Merger remedy evaluations

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Competition & Markets Authority

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1. Executive Summary

The CMA's merger remedy evaluation programme

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

1.2 The CMA has an established programme of evaluating its merger remedies. These have been undertaken in seven tranches, starting in 2007.[1] The 23 merger remedy evaluations conducted to date, including the five cases covered in the most recent update, were selected to cover a variety of remedy types, including structural remedies such as full divestiture and partial divestitures, behavioural remedies such as price controls and vertical separation, as well as intellectual property (IP) and licensing remedies. Following the creation of the CMA in 2014 bringing together the UK merger control regime in a single agency, we have sought to include merger remedies introduced at both phase 1 (Phase 1) and phase 2 merger investigations (Phase 2) of our process.

1.3 The findings of our merger remedy evaluations have been used to inform the way in which the CMA approaches remedy design and implementation in subsequent cases with a view to increasing the effectiveness of our interventions over time. As the CMA has further developed its understanding regarding the effectiveness of more straightforward merger remedies such as divestiture of a standalone business, more recent evaluations have tended to focus on cases where relatively novel and/or complex merger remedies have been implemented.

Recent evaluations of carve-out divestiture remedies

1.4 For our most recent tranche of merger remedy case studies we commissioned Aldwych Partners and NOCON to undertake the evaluations. These case studies were chosen by the CMA and focus on

[1] The Competition Commission (CC), a predecessor organisation to the CMA, published 11 case studies in four tranches between 2007 and 2012. The CMA has since published 12 case studies in four tranches, in 2015, 2017, 2019 and 2023.

mergers where carve-out remedies were imposed.[2] Key learnings specific to these case studies include:

(a) Carve-out remedies carry greater composition and purchaser risks compared to the divestiture of a previously self-standing business or business unit. This increases the risk that the remedy will not be effective;

(b) Purchasers face challenges in conducting robust due diligence on divestment packages in carve-out remedies. This limits the usefulness of such due diligence to the CMA as a safeguard against composition risks; and

(c) Fallback remedies (which have been a feature of some carve-out remedies) may not be an effective safeguard against the higher composition risks of initial divestiture packages and may play only a limited role in reducing the risk profile of poorly-specified remedies.

Follow up evaluations

1.5 The CMA has also conducted follow up research on two evaluation case studies undertaken in 2019, as at that time, it was too early to tell whether the merger remedies from these case studies were going to be effective. These two case studies were:

(a) *Muller / Dairy Crest* (2015); and

(b) *Reckitt Benckiser / K-Y* (2015).

1.6 These follow up evaluations highlight the importance to the CMA of tracking how the nature and potential impact of the risks in the design of a remedy, and the steps taken to mitigate these risks, ultimately affect the effectiveness of the remedy.

1.7 In *Muller / Dairy Crest* we found that the remedy has not been effective. The remedy design meant that its success was reliant on the purchaser's ability to minimise its costs in a challenging commercial environment in which it had limited sector-specific experience. The divestiture package in

[2] Throughout this report, when referring to carve-out remedies, we are referring to divestitures that entail significant separation or 'carving up' of an existing business, as compared to divestiture of a stand-alone business, or a business unit that can be largely operated independently of its parent company. See also paragraph 3.11.

this case therefore contained a significant element of risk that ultimately crystalised in the exit of the remedy taker and the failure of the remedy.

1.8 In *Reckitt Benckiser / KY* there are positive signs that the merger remedy will be effective, given that the acquirer of the licensing rights to KY in the UK, Thornton and Ross, launched its replacement brand in 2023.

Acknowledgements

1.9 The CMA would like to thank all those who have participated in each phase of this research and in particular the representatives of various companies who were interviewed, as well as Aldwych Partners and NOCON, who were commissioned by the CMA to conduct an independent review of the five cases in the most recent tranche of evaluations.

2. Introduction

2.1 The UK merger control regime has been subject to successive reforms since 2002. With the coming into force of the Enterprise Act 2002 on 20 June 2003, the CMA's predecessors, the Office and Fair Trading (OFT) and the Competition Commission (CC) acquired the power to decide and implement remedies to tackle the great majority of problematic mergers, without recourse to Ministers.[3] The Enterprise and Regulatory Reform Act 2013 (ERRA) built on these reforms and brought the UK regime within the scope of a single body, the CMA.

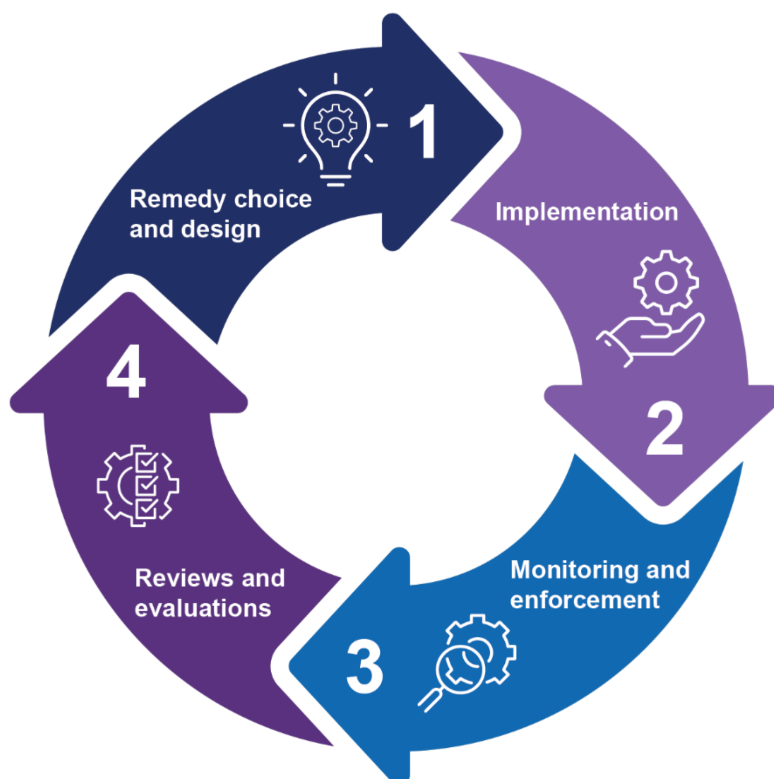
2.2 Since the last evaluation report was published in 2019 there have been substantial changes to the operation of the UK's Merger Control regime as a result of the UK leaving the European Union (EU). The UK's exit from the EU resulted in the CMA taking jurisdiction for the UK aspects of mergers (where the applicable jurisdictional tests in the UK are met) that previously fell under the exclusive jurisdiction of the European Commission. Further reforms to the UK regime are planned through the Digital Markets Competition and Consumers Bill, currently going through Parliament.

2.3 The CC initiated a rolling programme of evaluation of past merger remedies in 2004 with the aim of ensuring that learning points were captured and fed into merger remedies policy and practice. Seven phases of review have been concluded, with the first report being published in January 2007. This rolling programme was adopted by the CMA on its formation in 2014.

2.4 The figure below shows the four main stages of the remedy life cycle, illustrating how the findings from our merger remedy evaluations feed back into the design of future merger remedies. Through this process of continuous improvement, learning points from these case studies have informed the development of the Merger Remedies Guidance which provides a single source of guidance on remedies for Phase 1 and Phase 2 and also reflects the CMA's experience of merger investigations and the judgments of the Competition Appeals Tribunal (CAT).

Figure: Four stage remedy life cycle

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



2.5 In December 2020 the CMA updated its Guidance on the CMA's jurisdiction and procedure to include guidance on conceding SLCs at Phase 2.[4] Conceding an SLC at Phase 2 can (i) aid the alignment of the CMA's merger remedies process with proceedings in other jurisdictions; and (ii) enable the CMA and merger parties to focus their efforts during the remainder of the CMA's substantive assessment on other areas. This guidance also sets out the possibility for the case team and the merger parties to discuss, on an informal basis (and without prejudice to the CMA's competition assessment), potential merger remedy options if a competition concern is ultimately found.[5]

2.6 In this summary report we have set out the key learnings from our research across the 23 case studies to date. The structure is outlined below:

(a) Section 3 provides an overview of the aims of the review and the methodology used.

(b) Section 4 sets out the key findings from the 2023 merger remedy evaluation. This evaluation mainly relates to five recent cases and was

[4] Guidance on the CMA's jurisdiction and procedure, CMA2 Revised.
[5] Guidance on the CMA's jurisdiction and procedure, CMA2 Revised, paragraphs 6.19 and 12.14.

carried out by Aldwych Partners and NOCON. We have also assessed the findings from two case studies from the 2019 evaluation.

(c) Section 5 outlines the consolidated learning points from the 23 case studies conducted to date, focusing on (i) interim measures; and (ii) the choice and design of final merger remedies.

(d) The Appendices outline the work carried out by the CMA during past merger remedies, including:

(i) A summary of the remedies used in merger investigations by the CMA between 1 April 1999 and 31 May 2023;

(ii) An overview of the research methodology used to carry out research on all 23 case studies;

(iii) A comparison of the CMA merger remedy programme with other remedies research; and

(iv) Details of 18 previous case study results.

3. Overview of aims and methodology

Aims of CMA's merger remedy evaluation programme

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

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

3.3 A particular focus of this research – and which contrasts with some other work in this area – has been to explore the issues associated with less commonly applied merger remedies, including behavioural remedies or more complex divestitures such as carve-out remedies.

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

Overview of the methodology

3.5 This section provides an overview of the methodology. Further background to the research and a more detailed exposition of the methodology used is provided in Appendix 2.

3.6 The methodology is based on the review of a small number of case studies in each tranche. The case studies chosen in each phase were selected in order:

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

individuals involved in the merger remedy process were still available for interview;[6]

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

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

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

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

3.8 Applying the criteria set out in paragraph 3.6 led to the choice of the 23 case studies detailed in Table 1 below.

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

(a) Divestiture – full or partial – represents the clear majority of merger remedies in our sample. Despite the large number of divestiture remedies

[6] In practice, the need for the case studies to involve remedies sufficiently far in the past for a meaningful assessment of success meant that the case studies chosen in the first phase of research were all remedies put in place under the Fair Trading Act 1973, rather than under the Enterprise Act 2002. Although the majority of observations from the first phase of research are relevant to the current regime, the change in the approach to implementation of remedies (when responsibility for remedy implementation was passed from the Director General of Fair Trading to the CC and subsequently the CMA) means that some observations from those initial case studies are no longer relevant.

in our sample, we have over-represented other types of merger remedies eg behavioural remedies, to capture a greater diversity of interventions in this research;

(b) Out of 23 cases reviewed to date, 21 cases involved horizontal theories of harm with the most frequently used merger remedies being divestitures;

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

(d) Merger remedies to control outcomes are more common in the older cases in our sample. This is partly because of the weaker approach to interim measures at that time, which made it much harder to put in place effective structural remedies;

(e) We have included in our sample cases where merger remedies were accepted by the CMA in Phase 1 (UiLs); and

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

3.10 The most recent tranche of evaluations has focused on a particular form of partial divestiture merger remedies, which for ease we refer to as carve-out remedies. There is no single definition as to what constitutes a carve-out remedy. Separating a business unit or even a subsidiary from a wider group can require some carving out, for example if they share central functions such as R&D.

3.11 For this report, when referring to carve-out remedies we are referring to divestitures that entail significant separation or 'carving up' of an existing business. The divestiture package is often just a limited group of customers along with some assets and does not resemble anything close to a standalone subsidiary or business unit. Purchasers are often expected to have significant complementary resources to enable these remedies to work. We have focused on looking at carve-out divestitures in this tranche of evaluations given the recent frequency with which these have been proposed by merger parties to remedy the relevant SLCs and the subsequent need for decision makers and panel members to grapple with these types of merger remedy proposals.

Table 1: Summary of Phase 2 case studies[7]

Inquiry	Name of adverse finding				Type of remedy					
	Horizontal	Vertical	Unilateral	Coordinated	Behavioural	Divestiture	Recommendations	Price Control	IP	Prohibition
Alanod **(2000)**	✓	✓	✓		✓			✓		
Sibelco **(2001)**	✓		✓			✓				
Coloplast **(2002)**	✓		✓		✓			✓		
Centrica **(2003)**		✓	✓		✓					
Draeger **(2003)**	✓		✓				✓	✓		
Emap **(2004)**	✓		✓			✓				
Somerfield **(2005)**	✓		✓			✓				
Stericycle **(2006)**	✓		✓			✓	✓			
Noble **(2006)**	✓		✓			✓				
Arqiva **(2007)**	✓		✓		✓					
Nurfarm **(2009)**	✓		✓						✓	
Stagecoach **(2009)**	✓		✓			✓				
Global **(2013)**	✓		✓			✓				

[7] Alanod Aluminium Veredlung GmBH / Metalloxyd Ano-Coil Ltd, 2000 (*Alanod*), SCR Sibelco SA / Fife Silica Sands LTD and Fife Resources LTD, 2001 (*Sibelco*), Coloplast A/S / SSL International plc, 2002 (*Coloplast*), Centrica plc / Dynegy Storage Ltd, 2003 (*Centrica*), Draeger Medical AG / the Air-Shields business from Hillenbrand Industries Inc, 2003 (*Draeger*), Emap plc / ABI Building Data Ltd, 2004 (*Emap*), Somerfield Stores Ltd / WM Morrison Draeger, 2005 (*Somerfield*), Stericycle International LLC / Sterile Technologies Group Ltd, 2006 (*Stericycle*), Deans Food Group Ltd / Clifford Kent Holdings Ltd, 2006 (*Noble*), Arquiva Limited / National Grid Wireless Group, 2007 (*Arqiva*), Nurfarm Limited / AH Marks Holdings Ltd, 2009 (*Nurfarm*), Stagecoach Bus Holdings Ltd / Preston Transport Ltd, 2009 (*Stagecoach*), Global Radio Holdings Ltd / GMG Radio Holdings, 2013 (*Global*), The Rank Group Plc / Gala Casinos Ltd, 2013 (*Rank*) Reckitt Benckiser / K-Y brand, 2015 (*Reckitt Benckiser / K-Y*), Electro Rent Corporation of Test Equipment Asset Management / Microlease Inc., 2018 (*Electro Rent / Microlease*), Rentokil Initial plc / Cannon Hygiene Limited, 2019 (*Rentokil / Cannon*), Ecolab Inc / The Holchem Group Ltd, 2019 (*Ecolab / Holchem*).

Inquiry	Name of adverse finding				Type of remedy					
	Horizontal	Vertical	Unilateral	Coordinated	Behavioural	Divestiture	Recommendations	Price Control	IP	Prohibition
Rank **(2013)**			✓	✓		✓				✓
Reckitt Benckiser / K-Y **(2015)**	✓		✓						✓	
Electro Rent / Mircrolease **(2018)**	✓		✓			✓				
Rentokil / Cannon **(2019)**	✓		✓			✓				
Ecolab / Holchem **(2019)**	✓		✓			✓				

Table 2: Summaries of Phase 1 case studies[8]

Inquiry	Name of adverse finding				Type of remedy					
	Horizontal	Vertical	Unilateral	Coordinated	Behavioural	Divestiture	Recommendations	Price Control	IP	Prohibition
Unilever **(2011)**	✓		✓			✓				
Müller / Dairy Crest **(2015)**	✓		✓			✓				
ICAP **(2016)**	✓		✓			✓			✓	
Rentokil / MPCL **(2019)**	✓		✓			✓				
Stryker / Wright **(2020)**	✓		✓			✓				

[8] Unilever N.V. and Unilever plc / The Alberto Culver Company, 2011 (*Unilever*), Müller UK & Island Group Plc / Dairy Crest Group Plc, 2015 (*Müller / Dairy Crest*), Tulett Prebon plc / ICAP plc, 2016 (*ICAP*), Rentokil Initial plc / MPCL Ltd, 2019 (*Rentokil / MPCL*), Stryker Corporation / Wright Medical Group N.V., 2020 (*Stryker / Wright*).

3.12 For the first six tranches of evaluations, the CMA has conducted the post assessment of merger remedies in-house. The CMA outsourced the most recent tranche of merger remedy evaluations in this report to a third party. We considered that there may be significant benefits from appointing an external firm to conduct the evaluations on an arm's length basis from the CMA. The key benefits in outsourcing we saw were:

(a) Independence – providing increased transparency and confidence in the robustness of the findings of the programme;

(b) Robust challenge – an external third party should be well placed to provide additional challenge to the CMA's approaches on cases, strengthening the conclusions that can be drawn;

(c) Alternative perspective – this approach provides an opportunity for a fresh pair of eyes and to bring external experience to bear on evaluating CMA merger remedies.

3.13 In August 2022 the CMA tendered for the merger remedies evaluation contract. Following submissions and interviews of several bidders, the CMA appointed Aldwych Partners[9] and NOCON[10] (the Contractor) as part of a joint bid. The Contractor's bid was assessed as being the best mix of expertise and value for money.

3.14 The Contractor started its research in January 2023 submitting a final report to the CMA on 27 June 2023. The report (the Contractor Report) can be found on the case page.[11]

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[9] Aldwych Partners is a competition consultancy firm with experienced personnel that provides advice and representation for merging parties on CMA merger investigations. Aldwych publishes its own internal research and offers clients the following services: (i) securing CMA clearance for M&A transactions; (ii) assessing CMA intervention risks; and (iii) advising on regulation and competition.
[10] NOCON provides monitoring trustee services supporting companies and competition authorities with solution-oriented advice. As a monitoring trustee, NOCON has significant experience both in and out of the UK in overseeing the implementation of remedies, both structural and behavioural and monitoring merging parties' obligations under the UK hold separate regime (Interim measures).
[11] Commercially sensitive information is redacted from the public version of this report.

4. Key findings from the 2023 evaluation

4.1 For the 2023 evaluation the Contractor evaluated the outcomes of five previous merger inquiries that in four cases resulted in relatively complex carve-out remedies being implemented with the fifth case being a full divesture, where a carve-out remedy had been proposed by the merger parties.

4.2 As noted in paragraph 3.9(a) and in line with CMA guidance, merger remedies most commonly involve straightforward structural remedies in the form of prohibition or divestiture of a standalone business or business unit. Occasionally, the circumstances of particular cases have led to other approaches being taken. This year we have focused on carve-out remedies, as a particular form of partial divestiture.

4.3 Partial divestitures are a common form of merger remedial action. Since 1 April 2014, at Phase 2 there have been 21 partial divestiture remedies out of 38 total merger remedies. As noted in paragraph 3.10, there is no clear delineation as to what constitutes a carve-out remedy as many partial divestitures will require separating a business unit from a larger corporate group. For example, in the Veolia / Suez merger inquiry (2022)[12] the divested businesses had links to the wider corporate groups that needed severing, but the divestiture packages were themselves largely self-contained businesses.

4.4 As set out in paragraph 3.11, carve-out remedies are generally not self-contained, viable standalone businesses. The four carve-out remedies selected for the 2023 evaluations are the divestitures since 2018 that, in our view, least resembled standalone business units.[13] Such merger remedies are rare in terms of the CMA's overall experience since 2014, though these four instances occurred within a relatively short period of time.

4.5 The new cases selected for evaluation were:

(a) *Electro Rent / Microlease* (Phase 2 Final Report published 17 May 2018);

[12] The completed acquisition by Veolia Environnement S.A. of a minority shareholding in Suez S.A. and the anticipated public takeover bid by Veolia Environnement S.A. for the remaining share capital of Suez S.A.
[13] There are other remedies within our sample that do not involve the divestiture of standalone businesses. These remedies are typically behavioural in nature and / or involve some form of licencing such as in *Műller / Dairy Crest* and *Reckitt Benckiser / K-Y*.

(b) *Rentokil / Cannon*. This is a merger that had completed prior to the CMA's review. (Phase 2 Final Report published 25 January 2019);

(c) *Rentokil / MPCL* (Phase 1 UiLs accepted July 2019);

(d) *Stryker / Wright* (Phase 1 UiLs accepted November 2020); and

(e) *Ecolab / Holchem* (Phase 2 Final Report published October 2019).

4.6 The *Ecolab / Holchem* merger remedy was not a carve-out remedy, though the merger parties proposed a carve-out remedy as being an effective remedy to the SLCs that had been found. The other four merger remedies are carve-out remedies. The details of the industry, the SLC and the merger remedy in each case is set out in the Contractor Report.

What happened post implementation?

4.7 In this section we provide an overview of what happened to the divestiture business post implementation in relation to the five cases under the 2023 evaluation. The purpose of this summary is to highlight whether the acquirer of the divestiture package was successfully competing in the relevant market at the time of this review. This summary is taken from the findings of the Contactor Report where a fuller overview can be found.[14]

Electro Rent / Microlease

4.8 On 27 July 2018, the CMA accepted undertakings from Electro Rent to divest Electro Rent UK to a suitable purchaser. The acquisition took the form of an asset sale, unwinding the significant economies of scale that Electro Rent had benefited from pre-Merger.[15]

4.9 MCS, a UK-focused testing and measuring equipment (TME) business, was identified by Electro Rent as its preferred purchaser and approved by the CMA prior to acquiring the divestiture package. MCS was supplied with a partial (rather than complete) list of Electro Rent's inventory to facilitate

[14] See Contractor Report, paragraphs A.1 – E.25.

[15] This risk was identified by the CMA in its final report, and while the CMA concluded that it would be mitigated by selecting a suitable purchaser, there was no specific requirement in the purchaser suitability criteria for prospective purchasers to have assets capable of restoring the lost economies of scale. The effect of the divestment package on economies of scale are described at paragraphs 9.88 to 9.96 in the Final Report, while purchaser suitability criteria are set out in paragraphs 9.186 to 9.188. See Contractor Report, A.25.

the process of selecting assets to be included in the final divestiture package.

4.10 After acquiring the divestiture package, MCS's customer base, revenues and profits increased. Customers that transferred with the divestiture package were largely retained, and a review of its publicly available financial accounts indicates that there was organic growth in its customer base after the acquisition. The new TME rental assets allowed MCS to supply customers involved in the construction of the UK's 5G telecommunications network.

4.11 MCS's financial success following its acquisition of the divestiture package may have increased its attractiveness as an acquisition target. In late 2022 MCS was purchased by TestEquity, a US business active in the sale, servicing, and rent of TME and now expanding into Europe. TestEquity continues to operate in the UK TME market.

Rentokil / Cannon

4.12 On 16 April 2019, the CMA accepted undertakings from Rentokil to divest all of Cannon's contracts in markets in which the SLC was identified (ie the supply of washroom waste disposal services to multi-regional and national customers where customers are: (i) located in eight or more regions of the UK and purchase directly from a washroom services supplier; or (ii) purchasing through public and private framework arrangements), alongside the staff and assets required to service these contracts, to a suitable purchaser.

4.13 The divestment package was not profitable on a standalone basis. Contracts with multi-regional and national customers tend to have much smaller profit margins than those with local and regional customers. Further, separating the servicing of multi-regional and national customers from local and regional customers undermined the route density that appears to be an important factor in the profitability of washroom services.[16]

4.14 Citron Hygiene UK was selected by Rentokil as its purchaser of the divestiture package and approved by the CMA. Citron Hygiene purchased operations carved out from Cannon's wider UK business of the relevant contracts, staff, and assets. Rentokil increased the number of non-SLC contracts in the divestiture package to ensure the deal completed. This

[16] Contractor Report, B.8.

ensured that the fallback remedy of [✄] did not have to be implemented. As these additional contracts were not included in the remedies package, Rentokil decided which additional contracts were offered to Citron Hygiene.

4.15 Following its acquisition of the divestiture package, Citron has acquired multiple other washroom services businesses in the UK, and has continued to serve a portfolio of national, regional and local customers across the UK. The divestiture package was loss making on a standalone basis, due to losses in economies of scale and density, as well as the lower profit margins in multi-regional and national customer contracts relative to regional and local customer contracts.

4.16 Citron currently still operates in the UK washroom services market and has restructured its business to ensure that its depots are of an appropriate size for its operational service delivery model, and it has also sold non-core operations. It has not yet reached a profitable position with its UK washroom services and it has made substantial losses, but continues to serve UK customers and grow its UK business.

Rentokil / MPCL

4.17 On 22 August 2019, the CMA accepted undertakings in lieu from Rentokil involving at a minimum, all of MPCL's pest control contracts with national customers, as well as the assets (including staff) required for a purchaser to become an effective national competitor. By separating out national customers from regional and local customers, the divestiture package lost the local route density[17] that MPCL had built up over a considerable period.[18]

4.18 ServiceMaster, a US-headquartered company that provides a range of services including pest control services, was chosen by Rentokil as its preferred purchaser of the divestiture package and approved by the CMA.

4.19 Following the acquisition, ServiceMaster operated its UK pest control business under the Terminix name and retained the majority of its customers. However, ServiceMaster endured substantial losses in doing so, which were anticipated to a degree due to lower margins in national customer contracts, as well as losses in economies of scale and density.[19] These losses were, however, greater than initially expected.

[17] This allowed MPCL to maximise the number of customer visits its technicians could carry out each day.
[18] Contractor Report, C9.
[19] The divestiture package was loss making on a standalone basis.

4.20 Terminix has acquired multiple smaller pest control UK businesses to help build route density, which has reduced losses, but it has yet to become profitable. Terminix's UK business has since been acquired by Norvestor, a Norwegian private equity firm, and has rebranded as Vergo Pest Management.

Stryker / Wright

4.21 On 4 November 2020, the CMA accepted UiLs from Stryker to divest its ankle replacement product (known as Scandinavian Total Ankle Replacement – 'STAR') and its related assets to a suitable purchaser. Colfax Corporation, who already supplied shoulder, knee, and hip orthopaedic products, was identified by Stryker as its preferred purchaser of the divestiture package and approved by the CMA.

4.22 Colfax Corporation has since been renamed Enovis and it has continued to sell STAR globally (including the UK). STAR's market share, both globally and in the UK, has declined since the acquisition however, at least in part due to a Food and Drug Administration (FDA) security alert in March 2021 in relation to the risk of STAR's plastic component breaking. Enovis has engaged with the FDA and a new plastic component will soon be available.

Ecolab / Holchem

4.23 On 23 December 2019, the CMA accepted undertakings from Ecolab to divest Holchem Laboratories Limited to a suitable purchaser. Holchem Laboratories is a leading UK based specialist in hygiene solutions. In May 2020, the CMA approved the sale to the Kersia Group, a multinational company focused on food safety, who Ecolab chose as its preferred purchaser.

4.24 Since being acquired by Kersia, Holchem has continued to supply cleaning chemicals and ancillary services in the UK as it had prior to being acquired by Ecolab. Rather than being a carve-out remedy as in the other four case studies, this was a full divestiture of a standalone business and as a consequence it has not required any significant additional support or management from its new owner.

Findings from the 2023 evaluation

4.25 In this section we outline the key findings from the 2023 evaluation as described in the Contractor Report.[20] Overall, the research shows that carve-out remedies, as defined in paragraph 3.11 above, carry additional risks.

4.26 The key findings from the Contractor Report were:

(a) Carve-out remedies that unwind or undermine economies of scale, density or scope can be expected to significantly increase the risk to these remedies' effectiveness. The pool of potential purchasers with complementary assets that can promptly restore lost economies and compete effectively with the merged business will be much smaller than for other divestment packages, and in some cases, there may not be any such purchaser available.

(b) Carve-out remedies can provide merger parties with opportunities to influence the content of a divestment package and, through this, limit future competition. Divestment packages in carve-outs are less well-defined than is the case with a standalone business or business unit and, as a result, are subject to greater negotiation over their content. The case studies show that the CMA has used several approaches to deciding on the composition of these packages. Those approaches that afford the Merger parties' more influence appear to result in higher composition risks.[21]

(c) Carve-out remedies that transfer customers to a new supplier will depend on customer consent and this can pose a substantial risk to these remedies' effectiveness. The ease of securing customer consent can vary markedly according to the importance placed on the supplier's service by its customers. Alternatively remedy designs, such as reverse carve-outs, may assist where customer consent challenges are administrative or process-related in nature, but are unlikely to be effective where customer concerns about a transfer are more fundamental.

(d) Carve-out remedies pose additional challenges for purchasers' ability to carry out effective due diligence as the divestment package is not based

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[20] The details of the research and write ups of each case study can be found in the Contractor Report, which has been published on the case page.

[21] According to the Contractor Report, the CMA approaches to specifying the content of a divestment package in a carve-out remedy are: (i) specifying a framework and allowing the merger parties to negotiate the details; specifying a minimum package and leaving negotiation of any additional elements to the merger parties; and (iii) mandating an offer to prospective purchasers.

on a pre-existing business unit. The financial profile of the package will generally be less transparent and prospective purchasers are likely to have less insight into how the package operates. Limits to the effectiveness of purchasers' due diligence in carve-out remedies means that the CMA cannot rely on this as an effective means of mitigating composition risks for these remedies.

(e) Merger parties may be able to weaken future competition through their influence over the choice of purchaser for a divestment package. This risk is greater in carve-out remedies, where fewer prospective purchasers have the ability to become effective competitors. The CMA's purchaser approval process mitigates this risk by screening out prospective purchasers that are inappropriate as a result of not meeting minimum requirements. However, it may be more difficult in carve-out remedies for the CMA to set minimum requirements that are sufficiently specific and comprehensive. As a result, merger parties may have scope to promote weaker, rather than stronger, prospective purchasers.

(f) Fallback remedies may not significantly mitigate the risks associated with carve-out remedies given the low probability of their use and their limited assistance to prospective purchasers in negotiating divestment packages. The option of including a fallback remedy may, as a result, be providing the CMA with an unwarranted degree of comfort when adopting a carve-out remedy as the initial divestment package.

How the findings of the 2023 evaluation add to the CMA's understanding of merger remedies

4.27 The following section sets out the CMA's assessment of how the findings of the 2023 evaluation contribute to the CMA's overall understanding of merger remedies.

4.28 The findings as set out in the previous section arise from observations in each of the case studies on the merger remedies' effectiveness and risk profiles. Some of these findings support the existing understanding of the risks associated with partial divestitures (as set out in the CMA Merger Remedies Guidance), while others represent new insights and arise from these remedies specifically being carve-out remedies.

4.29 In the remainder of this section, we have sought to distinguish between findings that support existing learning points, and findings that we can draw new learning points from.

Findings that support existing learning points

4.30 Of the six findings from the Contractor Report, two have also been highlighted in previous evaluations. These are in relation to:

(a) Parties' influence over remedy scope and choice of purchaser;

(b) Fallback remedies.

Influence over remedy scope and choice of purchaser

4.31 The evaluation programme has previously highlighted the need to be clear in the final report about all those elements that should be included in the divestiture package. This is particularly the case where the merger remedy does not relate to the divestiture of a whole business.

4.32 Most of the carve-out remedies selected for evaluation this year did not robustly outline all the elements of the divestiture package. While some aspects of the remedy package were defined, there was significant scope for the merger parties to influence the composition of the final package.

4.33 This year's evaluation found that in carve-out remedies, where there are likely to be fewer prospective purchasers with the resource, expertise or assets needed to turn the divestiture package into an effective competitor compared to a full divestiture, the merger parties' influence over the choice of purchaser – through the sale process – may present additional risks. Further, where there is negotiation over the divestiture package's content, there may be opportunities to favour prospective purchasers that are willing to concede on optional elements of the package that might otherwise strengthen their ability to compete.

4.34 The research this year bolsters the CMA's previous finding that there is a need to be clear in the final report (or phase 1 UiLs acceptance decision) about all those elements that should be included in the divestiture package. Failing to do so amounts to a clear risk to the merger remedies' effectiveness and may increase the merger parties' ability to influence the choice of purchaser.

Fallback remedies

4.35 Any initial merger remedy accepted in principle in Phase 1 or determined in Phase 2 is expected to be effective, albeit in some cases there may be a residual risk regarding the practical implementation of that remedy (eg whether a suitable purchaser would, in fact be found, for a particular package). The evaluation programme has previously concluded that where

such a residual risk exists, it may be appropriate for a fallback remedy to be proposed to help manage that risk. This fallback remedy will generally be more onerous than the initial merger remedy, otherwise it may create incentives for the merger parties to delay or undermine the implementation of the initial remedy.

4.36 This year's evaluation found that in the case of carve-out merger remedies, a fallback remedy may encourage the merged business to make concessions on the content of a divestiture package to ensure that a suitable purchaser is found (where the content of the package is subject to negotiation with prospective purchasers). In these situations, a fallback remedy may have the effect of strengthening a prospective purchaser's bargaining position notwithstanding that the existence of a fallback remedy will be confidential.

4.37 However, the Contractor Report also concluded that the probability of using a fallback remedy is low because the merger parties have the ability to influence the divestiture package and there is informational asymmetry between the purchaser (who is not made aware that there is a fallback remedy) and merger parties. These factors increase the merger parties' ability to amend the scope of the divestiture package as set out in the original remedy and reach an agreement with the acquirer. As such, in some cases the presence of a fallback remedy may provide limited assistance for prospective purchasers in negotiating improved divestiture packages (as seen in the case studies), and fallback remedies may not, in practice, provide the CMA with sufficient risk mitigation.

New learning points

4.38 Of the six key findings, four are findings that were not included in the lessons from cases assessed in previous evaluations. These are set out below.

(a) Unwinding economies of scale, density or scope through a carve-out remedy is likely to significantly increase the risk to a remedy's effectiveness.

(b) Carve-out remedies can offer merger parties opportunities to limit future competition by influencing the divestiture package's content.

(c) The viability of carve-out remedies that transfer customers to new suppliers (eg customer carve-outs) will depend on customer consent.

(d) Carve-out remedies pose greater challenges for the effectiveness of purchaser due diligence on divestiture packages.

Loss of economies of scale in carve-out remedies

4.39 The loss of economies of scale is a significant risk to the competitive capability of a divestiture business. Three of this year's cases involved a loss of economies of scale, density or scope in the divestiture package. The impact of the specification of these merger remedies was that they increased the cost for the divestiture business to offer its services. In contrast, the merged entities benefited from the addition of the non-divested assets of the acquired business to their existing operations and potentially from increasing any economies of scale.

4.40 The review shows that purchasers of these carve-out remedies have experienced significant challenges in turning these loss-making remedies into profitable businesses. This is notwithstanding the fact that purchasers have acquired several additional businesses in an effort to restore the economies of density that were lost as a result of the carve-out of the divestiture packages.

4.41 Carve-out remedies pose a significant risk to a merger remedy's effectiveness arising from the loss of economies of scale. This might be mitigated by selecting a purchaser with sufficient assets to restore lost economies; however, few such purchasers are likely to exist compared to the number of purchasers that might be available for a standalone business. Further, a merger remedy may not be deemed effective if it is based on the expectation that the purchaser will need to gain scale in the future to render the business profitable and become an effective competitor.

Ability for merger parties to limit future competition

4.42 Under a divestiture of a standalone business or business unit, merger parties have limited opportunity to influence the contents of the divestiture package. With carve-out remedies, the merger party may have a greater opportunity to influence the content of a divestiture package given the less well-defined boundaries of such a package compared with a standalone business or business unit.

4.43 Whilst, at least in theory, prospective purchasers also have an ability to negotiate and alter the business boundaries, this year's case studies have shown that the informational asymmetries mean they are at a disadvantage. The merger parties have an incentive to use this advantage

to influence the size or scope of a divestiture package so as to limit the future competitive constraint offered by a purchaser.

4.44 These case studies illustrate three different approaches used by the CMA to specifying the content of a divestiture package in a carve-out remedy, namely:

(a) Specifying a framework and allowing the parties to negotiate the details: as in *Electro Rent / Microlease* in relation to the value and selection of additional TME assets to be included in the divestiture package.

(b) Specifying a minimum package and leaving negotiation of any additional elements to the parties: as in *Rentokil / Cannon* and *Rentokil / MPCL* in relation to the inclusion of additional customer contracts in the divestiture package.

(c) Mandating an offer to the prospective purchasers: as in *Electro Rent / Microlease* in relation to one of the Microlease brand names and access to Electro Rent's global inventory of TME rental assets.[22]

4.45 All of these approaches have advantages and disadvantages but all retain a degree of composition risk compared to merger remedies that are more clearly defined.

4.46 With divestiture packages in carve-out remedies being less clearly defined compared to a standalone business, the case studies show they are subject to greater negotiation over their content. The merger parties are therefore able to influence the contents of the divestiture package and this enables them to limit the competitive strength of the divestiture package. Accordingly, carve-out remedies entail a material composition risk.

Customer consent risk

4.47 Carve-out remedies often do not involve the transfer of legal entities. This creates challenges when transferring customers contracts. Where

[22] A requirement for the divestiture package in *Electro Rent / Microlease* was that the purchasers should be offered the Microlease or Livingston brand and access to Electro Rent's international inventory. Following negotiations between Electro Rent and the remedy taker these elements were not included in the divestment package (see Contractor report, paragraph A.34). We believe that, while there could have been legitimate reasons for MCS not to be interested in acquiring these elements, it is also possible that Electro Rent influenced the negotiations with the remedy taker so that the latter did not make any additional requests. The CMA does not normally have insight into the dynamics of such negotiations and is not best placed to determine whether the merger parties are able to influence the purchaser with regard to the number of assets included in the divestiture package. On this basis negotiations over a carve-out remedy carry an element of composition risk.

customer contracts are intended to be included in the divestiture package, but not the legal entity that holds these contracts (as a result of it being retained by the merged business), customers' consent to transferring their contracts to a new service provider will usually be required. The viability of such a remedy and, therefore its ultimate success, will depend heavily on customers' willingness to provide their consent, which in certain instances may be difficult to evaluate prior to implementation.

Limitations of due diligence in managing composition risk

4.48 As part of the divestiture process, purchasers conduct due diligence on the divestiture package, which in part includes an assessment as to whether the package is sufficiently robust to allow it to compete in the market. This purchaser due diligence has the potential to mitigate composition risks to some degree, which could provide the CMA with some confidence in the remedy.

4.49 This year's evaluation has shed a different light on this issue, showing that the purchaser due diligence process can have significant limitations, and carve-out remedies are likely to be at greater risk of shortcomings in the due diligence process. Some of the issues that contribute to these heightened risks include: (i) these packages frequently lack historic financial accounts; (ii) business records for assets in the package may not be readily separable from wider business records; and (iii) the content of the package may still be under negotiation. Three of the four carve-out remedies reviewed this year demonstrate the challenges purchasers face when carrying out the due diligence process. These challenges may conceal issues with the remedy package from the purchaser and the CMA, leading to the purchaser being a weaker competitor than expected.

4.50 The case studies show that the CMA should not be placing material weight on a prospective purchaser's ability to identify weaknesses in a remedy package, especially where the divestiture package is not a pre-existing business or business unit.

Overall conclusions

4.51 This year's evaluation highlights a number of risks that are either specific to or heightened by the choice of a carve-out remedy. This suggests that the CMA should ensure that its assessment of the effectiveness of such carve-out remedies is sufficiently robust so that the merger remedies it puts in place have a high likelihood of being effective in addressing the identified competition concerns. Relevant to this assessment will be the likely

additional safeguards and resources required to reduce the magnitude of such risks.

4.52 Where the CMA concludes that a carve-out remedy is nonetheless an effective merger remedy, this year's evaluation highlighted a number of potential safeguards that could be built into the specification of the remedy and the process for implementation. These are:

(a) higher thresholds for judging prospective purchasers as suitable (eg purchasers that can immediately, or almost immediately, earn profits from a divestiture package);

(b) less discretion for negotiations between merger parties and prospective purchasers over the content of divestiture packages;

(c) increased safety margins when specifying asset or contract values for inclusion in divestiture packages; and

(d) increased use of monitoring and divestiture trustees in overseeing and managing divestiture processes.

Findings from follow up cases

4.53 The 2019 evaluation set out that it was too early to tell whether the merger remedies from two case studies were going to be effective. To identify any further insights from these cases, the CMA has conducted follow up research, which we set out below.

4.54 These two cases were (the full description and evaluation of these follow up case study can be found in Appendix 4[23]):

(a) *Müller / Dairy Crest* (2015), where the CMA accepted UiLs at Phase 1. This merger remedy centred around a medium-term milk supply agreement that allowed a competitor, Medina, to supply milk to national multiples.

(b) *Reckitt Benckiser / K-Y* (2015), where the merger remedy involved the licensing of the IP rights of the K-Y brand in the UK to Thornton & Ross Ltd for a fixed period.

[23] See Appendices 1 – 4 (which can be found on the case page), and pages 188 - 200 for a full description and evaluation of the *Müller / Dairy Crest* and *Reckitt Benckiser / K-Y* case studies

4.55 In November 2014, Müller, the UK trading company for the Müller UK & Ireland Group LLP, announced the proposed acquisition of the liquid milk, packaged cream, flavoured milk and bulk commodity ingredient business of Dairy Crest.[24] On 12 June 2015, the CMA found that it was or may have been the case that the merger may be expected to result in an SLC in the supply of fresh milk to national multiples in the catchment area of the Severnside dairy.

4.56 The CMA accepted UiLs from the merger parties and, as a result, this case was not referred to a more in-depth Phase 2 investigation. Under the UiLs, Müller was required to sell a toll processing arrangement option (TPAO) to a specified third party (ie a Nominated Purchaser, in this case, Medina). This quasi-structural agreement required Müller to process up to 100 ml pa of fresh milk from the Severnside dairy to enable the Nominated Purchaser to supply this milk to national multiples. The TPAO was essentially a contractual obligation undertaken by Müller to supply its products to a competitor so that the competitor could compete with Müller and others to win new contracts with large retailers. The TPAO meant that Müller would make fresh milk supplies available if required by the Nominated Purchaser for it to compete to supply national multiples.

4.57 Medina was approved by the CMA as the acquirer of the TPAO. In the 2019 evaluation the CMA concluded that it was too soon to tell whether the remedy would result in an effective longer-term competitor in the relevant markets, or whether the new supplier will turn out to be a potentially profitable but structurally weak competitor imposing only a limited constraint on the merged entity.

4.58 Subsequent to the 2019 evaluation, on 2 February 2022 the CMA launched a merger inquiry into the anticipated Freshways / Medina merger, which was approved in March 2022, on the basis that Medina was a failing firm. The CMA concluded that it was inevitable that Medina would exit the markets in which it was active in and there was no other alternative, less anti-competitive purchaser for Medina or its assets apart from Freshways.[25] Notwithstanding the CMA's clearance decision, the merger did not materialise and, in November 2022, Medina went into voluntary liquidation.

[24] For its decision, the CMA defined 'national multiples' as comprising: Tesco, Asda, Sainsbury's, Morrisons, Co-op, Aldi, Lidl, Iceland, Waitrose and M&S. Whereas 'middle- ground' customers would include stores such as Spar and CostCutters.
[25] Nijjar Group Holdings (Acton) Limited / Medina Holdings Limited merger inquiry - GOV.UK (www.gov.uk)

4.59 In undertaking our case study evaluation, we interviewed the monitoring trustee monitoring the Müller firewall and the monitoring trustee appointed in the Freshways / Medina merger inquiry. We also reviewed the case file from the Freshways / Medina merger to understand the circumstances that lead to Medina's demise. We were unable to speak to Medina or Müller representatives. Given Medina exited the market, it is clear that the Müller / Dairy Crest remedy has not ultimately restored competition in the Severnside Dairy, other than in the very short-term. This is because the remedy taker no longer provides any competitive constraint on Müller. As we were unable to arrange a discussion with the parties[26], we cannot conclude if and up to what extent the remedy contributed to Medina's decline.

4.60 We have evaluated the risk profile of the merger remedy with the benefit of hindsight. The remedy relied on a purchaser's ability to scale up and supply national multiple milk contracts. Milk is as an undifferentiated product and the industry is characterised by low margins, particularly in the supply of national multiple contracts. The remedy design meant that its success was reliant on the purchaser's ability to minimise its costs in an industry it had limited experience in. The divestiture package in *Müller / Dairy Crest* contained a significant element of risk that ultimately crystalised in the exit of the remedy taker and the failure of the remedy.

4.61 We spoke to the monitoring trustee responsible for monitoring the information ring-fencing within Müller, which was designed to prevent Müller from learning the commercial dealings of the acquirer. The monitoring trustee told us that Müller took the ring-fencing measures seriously and implemented all of the monitoring trustee's recommendations.

4.62 The broad learning points from this evaluation is that:

(a) "Quasi structural" merger remedies similar to the one in *Müller / Dairy Crest* are high risk. This risk was compounded by the nature of the industry, with the milk industry being characterised by volatile and low margins and high barriers to expansion.

[26] Medina was already insolvent by the time the CMA attempted to contact it, while Mülller declined to speak with the CMA.

(b) In a scenario where the success of a merger remedy is reliant on the ability of the remedy taker to build scale, the CMA must exercise particular caution and vigilance when assessing purchaser suitability.

Reckitt Benckiser / K-Y

4.63 On 10 March 2014, Reckitt Benckiser (RB) agreed to purchase the rights, liabilities and assets relating to the K-Y brand globally from Johnson & Johnson (J&J). The CMA conducted an in-depth Phase 2 investigation of the transaction and concluded that RB and J&J overlapped in the supply of personal lubricants[27], and that the transaction may be expected to result in an SLC in that market.[28]

4.64 On 4 November 2015, the CMA accepted undertakings from both RB and J&J. In order to obtain clearance for the deal, RB agreed to licence the rights to K-Y (including brand, packaging and formula) in the UK to a third party for a period of eight years. The CMA approved Thornton & Ross Ltd as the licensee.[29]

4.65 The purpose of the licensing agreement was to give a competitor (in this case, Thornton & Ross Ltd) an existing platform from which it could develop a new brand to rival the Durex range. Rights to the K-Y brand will revert to RB at the end of the licence period.

4.66 Since the last update Thornton & Ross Ltd have rebranded the K-Y brand from K-Y to Knect. This involved a four-stage rebranding process that reached its final stage [✂], where the K-Y name had been completely removed the product's packaging. [✂]. Thornton & Ross Ltd has maintained its market position throughout the rebranding process and has invested in the new brand, including by carrying out a national marketing campaign in February 2023. The rebranding has been positively received by the UKs leading high street retailer of personal lubricants.

[27] The CMA found an SLC in the supply of personal lubricants to the grocery retailers and national pharmacy chain market, in which the merger parties enjoyed a combined market share of 60% to 80%. The CMA found that shelf space for personal lubricants in grocery retailers and national pharmacy chains was limited and that these stores tended to stock only Durex and K-Y brands (and possibly their own-label brand). In contrast, online and specialist (adult) shops tended to stock a wider range of brands.

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

[29] Thornton & Ross Ltd is a subsidiary of STADA Arzneimittel AG of Germany, manufactures and markets a range of consumer and prescription medical products, including Covonia cough medicines, Hedrin head lice treatment, the Care range of medicines, the Cetraben and Zero dermatological brands, Flexitol footcare products and the Fultium range of Vitamin D3 products.

4.67 We note that Thornton & Ross Ltd could have profitability exited the market before the end of the licensing agreement as set out by the remedy, which is a significant risk to the effectiveness of the remedy. However, Thornton & Ross Ltd has chosen to invest in the product, retaining competitive rivalry in the market.[30] Thornton & Ross Ltd appears to have been a strong purchaser with good relationships with relevant distribution channels. The merger remedy in this case appears to have been successful to date.[31]

4.68 The broad learning points from this evaluation are that:

(a) Merger remedies similar to the one in *Reckitt Benckiser / K-Y* are high risk, because the remedy taker needs to have the incentive to engage in the rebranding process and the capability to carry this out successfully. This risk is compounded by the strength of the brand that the remedy taker is branding away from.

(b) Noting the positive performance of this merger remedy to date, the remedy carried significant risk ex-ante because the potential for the product to exit the market was material, and this would have harmed consumers of personal lubricant products in the UK as there would have been a significantly weaker competitive constraint against RB.

[30] The one exception to this is that Thornton & Ross Ltd ceased to supply the NHS as it would have been a significant investment to meet the NHS sterile production facility requirements and the commercial return was not sufficient to justify this. Thornton & Ross Ltd was certain that the NHS had multiple alternative suppliers prior to taking the decision to cease supplying the NHS.

[31] [✂]

5. Consolidated learning points

5.1 For each of the first 18 case studies conducted to date, a detailed account of the main points of the relevant inquiry, the key factors in the choice of merger remedy, what happened after the final report and an assessment of the effectiveness of the remedies is presented in Appendix 4. A detailed account of the five case studies that have been evaluated this year can be found in the Contractor Report.[32] This section takes the results of those studies and summarises and groups thematically the key learning points as follows:

(a) Interim measures;

(b) Choice and design of final merger remedies;[33]

(i) Divestitures;

(ii) Behavioural remedies;

(iii) IP rights and licensing[34]; and

(iv) Recommendations.

Interim measures

5.2 The CMA has powers to put in place interim measures to prevent 'pre-emptive' action[35] during the course of an inquiry.[36] Such interim measures are aimed at preserving the scope for remedial action in the event of an adverse finding and typically involve maintaining the separate integrity of the two merging businesses.

5.3 Lessons have been generated specifically in relation to:

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

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

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

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[32] Contractor Report, paragraphs A.1 to E.25.
[33] We have considered learning points according to the remedy categories set out in the 'remedies universe' in CMA87, Figure 1.
[34] These can be a formal of structural and/or behavioural remedy.
[35] Pre-emptive action is action which might prejudice the outcome of the reference or impede the CMA from later taking remedial action if it reaches an SLC decision.
[36] At Phase 1: section 72 of the Act. At Phase 2: sections 80 and 81 of the Act

Hold separate arrangements and unwinding post-merger integration

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

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

5.6 The *Alanod* case study showed that, even where there is no specific intention to undermine any divestiture package, pursuing the normal course of integration following completion of a merger might remove any scope for an effective divestiture remedy by making it extremely difficult to create a separable, viable divestiture package from the merged entity.

5.7 Since the successive reforms of the Enterprise Act and ERRA, the CMA has learnt and is still learning how best to manage interim measures on completed mergers.[37] In contrast to *Alanod*, the *Emap* case study showed the benefit of putting in place interim 'hold separate' measures, which preserved the scope for what proved to be an effective divestiture remedy.

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

5.9 The *Noble* case showed that to ensure that commercially sensitive information about the acquired firm is not gained by a competitor it is essential to ring-fence financial information. Any flow of information should

[37] See CMA Guidance on Interim measures in merger investigations (2021).

be no more than is absolutely necessary and limited to as few individuals as possible. Although this approach can be awkward for the acquirer, this is a risk that the acquirer takes on when agreeing to the transaction.

5.10 The *Müller / Dairy Crest* case highlighted the importance of information firewalls which must be designed carefully to ensure they do not have an unduly detrimental impact on the effective operation of the divestiture business.

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

Monitoring trustees

5.12 Monitoring trustees are now routinely required by the CMA in completed mergers, as shown in the *Stericycle, Arqiva, Nufarm, Noble, Global, Müller / Dairy Crest*, *ICAP, Electro Rent / Microlease, Rentokil / Cannon, Rentokil / MPCL and Ecolab / Holchem* cases. The monitoring trustees appointed are usually a professional services firm with a breadth of financial skills and business experience. The *Draeger* case showed that the team acting as monitoring trustee should be suitably experienced and drawn from a relevant area of practice in the firm. The skills required will depend on the circumstances of the case but are likely to cover a deep understanding of corporate finance and, in complex hold separate cases, corporate restructuring skills will be beneficial.[38]

5.13 The *Arqiva* case illustrated that the skills required may be case-specific—for example, needing a ‘technical monitor’. The *Noble* case showed that the ‘softer’ role of the monitoring trustee can be valuable where the merging firms are small businesses. A suitably skilled sole practitioner can, as in this case, bring significant focus and involvement to the monitoring role. However, appointing a sole practitioner carries material risks of not having sufficient back-up, or versatility to deal with the full range of issues that may arise.

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

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

5.15 The *Stagecoach* case showed the importance of the relationship between any hold separate manager and the monitoring trustee. Having a good working relationship and clear communication between these two parties can help address any hold separate risks and ensure that divestiture remedies remain viable.

5.16 The *Müller / Dairy Crest* case demonstrated the need for rigorous, ongoing compliance monitoring which can be undertaken by a monitoring trustee. Compliance monitoring would ideally be designed such that the time spent in carrying out the role (and implicitly the costs for the relevant parties) can decline over time.

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

5.18 The *Electro Rent / Microlease* case showed the need for clarity about the respective roles of the CMA and the monitoring trustee.[39] In *Electro Rent / Microlease* the interim measures were breached twice despite the presence of a monitoring trustee. Electro Rent decided to serve a break notice to terminate a commercial lease following discussion with the monitoring trustee but without the CMA's prior consent. The CMA considered this constituted pre-emptive action and imposed a penalty on Electro Rent for breach of the interim order.[40]

5.19 Monitoring trustees were appointed in each of the merger cases included in the 2023 evaluation, further illustrating the variety of issues that may arise.[41] These cases could have benefited from increasing the level of involvement of the monitoring trustee in the divestiture process, including monitoring negotiations that determined the scope of the divestiture

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[39] The lessons learnt from the *Electro Rent / Microlease* case have been included in the CMA Guidance on Interim measures in merger investigations (2021), paragraph 1.10.

[40] 1285/10/12/18 Electro Rent Corporation v the Competition and Markets Authority - Judgment [2019] CAT 4 | 11 Feb 2019 (catribunal.org.uk), paragraphs 45- 63.

[41] *Electro Rent / Microlease, Rentokil / Cannon, Rentokil / MPCL, Ecolab / Holchem,* and *Stryker / Wright*

package and providing support to the CMA in its purchaser approval process. We think this lesson is relevant to carve-out remedies, and complex partial divestitures, more generally.

Hold Separate Managers

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

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

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

Choice and design of final merger remedies

Divestitures

5.23 17 of the case studies have involved full or partial divestitures.[42, 43] The case studies demonstrate the importance of a full assessment and active management of the risks the CMA sets out in its merger remedies guidelines – composition risks, purchaser risks and asset risks.

Composition risk

5.24 Composition risks are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.[44]

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

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

(b) Carve-out remedies are subject to specific and heightened risks:

(i) Some carve-out remedies can lead to a loss of economies of scale giving the purchaser loss-making asset(s) which can undermine its ability to compete effectively. The two *Rentokil* cases involved divesting loss-making remedy packages, neither of which has since become profitable.[45]

(ii) Carve-out remedies give the merger parties greater ability to influence the divestiture package such as in the two *Rentokil* cases. This influence provides an ability to reduce the competitive capability of the divestiture package.

(iii) Carve-out remedies increase the risk that customers refuse consent for their business to be transferred to the purchaser, increasing the risk the remedy will not be effective.

(iv) Purchaser due diligence of carve-out divestiture packages is challenging given the lack of historic information and information

[42] *Sibelco, Emap, Somerfield, Stericycle, Noble, Stagecoach, Unilever, Global, Rank, Müller / Dairy Crest, Reckitt Benckiser / K-Y, ICAP, Electro Rent / Microlease, Rentokil / Cannon, Rentokil / MPCL, Stryker / Wright, and Ecolab / Holchem.*

[43] The *Coloplast* case study also involved an attempted divestiture.

[44] See CMA87, paragraph 5.3

[45] The *Electro Rent* case relied on the purchaser achieving sufficient scale so that it could profitably invest in new TME rental assets (see Sections 4.1 and 4.2.1). The recent acquisition of the purchaser by a larger, international TME business means that the business is now likely to have this scale, but this was not a planned outcome for the remedy. (see Contractor Report, paragraph 4.4).

asymmetry between the purchaser and the merger parties. Purchasers' due diligence is therefore unlikely to be a sufficient mitigation for composition risks associated with carve-out remedies.

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

(d) It is important to ensure that the merger parties are appropriately incentivised to implement a remedy effectively and promptly. A fallback remedy, which is generally more onerous than the initial remedy may be part of this, alongside other measures, such as making provisions to appoint a divestiture trustee. However, as shown in the *Rentokil / Cannon* case, whilst fallback remedies may help incentivise remedy implementation, the likelihood of using a fallback remedy may be limited given the merger parties have the ability to alter the divestiture package to get a sale 'over the line', as well as the potential risks of switching to a fallback remedy after an extensive sales process. Further, the presence of a fallback remedy provides limited assistance for prospective purchasers in negotiating improved divestiture packages because they are not made aware that there is a fallback remedy in place.

Purchaser risks

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

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

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

assessment of the effects of potential regulatory changes on the performance of the business.

(b) Commitment to the market: it is important to take account of a firm's incentives to compete in the relevant market and the information available to it in gauging whether it is likely to be a willing and able purchaser. In doing so it is important for the CMA to understand the intentions of potential purchasers, to talk through with them their specific plans for the business they wish to acquire and how the acquisition fits into their overall strategy.

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

5.28 Our 2023 evaluation of carve-out remedies highlighted a number of increased purchaser risks. These are:

(a) Carve-out remedies have a greater reliance on purchasers' resources, expertise and assets. This may necessitate specifying additional criteria for purchaser suitability, should such a remedy be taken forward. It may also reduce the available pool of suitable purchasers, which is a relevant factor to consider in deciding whether to move forward with a carve-out remedy.

(b) Carve-out remedies may give the merger parties additional influence over the choice of the purchaser for a divestiture package by allowing them the ability to favour purchasers who are more willing to concede the inclusion of certain divestiture items.

(c) Carve-out remedies have a greater likelihood that post-divestiture relationships between merger parties and purchasers of divestiture packages will be required. This could be through the requirement for extended transitional service agreements, or as was the case in *Stryker / Wright* where Stryker continued to manufacture the divestiture product on an interim basis.

Asset risks

5.29 Asset risks are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example through the loss of customers or key members of staff.[46] An effective divestiture process will protect the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale.[47] Our case studies have highlighted a number of lessons in relation to the oversight of the divestiture process and the appointment and use of a divestiture trustee:

(a) Oversight of the divestiture process: careful oversight of the divestiture process is required to ensure that the divestitures are completed within the required timescales. The case studies include examples of cases where divestitures were completed well within the initial divestiture periods[48] and of cases where the divestitures significantly exceeded the initial divestiture periods and required the appointment of divestiture trustees.[49] The CMA needs to make sure that the parties are progressing in line with clearly defined timetables and that if these milestones are missed the parties are fully aware that the prospect of the appointment of divestiture trustee is heightened. Litigation, for example an appeal of the CMA's merger final report, can potentially delay the completion of a required divestiture. The risks to undue delay can be mitigated by running the divestiture process (short of completion) in parallel with any litigation process. This approach helps ensure that divestitures can be completed in a timely manner following conclusion of any litigation.

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

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[46] Incentives to retain staff typically include bonuses for remaining in place until final determination of the CC's inquiry.
[47] See CMA87, paragraph 5.33.
[48] Eg *Stericycle Emap, Unilever* and *Rank.*
[49] Eg *Noble* and *Somerfield.*

business plans in order for them to be attractive even at no minimum price.

(c) It is important that the process of appointing a divestiture trustee should be made as streamlined as possible (for example, having a template divestiture trustee mandate, or requiring the nomination of prospective divestiture trustees as soon as progress milestones are missed even if the appointment is not actioned immediately).[50] It is also important to establish the correct working relationship between the competition authorities, the divesting party and the trustee. It should be made clear from the outset to trustees that, although they are remunerated by the parties, they are working for the competition authorities. A strong working relationship between the monitoring trustee and the divestiture trustee is also important.

Behavioural remedies

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

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

Specification risks

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

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

[50] The European Commission’s template divestiture commitments require that parties submit a list of one or more proposed divestiture trustees no later than one month before the end of the first divestiture period (see clause 29). https://ec.europa.eu/competition/mergers/legislation/best_practice_commitments_trustee_en.pdf

(b) The likelihood of misspecification grows the longer a behavioural remedy is in place. If the remedy has not tackled the underlying cause of the SLC, this means the CMA may be faced with a choice of continuing to maintain an ineffective remedy, with risks for consumers, or seeking to improve outcomes, for example through conducting a review of the remedy at a later date; and

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

Circumvention risks

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

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

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

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

Distortion risks

5.34 Distortion risks are risks that behavioural remedies may create market distortions that reduce the effectiveness of these measures. For example, price controls, by holding down a firm's prices, might increase the controlled firm's market share, which in turn might force firms that are unable to compete with the controlled price out of the market and/or deter

new entry. This risk was highlighted in our review of the *FirstGroup* remedies, completed in April 2016.[51]

Monitoring and enforcement risks

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

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

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

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

IP rights and licensing

5.36 IP rights and licensing remedies can involve combined elements of both structural and behavioural remedies. For example, the *Unilever* case study required the divestiture of soap brands. For the Cidal and Wrights brands, this was achieved by outsourcing the manufacture of the brands. For the Simple brand this was achieved by a perpetual and royalty-free licence for the Simple brand bar soaps. The *Reckitt Benckiser / K-Y* case study required the divestiture of the K-Y brand and related IP rights for a period of eight years and the right to use the K-Y formula in perpetuity.

5.37 While such outsourcing and licensing is common in certain commercial sectors, these were unusual remedies in a merger control context. The general view from the *Unilever* case study is that the remedies have been effective. For the *Reckitt Benckiser / K-Y* case study, the evidence to date is positive, as the acquirer has committed to and invested in a re-brand of the K-Y formulation to "Knect" and has maintained its position in the market. There remains a risk with this type of remedy that the acquirer could walk away at the end of the licencing period at minimal cost without engaging in the rebranding process, due to potential difficulties entailed by

[51] FirstGroup Undertakings Review, CMA, 2016.

the rebranding process. There is also a risk that the potential return of the divested brand under the ownership of the merger parties, after the expiry of any ‘black-out’ period, might lead the acquirer to reconsider its strategic options.

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

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

(a) Deterring larger potential acquirers from engaging in the CMA’s divestiture process if they have concerns about engaging in a licencing agreement with a competitor; and/or

(b) The purchaser having an insufficient degree of independence following remedy implementation because of the ongoing need to cooperate with the licence owner.

Recommendations

5.40 Recommendations have been made in only two mergers since 2003 and both of these cases (*Draeger* and *Stericycle*) have been evaluated as to whether the recommendation has been effective.

5.41 In the very rare merger cases where the CMA recommends action to be taken by others, an element of ongoing oversight by the CMA is likely be needed in order that recommendations can be nurtured and followed through, in order to have a continuing positive effect. In doing so, the CMA would have to rely on advocacy, rather than statutory powers, to encourage the pursuit of any recommendations. The remedy evaluation shows the recommendations from Draeger and Stericycle have not been effective.[52]

[52] See Appendix 4, paragraphs 200-209 and 280-282.