

Mergers: Guidance on the CMA's jurisdiction and procedure

Draft for consultation

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1 PREFACE

- 1.1 The CMA's merger control function is part of its duty to promote competition for the benefit of consumers.¹ Its merger control procedures are designed to fulfil this duty in an efficient manner, while ensuring that the merger parties' rights to due process are fully respected. The CMA is also required to balance the rights of the merger parties with those held by third parties.
- 1.2 This guidance forms part of the advice and information published by the Competition and Markets Authority (CMA) under section 106 of the Enterprise Act 2002, as amended (the Act). It is designed to provide general information and advice to companies and their advisers on the procedures used by the CMA in operating the merger control regime set out in the Act. It also includes guidance on when the CMA will have jurisdiction to review mergers under the Act, and it explains the respective roles of the CMA, the Secretary of State, and relevant sectoral regulators in UK merger control.²
- 1.3 This guidance reflects experience gained since the Act entered into force in 2003 and, in particular, since the CMA was established in April 2014. It replaces CMA2, which was published in 2014.
- 1.4 This guidance should be read alongside other CMA guidance including in particular: *Merger Assessment Guidelines* (OFT1254/CC2); *Merger Remedies* (CMA87); *Guidance on the CMA's mergers intelligence function* (CMA56); *Interim measures in merger investigations* (CMA108); *Mergers: Exceptions to the duty to refer* (CMA64); *Guidance on requests for internal documents in merger investigations* (CMA100); *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4) and *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6). A full list of relevant guidance is provided in Annex B.
- 1.5 Where there is any difference in emphasis or detail between this guidance and other guidance produced or adopted by the CMA, the most recently published document takes precedence.

¹ Section 25(3) of the Enterprise and Regulatory Reform Act 2013 (the ERRA13).

² At the date of publication of this guidance the relevant sectoral regulators for the purposes of this guidance are: the Office of Communications (Ofcom), the Gas and Electricity Markets Authority (Ofgem), the Oil and Gas Authority (OGA), the Water Services Regulation Authority (Ofwat), the Northern Ireland Authority for Utility Regulation (URRegNI), the Office of Rail and Road (ORR), the Civil Aviation Authority (CAA), NHS Improvement (NHSI), the Financial Conduct Authority (FCA), and the Payment Systems Regulator (PSR).

- 1.6 While the CMA will have regard to this guidance in handling mergers under the Act, it will apply this guidance flexibly and may depart from the approach described in the guidance where there is an appropriate and reasonable justification for doing so.

2 INTRODUCTION

Scope of the guidance

- 2.1 This guidance describes the procedures used by the CMA in operating the merger control regime set out in the Act. In particular, this guidance discusses the criteria that the CMA applies to determine whether it has jurisdiction under the Act (chapter 4) and the policies and procedures that the CMA will use in discharging its functions under the Act (chapter 5 onwards).
- 2.2 This guidance does not address the substantive ‘substantial lessening of competition’ (SLC) test against which the CMA assesses whether a merger raises competition concerns. Detailed information on the application of the substantive test for mergers is provided in *Merger Assessment Guidelines* (OFT1254/CC2). This guidance also does not explain the CMA’s approach and requirements in the selection, design and implementation of remedies in merger investigations, which is covered in *Merger Remedies* (CMA87).
- 2.3 Other aspects of the CMA’s practice in merger control cases (for example in relation to the use of interim measures,³ the approach taken to considering whether non-notified cases should be called in for investigation⁴ and the approach taken to gathering internal documents⁵) are referred to in this guidance but explained more fully in separate guidance documents.

Who does what?

- 2.4 The Act assigns distinct roles in relation to merger control to the CMA, the Secretary of State, and certain sectoral regulators. The inter-relationship between these roles is summarised in the following paragraphs.

The CMA

- 2.5 The ERR13 established the CMA as the UK’s economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. The CMA’s primary duty is to seek to promote competition, both within and outside the UK, for the benefit of consumers.

³ [Interim measures in merger investigations \(CMA108\)](#).

⁴ [Guidance on the CMA’s mergers intelligence function \(CMA56\)](#).

⁵ [Guidance on requests for internal documents in merger investigations \(CMA100\)](#).

- 2.6 Under the Act, the CMA has a function to obtain and review information relating to merger situations, and a duty to refer for an in-depth 'phase 2' investigation any relevant merger situation where it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in a UK market.
- 2.7 Following a reference for a phase 2 investigation, the CMA conducts a more detailed analysis to determine whether: (i) there is a relevant merger situation falling within the UK merger control regime, (ii) that relevant merger situation has resulted, or may be expected to result, in an SLC, and (iii) it should take action to remedy any SLC identified.
- 2.8 At phase 2, those decisions are taken by an Inquiry Group, selected for each case from the independent experts appointed by the Secretary of State to the CMA's panel.
- 2.9 The CMA's role in relation to public interest merger cases is set out in chapter 16.

The Secretary of State

- 2.10 The Secretary of State has a role in certain public interest cases, as described more fully below in chapter 16. The decision on the competitive effects of a merger is, however, solely for the CMA under the Act. Outside the public interest interventions described in chapter 16, the UK merger control process is independent of government and the UK Government does not play any formal role within, or otherwise exercise any influence over, a CMA merger control investigation.

The sectoral regulators

- 2.11 The CMA routinely consults the sectoral regulators about any mergers in which they are likely to have industry-specific knowledge. This is described further in chapter 9 below. In addition, Ofcom and NHSI have statutory roles in the assessment of, respectively, certain media mergers and mergers involving NHS foundation trusts. See chapters 9 and 17 below.

Overview of the CMA's merger investigation process

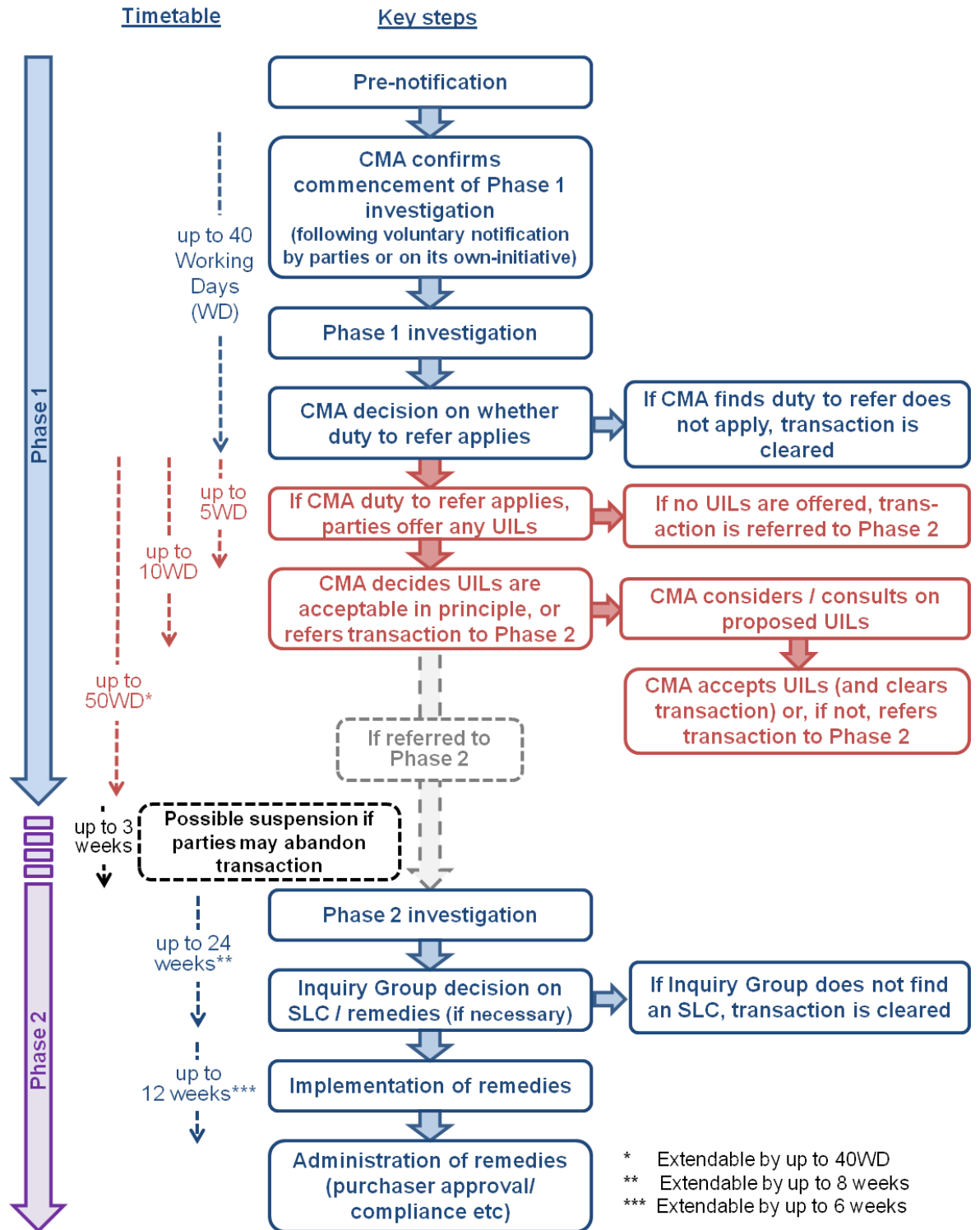
- 2.12 The diagram below provides a high-level summary of the principal stages in phase 1 and phase 2 merger investigations undertaken by the CMA, from initial contact with the CMA through to, in appropriate cases, the outcome of

a full, two-phase investigation.⁶ While this broad process applies in all CMA merger investigations, the approach adopted can (as explained further in this guidance) vary depending on the circumstances of the case.⁷

⁶ This diagram provides a summary only: it does not show, for example, processes that are relevant only in certain limited cases (such as public interest cases, local media mergers or NHS foundation trust mergers, where the Secretary of State, Ofcom or NHSI respectively have a role).

⁷ One such variation is a “fast-track” case, as described further in chapter 7. See, for example: Anticipated merger between J Sainsbury Plc and Asda Group Ltd (19 September 2018), Completed acquisition by CD&R Fund IX of MRH (GB) Limited (31 August 2018), Anticipated merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust (27 February 2017), Anticipated acquisition by Tesco plc of Booker Group plc (12 July 2017), and Anticipated acquisition by BT Group plc of EE Limited (9 June 2015).

Figure: CMA merger investigations – principal stages



The structure of this guidance

- 2.13 This guidance seeks to follow broadly the chronology of the UK merger process shown in the diagram above. To this end, it is structured as follows:
- a) **chapters 3 and 4** set out the legal framework for the UK merger control regime and provide guidance on the relevant merger situations which the CMA has jurisdiction to review;
 - b) **chapters 5 to 9** provide guidance on the phase 1 process, from initial contact with the CMA, and covers the notification of mergers and ‘calling in’ of non-notified mergers;
 - c) **chapters 10 to 15** provide guidance on the phase 2 process explaining the further information-gathering and assessment that the CMA may undertake as part of this more in-depth examination of the merger and the role of CMA panel members in the investigation and decision-making process. These chapters also explain the process followed in cancelling an investigation;
 - d) **chapters 16 to 20** provide more general information on the different process applicable to public interest mergers, the interaction of the UK merger control regime with other regulatory processes, considerations relating to international (multi-jurisdictional) mergers, communication and publication of CMA merger decisions, and the payment of merger fees to the CMA following its phase 1 investigation; and
 - e) finally, the **annexes** provide further information on the calculation of turnover, other published CMA guidance in relation to mergers, ancillary restraints, and relevant contact addresses.

Further information

- 2.14 Further information can be obtained from the CMA’s mergers homepage at <https://www.gov.uk/topic/competition/mergers>, and in the guidance listed in Annex B.

3 THE LEGAL FRAMEWORK

The statutory questions

- 3.1 The Act imposes a duty on the CMA to refer completed and anticipated mergers for an in-depth phase 2 investigation if it believes that it is or may be the case that:
- a) a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets for goods or services in the UK.^{8, 9}
- 3.2 The CMA may, however, decide not to make a reference for a phase 2 investigation if it believes that:
- a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference;
 - b) any relevant customer benefits in relation to the creation of the relevant merger situation outweigh the substantial lessening of competition concerned and any adverse effects of that substantial lessening of competition; or
 - c) in the case of an anticipated merger, the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference.¹⁰
- 3.3 Where the CMA finds that it is under a duty to refer a merger for a phase 2 investigation, it may, under section 73 of the Act, accept undertakings in lieu of reference (UILs) to remedy, mitigate or prevent the substantial lessening

⁸ Crown dependencies (Jersey, Guernsey and the Isle of Man) are not part of the United Kingdom and may have separate merger control laws applicable in their respective jurisdictions (for example Jersey has a specific merger control regime: see the Jersey Competition Regulatory Authority, which forms part of the Channel Islands Competition and Regulatory Authorities, at www.cicra.gg).

⁹ Sections 22(1) and 33(1) of the Act.

¹⁰ Sections 22(2) and 33(2) of the Act.

of competition concerned or any adverse effect of it (for further information on the CMA's approach to merger remedies see *Merger remedies (CMA87)*).

- 3.4 In certain limited circumstances, the CMA is not able to refer a merger. For example, in the case of a completed merger, the CMA is not able to refer a merger if the four month period following the completion of the acquisition (as extended where applicable) has expired.¹¹
- 3.5 Following a reference for a phase 2 investigation, the Inquiry Group must decide:
- a) whether a relevant merger situation has been or will be created; and
 - b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the UK for goods or services (where both limbs are satisfied, this is referred to as an 'anti-competitive outcome').¹²
- 3.6 If the Inquiry Group finds that there is an anti-competitive outcome, it must decide:
- a) whether action should be taken by it, or by others, to remedy, mitigate or prevent the substantial lessening of competition concerned or any adverse effect that has resulted from, or may be expected to result from, that substantial lessening of competition; and
 - b) if action is to be taken, what action should be taken and what is to be remedied, mitigated or prevented.
- 3.7 While many mergers will not raise competition issues, the merger control process is designed to allow the CMA to identify those where such issues may arise, so that they may be properly investigated and, where necessary, resolved through appropriate remedies.
- 3.8 At phase 1, the CMA's test for reference (its 'duty to refer') will be met if the CMA has a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that the merger will lessen competition substantially. At phase 2, the Inquiry Group is then required to base its decisions on whether the merger will lessen competition substantially on the

¹¹ Section 24(1) of the Act.

¹² Section 35(2) of the Act.

balance of probabilities. Further guidance on the application of these tests may be found in *Merger Assessment Guidelines* (OFT1254/CC2).

Public interest interventions

- 3.9 The Act permits intervention by the Secretary of State in cases where public interest issues arise.¹³ In such cases, the CMA is responsible for the competition assessment, but the Secretary of State may take public interest factors into account in deciding whether to make a reference to phase 2, accept UILs, or impose remedies following a phase 2 investigation. The public interest considerations that the Secretary of State may take into account are those relating to:¹⁴
- a) national security, including public security;
 - b) media plurality and other considerations relating to newspaper and certain other media mergers;
 - c) the stability of the UK financial system; and
 - d) the need to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies.¹⁵
- 3.10 The Secretary of State is able to intervene in special public interest cases where the standard jurisdictional thresholds relating to share of supply and turnover are not satisfied. The Secretary of State can only intervene in special public interest cases where one or more of the enterprises concerned is carried on in the UK, or by or under the control of a body corporate incorporated in the UK, and where one or more of the enterprises concerned is a relevant government contractor (as defined) in defence mergers, or where the merger involves certain newspaper or broadcasting companies.¹⁶ These are known as special merger situations and are considered under the special public interest regime of the Act. There is no competition assessment in such cases.

¹³ Section 42 of the Act.

¹⁴ The Secretary of State has the power to add further public interest considerations by statutory instrument. See sections 58(3) and 58(4) of the Act.

¹⁵ Section 58 of the Act.

¹⁶ Section 59 of the Act.

4 JURISDICTION AND RELEVANT MERGER SITUATIONS

Introduction

- 4.1 The question of whether there is a ‘relevant merger situation’ under the Act or arrangements are in progress or contemplation that will give rise to such a relevant merger situation is relevant at both phase 1 and phase 2.¹⁷
- 4.2 The Act’s definition of a ‘relevant merger situation’ covers several different kinds of transaction and arrangement. A company that buys or intends to buy a majority shareholding or a significant minority shareholding in another company is the most obvious example, but other arrangements such as the transfer or pooling of assets or employees, the creation of a joint venture, or outsourcing arrangements may also give rise to relevant merger situations. The Act’s provisions apply both to mergers that have already taken place (subject to time limits) and to those that are proposed or in contemplation.
- 4.3 Subject to the provisions described at paragraph 4.4 below in relation to certain specified sectors, a merger must meet all three of the following criteria to constitute a relevant merger situation for the purposes of the Act:^{18, 19}
- a) first, either:
 - i) two or more enterprises (broadly speaking, business activities of any kind)²⁰ must cease to be distinct; or

¹⁷ See paragraphs 2.6 and ANNEXE(S)2.7 above in relation to the standard of proof required for these decisions at phase 1 and phase 2.

¹⁸ It may, in certain limited circumstances, be appropriate to treat a single commercial transaction as giving rise to more than one relevant merger situation. See, for example, CMA Decision: Completed acquisition by Circle Health Holdings of GHG Healthcare Holdings (8 April 2020); CMA Decision: Anticipated joint venture between Dawn Meats and Dunbia (12 October 2017); and the CC’s Thomas Cook Group plc/Co-operative Group Limited/Midlands Co-operative Society Limited inquiry (2011). In contrast, in some circumstances it may be appropriate to treat more than one commercial transaction as a single relevant merger situation. See, for example, CMA Decision: Anticipated acquisition by Motor Fuel Limited of 90 petrol stations from Shell Service Station Properties Limited, Shell U.K. Limited and GOGB Limited (26 August 2015).

¹⁹ Section 23 of the Act.

²⁰ See paragraphs 4.10 to 4.19 below.

- ii) there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct;
- b) and second, either:
- i) the UK turnover associated with the enterprise which is being acquired exceeds £70 million (this is referred to as ‘the turnover test’);²¹ or
 - ii) the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition (this is referred to as ‘the share of supply test’);²²
- c) and third, either:
- i) the merger must not yet have taken place; or
 - ii) the date of the merger must be no more than four months before the day the reference is made, unless the merger took place without having been made public and without the CMA being informed of it (in which case the four-month period starts from the earlier of the time the merger was made public or the time the CMA was told about it).²³ This four-month deadline may be extended in certain circumstances.²⁴

4.4 For mergers that involve an enterprise being taken over which is active in the areas specified under section 23A of the Act, (a ‘**relevant enterprise**’), there are also alternative jurisdictional thresholds which differ from those applicable to other mergers under the UK merger control regime (as set out in paragraph 4.3 above). These areas of specified activity are:

²¹ See further paragraphs 4.56 to 4.61 below.

²² See further paragraphs 4.62 to 4.67 below.

²³ In this context, the date of the merger refers to the date when the enterprises cease to be distinct (see section 24(1) of the Act).

²⁴ See for example sections 25, 42 and 122 of the Act.

- a) the development or production of items for military or military and civilian use;
- b) the design and maintenance of aspects of computing hardware;
- c) the development and production of quantum technology;
- d) artificial intelligence;
- e) cryptographic authentication; and
- f) advanced materials.²⁵

4.5 For mergers in which the enterprise being taken over (or part of it) is a relevant enterprise, the criteria at paragraph 4.3 apply. However, in addition, the turnover and share of supply tests can be met in the following ways:

- a) the turnover test is met if the relevant enterprise's annual UK turnover exceeds £1 million;
- b) the share of supply test is met if before the merger, the relevant enterprise being acquired or merged has a share of supply or purchase of 25% or more of relevant goods or services in the UK or in a substantial part of it.²⁶

4.6 In other words, the test is met even if share of supply does not increase as a result of the merger so long as the relevant enterprise has a 25% share of supply. The relevant goods or services for the purposes of deciding whether the share of supply test is met are those by virtue of which the target enterprise qualifies as a relevant enterprise. This provision adds to, rather than replaces, the 'share of supply' test discussed at paragraph 4.3.

4.7 These thresholds are intended to enable the Secretary of State to be able to intervene on public interest national security grounds in transactions involving changes of control over relevant enterprises. They also enable the CMA to review a merger involving changes of control of relevant enterprises on competition grounds.

²⁵ BEIS Guidance: Enterprise Act 2002: changes to the turnover and share of supply tests for mergers (June 2020). This can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902531/Enterprise_Act_2002_guidance_on_changes_to_the_turnover_and_share_of_supply_tests_for_mergers__Orders_2020_.pdf.

²⁶ As above.

4.8 In the context of mergers that have not yet completed, at phase 1 the CMA will generally consider that ‘arrangements are in progress or in contemplation’ for the purposes of section 33 of the Act if a public announcement has been made by the merger parties concerned.²⁷

Enterprises ceasing to be distinct

4.9 Two enterprises will ‘cease to be distinct’ if they are brought under common ownership or control.²⁸

Enterprises

4.10 The term ‘enterprise’ is defined in section 129 of the Act as the activities, or part of the activities, of a business. This does not mean that the enterprise in question need be a separate legal entity: it simply means that the activities in question could be carried on for gain or reward. However, there is no requirement that the transferred activities have generated,²⁹ or are expected to generate, a profit or dividend for shareholders: indeed, the transferred activities may be loss-making or conducted on a not-for-profit basis.³⁰

4.11 In making a judgement as to whether or not the activities of a business, or part of a business, constitute an enterprise under the Act, the CMA will have regard to the substance of the arrangement under consideration, rather than merely its legal form.³¹

²⁷ In the case of a public bid, this will generally mean announcement of a possible offer or of a firm intention to make an offer.

²⁸ Section 26 of the Act. In the case of a ‘start-up’ joint venture, the question under the Act will be whether the activities transferred to the joint venture by one or more parents (or acquired from a third party) are sufficient to constitute an enterprise.

²⁹ See for example CMA Decision: Anticipated acquisition by Roche Holdings of Spark Therapeutics (16 December 2019).

³⁰ See CMA Decision: Anticipated acquisition by Bupa Insurance Limited of Civil Service Healthcare Society Limited (24 September 2020). NHS Foundation Trusts may also constitute enterprises for this purpose - see CMA Guidance on the review of NHS mergers (CMA29). See also CMA Decision: Anticipated merger between The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital NHS Foundation Trust (27 April 2020).

³¹ For example, the fact that the merger was effected via two legal agreements rather than a single agreement did not mean that the target did not constitute one enterprise in CMA Decision: Completed acquisition by Rentokil Initial plc of MPCL Ltd (formerly Mitie Pest Control Ltd) (12 April 2019), and the fact that there was no direct sale agreement between the existing cinema operator and the new cinema operator did not preclude enterprises ceasing to be distinct for the purposes of the Act in the OFT Decision: Anticipated acquisition by Cineworld Group plc, through its

- 4.12 An ‘enterprise’ may comprise any number of components, most commonly including some combination of the assets and records needed to carry on certain activities of the business, employees working in the business, and existing contracts and/or goodwill. However, the Act does not require that a business (or part thereof) be of any minimum scale, or include any particular combination of components, in order to constitute an enterprise.³²
- 4.13 In some cases, the transfer of assets or employees alone may be sufficient to constitute an enterprise: for example, where the facilities or site transferred, or a group of employees and their know-how, enables a particular business activity to be continued. A collection of ‘bare assets’ is unlikely to amount to an enterprise for the purposes of the Act.³³ An enterprise would generally require something more than bare assets, related to the fact that the assets being transferred were previously employed in combination in the activities of the business being acquired.³⁴ There is, however, no requirement for the business being transferred to include physical assets, or any particular category of asset, in order to constitute an enterprise under the Act.
- 4.14 The CMA’s assessment of whether what is being acquired amounts to an enterprise will depend on the specific facts and circumstances of each case and the industry in question. No one single factor will necessarily be determinative. Rather, the CMA will make an assessment based on the totality of all relevant considerations.
- 4.15 Where a transaction results in the acquisition of parts of a business, in determining whether the activities or components of the business being acquired constitute an enterprise, the CMA will have particular regard to whether the transaction includes:

subsidiary Cine-UK Limited, of the Cinema Business operating at the Hollywood Green Leisure Park, Wood Green (17 March 2008).

³² For instance, there is no requirement for the inclusion of physical assets. See CMA Decisions: Completed agreement between Aer Lingus Limited and CityJet designated Activity Company (21 December 2018); Anticipated acquisition by Arla Foods Limited of Yeo Valley Dairies Limited, including a licence to supply certain dairy products under the Yeo Valley brand (11 July 2018); and Completed acquisition by Medtronic plc of certain assets of Animas Corporation (30 May 2018).

³³ *Société Cooperative De Production Seafrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 (“Eurotunnel”) at paragraph 40, endorsing the CAT’s view in *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30 at paragraph 105.

³⁴ *Société Cooperative De Production Seafrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 (“Eurotunnel”) at paragraphs 39 and 40.

- a) The transfer of tangible or intangible assets. However, intangible assets such as intellectual property rights (including know-how) are unlikely, on their own, to constitute an enterprise unless it is possible to identify recently-generated turnover directly related to the transferred intangible assets (or expected revenues directly related to the assets being transferred without material further development).³⁵
- b) The transfer of business data (including customer databases, lists or other customer relationships).³⁶
- c) The transfer of employees, including under the TUPE regulations.^{37, 38}
- d) Consideration for the goodwill obtained by the purchaser. The presence of a price premium being paid over the value of any assets being transferred would be indicative of goodwill being transferred.³⁹
- e) The transfer of trademarks, trade names, or domain names.

4.16 The CMA will also consider, as an important factor, whether the combination of components results in a degree of economic continuity in the activities of the business being transferred.

³⁵ See the CC's inquiry into the Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel 4 Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecoms Limited and Arqiva Limited – Project Canvas inquiry (2010) and OFT Decision: Completed supplier agreement between Guestlogix Inc and Panasonic Avionics in respect of a commercial arrangement to provide services in the development of onboard point of sale payment facility integrated into in-flight entertainment systems (21 December 2012).

³⁶ See CMA Decisions: Completed acquisition by Medtronic plc of certain assets of Animas Corporation (30 May 2018); Completed agreement between Aer Lingus Limited and CityJet designated Activity Company (21 December 2018).

³⁷ The Transfer of Undertakings (Protection of Employment) Regulations 2006.

³⁸ See, for example, CMA Decisions: Completed agreement between Aer Lingus Limited and CityJet designated Activity Company (21 December 2018); Anticipated acquisition by Arla Foods Limited of Yeo Valley Dairies Limited, including a licence to supply certain dairy products under the Yeo Valley brand (11 July 2018); and Completed acquisition by Medtronic plc of certain assets of Animas Corporation (30 May 2018).

³⁹ See CMA Decision: Completed acquisition by Medtronic plc of certain assets of Animas Corporation (30 May 2018).

- 4.17 Outsourcing arrangements involving ongoing supply arrangements will not generally result in enterprises ceasing to be distinct, but may do so where, for example, they involve the permanent (or long-term) transfer of assets, rights and/or employees to the outsourcing service supplier and where those may be used to supply services other than to the original owner/employer. The CMA will assess whether, overall, the assets, rights and employees transferred to the outsourcing service supplier are such as to constitute an enterprise under the principles set out above.⁴⁰
- 4.18 The fact that a target business may no longer be, or has not yet started, actively trading does not in itself prevent it, or a combination of its assets, from being an enterprise for the purposes of the Act.⁴¹ The CMA will consider whether what is being acquired amounts to more than ‘bare assets’, owing to the fact that the assets were previously employed in combination in the activities of a business (or would be employed in combination to commence active trading). In such cases, while the relevant criteria may vary according to the particular circumstances of a case, the CMA will consider, for example:
- a) the period of time elapsed since the business was last trading (if relevant);
 - b) the extent and cost of the actions that would be required in order for the business to start trading;⁴²

⁴⁰ See CMA Decision: Anticipated acquisition by DHL Supply Chain Limited of the enterprise constituted by the secondary distribution assets of Carlsberg Supply Company UK Limited (13 January 2017), OFT Decisions: Anticipated contract award to Nuclear Management Partners Limited as the Parent Body Organisation for Sellafield Limited (22 October 2008), and Completed acquisition by AEG Facilities (UK) Limited of the contract to manage Wembley Arena (22 March 2013).

Similar principles apply in relation to the award of contracts or concessions. See CMA decision: Acquisition by Keolis Amey Docklands Limited of the Docklands Light Railway Franchise (14 November 2014), OFT Decision: Anticipated acquisition by Tramlink Nottingham Consortium of NET Phase Two concession (12 September 2011).

⁴¹ Considered in *Société Coopérative de Production SeaFrance SA v Competition and Markets Authority* [2015] UKSC 75 at paragraph 37 ff. See also *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30, and *Groupe Eurotunnel SA v Competition and Markets Authority* [2015] CAT 1.

⁴² See for example, OFT Decision: Completed acquisition by European Metal Recycling of five sites and certain assets of SITA Metal Recycling (7 March 2014). It is not essential for the purposes of the jurisdictional test for the buyer to use the business assets in the same manner as they were used before transfer (including, if relevant, before the target enterprise ceased trading). See also OFT Decisions: Completed acquisition by a consortium of Shell UK Limited, Greenergy

- c) the extent to which customers, investors and competitors would regard the assets transferred as, in substance, amounting to a business; and
- d) whether, despite the fact that the business is not trading, goodwill or other benefits may be acquired beyond the assets being transferred.⁴³

4.19 None of these factors, individually, is necessarily conclusive. The CMA will assess all relevant circumstances, with a view to determining whether the target business constitutes an enterprise under the Act.

Control

4.20 'Ceasing to be distinct' is defined in section 26 of the Act as two enterprises being brought under common ownership or common control. 'Control' is not limited to the acquisition of outright voting control but may include situations falling short of outright voting control. Section 26 of the Act distinguishes three levels of interest (in ascending order):

- a) material influence,
- b) de facto control, and
- c) a controlling interest (also known as 'de jure', or 'legal' control).

Material influence

4.21 The ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation. When making its assessment, the CMA focuses on the acquirer's ability materially to influence policy relevant to the behaviour of the target entity in the marketplace. The policy of the target in this context means the management of its business, and thus

International Limited and Vopak Holdings UK Limited of certain assets of former Petroplus Refining and Marketing Limited (24 May 2013); and Completed acquisition by Servisair UK Limited of the regional ground handling business of Aviance UK Limited (27 May 2010).

⁴³ See OFT Decisions: Completed acquisition by European Metal Recycling of five sites and certain assets of SITA Metal Recycling (7 March 2014); The assignment of a lease to Tesco plc for the site of a former FreshXpress store at St Helens (21 April 2009); Anticipated acquisition by Cineworld Group plc, through its subsidiary Cine-UK Limited, of the cinema business operating at the Hollywood Green Leisure Park, Wood Green (17 March 2008); and Completed acquisition by Home Retail Group plc of 27 leasehold properties from Focus (DIY) Limited (15 April 2008).

includes the strategic direction of a company and its ability to define and achieve its commercial objectives.

- 4.22 The assessment of material influence requires a case-by-case analysis of the overall relationship between the acquirer and the target. In making its assessment, the CMA will have regard to all the circumstances of the case.
- 4.23 A finding of material influence may be based on the acquirer's ability to influence the target's policy through exercising votes at shareholders' meetings, together with, in some cases, any additional supporting factors (see paragraph 4.28 below). However, material influence may also arise as a result of the ability to influence the board of the target, and/or through other arrangements: that is, without the acquirer necessarily being able to block votes at shareholders' meetings.
- 4.24 Each of these potential sources of influence (shareholding, board representation, and other sources) is described further below. The variety of commercial arrangements entered into by firms makes it difficult to state categorically what will (or will not) constitute material influence. The following matters may be of particular relevance, although this list is by no means exhaustive.

Shareholdings

- 4.25 The size of the acquirer's minority shareholding in the target company will typically have a direct bearing on the extent of the acquirer's voting power at a shareholders' meeting, and thus on the acquirer's influence on the corporate and strategic decisions of the target company. For example, a shareholding conferring on the holder more than 25% of the voting rights in a UK company generally enables the holder to block special resolutions.
- 4.26 Given the nature of the decisions that typically will require a special resolution – and which the holder could therefore block – a share of voting rights of over 25% is likely to be seen as conferring the ability materially to influence policy – even when all the remaining shares are held by only one person.
- 4.27 Shareholdings of below 25% will typically be less likely to confer material influence. However, the CMA may examine any shareholding to determine whether the holder might be able materially to influence the company's policy. Even shareholdings of less than 15% might attract scrutiny where

other factors indicating the ability to exercise material influence over policy are present.^{44, 45}

4.28 In considering whether material influence may be present in a particular case, the CMA will consider not only whether the acquiring party has the right to block special resolutions but also whether, given other factors, it is able to do so as a practical matter.⁴⁶ This gives effect to the general principle that the purpose of UK merger control is to enable the CMA to consider the commercial realities and results of transactions and that the focus should be on substance and not legal form. Other factors relevant to whether special resolutions might be blocked in practice may include:

- a) the distribution and holders of the remaining shares, for example whether the acquiring entity's shareholding makes it the largest shareholder; and
- b) patterns of attendance and voting at recent shareholders' meetings based on recent shareholder returns,⁴⁷ and, in particular, whether voter attendance is such that a shareholder holding 25% of the voting rights or less would be able in practice to block special resolutions. In making this determination, the CMA may have regard to the votes of other shareholders that it considers may be expected to be voted with the acquirer against a special resolution.

4.29 In addition, an acquirer's shareholding, whilst insufficient in itself to enable the acquirer to defeat a special resolution (even as a practical matter), may

⁴⁴ See, for example, the factors discussed in paragraphs 4.35 and 4.36 below.

⁴⁵ This does not mean that all cases in which parties obtain material influence through minority shareholdings need to be notified to the CMA, or will be investigated by the CMA on its own initiative. In deciding whether to investigate any such merger situation on its own initiative, the CMA will have regard to whether, on the information available to it, there is a reasonable chance that the test for a reference under the Act will be met.

⁴⁶ See CMA Decision: Anticipated acquisition by RWE AG of a 16.67% minority stake in E.On SE (5 April 2019); CMA Decision: Anticipated acquisition by Prosafe SE of Floatel International Limited (5 September 2019); OFT Report: Acquisition by British Sky Broadcasting Group plc of a 17.9% in ITV plc; Report to the Secretary of State for Trade and Industry (14 December 2007) and *British Sky Broadcasting Group plc v the CC and the Secretary of State* [2008] CAT 25; and OFT Decision: Anticipated acquisition by Centrica plc of a 20% stake in Lake Acquisitions Limited (a wholly owned subsidiary of EDF SA) (7 August 2009).

⁴⁷ Given that any prediction of attendance and voting at shareholders' meetings is complex, involving a wide range of factors, the CMA considers that patterns of participation at recent shareholders' meetings of a particular company (for example over the last three years) are likely to be the best available indication of future participation.

still in some cases afford the acquirer special voting or veto rights over relevant policy or strategic matters sufficient to confer material influence.

- 4.30 The CMA may also have regard to the status and expertise of the acquirer, and its corresponding influence with other shareholders, and may consider whether, given the identity and corporate policy of the target company, the acquirer may be able materially to influence policy formulation through, for example, meetings with other shareholders.⁴⁸
- 4.31 Where a company's appetite for pursuing certain strategies would be reduced because of a perception that these strategies would be likely to cause conflict with the acquirer, this may be an additional relevant factor in determining material influence.

Board representation

- 4.32 In addition to the ability materially to influence policy through the voting of shares, the CMA's determination may also, or alternatively, turn on whether the acquirer is able materially to influence the policy of the target entity through board representation.⁴⁹ Indeed, board representation alone may confer material influence.⁵⁰
- 4.33 Whether as a free-standing basis for material influence or as a supporting factor in the context of a shareholding, the CMA will review a range of factors in relation to such board representation, including, for example, the

⁴⁸ See CMA Final Report: Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo (4 August 2020); CMA Decision: Anticipated acquisition by RWE AG of a 16.67% minority stake in E.On SE (5 April 2019) and the CC's British Sky Broadcasting Group/ITV plc inquiry (2007).

⁴⁹ See CMA Final Report: Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo (4 August 2020). See OFT Decisions: Completed acquisition by JCDecaux UK Limited of rights in Concourse Initiatives Limited and Media Initiatives Limited (19 March 2012); and Anticipated acquisition by Centrica plc of a 20% stake in Lake Acquisitions Limited (a wholly owned subsidiary of EDF SA) (7 August 2009).

⁵⁰ This does not mean that all cases in which parties obtain material influence through board representation need to be notified to the CMA. See footnote 45 above for analogous considerations in the context of minority shareholdings.

corporate/industry expertise,⁵¹ other relevant experience or incentives of the various members of the board.⁵²

- 4.34 Where a party acquires the right or ability to obtain board representation, the CMA considers it appropriate to have regard to this possibility in relation to its jurisdictional assessment (and potentially also in its substantive assessment), even where there remains some uncertainty around whether, or when, this right or ability might be exercised.

Other sources of material influence

- 4.35 The CMA may also consider whether any other factors, such as agreements with the target company, might enable the acquirer materially to influence policy. Whilst there are no fixed types of agreement that will (or will not) be relevant to this assessment, such arrangements might include the provision of consultancy services to the target and other relevant customer/supplier relationships.
- 4.36 Financial arrangements may in certain circumstances confer material influence where the conditions are such that one party becomes so dependent on the other that the latter gains material influence over the company's commercial policy (for example, where a lender could threaten to withdraw loan facilities if a particular policy is not pursued, or where the loan conditions confer on the lender an ability to exercise rights over and above those necessary to protect its investment, say, by options to take control of the company or veto rights over certain strategic decisions).⁵³

De facto control

- 4.37 Merger arrangements may give rise to a position of 'de facto' control when an entity controls a company's policy, notwithstanding that it holds less than the majority of voting rights in the target company (that is, it does not have a controlling interest). De facto control requires the ability to unilaterally

⁵¹ See CMA Decision: Anticipated acquisition by RWE AG of a 16.67% minority stake in E.On SE (8 April 2019). See the CC's report: Acquisition by British Sky Broadcasting Group of 17.9 per cent of the shares in ITV (14 December 2007).

⁵² See CMA Final Report: Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo (4 August 2020). See OFT Decision: Completed acquisition by First Milk Limited of a 15% stake in Robert Wiseman Dairies plc (7 April 2005).

⁵³ See OFT Decision: Completed acquisition by First Milk Limited of a 15% stake in Robert Wiseman Dairies plc (7 April 2005).

determine (as opposed to just materially influence) a company's policy.⁵⁴ De facto control is likely to include situations where the acquirer has in practice control over more than half of the votes actually cast at shareholder meetings. However, other factors may be relevant and there is no 'bright line' between factors which might give rise to material influence and those giving rise to de facto control. For instance, de facto control might also involve situations where an investor's industry expertise might lead to its advice being followed to a greater extent than its shareholding would seem to warrant.

- 4.38 The CMA has the ability under section 26(3) of the Act to decide whether or not to treat 'de facto' control as equivalent to 'control' for the purposes of establishing whether enterprises have been 'brought under common ownership or common control' within the meaning of the Act.

A controlling interest

- 4.39 A 'controlling interest' generally means a shareholding conferring more than 50% of the voting rights in a company. Only one shareholder can have a controlling interest, but it is not uncommon for a company to be subject to the control (in the wider senses described above) of two or more major shareholders at the same time – in a joint venture, for instance. Therefore, a significant minority shareholder may be seen as being able materially to influence a company's policy even though someone else owns a controlling interest.

Acquiring control by stages

- 4.40 Under section 26(4) of the Act, should a shareholding (and/or a level of board representation) that confers the ability materially to influence a company's policy increase subsequently to a level that amounts to 'de facto' control or a controlling interest, that further acquisition may produce a new relevant merger situation (which is therefore potentially liable to reference for a phase 2 investigation and to the imposition of remedies at the end of the

⁵⁴ See CMA Final Report: Completed acquisition by Hunter Douglas N.V. of convertible loan notes and certain rights in 247 Home Furnishings Ltd. in 2013 and the completed acquisition by Hunter Douglas N.V. of a controlling interest in 247 Home Furnishings Ltd. in 2019 (14 September 2020).

phase 2 process). The same applies to a move from ‘de facto’ control to a controlling interest.^{55, 56}

- 4.41 In principle, therefore, if Company A acquires Company B in stages, this could give rise to three separate relevant merger situations: first, as Company A acquires material influence; then to ‘de facto’ control; and, finally, to a controlling interest.⁵⁷ But further acquisitions of a company’s shares by a person who already owns a controlling interest do not give rise to a new merger situation.
- 4.42 For the purposes of a merger reference, where a person acquires control of an enterprise (in any of the three senses described above) during a series of transactions or successive events within a single two-year period, sections 27(5) and 29 of the Act allow them to be treated as having occurred or occurring simultaneously on the date of the last transaction.⁵⁸ The CMA has discretion in whether to apply these sections. In exercising this discretion, the CMA will have regard to the nature and extent of any competition issues associated with the merger.⁵⁹ In giving effect to these provisions, the CMA may take into account transactions in contemplation (that is, where the last of the events has not yet occurred).⁶⁰

⁵⁵ See CMA Final Report: Completed acquisition by Hunter Douglas N.V. of convertible loan notes and certain rights in 247 Home Furnishings Ltd. in 2013 and the completed acquisition by Hunter Douglas N.V. of a controlling interest in 247 Home Furnishings Ltd. in 2019 (14 September 2020); and OFT Decision: Anticipated acquisition by Cavendish Square Partners (General Partner) Limited of a controlling interest in each of Lakeside 1 Limited (Keepmoat) and Apollo Group Holdings Limited (Apollo) (24 November 2011).

⁵⁶ Such cases may qualify on the share of supply test (as well as the turnover test) given that section 26(4) of the Act allows for the acquirer to be ‘treated’ as bringing the target under its control (notwithstanding that it already had material influence or ‘de facto’ control over the target) such that there would therefore (under such ‘treatment’) be an increment in the share of supply.

⁵⁷ See OFT Decisions: Anticipated acquisition by The Coca-Cola Company of full control over Fresh Trading Limited (1 May 2013); Completed acquisition by Travis Perkins plc of a controlling interest in Toolstation Limited (29 March 2012); and Anticipated acquisition by Cavendish Square Partners (General Partner) Limited of a controlling interest in each of Lakeside 1 Limited (Keepmoat) and Apollo Group Holdings Limited (Apollo) (24 November 2011).

⁵⁸ See CMA Decision: Completed acquisition by Co-operative Foodstores Limited of eight My Local grocery stores from ML Convenience Limited and MLCG Limited (19 October 2016); and OFT Decision: Completed acquisition by Dairy Crest Group plc of certain assets of Arla Foods UK plc (8 January 2007).

⁵⁹ See OFT Decision: Completed acquisitions by Tesco plc of the Co-operative Group’s stores in Uxbridge Road, Slough (2 February 2004), in which the OFT declined to exercise its discretion.

⁶⁰ Article 3 of the Enterprise Act 2002 (Anticipated Mergers) Order 2003 SI2003/1595 (as amended).

- 4.43 A new merger situation would not arise directly from the fact that there has been a reduction in the level of a shareholder's control (for example from a controlling interest to 'de facto' control). However, it is possible in these circumstances that a merger situation could arise through a third party thereby acquiring material influence, 'de facto' control or a controlling interest.

Temporary merger situations

- 4.44 The Act does not define the period of time that a merger situation should last in order for it to qualify as a relevant merger situation under the Act.⁶¹ In theory, therefore, acquisitions of control intended purely as a temporary step in a wider overall transaction might constitute a relevant merger situation. In practice, such arrangements might include break-up bids, stake-building in the context of a public bid⁶², and 'warehousing' arrangements.⁶³
- 4.45 Break-up bids occur where one or more entities purchase an enterprise pursuant to an agreement that the acquired enterprise will be divided up according to a pre-existing plan upon completion of the transaction. In some cases, the break-up bid is structured in anticipation of merger control concerns that would otherwise occur. The question therefore arises whether the CMA will consider the first step (that is, the initial acquisition of the target enterprise) as a separate relevant merger situation concerning the entire target enterprise, or whether it will examine the ultimate acquisitions in the second step (that is, after the target enterprise is split up).⁶⁴
- 4.46 The nature of the voluntary regime under the Act means there is, as a starting point, no requirement on the party or parties acquiring control under the first step in the above scenario to notify the CMA about the initial acquisition.

⁶¹ See CMA Decision: Completed agreement between Aer Lingus Limited and CityJet designated Activity Company (21 December 2018).

⁶² In this situation, the CMA's decision if and when to investigate on its own initiative a minority interest will depend on all the circumstances of the case (including the likelihood of a public bid being launched), and in particular its belief as to the extent of the competition concerns that could potentially result from a minority shareholding.

⁶³ 'Warehousing' refers to a situation where a transferring business is temporarily acquired by an interim buyer, often a bank, on the basis of an agreement for the subsequent onward sale of the business to an ultimate acquirer.

⁶⁴ The CMA will apply similar principles to those set out in paragraphs 4.47 to 4.48 in the context of joint acquisitions for a start-up period.

- 4.47 In terms of whether the CMA will investigate the initial acquisition on its own initiative, the CMA will generally be unlikely to do so where it is clear that it will be merely an interim step in the context of a wider transaction and that the subsequent steps will occur within the four-month time period within which the CMA has the ability to refer the initial acquisition. Where it appears that the subsequent steps may not take place within four months of the completion of the initial acquisition, the CMA will not risk losing its ability to refer the initial acquisition simply on the basis that it is intended that the current situation will not be permanent.
- 4.48 Where the initial acquisition is notified to it (whether the initial acquisition is anticipated or completed), the CMA would not be able to clear the transaction unconditionally simply on the basis that the situation as notified was not intended to be permanent. To avoid any referral for a phase 2 investigation that would otherwise be required on the basis of the initial acquisition, the CMA would require UILs (potentially effectively formalising in undertakings the merger parties' intended break-up).

Associated persons

- 4.49 For the purposes of considering whether an enterprise has ceased to be distinct, section 127 of the Act requires the CMA to consider whether a number of persons acquiring an enterprise are in fact 'associated persons' and thus should be viewed as acting together.
- 4.50 This situation will most commonly arise where the acquiring persons are related or have a signed agreement to act jointly to make an acquisition.⁶⁵ The Act does not require that each of the acquiring parties should themselves individually have control over the acquired entity for them all to be regarded as being associated persons.⁶⁶ Separate groups of enterprises may be associated persons where a single member that is an associated person to each of those groups is common to both groups.⁶⁷

⁶⁵ See *Lebedev Holdings Limited and Another v Secretary of State for Digital, Culture, Media and Sport* [2019] CAT 21, at paragraph 30.

⁶⁶ See *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30 at paragraph 57, *Groupe Eurotunnel SA v Competition and Markets Authority* [2015] CAT 1 at paragraph 79(c), *Société Coopérative de Production SeaFrance SA v Competition and Markets Authority* [2015] UKSC 75 at paragraph 6.

⁶⁷ See *Lebedev Holdings Limited and Another v Secretary of State for Digital, Culture, Media and Sport* [2019] CAT 21 at paragraphs 66-67; CMA Report to the Secretary of State for Digital, Culture, Media and Sport: Completed acquisition by Mr. Sultan Muhammad Abduljadayel and

Time limits for reference decisions

- 4.51 After starting an investigation, the CMA is in most cases required to decide whether the test for reference is met within a timetable of 40 working days, failing which it loses its ability to refer the merger to a phase 2 inquiry. Where merger parties notify the CMA using a Merger Notice, that timetable (referred to in the Act as the 'initial period') starts on the first working day after the CMA confirms to the merger parties that the Merger Notice is complete.⁶⁸ In other cases, the timetable starts on the first working day after the CMA confirms that it has received sufficient information to enable it to begin its investigation.⁶⁹ The 40 working day deadline is subject to extension in certain circumstances,⁷⁰ and does not apply to decisions by the Secretary of State to refer a merger after issuing an intervention notice.
- 4.52 In addition, for the CMA to be able to refer a merger either:
- a) the merger must not yet have taken place (that is, the parties must not yet have ceased to be distinct); or
 - b) under section 24 of the Act, the completed merger must have taken place not more than four months before the reference is made, unless the merger took place without having been made public and without the CMA being informed of it (in which case the four-month period starts from the earlier of the time that material facts are made public or the time the CMA is told of material facts).
- 4.53 The test under the Act for when material facts are 'made public' is when they are 'so publicised as to be generally known or readily ascertainable'.⁷¹ In

Wondrous Investment Holdings L.P. of Independent Digital News and Media Limited and Lebedev Holdings Limited (28 June 2019); and OFT Decisions: Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel 4 Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecoms Limited and Arqiva Limited – Project Canvas (19 May 2010); and Anticipated acquisition by Tramlink Nottingham Consortium of Net Phase 2 Concession (12 September 2011).

⁶⁸ Section 34ZA(3)(a) of the Act. A Merger Notice must meet the requirements set out in section 96(2) of the Act. Further information on notifying mergers to the CMA is set out in chapter 6.

⁶⁹ Section 34ZA(3)(b) of the Act.

⁷⁰ Section 34ZB of the Act. These include where relevant parties have failed to comply with the requirements of a formal information request under section 109 of the Act and where the Secretary of State has served an intervention notice in relation to a merger which may raise public interest issues.

⁷¹ Section 24(3) of the Act.

interpreting these provisions of the Act, the CMA will have regard to the following factors:

- a) The CMA interprets ‘material facts’ as being the necessary facts that are relevant to the determination of the CMA’s jurisdiction in terms of the four-month time period (but not facts relevant to other aspects of whether a relevant merger situation exists for the purposes of the Act). In practice, this means information on the identity of the merger parties and whether the transaction remains anticipated (including the status of any conditions precedent to completion) or has completed.⁷²
- b) Where the merger parties do not notify the CMA, but ‘make public’ material facts about the transaction such that they are generally known or reasonably ascertainable, the CMA interprets this as meaning that such information could readily be ascertained by the CMA acting reasonably and diligently in accordance with its statutory functions. In practical terms, the CMA would consider that an acquiring party would normally be said to have ‘made public’ material facts where those facts had been publicised in the national⁷³ or relevant trade press in the UK and where the acquiring party had itself taken steps to publicise the transaction at large, normally by publishing and prominently displaying on its own website a press release about the transaction.⁷⁴

⁷² See *Lebedev Holdings Limited and Another v Secretary of State for Digital, Culture, Media and Sport* [2019] CAT 21 at paragraphs 60, 64-68; CMA Report to the Secretary of State for Digital, Culture, Media and Sport: Completed acquisition by Mr. Sultan Muhammad Abduljadayel and Wondrous Investment Holdings L.P. of Independent Digital News and Media Limited and Lebedev Holdings Limited (28 June 2019). See also CMA Final Report: Completed acquisition by Ecolab Inc. of the Holchem Group Limited (8 October 2019) at paragraph 4.6 where a public announcement by Ecolab shortly after the Merger completed did not constitute material facts about the Merger being made public because the press release erroneously indicated that the Merger had not completed. See also the CC’s report: *Icopal Holding A/S and Icopal a/s: A report on the merger situation (2001)* at paragraph 2.50. That report concerned the application of the equivalent provisions of the Fair Trading Act 1973, but the result would not have differed under the Act.

⁷³ See *Lebedev Holdings Limited and Another v Secretary of State for Digital, Culture, Media and Sport* [2019] CAT 21, at paragraph 53.

⁷⁴ See OFT Decisions: Completed acquisition by Genus plc of Local Breeders Limited (14 May 2008) and Completed acquisition by Tesco Stores Limited of Brian Ford’s Discount Store Limited (22 December 2008). For a discussion of steps which were not considered by the CMA to give rise to material facts being made public, see CMA Final Report: Completed acquisition by Bottomline

- 4.54 The Act permits the CMA to extend the four-month time period in certain circumstances. When examining completed mergers, for example, the CMA may under section 25 of the Act extend that period if an information request issued by it under section 109 of the Act is not complied with (for example, information is not supplied within the stated deadline).⁷⁵
- 4.55 As described at paragraph 4.42 above, section 27(5) of the Act allows the CMA to treat successive events within a period of two years between the same parties as occurring simultaneously on the date of the latest event.

The turnover test

- 4.56 The ‘turnover test’ is met where:
- a) the annual UK turnover of the enterprise being acquired exceeds £70 million⁷⁶; or
 - b) where the enterprise being taken over (or part of it) is a relevant enterprise, the relevant enterprise’s annual UK turnover exceeds £1 million.

Enterprise being acquired

- 4.57 Under section 28 of the Act, two types of situation may be distinguished for the purposes of calculating turnover: those where one or more enterprises remain under the same ownership and control after the merger as they were under before it, and those where no enterprise remains under the same ownership and control after the merger.
- 4.58 Where one or more enterprises remain under the same ownership and control after the merger, turnover is calculated by taking the total value of all enterprises ceasing to be distinct (that is, the acquiring entities and target entities) and deducting the turnover of those enterprises that remain under the same ownership and control after the merger.

Technologies (de), Inc. of Experian Limited’s Experian Payments Gateway business and related assets (2020), at paragraph 5.26.

⁷⁵ Other circumstances in which the CMA can extend the four month time period include, for example, by agreement with the merger parties and in certain circumstances following the giving of an intervention notice by the Secretary of State. See, in those respects, sections 25 and 42 of the Act.

⁷⁶ See the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended).

- a) This situation includes a straightforward acquisition, in which the acquirer (A) and the target (T) cease to be distinct from each other. The turnover of the acquirer is deducted as it remains under the same ownership and control after the merger. The relevant turnover is therefore that of the target. (See Figure 1 below.)
- b) It also includes a situation where two or more companies (A and B) form a joint venture incorporating their assets and businesses in a particular area of activity. In this situation, each parent with control ceases to be distinct from the target business contributed to the joint venture by the other parent.⁷⁷ As all the parent companies remain under the same ownership and control after the merger,⁷⁸ and therefore have their turnover deducted, the turnover is the sum of the turnover of each of the contributed enterprises (which are, effectively, the target enterprises) (T_A and T_B).⁷⁹ (See Figure 2 below.)

4.59 Where no enterprises remain under the same ownership and control after the merger, the relevant turnover is calculated by taking the total value of all enterprises ceasing to be distinct and deducting the turnover of the enterprise with the highest UK turnover.

- a) This includes a situation in which two enterprises (A and B) come together to form a full legal merger.⁸⁰ The relevant turnover would be that of the existing enterprise with the smaller UK turnover (B). (See Figure 3 below.)
- b) It also includes a situation in which two or more companies (A, B and C) form a joint venture (Newco) incorporating all of their assets and

⁷⁷ See CMA Decision: Anticipated joint venture between Anglican Water Group Ltd and Northumbrian Water Group Ltd (1 August 2017). See the CC's report: A report on the anticipated joint venture between BBC Worldwide Limited, Channel Four Television Corporation and ITV plc relating to the video on demand sector (2009), at paragraph 3.53.

⁷⁸ In certain cases, the CMA may treat entry into a joint venture as giving rise to more than one relevant merger situation (see footnote 18 above). In such a case, the CMA will treat the turnover of the enterprise being taken over as being the turnover of the enterprises contributed to the joint venture by the other parent(s).

⁷⁹ See OFT Decision: Anticipated relevant joint venture between Goodrich Corporation and Rolls-Royce plc (8 December 2008).

⁸⁰ A full legal merger occurs where a full merger of A and B as equals is achieved by Newco C acquiring both. In this circumstance, neither A nor B survives the merger. Both firms are brought under common control, but neither remains under the same control as it was pre-merger. The turnovers to be considered are those of A and B.

businesses. The relevant turnover would be that of all the existing companies, excluding the company with the largest UK turnover. (See Figure 4 below.)

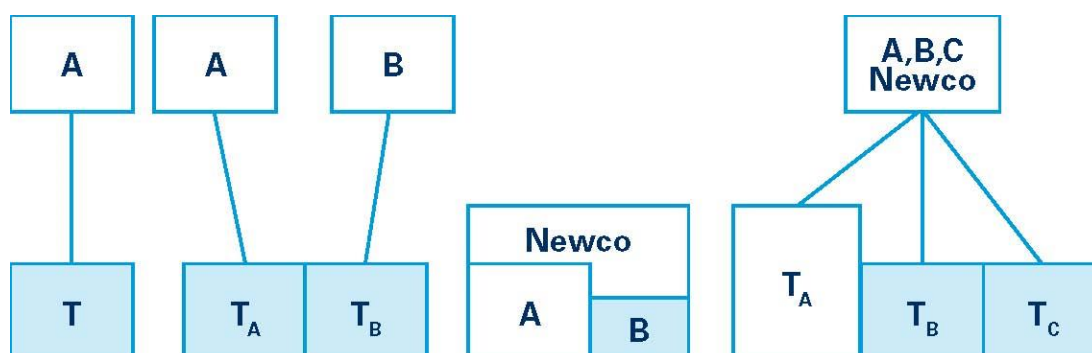


Fig. 1

Fig. 2

Fig. 3

Fig. 4

Shaded areas mark those businesses to be included in the turnover calculation

Calculation of turnover

4.60 In principle, the turnover test applies to the turnover of the acquired enterprise that was generated in relation to customers within the UK⁸¹ in the business year preceding the date of completion of the merger or, if the merger has not yet taken place, the date of the reference for a phase 2 investigation.⁸² The figures in the enterprise's latest published accounts will normally be sufficient to measure whether the turnover test is met, unless there have been significant changes since the accounts were prepared.⁸³ In

⁸¹ For the purpose of the geographic allocation of turnover, subject to complying with the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended), the CMA will follow the approach set out in Annex A. Subject to the qualifications outlined in Annex A, the general rule is that turnover should be regarded as UK turnover for the purposes of the Act when the customer is located in the UK. The CMA will have regard to whether sales are made directly or indirectly (via agents or traders) to UK customers.

⁸² In some cases, this may include intra-group sales (for example where a target business previously made intra-group sales, which would become external sales as a result of the acquisition of the target by a third party). See further Annex A. Such considerations were relevant in OFT Decision: Anticipated joint venture between Vodafone Limited and Telefonica UK Limited (28 September 2012).

⁸³ In line with Article 11(3) of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended), the CMA would regard acquisitions or divestments or

this circumstance, more recent accounts would provide a better guide to the actual turnover of the enterprises concerned. Where company accounts do not provide a relevant figure, for example because only part of a business is being acquired or the accounts do not provide a suitable geographic breakdown of turnover, the CMA will consider evidence presented by the merger parties and other interested parties to form its own view as to what it believes to be the value of UK turnover for jurisdictional purposes.

4.61 The basic principles set out above are elaborated further in Annex A.

The share of supply test

4.62 Under section 23 of the Act, the ‘share of supply test’ is satisfied if the merged enterprises:

- a) both⁸⁴ either supply or acquire goods or services of a particular description in the UK;⁸⁵ and
- b) will, after the merger,⁸⁶ supply or acquire 25% or more of those goods or services, in the UK as a whole or in a substantial part of it.

The supply or procurement of goods or services of any description

4.63 The Act confers on the CMA a broad discretion to identify, for the purposes of applying the share of supply test, a specific category of goods or services supplied or procured by the merger parties.⁸⁷ In applying the share of supply test, the CMA will have regard to the following considerations:

- a) The share of supply test is not an economic assessment of the type used in the CMA’s substantive assessment; therefore, the group of

other transactions or events as relevant for these purposes, but considers that the gain or loss of individual customers would, absent exceptional circumstances, be unlikely to be relevant.

⁸⁴ Where more than two enterprises cease to be distinct, at least two of them must supply or acquire such goods or services.

⁸⁵ See, for example, CMA Decision: Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc (10 February 2020) where the CMA found that the share of supply test was satisfied (on an alternative basis) based on the number of patents procured by the merger parties.

⁸⁶ In accordance with section 23(9) of the Act, the CMA assesses whether the share of supply test is met at the time of its decision on reference, unless the reference of an anticipated merger is subsequently treated by the CMA as being a reference of a completed merger pursuant to section 37(2) of the Act (in which case, it is at such time as the CMA may determine).

⁸⁷ Section 23 of the Act.

goods or services to which the jurisdictional test is applied need not amount to a relevant economic market, and can aggregate, for example, intra-group and third party sales even if these might be treated differently in the substantive assessment.⁸⁸ As such, the description of goods or services to which the jurisdictional test is applied may differ from the relevant economic market used for the purposes of the substantive assessment of the merger.⁸⁹

- b) The CMA will have regard to any reasonable description of a set of goods or services to determine whether the share of supply test is met. Whilst the share of supply used may correspond with a standard recognised by the industry in question, this need not necessarily be the case. The CMA will consider the commercial reality of the merger parties' activities when assessing how goods or services are supplied, focussing on the substance rather than the legal form of arrangements. Firms can engage in a variety of different business models and the way in which firms interact (with each other and other market participants) to win business over time can vary significantly. In practice, this means that competitive interactions between firms may not be reduced to overlaps in directly-marketed products or services but can result, for example, from overlaps involving pipeline products or services,⁹⁰ or where there are sufficient elements of common functionality between the merger parties' activities,⁹¹ amongst other factors.
- c) In applying the share of supply test, the CMA may, under section 23(8) of the Act, apply such criteria as it considers appropriate to decide whether certain goods or services should be treated as goods or services of a separate description (and therefore not taken

⁸⁸ See CMA Decision: Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc (10 February 2020) and OFT Decision: Anticipated acquisition by Montauban S.A. of Simon Group plc (21 August 2006).

⁸⁹ See CMA Decisions: Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc (10 February 2020); Completed acquisition by ION Investment Group Limited of Broadway Technology Holdings LLC (7 July 2020); Anticipated acquisition by LN-Gaiety Holdings Limited of MCD Productions Unlimited Company (11 July 2019).

⁹⁰ See CMA Decision: Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc (10 February 2020).

⁹¹ See CMA Decision: Anticipated acquisition by Visa International Service Association of Plaid Inc (24 August 2020); CMA Final Report: Completed acquisition by Linergy of Ulster Farm By-Products (6 January 2016).

into account in assessing whether the share of supply test is met) in any particular case.

- d) The CMA cannot apply the share of supply test unless the merger parties together supply or acquire the same category of goods and services (of any description). The test cannot capture mergers where the relationship between the merger parties is purely vertical in nature and where there is no overlap between the merger parties' activities based on any reasonable description of a set of goods or services.⁹²

The UK or a substantial part of it

4.64 The share of supply test requires that the merger has a sufficient UK nexus, namely, that it would result in the creation or enhancement of at least a 25% share of supply or acquisition of goods or services either in the UK or in a substantial part of the UK. In assessing how goods or services are supplied to the UK, the CMA will have regard to the following considerations:

- a) The merger parties do not need to be legally incorporated in the UK.
- b) Services or goods are generally supplied in the UK where they are provided to customers which are located in the UK.⁹³ The CMA will apply this general rule in a flexible and purposive way, with regard to all relevant factors. In many circumstances, where competition with alternative suppliers takes place is likely to be informative. The CMA's assessment may also consider other factors, such as where relevant procurement decisions are likely to be taken or where the goods or services are ultimately delivered, supplied, accessed or used (for example, if the relevant goods or services are used to meet UK regulatory obligations) where appropriate. This general approach also applies in the case of sales to multinational companies,

⁹² In CMA Decision: Completed acquisition by Google LLC of Looker Data Sciences, Inc. (13 February 2020), the share of supply test was applicable where parties were active at the same level of the supply chain, in addition to being vertically related. See also OFT Decisions: Completed acquisition by GFI Group Inc of Trayport Limited (28 May 2008) and Completed acquisition by the BUPA Group of the Cromwell Hospital (24 June 2008).

⁹³ The mere fact that a supplier is located in the UK is therefore not conclusive that services are being supplied in the UK. Conversely, suppliers based overseas may be supplying services in the UK.

irrespective of place of incorporation, domicile or principal place of business.

- c) The CMA will also have regard to the nature of the relationships between the merger parties and their customers (including as between different customer groups). While the CMA will consider direct contractual relationships, it may also consider customer relationships that are not governed by contract,⁹⁴ as well as other relevant factors. For example, under section 128 of the Act, the supply of services includes the provision of services by making them available to potential users,⁹⁵ and making arrangements for the use of computer software.⁹⁶

Substantial part of the UK

- 4.65 The share of supply test may be applied to the UK as a whole or to a substantial part of it. The test may be satisfied on the basis of the share of supply or acquisition in a relatively wide geographic area (such as the UK, Great Britain, England, Scotland, Wales or Northern Ireland), even if the transaction's competitive impact is more likely to be regional or local in nature.⁹⁷
- 4.66 There is no statutory definition of 'a substantial part'. The House of Lords (now the Supreme Court of the UK) ruled in the context of similar provisions in the Fair Trading Act 1973 that, while there can be no fixed definition, the area or areas considered must be of such size, character and importance as to make it worth consideration for the purposes of merger control.⁹⁸ The

⁹⁴ In some cases, interactions between firms and their customers might not be reduced to single (formal) 'procurement' decisions giving rise to direct contractual relationships, and it may be necessary to consider the significance of commercial relationships in the round.

⁹⁵ Section 128(3) of the Act. See CMA Request pursuant to article 22 of Council Regulation (EC) 139/2004: Anticipated acquisition by Mastercard Incorporated of Parts of the Corporate Services Business of Nets A/S (16 March 2020).

⁹⁶ Section 128(4) of the Act. See CMA Decision: Completed acquisition by ION Investment Group Limited of Broadway Technology Holdings LLC (7 July 2020).

⁹⁷ See CMA Final Report: Anticipated acquisition by LN-Gaiety Holdings Ltd of MCD Productions Unlimited Company (19 December 2019).

⁹⁸ See *Regina v Monopolies and Mergers Commission and another ex parte South Yorkshire Transport Limited* [1993] 1 WLR 23, at paragraphs 31A to 32B: "... the epithet "substantial" is there to ensure that the expensive, laborious and time-consuming mechanism of a merger reference is not set in motion if the effort is not worthwhile... [To be a substantial part of the UK] "the part must

CMA will take such factors into account as: the size, population, social, political, economic, financial and geographic significance of the specified area or areas, and whether it is (or they are) special or significant in some way.⁹⁹

- 4.67 There is no need in the application of the share of supply test for the substantial part of the UK to constitute an undivided geographic area. This interpretation gives effect to the purposes of the Act. The economic significance of a merger, in terms of a substantial lessening of competition, does not necessarily depend on whether several localities are contiguous or separated.¹⁰⁰

The 25% Threshold

- 4.68 Under section 23(3) and (4) of the Act, the share of supply test is satisfied where the merger will result in a share of supply of 25% or more in relation to the supply of goods or services of any description in the UK or in a substantial part of the UK.
- 4.69 Accordingly, where an enterprise already supplies or acquires 25% of any particular goods or services, the test is satisfied so long as its share is increased as a result of the merger, regardless of the size of the increment.¹⁰¹ Where there is no increment, the share of supply test is not met (subject to the exceptions and special regimes described below).
- 4.70 In applying the share of supply test, the CMA may under section 23(5) of the Act have regard to the value, cost, price, quantity, capacity, number of

be of such size, character and importance as to make it worth consideration for the purposes of the Act.”

⁹⁹ See CMA Decisions: Completed acquisition by Novo Invest GmbH acting through Novomatic UK Ltd of Talarius Limited (28 October 2016); Completed acquisition by Co-operative Foodstores Limited of eight My Local grocery stores from ML Convenience Limited and MLCG Limited (19 October 2016); Anticipated acquisition by Co-operative Foodstores Limited of 15 Budgens grocery stores from Booker Retail Partners (GB) Limited (6 June 2016); Completed acquisition by LN-Gaiety Holdings Limited of MAMA & Company Limited (19 February 2016); Completed acquisition by Oasis Dental Care (Central) Limited of Total Orthodontics Limited (2 September 2015).

¹⁰⁰ See CMA Decisions: Completed acquisition by Henderson Retail Limited of part of the Martin McColl Limited portfolio (16 February 2018); Completed acquisition by Novo Invest GmbH acting through Novomatic UK Ltd of Talarius Limited (28 October 2016); See also the CC’s report: A report on the acquisition by Archant Limited of the London newspapers of Independent News and Media Limited (22 September 2004).

¹⁰¹ See, for example, CMA Final Report: Anticipated acquisition by LN-Gaiety Holdings Ltd of MCD Productions Unlimited Company (19 December 2019).

workers employed¹⁰² or any other criterion, or combination of criteria, in determining whether the 25% threshold is met.¹⁰³

Exceptions and special regimes

- 4.71 The following exceptions and special regimes apply in relation to the share of supply test:
- a) No increment is required in relation to the shares of supply of newspapers and/or broadcasting where the Secretary of State issues a special intervention notice (see paragraph 16.15 below).
 - b) For mergers in which the enterprise being taken over (or part of it) is a relevant enterprise (see paragraphs 4.4 to 4.5 above), the share of supply test is met if, before the merger, the relevant enterprise being acquired or merged has a share of supply or purchase of 25% or more of relevant goods or services in the UK or in a substantial part of it. The test is met even if the share of supply does not increase as a result of the merger. The relevant goods or services for the purposes of deciding whether the share of supply test is met are those by virtue of which the target enterprise qualifies as a relevant enterprise. This provision adds to, rather than replaces, the share of supply test discussed in paragraph 4.62 above.
- 4.72 For mergers involving two or more ‘water enterprises’ the jurisdictional test is based on turnover only (see paragraph 17.1 below for further information).
- 4.73 The increase in the share of supply (referred to in paragraph 4.69) must result from the enterprises ceasing to be distinct. In the case of an acquisition, this requires calculation of the share of supply based on the activities of the acquirer and the target company. In joint venture situations, the share of supply is calculated by reference to the activities of the joint venture, although it will include shares of the controlling joint venture parents where they remain active in the same activities as the joint venture. For

¹⁰² See CMA Decision: Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc (10 February 2020).

¹⁰³ In the CMA Decision: Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc (10 February 2020), the CMA relied on the number of patents procured by the merger parties as an alternative basis to satisfy the share of supply test. In CMA Request pursuant to article 22 of Council Regulation (EC) 139/2004 in Anticipated acquisition by Mastercard Incorporated of Parts of the Corporate Services Business of Nets A/S (16 March 2020), the CMA considered that the share of supply test would be met based on the number of suppliers bidding to supply certain services.

example, where two companies, Company A and Company B, form a joint venture incorporating their assets and businesses in a particular area of activity, enterprises T_A and T_B respectively, the share of supply test is applied with reference to whether there is an increase in the share of supply between A, B, T_A and T_B in relation to the areas of activity in which T_A and/or T_B are active. The CMA would therefore not apply the share of supply test as between A and B outside the areas of activity of the joint venture.

5 THE PHASE 1 PROCESS: OVERVIEW

- 5.1 The table below shows the key stages – and indicative timing – of a typical phase 1 investigation by the CMA, together with a high level summary of the actions that are typically taken by the CMA¹⁰⁴ and by the merger parties (and, where relevant, third parties) at each stage.
- 5.2 As noted in the table, certain actions (for example, information gathering, the imposition of interim measures, or engagement with the CMA on potential remedies) may in practice occur at various stages of the phase 1 process, including prior to the formal commencement of the investigation timetable. The CMA will apply a reasonable and proportionate approach to these actions according to the complexity of the issues under investigation.
- 5.3 Each of the stages is described in more detail in chapters 6 to 9 below.

¹⁰⁴ The table does not show the statutory functions performed by Ofcom, NHSI or the Secretary of State in relation to, respectively, local media mergers, NHS mergers and public interest mergers nor does it show the responsibilities of the CMA in respect of these types of merger (see further chapters 9 and 16 below).

Figure: The key stages of a typical Phase 1 investigation

	MILESTONES	CMA	PARTIES
STAGE 1: Pre-notification discussions commence (for parties wishing to submit a voluntary notification)			
Typically minimum of 2 weeks before initial submission of draft notification	Initial contact between parties and CMA	CMA allocates case team of CMA staff to review transaction and liaise with parties.	Merger parties engage in initial contact with CMA and submit a case team allocation request form.
	Pre-notification process begins	<p>CMA case team engages with merger parties on the nature and scope of information and internal documents which the case team considers the merger parties will need to provide in their voluntary notification.</p> <p>For some mergers, it may also be appropriate for the case team to hold informal discussions on remedies with the merger parties at any point from the start of the pre-notification process onwards.</p>	<p>Merger parties respond to CMA information requests.</p> <p>Merger parties may also wish to signal to the CMA at this stage that they wish to engage in early remedies discussions or pursue a 'fast-track' process (eg to proceed more quickly to offering remedies or to a phase 2 investigation).</p>
STAGE 2A: Voluntary notification by merger parties¹⁰⁵			
Duration of pre-notification process will differ on case-by-case basis; cases raising complex and/or	Merger parties submit voluntary notification (Merger Notice)	<p>CMA continues pre-notification discussions and reviews draft Merger Notice.</p> <p>CMA will typically issue information requests (including statutory requests under section 109 of the Act) to the merger parties to complete the notification and ensure that the CMA has sufficient information to commence its investigation.</p> <p>CMA is also likely to engage with third parties and may issue a public invitation to comment, inviting submissions about the potential competitive impact of the merger. Once CMA is satisfied that the Merger Notice is in the form, and contains the</p>	<p>Merger parties submit a Merger Notice, usually in draft form.</p> <p>Merger parties respond to any information requests, and submit updated drafts of voluntary notification as appropriate.</p> <p>Merger parties submit completed Merger Notice.</p> <p>Third parties respond to requests for information (in writing or orally) and/or to any invitation to comment.</p>

¹⁰⁵ For information regarding submission of a "briefing note" to the CMA's mergers intelligence function, see *Guidance on the CMA's mergers intelligence function* (CMA56).

	MILESTONES	CMA	PARTIES
		<p>information, required by the Act, it confirms this to the merger parties, and confirms the consequent statutory deadline for its phase 1 decision.</p> <p>CMA considers whether interim measures are necessary to prevent or unwind pre-emptive action – in some cases, this may be before submission of the voluntary notification.¹⁰⁶</p>	
STAGE 2B: Own initiative investigation (where transaction is not voluntarily notified by the merger parties)			
	CMA becomes aware of a transaction that has not been voluntarily notified	<p>CMA considers whether there is a reasonable chance that its duty to refer would be met if it investigated the transaction.</p> <p>Where appropriate, CMA sends an enquiry letter to the merger parties requesting further information about the transaction.</p> <p>CMA also likely to engage third parties and may issue a public invitation to comment, inviting submissions about the potential competitive impact of the merger.</p> <p>CMA considers whether interim measures are necessary to prevent or unwind pre-emptive action.</p> <p>When CMA has sufficient information to begin its investigation, it confirms this to the merger parties, and confirms the consequent statutory deadline for its phase 1 decision.</p>	<p>Merger parties respond to enquiry letter and provide CMA with requested information.</p> <p>Third parties respond to requests for information (in writing or orally) and/or to any invitation to comment.</p>
STAGE 3: Phase 1 assessment			

¹⁰⁶ The Act permits the CMA to make initial enforcement orders (IEOs), including unwinding orders, at any stage of the phase 1 investigation process (including prior to the formal commencement of its phase 1 investigation), in order to prevent action which may prejudice any reference to phase 2 or impede any action by the CMA which may be justified by its findings following a phase 2 investigation.

	MILESTONES	CMA	PARTIES
Working Day 1		The 40 working day initial period for the CMA's phase 1 investigation begins on the first working day after it confirms to the merger parties that it has received a complete Merger Notice or that it has sufficient information to begin its investigation.	
	Information-gathering	CMA continues to engage with merger parties as appropriate throughout the 40 working day period. CMA requests further information from merger parties (if necessary) during the 40 working day period. CMA may also directly contact third parties to seek views and information relevant to the assessment of the transaction. ¹⁰⁷	Ongoing liaison between case team and merger parties. Merger parties respond to any information requests. Third parties respond to any requests for information.
	Invitation to comment	CMA publishes invitation to comment notice, inviting views from interested third parties on the transaction under review. CMA assesses responses from third parties.	Third parties respond to invitation to comment.
Working Day 15 – 20	State of play discussion	CMA holds 'state of play' discussion with merger parties (typically by telephone call/videoconference).	Merger parties participate in state of play discussion.
STAGE 4A: Phase 1 decision-making process (for cases raising no serious competition concerns)			
By Working Day 40	Phase 1 decision	CMA clears transaction. CMA drafts clearance decision and communicates this to the merger parties. CMA publicly announces clearance decision (full decision published at a later date following identification of confidential	

¹⁰⁷ In some cases, the CMA may contact third parties and/or publish an invitation to comment notice during the pre-notification stage.

	MILESTONES	CMA	PARTIES
		information).	
STAGE 4B: Phase 1 decision-making process (for cases raising more complex or material competition issues)			
By Working Day 40	Issues Meeting (Typically held by Working Day 25)	CMA invites merger parties to issues meeting. CMA sends merger parties 'issues letter' stating core arguments for reference to phase 2. CMA holds 'issues meeting' with merger parties.	Merger parties may provide written response to issues letter (before and/or after issues meeting). Merger parties attend issues meeting, in person or via videoconference.
	Phase 1 decision	CMA holds internal 'Case Review Meeting'. CMA holds internal decision meeting. The CMA's phase 1 decision maker decides whether duty to refer has been met.	
	Notice of decision	CMA provides merger parties with its reasoned decision within statutory period. CMA publishes notice of decision (full decision published at a later date following identification of confidential information).	
STAGE 5: Phase 1, potential remedies – where CMA decides duty to refer is met			
0-5 working days after merger parties given decision	Offer of undertaking in lieu of reference (UILs)		Merger parties decide whether to offer UILs to remedy identified concerns. Merger parties who do wish to offer UILs submit completed Remedies Form and draft UILs to CMA.
Up to 10 working days after merger parties given decision	Consideration of offered UILs	If no UILs offered within five working day period, CMA refers transaction to phase 2. CMA considers any UILs offered. CMA decides whether to provisionally accept UILs (or a modified version of them). If CMA rejects UILs, transaction is referred to phase 2.	Merger parties respond to any modifications to the UILs proposed by the CMA.

	MILESTONES	CMA	PARTIES
Within 50 working days of merger parties being given decision (subject to extension for special reasons)	Agreement and acceptance of UILs	<p>CMA gives detailed consideration to terms of proposed UILs to determine if any modifications required before they can be finally accepted.</p> <p>CMA publishes draft UILs for third party comment.</p> <p>CMA considers whether to formally accept draft UILs (with possible further, shorter consultation if required following any material changes to the UILs).</p> <p>If UILs are considered sufficiently 'clear cut' and effective, the CMA publishes a notice of acceptance of UILs.</p> <p>If UILs are not agreed, transaction is referred to phase 2.</p>	<p>Merger parties discuss any necessary modifications to the UILs so as to agree a version for publication for third party consultation.</p> <p>Third parties submit comments on draft UILs within consultation period (at least 15 days for the initial consultation, and at least seven days for any subsequent consultation).</p> <p>If CMA agrees UILs, merger parties sign UILs.</p>
	Implementation of UILs if agreed	<p>CMA publishes final UILs.</p> <p>CMA assesses, and as appropriate approves, proposed purchaser(s) of the business(es) being divested by merger parties (will occur prior to acceptance of UILs in 'upfront buyer' cases).</p>	<p>Merger parties implement UILs, including (where no upfront buyer was required) submitting for CMA approval details of proposed purchasers of any divestments required under the UILs.</p>

6 NOTIFICATION OF MERGERS TO THE CMA

- 6.1 Under the Act, there is no requirement to notify mergers to the CMA. Notification to the CMA is therefore described as ‘voluntary’,¹⁰⁸ in contrast to the situation in most other jurisdictions. The CMA does not, for the purposes of substantive competition assessment, treat completed acquisitions any differently to anticipated transactions.¹⁰⁹ However, as described in this chapter, there can be significant benefits to merger parties notifying a merger to the CMA and/or engaging in early discussions with the CMA as to whether they should notify a merger, particularly in the case of transactions which may be notifiable across multiple jurisdictions.
- 6.2 In cases that constitute a relevant merger situation, but where competition concerns clearly do not arise, the merger parties may decide that notification to the CMA is not necessary.
- 6.3 However, in cases that do raise the possibility of competition concerns, parties should consider carefully whether to notify the merger to the CMA. In making this choice, they should be aware that:
- a) the CMA may well become aware of the transaction as a result of its own mergers intelligence functions (including through the receipt of complaints); and
 - b) a decision not to notify the CMA carries particular risks once the merger has been completed.

These considerations are discussed in turn below.

The CMA’s mergers intelligence function

- 6.4 The fact that a merger has not been voluntarily notified to the CMA does not mean that the CMA will not review it. The CMA has a duty to track merger activity to determine whether any unnotified merger may give rise to a

¹⁰⁸ The merger parties may, however, be asked to provide sufficient information for the CMA to be able to review the merger, if the CMA chooses to investigate on its own initiative.

¹⁰⁹ A number of cases referred by the CMA for a phase 2 investigation have been ones which the merger parties did not voluntarily notify, but which the CMA decided to investigate on its own initiative or following a complaint from a third party. See, for example, CMA Decisions: Completed acquisition by Tobii AB of Smartbox Assistive Technology Limited and Sensory Software International Ltd (25 January 2019) and Completed acquisition by Vanilla Group Limited (JLA) of Washstation Limited (3 April 2018).

substantial lessening of competition. The CMA will take a decision to investigate if it believes that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met (ie there is a reasonable chance that an investigation will identify a relevant merger situation that gives rise to a realistic prospect of a substantial lessening of competition).

- 6.5 The CMA has dedicated mergers intelligence staff responsible for monitoring non-notified merger activity. Any interested party that wishes to make the CMA aware of a merger that it considers could raise competition concerns can also contact the CMA confidentially at Mergers.Intelligence@cma.gov.uk.
- 6.6 Further information about the operation of the CMA's mergers intelligence function is provided in the CMA's *Guidance on the CMA's mergers intelligence function* (CMA56).

Risks to the merger parties of not notifying and/or completing mergers

- 6.7 The fact that a merger has been completed does not prevent the CMA from investigating and referring it for a phase 2 investigation for possible remedial action, or accepting UILs. For non-notified completed mergers, the CMA will generally seek to prevent pre-emptive action which might prejudice the reference or impede any action by the CMA which may be justified by its findings through its powers to make an initial enforcement order (IEO). Where it decides to make such an order, the CMA will notify the merger parties that it has made an IEO under section 72 of the Act that prevents them from starting integration (or undertaking further integration) at the same time as it sends the enquiry letter, or shortly thereafter.
- 6.8 In considering whether to notify a merger to the CMA, merger parties should note, in the context of completed mergers, that:
- a) First, the CMA will normally issue IEOs¹¹⁰ in investigations where it has reasonable grounds for suspecting that two or more enterprises have ceased to be distinct.¹¹¹ An IEO is intended to prevent any

¹¹⁰ Section 72 of the Act. Such orders may also require the appointment, at the cost of the merger parties, of a hold separate manager and/or monitoring trustee to oversee the order.

¹¹¹ This is a lower threshold than having reasonable grounds for suspecting that a relevant merger situation has been created, since it does not require the turnover or share of supply jurisdictional tests to be met (see chapter 4 above).

action (for example, integration of the merging businesses) that might prejudice the reference to a phase 2 investigation and/or impede any action by the CMA which may be justified by its findings. An IEO will remain in force until the merger is cleared or remedial action is taken, unless varied, revoked or replaced.¹¹² In certain circumstances, the CMA may consider it necessary to use its powers to unwind integration that has already occurred prior to the IEO coming into force. This will also be assessed on a case-by-case basis, where the CMA reasonably suspects that action has, or may have, been taken which constitutes pre-emptive action. See *Interim measures in merger investigations* (CMA108) for further information about IEOs.

- b) Second, completing a merger without first obtaining clearance from the CMA carries the risk that the completed transaction may be unwound by disposal of the acquired business (or otherwise remedied by disposal of other businesses or assets) following an investigation. This has occurred under the Act in a number of cases.¹¹³ The fact that a merger has been completed does not reduce the likelihood of the CMA referring the merger to phase 2 or of implementing remedies (which will typically be structural in nature). When considering remedies in the context of a completed merger, the CMA will not normally consider the costs of divestment to the merger parties as it is open to the merger parties to make merger proposals conditional on competition authorities' approval.¹¹⁴

Informing the CMA about mergers

6.9 Companies and their advisers are strongly encouraged to contact the CMA at an early opportunity to discuss the application of the Act to a merger

¹¹² An IEO made at phase 1 will be reassessed in the event of a reference to phase 2, and additional or alternative safeguards may be put in place (for example, to prevent the target business from deteriorating during the phase 2 investigation).

¹¹³ See, for example, Completed acquisition by Tobii AB of Smartbox Assistive Technology Limited and Sensory Software International Ltd (25 January 2019); Completed acquisition by Danspin A/S of Lawton Yarns Limited (5 November 2019); Completed acquisition by Ecolab Inc. of Holchem Group Limited (8 October 2019); Completed acquisition by Vanilla Group Limited (JLA) of Washstation Limited (3 April 2018).

¹¹⁴ See *Merger Remedies* (CMA87).

situation, particularly in cases where competition concerns cannot easily be ruled out. Contact details are available on the CMA website.¹¹⁵

6.10 There are two ways in which parties to a merger that is sufficiently advanced may voluntarily bring a merger to the attention of CMA. These are:

- a) Where merger parties wish to formally notify a merger to the CMA for investigation, they should first submit a request for a case team.¹¹⁶ This request is made by submitting a Case Team Allocation Form (CTAF), available on the CMA website, and following up with a Merger Notice.
- b) Where merger parties do not intend to formally notify a merger to the CMA for investigation, they can submit a short briefing paper to the mergers intelligence function explaining why, in their view, the merger does not give rise to a relevant merger situation and/or does not give rise to a substantial lessening of competition. This may result in a decision to investigate, or the CMA may indicate that it has no further questions about the merger at that stage.¹¹⁷ Further information relating to the mergers intelligence function is set out in the CMA's *Guidance on the CMA's mergers intelligence function* (CMA56).

6.11 As part of pre-notification, merger parties will be asked to provide information to the CMA in relation to whether they consider the merger to fall within the scope of a public interest consideration.

Submitting a Merger Notice

6.12 If merger parties wish to obtain a binding decision from the CMA, a formal investigation is required. This process is commenced by the submission of a CTAF, followed by a Merger Notice.¹¹⁸ The submission of the final Merger Notice is typically preceded by a pre-notification process during which the

¹¹⁵ <https://www.gov.uk/guidance/mergers-how-to-notify-the-cma-of-a-merger>.

¹¹⁶ See section 96 of the Act.

¹¹⁷ This does not preclude further questions at a later stage and, if further information comes to light, the CMA may open an investigation at any point until the expiry of the four-month statutory period set out in section 24 of the Act.

¹¹⁸ The relevant templates are available at <https://www.gov.uk/government/publications/mergers-forms-and-fee-information>.

CMA ensures that it has sufficient information to be able to begin its phase 1 investigation.

Case Team Allocation Form

- 6.13 The pre-notification process is available for all transactions regardless of whether or not they are in the public domain. The CMA does not make public the fact that it is in pre-notification discussions on a case. The submission of a CTAF enables the CMA to allocate a case team to lead the CMA's phase 1 investigation. The case team is the principal point of contact within the CMA for the merger parties and their representatives.
- 6.14 The pre-notification process is not available for transactions that remain hypothetical. Where the merger parties have not signed a share purchase agreement or equivalent, the CTAF should therefore set out evidence of a good faith intention to proceed with the transaction (such as because heads of terms have been concluded, adequate finance has been put in place, or the transaction has been subject to board-level consideration). In the case of a public bid, the CMA will expect at least a public announcement of a firm intention to make an offer or the announcement of a possible offer in order to open a phase 1 investigation.¹¹⁹
- 6.15 For completed mergers, the CMA is likely to impose an IEO and issue an information request to ascertain the extent of any integration.
- 6.16 Merger parties should keep the CMA informed of any material developments, in particular in relation to the timing or status of the transaction, following the submission of the original CTAF.

Pre-notification process

- 6.17 The case team will endeavour to review submissions and revert to the merger parties within a reasonable timeframe. Where the CMA considers that a pre-notification meeting or telephone call/videoconference is desirable, the case team will schedule one. In some cases, in pre-notification the CMA may issue an invitation to comment and/or engage with relevant third parties.

¹¹⁹ Corresponding with Rules 2.7 and 2.4 of the City Code respectively.

Benefits of pre-notification

- 6.18 Pre-notification is the process in which the CMA ensures that it has all the information it needs before formally starting its merger inquiry. It is intended to enable information-gathering and engagement on the issues that are likely to be the focus of the CMA's formal investigation. Depending on the circumstances of the case at issue, the pre-notification process is intended to facilitate:
- a) The clarification of the information and evidence the CMA will require for the purposes of the Merger Notice and is likely to require during the 40-working day investigation;
 - b) The clarification of any types of information in the Merger Notice form that the CMA does not consider necessary for a complete notification in the case at hand; and
 - c) Informal dialogue on the CMA's likely approach to the assessment of particular competition concerns (noting that the CMA's assessment of the substance of the case is ultimately arrived at by its formal investigation), including the approach to evidence-gathering to inform that assessment (including, for example, the approach to any local analysis that may be appropriate).¹²⁰
- 6.19 In some cases, pre-notification may also be an opportunity for the case team and the merger parties to discuss, on an informal basis (and without prejudice to the CMA's competition assessment), potential remedy options if a competition concern is ultimately found. Such discussions will not usually

¹²⁰ This includes any primary data collection undertaken for the purposes of merger review, such as a consumer survey. The time and scale of work required to design and conduct reliable consumer surveys means that they are often more suited to use during an in-depth phase 2 process.

However, if merger parties consider that the gathering of survey evidence may allow the merger to be cleared at phase 1, the CMA encourages parties, prior to undertaking such a survey, to discuss the need for, and (as appropriate) design and scope of, the survey with the CMA during pre-notification discussions. This will increase the likelihood that the survey results will constitute robust evidence (although the final assessment of the evidence remains one for the decision maker at the end of the investigation).

The CMA has also adopted the guidance document *Good practice in the design and presentation of consumer survey evidence in merger enquiries* (CMA68) (originally published by the OFT and CC) to provide further assistance to merger parties. Given, however, that the circumstances of each case vary considerably, parties are encouraged to discuss with the CMA in advance how the principles in that document should be applied in their case.

be disclosed to the CMA decision maker in advance of his or her decision on competition issues.¹²¹

Formal commencement of the investigation

- 6.20 Once the Merger Notice is complete (which also requires the merger to be public knowledge), the CMA is able to commence its 40-working day investigation.¹²²
- 6.21 The 40-working day period within which the CMA must decide whether the test for reference is met begins on the working day after the CMA has confirmed to the merger parties that:
- a) it is satisfied that it has received a complete Merger Notice meeting the requirements of the Act: that is, it is in the prescribed form and contains the prescribed information, and states that the existence of the proposed merger has been made public; or
 - b) the CMA believes that it has sufficient information to enable it to begin its investigation.
- 6.22 The template Merger Notice¹²³, once completed to the satisfaction of the CMA, comprises the 'prescribed form' for the purposes of the Act. The template includes guidance notes to assist parties in identifying the information that is likely to be required by the CMA within the Merger Notice. In certain mergers, some of the information requested by the template Merger Notice may not be relevant (or may not be required to the full extent

¹²¹ In exceptional circumstances (eg where the remedies are likely to be complex in design and/or implementation, or where competition authorities in other jurisdictions are considering a merger which the CMA is also investigating), or when requested by the merger parties, the decision maker may be involved in discussions concerning UIIs prior to taking the SLC decision. The merger parties will be informed if the decision maker deems that this is appropriate. In these circumstances, the decision maker will engage with the merger parties, in order to maximise the chance of the CMA achieving an effective remedy to any competition concerns which might arise from the merger. The merger parties are not obliged to engage with the decision maker. The CMA will consider on a case-by-case basis whether additional procedural safeguards are necessary to ensure that the early discussion of remedies does not prejudice the SLC decision: see *Merger Remedies* (CMA87), at paragraph 4.6.

¹²² Under section 96(2)(b) of the Act, a Merger Notice must state that the existence of the proposed merger has been made public.

¹²³ Available at <https://www.gov.uk/government/publications/mergers-forms-and-fee-information>.

indicated in the guidance notes in the template Merger Notice).¹²⁴ Merger parties are encouraged to engage with the case team during pre-notification to discuss what information is likely to be required for a complete Merger Notice.

- 6.23 Parties are free to supply the requisite information in the format of the Merger Notice template, or to provide a submission in a written format of their choosing, accompanied by a signed and annotated version of the Merger Notice template completed to indicate clearly where in that bespoke submission the information responsive to each question in the Merger Notice can be found.
- 6.24 The CMA will endeavour to confirm that a submitted notice is complete as promptly as is practicable in the circumstances.¹²⁵ Similarly, where it considers that prescribed information is missing from a submitted Merger Notice, the CMA will inform the merger parties of this fact. The CMA may, in appropriate circumstances, use its compulsory information-gathering powers (described in chapter 9) to obtain the necessary information.

Rejection of a Merger Notice after commencement of the initial period

- 6.25 Even where the CMA has accepted a Merger Notice and confirmed that the 40-working day initial period has commenced, it can, at any time during that initial period, subsequently reject a Merger Notice for three reasons:¹²⁶
- a) it suspects information given to the CMA, whether in the Merger Notice or otherwise, to be false or misleading;
 - b) it suspects that the relevant parties do not propose to carry the notified arrangements into effect; or
 - c) the merger parties fail to provide information which should in fact have been included in the Merger Notice, or fail, without reasonable

¹²⁴ The fact that the CMA has accepted a Merger Notice as complete without having received particular information from the merger parties does not prevent the CMA requesting that information at a later stage, should it consider it to be material to its review.

¹²⁵ This will typically be within five (and no more than ten) working days of receipt of that Merger Notice, and is likely to depend on, for example, the volume and length of submissions, the extent to which the CMA has previously considered earlier drafts of the same submissions, and the available CMA resource. In general, the CMA is likely to be able to provide such confirmation more promptly in those cases in which parties have engaged in pre-notification.

¹²⁶ Under section 99(5) of the Act.

excuse, to provide on time, any information requested by the CMA using its powers under section 109 of the Act.

- 6.26 The CMA's decision to reject a Merger Notice takes effect from the moment it is sent to the notifier or an authorised representative. The CMA will give notice in writing (including by email).

Withdrawal of a Merger Notice

- 6.27 A company can withdraw a Merger Notice at any time. The withdrawal must be made in writing by the notifier or an authorised representative.
- 6.28 Where a Merger Notice is withdrawn, but the CMA suspects that the merger parties nevertheless propose to carry the notified arrangements into effect, it will continue to examine the merger on its own initiative. In that scenario, the CMA will not be bound by its original statutory deadline to reach its decision as to whether its duty to refer applies.¹²⁷

Reference after expiry of statutory deadlines

- 6.29 In some circumstances, a notified merger can still be referred for a phase 2 investigation after expiry of the statutory periods in section 34ZA of the Act within which the CMA must decide whether its duty to refer a merger is met.¹²⁸

Competing bids and parallel industry mergers

- 6.30 Where there are competing bids for the same company, the CMA tries, other factors being equal, to consider them simultaneously. As in the case of a single bidder, each case will be considered on its own merits. It does not

¹²⁷ Section 100(1)(f) of the Act. A fee will be payable on the publication of the CMA's decision as to whether its duty to refer applies.

¹²⁸ Section 100(1) of the Act. These are where: the Merger Notice is rejected by the CMA prior to the end of the initial 40 working day period; the Merger Notice is withdrawn; before the merger covered by the Merger Notice is completed, any of the enterprises concerned enters into an unrelated merger with any other enterprise not covered by the Merger Notice; the merger covered by the Merger Notice is not completed within six months of the expiry of the consideration period; any information supplied by the notifier (or any associate or subsidiary) is in any material respect false or misleading; any material information which is, or ought to be, known to the notifier (or an associate or subsidiary) is not disclosed to the CMA (such information must be given in writing); or the merger parties have offered UILs to the CMA (or to the Secretary of State in public interest cases) but the CMA (or Secretary of State) has not accepted those UILs.

necessarily follow that, because one is referred, the other or others will be also.

Restrictions directly related and necessary to the merger (ancillary restraints)

- 6.31 Mergers and ancillary restrictions to the merger are generally excluded from the prohibitions of the Competition Act 1998 under Schedule 1 of the Competition Act 1998.
- 6.32 The CMA's analytical approach to ancillary restrictions is described in Annex C.

7 FAST TRACK PROCESSES AND CONCEDED AN SLC

- 7.1 In some circumstances, such as where a merger is subject to review in multiple jurisdictions, merger parties may wish to waive their rights in relation to certain procedural steps in order to enable a binding outcome to be arrived at more quickly.
- 7.2 As set out below, merger parties are able to request that a case should be ‘fast tracked’ to the consideration of UILs or to an in-depth phase 2 investigation.
- 7.3 Similarly, in a phase 2 investigation, merger parties are able to ‘concede’ that the relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition within a specified market or markets for goods or services in the UK.

Fast track processes

- 7.4 Merger parties are able to request that a case should be ‘fast tracked’ where they accept that the CMA has evidence at an early stage in an investigation that objectively justifies a belief that the test for reference is met.
- 7.5 A case can be fast tracked for two purposes:
- a) To proceed more quickly to offering UILs, with the objective of reaching a phase 1 clearance with remedies;¹²⁹ or
 - b) To proceed more quickly to an in-depth phase 2 investigation.¹³⁰

¹²⁹ See, for example, CMA Decisions: Anticipated acquisition by Stryker Corporation of Wright Medical Group N.V. (30 June 2020); Completed acquisition by CD&R Fund IX of MRH (GB) Limited (31 August 2018); Completed acquisition by GTCR of PR Newswire (20 June 2016).

¹³⁰ Cases which have been fast-tracked to an in-depth phase 2 investigation include: Anticipated acquisition by J Sainsbury Plc of Asda Group Ltd (2018); Anticipated merger between Central Manchester University Hospitals NHS Foundation Trust (CMFT) and University Hospital of South Manchester NHS Foundation Trust (UHSM) (2017); Anticipated acquisition by Tesco plc of Booker Group plc (2017); Anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited (2016); Anticipated acquisition by BT Group plc of EE limited (2015); Completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited (2012); and Anticipated joint venture between Thomas Cook Group plc, the Co-operative Group Limited and the Midlands Co-operative Society Limited (2011).

- 7.6 As in any other case in which the CMA has decided to investigate, the CMA is required to publish a reasoned decision at the end of a phase 1 investigation in fast track cases.¹³¹

Fast track for the consideration of UILs

- 7.7 The merger parties can request a case to be referred for the consideration of UILs early during the phase 1 investigation or during pre-notification.
- 7.8 In this circumstance, the merging parties would typically have discussed possible UILs with the CMA case team early during the phase 1 investigation or during pre-notification.¹³²
- 7.9 The merger parties are required to accept in writing that the test for reference is met (ie that there is sufficient evidence available to meet the CMA's statutory threshold for reference) and that they agree to waive their right to challenge that position during a phase 1 investigation. This process therefore differs from circumstances in which merging parties have hypothetical discussions with the CMA case team, on a without prejudice basis, on possible remedies in the event that the CMA decision maker decides that the merger gives rise to an SLC following the issues meeting process.¹³³
- 7.10 The CMA will therefore not follow all of the normal procedural steps prior to reference (including an issues meeting). The CMA will generally reduce the time provided for third-party consultation, given that the merger parties have accepted that competition concerns arise and third parties will have an opportunity to present their views on whether the proposed remedies are effective during the consultation on UILs.
- 7.11 The CMA may decline a request for a fast track process where this would not be appropriate for the substantive assessment of the case (for example because there remains material uncertainty about the nature or scope of the potential competition concerns that the merger gives rise to) or for the efficient conduct of the CMA's investigation (including, for example, where this could hinder the ability of the CMA to align its proceedings with those in other jurisdictions).

¹³¹ Section 107 of the Act.

¹³² For further information on the UIL process, see *Merger remedies* (CMA87).

¹³³ See *Merger remedies* (CMA87) at paragraph 4.4.

- 7.12 Any UILs offered further to a fast-track process are subject to the same requirements as UILs in other phase 1 cases, as set out in the CMA's guidance on *Merger remedies* (CMA87). For the avoidance of doubt, this means that, even where the CMA has discussed possible UILs with the merger parties at an early stage, there remains the possibility that the transaction is referred to a phase 2 inquiry if the CMA ultimately decides that the UILs do not meet these requirements.

Fast track to phase 2 investigation

- 7.13 The merger parties can request a case to be referred for a phase 2 investigation early during the phase 1 investigation or during pre-notification. The merger parties are required to accept in writing that the test for reference is met (ie that there is sufficient evidence available to meet the CMA's statutory threshold for reference) and that they agree to waive their right to challenge that position during a phase 1 investigation. Further, the CMA must have evidence in its possession at an early stage in its investigation that it believes objectively justifies a belief that the test for reference is met.
- 7.14 The CMA will encourage merger parties to remedy competition concerns where possible by means of UILs (subject to the requirements for phase 1 UILs described in the CMA's remedies guidance).¹³⁴ Candidate cases for fast track reference for a phase 2 investigation are therefore likely to be cases where a phase 1 outcome is unlikely to be possible because any competition concerns ultimately established would, by their nature, impact on the whole or substantially all of the transaction, and not just one part.
- 7.15 Subject to these conditions being satisfied, in a fast track case, the CMA will not follow all of the normal procedural steps prior to reference (including an issues meeting). In cases fast tracked to a phase 2 investigation, the CMA will generally reduce the time provided for third-party consultation, given that third parties will have an opportunity to present their views during a phase 2 investigation.
- 7.16 The CMA may decline a request for a fast track procedure where: a significant amount of the CMA's information-gathering (in pre-notification or in a phase 1 investigation) has already been carried out; the CMA disagrees with the merger parties' assessment that the case is suitable to be fast-tracked; or it would not be appropriate to fast-track the case for the efficient

¹³⁴ *Merger remedies* (CMA87).

conduct of the CMA's investigation (including, for example, where this could hinder the ability of the CMA to align its proceedings with those in other jurisdictions). The CMA may also ask the merger parties to formally request a fast-track procedure by a given point in proceedings, noting that the CMA would be unlikely to be minded to grant any request for a fast-track procedure received at a later date on the basis that it would not expect to be able to achieve the same administrative efficiencies.

Conceding an SLC

- 7.17 In a phase 2 investigation, merger parties are able to request that they formally accept that the CMA has evidence that establishes, to the required legal standard, that the relevant merger situation has resulted, or may be expected to result, in an SLC within specified market or markets for goods or services in the UK.
- 7.18 In practice, merger parties may wish to consider this approach where it could facilitate the efficient conduct of the case. This might be, for example, where the 'concession' of an SLC would aid the alignment of the CMA's remedies process with proceedings in other jurisdictions or where it would enable the CMA and merger parties to focus their efforts during the remainder of the CMA's substantive assessment on other areas.
- 7.19 Where merger parties wish to 'concede' an SLC, they are required to accept in writing that an SLC arises within a specified market or markets for goods or services in the UK and that they agree to waive their right to challenge that position during a phase 2 investigation.
- 7.20 The CMA may decline a request to 'concede' an SLC where this would not be appropriate for the substantive assessment of the case (for example, because there remains material uncertainty about the nature or scope of the potential competition concerns that the merger gives rise to or competition concerns in different areas might be linked) or for the assessment of effective and proportionate remedies. The CMA will also consider whether 'conceding' an SLC would support the efficient conduct of the CMA's investigation (including, for example, whether this could in fact hinder the ability of the CMA to align its proceedings with those in other jurisdictions).

8 INTERACTIONS WITH OTHER PROCEEDINGS

- 8.1 The CMA recognises that merger parties may be subject to other regulatory processes in addition to UK merger control, such as the City Code governing public takeovers, or merger control regulation in other jurisdictions. Parties should inform the CMA if the merger is subject to such processes and any associated timing constraints for the merger.
- 8.2 The CMA will take account of such constraints when conducting its review and may, where the demands of the particular case and its existing caseload allow, seek to make its decision more quickly than the standard statutory timetable. If merger parties wish to request that a decision is taken more quickly than the statutory timetable, the case team allocation request should clearly explain why the case is urgent, with evidence if available, and why the merger parties did not commence pre-notification discussions earlier. In such cases, the CMA would expect the merger parties to be particularly alert to the importance of a full and complete merger submission and to the need for very prompt responses to additional requests for information.
- 8.3 In deciding whether to open an investigation on its own initiative, the CMA may take into account any merger control proceedings in other jurisdictions. The CMA may decide not to open an investigation if any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that could arise in the UK. This could be the case, for example, where all of the markets that are relevant to the transaction are broader than national in scope.
- 8.4 In this circumstance, merger parties may be invited to update the CMA on the progress of proceedings in other jurisdictions and to provide the necessary waivers for the CMA to discuss these proceedings with other competition authorities (and, where appropriate, waivers to other competition authorities to allow them to discuss the proceedings with the CMA). The CMA may consider whether to open a formal investigation at any point before expiry of the four-month statutory period and merging parties run the risk that remedies in other jurisdictions that would not fully eliminate any competition concerns relating to the UK would result in the CMA opening a formal investigation at a later stage.
- 8.5 For more information in relation to the CMA's approach to multi-jurisdictional mergers, see chapter 18 below.

9 THE PHASE 1 ASSESSMENT PROCESS

- 9.1 This chapter of the guidance provides a more detailed summary of certain aspects of the CMA's typical phase 1 assessment process (chapters 10 to 14 provide equivalent information on the phase 2 process). It first explains how the CMA may gather information from the merger parties and from third parties. It sets out the penalties for failure to comply with the CMA's investigatory powers. It also sets out interactions with the merger parties, as well as with other bodies. It then sets out the decision-making process followed in determining where the duty to refer is met, both in cases which do not raise material competition concerns and in more complex cases.
- 9.2 The CMA aims to conduct its investigations flexibly within the applicable legal framework in light of the circumstances of the transaction under review. While the CMA will ensure that the procedural rights of merger parties and third parties are fully respected in all circumstances, it may be that certain of the steps set out below are not applied in all cases.
- 9.3 The CMA may also decide to adapt its typical phase 1 process where a transaction may be subject to merger review processes in other jurisdictions. In these cases, the CMA may coordinate certain stages of its investigation timetable with those of other competition agencies. For further information on the CMA's general approach to multi-jurisdictional mergers, see chapter 18.

Information gathering

- 9.4 The CMA will often require additional information from the merger parties than provided in the initial Merger Notice,¹³⁵ or than is requested via an enquiry letter (ie where the CMA's mergers intelligence function has 'called-in' a merger), to inform its decision on reference. In practice, the CMA asks for any such additional data, information or documents as soon as it is clear this will be necessary, but, given the nature of the statutory timescales within which the CMA operates, responses will often be requested within a relatively short (but reasonable) period.
- 9.5 For both information requests made using the CMA's formal section 109 powers and for informal requests, it is important that recipients, as soon as possible after receiving a request for information, inform the CMA of any

¹³⁵ This is usually the case even where the information received was sufficient for the CMA to be satisfied that the Merger Notice was complete for the purposes of commencing the CMA's review and its 40 working day timetable.

difficulties they may have in meeting the deadline for providing the information or in submitting the information in the requested format. Such discussions may enable the CMA to vary the information request or the stipulated response date (where appropriate).

Informal requests for information

- 9.6 The CMA may request information about the transaction from merger parties or third parties without using its formal powers. This may include via questionnaires, telephone or videoconference calls,¹³⁶ and in-person meetings.¹³⁷
- 9.7 The intentional or reckless provision of false or misleading information in response to an informal request for information (or during discussions with the CMA) is a criminal offence.¹³⁸

Formal requests for information

- 9.8 The CMA has the power under section 109 of the Act to issue a notice requiring a person to provide information or documents, or to give evidence as a witness (a section 109 notice):
- a) ***Internal documents.*** The CMA regularly asks parties to provide internal documents (ie documents that merger parties or third parties have generated internally in the ordinary course of business) to inform its investigation. When requesting internal documents from the merger parties, the CMA will use a section 109 notice as standard.¹³⁹ When requesting internal documents from third parties, the CMA may decide to request such documents informally in the first instance or may decide to use section 109 notices if it considers this appropriate, depending on the materiality of that evidence to its investigation, and/or if it has doubts about whether it will receive a full or timely response to an informal request. More information on the CMA's approach to requests for internal documents in merger

¹³⁶ Where appropriate, the CMA will record telephone/videoconference calls, having informed the counterparty before doing so. The CMA will generally not transcribe these interactions but may also take a written note where practicable.

¹³⁷ The CMA will usually take a written note of any in-person meetings.

¹³⁸ Section 117 of the Act.

¹³⁹ As stated in paragraph 16 of the CMA's *Guidance on requests for internal documents in merger investigations* (CMA100).

investigations is provided in the CMA's *Guidance on requests for internal documents in merger investigations* (CMA100).

- b) **Other information.** The CMA regularly asks parties to provide a wide variety of views and information to inform its investigation. Depending on the nature of the evidence being requested, the materiality of the evidence to the investigation, and/or whether the CMA has doubts about whether it will receive a full or timely response to an informal request, the CMA may request this evidence informally or through a section 109 notice.¹⁴⁰
- c) **Interviews.** In some cases, the CMA may also issue a section 109 notice requiring an individual to give evidence in person (or by telephone or videoconference) in a formal interview with the CMA.¹⁴¹ This is a more formal process than an ordinary information-gathering call with the merging parties (or third parties), and a failure to comply with such a notice can result in enforcement action under section 110 of the Act.

9.9 The failure to comply without reasonable excuse with a notice under section 109 of the Act can cause delay to the review timetable. If a relevant party¹⁴² fails to comply with a section 109 notice, this permits the CMA to extend the relevant statutory timetable (including, where relevant, the four-month statutory deadline for referring completed mergers) until the party has produced the documents and/or supplied the information and the CMA has assessed whether the documents and/or information form a satisfactory response to its section 109 notice (commonly known as 'stopping the clock').

9.10 The failure to comply with a section 109 notice can also result in the imposition of a fine (as explained further below).

9.11 The intentional or reckless provision of false or misleading information in response to a section 109 notice is a criminal offence.¹⁴³

¹⁴⁰ See section 109 (3) of the Act.

¹⁴¹ For example, in the phase 1 inquiry concerning the anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo (29 January 2020) the CMA requested representatives of Amazon to provide information to the CMA by means of an interview.

¹⁴² In this context, this does not include third parties who are not connected to the merger parties.

¹⁴³ Section 117 of the Act.

Third-party submissions

- 9.12 The CMA invites comments on any public merger situation under review from interested third parties by means of an invitation to comment notice published through the Regulatory News Service and on its website.¹⁴⁴
- 9.13 The CMA recognises that, in some cases, third parties may have commercial incentives to raise concerns in relation to a merger. The CMA will always scrutinise any views submitted by third parties carefully and consider the available evidence, such as internal documents prepared in the ordinary course of business, to support these views. The CMA also recognises that third parties may have concerns about the confidentiality of information and/or documents which are provided to the CMA. The CMA's general approach to confidentiality is set out in chapter 19 below.

Penalties for failure to comply with the CMA's investigatory powers

- 9.14 There are penalties for parties (including third parties) who supply false or misleading information. It is an offence punishable by a fine or a maximum of two years imprisonment (or both) to:
- a) knowingly or recklessly to supply false or misleading information to the CMA, Ofcom, NHSI or the Secretary of State in connection with any of their merger control functions under Part 3 of the Act, or to give false or misleading information to any third party knowing that they will then supply it to the CMA, Ofcom, NHSI or the Secretary of State;¹⁴⁵ or
 - b) intentionally alter, suppress, or destroy any information that the CMA has required to be produced under an information request notice under section 109 of the Act.¹⁴⁶
- 9.15 In addition, the CMA may impose a fine¹⁴⁷ where a person has:

¹⁴⁴ In some cases the CMA will publish the invitation to comment notice during the pre-notification period.

¹⁴⁵ Section 117 of the Act and section 73(6) of the Health and Social Care Act 2012.

¹⁴⁶ Section 110(5) of the Act.

¹⁴⁷ Fines may be of a fixed amount or calculated by reference to a daily rate. The amount of the fine is determined by the CMA, up to a maximum of £15,000 per day or £30,000 for a fixed amount, or such lower maximum as the Secretary of State may impose by statutory instrument.

- a) without a reasonable excuse, failed to comply with any requirement of an information request notice under section 109 of the Act;¹⁴⁸ or
 - b) intentionally obstructed or delayed a CMA official or other person in the exercise of their powers under section 109(6) of the Act to take a copy of information produced pursuant to such a notice.¹⁴⁹
- 9.16 This is in addition to the CMA's powers to, for example, suspend the statutory timetables for reviewing mergers where information required under a section 109 notice is not provided by a relevant person or is found to be false or misleading.
- 9.17 Further guidance on the CMA's approach to penalties is set out in *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4).

Interactions with merger parties

- 9.18 The CMA encourages merger parties and their advisers to liaise closely with the case team during the lifetime of the case. The level of interaction required between merger parties and their advisers and the CMA's case team will depend on the individual circumstances of the case in question.
- 9.19 In all cases, the CMA will have a 'state of play' discussion with the merger parties, typically 'remotely' ie by telephone call or video-conference. This will generally take place in the period between working days 15 and 20 but may occur earlier depending on the circumstances of the case. The purpose of this discussion is to inform merger parties about any competition concerns that have been raised in the CMA's investigation to date, including feedback from the CMA's market test, and whether or not the CMA is to proceed to an issues letter. The case team will provide an update on the likely timetable for the case going forward.

¹⁴⁸ Section 110(1) of the Act. The CMA has imposed fines in a number of merger cases for failure to comply with the requirements of section 109 notices. See penalty notices related to CMA Decisions: Anticipated acquisition by Just Eat.co.uk Limited of Hungryhouse Holdings Limited (24 November 2017); Anticipated acquisition by AL-KO Kober Holdings Limited of Bankside Patterson Limited (28 May 2019); Completed acquisition by Rentokil Initial plc of MPCL Limited (14 August 2019); and Anticipated acquisition by Sabre Holdings Corporation of Farelogix Inc. (11 October 2019).

¹⁴⁹ Section 110(3) of the Act.

- 9.20 If the CMA does intend to proceed to an issues letter, the CMA will also provide an overview of the theories of harm that the CMA proposes to include in the issues letter.

Contacts with other bodies

- 9.21 The CMA may also contact other governmental departments, regulators (including the sectoral regulators), industry associations and consumer bodies for their views on merger cases where appropriate. Sectoral regulators may also carry out their own public consultation before providing comments to the CMA. The CMA will take any views it receives into account, although it is ultimately for the CMA to decide whether there is a realistic prospect that the merger will give rise to substantial lessening of competition.¹⁵⁰
- 9.22 Where a merger is being investigated by competition authorities in other jurisdictions, the CMA will typically seek a confidentiality waiver from the merger parties. This is intended to enable the CMA and the relevant competition authorities (for example, the European Commission and/or national competition authorities) to discuss any competition concerns that may arise from the merger, exchange confidential information and evidence related to the merger, discuss any potential or actual remedies and, where appropriate, gather information to facilitate coordinating certain stages of the investigation timetables.

Media mergers

- 9.23 In local media mergers involving newspaper publishing and/or commercial radio or television broadcasting, where the case raises *prima facie* competition concerns, the CMA will ask Ofcom to provide it with an assessment in order further to inform the CMA's decisions on the reference test and on the application of any available exceptions to the duty to refer. Drawing on Ofcom's understanding of media markets, this assessment may include information relating to:
- a) the overall market context;
 - b) the relevant counterfactual to the merger (including the risk of the asset or business in question failing);

¹⁵⁰ The operation of the public interest intervention regime in mergers is described below in chapter 16.

- c) the scope of relevant product and geographic markets;
- d) the competitive effects of the merger; and
- e) exceptions to the duty to refer, and in particular Ofcom's views on whether the markets are of insufficient importance (de minimis) to warrant reference and whether there are 'relevant customer benefits' (RCBs) that might be weighed against an identified substantial lessening of competition.

9.24 For further information on the role of Ofcom in relevant mergers where the Secretary of State has issued a Public Interest Intervention Notice (PIIN), see chapter 16 below.

National Health Service mergers

9.25 For mergers involving NHS foundation trusts, the CMA must notify NHSI where it decides to carry out an investigation into the merger. NHSI is then required to provide advice to the CMA on relevant benefits for NHS users arising from the merger, and any other matters relating to the investigation that NHSI considers appropriate to bring to the CMA's attention.¹⁵¹ The CMA retains responsibility for making the decision under the Act, but in doing so, will take NHSI's advice into account in reaching its conclusions within the context and timeframe of its normal review processes. Further information is provided in *CMA guidance on the review of NHS mergers* (CMA 29).

The phase 1 decision making process

9.26 This section sets out the procedure typically followed by the CMA when it is deciding whether the test for reference for a phase 2 investigation is met ('the SLC decision').

9.27 In cases that raise no serious competition issues, the decision to clear the merger is made by a staff member of the CMA (at the Assistant Director level or above). The decision will then be adopted by the CMA, relayed to the merger parties or their advisers and announced publicly. See chapter 19 for the process around publishing the CMA's decisions.

9.28 In cases that raise more complex or material competition issues, a different process is followed. As noted above, the CMA will have a 'state of play'

¹⁵¹ This is a requirement under section 79 of the Health and Social Care Act 2012.

discussion with the merger parties in which it will indicate whether or not the CMA is minded to proceed to an issues meeting. The merger parties will be invited to attend an issues meeting.¹⁵²

- 9.29 An issues letter is sent to the merger parties to help them prepare for the issues meeting. The issues letter sets out the core arguments in favour of a reference in the case so that merger parties have an opportunity to make representations on these concerns during the issues meeting and in a written response to the issues letter.
- 9.30 The issues letter is not a provisional decision or a statement of objections. Rather, the issues letter sets out hypotheses which the CMA is still evaluating in the light of the evidence put to it by the merger parties and gathered from third parties. The issues letter will therefore typically not consider in detail the arguments in favour of clearance.
- 9.31 The CMA will provide the merger parties with a short interval (usually 48 hours, not counting weekends or public holidays) between receipt of the issues letter and the issues meeting to allow them time to prepare. Although this is a relatively short time period, the description of the competition concerns provided by the case team in the state of play discussion should ensure that the merger parties understand the theories of harm that the issues letter outlines at an earlier stage and can already start to prepare their representations to the CMA on these points.¹⁵³
- 9.32 Parties to a merger may either respond to the issues letter in writing, or orally at an issues meeting, or both.¹⁵⁴ The case team will advise the merger parties on the deadline within which responses must be received in order to be considered within the statutory time limits for the SLC decision.
- 9.33 Third parties will not normally be informed as to whether an issues meeting has been held (or will be held) in a particular case and will not be given a copy of the issues letter.

¹⁵² Given the statutory deadlines for the phase 1 investigation that apply to the CMA, the CMA may be limited in its ability to accommodate requests from the merger parties for the issues meeting to be held at a time or date other than that suggested by the CMA.

¹⁵³ However, due to the timing constraints of a phase 1 investigation, the CMA is not in a position to provide any written information in relation to these theories of harm ahead of the issues letter.

¹⁵⁴ There is no obligation to respond to an issues letter and/or to attend an issues meeting.

- 9.34 Issues meetings will generally be chaired by a member of the case team and, absent exceptional circumstances, the phase 1 decision maker (either the Senior Director of Mergers or another senior member of CMA staff) will attend.¹⁵⁵
- 9.35 To further enhance the level of scrutiny to which the case team's recommendations are subject, and to assist the phase 1 decision maker in making the SLC decision, a member of CMA staff from outside the case team is charged specifically with acting as a 'devil's advocate' to comment critically on the case team's recommended outcome (whether that is for or against reference). The 'devil's advocate' will also attend the issues meeting wherever possible.
- 9.36 At the issues meeting, the CMA will wish to speak to senior management in the businesses affected by the merger. The CMA will inform the merger parties if it wishes specified individuals or representatives of particular business areas to attend the issues meeting. Merger parties may wish to provide a presentation for the issues meeting, particularly where they have not yet responded in writing to the issues letter.
- 9.37 In exceptional circumstances (eg where the remedies are likely to be complex in design and/or implementation or where competition authorities in other jurisdictions are considering a merger which the CMA is also investigating), or when requested by the merger parties, the decision maker may choose to be involved in discussions concerning UILs prior to taking the SLC decision. The merger parties will be informed if the decision maker deems that this is appropriate. In these circumstances, the decision maker will engage with the merger parties, in order to maximise the chance of the CMA achieving an effective remedy to any competition concerns which might arise from the merger. The merger parties are not obliged to engage with the decision maker. The CMA will consider on a case-by-case basis whether additional procedural safeguards are necessary to ensure that the early discussion of remedies does not prejudice the SLC decision.¹⁵⁶

¹⁵⁵ If, for exceptional reasons, it is not practicable for the phase 1 decision maker to attend the issues meeting, he or she will in any event be informed of the discussion at the issues meeting by those who were present at that meeting, and will consider this alongside the other (written and oral) evidence in the case.

¹⁵⁶ *Merger Remedies* (CMA87), at paragraph 4.6.

- 9.38 After the issues meeting, the phase 1 decision maker will meet with members of the case team and the devil's advocate to consider the case and to decide on whether or not the reference test is met.
- 9.39 In cases where the decision maker concludes that the test for reference is met, the decision maker will then consider whether any of the available exceptions to the duty to refer (such as the 'de minimis' exception) should be applied.¹⁵⁷
- 9.40 Once the decision maker has considered whether any of these exceptions apply, the decision will be adopted by the CMA, relayed to the merger parties or their advisers and announced publicly. See chapter 19 for the process around publishing the CMA's decisions.

Undertakings in lieu of reference (UILs)

- 9.41 If the CMA finds that its duty to refer the merger for a phase 2 investigation applies, the merger parties may have an opportunity to avoid that outcome by offering binding undertakings in lieu of reference (UILs) for the CMA (or the Secretary of State in public interest cases)¹⁵⁸ to accept.
- 9.42 UILs may be accepted by the CMA only where it has concluded that the merger should be referred for a phase 2 investigation. Any UILs accepted by the CMA must be for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effects identified.
- 9.43 For further information on the CMA's approach to remedies, please see *Merger remedies* (CMA87). Merger parties and their advisers are advised to review this Guidance in detail (see in particular, paragraphs 4.2 to 4.53) for further information on the UILs process applicable at phase 1.

¹⁵⁷ See *Mergers: Exceptions to the duty to refer* (CMA64).

¹⁵⁸ See chapter 16 of this Guidance.

10 PHASE 2 INQUIRIES: OVERVIEW

10.1 The following chapters set out the typical phase 2 process. Chapter 10 sets out the role and responsibilities of the Inquiry Group and CMA staff team; it also summarises, at a high-level, the phase 2 process. Chapters 11 to 14 then provide greater detail on various aspects of the process.

The phase 2 Inquiry Group and case team

10.2 An Inquiry Group is appointed for each inquiry, supported by a case team of CMA staff. The duties and powers of Inquiry Groups conducting a phase 2 inquiry are set out in the Act.¹⁵⁹

10.3 The Chair of the CMA is responsible for identifying and appointing the Inquiry Group that will conduct a particular inquiry and for selecting one of them to act as chair of the Inquiry Group (the Inquiry Group Chair). In practice, the Chair of the CMA will delegate these responsibilities to the CMA Panel Chair (or one of the CMA Deputy Panel Chairs).¹⁶⁰ Until the Inquiry Group is appointed, the Chair of the CMA (or his/her delegate, in practice usually the CMA Panel Chair) may act in its place.¹⁶¹

10.4 The CMA's panel members come from a variety of backgrounds and expertise in different areas including law, economics, business and consumer policy. For a phase 2 inquiry, an Inquiry Group will comprise at least three members, including the Inquiry Group Chair.

10.5 Before appointing members to an Inquiry Group, the CMA will satisfy itself of members' availability and consider whether their outside interests could affect the impartiality, or perception of the independence, of the Inquiry Group. Outside interests of appointed members may be disclosed on the relevant case page. In some cases, the CMA may contact merger parties¹⁶² to disclose particular interests and give them an opportunity to comment before deciding whether to make a proposed appointment.

¹⁵⁹ See parts 3 and 9 of, and Schedules 8 and 10 to the Act and Schedule 4 to the ERR13.

¹⁶⁰ The CMA Panel Chair is a member of the CMA Board.

¹⁶¹ Paragraph 46, Schedule 4 to the ERR13.

¹⁶² As defined in the Rules of procedure for CMA Groups.

- 10.6 Phase 2 Inquiry Groups are appointed for the duration of the inquiry, up to the point at which the reference is finally determined.¹⁶³ In cases where a merger is found to give rise to a substantial lessening of competition (SLC), the merger is finally determined when remedy undertakings¹⁶⁴ are accepted by the CMA or a final remedy order is made; and if no SLC is found, the reference is finally determined when the final report is published.¹⁶⁵
- 10.7 The appointed Inquiry Group are the decision makers on phase 2 inquiries. Their role is to set the overall direction of the inquiry, review the appropriate evidence and analysis, and answer the statutory questions on the case (see chapter 3). They also hear directly from the merger parties in a formal hearing during the assessment phase of the case (the ‘main party hearing’: see paragraphs 12.4 to 12.6), and will attend any site visit (see paragraph 11.32). Inquiry Groups are required by law to act independently of the CMA Board,¹⁶⁶ and therefore make their own independent decisions, based on the objective evidence before them. The appointment of an independent group is intended to provide a ‘fresh pair of eyes’ in relation to the CMA’s phase 1 investigation, in which a member of CMA staff decides whether the test for reference is met.
- 10.8 Inquiry Groups are supported by a case team. The phase 2 case team will include a combination of both:
- a) project delivery staff, responsible for the day-to-day running of the inquiry, and ensuring that inquiry procedures are followed correctly and that the inquiry progresses according to the published timetable; and
 - b) specialist staff, who will provide advice to the Inquiry Group in particular areas of expertise and are responsible for analysing, and advising the Inquiry Group on, the substantive issues that arise during the inquiry. There are usually one or more economists, lawyers, and business/financial advisors assigned to each phase 2 inquiry as well as other experts as appropriate (for example, statisticians).

¹⁶³ Sections 79(1) and (2) of the Act.

¹⁶⁴ Section 82 of the Act.

¹⁶⁵ Section 84 of the Act.

¹⁶⁶ See paragraph 49, Schedule 4 to the ERA13.

The key stages of a phase 2 inquiry

- 10.9 The key stages of a typical phase 2 inquiry are shown in the table on the following pages. This indicates the steps the CMA will usually take and what the merger and third parties will usually need to do at each key stage of a phase 2 inquiry. Although indicative timings for each stage have been set out, the steps described may not, in practice, always take place or may not take place sequentially and may sometimes overlap. In particular, information-gathering takes place throughout the inquiry.
- 10.10 Further, subject to agreement with the CMA, it may be possible to omit certain stages of the process where to do so would lead to greater efficiency.¹⁶⁷ There may also be reason to adjust the typical process where the merger may be subject to review in other jurisdictions (see further, chapter 18 below). In all cases, merger parties and their advisers are encouraged to speak to the CMA to discuss.

¹⁶⁷ For example, merger parties may decide that a 'main party hearing' is unnecessary where the CMA's emerging thinking is such that the merger may not be expected to result in an SLC.

Figure: The key stages of a typical phase 2 inquiry

	MILESTONES	CMA	PARTIES
FOLLOWING REFERRAL: Possible suspension of reference (anticipated mergers only)			
Following reference to phase 2	Possible abandonment of transaction	<p>CMA considers, in response to any request by merger parties, whether transaction may be abandoned and whether to suspend the phase 2 investigation for up to three weeks.</p> <p>If transaction is abandoned, CMA cancels reference.</p> <p>CMA publishes notice of suspension (and termination of any suspension if merger is not abandoned).</p>	Merger parties may request suspension of reference in light of any possible abandonment of transaction.
STAGE 1: Phase 2 information gathering Weeks 1–6¹⁶⁸			
	Reference	CMA issues phase 2 opening letter to merger parties.	Where appropriate, merger parties attend case management meeting and data meeting with CMA case team (which will usually be by telephone/videoconference).
		CMA considers need for modified interim measures	Merger parties discuss with the CMA any ongoing phase 1 IEOs or if necessary phase 2 interim measures and reporting on compliance. CMA makes interim order or merger parties accept interim undertakings. CMA may also consider unwinding integration.

¹⁶⁸ Information gathering continues to some extent throughout the inquiry. However, this initial phase (around weeks 1 to 6) is the period during which parties should expect information gathering to be most intensive (although the precise extent of necessary information gathering during this period will vary from case to case, depending on the extent, and ongoing relevance to the CMA's investigation, of information previously gathered at phase 1).

	MILESTONES	CMA	PARTIES
		CMA creates administrative timetable. Timetable is published after it is shared with the merger parties.	Merger parties comment on administrative timetable.
	Initial information-gathering	CMA issues information requests to merger parties under section 109 of the Act (and to third parties, usually on a voluntary basis) as necessary.	Merger parties (and third parties) respond to information requests.
		CMA develops any consumer surveys.	Merger parties provided opportunity to comment on any draft consumer survey. ¹⁶⁹
		CMA attends site visit (if being held).	Merger parties organise site visit.
		CMA conducts calls and meetings with third parties to the extent necessary to supplement existing evidence base.	Third parties give oral evidence.
	Publication of issues statement, reflecting theories of harm on which the CMA is focusing	CMA publishes issues statement and considers responses to it.	Merger parties (and third parties) respond to issues statement.
STAGE 2: Phase 2 assessment		Weeks 7–15	
		<p>CMA conducts analysis of evidence.</p> <p>CMA holds a 'main party hearing' with each merger party.</p> <p>An annotated issues statement is sent to the merger parties in advance of the main party hearing setting out the Inquiry Group's emerging</p>	<p>Merger parties attend main party hearing.</p> <p>Merger parties comment on annotated issues statement and any working papers (or extracts of working papers) disclosed to them.</p>

¹⁶⁹ The CMA does not typically share its customer or competitor questions with the merger parties. See further footnote 191 below.

	MILESTONES	CMA	PARTIES
		<p>thinking by reference to the matters outlined in the issues statement.</p> <p>Key working papers (or extracts of them) may also be disclosed to the merger parties as appropriate in advance of the main party hearing.</p>	
		Put-back of material to parties where appropriate.	Parties check put-back. ¹⁷⁰
Around week 15	Publication of Notice of provisional findings, provisional findings and (if relevant) Notice of Possible Remedies.	The provisional findings report is the main means the CMA uses to satisfy its duty to consult under section 104 of the Act, by disclosing its provisional decisions, and the underlying reasoning.	
STAGE 3: After provisional findings Weeks 16–24			
		CMA considers responses to provisional findings and (if relevant) Notice of Possible Remedies	Merger parties (and third parties) comment on provisional findings and (if relevant) any Notice of Possible Remedies.
		Where new evidence has been obtained after provisional findings, and to the extent not previously commented on, put-back of material to parties for checking for factual accuracy and to identify confidential information prior to publication of final report.	Parties check put-back.
		Where relevant the CMA will conduct subsequent hearings ('response hearings') to receive evidence on any remedies proposals and brief submissions on the provisional findings.	Merger parties (and sometimes third parties, if appropriate) attend response hearings.

¹⁷⁰ The CMA will typically not 'put back' text from written submissions or agreed oral evidence with parties. See further paragraph ANNEXE(S)12.8 below.

	MILESTONES	CMA	PARTIES
		CMA produces remedies working paper and discloses this to merger parties for comment.	Merger parties comment on remedies working paper.
Week 24	Statutory deadline for publication of the final report	CMA publishes final report by the end of week 24 (subject to any extension of statutory deadline).	
STAGE 4: Implementation of remedies – after publication of the CMA’s final report			Weeks 24 –36
		CMA considers whether any variation to interim measures is necessary.	CMA varies interim order or merger parties accept revised or additional interim undertakings if appropriate. CMA may also consider unwinding any integration.
		CMA creates timetable for implementation of undertakings/order, and informs merger parties of key milestones.	
		CMA consults merger parties (and, where relevant, third parties) on draft undertakings/order.	Merger parties (and, where relevant, third parties) comment on draft undertakings/order and request excisions (if any) prior to publication.
		CMA consults publicly on draft undertakings/order.	Merger parties (and third parties) comment further on draft undertakings/order.
Week 36	Statutory deadline for implementation of remedies (subject to any extensions of statutory deadlines)	CMA accepts final undertakings/makes final order within statutory 12 week deadline (subject to extension by six weeks if there are special reasons to do so). Responsibility for further implementation is assigned to a Group appointed to oversee this part of the process (usually the original Inquiry Group).	

Suspension of the reference

- 10.11 Following the reference of an anticipated merger for a phase 2 investigation and within three weeks of the reference date, the CMA can suspend its phase 2 inquiry for a period of up to three weeks if the merger parties request it and the CMA reasonably believes that the merger may be abandoned by the merger parties.¹⁷¹ This prevents wasted or unnecessary work by the CMA (and the need for merger parties and third parties to respond to initial information requests).
- 10.12 If the CMA suspends the investigation, it will publish, at the end of the suspension period (or earlier if the merger parties themselves announce publicly that the investigation has been suspended), a notice stating that the power was used and (if the merger was not abandoned) the date by which the CMA's phase 2 report will be published.

¹⁷¹ Section 39(8A) of the Act. See chapter 15 for the process of cancelling a reference. For abandonment after the SLC decision has been issued but before a reference is made, see paragraph ANNEXE(S)15.3.

11 PHASE 2 INQUIRIES: KEY STAGES PRIOR TO PROVISIONAL FINDINGS

Preparatory work for the phase 2 inquiry

- 11.1 Shortly after a merger is referred, the CMA will publish the terms of its reference for a phase 2 investigation.¹⁷² These terms of reference specify the transaction which is to be investigated, and summarise at a high level the basis on which the reference is made (that is, the market or markets in which the phase 1 decision maker believes there is an SLC).
- 11.2 In its phase 2 investigation, the CMA will use the evidence and information gathered in phase 1. In some cases, it may not be necessary to significantly expand this evidence base in order for the CMA to reach a properly informed decision on the phase 2 statutory competition questions.¹⁷³ In other cases, it will be necessary to expand this evidence base, but the CMA will seek to do so in a proportionate and targeted manner.
- 11.3 At an early stage in its phase 2 inquiry the CMA also considers the ‘theories of harm’ which will frame its substantive assessment of the phase 2 statutory competition question (see above) and focus any further information-gathering and analysis. Typically, the ‘starting point’ at phase 2 will be the theories of harm on which the CMA determined at phase 1 that the statutory test for reference was met. The CMA’s theories of harm will be outlined in the issues statement when it is published (see paragraphs 11.30 to 11.31), and may evolve during the course of the inquiry in light of further evidence received and analysis undertaken.
- 11.4 The CMA also considers how best to conduct the phase 2 inquiry and draws up an administrative timetable which reflects the statutory time limits for investigations. The merger parties are sent a draft of the administrative timetable for comment. The final version of the administrative timetable is published on the case page.

¹⁷² Pursuant to either section 22 (completed mergers) or section 33 (anticipated mergers) of the Act. In certain cases raising public interest considerations the reference is made by the Secretary of State; see chapter 16.

¹⁷³ That is, firstly, whether or not a relevant merger situation has been (or will be) created and second, if so, whether or not the relevant merger situation has resulted, or may be expected to result, in an SLC within any market or markets in the United Kingdom for goods or services.

Contact with the merger parties at the outset of the phase 2 process

- 11.5 Following a reference from phase 1, the CMA will send the parties to the merger a phase 2 'opening letter'. This letter marks the formal start of the phase 2 inquiry. The phase 2 opening letter:
- a) covers important administrative details, for example, requesting information about the availability of the merger parties and any advisers during the inquiry period;
 - b) in some cases, may include an information request under section 109 of the Act. The scope of any such information request will be determined primarily by the nature of information already gathered by the CMA at phase 1, on which it seeks to build. Where the CMA considers any information already provided at phase 1 to be sufficient for the purposes of starting a phase 2 inquiry, it will not ask merger parties to submit it again, but may (where relevant) ask for it to be updated to cover the time period (and any relevant developments or changes) since its original submission;
 - c) invites the merger parties to participate, usually by telephone or videoconference and where the CMA considers it will be useful, in:
 - i) a 'case management meeting' with the case team. This meeting is an opportunity for merger parties to discuss the phase 2 timetable and administrative arrangements¹⁷⁴ and to ask the CMA questions about the phase 2 process; and
 - ii) a data meeting. This is an opportunity for the case team to discuss what (if any) relevant additional or updated data, internal documents and other information sources, not already drawn on during the phase 1 investigation, may be available to the merger parties. This helps to focus subsequent information requests, which will usually be sent under section 109 of the Act. The CMA will therefore request that representatives of the merger party who are familiar with that party's data and internal records/documents attend this meeting; and
 - d) refers:

¹⁷⁴ For example, suggestions for site visits.

- i) to the ongoing applicability and effect of any IEOs made during the phase 1 investigation, including any variation that may be required to such order(s);¹⁷⁵ and
- ii) in the case of anticipated mergers, to section 78 of the Act, which prohibits the acquiring company from acquiring, without the CMA's consent, an interest in shares in a company if any enterprise to which the reference relates is carried on by or under the control of that company.

Phase 2 information-gathering

- 11.6 The theories of harm (see paragraph 11.3 above) form the framework for any subsequent information gathering by the CMA from both the merger parties and third parties. Information may be gathered by various means, including questionnaires, submissions, hearings, telephone or videoconference calls, surveys and site visits. Information-gathering takes place throughout the phase 2 inquiry. However, as set out in 11.2 above, the CMA's 'starting point' will be the evidence base obtained at phase 1 and, in some cases, it may not be necessary to significantly expand this evidence base.
- 11.7 As soon as practicable after the start of the phase 2 inquiry, the CMA is likely to issue the merger parties with questionnaires requesting any additional information to supplement the phase 1 evidence base.
- 11.8 Third parties will generally not be subject to the same degree of information-gathering in the phase 2 inquiry process as the merger parties.¹⁷⁶ However, some will receive information requests (which may be under section 109 of the Act where appropriate) and may be invited to give oral evidence to the case team (see paragraphs 11.23 to 11.24 below).
- 11.9 It is very important that merger parties (and third parties) respond to information requests fully and accurately. As at all other stages of the CMA's investigation, intentional or reckless provision of false or misleading information is a criminal offence, regardless of whether that information has

¹⁷⁵ On referral to a phase 2 investigation, the CMA will consider whether any or additional interim measures are necessary. For further information on the CMA's approach to interim measures, please see *Interim measures in merger investigations* (CMA108).

¹⁷⁶ In cases where third parties have a significant role in the industry affected by the merger, third party input may be more substantial.

been required by a notice under section 109 of the Act or has been provided voluntarily.¹⁷⁷ Intentional alteration, suppression or destruction of any documents a person is required to produce by a notice under section 109 of the Act is also an offence.¹⁷⁸ (See also paragraphs 9.14 to 9.17 above.)

- 11.10 Because of the strict phase 2 statutory deadlines that the CMA has to meet, it is essential that the CMA gathers the bulk of any additional information that it may require for its phase 2 analysis early in the process (notwithstanding that it may need to make further requests for information as the inquiry progresses).
- 11.11 Requests for information may be made informally or using the CMA's formal powers (see paragraphs 9.5 to 9.10 above). Requests for information from third parties will typically be issued on a voluntary basis but the CMA will use its section 109 information-gathering powers in relation to third parties where appropriate – for example, where delay or failure to respond to a voluntary request affects the ability of the CMA to progress its investigation. Whether information is requested on an informal or formal basis, it is important that recipients, as soon as possible after receiving a request for information, inform the CMA of any difficulties they may have in meeting the deadline for providing the information or in submitting the information in the requested format. Such discussions may enable the CMA to vary the information request or the stipulated response date (where appropriate).

Submissions

Key points where merger parties are invited to make written submissions

- 11.12 The merger parties are invited to make written submissions at several different stages in the process. The main opportunities to make written submissions on the substance of the case are, first, in response to the issues statement (see paragraphs 11.30 to 11.31), second, in response to the annotated issues statement (and any working papers disclosed at the same time) and, third, in response to the provisional findings. Where an SLC has been provisionally found, and remedies are envisaged, further opportunities to make written submissions are provided in response to a

¹⁷⁷ Section 117 of the Act.

¹⁷⁸ Section 110(5) of the Act.

Notice of Possible Remedies and the CMA's remedies working paper¹⁷⁹ (see chapter 13 below).

- 11.13 A CMA phase 2 investigation is formal in nature and the process is not well suited to accommodating unsolicited submissions at other times. Parties and their advisers may wish to take into account that focusing their submissions on the key stages described in paragraph 11.12 above is the optimal means of engaging with the Inquiry Group. While the CMA will seek to take submissions provided outside these stages into account, to the extent possible within the applicable statutory timescales, it may not do so where this would risk undermining the effective functioning of the CMA's investigation (for example by unnecessarily delaying the completion of the investigation).
- 11.14 In making submissions to the CMA, parties should provide the reasoning and evidence (including supporting documents) necessary to support the arguments or contentions made. Parties can, if they wish, provide this evidence by reference to previous submissions to the CMA (including submissions at phase 1). The CMA will generally publish submissions it receives (see paragraphs 11.18 to 11.22 below).

Submissions of technical economic analysis

- 11.15 When making submissions of technical economic analysis, parties should refer to the principles set out in the CC publication *Suggested best practice for submissions of technical economic analysis from parties to the CC* (CC2com3), which the CMA has adopted. Parties are encouraged to inform the CMA in advance of any proposed technical economic analysis but should be aware that the CMA will form its own independent assessment of the appropriate weight to be placed on any analysis and should not expect the CMA to agree the analytical approach in advance. Parties should also be aware that the timing of submission may also affect the weight that can be placed on any analysis due to the statutory timescales for a phase 2 inquiry.

Submissions of evidence based on surveys

- 11.16 In some cases, merger parties submit to the CMA evidence derived from surveys of consumers or suppliers; the CMA may also or alternatively commission its own surveys. In such cases, it is important that the research is statistically robust and the design and implementation of the survey is

¹⁷⁹ The remedies working paper is typically only disclosed to the merger parties.

effective. If considering a survey, merger parties should refer to the principles set out in the CMA's *Guidance on good practice in the design and presentation of customer survey evidence in merger cases* (CMA78).

- 11.17 As with technical economic analysis, merger parties are encouraged to inform the CMA in advance of any proposed survey but should be aware that the CMA will form its own independent assessment of the appropriate weight to be placed on any survey evidence and should not expect the CMA to agree the survey approach in advance. Merger parties should also be aware that the timing of submission may also affect the weight that can be placed on any survey evidence due to the statutory timescales for a phase 2 inquiry.

Publication of submissions

- 11.18 The CMA generally publishes written submissions it receives in phase 2 investigations. Parties should provide non-confidential versions of all submissions for publication at the same time as their full submissions. If this is not possible, parties should submit a non-confidential version as soon as possible and agree a time-frame with the case team (which will be no more than five working days from the date that the full submission was provided).
- 11.19 The non-confidential version of the submission must set out the fundamentals of the relevant party's case, with a sufficient description of the evidence relied upon to enable other parties to understand and, if appropriate, make representations in relation to the inferences drawn from this evidence. Requests for confidential treatment of information should be limited to information that is genuinely sensitive, the disclosure or publication of which would be likely to cause significant harm to a party's legitimate business interests or to the interests of any individual to whom the information relates.¹⁸⁰ Parties should therefore accompany the non-confidential version with a detailed explanation of why they consider that particular parts of their submissions should not be disclosed, including explaining the nature of the information, the harm that could be caused, and the likelihood and magnitude of that harm. Where appropriate, it should also identify information which may be confidential as between the merger parties – for example, where external advisers have combined confidential information from both parties.

¹⁸⁰ Section 244 of the Act.

- 11.20 The final decision on disclosure lies with the Inquiry Group, having regard to the CMA's powers and duties under the Act.¹⁸¹ The publication of a non-confidential version of a party's submission should not be taken to mean that the CMA necessarily accepts that all the material excised in that version of the document should not be published or disclosed at some future stage of the inquiry, if such disclosure becomes necessary to fulfil the CMA's functions under the Act.¹⁸²
- 11.21 In practice, it may be possible to avoid disclosure of sensitive information by, for example, publishing an anonymous version of the submission or publishing the confidential information in a way that mitigates the sensitivity of this information, for example replacing specific figures with ranges.
- 11.22 In the event of a disagreement on the treatment of purportedly confidential information with the Inquiry Group, parties may make representations to the CMA's Procedural Officer within 24 hours of the Inquiry Group's decision. The Procedural Officer will advise the Inquiry Group following consideration of the parties' representations.¹⁸³ The Inquiry Group will have all due regard to that advice, but the final decision remains with the Inquiry Group.

Third party oral evidence

- 11.23 Where a third party is asked to give oral evidence (which will usually be by telephone/videoconference call but may occasionally be in person) the discussion will typically be led by the case team, although Inquiry Group members may also participate. The CMA will record the telephone/videoconference call, having informed the counterparty before doing so. In some circumstances (for example, a merger which has attracted

¹⁸¹ As described in this guidance, as well as in *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6) and *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7).

¹⁸² Parties will be informed of any decision to publish previously excised material that remains unpublished and given an opportunity to make representations.

¹⁸³ The Procedural Officer is intended to provide a swift, efficient supplementary mechanism for resolving disputes relating to the confidentiality of information in a party's submission proposed to be published by the CMA. The procedure followed by the Procedural Officer in this regard will be flexible, and will be tailored to the nature of the dispute at hand and, in particular, to any specific timing constraints to which the CMA's investigation is subject.

significant public interest), the CMA may consider that it is appropriate to publish a summary of third-party oral evidence on the CMA's website.¹⁸⁴

- 11.24 In the case of completed mergers, the CMA may wish to seek views on the merger from those associated with the acquired business, separately from any submissions or oral evidence from the acquirer. For example, senior management of the acquired business, who have transferred to the acquirer, may be asked to give evidence separately from the acquirers. In addition, the seller, including any senior management of the acquired business that have left the organisation and professional advisers to the business (such as financial or insolvency advisers), may be required to provide information or give evidence to the CMA during the course of its inquiry.

Open and joint hearings

- 11.25 Early in the phase 2 inquiry, the CMA will consider whether one or more public hearings should be held. Given the timescales in a phase 2 inquiry, it is unusual in practice to hold an open hearing. Private, multi-party hearing (for example, involving industry commentators or a group of industry participants, sometimes under the auspices of a trade association) may occasionally be held.¹⁸⁵ These hearings are inquisitorial in nature and the aim is to allow the CMA to put questions to the parties, probe responses and test the strength of the submissions and evidence previously provided to the CMA by the parties.

Surveys and consultants

- 11.26 Where an inquiry involves a significant number of third-party suppliers or customers, or where the market is one directly affecting consumers, a survey may be a useful part of the phase 2 information-gathering process. If the

¹⁸⁴ If a summary of third party oral evidence is to be published then, prior to its publication, the summary will be sent to the relevant third party for checking of factual accuracy and for the identification of any confidential material. The CMA will then consider whether the material is within the scope of Part 9 of the Act.

¹⁸⁵ See, for example, the CMA Final Report: Anticipated acquisition by 21st Century Fox of shares in Sky plc (5 June 2018), during which the CMA held a roundtable on issues concerning media plurality, as well as a multi-party hearing with various interested third parties.

CMA decides to conduct a survey, the merger parties will be consulted on the draft survey design and survey questions.¹⁸⁶

- 11.27 Before any contract to conduct the survey is awarded, the merger party or parties will, where practicable, be informed which market research organisations have been invited to tender. Where possible, the merger parties will be asked if they have any objections to the proposed market research organisations (for example, due to a possible conflict of interest) and any objections will be considered by the CMA prior to any appointment being made.
- 11.28 In cases where a survey is to be conducted, the CMA will need to obtain relevant contact details from those individuals or businesses who will be surveyed and will seek these details directly from the merger parties (and in some cases, from third parties as well).¹⁸⁷
- 11.29 In some merger inquiries, the CMA may wish to employ a consultant to provide specialist advice on the sector concerned. Where possible, before any contract is awarded, the merger party or parties will be informed and allowed a short time to inform the CMA of any objections to the proposed consultants, which the CMA will consider prior to any appointment being made.

The issues statement

- 11.30 At an early stage of the phase 2 inquiry the CMA publishes an issues statement. The issues statement sets out one or more theories of harm which will form the framework for the CMA's competitive analysis at phase 2 and outlines the issues which the inquiry will be exploring. The issues statement will invite comments from parties, setting a deadline for their

¹⁸⁶ See *Tobii AB (PUBL) v CMA* [2020] CAT 1, at paragraphs 291 and 220, where the CAT found that the CMA's survey guidance (*Good practice in the design and presentation of consumer survey evidence in merger enquiries* (CMA68)) is targeted at commissioned statistical sample research surveys rather than qualitative research methods. In contrast to its stated approach regarding statistical sample research surveys, the CMA will typically not consult the merger parties on or disclose questions put to third parties as part of its evidence gathering or requests for information that are issued during the course of its investigation.

¹⁸⁷ Parties may request that the CMA require them to provide such information pursuant to its powers under section 109 of the Act, where they have regulatory or other concerns about providing the data voluntarily.

receipt. The issues statement will be sent to the merger party or parties shortly before publication.

- 11.31 Later in the inquiry, the issues statement will be annotated to indicate the current state of the CMA's thinking on the issues and provided to the merger parties in advance of the main party hearing (see paragraphs 12.4 to 12.6 below). The annotated issues statement is not published.

Site visit

- 11.32 During the early weeks of the phase 2 inquiry the case team may arrange a 'site visit' for the Inquiry Group and a selection of the case team.¹⁸⁸ This 'site visit' may be an 'in-person' event or it may be by videoconference. The 'site visit' is an opportunity for the CMA to gain a greater understanding of the merger parties' businesses and to engage with key commercial and operational staff. Merger parties are encouraged to organise a short presentation on their businesses in order to explain the nature of the businesses, followed by a tour of the relevant business areas (where appropriate and possible) and to provide an opportunity for the CMA to ask questions.¹⁸⁹ The CMA may also ask the merger parties to present on particular issues of relevance in the inquiry to help inform its understanding of these issues.

¹⁸⁸ Where this is appropriate, given the nature of the businesses involved. If the nature of the business does not lend itself to a site visit, a presentation by the merger parties on the relevant industry may take place instead.

¹⁸⁹ Although these are intended to be scene-setting meetings, where appropriate, the CMA may disclose to other parties non-confidential versions of material presented to it.

12 PROVISIONAL FINDINGS

Developing the analysis

- 12.1 Following any submissions in response to the issues statement and its continued information-gathering, the CMA will develop its analysis on the case prior to the main party hearing.

Annotated issues statement

- 12.2 In advance of a main party hearing, the CMA will provide the merger parties with an annotated issues statement which sets out its emerging thinking on the matters outlined in the issues statement. In addition to the annotated issues statement, the CMA may also decide to disclose a limited number of key 'working papers' covering matters it wishes to discuss with the merger parties at the hearing (although the number and nature of working papers that the CMA discloses will vary depending on the circumstances of the case at issue).
- 12.3 Merger parties will be given the opportunity to comment in writing on the annotated issues statement (and any key working papers which have been disclosed). Typically, the deadline for any comments will be shortly after the main party hearing.

The main party hearings

- 12.4 Towards the end of the information-gathering phase, the CMA will typically hold hearings with each of the merger parties.¹⁹⁰ A hearing agenda will give an indication of the topics that the CMA wishes to explore in the main party hearing. The hearings will be attended by the Inquiry Group¹⁹¹ and members of the case team. The CMA will wish to speak to senior management in the businesses affected by the merger. The CMA will inform the merger parties if it wishes specified individuals or representatives of particular business areas to attend the hearing. In the case of a completed merger, the CMA may wish to hold a separate hearing with the sellers/former management of the acquired company (see paragraph 11.24). For an anticipated merger, the

¹⁹⁰ The CMA may compel specified persons to attend to give evidence and may also take evidence under oath using its powers under section 109 of the Act.

¹⁹¹ The merger parties will be informed if members of the Inquiry Group are unable to attend the main party hearing.

CMA is likely to want to hear from the acquirer and the target business separately.

- 12.5 The primary purpose of the main party hearing is to enable the CMA to test certain evidence and explore key issues with the merger parties. The hearings therefore take place at a stage in the investigation at which Inquiry Group members have absorbed sufficient evidence to produce an annotated issues statement and to frame challenging questions based on the evidence¹⁹² and the annotated issues statement/any working papers which have been disclosed to the merger parties. It also provides an opportunity for the merger parties to explain their position on these issues orally and directly to the phase 2 decision makers.
- 12.6 At the hearing, the merger party is given the opportunity to make brief opening and/or closing statements.¹⁹³ The CMA will then ask the merger party a series of questions. These questions will be led by the Inquiry Group but members of the case team are also likely to ask questions. A transcript of the hearing will be taken, and will be sent to the relevant merger party after the hearing for checking (the transcript is not published). The intentional or reckless provision of false or misleading information during a hearing is a criminal offence.¹⁹⁴ While a merger party may be accompanied by its legal or other professional advisers, the CMA will expect to hear primarily from the representatives of the business themselves. The CMA may direct its questioning at specific individuals. If merger parties are unable to provide specific information requested at the hearing, this may be provided subsequently in writing, usually with a short deadline for response.¹⁹⁵

¹⁹² The CMA will give the merger parties advance notice of any evidence it wishes to discuss at the main party hearing.

¹⁹³ Merger parties must inform the case team in advance if they wish to make an opening or closing statement and discuss the appropriate length of such statements given the timing constraints of the hearing (typically no more than 15 minutes will be available for such statements). Where relevant, merger parties should provide copies in advance of any presentation materials they wish to use when making those statements. As the CMA will have received and considered written submissions from the merger parties, as well as other evidence, it is not necessary for the merger parties to restate in detail all aspects of their case.

¹⁹⁴ Section 117 of the Act.

¹⁹⁵ In such circumstances, the CMA may recall specified persons to give further evidence (whether voluntarily or pursuant to a notice issued under section 109 of the Act).

‘Put-back’

- 12.7 Towards the end of the information-gathering phase, and prior to its provisional findings, the CMA may, where appropriate, send extracts – from its working papers and/or its draft provisional findings – to merger parties and third parties to identify potentially confidential material, prior to disclosure of the material.
- 12.8 The CMA will typically not ‘put back’ draft text to parties to verify factual accuracy where the draft text is taken directly from information already provided to the CMA, whether in phase 1 or in phase 2 – for example, from previous written submissions, responses to written questions, or from agreed notes of oral evidence. In these cases, put back will be limited to the purpose of identifying potentially confidential information (to the extent parties have not previously been given the opportunity to indicate whether or not the information may be confidential).
- 12.9 Parties should give reasons for any requests they make for material to be excised from CMA documents that are to be published (for example, its provisional findings), by reference to section 244 of the Act (see also paragraphs 11.18 to 11.22 above).
- 12.10 As the put-back process is intended to be limited to identifying confidential information (and occasionally, and typically mainly with third parties, any factual inaccuracies), the relevant parties will be given a relatively brief period to respond to put-back requests.
- 12.11 When the Inquiry Group has made its decision on excisions from its provisional findings (see paragraphs 12.12 to 12.13 below), parties will be informed of any requests the Inquiry Group has rejected. The party has the right to make further representations to the Procedural Officer, although the final decision remains with the Inquiry Group.

Provisional findings

- 12.12 After considering all of the relevant evidence, the CMA publishes its provisional findings which represents a provisional decision on first, whether or not a relevant merger situation has been (or will be) created and second, if so, whether or not the relevant merger situation has resulted, or may be expected to result, in an SLC within any market or markets in the United Kingdom for goods or services.
- 12.13 The provisional findings report sets out the core background details necessary for an understanding of the inquiry (for example, details of the

merger parties, the principal features of the industry where relevant and a description of the transaction) and a full explanation of the CMA's reasoning in reaching its provisional findings. The provisional findings report is therefore the main means the CMA uses to satisfy its duty to consult under section 104 of the Act, by disclosing its provisional decisions, and the underlying reasoning. Alongside the provisional findings report, the CMA will publish a Notice of provisional findings¹⁹⁶ and will generally issue a press release. For further information on the CMA's approach to communicating and publishing the provisional findings report see chapter 19 below.

Notice of Possible Remedies

12.14 Where the CMA has provisionally found an SLC (or SLCs), it will publish a Notice of Possible Remedies which acts as a formal starting point for discussion of remedies. The Notice of Possible Remedies will set out one or more options to remedy the SLC (or SLCs) that the CMA provisionally expects to arise as a result of the merger, and will usually set out the CMA's initial thoughts on the relative merits of these options. If merger parties wish to propose potential remedies in advance of publication of provisional findings, details of the proposals should be provided in writing and may be discussed with the case team (and the Inquiry Group, in certain circumstances) without prejudice to the CMA's provisional findings. Where relevant, the Notice of Possible Remedies will include any options put forward by the merger parties (although generally these will not be identified as such in the Notice). The Notice of Possible Remedies will invite comments by a given date from all interested parties on the remedies set out in the Notice, and will also invite parties to suggest alternatives.

¹⁹⁶ *CMA Rules for Merger, Market and Special Reference Groups*, (CMA 17), Rule 11.

13 AFTER PROVISIONAL FINDINGS

Public consultation on provisional findings and Notice of Possible Remedies

- 13.1 The Notice of provisional findings identifies a period (of at least 21 days¹⁹⁷) in which parties can comment on the provisional findings. Where the CMA has provisionally found an SLC arising from the merger, consideration of possible remedies to the SLC proceeds in parallel with consultation on the provisional findings. Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of that Notice (and in any event, no less than seven days) so that they can be considered before any 'response hearings' (see paragraph 13.16 below).¹⁹⁸
- 13.2 Responses from parties to the provisional findings and the Notice of Possible Remedies are published on the CMA's inquiry web-page. For further information on the CMA's approach to communicating and publishing the provisional findings report see chapter 19 below.
- 13.3 The CMA will consider all responses it receives, and whether the provisional findings should be altered in the light of these.

Disclosure in Provisional Findings Report

- 13.4 The CMA has a statutory duty to consult any party whose interests are likely to be adversely affected by the CMA's proposed decision on the outcome of a merger and to give reasons for that proposed decision.¹⁹⁹ Consistent with settled precedent,²⁰⁰ the provisional findings are the means by which the

¹⁹⁷ Note that these are calendar days and run from the date on which the merger parties are notified of the provisional findings, and not the date of publication on the CMA's website.

¹⁹⁸ In the interests of keeping the inquiry to schedule, response hearings will usually be held before the 21-day consultation period on the provisional findings has expired. In such cases, the merger parties are still able to provide their written comments in response to the provisional findings at any time within the period specified in the Notice of provisional findings.

¹⁹⁹ Section 104 of the Act.

²⁰⁰ *Tobii AB (Pulb) v CMA* [2020] CAT 1, at paragraph 117; *Ryanair v Competition Commission* [2014] CAT 3, at paragraph 128; *BMI Healthcare Limited v Competition Commission* [2013] CAT 24, at paragraph 20.

CMA fulfils this duty,²⁰¹ enabling merger parties to have an opportunity to respond to, challenge, and correct²⁰² the CMA.

- 13.5 However, the Act also imposes a general restriction on the disclosure of ‘specified information’; that is, information the CMA receives during the course of a merger inquiry which relates to the affairs of an individual or business of an undertaking.²⁰³
- 13.6 Both of these duties are qualified under the Act. The CMA’s obligation to consult is subject to any need to keep what is proposed, or the reasons for it, confidential,²⁰⁴ while the obligation to keep confidential specified information can be overridden for the purpose of facilitating the exercise by the CMA of its functions under the Act.²⁰⁵ In balancing these potentially conflicting obligations, the CMA must ensure that it discloses confidential specified information²⁰⁶ only insofar as it is necessary to do so.²⁰⁷
- 13.7 In accordance with settled precedent, the disclosure of confidential information will be deemed necessary where it forms part of the ‘gist of the case’ the merger parties have to answer.²⁰⁸ In other words, the merger parties need to be provided with sufficient information in order to be able to make informed submissions in response to the CMA’s provisional findings.
- 13.8 What constitutes the ‘gist’ of a case is context-sensitive.²⁰⁹ In most cases, the ‘gist’ of the case will be provided in the provisional findings report.

²⁰¹ *Chairman’s guidance on disclosure of information in merger and market inquiries (CC7)* (Revised), paragraph 7.1.

²⁰² *Ryanair v Competition Commission* [2014] CAT 3, at paragraph 133.

²⁰³ Sections 237 and 238 of the Act. The CMA also notes that section 104 of the Act refers to the need to protect confidentiality.

²⁰⁴ Section 104(4)(b) of the Act. It is also qualified by the practical restrictions imposed by the CMA’s investigation timetable (under section 104(4)(a) of the Act).

²⁰⁵ Section 241 of the Act. Other gateways are set out in sections 239 to 244 of the Act.

²⁰⁶ That is, commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of an undertaking or information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual’s interests.

²⁰⁷ Section 244 of the Act.

²⁰⁸ *R v Secretary of State for the Home Department, Ex parte Doody* [1993] UKHL 8 (“**Doody**”), page 14.

²⁰⁹ *BMI Healthcare Ltd v. Competition Commission* [2013] CAT 24 (“**BMI**”), at paragraph 39(7).

- 13.9 There is therefore no general right of ‘access to file’ within CMA merger control proceedings,²¹⁰ and the CMA is not, as a general principle, obliged to disclose all inculpatory or exculpatory material.

Additional Disclosure

- 13.10 Where the CMA considers that it must disclose highly confidential third party information as part of the gist of the case, it may choose to impose additional safeguards to the disclosure of such information, most commonly by disclosing the information into a confidentiality ring or data room.
- 13.11 It is in the CMA’s discretion to decide whether this is appropriate in a particular case.²¹¹ Disclosure may take the form of unredacted sections of the provisional findings or of information contained in separate documents (eg a summary of third party views or unredacted data sets).
- 13.12 Confidentiality rings and disclosure rooms provide access to confidential information held by the CMA in a restricted manner. They limit the number and/or category of persons having access (and the use of the information being accessed). Strict rules relating to access and onward disclosure will be applied and recipients, likely to be restricted to the merger parties’ external advisers only, will be required to acknowledge that they understand the basis on which such disclosure is made and that they will comply with these restrictions.²¹²
- 13.13 Breaching the terms of the confidentiality ring or data room carries serious consequences and may result in criminal penalties (up to 2 years imprisonment and/or a fine with no upper limit),²¹³ referral of the advisors to their professional regulator for disciplinary action, and potential exclusion from the current data room and any future CMA data access.
- 13.14 The CMA will engage in advance with other parties (including third parties where relevant) prior to disclosing information in this way. The CMA may also anonymise and/or aggregate information and take any other steps it considers are reasonable in relation to the disclosed information.

²¹⁰ *BMI Healthcare Ltd v. Competition Commission* [2013] CAT 24 (“**BMI**”), at paragraph 4.

²¹¹ *BMI Healthcare (No. 1) v Competition Commission* [2013] CAT 24, at paragraph 46.

²¹² The CMA has published [confidentiality ring and disclosure room undertakings templates](#).

²¹³ A breach of Part 9 of the Act constitutes a criminal offence under s.245 of the Act.

- 13.15 The disclosure of information into a confidentiality ring or data room to the merger parties' external advisers remains subject to Part 9 of the Act. The CMA will at all times seek to uphold its duty of maintaining confidentiality where possible, and the possibility of using a confidentiality ring or disclosure room to share confidential information will not result in the disclosure of confidential information beyond that necessary to provide the 'gist' of the case.

Response hearings

- 13.16 Where the CMA has provisionally found an SLC arising from the merger, response hearings with the merger parties will take place. Response hearings will usually take place after the deadline for responses to the Notice of Possible Remedies but before the deadline for responses to the CMA's provisional findings.
- 13.17 The response hearing will be led by the Inquiry Group with case team support. Parties will be given the opportunity at the beginning to briefly comment orally on the provisional findings and the CMA may seek clarification of particular points made in written submissions or at the hearing. However, the hearing will focus on possible remedies. The format of the response hearing is otherwise similar to that of the main party hearing (see paragraph 12.6 above).

Remedies working paper

- 13.18 A remedies working paper, containing a detailed assessment of the different remedies options and setting out a provisional decision on remedies, will be sent to the merger parties for comment following the response hearings.²¹⁴ The remedies working paper will also set out the CMA's views on whether the merger gives rise to RCBs,²¹⁵ and if so, whether the proposed remedies should be modified in order to preserve those benefits. A period of typically no less than five working days would normally be allowed for the merger parties to submit their comments. Third parties may also be consulted about the proposed scope of remedies and their views on any RCBs. The remedies working paper is not usually published.

²¹⁴ *Merger Remedies* (CMA87) explains how the CMA conducts its substantive assessment of remedies options, and how it takes RCBs into account in this assessment.

²¹⁵ As defined in section 30 of the Act.

- 13.19 Following consultation with the merger parties on the remedies working paper and any further discussions and meetings with them that the CMA considers necessary, the CMA takes its final decisions on both the competition issues and any remedies.
- 13.20 The CMA's final report must normally be published²¹⁶ within 24 weeks of the date of the reference.²¹⁷ The inquiry can be extended, once only, by up to eight weeks if the CMA considers there are special reasons why a report cannot be prepared and published within the statutory deadline.²¹⁸ In addition to an extension for special reasons, the inquiry period can be extended if one of the merger parties fails (with or without reasonable excuse) to provide information in response to a formal section 109 notice within the time stated in the notice.²¹⁹ In this case the inquiry timetable is extended until the information is provided to the satisfaction of the CMA or the CMA decides to cancel the extension. If the inquiry timetable is extended for any reason a notice of extension will be published²²⁰ and the administrative timetable will be revised and republished.
- 13.21 Where the CMA changes its provisional decisions on the statutory questions (or, exceptionally, where the 'gist' of the CMA's case fundamentally evolves) as a result of evidence received following publication of its provisional findings, it may be appropriate for the CMA to publish on its website, or otherwise disclose to the merger parties and relevant third parties, a description of its reasons for changing its provisional decision in order to provide parties with an opportunity to comment prior to publication of the final report. In such cases, the requirement for a minimum 21-day period for consultation on provisional findings does not apply and an appropriate period for response will be set depending on the circumstances of the case in

²¹⁶ The CMA is responsible for publishing all its reports of merger inquiries that are not public interest cases (as to which, see chapter 16).

²¹⁷ Section 39(1) of the Act. The statutory deadline for publication will normally, for convenience, be stated in the phase 1 reference and will also be shown in the administrative timetable and on the inquiry page for the relevant inquiry at <https://www.gov.uk/cma-cases>.

²¹⁸ Section 39(3) of the Act. The CMA is required also to publish the reasons for any such extension (section 107(2)(c) and 107(4) of the Act).

²¹⁹ Section 39(4) of the Act. For further information on section 109 notices, see paragraphs 11.10 to 11.11; and paragraphs 18.1 to 18.7 concerning multi-jurisdictional mergers.

²²⁰ Section 107(2)(c) of the Act.

question.²²¹ In deciding whether it is necessary to publish or otherwise disclose such an update to its provisional findings, the CMA will in particular have regard to its statutory duties to consult where it proposes to make a relevant decision that is likely to be adverse to the interests of the merger parties.²²²

The final report

- 13.22 The CMA is required to publish its conclusions on the statutory questions (see paragraphs 3.1 to 3.8 above) in a report which must contain the reasons for the decisions and such information as the CMA considers appropriate for a proper understanding of the decision and the reasons.²²³ The report will also contain the CMA's final decisions on remedies if there is an SLC finding. For further information on the CMA's approach to communicating and publishing the final report see chapter 19 below.
- 13.23 If there is no SLC finding in the CMA's final report, this is the final stage in the phase 2 inquiry process.
- 13.24 Following publication of the final report, if the CMA has concluded that a merger would give rise to an SLC and that remedial action should be taken by it to remedy that SLC, the CMA will take steps to implement such remedies.

²²¹ See, for example, CMA revised provisional findings: Anticipated acquisition by Amazon of certain rights and a minority shareholding in Deliveroo (1 July 2020).

²²² Section 104 of the Act.

²²³ Section 38 of the Act.

14 IMPLEMENTATION OF PHASE 2 REMEDIES

- 14.1 Following publication of the final report, if the CMA has concluded that a merger would give rise to an SLC and that remedial action should be taken by it to remedy that SLC, the CMA will take steps to implement such remedies.
- 14.2 The CMA will also consider whether interim measures should be put in place (where none are already in place) or existing interim measures varied (for example, allowing for the appointment of a monitoring trustee), pending the implementation of final remedies.
- 14.3 The CMA will agree draft undertakings with the merger parties, or produce a draft order, which will then be consulted on publicly. Taking into account any responses to its consultation, the CMA will then publish a 'notice of acceptance of undertakings' or a 'notice of making an order'. At this point, the inquiry will be finally determined.
- 14.4 The CMA is subject to a statutory deadline of 12 weeks following its final report, extendable once by up to six weeks if the CMA considers there are special reasons for doing so, to implement its phase 2 remedies.²²⁴
- 14.5 The process of agreeing undertakings or making an order is set out fully in the CMA's guidance on *Merger remedies* (CMA87).

²²⁴ These time limits may be further extended where a relevant party has failed to comply with the requirements of a notice requiring the submission of evidence issued under section 109 of the Act.

15 THE ABANDONMENT PROCESS

- 15.1 In some cases an anticipated merger may be abandoned by the merger parties during the course of the CMA's review.
- 15.2 In order to be satisfied that the merger parties have abandoned the merger, the CMA will require sufficient evidence that this is the case. The CMA may seek written assurances directly from the merger parties (from persons of suitable seniority and with authority to bind the acquirer).
- 15.3 If an anticipated merger is abandoned before the CMA takes a decision at phase 1, the CMA can issue a decision finding that its duty to refer does not arise because there is no relevant merger situation.²²⁵ If an anticipated merger is abandoned after an SLC has been found at phase 1 but before reference (during the period when the CMA is waiting to receive a UIL offer) then the duty to refer has arisen, but the CMA may exercise its discretion not to refer on the basis that the merger is insufficiently likely to proceed.²²⁶
- 15.4 Section 37(1) of the Act requires the CMA to cancel a phase 2 reference if it considers that the proposal to make arrangements of the kind mentioned in the reference has been abandoned.²²⁷ Where it is claimed that the arrangements have been abandoned and new arrangements are proposed or contemplated, the CMA must be satisfied that the arrangements that are described in the terms of reference have, in fact, been abandoned and that the new arrangements are not merely an amended form of the arrangements that were referred.²²⁸
- 15.5 If an Inquiry Group has not been constituted, or an Inquiry Group has not held its first meeting, the Chair of the CMA is able to cancel a reference

²²⁵ See, for example, CMA Decision: Anticipated acquisition by Non-Standard Finance PLC of Provident Financial PLC (11 June 2019).

²²⁶ Section 33(2)(b) of the Act. The Act does not require such decisions to be published, but the outcome will be indicated on the case page. See, for example, CMA Decision: Anticipated acquisition by Safetykleen UK Ltd of Pure Solve UK Limited (11 May 2016).

²²⁷ As discussed in paragraphs ANNEXE(S)10.11 and ANNEXE(S)10.12 above, the CMA may also, within three weeks of the reference and at the request of a relevant person connected to the merger parties, suspend the phase 2 timetable for up to three weeks if the CMA reasonably believes that an anticipated merger might be abandoned (section 39(8A) of the Act). If during this suspension the merger parties abandon the merger, the CMA will cancel the reference.

²²⁸ *R v MMC and SoS for Trade and Industry ex parte Argyll Group* [1986] 2 All ER 257.

where he or she is satisfied that arrangements have been abandoned.²²⁹ If an Inquiry Group has been appointed and has held its first meeting, it falls to the Inquiry Group to cancel the reference.

15.6 Merger parties may seek cancellation of a reference at any time prior to final determination of that reference.

15.7 The CMA has no power to cancel an investigation of a completed merger.²³⁰

²²⁹ Paragraph 47, Schedule 4 to ERRA13.

²³⁰ In circumstances where only part of the arrangements under consideration have been abandoned, it may be appropriate for the CMA to continue its investigation.

16 PUBLIC INTEREST MERGERS

Introduction to public interest mergers

- 16.1 The Act provides that (as the default position) the CMA decides whether or not to refer the merger for a phase 2 investigation, and that the phase 2 Inquiry Group makes the final decision as to whether any competition issues arise and whether any remedies are required, based purely on whether the merger has caused or may cause a substantial lessening of competition (SLC). However, the Act also allows for the Secretary of State to assume responsibility for determining whether or not to refer a merger when defined public interest considerations are potentially relevant by issuing a public interest intervention notice (PIIN). If the Secretary of State has referred a merger on such public interest grounds, he or she also takes the final decision on whether the merger operates or may be expected to operate against the public interest, and on any remedies for identified public interest concerns.
- 16.2 The UK Government has published guidance on the operation of the public interest merger regime, which includes contact information for interested parties.²³¹
- 16.3 Section 42 of the Act therefore provides that the Secretary of State may issue a PIIN in the case of mergers that meet the Act's jurisdictional thresholds (set out in paragraph 4.5 above), that have public interest implications²³², and which the CMA has not referred for a phase 2 investigation.
- 16.4 To facilitate this, the CMA has an obligation under section 57 of the Act to inform the Secretary of State where it is investigating a merger (at phase 1) that it believes raises material public interest considerations.

²³¹ See BEIS Guidance: Enterprise Act 2002: changes to the turnover and share of supply tests for mergers (June 2020). This can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902531/Enterprise_Act_2002_guidance_on_changes_to_the_turnover_and_share_of_supply_tests_for_mergers__Orders_2020_.pdf.

²³² The Secretary of State may also intervene in certain public interest cases where the jurisdictional thresholds are not met (see 'public interest in special merger situations' below; paragraph 16.15 *et seq.*).

Public interest considerations

- 16.5 Section 58 of the Act details the public interest considerations on which the Secretary of State may intervene in a merger case. These are:
- a) national security, including public security;^{233, 234}
 - b) plurality and other considerations relating to newspapers and other media, specifically²³⁵
 - i) the need for accurate presentation of news and free expression of opinion in newspapers
 - ii) the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK
 - iii) the need, in relation to every different audience in the UK or in a particular area or locality of the UK, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience

²³³ Different jurisdictional thresholds for certain mergers involving a 'relevant enterprise' (see paragraph ANNEXE(S)4.4 above) were introduced by the Government principally to enable the Secretary of State to intervene on public interest national security grounds in transactions involving changes of control of 'relevant enterprises.' See BEIS Guidance: Enterprise Act 2002: changes to the turnover and share of supply tests for mergers (June 2020). This can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902531/Enterprise_Act_2002_guidance_on_changes_to_the_turnover_and_share_of_supply_tests_for_mergers__Orders_2020_.pdf.

²³⁴ See, for example, CMA Decisions: Anticipated acquisition of Sepura plc by Hytera Communications Corporation Ltd (12 May 2017); Anticipated acquisition of Northern Aerospace Limited by Gardner Aerospace Holdings Limited (20 July 2018); Anticipated acquisition by Connect Bidco Limited of Inmarsat plc (20 October 2019); Anticipated acquisition of Impcross Ltd by Gardner Aerospace Holdings Ltd (9 September 2019); Anticipated acquisition of Mettis Aerospace by Aerostar (26 February 2020).

²³⁵ See, for example, OFT Decisions: Acquisition by British Sky Broadcasting of a 17.9% stake in ITV plc (27 April 2007); Completed acquisition by Global Radio Holdings Limited of GMG Radio Holdings Limited (2012); CMA Decisions: Completed acquisition by Trinity Mirror plc of certain assets of Northern & Shell Media Group Limited (20 June 2018); Completed acquisition by DMG Media Limited of JPIMedia Publications Limited (17 April 2020); and CMA Final Report: Anticipated acquisition of Sky plc by Twenty-First Century Fox, Inc. (5 June 2018).

- iv) the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests
- v) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in section 319 of the Communications Act 2003;²³⁶
- c) the interest of maintaining the stability of the UK financial system;^{237, 238} and
- d) the need to maintain in the UK the capability to combat, and to mitigate the effects of, public health emergencies.²³⁹

16.6 In addition to the specified considerations outlined above, section 42(3) of the Act also allows the Secretary of State to intervene on the basis of a consideration which is not specified but which the Secretary of State believes ought to be specified. To the extent that the Secretary of State intervenes on the basis of a consideration that he or she believes ought to be specified, he or she is required by section 42 of the Act to seek to have that consideration subsequently inserted into section 58 of the Act by means of an order approved by both Houses of Parliament.

²³⁶ The media considerations were added by the Communications Act 2003. See also BEIS (formerly DTI) Guidance: Enterprise Act 2002: Public Interest Intervention in Media Mergers: Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers (May 2004). This can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/595816/file14331__1_.pdf.

²³⁷ Added by the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 SI 2008/2645.

²³⁸ See, for example, OFT Decision: Anticipated acquisition by Lloyds TSB plc of HBOS plc (31 October 2008).

²³⁹ Added by the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020 SI 2020/627. See also BEIS Guidance Enterprise Act 2002: Changes to the public interest grounds for intervention in merger cases (June 2020). This can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902531/Enterprise_Act_2002_guidance_on_changes_to_the_turnover_and_share_of_supply_tests_for_mergers__Orders_2020_.pdf.

Process for public interest cases

Phase 1

16.7 If a PIIN is issued, the case is handled in the following way:

- a) The CMA will publish an invitation to comment seeking third party views on both competition and public interest issues.
- b) As well as generally issuing an invitation for comment, the CMA will actively contact other governmental departments, sectoral regulators, industry associations and consumer bodies for their views on public interest issues where appropriate. For example, in a case raising national security issues relating to security of energy supply, the CMA would seek submissions from Ofgem and would pass these on in full to the Secretary of State. For cases raising national security issues relating to defence, this would be the Ministry of Defence, and for national security issues relating to the police, this would be the Home Office. In media public interest cases, section 44A of the Act provides expressly for a report by Ofcom.²⁴⁰
- c) The CMA will carry out its review of the jurisdictional and competition issues in a similar way as it would for any other case, with the caveat that its process and timetable will be adapted in order to enable it to provide its report to the Secretary of State by the deadline specified in the PIIN.
- d) The CMA then provides advice to the Secretary of State on jurisdictional and competition issues, which must be accepted (section 46 of the Act). The CMA is also required to pass to the Secretary of State a summary of any representations it has received that relate to the public interest matters.²⁴¹ The Act allows the CMA

²⁴⁰ In phase 1 cases in which the Secretary of State has intervened on media public interest grounds, Ofcom will advise the Secretary of State on the public interest aspects of the case under section 44A of the Act. Ofcom may also advise the Secretary of State at phase 2, following receipt of the CMA's phase 2 report.

²⁴¹ The position is different in cases raising media public interest issues where Ofcom will provide a separate report on issues of media plurality and diversity. See, for example, OFT Decision: Acquisition by British Sky Broadcasting Group plc of 17.9% per cent stake in ITV plc (27 April 2007); and see CMA Final Report: Anticipated acquisition by 21st Century Fox, Inc of Sky plc (1

to provide advice and recommendations on the public interest consideration to the Secretary of State; however, given the CMA's role as a competition agency, the CMA would not normally provide its advice on public interest issues at phase 1. (By contrast, following a reference on public interest grounds, the independent phase 2 Inquiry Group will report to the Secretary of State about whether the merger operates or may be expected to operate against the public interest: see further paragraph 16.9 below.)

- e) The CMA will also inform the Secretary of State about the applicability of any of the exceptions to the duty to refer and as to whether it would be appropriate to deal with any competition concerns by way of UILs.²⁴²
- f) The Secretary of State then makes a decision on the outcome of the case in the light of the CMA's advice.²⁴³ References for a phase 2 investigation can be made under section 45 of the Act either:
 - i) because the Secretary of State believes that a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and it is or may be the case that the merger has resulted, or may be expected to result, in an SLC and, combined with the relevant public interest consideration(s), the merger operates or may be expected to operate against the public interest; or
 - ii) while there is no realistic prospect of an SLC arising from the merger, because the public interest considerations are such that it is or may be the case that the merger operates or may be expected to operate against the public interest.²⁴⁴

May 2018). The CMA may also summarise any representations it has received that relate to the media public interest.

²⁴² Sections 44(4) and 44(5) of the Act.

²⁴³ Section 45 of the Act does not provide a specific time limit within which this decision must be taken.

²⁴⁴ See OFT Decision: Anticipated acquisition by News Corporation of British Sky Broadcasting Group plc (2011).

- g) Alternatively, the Secretary of State may decide under section 45(6) of the Act not to make a reference on the basis that an anti-competitive outcome in the form of a CMA finding of a realistic prospect of an SLC is justified by one or more public interest considerations.²⁴⁵
- h) Where the Secretary of State is minded to refer the case for a phase 2 investigation, he or she will also consider whether UILs are justified.

16.8 If the Secretary of State concludes, after receipt of the CMA's report, that there are no public interest issues that are relevant to the PIIN, the CMA will be instructed under section 56 of the Act to deal with the merger as an ordinary merger case.^{246, 247}

Phase 2

- 16.9 If a reference is made on public interest grounds (whether or not there are any competition concerns), the CMA conducts a phase 2 inquiry and reports to the Secretary of State. If the CMA considers that the merger operates or may be expected to operate against the public interest, it makes recommendations as to the action the Secretary of State (or others) should take to remedy any adverse effects. The Secretary of State will make the final decision on the public interest test and take whatever remedial steps he or she considers necessary to address the competition and public interest issues.
- 16.10 The CMA's phase 2 procedures for public interest inquiries are similar to those for ordinary merger references. The principal differences are that the CMA provides its report to the Secretary of State and the final decision on public interest matters lies with the Secretary of State. The CMA has to prepare a report and give it to the Secretary of State within 24 weeks (subject to a possible eight-week extension) from the date of the reference.

²⁴⁵ See OFT Decision: Anticipated acquisition by Lloyds TSB plc of HBOS plc (31 October 2008).

²⁴⁶ See, for example, CMA Decision: Completed acquisition by Trinity Mirror plc of certain assets of Northern & Shell Media Group Limited (20 June 2018).

²⁴⁷ Under section 34ZB(4) of the Act, the CMA may in those circumstances extend the 'standard' 40 working day deadline to decide whether its duty to make a reference for a Phase 2 investigation applies.

The Act does not require the CMA to consult the Secretary of State in the event that the CMA proposes to extend the inquiry.

- 16.11 Once the Secretary of State has received the CMA's report, he or she has 30 days in which to make and publish his or her decision.²⁴⁸ The Secretary of State is bound by the CMA's decision on whether there is a merger situation and its findings on whether or not there is an SLC, but must decide on whether there is a concern in relation to the specified public interest issue. The Secretary of State must have regard to the findings in the CMA's report regarding remedies, but can also decide on remedies other than those the CMA has recommended. If the Secretary of State decides that the public interest issue does not raise a concern, the case will be sent back to the CMA to decide how to remedy any competition issue identified.²⁴⁹
- 16.12 There may also be further procedural differences applicable to a PIIN case and a typical merger investigation focussing purely on competition grounds, to reflect the different statutory questions at issue, differences in the assessment which is required to answer the statutory questions at issue, as well as differences in the CMA's approach to engagement with the merger parties and third parties. As part of its inquiry, the CMA will typically engage other governmental departments as relevant third parties. The degree to which the CMA seeks information and views from governmental departments, relative to other parties, will depend on the nature and scope of the phase 2 inquiry. There may also be particular sensitivities around the confidentiality of information which may include national security considerations (if applicable) that would require the CMA to amend its typical approach to an ordinary merger investigation.

Publication of decisions

- 16.13 When the Secretary of State has made a decision as to whether or not to refer the case for a phase 2 investigation, the Secretary of State is required under section 107 of the Act to publish a non-confidential version of the CMA's phase 1 report. At phase 2, the Secretary of State must publish a non-confidential version of the CMA's final report no later than the

²⁴⁸ Section 54(5) of the Act.

²⁴⁹ See *Merger remedies* (CMA87) for more information on the CMA's approach to remedies in the context of public interest mergers.

publication of his or her decision on the case²⁵⁰ (that is, within 30 days). The final decision on the material to be excised from the published report is made by the Secretary of State.²⁵¹

Fees

- 16.14 A merger fee is calculated in respect of cases in which a PIIN has been issued in the same way as for normal competition cases (see chapter 20 below).

Public interest in special merger situations

- 16.15 Section 59 of the Act also allows the Secretary of State to intervene in a very limited number of cases that do not qualify under the Act's general merger regime but where a specified consideration is relevant to the merger. These special merger situations may arise in defence industry mergers if at least one of the enterprises concerned is carried on in the UK by, or under the control of, a body corporate incorporated in the UK and where one or more of the enterprises concerned is a relevant government contractor.²⁵² In addition, following the Communications Act 2003, a special merger situation may also arise where the merger involves a supplier or suppliers of at least 25% of any description of newspapers or broadcasting in the UK or in a substantial part of the UK. Unlike the standard jurisdictional test, no increment to this share of supply is required. The CMA will not conduct a competition assessment in such cases.
- 16.16 In cases where the Secretary of State has issued a special public interest intervention notice (SPIIN), the CMA will prepare a report under section 61 of the Act for the Secretary of State advising on whether a special merger situation has been created. The SPIIN will set out the time period within which the CMA must provide this report to the Secretary of State. The CMA will also summarise representations that it has received relating to the considerations in the SPIIN. Given that the CMA is not expert in the considerations that would be expected to be specified in the SPIIN, it is likely to confine itself at phase 1 to summarising and commenting on the

²⁵⁰ Section 107(9)(b) of the Act.

²⁵¹ Accordingly, parties are not able to apply to the CMA's Procedural Officer if they disagree with any decisions in relation to excisions.

²⁵² See OFT Decision: Anticipated acquisition by Atlas Elektronik UK Ltd of the underwater systems Winfrith division of Qinetiq plc (25 June 2009).

representations received by relevant third party experts, such as the Ministry of Defence or Ofcom as applicable.²⁵³

- 16.17 The Secretary of State may make a reference for a phase 2 investigation under section 62 of the Act if he or she believes that it is or may be the case that, taking account only of the public interest consideration, the creation of the special merger situation operates or may be expected to operate against the public interest. The CMA's phase 1 report is published by the Secretary of State at the time the reference decision is announced. The final decision on the material to be excised from the published report is made by the Secretary of State.
- 16.18 Following a reference on special public interest grounds, the CMA is responsible for the conduct of the inquiry and reports its findings to the Secretary of State. The CMA would apply similar procedures to those outlined for normal mergers subject to the procedural differences set out in paragraphs 16.9 to 16.12 above relating to public interest mergers, although its assessment would be confined to the public interest issues specified in the intervention notice.
- 16.19 No merger fee is payable in special public interest cases.

²⁵³ By contrast, as described in paragraph 16.18 below, following a reference on special public interest grounds the independent phase 2 Inquiry Group will report to the Secretary of State about whether the merger operates or may be expected to operate against the public interest.

17 INTERACTIONS WITH OTHER REGULATORY PROCESSES

Mergers of water or sewerage undertakings

- 17.1 Mergers involving two or more water and sewerage or water-only companies are in certain circumstances subject to a special water merger regime. For guidance on water and sewerage mergers, see *Water and sewerage mergers: Guidance on the CMA's procedure and assessment* (CMA 49) and the statement of intent setting out an agreement on the working arrangements between the CMA and Ofwat for the special water merger regime.²⁵⁴

Regulated utilities

- 17.2 There are no special provisions under UK merger legislation for regulated utilities such as electricity, gas, telecommunications, postal services, rail,²⁵⁵ airports and air traffic services. A merger in these industries, however, may require the modification of an operating licence or give rise to other issues falling within the ambit or experience of the relevant sectoral regulator. For this reason, the CMA and the sectoral regulators work closely together on such mergers. In some cases, the sectoral regulator may issue a consultation document in respect of the merger, the responses to which will inform the views offered to the CMA. The CMA is not bound by the sectoral regulator's views but will consider them carefully.

²⁵⁴ See *Water and sewerage mergers: Guidance on the CMA's procedure and assessment* (CMA49).

²⁵⁵ Entering into a rail franchise agreement constitutes an acquisition of control of an enterprise by virtue of section 66(3) of the Railways Act 1993. For guidance on rail franchise mergers, see *Rail franchise mergers – Review of methodologies and guidance* (CMA74).

18 MULTI-JURISDICTIONAL MERGERS

- 18.1 Some mergers qualify for merger control review in more than one jurisdiction (these mergers are referred to as ‘multi-jurisdictional’ mergers for the purposes of this guidance). For multi-jurisdictional mergers, there can be substantial benefits (to merging parties and competition authorities, and therefore, in turn, to consumers) from communication and cooperation between the competition authorities that have jurisdiction to investigate the merger.
- 18.2 In practice, communication and cooperation between competition authorities in such circumstances typically relates to both the substantive assessment of the merger (eg through the sharing of evidence and analysis), as well as any remedies that might be put in place to address competition concerns (eg to ensure that potential remedies in different jurisdictions are consistent, or at least mutually compatible, while meeting the applicable statutory requirements).
- 18.3 In carrying out its merger investigations, the CMA frequently cooperates with other competition authorities. More broadly, the CMA actively seeks to promote best practice in merger control through networks such as the International Competition Network (ICN) and the Competition Committee of the Organisation for Economic Co-operation and Development (OECD).
- 18.4 In relation to multi-jurisdictional mergers, communication and cooperation between competition authorities typically takes place within formal multilateral or bilateral arrangements or through the use of waivers. The CMA will, as standard, ask merger parties whether they have also notified or intend to notify the merger to other competition authorities. Where this is the case, the CMA will typically ask the merger parties to provide a confidentiality waiver²⁵⁶ allowing the CMA to exchange confidential information with the relevant competition authorities in respect of the merger. The CMA will then typically contact the relevant officials at the other competition authorities to discuss and share information on the merger as appropriate.
- 18.5 Multi-jurisdictional mergers, being subject to different merger control requirements across multiple jurisdictions (and processes that have different timelines), can raise several additional considerations that the CMA, and

²⁵⁶ The CMA’s template waiver is available at:
<https://www.gov.uk/government/publications/confidentiality-waiver-template>.

merger parties, may seek to reflect in the CMA's approach to those mergers. In some circumstances, it may be beneficial for the CMA, in executing its duties under the Act, to be able to communicate and coordinate extensively with other authorities in reaching decisions on the competition assessment and remedies. There may also be circumstances in which it is appropriate for the CMA to take account of developments in other jurisdictions in assessing what action the CMA is required to take in relation to a given merger.

- 18.6 Merger parties are encouraged to discuss the process and timing of the review of a multi-jurisdictional merger with the CMA at an early stage (and to provide confidentiality waivers expediently to facilitate early-stage discussions with other competition authorities). This may, in some cases, include discussing with the CMA the timing of any pre-notification discussions and the commencement of formal proceedings before the CMA and/or other competition authorities to ensure, so far as possible, the alignment of the respective timetables.
- 18.7 In addition, the following aspects of this guidance may be particularly relevant in multi-jurisdictional mergers:
- a) As noted in paragraph 8.3 above, the CMA might decide not to open an investigation immediately where a transaction is subject to review by a competition authority outside the UK and any remedies imposed or agreed in those proceedings would be likely to address any competition concerns that could arise in the UK. This could be the case, for example, where all of the markets that are relevant to the transaction are broader than national in scope. In this circumstance, merger parties may be invited to update the CMA on the progress of proceedings in other jurisdictions and to provide waivers to the CMA to discuss these proceedings with other competition authorities. The CMA may consider whether to open a formal investigation at any point before expiry of the four-month statutory period and merger parties run the risk that remedies in other jurisdictions that would not fully eliminate any competition concerns relating to the UK would result in the CMA opening a formal investigation at a later stage.
 - b) As noted in paragraph 1.6 above, the CMA will generally apply this guidance flexibly and may depart from the approach described in the guidance where there is an appropriate and reasonable justification for doing so, which may include the alignment of the CMA's investigation with the processes of other competition authorities. Merger parties may wish to give early consideration to the potential process variations set out in this guidance where that might help to

support alignment between the processes in different competition authorities in multi-jurisdictional mergers.²⁵⁷

- c) For example, as noted in paragraph 7.2 above, merger parties are able to request that a case should be 'fast tracked' to the consideration of UILs or to an in-depth phase 2 investigation. In some circumstances, this may aid the alignment of the CMA's substantive assessment and/or remedies process with proceedings in other jurisdictions.
- d) Moreover, as noted in paragraph 7.17 above, merger parties are, in a phase 2 investigation, able to request that they formally accept that the CMA has evidence that establishes, to the required legal standard, that the relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition within a specified market or markets for goods or services in the UK. In some circumstances, the 'concession' of an SLC (which might involve business activities that may be within the scope of remedies being put in place in other jurisdictions) may aid the alignment of the CMA's remedies process with proceedings in other jurisdictions.
- e) As noted in paragraph 9.37 above, the fact that competition authorities are considering a merger that the CMA is also investigating is one of the circumstances in which the CMA decision maker at phase 1 (or the Inquiry Group, at phase 2) may choose to become involved in remedies discussions before the SLC decision. The merger parties will be informed if the decision maker deems that this is appropriate. The merger parties are also able to request that the decision maker should become involved in remedies discussions before any SLC decision.

²⁵⁷ See, for example, CMA Decision: Anticipated acquisition by Stryker Corporation of Wright Medical Group N.V. (30 June 2020).

19 COMMUNICATION AND PUBLICATION OF DECISIONS, UNDERTAKINGS AND ORDERS

General approach to publication

- 19.1 The CMA is mindful of the need to respect the confidentiality of commercially-sensitive information provided to it (by the merger parties and third parties). At the same time, it is required by section 107 of the Act to publish its decisions and the reasons for them. Accordingly, it will ensure that the ‘gist’ of the evidence that is key to the reasoning and outcome of a decision is included in the public version of the decision.²⁵⁸ Therefore, when parties make requests for excision of confidential information, they are expected to justify each of those requests. The CMA will not accept blanket claims that particular classes of information are confidential.
- 19.2 In the event of a disagreement with the CMA as to the confidentiality of specific information relating to a party that the CMA proposes to publish in its decision, parties should seek in the first instance to resolve the matter with the CMA case team.²⁵⁹ If, thereafter, the parties' concerns remain unresolved, they may make representations to the CMA's Procedural Officer, who will consider those representations and reach a determination on the issue in relation to a phase 1 inquiry or provide advice to the Inquiry Group in relation to a phase 2 inquiry who will make the final decision.²⁶⁰

Phase 1

- 19.3 Section 34ZA(1)(b) of the Act requires the CMA to provide the merger parties with the reasons for its decision whether its duty to refer applies. Section 107 of the Act requires the CMA to publish its decisions, including decisions that a transaction is not a relevant merger situation and decisions not to refer (including findings that the market is of insufficient importance to justify a reference). However, this publication obligation does not apply to decisions where the CMA decides not to make a reference because it

²⁵⁸ For guidance on the CMA's wider approach to such issues of confidentiality, see *Transparency and disclosure: Statement of the CMA's policy and approach* (CMA6).

²⁵⁹ If the matter in disagreement arises in relation to a phase 2 inquiry the staff team will liaise with the Inquiry Group as necessary.

²⁶⁰ The Procedural Officer is intended to provide a swift, efficient supplementary mechanism for resolving disputes relating to the confidentiality of information proposed to be published by the CMA.

believes that the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference.²⁶¹

- 19.4 Where the CMA finds that its duty to refer applies, and considers that there are reasonable grounds for believing that any UILs offered by the merger parties (or a modified version of them) might be accepted by the CMA, it will also publish a notice of that decision.²⁶²
- 19.5 On the day that the decision is finalised and adopted, the outcome of the CMA's decision is communicated to the merger parties and announced publicly. The CMA may also issue a press release (and/or a short summary of its findings) in relation to its decision. The text of the reasoned decision is provided to the merger parties and subsequently published on <https://www.gov.uk/cma-cases> following the excision of confidential information (see paragraph 19.6 below).
- 19.6 Publication is generally a two-step process:
- a) The first step is the announcement of the nature of the CMA's decision, done through the Regulatory News Service and placed on <https://www.gov.uk/cma-cases>. Before publicly announcing the decision, the CMA will seek to notify the merger parties of the precise timing and nature of the decision. The exact timing of this communication will vary from case-to-case but typically the timing of this communication may be the day before, or on the same day as, the date of the announcement.²⁶³ Where a press release is issued and/or where a summary of the decision will be published at the same time as announcement of the decision, these documents will

²⁶¹ ie decisions under section 33(2)(b) of the Act; see section 107(1)(aa).

²⁶² The final decision on whether to accept the UILs would be made following further consideration and public consultation – see *Merger Remedies Guidance* (CMA87).

²⁶³ In cases where one or more of the merger parties is a UK-listed company, the CMA will contact the merger parties/their advisers after the London Stock Exchange has closed on the day before publication, normally after 5pm. By 7.00am (when the London Stock Exchange opens) the following day, the decision will be announced (and any press release/summary of the decision will be published) on www.gov.uk/cma. Where the merger parties are listed companies in other jurisdictions, the CMA will, where possible, seek to avoid announcing its decision during stock exchange hours in those jurisdictions.

also normally be sent to the merger parties at the same time.^{264, 265}

The purpose of sending these documents to the merger parties/their advisers is solely to identify, ahead of publication, any information which may be protected by Part 9 of the Act (see paragraphs 19.12 to 19.14 below). On the day the CMA announces its decision, it will also provide the merger parties with the text of its decision, having redacted any information which may relate to a third party.

- b) The second step, usually sometime later, is the publication of the non-confidential text of the decision or notice on <https://www.gov.uk/cma-cases>, which will be announced on the Regulatory News Service, following engagement with the merger parties and any third parties to identify any information which may be protected by Part 9 of the Act.

Phase 2

Provisional findings

19.7 The CMA's usual practice is to provide to the merger parties (and any external advisers²⁶⁶) the following materials shortly before publication: a copy of the CMA's press release (where one will be issued); the Notice of provisional findings; the summary of provisional findings; and, where relevant, the Notice of Possible Remedies. These are finalised documents that are provided on an embargoed basis until publication solely to enable the merger parties to prepare their external and/or internal communications and to identify any information which may be protected under Part 9 of the Act. The merger parties are therefore not invited to make submissions on the

²⁶⁴ Before prior notice of any announcement is given to the merger parties, an email will be sent to the merger parties or their advisers that sets out the terms on which any price-sensitive information is being provided. The merger parties must agree to these terms before the price-sensitive information will be provided. The same terms regarding price-sensitive information will also apply in the event that the case is referred for a phase 2 investigation.

²⁶⁵ In some circumstances, the CMA may consider it is inappropriate to provide advance copies of any or some of the documents to the merger parties and/or their external advisers. For example, where the CMA has concerns as to the ability of merger parties and/or their external advisers to keep the contents of documents confidential before publication; or where there are issues of confidentiality which cannot be sufficiently protected under the terms of any embargo.

²⁶⁶ As noted above, there may be circumstances in which the CMA considers it is inappropriate to provide advance copies of any or some of the documents to the merger parties and/or their external advisers.

substantive content of these documents. The CMA will publish these documents after a short delay.²⁶⁷

- 19.8 At around the same time (or shortly thereafter), the merger parties will also be given the redacted version of the full provisional findings report. The redacted provisional findings report will typically be published once the merger parties have had an opportunity to make final representations on the CMA's treatment of information which may be protected under Part 9 of the Act. This period will be brief and may, in some cases, be as short as only a few hours (given that CMA will have taken steps earlier in the process to identify any confidential material). However, if the CMA is fully satisfied that all confidential material has been treated appropriately within the provisional findings report, it may publish the full decision at the same time as the Notice of provisional findings.

Final report

- 19.9 The CMA will send the final report, including a summary, to the merger parties in the form in which it will be published, that is, with excisions. The final report and summary are embargoed until publication. At this stage, the merger parties are not generally invited to make a final check of the text because most excision requests will have been resolved ahead of publication of provisional findings (see paragraphs 19.7 to 19.8 above) or through a 'put-back' process of any additional submissions/evidence prior to production of the final report.

Publication of undertakings and orders

- 19.10 The CMA publishes the details of all merger undertakings and orders that have been agreed and accepted or imposed under the Act on the relevant case page of the CMA website.²⁶⁸ Publication is designed to ensure that

²⁶⁷ Where the merger parties are not UK-listed companies, this delay will generally be a matter of a few hours. In cases where one or more of the merger parties is a UK-listed company, a copy of the Notice of provisional findings, summary of provisional findings and, where relevant, Notice of Provisional Remedies is made available to the merger parties on an embargoed basis after the London Stock Exchange has closed on the day before publication, normally after 5pm. By 7.00am (when the London Stock Exchange opens) the following day, these documents are published on www.gov.uk/cma. Where the merger parties are listed companies in other jurisdictions, the CMA will, where possible, seek to avoid publication during stock exchange hours in those jurisdictions.

²⁶⁸ See <https://www.gov.uk/cma-cases>. The CMA is also required by section 107 of the Act to publish any IEO or interim order made by it under section 72 or 76 of, or paragraph 2 of Schedule 7 to, the Act.

interested third parties are aware of the undertakings and, in the event of a breach of undertakings, they may take action in the courts under section 94 of the Act.

- 19.11 Once they are in place, undertakings and orders are monitored by the CMA under section 92 of the Act in order to ensure compliance and so that the CMA may consider whether they should be amended or replaced, or, where relevant, so that the CMA may advise the Secretary of State as to such issues (see *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* (CMA11)). Any changes that are agreed are published in the same way as the original undertakings.

Freedom of Information Act

- 19.12 The Freedom of Information Act 2000 (the FOIA) creates a general right of access to information held by public bodies, including the CMA.²⁶⁹ A request for information under the FOIA will be dealt with within 20 working days of receipt.
- 19.13 There are a number of exemptions from disclosure under the FOIA of potential relevance to a request for information held by the CMA, including where disclosure would be prohibited under any statutory bar to disclosure including under the Act.²⁷⁰ Part 9 of the Act, under which information relating to the affairs of an individual (a sole trader, for example) or any business of an undertaking which has come to the CMA may not be disclosed during the lifetime of the individual or while the undertaking continues in existence unless the disclosure is permitted under one of the gateways in the Act, therefore continues to apply. In addition, the CMA may rely on section 31(1)(g) of the FOIA (for the purposes at section 31(2)) in withholding information if it considers its disclosure would, or would be likely to, prejudice the exercise by the CMA of its statutory merger control functions and there are public interest arguments for maintaining the exemption outweighing the public interest in disclosing the information. Other exemptions may also be engaged, depending on the facts.

²⁶⁹ More information on the FOIA can be found at www.gov.uk/cma, including contact details should you require further information. More detailed information on the FOIA is available on the Information Commissioner's website at www.ico.org.uk.

²⁷⁰ Section 44(1)(a) of the FOIA.

19.14 Further information on exchanges of confidential information in the context of multi-jurisdictional mergers is provided in chapter 18 above.

20 FEES

- 20.1 Subject to some limited exceptions²⁷¹, any merger that qualifies as a relevant merger situation (including on the ‘may be the case’ standard)²⁷² and in which the CMA (or Secretary of State in public interest cases) reaches a decision on whether or not to refer the merger for a phase 2 investigation, is subject to a fee irrespective of whether a reference is made.²⁷³ That fee is collected by the CMA on behalf of HM Treasury. The main exception is where the interest acquired or being acquired is less than a controlling interest and a merger notice has not been submitted in relation to that acquisition.²⁷⁴ In addition, there is an exemption from paying a fee where the acquirer and any group of which it is a member qualify as small or medium sized. This is defined by reference to qualifying conditions in the Companies Act 2006 (see paragraph 20.6 below).
- 20.2 Where a fee is due, that fee is payable by the person filing the Merger Notice, or – in cases in which no Merger Notice is filed – the person acquiring control. The fee becomes payable on the publication by the CMA of either a reference decision or any decision not to make a reference. No fee is payable if the CMA finds that the case does not qualify as a relevant merger situation. For cases resolved through UILs, the fee becomes payable when the CMA loses its duty to refer as a result of its formal acceptance of UILs. In the case of public interest cases decided by the Secretary of State, the fee becomes payable to the CMA when the Secretary of State publishes a reference decision under section 45 of the Act or publishes any decision not to make such a reference. In all cases, an invoice will be issued by the

²⁷¹ A fee shall not be payable in relation to arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, where the CMA decides pursuant to section 33(2)(b) of the Act that the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a merger reference.

²⁷² This therefore excludes ‘found-not-to-qualify’ cases (where the transaction is found not to give rise to a relevant merger situation). In those cases, no fee is payable.

²⁷³ Full details in respect of the payment of fees are, pursuant to section 121 of the Act, set out in the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended).

²⁷⁴ Chapter 4 explains further the meaning of the term ‘controlling interest’. It should be noted, however, that multiple parties may be treated as one person for the purposes of determining whether fees are payable, potentially as a result of the application of the ‘associated persons’ provision, in which case they are jointly and severally liable for the fee under Article 6(4) of the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended).

CMA when the fee becomes payable. Payment must be made within 30 days of the date of the invoice.

- 20.3 Given that a fee is payable in all cases in which the CMA reaches a decision whether or not to refer in respect of a relevant merger situation, a fee will be payable in cases where the CMA decides to investigate the merger on its own initiative and proceeds to publish such a decision (save, as noted above, in cases where the interest acquired is less than a controlling interest).
- 20.4 Information on how to pay the fee (including the CMA's account details and the forms of payment that it will accept) is available on <https://www.gov.uk/government/publications/merger-fees-payment-information>.
- 20.5 Fees vary according to the type and size of the merger. Details of the current fee scales are available from the case team and on <https://www.gov.uk/government/publications/merger-fees-payment-information>.
- 20.6 Where the acquirer qualifies as small or medium sized as defined (by reference to provisions of the Companies Act 2006²⁷⁵) in the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (as amended) it is exempt from paying the above fees.
- 20.7 Fees are payable on the making of a merger reference under the Water Industry Act 1991 (see chapter 17). In such cases, the level of the fee is determined depending on the value of the turnover of the water enterprise being acquired in England and Wales.²⁷⁶

²⁷⁵ At the time of writing, 'small enterprises' under section 382 of the Companies Act 2006 are those satisfying two or more of the following criteria: (i) turnover of not more than £10.2 million; (ii) balance sheet total of not more than £5.1 million; (iii) number of employees not more than 50. 'Medium enterprises' under section 465 of the Companies Act 2006 are those satisfying two or more of the following criteria: (i) turnover of not more than £36 million; balance sheet total of not more than £18 million; (iii) number of employees of not more than 250. Full details are set out in sections 382 and 465 of the Companies Act 2006, most recently amended by the Companies, Partnerships and Groups (Accounts and Reports) Regulations SI 2015/980. Where the acquirer is a member of a group as defined in section 474 of the Companies Act, it will qualify as small if the group qualifies as small under section 383 of the Companies Act, or medium sized if the group qualifies as medium-sized under section 466 of the Companies Act.

²⁷⁶ The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended).

ANNEXES

A. Guidance on the calculation of turnover for the purposes of Part 3 of the Enterprise Act 2002

- A.1 This annex provides guidance on the calculation of turnover for the purposes of Chapter 1 of Part 3 of the Act.
- A.2 While this annex is intended to help explain the detailed provisions of the law concerning turnover calculation, it should not be regarded as a substitute for the Act and secondary legislation made under it. Nor should it be regarded as a substitute for expert legal advice on the interpretation of the Act and secondary legislation.

Background

- A.3 Under the turnover test in the Act, a relevant merger situation will arise if two or more enterprises cease to be distinct and the turnover in the UK of the enterprise being taken over exceeds £70 million (or for certain mergers which give rise to potential public interest considerations, £1 million) (see chapters 4 and 16 above).²⁷⁷
- A.4 The turnover of the enterprise being taken over is, for these purposes, calculated by taking together the total value of the UK turnover of all the enterprises ceasing to be distinct and deducting either:
- a) the UK turnover of any enterprise which continues to be carried on under the same ownership and control, or
 - b) if no enterprise continues to be carried on under the same ownership or control, the UK turnover of the enterprise whose turnover has the highest value.²⁷⁸
- A.5 In most relevant merger situations, this means in practice that the applicable turnover for mergers within (i) above – which is most takeovers and acquisitions – will be the UK turnover of the target enterprise. For mergers falling within (ii) above – a full legal merger or a joint venture combining all of the merger parties' assets and businesses, for example – the applicable UK turnover will be that of the enterprise having the lower turnover (or, put

²⁷⁷ Section 23(1)(b) of the Act.

²⁷⁸ Section 28(1) of the Act.

another way, in this scenario both enterprises must have UK turnover exceeding £70 million).

- A.6 The method of calculating the applicable turnover is set out in the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 SI 2003/1370 (as amended) (referred to in this annex as the Order).

Period over which turnover is calculated

- A.7 The relevant period used for the purposes of determining turnover under Part 3 of the Act is the business year preceding either the date the enterprises ceased to be distinct (in the case of a completed merger); or, the date of the CMA's decision whether or not to make a reference (in the case of a proposed merger). However, in either case, the CMA may substitute such earlier date as it considers appropriate.²⁷⁹ In practice, the CMA will usually consider the turnover for the last completed 'business year' preceding either the date the enterprises ceased to be distinct (for a completed merger) or the date of notification (in the case of a proposed merger).
- A.8 A 'business year' for these purposes is any period of more than six months for which accounts have been or will be prepared.²⁸⁰ In general, this will, of course, be a 12-month period. Where (perhaps because the enterprise has been newly formed) there is a period for which there is no preceding business year then the applicable turnover is the turnover for that shorter period.²⁸¹
- A.9 If the preceding business year is not a period of 12 months, then turnover, for the purposes of Chapter 1 of Part 3 of the Act, is arrived at by adjusting the applicable turnover received in that period by the same proportion as 12 months bears to that period.²⁸² Thus, if the preceding business year for an enterprise ceasing to be distinct is a nine-month period during which the applicable turnover was £54 million, then turnover for this purpose (that is, for determining whether the jurisdictional threshold is met) would be £72 million ($£54 \text{ million} \div 9 \times 12$).

²⁷⁹ Article 10(2)(a) and (b) of the Order.

²⁸⁰ Article 2(c) of the Order.

²⁸¹ Article 10(4) of the Order.

²⁸² Article 2(b) of the Order.

A.10 In determining the applicable turnover of an enterprise, the CMA may take into account events which have occurred since the end of the business year and which may have a significant impact on the turnover of the enterprise ceasing to be distinct.²⁸³ This allows the CMA to take account of acquisitions or divestments or other transactions which have had, or will potentially have, a continuing positive or negative effect on the turnover of the enterprise. The CMA would only expect to exercise this discretion in cases where the effect may impact upon the question of jurisdiction or the fee due.

Applicable turnover

A.11 The applicable turnover of an enterprise is the turnover of the enterprise arising during the previous business year. It comprises the amounts derived from the sale of products and the provision of services which it makes in the ordinary course of its business activities to customers (businesses or consumers) in the UK, net of any sales rebate, value added tax and other taxes directly related to that turnover.²⁸⁴ The calculation of turnover for these purposes should be interpreted in accordance with accounting principles and practices that are generally accepted in the UK.²⁸⁵ Turnover includes any aid granted by a public body to a business which is directly linked to the sale of products or the provision of services by the business and therefore reflected in the price of those products/services.²⁸⁶ Special provisions, described below, apply to an enterprise which is (in whole or in part) a credit institution, financial institution or insurance undertaking.

Credit institutions and financial institutions

A.12 The applicable turnover of an enterprise which, in whole or in part, is a credit institution or financial institution is the sum of certain specified income received by the branch or division of that institution in the UK, after the deduction of value added tax and other taxes directly related to those items.²⁸⁷ The types of income specified for these purposes are:

- a) interest income and similar income

²⁸³ Article 10(3) of the Order.

²⁸⁴ Paragraph 3 of the Schedule to the Order.

²⁸⁵ Paragraph 2 of the Schedule to the Order.

²⁸⁶ Paragraph 13 of the Schedule to the Order.

²⁸⁷ Paragraphs 10 and 11 of the Schedule to the Order.

- b) income from securities:
- c) income from shares and other variable yield securities
- d) income from participating interests
- e) income from shares in affiliated undertakings
- f) commissions receivable
- g) net profit on financial operations, and
- h) other operating income.

Insurance undertakings

A.13 The applicable turnover of an enterprise which, in whole or in part, is an insurance undertaking is the value of the gross premiums received from residents of the UK after deduction of taxes and certain other premium-related deductions.²⁸⁸ Gross premiums received comprises all amounts received together with all amounts receivable in respect of insurance contracts issued by or on behalf of an insurance undertaking, including outgoing reinsurance premiums.

Enterprises treated as under common ownership or control

A.14 Where an enterprise ceasing to be distinct consists of two or more enterprises which are under common ownership or common control the applicable turnover is calculated by adding together the applicable turnover of each of those enterprises.²⁸⁹ For the purposes of determining whether enterprises are treated as being under common control when calculating the applicable turnover, the provisions of section 26(2) and (3) (as reproduced in paragraphs 5 and 6 of the Schedule to the Order) and section 127 of the Act apply as they apply in the Act for the purposes of determining whether enterprises have ceased to be distinct.²⁹⁰

A.15 As a result, applicable turnover may include not only the applicable turnover of the particular enterprise ceasing to be distinct but also that of certain other enterprises to which it is 'linked'. In particular, this might include the

²⁸⁸ Paragraphs 10 and 12 of the Schedule to the Order.

²⁸⁹ Paragraph 4 of the Schedule to the Order.

²⁹⁰ Paragraphs 5, 6 and 7 of the Schedule to the Order.

applicable turnover of any enterprise over which the enterprise ceasing to be distinct has control for the purposes of section 26(3) (as reproduced at paragraph 6 of the Schedule) of the Act – that is where the interest held confers, at least, the ability materially to influence policy. Where applicable turnover includes the applicable turnover of a linked enterprise, in which the enterprise ceasing to be distinct has less than a controlling interest, the whole of the applicable turnover of the linked enterprise is included in assessing whether the jurisdictional test is met. There is no reduction simply because the interest is less than a controlling interest.

A.16 For example:

- a) Company A acquires Company B and also its subsidiaries B1 and B2: B and B1 and B2 are enterprises of interconnected bodies corporate which are treated as being under common control and their turnover is taken together in arriving at the applicable turnover of the enterprises ceasing to be distinct.
- b) Company A acquires Company C which also has a significant shareholding – conferring at least material influence – in Company D. The turnover of Company C and Company D is taken together in determining the applicable turnover.
- c) Partnerships A, B and C act together to secure control of Partnership D and form Partnership E. Partnerships A, B and C are associated persons and their turnover is added together. To determine the applicable turnover, the higher of the two turnover figures (that is, of A, B and C together or of D) is deducted from the combined turnover figure (of A, B, C and D).

A.17 In the case of some joint ventures, none of the enterprises will remain under the same ownership or control. For example, Company A and Company B may form a 50:50 joint venture (Newco) incorporating all their assets and businesses. In this case, neither enterprise A or B will remain under the same ownership or control as previously. In determining the relevant applicable turnover, the highest turnover (of A or B) would therefore, effectively, be ignored. By contrast, where Company A and Company B form a joint venture incorporating their assets and businesses in a particular area of activity, each parent with control ceases to be distinct from the target business contributed to the joint venture by the other parent, but the parent companies themselves remain under the same ownership and control after the merger. Therefore, the parent companies have their turnover deducted

and the relevant turnover is the sum of the turnover of each of the contributed enterprises.

Treatment of intra-group transactions

- A.18 To avoid double counting, applicable turnover does not include amounts that are derived from transactions involving the sale of goods or provision of services between enterprises that are and will remain, post-merger, under the same common ownership or common control.²⁹¹ In other words, external sales only are taken into account.
- A.19 However, in certain cases the CMA may take into account sales that were previously internal to a group and may attribute an appropriate value to such sales. This is to allow the CMA to make a sensible assessment of the turnover for jurisdictional purposes of the business being sold.
- A.20 Where, as a result of the merger, one or more enterprises will cease to be under the same common ownership or common control – that is, where what was an intra-group transaction pre-merger would, post-merger, be regarded as an external transaction – then the CMA may treat the amounts derived from the previously internal transactions as applicable turnover. In these cases, if such transactions have not resulted in any turnover, or the CMA believes that the turnover attributed to them does not reflect open market value, then the CMA may attribute an appropriate value to those transactions for inclusion in the applicable turnover.²⁹²

Example:

The enterprise ceasing to be distinct is part of a vertically integrated process, a mill supplying flour to a downstream baking operation. It is possible that, pre-merger, the raw material (flour) may be supplied by the mill to the baking operation at a nil value or less than market price. If only the mill was being taken over, the turnover attributed to the milling operation may, as a result, be artificially low. In these circumstances the CMA might exercise its discretion to take into account the pre-merger supplies of raw materials (flour) to the baking operation in calculating the applicable turnover, and to attribute a more appropriate value for those supplies. In seeking to re-value the turnover attributed to the supply of such goods so that it more accurately reflects an open market value, the CMA might have regard to the terms of

²⁹¹ Paragraph 8 of the Schedule to the Order.

²⁹² Paragraph 9 of the Schedule to the Order.

any future supply agreement that might be part of the transaction as well as market prices more generally. Again, it is likely that the CMA would only seek to exercise this discretion in those cases where the effect may impact upon the question of jurisdiction or the fee due.

Treatment of foreign currencies

- A.21 The turnover test is expressed in terms of pounds sterling. If it is necessary to convert foreign currencies in order to arrive at this figure then the CMA would usually be content to accept the approved exchange rate applicable at the date of the accounts.

B. Guidance in relation to the CMA's assessment of mergers

- B.1 In addition to this guidance, the CMA (or its predecessor organisations) has published a number of other pieces of guidance in relation to the assessment of mergers, namely:
- a) Merger assessment guidelines (OFT1254/CC2)
 - b) Suggested best practice for submission of technical economic analysis to the CC (CC2com3)
 - c) Chairman's guidance on disclosure of information in merger and market inquiries (CC7) (Revised)
 - d) Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders (CMA11)
 - e) Rules of procedure for merger, market and special reference groups (CMA17)
 - f) Quick guide to UK merger assessment (CMA18)
 - g) CMA guidance on the review of NHS mergers (CMA29)
 - h) Water and sewerage mergers: Guidance on the CMA's procedure and assessment (CMA49)
 - i) Guidance on the CMA's mergers intelligence function (CMA56)
 - j) Retail mergers commentary (CMA62)
 - k) Mergers: Exceptions to the duty to refer (CMA64)
 - l) Rail franchise mergers: Review of methodologies and guidance (CMA74)
 - m) Good practice in the design and presentation of customer survey evidence in merger cases (CMA78)
 - n) Merger remedies (CMA87)
 - o) Guidance on requests for internal documents in merger investigations (CMA100)
 - p) Interim measures in merger investigations (CMA108)

- q) Mergers and markets remedies – guidance on reporting, investigation and enforcement of potential breaches (CMA123)
- r) Guidance on the functions of the CMA after the end of the Transition Period (CMA126)

B.2 The following guidance has been withdrawn:

- a) Guidance on changes to the jurisdictional thresholds for UK merger control (CMA90); and
- b) Government in Markets (OFT1113).

B.3 Interested parties should refer to those documents listed above where relevant, subject in particular to the following general limitations:

- a) all references to issues of jurisdiction or procedure in mergers cases must be read in the light of this guidance
- b) in the case of conflict between this guidance and any other guidance, this guidance prevails
- c) the original text of any guidance issued by one of its predecessor organisations and adopted by the CMA ('adopted guidance') has been retained unamended: as such, that text does not reflect or take account of developments in case law, legislation or practice since its original publication, and
- d) all the adopted guidance should be read subject to the following cross-cutting amendments:
 - i) references to the 'OFT' or 'CC' (except where referring to specific past OFT or CC practice or case law), should be read as referring to the CMA
 - ii) references to 'referral to the CC' or 'a reference to the CC' should be read as referring to the referral of a case by the CMA (or Secretary of State) of a case for a phase 2 investigation involving an Inquiry Group of CMA panel members
 - iii) certain OFT or CC departments, teams or individual roles may not be replicated in the CMA, or may have been renamed. A copy of the CMA's organisational chart is available on www.gov.uk/cma, and

- iv) parties should check any contact details against those listed on www.gov.uk/cma, which will be the most up to date.

C. Ancillary Restraints

Introduction

- C.1 Mergers and ancillary restrictions to the merger are generally excluded from the prohibitions of the Competition Act 1998 (CA98), as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13), under Schedule 1 of the CA98. This extends to any provision directly related and necessary to the implementation of the merger provisions (referred to in this guidance as ‘ancillary restraints’).²⁹³
- C.2 The CMA considers that it is, in principle, no better placed than the merger parties and their advisers in most cases to determine whether contractual arrangements and agreements are ancillary to a merger and, therefore, automatically excluded from the Chapter I and Chapter II prohibitions of the Competition Act 1998. Accordingly, the CMA will not ordinarily give a view in its published decision (or to the merger parties confidentially) on whether or not a restriction is ancillary.²⁹⁴
- C.3 This Annex sets out the CMA’s analytical approach to ancillary restraints. It sets out the principles for assessing whether, and to what extent, the most common types of agreements are considered to be ancillary restraints.

General Principles

- C.4 The criteria of direct relation and necessity set out under Schedule 1 of the CA98 are objective in nature. Restrictions are not directly related and necessary to the implementation of a merger simply because the merger parties regard them as such.
- C.5 For restrictions to be considered ‘directly related to the implementation of the merger’, they must be closely linked to the merger itself. It is not sufficient that an agreement has been entered into in the same context or at the same time as the merger. Restrictions which are directly related to the merger are

²⁹³ Competition Act 1998, Schedule 1, section1(2).

²⁹⁴ In exceptional cases raising novel or unresolved questions, the CMA may agree to provide guidance on the ancillary nature of a restriction. In these rare cases, the CMA may need to seek the views of third parties, and it will include its assessment of the restriction in its published decision on the merger. As a result, the CMA will not be able to express a view as to whether the restrictions are ancillary if the merger parties consider that the arrangements are confidential, or if there is insufficient time to consider these matters within the statutory deadlines of an investigation

economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the merger.

- C.6 Agreements must be ‘necessary to the implementation of the merger provisions’²⁹⁵, which means that, in the absence of those agreements, the merger could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty. Agreements necessary to the implementation of a merger are typically aimed at protecting the value transferred, maintaining the continuity of supply after the break-up of a former economic entity, or enabling the start-up of a new entity. In determining whether a restriction is necessary, it is appropriate not only to take account of its nature, but also to ensure that its duration, subject matter, and geographical field of application does not exceed what the implementation of the merger reasonably requires. If equally effective alternatives are available for attaining the legitimate aim pursued, the merger parties must choose the one which is objectively the least restrictive of competition.
- C.7 For acquisitions which are carried out in stages, the contractual arrangements relating to the stages before the establishment of control²⁹⁶ within the meaning of section 26 of the Act cannot normally be considered directly related and necessary to the implementation of the merger. However, an agreement to abstain from material changes in the target's business until completion is considered directly related and necessary to the implementation of the merger.²⁹⁷ The same applies, in the context of a joint bid, to an agreement by the joint purchasers of an enterprise to abstain from making separate competing offers for the same enterprise, or otherwise acquiring control.
- C.8 Agreements which serve to facilitate the acquisition of any level of control over a target by more than one enterprise are to be considered directly related and necessary to the implementation of the merger. This will apply to arrangements between the merger parties for the acquisition of control aimed at implementing the division of assets in order to divide the production

²⁹⁵ Section 1(2), Schedule 1 to the Competition Act 1998.

²⁹⁶ For the purposes of this Annex, ‘control’ is defined as comprising any level of control set out under Section 26 of the Act, including material influence.

²⁹⁷ The CMA may put in place interim measures to prevent the merger parties from giving effect to such ancillary restraints where the CMA considers it necessary to prevent or unwind pre-emptive action.

facilities or distribution networks among themselves, together with the existing trademarks of the acquired enterprise.

- C.9 To the extent that such a division involves the break-up of a pre-existing economic entity, arrangements that make the break-up possible under reasonable conditions are to be considered directly related and necessary to the implementation of the merger, under the principles set out below.

Principles applicable to commonly encountered ancillary restraints in cases of acquisition of an enterprise

- C.10 Restrictions agreed between the merger parties in the context of a transfer of an enterprise may be to the benefit of the purchaser or of the seller. In general terms, the need for the purchaser to benefit from certain protection is more compelling than the corresponding need for the seller. It is the purchaser who needs to be assured that she/he will be able to acquire the full value of the acquired business. Thus, as a general rule, restrictions which benefit the seller are either not directly related and necessary to the implementation of the merger at all, or their scope and/or duration need to be more limited than that of clauses which benefit the purchaser.

Non-competition clauses

- C.11 Non-competition obligations which are imposed on the seller in the context of the transfer of an enterprise can be directly related and necessary to the implementation of the merger. In order to obtain the full value of the enterprise transferred, the purchaser must be able to benefit from some protection against competition from the seller in order to gain the loyalty of customers and to assimilate and exploit the know-how. Such non-competition clauses guarantee the transfer to the purchaser of the full value of the assets transferred, which in general include both physical assets and intangible assets, such as goodwill or know-how. These are not only directly related to the merger but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the enterprise could not be accomplished.
- C.12 However, such non-competition clauses are only justified by the legitimate objective of implementing the merger when their duration, their geographical field of application, their subject matter, and the persons subject to them do not exceed what is reasonably necessary to achieve that end.
- C.13 Non-competition clauses are justified for periods of up to three years, when the transfer of the enterprise includes the transfer of customer loyalty in the

form of both goodwill and know-how. When only goodwill is included, they are justified for periods of up to two years.

- C.14 By contrast, non-competition clauses cannot be considered necessary when the transfer is in fact primarily physical assets (such as land, buildings or machinery) or exclusive industrial and commercial property rights (the holders of which could immediately take action against infringements by the transferor of such rights).
- C.15 The geographical scope of a non-competition clause must be limited to the area in which the seller has offered the relevant products or services before the transfer, since the purchaser does not need to be protected against competition from the seller in territories not previously penetrated by the seller. That geographical scope can be extended to territories which the seller was planning to enter at the time of the transaction, provided that it had already invested in preparing this move.
- C.16 Similarly, non-competition clauses must remain limited to products (including improved versions or updates of products as well as successor models) and services forming the economic activity of the enterprise transferred. Protection against competition from the seller in product or service markets in which the transferred enterprise was not active before the transfer is not considered necessary.
- C.17 The seller may bind itself and its subsidiaries and commercial agents. However, an obligation to impose similar restrictions on others would not be regarded as directly related and necessary to the implementation of the merger. This applies, in particular, to clauses which would restrict the freedom of resellers or users to import or export.
- C.18 Clauses which limit the seller's right to purchase or hold shares in a company competing with the business transferred shall be considered directly related and necessary to the implementation of the merger under the same conditions as outlined above for non-competition clauses, unless they prevent the seller from purchasing or holding shares purely for financial investment purposes, without granting it, directly or indirectly, management functions or any material influence in the competing company.
- C.19 Non-solicitation and confidentiality clauses have a comparable effect and are therefore evaluated in a similar way to non-competition clauses.

Licence agreements

- C.20 The transfer of an enterprise can include the transfer to the purchaser, with a view to the full exploitation of the assets transferred, of intellectual property rights or know-how. However, the seller may remain the owner of the rights in order to exploit them for activities other than those transferred. In these cases, the usual means for ensuring that the purchaser will have the full use of the assets transferred is to conclude licensing agreements in its favour. Likewise, where the seller has transferred intellectual property rights with the business, it may still want to continue using some or all of these rights for activities other than those transferred; in such a case the purchaser will grant a licence to the seller.
- C.21 Licences of patents, of similar rights, or of know-how, can be considered necessary to the implementation of the merger. They may equally be considered an integral part of the merger and, in any event, need not be limited in time. These licences can be simple or exclusive and may be limited to certain fields of use, to the extent that they correspond to the activities of the enterprise transferred.
- C.22 However, territorial limitations on manufacture reflecting the territory of the transferred activity are not necessary to the implementation of the operation. As regards licences granted by the seller of a business to the buyer, the seller can be made subject to territorial restrictions in the licence agreement under the same conditions as laid down for non-competition clauses in the context of the sale of a business.
- C.23 Restrictions in licence agreements going beyond the above provisions, such as those which protect the licensor rather than the licensee, are not necessary to the implementation of the merger.
- C.24 Similarly, in the case of licences of trademarks, business names, design rights, copyrights or similar rights, there may be situations in which the seller wishes to remain the owner of such rights in relation to activities retained, but the purchaser needs those rights in order to market the goods or services produced by the enterprise transferred. Here, the same considerations as set out above apply.

Purchase and supply obligations

- C.25 In many cases, the transfer of an enterprise can entail the disruption of traditional lines of purchase and supply which have existed as a result of the previous integration of activities within the economic unity of the seller. In order to enable the break-up of the economic unity of the seller and the partial

transfer of the assets to the purchaser under reasonable conditions, it is often necessary to maintain, for a transitional period, the existing or similar links between the seller and the purchaser. This objective is normally attained by purchase and supply obligations for the seller and/or the purchaser of the enterprise. Taking into account the particular situation resulting from the break-up of the economic unity of the seller, such obligations can be recognised as directly related and necessary to the implementation of the merger. They may be in favour of the seller as well as the purchaser, depending on the particular circumstances of the case.

- C.26 The aim of such obligations may be to ensure the continuity of supply to either of the merger parties of products necessary for carrying out the activities retained by the seller or taken over by the purchaser. However, the duration of purchase and supply obligations must be limited to a period reasonably necessary for the replacement of the relationship of dependency by autonomy in the market. Thus, depending on the circumstances of the market at issue (including, for example, the typical length of contracts entered into by market participants in the ordinary course of business), purchase or supply obligations aimed at guaranteeing the quantities previously supplied may be justified for a transitional period of up to five years.
- C.27 Both supply and purchase obligations providing for fixed quantities, possibly with a variation clause, are recognised as directly related and necessary to the implementation of the merger. However, obligations providing for unlimited quantities, exclusivity, or conferring preferred-supplier or preferred-purchaser status, are not necessary to the implementation of the merger.
- C.28 Service and distribution agreements are equivalent in their effect to supply arrangements; consequently the same considerations as set out above apply.

Principles applicable to commonly encountered restrictions in cases of joint ventures

Non-competition obligations

- C.29 A non-competition obligation between the parent companies and a joint venture may be considered directly related and necessary to the implementation of the merger where such obligations correspond to the products, services, and territories covered by the joint venture agreement or its by-laws. Such non-competition clauses reflect, inter alia, the need to ensure good faith during negotiations; they may also reflect the need to fully utilise the joint venture's assets or to enable the joint venture to assimilate know-how and goodwill provided by its parents; or the need to protect the

parents' interests in the joint venture against competitive acts facilitated, *inter alia*, by the parents' privileged access to the know-how and goodwill transferred to or developed by the joint venture. Such non-competition obligations between the parent companies and a joint venture can be regarded as directly related and necessary to the implementation of the merger for the lifetime of the joint venture.

- C.30 The geographical scope of a non-competition clause must be limited to the area in which the parents offered the relevant products or services before establishing the joint venture. That geographical scope can be extended to territories which the parent companies were planning to enter at the time of the transaction, provided that they had already invested in preparing this move.
- C.31 Similarly, non-competition clauses must be limited to products and services constituting the economic activity of the joint venture. This may include products and services at an advanced stage of development at the time of the transaction, as well as products and services which are fully developed but not yet marketed.
- C.32 If the joint venture is set up to enter a new market, reference will be made to the products, services and territories in which it is to operate under the joint venture agreement or by-laws. However, the presumption is that one parent's interest in the joint venture does not need to be protected against competition from the other parent in markets other than those in which the joint venture will be active from the outset.
- C.33 Additionally, non-competition obligations between investors whose level of control falls below material influence and a joint venture are not directly related and necessary to the implementation of the merger.
- C.34 The same principles as for non-competition clauses apply to non-solicitation and confidentiality clauses.

Licence agreements

- C.35 A licence granted by the parent companies to the joint venture may be considered directly related and necessary to the implementation of the merger. This applies regardless of whether or not the licence is an exclusive one and whether or not it is limited in time. The licence may be restricted to a particular field of use which corresponds to the activities of the joint venture.
- C.36 Licences granted by the joint venture to one of its parents, or cross-licence agreements, can be regarded as directly related and necessary to the

implementation of the merger under the same conditions as in the case of the acquisition of an enterprise. Licence agreements between the parents are not considered directly related and necessary to the implementation of a joint venture.

Purchase and supply obligations

C.37 If the parent companies remain present in a market upstream or downstream of that of the joint venture, any purchase and supply agreements, including service and distribution agreements are subject to the principles applicable in the case of the transfer of an enterprise.

D. Contact addresses

Contact for further information about the application of competition law to mergers in the UK:

The Mergers Unit
Competition and Markets Authority
The Cabot
25 Cabot Square
London
E14 4QZ

CMA switchboard: 020 3738 6000
Email: general.enquiries@cma.gov.uk.
CMA website: www.gov.uk/cma.

Additional contact details are available on <https://www.gov.uk/guidance/mergers-how-to-notify-the-cma-of-a-merger>.

For further information about public interest mergers, contact:

Consumer and Competition Policy Directorate
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

BEIS switchboard: 020 7215 5000
Email: enquiries@beis.gov.uk.
BEIS website: www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy.