

Decision to launch reviews of one Market Investigation order and three sets of Merger undertakings

21 November 2023

Introduction

1. In line with its statutory duty under the Enterprise Act 2002, the CMA keeps its portfolio of undertakings and orders arising from its markets and mergers work under review, including through considering those undertakings and orders that should be reviewed where there are reasons to suspect that one or more changes in circumstance have taken place.
2. In January and February 2023 the CMA published an Invitation to Comment (ITC), seeking stakeholder views on candidates for review in the CMA's portfolio, with specific reference to 10 orders and undertakings which it had identified for review. Following assessment of responses, the CMA is now launching reviews of one market investigation order and three sets of merger undertakings.

Legal framework

3. The CMA has a statutory duty under sections 92 and 162 of the Enterprise Act 2002 to keep under review undertakings and orders.¹ From time to time, the CMA must consider whether, by reason of any change in circumstance:
 - (a) undertakings are no longer appropriate and need to be varied, superseded or released; or
 - (b) an order is no longer appropriate and needs to be varied or revoked.
4. CMA Guidance document CMA11, *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market*

¹ Where the CMA is addressing remedies, adopted under the earlier Fair Trading Act 1973, for which it is now responsible, it is acting under the provision made in Schedule 24 of the Enterprise Act 2002, and associated subordinate provision.

[undertakings and orders](#) sets out the process which the CMA will typically follow.

Remedies prioritised for review

5. On the basis of the information available to it, the CMA has decided that the launch of reviews of the following remedies is an administrative priority at the current time. It has identified potential relevant changes of circumstance that may mean that the undertakings and order to be reviewed are no longer appropriate.

The Energy Market Investigation (ECOES/DES) Order 2016 (the Order)

Background

6. [The Order](#): was made on 14 December 2016 following the CMA report [Energy market investigation: Final report](#), published on 24 June 2016. It formed part of a package of remedies introduced following that investigation.
7. The CMA's concerns arising from its Market Investigation included a concern that a combination of features of the markets for domestic retail supply of gas and electricity in Great Britain gives rise to an Adverse Effect on Competition through an overarching feature of weak customer response. The CMA considered that this gives suppliers a position of unilateral market power which they are able to exploit through their pricing policies or otherwise.
8. The CMA found that features act in combination to deter customers from engaging in the domestic retail gas and electricity markets, to impede their ability to do so effectively and successfully, and to discourage them from considering and/or selecting a new supplier that offers a lower price for effectively the same product.
9. Particularly relevant to the Order, and in summary, the CMA found that:²
 - Customers have limited awareness of, and interest in, their ability to switch energy supplier due to the homogeneous nature of gas and electricity and the role of traditional meters and bills, which gives rise to a disparity between actual and estimated consumption and can be confusing and unhelpful to customers in understanding the relationship between the energy they consume and the amount they ultimately pay.

² See [Summary of AECs and Remedies](#).

- Customers face actual and perceived barriers to accessing and assessing information arising, in particular from the complex information provided in bills and the structure of tariffs; and a lack of confidence in, and access to, price comparison websites by certain categories of customers. In particular:
 - prepayment customers face higher actual and perceived barriers to accessing and assessing information about switching arising, in particular, from relatively low access to the internet and confidence in using price comparison websites; and
 - customers on restricted meters face higher actual and perceived barriers to accessing and assessing information arising, in particular, from a general lack of price transparency concerning the tariffs that are available to them due to restricted meter tariffs not being supported by price comparison websites or suppliers' online search tools.
10. The Order addressed these specific concerns by placing a requirement on energy providers to supply certain information to price comparison websites.

Potential change in circumstance

11. When established, the Order placed an obligation on the Master Registration Agreement Service Company and Gas Transporters to provide Third Party Intermediaries such as Price Comparison Websites with access to retail electricity and gas data.³
12. In 2019 Ofgem launched a [Retail Code Consolidation](#) project, and this led subsequently to the consolidation of provisions of the gas and electricity enquiry services within a new company – the Retail Energy Code Company, and the Retail Energy Code now contains the relevant obligations to supply retail electricity and gas data to Third Party Intermediaries such as Price Comparison Websites.⁴
13. As a result, the obligations in the Order have been superseded by the new requirements in the Retail Energy Code and there is therefore a realistic prospect that they may no longer be necessary. In addition, were the Order

³ Article 3 of the Order imposes an obligation on Master Registration Agreement Service Company to give PCWs access to the electricity enquiry service (ECOES) upon written request, and subject to the satisfaction of reasonable access conditions. Article 4 of the Order imposes an obligation on Xoserve to give PCWs access to the gas enquiry service (DES) upon written request.

⁴ Paragraph 4.3(a) of the Retail Energy Code.

still necessary, the obligations contained therein no longer apply to the correct energy entities.

Subsea 7 S.A. (ex Acergy S.A.) / Subsea 7 Inc

Background

14. [Undertakings in Lieu of reference](#) were given on 17 August 2011 by Subsea 7 S.A. and Acergy M.S. Ltd. following the Office of Fair Trading's (OFT's)⁵ decision: [Anticipated acquisition by Acergy SA of Subsea 7 Inc](#), published on 2 February 2011
15. The OFT's concerns were that there would be a realistic prospect of a substantial lessening of competition in the provision of small diameter rigid pipelay in the North Sea resulting from the merger.
16. The undertakings require divestment of a pipe layer vessel called Acergy Falcon, and continued separation on the part of Subsea 7 or any member of the Group of Interconnected Bodies Corporate to which Subsea 7 belongs.

Potential change in circumstance

17. The divested vessel, Acergy Falcon (IMO 7409401, built in 1976) was bought by GSP Falcon Ltd in 2011 and renamed GSP Falcon in 2011. The ship was renamed Falcon in 2017. It is currently listed as 'decommissioned'/'lost'/'out of service' and has been located at the port of Alang, India, where it has remained since 2017.⁶ As a result, there is a realistic prospect that the undertakings are no longer appropriate, as the divested vessel is no longer operating in the market where the competition concerns arose and could not be reacquired by Subsea 7.

⁵ The Office of Fair Trading was one of the CMA's predecessor bodies.

⁶ [FALCON, Pipe Layer - Details and current position - IMO 7409401 - VesselFinder](#). See also: [Ship GSP FALCON \(Pipe Layer\) Registered in St Kitts Nevis - Vessel details, Current position and Voyage information - IMO 7409401, Call Sign V4QK3 | AIS Marine Traffic](#).

N.B. an Offshore/Diving Support Vessel named 'GSP Falcon' (IMO 8324579) currently operates in the Adriatic Sea. That vessel was previously named 'Wellservicer' until 2018 and is not the same vessel as that covered in this remedy. In addition, a distinct Offshore/Diving Support Vessel named Seven Falcon (IMO 9455167), owned by Acergy Havila Ltd, currently operates in the North Sea. See:

- [Ship GSP FALCON \(Diving Support Vessel\) Registered in Panama - Vessel details, Current position and Voyage information - IMO 8324579, MMSI 374338000, Call Sign 3FFC | AIS Marine Traffic](#); and [GSP FALCON, Offshore Support Vessel - Details and current position - IMO 8324579 - VesselFinder](#)
- [Ship SEVEN FALCON \(Diving Support Vessel\) Registered in United Kingdom - Vessel details, Current position and Voyage information - IMO 9455167, MMSI 235084424, Call Sign 2EEN9 | AIS Marine Traffic](#)

Home Retail Group plc / Focus (DIY) Ltd

Background

18. [Undertakings in Lieu of reference](#) were given by Home Retail Group plc (HRG) on 8 August 2008 following the OFT's decision: [Completed acquisition by Home Retail Group plc of 27 leasehold properties from Focus \(DIY\) Ltd](#), published on 12 May 2008.
19. The OFT's concerns were that the transaction would result in a substantial lessening of competition in the supply of DIY and home-enhancement products through DIY sheds in Woking.
20. The undertakings required HRG to divest the leasehold premises and personnel located at Unit 1B Lion Retail Park, Woking, in relation to the DIY and home enhancement retail business previously run by Focus at Unit 1 (the Divestment Business). The divestment was to be carried out by means of, in summary: Homebase Ltd (a subsidiary of HRG) separating Unit 1 into two sub-units, with Focus taking a lease of one and Argos Ltd (a subsidiary of HRG) taking a lease of the other.
21. The undertakings require continued separation of HRG (or any member of the Group of Interconnected Bodies Corporate to which HRG belongs) from the Divestment Business.

Potential change in circumstance

22. There have been structural changes to the parties to the merger, and also to the retail unit occupancy.
 - Focus DIY Ltd closed its stores in 2011 and assets were sold, including 31 stores to B&Q. Also in 2011 the Focus brand was bought by Walker Group which at the time owned Victoria Plumb (now online retailer VictoriaPlum.com, and owned by Endless Fund IV).
 - Homebase Ltd was bought by Australian retailer Wesfarmers in 2016 and was renamed HHGL Ltd. It was subsequently bought by Hilco Trading LLC in 2018. It is now owned by an individual via Ark UK Group Ltd.
 - Home Retail Group plc was bought by J Sainsbury plc in 2016 and renamed Home Retail Group Ltd. Argos is therefore now also owned by J Sainsbury plc.

- Unit 1 remains divided into two sub-units, though the unit previously occupied by Focus is now occupied by ASDA.⁷
23. As a result of Focus DIY Limited being dissolved, and Homebase Ltd (the other party in the overlap of concern to the OFT) no longer being owned by HRG, the CMA considers there to be a realistic prospect that the undertakings are no longer appropriate.

Lloyds TSB Group plc / Abbey National plc

Background

24. Following investigation by the Competition Commission (CC) in 2001, Lloyds TSB Group plc (Lloyds) agreed undertakings which were accepted by the Secretary of State on 18 February 2002.⁸ Administration of the undertakings were transferred to the OFT's (now the CMA's) responsibility under Enterprise Act 2002 by means of Statutory Instrument 2004/2181.⁹
25. The CC's concerns, set out in its report: *Lloyds TSB Group plc and Abbey National plc: A report on the proposed merger* (Cm 5208), published on 10 July 2001, were that the elimination from the market of one of the most significant branch-based competitors to the largest four banks would result in a substantial lessening of competition, primarily in the market for personal current accounts, where it would strengthen the position of what was already the largest provider.
26. In addition, the CC was concerned that merger would reduce competition in the supply of banking services to SMEs, where there is a particular need for increased competition, because it would eliminate one of the few players outside the big four which would be able to contest this market. The CC believed that the merger would cause prices for SME banking services to be higher, and innovation lower, than would be expected in the absence of the merger.
27. The undertakings provide that "Lloyds TSB shall not acquire directly or indirectly: (i) any interest in Abbey National; (ii) any interest in any company having control of Abbey National; or (iii) any of the assets of Abbey National, insofar as such acquisition would result in Lloyds TSB being able to control all

⁷ <https://completelyretail.co.uk/scheme/Lion-Shopping-Park-Woking>

⁸ Details of the undertakings accepted can be found in the advice of the Director General of Fair Trading to the Secretary of State for Trade and Industry: http://webarchive.nationalarchives.gov.uk/20100913163336/http://www.of.gov.uk/OFTwork/mergers/mergers_fta/mergers_fta_advice/lloyds-tsb

⁹ See <http://www.legislation.gov.uk/uksi/2004/2181/made> (footnote 9).

or any part of any PCA or SME business which immediately prior to the acquisition was controlled by Abbey National prohibited the acquisition of Abbey National by Lloyds.”¹⁰

Potential change in circumstance

28. There have been a number of changes relevant to these undertakings since this transaction, including:
- (a) A number of acquisitions and changes in ownership since this transaction in 2001, the result of which is that there is no Abbey National business which remains distinct or separable within the broader current organisational structure. These changes include:
 - (i) in July 2004, Santander UK acquired Abbey National plc;
 - (ii) in July 2008, Santander UK acquired Alliance and Leicester plc;
 - (iii) in September 2008, Santander UK announced that it was to acquire the savings business and bank branch network of Bradford and Bingley plc;
 - (iv) in 2010, all customers were rebranded to be under the Santander brand.
 - (b) There have been a number of changes to the number and location of branches owned by Santander UK, so there is no longer a distinct branch network that could represent Abbey National. This has included relocations and closures of branches in the intervening years.¹¹
29. In response to the CMA’s ITC, Lloyds Banking Group (LBG) highlighted a number of changes, including that, ‘Abbey National plc is no longer a distinct entity’, noting that, ‘The remedy itself relates to a merger that was proposed over 20 years ago and reviewed under a different regulatory regime to that which is now in place’.
30. Given the potential relevant changes in circumstance that have been identified, specifically the various changes that have occurred to the ownership of the businesses concerned in the original transaction and the length of time that has elapsed, the CMA considers that these undertakings may no longer be the appropriate tool to assess or address any future action

¹⁰ Paragraph 1 of the undertakings.

¹¹ For example, approximately 140 Santander branches were closed in 2019. See for example: [Santander closures: the full list of bank branches closing, putting 1,270 jobs at risk \(inews.co.uk\)](#)

LBG may take to acquire the former Abbey National interests listed in the undertakings (see paragraph 27 above).

31. We would emphasise that this is a narrowly scoped review of a specific structural remedy. The CMA does not expect to take any view on the competitiveness of the retail banking market. It also does not intend to review any other part of its retail/SME banking market remedies portfolio at this time.

Reasons for launching reviews of these remedies

32. These undertakings have been selected for review on the following grounds:
- They are of a magnitude that the CMA can assess the case for a change in circumstance across multiple remedies with limited resources.
 - The Energy Order is effectively superseded by newer, sector-specific regulation.
 - The merger remedies are 12, 15 and 21 years old respectively. Therefore, given the time that has elapsed since they were put in place, we may expect to find some changes in the markets relevant to those remedies, and in fact we have observed potential relevant changes as described above.
 - We consider that collectively, these reviews would be likely to have a beneficial impact on the firms subject to the remedies and to the CMA's management of its portfolio of remedies, to ensure that portfolio remains appropriate.

Prioritisation

33. In order to make the best use of its resources, the CMA needs to ensure that it makes appropriate decisions about which projects and programmes to undertake across its areas of responsibility. The CMA has assessed all the information available in relation to the above remedies in reaching its decision in the light of its published [prioritisation principles](#) as described below. These principles are strategic significance, impact, whether the CMA is best placed to act, resources and risk. We consider each of these in turn below.

Strategic significance

34. The CMA considers these reviews to represent a strategic priority, as this work reflects the CMA's statutory duty to keep under review orders and undertakings.

Impact

35. The CMA expects to deliver reductions in regulatory burdens generating indirect benefits for consumer welfare from the release of remedies that are no longer necessary. The CMA considers this to be likely in a number of cases given the age of the remedies and the potential changes that we have identified. Moreover, the removal of remedies that are no longer appropriate allows the CMA to focus its resources on monitoring remedies that continue to generate benefit for consumers and the UK economy.

Is the CMA best placed to act?

36. The CMA has a statutory duty under sections 92 and 162 of the Enterprise Act 2002 to keep under review the relevant undertakings and orders.

Resources

37. The CMA considers that conducting simultaneous reviews of these remedies using the same decision group of CMA Panel Members would involve a modest amount of resource and would represent an efficient way to undertake these reviews.

Risk

38. The CMA notes that the merger remedies being considered are between 12 and 21 years old. Given the age of these remedies, the structural changes identified, and the developments in the regulatory landscape in relation to the Energy Order, it is likely that they may no longer be appropriate given market and other developments likely to have taken place. While there is at least some risk of the reviews not leading to remedies being varied or released, there is a realistic prospect of finding a change in circumstance in each of the remedies selected for review at this time.

Decision to launch a review

39. The CMA has decided to launch reviews of the above remedies. In reaching this decision, the CMA has obtained sufficient evidence, through responses to its ITC and through its own research and analysis, to have established a realistic prospect of finding at least one relevant change in circumstance in respect of each of the above remedies that may mean that they are no longer appropriate. Moreover, the CMA has assessed the review of these remedies against its published prioritisation criteria and found the carrying out of this review to meet those criteria.

Stakeholder views sought

40. The CMA is seeking views from interested parties on potential changes in circumstance that may mean that the remedies listed above are no longer appropriate, and if such changes are identified, whether they should be varied or released.
41. Respondents should provide their views, supported with relevant evidence where possible, in writing to the CMA at:

Email: remedies.reviews@cma.gov.uk
42. The CMA intends to publish all submissions received. Please ensure any submission provided to the CMA that contains any confidential material is accompanied by a non-confidential version which the CMA will publish on its website at the time that its Provisional Decisions are published for consultation.
43. Responses should be received by the CMA by **5pm on Tuesday 12 December 2023**. Following this consultation period, the decision makers will assess the available evidence in order to make, and consult on, a Provisional Decision on whether to retain, release or vary each of the remedies under review.