising, as the supply side of the market is heavily fragmented and there is a high degree of churn.[144]

Remedy design

678. Our evaluation of the CC's remedy design concerned events leading up to and including the publication of the CC's final report in May 2013.

679. Global told us that the CC's rejection of its proposed alternative remedy of a sales agency agreement for non-contracted airtime and local S&P for one or more of the stations within each of the overlap areas was not proportionate to the scale of the competition problem. Given the risks identified by the CC in relation to Global's alternative proposal (see paragraph 665), the CC considered that the partial divestiture remedy was likely to be the most effective and proportionate means to addressing the SLC.

680. Further, the inclusion of a brand licencing agreement was a proportionate response to the unusual circumstances of this case, where the CC required an effective competitive constraint in the overlap areas only, whilst placing no such constraints in the non-overlap areas in the UK. The inclusion of the

[143] We interviewed Communicorp UK, Nation Broadcasting Limited and Wireless Group Plc.
[144] We did not contact contracted advertisers in relation to their contracted advertising activity, as the CC's findings and primary competition concerns were in relation to non-contracted advertising.

brand licencing agreement enabled Communicorp UK to access the programming content (output) offered by the Global' national brand, thus generating a sufficient level of advertising revenue for Commnicorp, which was supported by a broad listener base. This is supported by the strong performance of the stations since their acquisition by Communicorp UK (see paragraph 694).

681. We are aware that the inclusion of the brand licensing agreement could have had the opposite effect of narrowing the pool of potential acquirers by deterring the larger operators, as this measure would have reduced their control over programming content and/or brand differentiation. However, in our view, the use of a brand licencing agreement provided the purchaser with the required assurance to complete the acquisition of the stations in the overlap areas, thereby directly addressing the CC's SLC finding.

Remedy implementation

682. Our evaluation of the CC's remedy implementation process concerned events following the publication of the CC's final report and up to and including the divestment of the radio stations in the overlap areas. We focused, in particular, on the divestiture process and the role of the monitoring trustee in overseeing the separation of divested from retained operations.

Divestiture process

683. Global told us that with the exception of its dealings with the monitoring trustee (see paragraph 686), the remedy implementation, including the divestiture process, was relatively straightforward and transparent. Further, Global told us that it was able to demonstrate to the CC that it remained on track with the divestment during the remedy implementation process, and that the CC was reasonable and pragmatic about the timing of the divestment.

684. We consider that the time taken to complete the divestment of the radio stations in the overlap areas was the result of Global's decision to appeal the CC's findings (see paragraph 675). We understand that the strong working relationship between the CC and Global, as reflected in the open channels of communication, ensured that any delay was minimised as much as feasibly possible. This is underlined by the divestiture of the radio stations in the overlap areas soon after Global's acceptance of final undertakings.

685. The divestiture process demonstrated the CC's ability to make good progress towards the remedy implementation, despite the ongoing litigation. Further, the litigation underlined Global's intention to exercise its legitimate rights of appeal, and without unnecessarily seeking to delay the remedy

implementation. This further supports the evidence that remedy implementation was efficiently managed. Unlike the circumstance in this case, the CMA is now required to finalise remedies within statutory deadlines, following publication of the final report.[145]

Monitoring Trustee

686. Global expressed concerns about a perceived lack of clarity regarding the role of the monitoring trustee and the delays and duplication of process caused by the monitoring trustee acting as a conduit between the CC and itself. Communicorp UK, whose views relate to the period before the hold-separate arrangements were put in place, considered that the monitoring trustee was helpful by acting as a conduit between itself and the CC. Nevertheless, it did accept that this did create certain inefficiencies and delays, compared to if it had communicated directly with the CC.

687. The monitoring trustee was able to assess the information that it received from Global before reporting to the CC, thus reducing issues to be clarified by the CC, including in respect of derogation requests. This increased the efficiency of the remedy implementation process.

688. In our view, the appointment of a monitoring trustee was necessary due to the complex process of overseeing the hold-separate arrangements and the separation of divested from retained operations. We consider a monitoring trustee was better placed than the CC to perform this role.

689. Nevertheless, the remedy implementation process has demonstrated the need for:

(a) open channels of communication between the CC, the monitoring trustee and all relevant parties; and

(b) the CC, in conjunction with the monitoring trustee, to communicate the role and responsibilities of the monitoring trustee clearly to all relevant parties.

690. Further, we agree that the appointment of a hold separate manager, in addition to a monitoring trustee, was unnecessary in this case. This was largely because two experienced Global employees were seconded as independent managers of the divested operations and kept the divested and

[145] See sections 41A and 41B of the Enterprise Act 2002, inserted pursuant to s32(2) and Paragraph 6 of Schedule 8 of the Enterprise and Regulatory Reform Act 2013.

retained operations separate during this process, which was overseen by the monitoring trustee and was largely reported to us as having been a success.

Impact of remedy

691. We assessed the effectiveness of the CC's final remedies package by considering its impact on the commercial radio market across the UK and, in particular, on non-contracted advertising in the overlap areas.

UK

692. Since the publication of the CC's final report, there has been some consolidation of operators at a national level:

(a) In early 2016, a new national, commercial digital radio multiplex[146] was launched, thus increasing the number of radio stations broadcasting on the digital platform.

(b) In May 2016, the Bauer Media Group acquired the Midlands based commercial radio group, Orion Media, which operates the Free Radio and Gem radio brands.

(c) In September 2016, News Corp acquired Wireless Group, which operates Talksport and Virgin Radio.

693. Notwithstanding the ongoing structural shift towards digital media, there was general consensus among the parties that the UK commercial radio market had been relatively stable in recent years, in terms of the number of listeners;[147] revenue generated from advertising;[148] and the offerings of commercial radio stations at a national level. This in part reflects the relatively high barriers to entry into the UK commercial radio market, a consequence of the limited number of licences available.

Overlap areas

694. The divested stations remain under the control of Communicorp UK and the brand licensing agreement between Global and Communicorp UK remains in

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[146] DAB Digital radio services (or stations) are grouped together in multiplexes, sometimes called ensembles. A multiplex consists of a stream of digital information containing a mixture of the audio from a number of services and other data. Packing services together in this way makes very efficient use of transmission resources. Ofcom manages the licencing process for running the multiplex and for new stations to broadcast on the multiplex.
[147] The proportion of people listening to the radio on a weekly basis remains flat, at close to 90% reach (see Ofcom's Communications Market Report 2016).
[148] Commercial revenue increased by 1.4% from £512 million in 2014 to £519 million in 2015, driven by growth in national advertising revenue (see Ofcom's Communications Market Report 2016).

place. We also understand that these stations have performed reasonably well since the divestment and that the acquirer is in a relatively stable financial position, with the group having been profitable and exceeded its forecast advertising revenue.

695. There was general consensus among the parties that we interviewed that there had not been significant changes to the commercial radio market at a local or regional level since the publication of the CC's final report. This is reflected, for example, by the prices charged by radio operators to non-contracted advertisers, which has not changed significantly in recent years.

696. The relative stability of the commercial radio market in the overlap areas following the implementation of the CC's remedies package reflects and supports the view that the partial divestiture remedy has effectively addressed the CC's SLC finding.

Learning points

697. The use of a brand licencing agreement reflected the unusual circumstance of this case. It provided the acquirer of the radio stations in the overlap areas with additional assurance that it would be able to generate a sufficient level of national sales (through the use of the relevant Global brand). However, the use of such a mechanism is often not appropriate. Therefore, the CMA must thoroughly assess the use of such mechanism against the risks it presents, such as:

(a) deterring potential purchasers from engaging with the CC in a divestiture process due to concerns regarding the commercial attractiveness of the divested operations, including whether it will have sufficient control; and/or

(b) having an inadequate degree of independence post remedy implementation such that the licensor and licensee may not act as effective competitors.

698. The length of time between the publication of the CC's final report and the acceptance of the undertakings reflected Global's appeal of the CC's final report. However, this was managed effectively, aided by the transparency of dealings between the CC and the interested parties, and reflected in the ability of the CC to run the remedy implementation process in parallel with the litigation process. The divestiture of the stations in the overlap areas was completed approximately two months after the acceptance of the undertakings. This timeline suggests that the CC was mindful of the uncertainty of the outcome of the litigation, and worked with Global to ensure

that remedy implementation could be achieved within a short timespan after the outcome of the appeal.

699. A monitoring trustee can play an essential role in the effective and efficient completion of remedy implementation, particularly in a completed merger and/or instances where there is a need to maintain pre-merger conditions. To improve the process in future, both the CMA and the monitoring trustee should take care to explain the role of the monitoring trustee to all interested parties, in order for effective:

(a) implementation of the remedy, particularly with regards to monitoring the separation of retained and divested operations; and

(b) communication between the CMA, the Monitoring Trustee and the interested parties.