Merger remedy evaluations

Report on case study research

18 June 2019

CMA109

© Crown copyright 2019

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Contents

1. Executive Summary

Introduction

1.1 Evaluating the impact and delivery of interventions is an important, but often overlooked, aspect of public policy. Evaluations help policy-makers understand what worked well and what has been less successful. They provide the basis for continuous improvement and can drive legislative reform and policy development, as well as informing future interventions.

1.2 The CMA has an established programme of evaluating its merger remedies. These have been undertaken in seven tranches, starting in 2007.[1] The 18 remedy evaluations conducted to date, including the three cases covered in this most recent update, were selected to cover a variety of remedy types, including structural remedies such as divestiture, behavioural remedies such as price controls and vertical separation, as well as intellectual property and licensing remedies. Following the creation of the CMA in 2014 bringing together the UK merger control regime in a single agency, we have sought to include remedies introduced at both Phase 1 and Phase 2 of our merger process.[2]

1.3 As the CMA's understanding has grown regarding more straightforwardly effective remedies such as divestiture of an existing business, more recent evaluations have tended to focus on cases where relatively novel and/or complex remedies have been implemented.

Lessons learnt

1.4 The case studies have highlighted important lessons for mergers remedies policy. A particularly valuable source of learning has been our evaluation of cases where the remedy implementation process has been problematic or where the remedies themselves have not been as successful as envisaged. The key learning points from the programme of work to date are as follows:

- The need to put addressing likely consumer harm from problematic mergers at the forefront of decisions about merger remedies – where the

[1] The Competition Commission (CC), a predecessor organisation to the CMA, published 11 case studies in four tranches between 2007 and 2012. The CMA has since published seven case studies in three tranches, in 2015, 2017 and 2019.
[2] The case studies published by the CC only evaluated remedies put in place following a Phase 2 investigation.

CMA accepts a risk that a remedy may not be fully effective in doing so, this risk is ultimately borne by consumers.

- The general superiority of structural over behavioural remedies in merger control, in terms of their effectiveness, risk profile and durability.
- The very limited circumstances in which behavioural remedies might be effective and the timescales over which this might be the case, for example, where a merger takes place in a technologically mature sector with an established and well-resourced regulatory regime and where there is clear evidence that the remedies will only be required for a limited period.
- The fundamental role played by interim measures in enabling the CMA to implement effective remedies in completed mergers; and
- The importance of implementation and the need to give parties strong incentives to implement remedies effectively in line with CMA timetables.

1.5 Specific lessons have also been learnt about the different types of remedies.

(a) Divestiture remedies:

(i) Problems encountered during the divestiture process and following divestiture have highlighted the need for the CMA to be clear in its decision about the constituents of the divestiture package and ensure that it is maintained separately and in good condition so that the buyer can compete effectively on acquiring the divested business, until the divestiture is complete;

(ii) Experience of implementing divestiture remedies, and our evaluations of post divestiture performance, have highlighted the importance of conducting a thorough assessment of potential purchasers; and

(iii) Evaluations of prolonged or otherwise unsatisfactory divestiture processes have highlighted the importance of including provision for sale of the divestiture package by divestiture trustees at no minimum price.

(b) Behavioural remedies:

(i) Behavioural remedies are higher risk, more complex and resource-intensive to design than divestiture remedies. Our case studies showed that with painstaking and intensive implementation, they can operate satisfactorily for a limited period in narrowly defined circumstances. This is more likely to be the case where the company already operates in a regulated environment and where the CMA is able to delegate aspects of monitoring to an expert third party;

(ii) Even in circumstances that may be relatively favourable to behavioural remedies, our experience of evaluating and reviewing this type of remedy indicates that it is very unlikely to be possible to design behavioural remedies that will be effective indefinitely without creating substantial distortion risks. It needs to be clear, at the time of accepting a behavioural remedy, that a future event is likely to arise that would remove the need for the remedy; and

(iii) Behavioural remedies are by their nature more resource intensive to implement, monitor and review, particularly when they are expected to be long-lasting. These additional requirements, together with the greater risk compared to divestiture remedies support the use of behavioural remedies only in very limited circumstances.

(c) Intellectual property/ licensing remedies:

(i) These can contain both structural and behavioural elements. While they are relatively unusual in merger control cases, they can make use of mechanisms – such as brand-licensing – that are common in commercial contexts in certain sectors such as fast-moving consumer goods. As such they can be well-understood by market participants in these sectors and may occasionally be effective, albeit with generally higher risk than a straightforward business divestiture.

Merger remedy reviews

1.6 As well as continuing the programme of merger remedy evaluations as set out in this document, the CMA has systematically reviewed the 'backbook' of existing merger remedies inherited from its predecessor bodies.

1.7 An important aim of this work has been to remove measures that are no longer necessary or may now be restricting or distorting competition. Removing such remedies both lightens the administrative burden on affected businesses and enables the CMA to focus its monitoring and enforcement activities on those remedies for which there is an ongoing need.

1.8 As part of this project the CMA has reviewed 99 merger remedies. These reviews have subsequently resulted in the removal of 72 remedies. This represents around three quarters of remedies that we have reviewed to date. The lessons learned from these reviews – for example, the increasing likelihood that behavioural remedies will become mis-specified over time – have similarly informed our policy and guidance.

1.9 These merger remedy reviews form an important element of the CMA's merger process whereby the CMA can look to identify best practice and continuously improve its remedy design and implementation processes.

Interim measures and financial penalties

1.10 As noted above, a key learning point from the merger remedy evaluations has been the importance of effective interim measures to help ensure that effective remedies can be put in place to tackle any substantial lessening of competition (SLC) identified.

1.11 The need for robust interim measures reflects an unusual aspect of the UK regime by international standards, which is that firms are not required to pre-notify mergers to the CMA prior to completion of the transaction, as well as the voluntary nature of the regime. This allows some flexibility for businesses but creates additional costs and risks for the effectiveness of remedies and hence for the overall merger control regime. Interim measures play a vital role in managing these risks.

1.12 The case studies set out in this programme document the progress that the UK competition regime has made in this area over the past 15-20 years. In some of the earliest case studies, where the statutory framework did not provide for a strong approach to be taken to interim measures, the scope for effective remedial action was effectively precluded by post-merger integration. In the more recent cases, a more robust approach at both Phase 1 and Phase 2, combined with the use of monitoring trustees and hold separate managers, have helped manage the risks associated with completed mergers much more effectively. The lessons learned from this evaluation programme have had a direct impact on legislation, policy and practice in this critical area.

1.13 In several recent cases, not yet subject to an ex post evaluation, the importance of effective interim measures has been further highlighted through merger parties breaching these requirements. This has resulted in financial penalties being levied in three cases.[3] The CMA has recently consulted on updated guidance on interim measures to reflect these developments and the robust approach now taken in this area.[4]

[3] The three cases were *Electro Rent / Microlease*, where there were two breaches of the interim measures, with financial penalties levied on both occasions, *EMR/ MWR* and JLA/ Washstation.

[4] CMA108con, Interim measures in merger investigations: Consultation Document, May 2019

Forward look

1.14 The findings of our merger remedy evaluations have been used to inform the way in which the CMA approaches remedy design and implementation in subsequent cases. This has increased the effectiveness of our interventions over time. Similarly, with this most recent tranche of remedy case studies, we will look at how our practices can be further refined to ensure our remedies in future cases are as effective as possible.

1.15 The CMA is continuing to prepare for the UK leaving the European Union, which will increase the volume and complexity of the UK's merger caseload. This will have an additional impact on remedies, including a greater need for international cooperation on multi-jurisdictional mergers. The lessons learned from this programme, as well as from similar studies by other leading agencies,[5] will help ensure that the interests of UK consumers are safeguarded. They also feed in to the overall reassessment of possible merger underenforcement globally, helping to ensure that agencies do not underestimate the risk of possible consumer harm if the remedies do not fully work out as planned.

1.16 We are also publishing this update to our merger remedy evaluations at a time when various reforms of the competition and consumer regime have been proposed, as set out in a letter from the CMA's Chairman, Lord Tyrie, to the Secretary of State for Business, Energy and Industrial Strategy in February 2019.[6] Work is being undertaken to develop these proposals further. Learning from our past experiences will continue to inform how the UK competition regime, including the framework for merger control, can be made more effective.

Acknowledgements

1.17 The CMA would like to thank all those who have participated in each phase of this research and in particular the representatives of various companies who were interviewed.

[5] See section 6.

[6] Chairman's reforms letter to Secretary of State for Business, Energy and Industrial Strategy, February 2019.

2. Introduction

2.1 The UK merger control regime has been subject to successive reforms since 2002. With the coming into force of the Enterprise Act 2002 on 20 June 2003, the CMA's predecessors, the Office and Fair Trading (OFT) and the (CC) acquired the power to decide and implement remedies to tackle the great majority of problematic mergers, without recourse to Ministers.[7] The Enterprise and Regulatory Reform Act 2013 (ERRA) built on these reforms and brought the UK regime within the scope of a single body, the CMA .

2.2 These changes in legislation have introduced important benefits (see Figure 1 below), including:

(a) Streamlining of the process between Phase 1 and Phase 2. The replacement of the two separate bodies of the OFT and the CC with the unitary CMA has allowed the introduction of efficiencies and greater knowledge sharing between the two phases.

(b) Greater potential to evaluate past decisions and incorporate lessons learnt into our processes. We have now extended our evaluation programme to include remedies implemented through Undertakings-in-Lieu (UiLs) of a reference to Phase 2 and include learnings from these evaluations in our end to end processes.

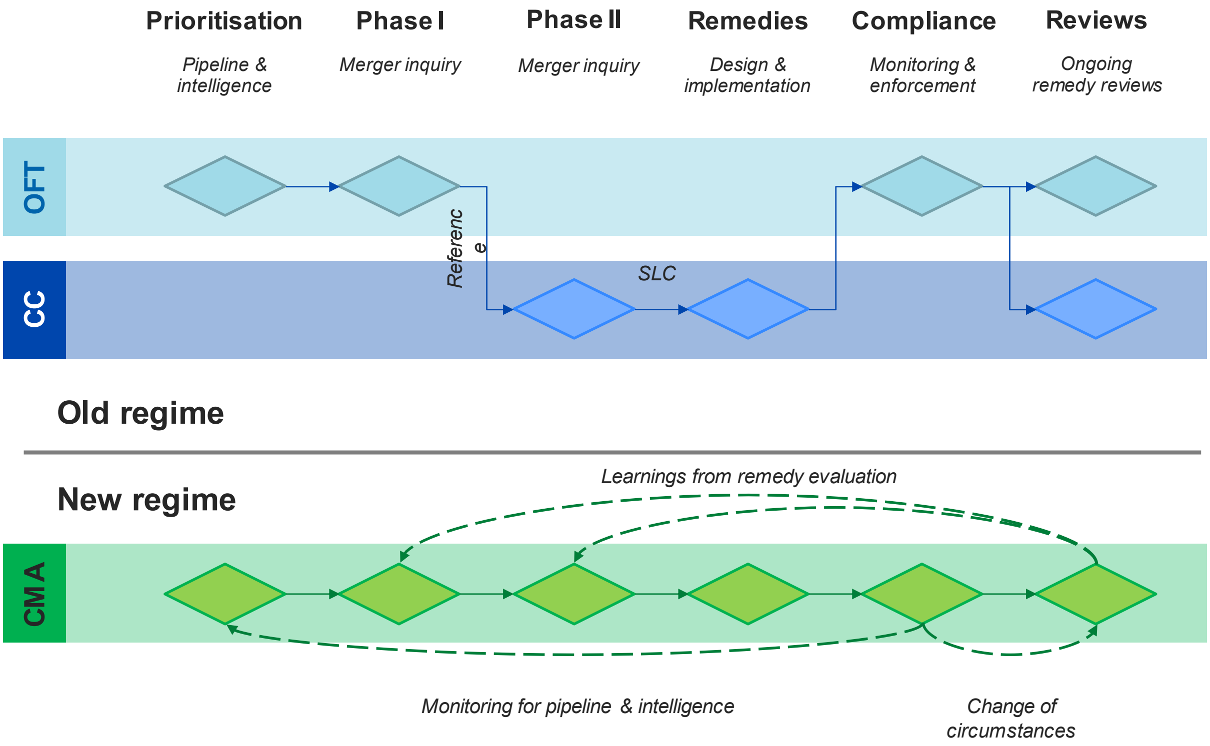
(c) We have a single compliance monitoring and enforcement function, whose experience can inform our design of future remedies.

(d) We are better able to undertake reviews of past merger remedies introduced either at Phase 1 or Phase 2 and amending or revoking them if required by a change of circumstance in the market.

---

[7] Except in relation to public interest cases and special public interest cases, which retained a role for Ministers in decision-making.

Figure 1 – Comparison of end to end merger process



2.3 Having acquired additional powers and duties in relation to remedies, the CC initiated a rolling programme of evaluation of past remedies in 2004 with the aim of ensuring that learning points were captured and fed into remedies policy and practice. Seven phases of review have been concluded, with the first report being published in January 2007. This rolling programme has been adopted by the CMA. Learning points from these case studies have informed the development of our merger remedies guidelines.

2.4 The CMA published updated merger remedies guidance in December 2018.[8] The updated guidance:

(a) Provides a single source of guidance on remedies for Phase 1 and Phase 2 merger investigations; and

(b) Reflects the CMA's experience of merger investigations in recent years, judgments of the Competition Appeals Tribunal (CAT) and our remedies research, which is being updated in this document.

2.5 In this summary document we have set out the key learnings from our research across the 18 case studies to date. We have also highlighted the

[8] CMA87, Merger remedies, December 2018. This supersedes the previous guidance adopted by the CMA CC8, Merger Remedies: Competition Commission Guidelines, November 2008.

three most recent case studies, the results of which have not been published previously. We are also publishing alongside this document a set of appendices, including a summary of merger remedies since 1999, details of our research methodology and the results of each of the separate case studies we have published to date.

2.6 This report begins by providing an overview of the aims of the review and the methodology used. It then reports on the most recent case studies, before summarising the key learning points from the research, taken as a whole. The report concludes by placing our research into a wider context, including the CMA's programme of merger remedy reviews and reports into the effectiveness of merger remedies by other competition agencies.

3. Overview of aims and methodology

Aim of research

3.1 This research programme helps develop the CMA's expertise, policy and practice on merger remedies. Publishing this research sets out some of the evidence underpinning the CMA's approach and provides a backdrop for wider policy and legislative discussions. Doing this work helps the CMA to develop and implement remedies that have an effective and timely impact on competition concerns, safeguarding the interests of UK consumers.

3.2 The research has captured learning points from the experience of choosing, designing, implementing and monitoring the remedies used in each merger case studied. In relation to each study, the evaluation has sought to understand whether the chosen remedy had worked to address the competition concerns identified, whether the remedy had worked as expected, and if not, why not.

3.3 A particular focus of this research – and which contrasts with some other work in this area – has been to explore the risks and challenges associated with less commonly applied remedies, including behavioural remedies or more complex divestitures, which have been more heavily represented in the sample compared with the CMA's decisional practice.

3.4 The learning points from the research are essentially qualitative in nature as the limited number of cases available for review and the variety and complexity of individual cases militates against statistically robust quantitative analysis. However, as the research programme has evolved over the past decade, we have been able to evaluate more remedies and a wider variety of market interventions. This has enhanced the value of this research.

Overview of the methodology

3.5 This section provides an overview of the methodology. Further background to the research and a more detailed exposition of the methodology used is provided in Appendix 3.

3.6 A methodology based on a small number of case studies was used in each phase. The case studies chosen in each phase were selected in order:

(a) To be sufficiently far in the past to allow meaningful research on their success, but sufficiently recent to ensure they were relevant and that key

individuals involved in the remedy process were still available for interview;[9]

(b) To cover a cross-section of different types of remedy, including the most frequently used classes of remedies, particularly divestiture but also looking at behavioural remedies to enable the development of competition (eg by restricting vertical conduct) and to control outcomes (eg by controlling prices). More recently, we have looked at remedies relating to the transfer of intellectual property rights and / or brand-licensing as well as merger remedies implemented through UiLs at Phase 1.

(c) To include examples of remedies that were thought to have been successful and examples of remedies that were thought to have been less successful; and

(d) To include examples of relatively straightforward cases and relatively complex cases.

3.7 Initial background research was undertaken in relation to each study, involving CMA staff in reviewing the final report and the inquiry files and discussing with colleagues who participated in the inquiry. Following this, interviews were conducted with key stakeholders involved in the design and implementation of the remedies. The questions for each interviewee were tailored to reflect their role in relation to the remedy. Broadly, interviewees were asked questions about the choice of the remedy; how it was implemented; what had happened since the remedy had been put in place; whether the remedy had been working as expected; and if not, why not.

3.8 Applying the criterion in paragraph 3.6 led to the choice of the 18 case studies detailed in Table 1.

---

[9] In practice, the need for the studies to involve remedies sufficiently far in the past for a meaningful assessment of success meant that the case studies chosen in the first phase of research were all remedies put in place under the FTA, rather than under the Enterprise Act. Although the majority of observations from the first phase of research are relevant to the current regime, the change in the approach to implementation of remedies (when responsibility was passed from DGFT to the CC and subsequently the CMA) means that some observations are no longer relevant.

Table 1: Summary of 18 case studies

Inquiry	Nature of adverse finding				Type of remedy							
	Horizontal	Vertical	Unilateral	Coordinated	Behavioural	Divestiture	Partial divestiture	Recommend-ations	Phase 1 divestment	Price control	Intellectual property	Prohibition
Alanod	✓	✓	✓		✓					✓		
Sibelco	✓		✓			✓						
Coloplast	✓		✓		✓					✓		
Centrica		✓	✓		✓							
Emap	✓		✓			✓						
Somerfield	✓		✓			✓						
Stericycle	✓		✓			✓		✓				
Noble	✓		✓			✓						
Arqiva	✓		✓		✓							
Nufam	✓		✓								✓	
Stagecoach	✓		✓			✓						
Unilever	✓		✓						✓			
Global	✓		✓				✓					
Draeger	✓		✓					✓		✓		
Rank			✓	✓		✓						✓
Müller	✓		✓						✓			
Reckitt Benckiser	✓		✓				✓				✓	
ICAP	✓								✓		✓	

3.9 From the information contained in Table 1, it is possible to identify a number of characteristics in the sample reviewed:

(a) Divestiture – full or partial – represent the clear majority of remedies in our sample. We have over-represented other types of remedy – eg behavioural – in our sample, relative to the CMA's decisional practice, to capture a greater diversity of interventions in this research;

(b) Out of 18 cases reviewed to date, 16 cases involved horizontal theories of harm with the most frequently used remedy being divestiture;

(c) The two cases that involved vertical theories of harm were remedied by behavioural interventions;

(d) Remedies to control outcomes are more common earlier in the sample, partly because of the weaker approach to interim measures at that time, made it much harder to put in place effective structural remedies;

(e) More recently we have evaluated cases where remedies were implemented in Phase 1, through the CMA accepting UiLs; and

(f) Only two of the cases involved making recommendations, with these being the only two mergers since 2003 where recommendations have been made. These recommendations were made as part of a package of measures in these cases.

4. Results from our most recent case studies

4.1 In 2018/19 the CMA evaluated three previous merger inquiries that had led to relatively complex remedies being implemented. As noted above, merger remedies usually involve straightforward structural remedies in the form of prohibition or divestiture of a standalone business or business unit. Occasionally, the circumstances of particular cases have led to other approaches being taken.

4.2 The three evaluations carried out in 2018/19 all involved hybrid "quasi-structural" remedies based on more complex divestitures. In common with a more standard divestiture, the aim of each remedy was to lead to the creation of a new competitor in the respective markets, to replace the competitive constraint lost because of the merger. However, in each of these cases the divestiture package did not constitute a stand-alone business; rather the acquirer purchased assets or contractual rights, such as a supply agreement, rights to use intellectual property, or employment contracts with key personnel. The greater complexity of these remedies introduced additional risks for the CMA to manage during the implementation phase, as well as giving rise to a behavioural as well as a structural element to the remedy.

4.3 The three cases were:

- **Müller / Dairy Crest**[10] (2015), where the CMA accepted Undertakings in Lieu (UILs) at Phase 1. This removed the need for an in-depth Phase 2 investigation as the remedy was judged to have addressed the competition concerns the CMA had identified at Phase 1. This remedy, which centred around the acquisition of a medium-term supply agreement, was chosen for an evaluation because it was an unusual remedy package to have progressed, particularly at Phase 1. Remedies need to provide a clear-cut solution to any competition concerns and it is not usually possible to identify suitable remedies other than straightforward divestures within the constraints of a Phase 1 timetable;

- **Reckitt Benckiser/ K-Y**[11] (2015), where remedies were imposed following an in-depth Phase 2 investigation. This remedy was chosen for an evaluation as it was complex (the remedy involved the licensing of the intellectual property rights of the K-Y brand in the UK to a nominated purchaser for a fixed period), and raised issues relating to the

[10] Müller - Dairy Crest Case Page
[11] K-Y / Reckitt Benckiser Case Page

implementation of remedies to safeguard UK consumers' interests in mergers cleared in most other jurisdictions;[12] and

- **ICAP / Tullett Prebon**[13] (2016), where the CMA accepted UILs at Phase 1. This remedy was chosen for an evaluation as it effectively involved the transfer of employees as the main assets of a business (individuals who were part of the brokering business) rather than the transfer of assets and/or business as is typical in most mergers. Further, only part of the brokering business was divested.

4.4 To undertake these evaluations, we interviewed the merger parties and relevant third parties, including suppliers and competitors. We also interviewed the Monitoring Trustee (MT) where one was appointed during the CMA's investigation and reviewed their compliance monitoring. We also consulted members of the CMA case teams who were involved in the merger investigations. We supported the information provided by these parties with desk research, including relevant public information on market developments following the mergers. The case studies are available at Appendix 1.

4.5 The Müller / Dairy Crest merger remedy involved a requirement on the merger parties to enter into a 5-year supply agreement, extendable by up to 3 years, to allow a new competitor to supply milk to supermarkets in the regions where competition concerns arising from the merger were identified. This remedy appears to have been moderately effective to date, insofar as the new supplier has won some such contracts and its supply needs to fulfil these contracts have grown in the first 3 years of the contract period. However, the remedy was complex to design and implement and its success was facilitated by the early and active engagement of the merger parties and the appointed MT being able to agree the detail of the contract terms promptly. Without this, and additional resource input compared to a standard UiL, such a remedy would not have been possible. Moreover, at this stage, it is too soon to tell whether the remedy will result in an effective longer-term competitor in the relevant markets, or whether the new supplier will turn out to be a potentially profitable but structurally weak competitor imposing only a limited constraint on the merged entity. As such, this remedy retains a significant element of ongoing risk in terms of longer-term outcomes for consumers, relative to a more standard structural remedy, such as prohibition or divestiture of a stand-alone business unit.

---

[12] New Zealand was the only other country that did not approve the K-Y / Reckitt Benckiser merger without a remedy.

[13] ICAP / Tullett Prebon Case Page

4.6 The Reckitt Benckiser / K-Y merger remedy was based on a licensing agreement for a new competitor to use the K-Y brand and formulation for personal lubricants over an 8-year period, in the UK. To date there are some positive signs that the remedy has been reasonably effective to date, insofar as K-Y sales have been maintained by the new supplier. However, the long-term success is uncertain as the new competitor is yet to commence the re-branding of the product which would be necessary if it is to be a strong competitor once the licensing period is concluded. As such, this remedy retains a significant element of ongoing risk in terms of longer-term outcomes for consumers, relative to a more standard structural remedy such as prohibition, or divestiture of a stand-alone business unit.

4.7 The ICAP / Tullett Prebon merger led to competition concerns for oil-based brokering services. The remedy led to the partial divestiture of these operations to a new competitor by transferring the relevant brokers and their customers to a different brokering business. The individual brokers were the main assets of the divested business and the success of the remedy required their co-operation to transfer to a new employer, and the incentives put in place to ensure this cooperation. This is an unusual and potentially problematic remedy. In this case the remedy appears to have been effective so far mainly due to the careful oversight by the CMA and the associated commitment of the parties and the MT to progress the partial divestiture smoothly and the willingness of the individual brokers to change to a new employer. The risk that the transfer of brokers to a new entity would not be smooth needed careful management. It remains to be seen, however, whether the divestiture will result in a strong longer-term competitor in the oil-based brokering sector.

4.8 The broad learning point from these three evaluations is that these types of remedy have significantly higher risks than standard structural remedies, such as prohibition or divestiture of a stand-alone business unit. In these three cases, the CMA was able to contain these risks during the remedy implementation period through active management and the use of third parties. However, even with the efforts that have been made, the longer-term impact of the remedies remains uncertain, suggesting that there is a significant element of ongoing risk to consumer outcomes

5. Learning points

5.1 For each of the 18 case studies conducted to date, a detailed account of the main points of the relevant inquiry, the key factors in the choice of remedy, what happened after the final report and an assessment of the effectiveness of the remedies is presented in Appendix 5. This section takes the results of those studies and summarises and groups thematically the key learning points as follows:

(a) Interim measures;

(b) Choice and design of final remedies;[14]

(i) Divestitures;

(ii) Behavioural remedies;

(iii) Intellectual property rights and licensing;[15] and

(iv) Recommendations.

Interim measures

5.2 The CMA has powers to put in place interim measures to prevent 'pre-emptive' action[16] during the course of an inquiry.[17] Such interim measures are aimed at preserving the scope for remedial action in the event of an adverse finding and typically involve maintaining the separate integrity of the two merging businesses.

5.3 Lessons have been generated specifically in relation to:

(a) Hold separate arrangements and unwinding post-merger integration;

(b) The appointment and use of monitoring trustees; and

(c) The appointment and use of hold separate managers (HSMs).

---

[14] We have considered learning points according to the remedy categories set out in the 'remedies universe' in CMA87, Figure 1.
[15] These can be a formal of structural and/or behavioural remedy.
[16] Pre-emptive action is action which might prejudice the outcome of the reference or impede the CMA from later taking remedial action if it reaches an SLC decision.
[17] At Phase 1: section 72 of the Act. At Phase 2: sections 80 and 81 of the Act.

Hold separate arrangements and unwinding post-merger integration

5.4 The case studies have demonstrated both the costs of putting in place inadequate interim measures and the benefits of putting in place effective interim measures. They have also illustrated how the UK competition agencies have learnt over time how to put in place stronger interim measures so as to allow effective remedies to be implemented if needed later on.

5.5 Some of the early cases in our sample amply showed the problems with taking too little action on interim measures. A key risk identified from those cases is that firms may be able to run the business in such a way as to undermine the effectiveness of a divestiture package. This highlights the importance of putting measures in place to protect against this as well as the ensuring that compliance with such measures is actively monitored and where breaches are uncovered, there is an active enforcement programme.

5.6 The *Alanod* case study showed that, 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 by making it extremely difficult to create a separable, viable divestiture package from the merged entity.

5.7 Since the successive reforms of the Enterprise Act and ERRA, the CMA has learnt and is still learning how best to manage interim measures on completed mergers. In contrast to *Alanod*, the *Emap* case study showed the benefit of putting in place interim ‘hold separate’ measures, which preserved the scope for what proved to be an effective divestment remedy.

5.8 The *Stericycle, Noble* and *Stagecoach* case studies also illustrated the benefit of introducing robust interim measures and of getting these in place quickly. In these cases, interim measures halted, and where necessary reversed the integration of the two merging businesses. These case studies showed that active monitoring of the interim measures through to end of the divestiture process was important in ensuring the effectiveness of the final remedies.

5.9 The *Noble* case showed that to ensure that commercially sensitive information about the acquired firm is not gained by a competitor it is essential to ring-fence financial information. Any flow of information should be no more than is absolutely necessary and limited to as few individuals as possible. Although this can create awkwardness for the acquirer this is a risk that the acquirer takes on when completing the transaction.

5.10 The *Müller* case highlighted the importance of information firewalls and that care needs to be taken in the design of such firewalls to ensure they do not have an unduly detrimental impact on the effective operation of the business.

5.11 Even though the CMA is prepared to take a tough stance on unwinding integration or holding entities separate, the *Arqiva* case illustrated the need to consider carefully well-reasoned and clearly evidenced requests for a derogation from the interim measures. In some circumstances, certain forms of interaction or information flow between the merging parties may be both necessary and appropriate. For example, in *Arqiva* essential meetings and communications between the two parties in relation to the digital switchover (DSO) process were supervised by a monitoring trustee – this allowed the time-sensitive DSO process to continue without adversely affecting the available remedy choices.

Monitoring Trustees

5.12 Monitoring trustees are now routinely required by the CMA in completed mergers, as shown in the *Stericycle*, *Arqiva*, *Nufarm, Noble, Global, Müller* and *ICAP* cases. The monitoring trustees appointed are usually a firm of accountants with a breadth of financial skills and business experience. The *Draeger* case showed that the team acting as monitoring trustee should be suitably experienced and drawn from a relevant area of practice in the firm. The skills required will depend on the circumstances of the case but are likely to cover a deep understanding of corporate finance and, in complex hold separate cases, corporate restructuring skills will be beneficial.[18]

5.13 The *Arqiva* case illustrated that the skills required may be case-specific—for example, needing a ‘technical monitor’. The *Noble* case showed that 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, appointing a sole practitioner carries material risks of not having sufficient back-up, or versatility to deal with the full range of issues that may arise.

5.14 The *Stericycle*, *Stagecoach* and *Global* cases showed that it is important for the CMA to work closely with the monitoring trustee during any divestiture process and to ensure that they in turn are engaged with the parties and their advisers. The CMA should be aware of any friction developing as the process proceeds and ensure there is clarity between all parties.

5.15 The *Stagecoach* case showed the importance of the relationship between any hold separate manager and the monitoring trustee. Having a good working relationship and clear communication between these two parties can help

---

[18] See also *Monitoring Compliance with Merger Remedies—The Role of the Monitoring Trustee*, Brueckner and Hoehn, 2010.

address any hold separate risks and ensure that divestiture remedies remain viable.

5.16 Monitoring trustees were also a feature in two of the three most recent evaluations, further illustrating the variety of issues that may arise:

(a) The *Müller* case demonstrated the need for rigorous, ongoing compliance monitoring which can be undertaken by a MT and which would ideally be designed such that the role and associated costs decline over time.

(b) The *ICAP* case required the MT to carry out functions additional to those in many other cases. Specifically, the MT undertook an active role in overseeing contractual negotiations to ensure the successful transfer of staff to the purchaser of the divestiture package.

Hold Separate Managers

5.17 The CMA and its predecessors required appointment of an external HSM in three of the cases evaluated as part of this programme (*Stericycle, Noble* and *Stagecoach*). In addition, in the *Global* case the hold separate management function was conducted by two Global employees (at the time) who were appointed as independent managers of the divested operations and kept the divested and retained operations separate. This process was overseen by the monitoring trustee to help ensure these employees were sufficiently insulated from Global management and decision making.

5.18 The introduction of an HSM in these cases was critical in maintaining the viability of the acquired businesses. When selecting an HSM, the CMA should conduct full interviews with them to ensure they have the relevant skills and competence to take on the role. Relevant sector experience is usually helpful but not always essential – for example, in *Stagecoach*, there was sufficient bus industry experience remaining within the acquired business, but a clear need for independent strategic and financial input, which the HSM from outside the sector was able to provide.

5.19 It is not unheard of for the HSM to take an interest in running or even owning the business they have managed on an interim basis, over the longer term. The *Noble* case demonstrated that, whilst it is not necessary to exclude an HSM from bidding for the business in the event a divestiture is required, it is necessary to put in place measures to ensure that the conduct of the HSM is appropriate if they do become a bidder. This requires additional scrutiny from the monitoring trustee (for example, when attending site visits and management presentations) and is no different to the measures required when a management buyout is being pitched against other bids.

Choice and design of final remedies

Divestitures

5.20 Twelve of the case studies have involved divestitures (or partial divestitures).[19] The *Coloplast* case study also involved an attempted divestiture. The case studies demonstrated the importance of a full assessment and active management of the risks the CMA sets out in its merger remedies guidelines – composition risks, purchaser risks and asset risks.

Composition risk

5.21 Composition risks are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.[20]

5.22 Key learnings from the case studies in relation to composition risks include:

(a) The need to be clear in the final report about all those elements that should be included in the divestiture package. This is particularly the case where a whole business is not being divested;

(b) The importance of considering how the construction of the divestiture package can impact the type and number of potential purchasers. For example, the inclusion of a brand licencing agreement in the *Global* case provided smaller-scale potential acquirers with additional assurance that they would be able to generate sufficient national sales through the use of the Global brand. However, the *Global* case also highlighted the opposite potential effect, where larger potential acquirers could be deterred from the purchasing process if they consider they will not acquire sufficient control and independence from the seller.

(c) Where there is doubt about the viability of a proposed divestiture package, it may be appropriate for a fall-back remedy to be proposed. This fall-back remedy will generally be more onerous than the initial

[19] *Sibelco, Emap, Stericycle, Somerfield, Noble, Stagecoach, Unilever, Rank, Global, Muller, Reckitt Benckiser* and *ICAP*

[20] See CC87, paragraph 5.3.

remedy otherwise it may create incentives for the parties to delay or undermine the implementation of the initial remedy.

Purchaser risks

5.23 Purchaser risks are risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser.[21] Case studies have highlighted the need for a thorough purchaser suitability assessment. This should be sufficiently detailed and robust to ensure that purchasers meet the CMA's criteria and must be effectively communicated to the bidder.

5.24 In terms of the purchaser suitability assessments the main learning points that have arisen from the evaluations have been in relation to:

(a) **Financial capability and expertise**: Purchaser assessments should include some form of 'stress test' of the financial viability of the bid, and the divestiture package, to ensure it is capable of withstanding changing economic and competitive conditions. This can also involve an assessment of the effects of potential regulatory changes on the business

(b) **Commitment to the market**: 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. In doing so it is important for the CMA 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.

(c) **Managing the purchaser approval process**: It is important to consider the interests of the management of a business to be divested in the design of the divestiture remedy. Were the management of the business being divested to be opposed to the divestiture or to acquisition by particular purchasers, this would increase the risk of an ineffective sale process. In such circumstances it is likely to be appropriate to use a MT to monitor the divestiture process closely. Experience also demonstrates that there are benefits from evaluating and approving several potential purchasers. Although this involves more work on the part of the competition authority, it increases the chances of successful and timely completion.

---

[21] See CC87, paragraph 5.3.

Asset risks

5.25 Asset risks are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example through loss of customers or key members of staff.[22] An effective divestiture process will protect the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale.[23] Our case studies have highlighted a number of lessons in relation to the oversight of the divestiture process and the appointment and use of a divestiture trustee:

(a) **Oversight of the divestiture process**: Careful oversight of the divestiture process is required to ensure that the divestitures are completed within the required timescales. The case studies include examples where divestitures were completed well within the initial divestiture periods[24] whereas, in contrast in others, divestitures significantly exceeded the initial divestiture periods and required the appointment of divestiture trustees.[25] The CMA needs to make sure that parties are progressing in line with clearly defined timetables and that if these milestones are missed the parties are fully aware that the prospect of the appointment of divestiture trustee is heightened.

Litigation, for example an appeal of the CMA's merger final report, can potentially delay the completion of a required divestiture. The risks to undue delay can be mitigated by running the divestiture process (short of completion) in parallel with any litigation process. This approach helps ensure that divestitures can be completed in a timely manner following conclusion of any litigation.

(b) **Divestiture trustee**: It is important to retain the option of appointing divestiture trustees to sell the divestiture package at no minimum price. Where there is an inadequate incentive on parties to manage an effective sale process themselves, the option of appointing a divestiture trustee can provide the sole means of implementing the remedy. However, even then it may be that the whole of a divestiture package may not be able to be sold. This was identified in the *Somerfield* case study, which showed that certain stores could not be sold even when a divestiture trustee was appointed with the option of selling at no minimum price. It highlighted that

[22] Incentives to retain staff typically include bonuses for remaining in place until final determination of the CC's inquiry.
[23] See CC87, paragraph 5.3.
[24] Eg *Stericycle Emap, Unilever* and *Rank.*
[25] Eg *Noble* and *Somerfield.*

particular stores needed to fit with potential purchasers' business plans in order for them to be attractive even at no minimum price.

It is important 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 immediately).[26] It is also important to establish the correct working relationship between the competition authorities, the divesting party and the trustee. It should be made clear from the outset to trustees that although they are remunerated by the parties, they are working for the competition authorities. A strong working relationship between the monitoring trustee and the divestiture trustee is also important.

Behavioural remedies

5.26 The case studies with behavioural remedies have covered both enabling measures – such as measures to facilitate new entry – and measures that control outcomes such as price controls. They showed that behavioural remedies are more complex and carry significantly higher risks than structural remedies and generally require more work both in upfront design and implementation and especially ongoing monitoring, enforcement and review.

5.27 The circumstances in which behavioural remedies are the right outcome of merger control are rare. However, there may on some occasions be no alternative and the case studies show that, if sufficient care is taken over the design and implementation of behavioural remedies and if active and informed monitoring arrangements are put in place, behavioural remedies can be at least partially effective for a limited period of time in narrowly defined circumstances. Where there is no expectation that the need for the remedy is itself in some way time-limited, the case for behavioural remedies is weaker still, as there is a greater likelihood that the remedy will either become ineffective or start to distort outcomes.

5.28 The case studies demonstrated the need to pay attention to the risks in using behavioural remedies which the CMA sets out in its merger remedies guidelines – specification risks, circumvention risks, distortion risks and monitoring and enforcement risks.

---

[26] In the European Commission's template divestiture commitments, it requires that parties submit a list of one or more proposed divestiture trustees no later than one month before the end of the first divestiture period (see clause 29). http://ec.europa.eu/competition/mergers/legislation/best_practice_commitments_trustee_en.pdf

Specification risks

5.29 Specification risks are risks that arise if the form of conduct required to address the SLC or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance. This has a number of implications, as illustrated in our case studies:

(a) Behavioural measures may have a somewhat greater chance of being effective if the pace of change in the industry concerned is relatively slow and predictable. The importance of this was highlighted in *Arqiva*;

(b) The likelihood of misspecification grows the longer a behavioural remedy is in place. If the remedy has not tackled the underlying cause of the SLC, this means the CMA may be faced with a choice of living with an ineffective remedy, with risks for consumers, or conducting a complex and time-consuming review of the remedy at a later date. This creates additional future risks for consumers and taxpayers; and

(c) As with divestiture remedies, it may be important in some circumstances for the CMA to have a credible contingency remedy option. The *Centrica*, *Arqiva* and *Nufarm* case studies showed that the existence of a credible contingency remedy option is important in ensuring that parties will give effect to a proposed remedy. Such contingency options might include enforcement of the remedy by order or the implementation of a 'back-up remedy' that is more intrusive than the initial remedy (such as a divestiture).

Circumvention risks

5.30 As behavioural remedies generally do not deal with the source of an SLC, it is possible that other adverse forms of behaviour may arise if particular forms of behaviour are restricted. Examples of such circumvention risks include:

(a) In markets where bidding is involved there is a risk from imposing a price cap that revealing the level of the cap will result in bids coalescing around that level;

(b) Where there are other products related to the price-controlled product, it will be necessary to take account of the effect of the control on those related products; and

(c) With access remedies it is important to develop a clear understanding of the regulatory framework to ensure that, as a result of the remedy, the suppliers have all the necessary approvals to supply UK customers.

Distortion risks

5.31 Distortion risks are risks that behavioural remedies may create market distortions that reduce the effectiveness of these measures and/or increase their effective costs. For example, 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 and/or deter new entry. This risk was highlighted in our review of the FirstGroup / SBH remedies, completed in April 2016.[27]

Monitoring and enforcement risks

5.32 Even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement. Our case studies have highlighted three main lessons for monitoring and enforcement:

(a) The relative benefit in terms of compliance culture and enforcement mechanisms of behavioural remedies being implemented in a regulated environment;

(b) The strong benefit of involving either the industry regulator or a third-party monitor to ensure compliance; and

(c) Even in the best-case scenario, the need to keep remedies under review and fit-for-purpose involves scope for substantial ongoing costs for the CMA in terms of monitoring, enforcing and reviewing behavioural measures. This contrasts with structural remedies, where the CMA's input is focused on the implementation period, after which competition may resume as normal.

Intellectual property rights and licensing

5.33 Intellectual property (IP) right and licensing remedies can combined elements of both structural and behavioural remedies. For example, the *Unilever* case study required the divestment of soap brands. For the Cidal and Wrights brands, this was achieved by outsourcing the manufacture of the brands. For the Simple brand this was achieved by a perpetual and royalty-free licence for the Simple brand bar soaps. The R*eckitt Benckiser* case study required the

[27] FirstGroup Undertakings Review, CMA, 2016.

divestiture of the K-Y brand and related IP rights for a period of eight years and the right to use the K-Y formula in perpetuity.

5.34 While such outsourcing and licensing is common in certain commercial sectors, these were unusual remedies in a merger control context. The general view from the *Unilever* case study is that the remedies have been effective. For the *Reckitt Benckiser* case study initial indications are positive, although the acquirer has yet to re-brand the K-Y formulation and there remains a risk that after the expiry of the eight-year period the additional competitor envisaged by the remedy will not materialise.

5.35 The *Global* case highlights the potential benefits of brand-licencing alongside a divestiture, where the circumstances of the case support it. The use of the brand licencing agreement provided smaller-scale potential acquirers with added assurance they would be able to generate a sufficient level of national advertising sales (a market in which no SLC had been found).

5.36 However, the *Global* case study also highlighted that the use of such an agreement is not always appropriate and could introduce risks. These may include

- *(a)* Deterring larger potential acquirers from engaging in the CMA's divestiture process if they have concerns about engaging in a licencing agreement with a competitor and/or
- *(b)* The purchaser having an insufficient degree of independence following remedy implementation because of the ongoing need to cooperate with the licence owner.

Recommendations

5.37 Recommendations have been made in only two mergers since 2003 and both of these cases (*Draeger* and *Stericycle*) have been evaluated as part of this study.

5.38 Neither experience was satisfactory in terms of effectiveness. They highlighted that in the very rare merger cases where the CMA recommends action to be taken by others, an element of ongoing oversight by the CMA is likely be needed in order that recommendations can be nurtured and followed through, in order to have a continuing positive effect. In doing so, the CMA would have to rely on advocacy, rather than statutory powers, to encourage pursuit of any recommendations.

6. Comparison with other relevant work

6.1 In this final section we place our merger remedy evaluation work in the context of two other sources of evidence about merger remedy outcomes:

(a) The CMA's remedy review programme initiated in 2015; and

(b) Remedy evaluations conducted by other leading competition authorities.

CMA remedy review programme

6.2 In addition to the programme of merger remedy evaluations set out in this document, the CMA has undertaken a programme of proactive remedy reviews since 2015 to examine existing remedies over 10 years old. This is another important part of our end to end merger remedy process. Our programme allows us to remove measures that are no longer necessary or those that may now be restricting or distorting competition. Removing such remedies both lightens the administrative burden on affected businesses and enables the CMA to focus its monitoring and enforcement activities on those remedies that are of the greatest value to consumers and markets.

6.3 As part of this work, in April 2015, the CMA launched reviews of 71 structural merger remedies that had been put in place before 2005. In June and August 2016, the CMA launched further reviews of merger remedies put in place before 1 January 2006. The CMA has also undertaken a number of reviews of merger remedies at the request of affected parties.

6.4 The CMA has now reviewed 99 merger remedies and these reviews have subsequently resulted in the removal of 72 remedies. This represents almost 75% of remedies that we have reviewed to date.

6.5 A number of the reviews of remedies have affected those remedies that were the subject of previous evaluation case studies. These were:

- *Sibelco*: The undertakings required Sibelco to divest the business and assets of Fife Silica Sand Limited and Fife Resources Limited. Sibelco was also required not to acquire or hold any interest in the Fife companies. The CMA reviewed the undertakings, but did not find or receive evidence of changes of circumstance relevant to the undertakings and decided in February 2016 to retain them.

- *Colopast*: The undertakings imposed a price control. The review concluded in January 2017 that the undertakings had lapsed.

- *Centrica*: The undertakings put various third-party supply obligations on Centrica. The CMA reviewed the undertakings in response to a request from Centrica Storage Limited (CSL). The CMA varied the undertakings in May 2016, introducing an adjustment mechanism which provided for Ofgem, the sector regulator, to vary the capacity obligations in the undertakings, where the need is demonstrated by CSL. The CMA undertook a further review of the undertakings in December 2017 following an announcement by Centrica that it intended to close the gas storage facility due to the physical deterioration of the facility which had come to the end of its design life. The CMA released the undertakings as they were no longer appropriate.

- *Draeger*: The undertakings put in place various supply commitments and price controls. The CMA concluded in January 2017 that the undertakings had lapsed.

6.6 Most cases that have been included in the CMA's programme of remedy reviews have not been subject to a remedy evaluation. One example is the Ivax International GmbH / 3M Company merger from 2003 (*Ivax*). The OFT was concerned that the merger would result in a potential loss of competition in the supply of two specific asthma relief products. To address the potential competition concerns, the OFT accepted UiLs from Ivax in 2004. These undertakings imposed price caps on these two asthma relief treatments.

6.7 The CMA reviewed the Ivax undertakings, but it did not find a change of circumstance relevant to the undertakings and decided in March 2017 to retain the undertakings. This case, where an enduring price control is in place, is a further example of why structural remedies should be preferred to price control mechanisms to remedy the loss of competition arising from anticompetitive mergers, as we set out in our merger remedies guidelines.[28]

6.8 These remedy reviews highlight some further lessons to be considered when designing remedies, including:

(a) **The ongoing costs of behavioural remedies and the importance of considering the inclusion of a sunset provision**: Putting in place time-limited remedies can help ensure that measures that may restrict or distort competition are removed automatically, without the need for a remedy review. In the *Coloplast* and *Draeger* examples, the measures were found to have lapsed and so were removed from the register. In

[28] CMA87, paragraph 3.46.

contrast, neither the *Sibelco,*[29] nor the *Ivax* undertakings included such a provision and the reviews did not find a change of circumstance. Given the statutory framework, this meant that the remedies in these cases could not be varied or released by the CMA under the remedy review procedure. However, a sunset clause is only appropriate for a behavioural remedy in merger control if it is clear that the need for the remedy will disappear over a specific period of time or following an anticipated and well-defined event.

(b) **Considering remedies in regulated sectors**: The *Centrica* review in 2016 highlighted the importance of the role of the sector regulator, Ofgem. In that review the CMA was able to vary the undertakings so that Ofgem had a greater role in the operation of the undertakings, which allowed the benefits of its sector expertise to be realised. Where the CMA is imposing remedies in sectors where there is a sector regulator, it should carefully consider how the regulator can take on more ownership of the remedy, how the remedy can transition to the regulator over time, and how the benefits of the expertise of the sector regulator can be best realised. This can be particularly important where price control remedies are introduced. In such cases the sector regulator will likely be better placed to design measures and monitor compliance.

Remedies research by other agencies

6.9 Other competition authorities have undertaken studies into the effectiveness of past merger remedies but relatively few have been published.[30] Those that have been include:

(a) 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.

(b) A study in 2005 by DG Comp of the European Commission, which looked at the effectiveness of a large sample of merger remedies.

[29] *Sibelco* is a structural remedy case but includes an enduring no reacquisition clause.

[30] 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.

(c) A study published in 2011 by the Canadian Competition Bureau (CCB), which looked at the effectiveness of both structural and behavioural remedies.

6.10 Appendix 3 provides a summary of each of these studies.

6.11 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.

6.12 Further, an important difference between the US/Canadian and EU systems is that DG Comp can only consider remedy proposals offered by the parties. It is able 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.

6.13 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:

(a) On interim measures, examples in earlier case studies where firms pressed ahead with integration to the detriment of a divestiture package and where the divesting party degraded the asset package closely echo the findings of the DG Comp study on interim preservation measures. The approaches used in more recent cases have shown how such risks have been mitigated.

(b) On divestiture, the CMA’s results 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, cases in the UK supports the warning from the FTC studies that divesting parties will look for purchasers who will not be strong competitors.

6.14 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.

6.15 The CMA case studies in relation to behavioural remedies differ somewhat from those of the DG Comp study.[31] 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)[32] and found that such remedies were more likely to be ineffective or only partially effective. This contrasts with the results of the CMA's case studies which suggest that some of behavioural remedies examined have been reasonably effective, at least for a short period, due to the specific circumstances in which they have been implemented and the close attention to detail in remedy design, implementation and monitoring.

6.16 The results of all studies are consistent in the finding that well-designed and implemented structural remedies – whether prohibition or divestiture of a standalone business – are generally superior in terms of effectiveness to the other forms of merger remedy. This finding is important within the context of the overall reassessment of possible merger underenforcement by agencies globally. Looking back at the cases reviewed by the CMA and other agencies, it appears that on some occasions, the agencies working within their statutory frameworks may have underestimated the risk of possible consumer harm, if the remedies did not fully work out as planned. On reflection this does not seem the right balance for consumers.

[31] And the CCB study did not draw firm conclusions given the sample size.
[32] Such as the *Alanod* and *Coloplast* price controls

Appendix 1: 2019 merger remedy evaluation case studies

1. This appendix presents the main factual findings of the research for the three most recent case studies:

- Annex 1: Müller / Dairy Crest.
- Annex 2: Reckitt Benckiser / K-Y.
- Annex 3: ICAP / Tullett Prebon.

Annex 1: Müller / Dairy Crest case study

The parties

1. In 2015, Dairy Crest completed the sale of its Dairies business to Müller, enabling it to reposition itself as a branded company for milk and food products. Dairy Crest's brands now include Cathedral City cheese, Utterly Butterly and Clover spreads, and Frylight oil sprays.

2. In the UK, Müller develops, manufactures and markets a wide range of branded and private label dairy products made with milk from more than 1,650 British farmers. Müller is Britain's largest producer of branded and private label fresh milk, cream, butter and ingredients products, with a network of dairies and depots servicing customers throughout the country. It has other divisions, such as its yoghurts business, though these were not the subject of the CMA's merger investigation.

3. Medina Dairy, who became involved with the remedy, is an independent national supplier of liquid milk, dairy and bakery products to UK retailers, wholesalers and food service operators. It now supplies around 4 million litres of milk from 3 dairies, including the Severnside dairy that is relevant to this merger, due to its location in the region where milk supply competition concerns were identified. It sources milk from just over 150 dairy farmers and is around a tenth of the size of the Müller operation.

The merger situation

4. In November 2014, Müller, the UK trading company for the Müller UK & Ireland Group LLP, announced the proposed acquisition of the liquid milk, packaged cream, flavoured milk and bulk commodity ingredient business of Dairy Crest. The assets acquired by Müller included Dairy Crest's dairies at Sevenside (near Stroud in Gloucestershire), Chadwell Heath (near Dagenham in Essex), Foston (near Derby in the East Midlands) and Hanworth (near Sunbury in Surrey), and 72 Dairy Crest depots, of which 65 were operational.

5. On 12 June 2015, the CMA found that it was or may have been the case that the merger may be expected to result in a substantial lessening of competition (SLC) in the supply of fresh milk to national multiples[33] in the catchment area of the Severnside dairy. The catchment area of this dairy included parts of the

[33] For its decision, the CMA defined 'national multiples' as comprising: Tesco, Asda, Sainsbury's, Morrisons, Co-op, Aldi, Lidl, Iceland, Waitrose and M&S. Whereas 'middle- ground' customers would include stores such as Spar and CostCutters.

Midlands, South England, South West England, West England and Wales. In its counterfactual the CMA found that, absent the merger, Dairy Crest was likely to have downsized to some degree. However, even in this scenario it would have continued to compete strongly in the Severnside dairy catchment area. Dairy Crest would still have had spare capacity at Severnside of (conservatively) 100 million litres of fresh milk per annum[34] (ml pa). Had the merger not progressed, it could otherwise have had the ability and incentive to compete to supply certain regional lots of national multiples in the Severnside dairy catchment area.

The remedy

6. The CMA accepted undertakings in lieu (UiLs) from the merger parties, which avoided a reference to a more in-depth Phase 2 investigation. The UILs were intended to remedy the SLC by replacing the competitive constraint provided by the smaller Dairy Crest that was anticipated in the counterfactual. The UILs were designed in such a way to enable an existing supplier of fresh milk in Great Britain to serve national multiples in the Severnside dairy catchment area.

7. Under the UILs, Müller was required to sell a toll processing arrangement option (TPAO) to a specified third party (the Nominated Purchaser). This agreement requires Müller to process up to 100 ml pa of fresh milk from the Severnside dairy to enable the Nominated Purchaser to supply this milk to national multiples. The TPAO is essentially a contractual obligation, that is, a formal arrangement, to supply its products so that the competitor can compete with Müller and others to win new contracts with large retailers. The TPAO ensures Müller makes fresh milk supplies available if required by the Nominated Purchaser for it to compete to supply national multiples.

8. The TPAO had an initial term of 5 years, plus the option to fulfil any ongoing national multiple contracts that were in place at the end of the initial term for an additional period of up to 3 years (referred to as the ‘5 plus 3’ year duration of the TPAO). Under such circumstances, the overall term of the TPAO would be 8 years. The length of the contract extension, available as an option to the Nominated Purchaser of the milk products from Müller, is dependent on the length of contracts that the Nominated Purchaser can secure with national multiples. For example, if the Nominated Purchaser secured a 2-year contract in year 4 of the TPAO, the TPAO would be extended by just 1 year (ie until the end of the contract), rather than the full 3 years potentially available. The

[34] 100 ml pa of milk is equivalent to around 3,400 full tankers of milk a year, ie around 10 tankers per day.

contracts to be fulfilled must be with national multiple customers (ie major supermarkets) and not 'middle ground' customers, such as Spar or Costcutter stores.

9. The '5 plus 3' year duration of the TPAO was designed to ensure that the Nominated Purchaser would be able to bid for a substantial number of national multiple contracts over a 5-year period and would also be able to fulfil any contract it won during that period using the TPAO volumes. It was also designed to provide the Nominated Purchaser with a sufficient period to build relationships with national multiples by enhancing its credibility as a supplier, and to allow for the development of any processing capacity it would need to supply national multiples cost-effectively in the Severnside dairy catchment area by the end of the TPAO.

10. The price paid by the Nominated Purchaser for the TPAO consisted of two elements:

    (a) A fixed sum determined in an auction process with several potential purchasers participating, such that the Nominated Purchaser was incentivised to compete to win contracts, as the cost of acquiring the TPAO represented a sunk cost recoverable only by securing contracts; and

    (b) A toll processing fee, consisting of a per litre price for the fresh milk supplied, based on Dairy Crest's variable costs of operating its fresh milk processing facilities at the Severnside dairy. The toll fee is subject to an annual review by Müller and adjusted to reflect any actual increase (capped at RPIJ[35]) or decrease in the costs of processing fresh milk by Müller at the Severnside dairy. One of the roles of the MT, discussed below, is to audit this annual price adjustment calculation.

11. The UILs also included other obligations on Müller that were optional for the Nominated Purchaser, such as segregating milk if required by a customer; facilitating access for the Nominated Purchaser to purchase raw milk directly from farmers using best endeavours; arranging for the collection of raw milk and distribution of processed milk on commercial terms; and processing and packaging cream associated with the fresh milk volumes process under the TPAO on an at cost basis. There were further provisions to ensure that Müller did not disclose information acquired under the TPAO to its employees responsible for its own tenders for the supply of fresh milk to national

[35] Retail Price Index Jevons Method.

multiples, and to allow for the independent monitoring of Müller's compliance with the terms of the UILs through the appointment of a MT.

12. Müller proposed two credible potential Nominated Purchasers to the CMA for its approval. The CMA's purchaser approval process rigorously sought to confirm that the selected Nominated Purchaser would be building on its extensive existing experience of supplying fresh milk in Great Britain. The 'step up' for an approved purchaser would therefore be much less than for a new entrant supplying fresh milk or a party seeking to enter the market without the initial advantage of the TPAO.

13. The CMA, following the conclusion of its purchaser approval process, decided to approve one of the proposed Nominated Purchasers, Medina Dairy, as a suitable Nominated Purchaser of the TPAO.

14. The CMA described the UILs as akin to a "quasi-structural remedy". The right of the purchaser to use the output of the Severnside dairy was similar to a structural remedy such as a divestment of all or part of a business. However, this remedy also directly introduced a new competitor into the market. It also involved arrangements of a behavioural nature during the life of the TPAO that were intended to regulate the conduct of Müller in processing fresh milk for supply to the Nominated Purchaser.

Scope of the evaluation

15. The evaluation of this merger remedy has focussed on two questions:

(a) Has the remedy been effective in its aim of allowing the expansion of an existing player (Medina) into the market for supplying fresh milk to national multiples in the Severnside dairy catchment area?

(b) Was the remedy too complex for it to be appropriate as an UIL at Phase 1 other than in exceptional circumstances?

What happened after the CMA's decision?

16. Following the CMA's decision, the undertakings in lieu (UILs) were accepted on 19 October 2015. The formal agreement for milk supplies between Müller and Medina commenced on 1 February 2016, ie less than 4 months later which is a relatively prompt. The two parties worked together effectively to ensure there was a prompt start to the agreement, promoting competition in the market swiftly.

17. Medina Dairy now supplies milk to 2 national multiples - Iceland and Sainsbury's. It also supplied potted cream to another national multiple, Lidl, from July 2017 to May 2018, through the TPAO with Müller. Prior to the CMA's intervention, Medina only supplied middle ground customers, such as grocery chains and petrol stations.

18. To enable Medina to fulfil its new milk contracts with the 2 national multiples, Müller processed just over [✂] million litres of fresh milk to Medina in the first year of the remedy (2016-17) and this doubled to just over [✂] million litres in years two (2017-18) and three (2018-19).

Effectiveness of the remedy

19. As Medina has won new contracts with some national multiples and had not done so prior to the CMAs intervention, and is also increasing its volumes of supply of fresh milk within the agreement threshold (100 ml pa), the remedy can be seen as having had a positive impact on competition.

20. The general consensus of the stakeholders we interviewed was that the capacity of 100 ml pa that forms the basis of the remedy was an appropriate level. It has enabled Medina to increase its supply of fresh milk to its 3 new national multiple contracts and continue to have the potential to win further new business with others. Further, it has not been set at unrealistically high supply levels for Müller to reserve, should Medina need this.

21. In our discussions with the merger parties and the MT, we were told that the information firewalls that Müller was required to establish as part of the remedy are working effectively, ensuring that commercially sensitive information is protected. The parties, however, noted that there were potential risks that an overly restrictive firewall in conjunction with the short shelf life of milk could in certain circumstances restrict operational efficiency by, for example, limiting the resolution of operational problems to only a very small number of individuals that are permitted to know the commercial information of the contracts, thus restricting the supplier's ability to resolve operational problems quickly. Whilst this has not been the case here, it has been identified as a potential issue to be wary of in future cases.

22. The MT considered that it was very helpful that the CMA's pricing formula and contract obligations were sufficiently clear, to avoid disputes or uncertainty between Müller and Medina. The CMA case team shared this view, the clarity of the TPAO agreement was critical to ensuring that the remedy was capable of implementation within the time constraints of a Phase 1 investigation. Had it not been clear, it would have been difficult to agree the TPAO at Phase 1. The parties that we spoke to agreed that it was important that everyone involved

worked together effectively to agree the terms of the contract and that this was progressed swiftly.

23. This merger, and its associated UILs offered at Phase 1, had the potential to be considered too complex for approval at Phase 1, but the parties' determination to overcome such potential complexities against the backdrop of a potential reference was crucial. Our view is that this was a complex remedy and it was only effective due to the active engagement of those involved to identify and agree on the detail in the agreement. It imposed significant additional burdens on the CMA and would not be feasible other than in exceptional circumstances. Early discussion of remedies is essential should complex remedies in the form of UILs be required at Phase 1.

24. Both Nominated Purchasers which went through the CMA's purchaser approval process considered that the process was efficiently and fairly run. Neither potential purchaser informed us of any aspects of the process that could have been improved upon.

25. Several supermarket chains told us that they considered that competition for contracts relating to the supply of milk products was relatively weak in some regions, as there were often only two major suppliers, and that this had become even more apparent after Dairy Crest has ceased operations. Therefore, the supermarket chains considered that the CMA's intervention was beneficial for competition for contracts relating to the supply of milk products in the South West region and surrounding areas. Some supermarkets did however comment that CMA action should also have been taken to require Müller to supply other regions, with Scotland and the North West region being cited as areas in need of increased sources of supply. However, the supermarkets did acknowledge that their points reflected general observations that there was already limited competition in the market, rather than this arising as a direct result of this merger.

26. The parties we interviewed suggested that, in hindsight, the length of time for the MT's involvement could possibly have been restricted and that the MT may not need to have been involved for the entire length of the toll-processing agreement, which is potentially eight years. The parties noted that it may have been possible to establish alternative self-compliance processes, once the MT confirmed that Müller's firewalls and accounting systems were satisfactory. The MT's role and associated costs should reduce as the process matures.

Lessons learned

27. Having completed this evaluation of a potentially complex supply agreement, the main lessons learnt are as follows:

(a) There must be credible potential competitors identified that could fulfil the role of purchaser, to ensure that effective competition in the market is maintained or enhanced;

(b) It is important to ensure that the purchaser approval process progresses efficiently and that the respective parties demonstrate a determination to agree the contract negotiations swiftly;

(c) Any contract terms must be clearly specified by the CMA to avoid any pricing, contract length or supply obligation disputes; and

(d) A balance is needed in designing firewalls that restrict personnel access to contract information. There is a need to protect commercially sensitive data, but also it is necessary to allow sufficient access for operational efficiency to be maintained.

28. A remedy of this complexity is rarely accepted at Phase 1. It was only possible here due to the parties engaging effectively with the CMA and reaching an agreement that enabled a new competitor to enter without a long delay. Whilst this evaluation has demonstrated that in the short-term the remedy appears to have been moderately effective in this case, it is unlikely that this type of Phase 1 remedy would be agreed unless there were similarly exceptional circumstances. At this stage, it is too soon to tell whether the remedy will result in an effective longer-term competitor in the relevant markets, or whether the new supplier will turn out to be a potentially profitable but structurally weak competitor imposing a limited constraint on the merged entities. As such, this remedy retains a significant element of ongoing risk in terms of longer-term outcomes for consumers, relative to a more standard structural remedy, such as prohibition or divestiture of a stand-alone business unit.

Annex 2: Reckitt Benckiser / K-Y case study

The parties

1. Reckitt Benckiser (RB) is a global consumer goods company, headquartered in the UK, that manufactures and sells a range of health, hygiene, home, food, and pharmaceutical products with operations in 66 countries worldwide. RB is the owner of the Durex brand, which is applied to a range of condoms, sex toys and personal lubricants.[36]

2. K-Y is a personal lubricants brand rather than a company. The business of supplying personal lubricants under the K-Y brand was owned by McNeil-PPC, Inc., a subsidiary of Johnson & Johnson (J&J). J&J is the ultimate parent of a global group of consumer goods companies with more than 100 brands and with operations in more than 60 countries.

The transaction

3. On 10 March 2014, RB and agreed to purchase the rights, liabilities and assets relating to the K-Y brand globally. The transaction covered the acquisition of the K-Y brand and its formulation only, rather than it being a merger of RB and J&J.

4. The CMA conducted an in-depth Phase 2 investigation of the transaction and concluded that RB and J&J overlapped in the supply of personal lubricants, and that the transaction may be expected to result in an SLC[37] in the market for the supply of personal lubricants to the grocery retailers and national pharmacy chain market, in which the merger parties enjoyed a combined market share of 60% to 80%. The CMA found that shelf space for personal lubricants in grocery retailers and national pharmacy chains was limited and that these stores tended to stock only Durex and K-Y brands (and possibly their own-label brand). In contrast, online and specialist (adult) shops tended to stock a wider range of brands.

5. When the CMA commenced its investigation, this was a completed global transaction. Due to the global nature of the products, this was a multi-

---

[36] Personal lubricants are specialised lubricants used primarily during human sexual activity. They mainly fall within the sexual well-being (SWB) category of products, which includes condoms, personal lubricants, body and massage oils, sexual accessories and toys, pregnancy kits and pregnancy planning products. K-Y is a water-based lubricant and the longest established brand of personal lubricant.
[37] SLC: substantial lessoning of competition

jurisdictional merger and resulted in parallel competition investigations across multiple jurisdictions.

6. At the time of publication of the CMA's final report in August 2015, the global acquisition had completed, following regulatory clearance where required, in approximately 50 countries. Apart from the CMA, the Commerce Commission in New Zealand was the only other agency that had declined to approve the transaction.

The remedy

7. On 4 November 2015, the CMA accepted undertakings from both RB and J&J. Despite not agreeing with the CMA's conclusions and the need for any remedy, in order to obtain clearance for the deal, RB agreed to licence the rights to K-Y in the UK to a third party. The CMA decided that the licence remedy should include the following elements:

   (a) The licence for the K-Y brand and related IP rights should be exclusive, comprehensive and irrevocable. The licensee would be able to use the K-Y brand alone on existing K-Y branded personal lubricants and on a co-branded basis for K-Y branded and other personal lubricant products.

   (b) RB would not use the K-Y brand and related IP rights in the UK during the licence and blackout period.

   (c) The licence would be for a period of 8 years, of which at least the last year should be a blackout period.[38]

   (d) There would be a one-off payment with no annual fee for the licence.

   (e) RB should, at the licensee's request, supply K-Y at cost for a transitional period.

   (f) Existing supply contracts and all information and IP rights needed to carry on the business would be transferred.

   (g) The licensee would have the right to supply the NHS.

   (h) The licensee would be entitled to continue after the licence period to use the K-Y formula in perpetuity.

[38] 'Blackout period' means a period during which RB and the licensee are not permitted to use the K-Y brand, rights and IP rights for any sexual well-being products sold in the UK.

8. The CMA selected Thornton & Ross Ltd as the licensee. Thornton & Ross Ltd, a subsidiary of STADA Arzneimittel AG of Germany, manufactures and markets a range of consumer and prescription medical products, including Covonia cough medicines, Hedrin head lice treatment, the Care range of medicines, the Cetraben and Zero dermatological brands, Flexitol footcare products and the Fultium range of Vitamin D3 products. The purpose of the licensing agreement was to give a competitor (in this case, Thornton & Ross Ltd) an existing platform from which it could develop a new brand to rival the Durex range. Rights to the K-Y brand will revert to RB at the end of the licence period (although the right to use the K-Y formulation under whatever new brand name they establish will remain with Thornton & Ross Ltd).

Scope of the evaluation

9. The evaluation of this merger remedy has focussed on the following two areas:

   (a) Has the remedy been effective in the short term and how likely is it that the remedy will work over the longer term? To assess this, we considered:

      (i) Has Thornton & Ross Ltd maintained sales of K-Y and successfully set up its own K-Y production operation?

      (ii) Is there time for Thornton & Ross Ltd to develop a rival brand to challenge Durex and K-Y?

   (b) What light does this shed on quasi-structural remedies involving divestiture of IP rights and how can they be designed to ensure that they are effective?

What happened after the CMA's decision?

10. In June 2016, RB licensed the K-Y brand to Thornton and Ross Ltd for 8 years, in the UK. Thornton and Ross Ltd has to date maintained sales of the K-Y product while maintaining use of the K-Y brand. It is also supplying the NHS with the K-Y lubricant product. It has also been successful in establishing its own K-Y production capabilities, using the K-Y formula.

Effectiveness of the remedy

Short-term effectiveness

11. As well as all the disadvantages from not being able to market the K-Y brand in the UK, RB told us that it had also initially been concerned that it would

have had to sell the rights to the K-Y brand and its formula for a low price given that the requirement for the sale was made public because of the CMA's investigation into the merger. However, RB told us that it was able to work hard to secure an acceptable price from Thornton & Ross Ltd for the K-Y brand, given this was so well established.

12. Some retailers said that they were a little frustrated that not much change has occurred in the lubricants market – prices, product, branding, innovation have all been rather static since the CMA's intervention. Retailers identified some recent changes from RB with its Durex brand, with it being positioned as a more premium product with higher prices. Retailers generally considered that Thornton & Ross has so far, after approaching three years, continued with the same approach that it inherited when it acquired the K-Y rights.

13. A global competitor told us that they were pleased with the CMA's intervention in the UK and that they had been frustrated that regulators in other jurisdictions[39] did not act against the merger, given the high market shares of these two companies.

14. Thornton & Ross told us that they had encountered some difficulties in producing a sterilised lubricant product, which is a growing requirement for supplying certain NHS contracts. Whilst this was not bought to our attention as a risk during the CMA inquiry, Thornton & Ross now consider in hindsight it would have been beneficial if we had extended the scope of the remedy to impose access rights to Reckitt Benckiser for their sterilised lubricant product, to help Thornton & Ross to fulfil the NHS contracts it inherited. Whilst this is something to consider for further mergers, it is acknowledged that this issue has been identified after the event in this case.

Long-term effectiveness

15. Thornton & Ross told us that they had not yet commenced any re-branding initiatives. This is an important part of the remedy, as when the licence period is over, and the K-Y brand reverts to RB, the intention of the remedy is that a competing brand is established. It acknowledged the K-Y brand is going to be hard to compete with if RB decides to revert to using the brand name after the licence period lapses. Thornton & Ross told us that it realised there is a risk that the long-term impact of the remedy will be muted if Thornton & Ross continue to only use the K-Y brand and fail to develop a credible alternative brand in time to compete in this market.

[39] Authorities in Brazil and New Zealand were the only others that took any competition enforcement action.

16. The CMA cannot control or act upon Thornton & Ross' failure to develop its own brand to date, as this is ultimately a commercial decision for Thornton & Ross. Further, we acknowledge that given the strength of the K-Y brand, it will take some time for Thornton & Ross to develop an alternative brand to compete with potentially both Durex and with K-Y, if RB were to decide to use the K-Y brand after the expiry of the eight-year licensing period. Our view is that the licensing arrangement will remain in place for a further 5 years, giving Thornton & Ross sufficient time to develop its own brand. Ultimately therefore the long-term effectiveness of this remedy is yet to be determined. As such, this remedy retains a significant element of ongoing risk in terms of longer-term outcomes for consumers, relative to a more standard structural remedy such as prohibition, or divestiture of a stand-alone business unit.

Lessons learned

17. Having completed this evaluation of the licensing arrangement that formed the basis of the remedy, the main lessons learnt are as follows:

(a) It is both reasonable and proportionate for the CMA to consider the impact of a multi-jurisdictional merger on the relevant markets in the UK and identify the remedies necessary to maintain competition in the UK, even if regulatory authorities in other jurisdictions do not have powers to do so or chose not to exercise these powers;

(b) Whilst it is not recommended that the CMA seek to impose complex quasi-structural remedies, sometimes these are unavoidable where there are exceptional circumstances, due to the specifics of the case. Here, there was a multi-jurisdictional review and the merger involved the acquisition of a brand and product formulation rather than a company;

(c) The period for a licensing arrangement to be in place needs careful consideration. Eight years was used here. There is a balance needed between allowing time for initial business stability and for consideration of how customers and retailers will react to different re-branding options, while on the other hand encouraging swift progress with re-branding rather than allowing too long for inactivity in the re-branding exercise; and

(d) Potential access rights may be required to support the licensing agreement, given the experience of Thornton & Ross with their ability to supply authorised sterilised products to the NHS. The CMA cannot easily modify a remedy to include additional elements, such as access rights, if they are not included as part of the original remedy package. This is an inherent risk with this type of remedy.

Annex 3: ICAP / Tullett Prebon case study

The parties

1. Tullett Prebon plc (Tullett) and ICAP plc (ICAP) are leading global interdealer brokers, companies that sit between counterparties helping to find buyers and sellers of large securities and derivatives.

The merger situation

2. On 11 November 2015, Tullett Prebon plc (Tullett) agreed to acquire ICAP plc's (ICAP) global wholesale broking and information businesses.

3. On 7 June 2016, following a Phase 1 investigation, the CMA found that the merger gave rise to a realistic prospect of an SLC[40] in the market for voice/hybrid broking of oil products where competition from other brokers is more limited, there is a lesser constraint from electronic platforms and exchanges, and the CMA received several third-party concerns.[41]

4. The CMA duly decided to refer the merger to a phase 2 investigation. Following this, on 14 June 2016, Tullett and ICAP offered UILs designed to remove the overlap. On 8 September 2016, the CMA accepted UILs from the merger parties, whereby the merger parties agreed to divest the ICAP oil-based brokering operations to a suitable purchaser approved by the CMA.

5. Hence this merger did not progress to a phase 2 full investigation.

The remedy

6. The divestiture package comprised ICAP's London-based oil desks (including key staff) responsible for providing broking services to EMEA-based customers[42] in relation to (i) crude oil; (ii) middle distillates; (iii) fuel oil; (iv) crude oil options; and (v) commodity and oil futures, would be divested as a going concern to a purchaser approved by the CMA.

---

[40] SLC: substantial lessoning of competition

[41] After considering in detail the 20 overlapping product categories (eg Spot Foreign Exchange, Equity Derivatives, Interest Rate Swaps, etc) in which the parties' voice/hybrid broking services overlap, the CMA stated that for all but one of these overlapping product categories there is no realistic prospect of a SLC because of the merger.

[42] EMEA-based customers are those in Europe, the Middle East and Africa.

7. In October 2016, the merger parties sold ICAP's London-based oil desks to FCStone, a purchaser approved by the CMA.

8. The CMA considered that FCStone had the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and operate the divested business as part of a viable and active business in competition with Tullett and other competitors in the provision of voice/hybrid broking services in relation to oil-based products.

9. The UILs required the merger parties to remain separate from the divested business for 2 years.

10. The broking business being divested was, to a large extent, a people business, and the UILs would not have been possible to implement without the consent of the large majority of the brokers (and the customers who traded with them). We were told that there were some potential issues which arose with some of the brokers during implementation, and that both ICAP and FCStone negotiated 'golden goodbye' and 'golden hello' payments respectively with individual brokers, to persuade them to agree to the transfer.

Scope of the evaluation

11. The evaluation of this merger remedy has focussed on the following 3 areas:

    (a) Has the remedy been effective? To assess this, we considered:

    (i) How many of the brokers who transferred from ICAP to FCStone remain?

    (ii) Has FCStone restored rivalry in the market that would have been lost had the divested business been allowed to merge with Tullett Prebon?

    (b) What lessons can be learned from divestiture remedies involving businesses which are, essentially, people businesses?

    (c) What lessons can be learned from the involvement of the MT in such cases?

What happened after the CMA's decision?

12. To give effect to the provisions in the UILs accepted by the CMA, ICAP entered into a framework agreement with FCStone which became effective on 1 October 2016. Under the terms of the framework agreement, 75% of brokers (measured by revenue generation) would accept the offer to move to

FCStone. The divestment was completed in line with the CMA’s criteria. Of the thirty-three brokers, twenty-six formally accepted offers to move to FCStone, one had left and the remaining six had been put on gardening leave.

13. The brokers transferred to FCStone on 16 December 2016 and started trading at FCStone from 19 December 2016. By the date of transfer, 134 customers (comprising 95% of customers by revenue, including all the top 25 customers) had transferred from ICAP to FCStone.

Role of the Monitoring Trustee

14. Four days after the undertakings were accepted in September 2016, the CMA issued directions to appoint a Monitoring Trustee (MT). These directions confirmed that main objective of the MT was to ensure compliance with the UILs, which involved the divestment of the relevant oil-based brokering business, including the transfer of brokering staff and associated customer accounts. The MT’s remit also included ring-fencing of the business area to be transferred and ensuring that preparations were underway to make sure the business area to be transferred could operate from Day 1 as a going concern, eg ensuing functioning IT systems were in place. This transfer was potentially problematic as it required the brokers and by extension, their customers, to agree to move to a new employer and the MT played a vital role in mitigating this risk.

15. Initially the merger parties had queried the requirement for a MT to be appointed. However, once the MT commenced it became clear that they played a vital role in liaising with the individual brokers to allay any individual concerns arising with the transfer. Broker retention was imperative.

16. The MT sought to secure the cooperation of the brokers by (a) obtaining their input on who they considered would be suitable purchasers, and (b) acting as a ‘confidante’ to the brokers, listening to their concerns at every stage and keeping the CMA abreast of the mood of the brokers as remedy implementation progressed. The MT could, if necessary, advise the CMA to take direct remedial action with ICAP and Tullett if it considered that there was more that should be done to progress the smooth and timely divesture of the oil-based brokering business. For example, the MT ensured that sufficient progress was being made to prepare IT systems for the transfer. This additional CMA intervention to address any concerns from the MT was not needed in this case, but it is likely that the possibility of any CMA intervention incentivised the merger parties to make good progress with the divestiture.

Developments since the transfer/divestment

17. TP ICAP has re-entered the London-based oil-based brokering market. It has managed to rebuild its business by recruiting brokers from other institutions, rather than those that transferred to FCStone. The remedy was designed with the intention that FCStone would be equipped to compete with TP ICAP and others, so the fact that they have re-entered the oil-based brokering field is not necessarily harmful. The key issue is the extent to which FCStone has impacted on effective competition.

Effectiveness of the remedy

18. As at December 2018, all the 26 brokers that transferred from ICAP to FCStone as part of the divestiture, remain with FCStone. This suggests that FCStone has proven to be a credible competitor in the oil-based brokering market.

19. Whilst this would suggest that that the remedy has been effective to some degree, it should be noted that it is potentially too early to fully assess the effectiveness of the remedy. There is a risk that some of the brokers that transferred to FCStone under the terms of the remedy may decide to switch back to ICAP once the hold separate arrangements expire. However, FCStone did not express a concern about this and told is that the brokers are content at their new employer.

20. In this case, effective remedy implementation was supported by the ability of the merger parties to pay bonus payments to brokers to drive switching between ICAP and FCStone. The close proximity of the office location was also helpful. We note that this may not be possible in other cases, where, for example, such payments are not commercially viable or barriers to entering the market are high. Ultimately the success of the remedy is determined by the commercial success of the new competitor that was created.

21. The role of the MT in this process appears to have been indispensable and warranted. It provided re-assurance to affected brokers that they were being treated fairly and that their new employer would provide sufficient security of employment. The MT also played a key role in gathering the brokers' views on who would be a suitable purchaser, which supported the CMA in its purchaser suitability assessment.

22. The MT also played a crucial role in providing independent assurance to the CMA and to FCStone that genuine efforts were being made by ICAP to affect the transfer of the business. The role of the MT included verifying that ICAP ensured the affected brokers in the oil-based business were happy to transfer

their employment; that their clients were also content to transfer their business despite often having long term relationships with TP ICAP; and that suitable IT systems in place to facilitate a seamless transfer without major disruption.

Lessons learned

23. Having completed this evaluation of the broker transfer to an alternative company that formed the basis of the remedy, the main lessons learnt are as follows:

(a) The transfer of staff is an unusual and potentially problematic remedy because the main asset involved can vote with their feet. In this case bonus payments were made to the staff that transferred to assist with their retention, but this may not always be possible.

(b) The MT played a more extensive role with individual employee liaison than is usual. It is vital that their role can be flexed and carefully stipulated to reflect the specific circumstances of the case and to focus on the key risks identified.

(c) It is usually preferable to divest entire businesses rather than partial divestitures, due to the complexities of ring-fencing the transferring operations. Where partial divestments are progressed, it is vital that the CMA has the full co-operation of all the parties involved to ensure the transfer can progress smoothly and the customer base is not disadvantaged by the move to the new entity.