

# Reviews of one Market Investigation order and three sets of Merger undertakings

**Provisional decisions**

19 March 2024

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The Competition and Markets Authority has excluded from this published version of the Provisional Decision information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂].

## Contents

	<i>Page</i>
Summary .....	4
1. Legal Framework .....	5
2. Provisional Decisions and consultation .....	6
Notice of intention to release/revoke .....	6
Stakeholder's views sought .....	6
Appendix 1: Lloyds TSB Group plc / Abbey National plc .....	8
Background .....	8
Changes in circumstance .....	9
Representations received .....	10
Provisional Decision .....	10
Appendix 2: Subsea 7 S.A. (ex Acergy S.A.) / Subsea 7 Inc .....	11
Background .....	11
Changes in circumstance .....	11
Representations received .....	11
Provisional Decision .....	12
Appendix 3: Home Retail Group plc / Focus (DIY) Ltd .....	13
Background .....	13
Changes in circumstance .....	13
Representations received .....	14
Provisional Decision .....	14
Appendix 4: The Energy Market Investigation (ECOES/DES) Order 2016 .....	15
Glossary of acronyms .....	15
Background .....	15
Changes in circumstance .....	16
Representations received .....	17
Provisional Decision .....	17

## Summary

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 2023 the CMA published an Invitation to Comment seeking stakeholder views on candidates for review in the CMA's portfolio. Following assessment of responses, in November 2023 [the CMA decided to prioritise reviews of one market investigation order and three sets of merger undertakings](#). The CMA consulted 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. The consultation closed on 12 December 2023. The CMA received two substantive responses, both in support of revoking the Energy (ECOES/DES) Order.
3. This document sets out and gives notice of the CMA's Provisional Decisions in relation to the three undertakings and one order in question. The CMA's Provisional Decisions are to release/revoke all three undertakings and one order.
4. The CMA is now consulting on these Provisional Decisions before it makes its Final Decisions.

# 1. Legal Framework

- 1.1 The CMA has a statutory duty under sections 92 and 162 of the Enterprise Act 2002 to keep under review undertakings and orders.<sup>1</sup> 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.
- 1.2 The precise nature of the CMA's consideration of any change of circumstances will depend entirely on the individual circumstances affecting a particular undertaking or order. However, the change of circumstances must be such that the undertaking or order is no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy, if it is to lead to either variation or termination.<sup>2</sup>
- 1.3 The process the CMA follows when conducting reviews of undertakings and orders is set out in CMA Guidance document CMA11, Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders.

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<sup>1</sup> In addition Schedule 24 of the Enterprise Act 2002 in cases where undertakings were originally agreed under the Fair Trading Act 1973.

<sup>2</sup> CMA11, paragraph 2.5

## 2. Provisional Decisions and consultation

2.1 The CMA's Provisional Decisions are that the following three undertakings and one order are no longer appropriate by reason of the relevant changes in circumstance identified in the Appendices below.

- (a) [The Energy Market Investigation \(ECOES/DES\) Order 2016](#) ('the Order')
- (b) [Undertakings in Lieu of reference](#) given on 17 August 2011 by Subsea 7 S.A. and Acergy M.S. Ltd. following the Office of Fair Trading's (OFT's)<sup>3</sup> decision: [Anticipated acquisition by Acergy SA of Subsea 7 Inc](#), published on 2 February 2011.
- (c) [Undertakings in Lieu of reference](#) 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.
- (d) Undertakings given by Lloyds TSB Group plc (Lloyds) on 18 February 2002<sup>4</sup> following the Competition Commission's<sup>5</sup> report: [Lloyds TSB Group plc and Abbey National plc: A report on the proposed merger](#) (Cm 5208), published on 10 July 2001.

### Notice of intention to release/revoke

2.2 As envisaged in paragraph 3.29 of guidance document [CMA11](#), and required under Schedule 10 of the Enterprise Act 2002, the CMA hereby gives notice of its intention to release the undertakings and to revoke the Order in Paragraph 2.1. The reasoning for this notice is set out in the Appendices to this Provisional Decisions document.

### Stakeholder's views sought

2.3 The CMA is now seeking views from interested parties on its Provisional Decisions.

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<sup>3</sup> The Office of Fair Trading was one of the CMA's predecessor bodies.

<sup>4</sup> 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.offt.gov.uk/OFTwork/mergers/mergers\\_fta/mergers\\_fta\\_advice/lloyds-tsb](http://webarchive.nationalarchives.gov.uk/20100913163336/http://www.offt.gov.uk/OFTwork/mergers/mergers_fta/mergers_fta_advice/lloyds-tsb)

<sup>5</sup> The Competition Commission was the other of the CMA's predecessor bodies.

- 2.4 Respondents should provide their views on these Provisional Decisions and the above Notice of intention to release the three undertakings and one order, supported with relevant evidence where possible, in writing to the CMA at:

Email: [remedies.reviews@cma.gov.uk](mailto:remedies.reviews@cma.gov.uk)

- 2.5 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 final decision is published.
- 2.6 Responses should be received by the CMA by **5pm on 18 April 2024**. Following this consultation period, the decision makers will assess the available evidence in order to make Final Decisions on whether to release the Undertakings and revoke the Order.

# Appendix 1: Lloyds TSB Group plc / Abbey National plc

## Background

1. 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.<sup>6, 7</sup> 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.
2. 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.
3. 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.
4. 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 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." <sup>8</sup>.

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<sup>6</sup> See <http://www.legislation.gov.uk/uksi/2004/2181/made> (footnote 9).

<sup>7</sup> 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](http://webarchive.nationalarchives.gov.uk/20100913163336/http://www.of.gov.uk/OFTwork/mergers/mergers_fta/mergers_fta_advice/lloyds-tsb)

<sup>8</sup> Paragraph 1 of the undertakings.



## Changes in circumstance

5. There have been a number of changes in the banking sector 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 reflects Abbey National. This has included relocations and closures of branches in the intervening years.<sup>9</sup>
6. 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'.
7. Given the changes in circumstance identified, specifically:
  - the material changes that have occurred to the structure of the businesses concerned in the original transaction
  - the substantial changes in the original assets (branch network)
  - both of the above combined with the substantial length of time that has elapsed.

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<sup>9</sup> 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 \(inews.co.uk\)](https://www.inews.co.uk/news/santander-closures-the-full-list-of-bank-branches-closing-putting-1270-jobs-at-risk/)

the CMA considers that these Undertakings (given under the Fair Trading Act 1973, which is no longer in force and was superseded by the Enterprise Act 2002) are no longer the appropriate tool to assess or address any future action LBG may take to acquire the former Abbey National interests listed in the undertakings. If that transaction were to be proposed in the future, it would appropriately fall to be assessed under the merger provisions of the Enterprise Act 2002 and not under the Undertakings in question.

8. This is a narrowly scoped review of a specific structural remedy, and in reaching its Provisional Decision, the CMA makes no inference on the competitiveness of the broader retail banking market, or the suitability of its other undertakings and orders that impact on the sector and its participants.

### ***Representations received***

9. LBG endorsed and referred the CMA back to the representations it had made in response to the CMA's ITC.

### ***Provisional Decision***

10. Given the relevant changes in circumstance that have been identified, including structural and regulatory changes, the CMA considers that these undertakings are no longer the appropriate tool to assess or address any future action LBG may take to acquire the former Abbey National interests listed in the undertakings.

## Appendix 2: Subsea 7 S.A. (ex Acergy S.A.) / Subsea 7 Inc

### Background

1. [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)<sup>10</sup> decision: [Anticipated acquisition by Acergy SA of Subsea 7 Inc](#), published on 2 February 2011.
2. 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.
3. 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.

### Changes in circumstance

4. 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.<sup>11</sup> As a result, we consider this to represent a change of circumstance that means 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.

### ***Representations received.***

5. The CMA received no submissions in relation to this remedy.

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<sup>10</sup> The Office of Fair Trading was one of the CMA's predecessor bodies.

<sup>11</sup> [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](#)

***Provisional Decision***

6. In light of the evidence available to it, the CMA's Provisional Decision is that the undertakings are no longer appropriate and should be released.

## Appendix 3: Home Retail Group plc / Focus (DIY) Ltd

### Background

1. [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.
2. 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.
3. 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.
4. 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.

### Changes in circumstance

5. 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, with the unit previously occupied by Focus now occupied by ASDA.<sup>12</sup>
6. 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 this to represent a change of circumstance which means the undertakings are no longer appropriate.

### ***Representations received***

7. The CMA received no representations in relation to this remedy over and above those received in response to the ITC.

### ***Provisional Decision***

8. In light of the evidence available to it, the CMA's Provisional Decision is that the undertakings are no longer appropriate and should be released.

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<sup>12</sup> <https://completelyretail.co.uk/scheme/Lion-Shopping-Park-Woking>

## Appendix 4: The Energy Market Investigation (ECOES/DES) Order 2016

### Glossary of acronyms

DES	- the former gas enquiry service
ECOES	- the former electricity enquiry service
GES	- Gas Enquiry Service
MRA	- Master Registration Agreement
PCW	- price comparison website
REC	- Retail Energy Code
RECCo	- Retail Energy Code Company Ltd
SPAA	- Supply Point Administration Agreement

### Background

1. [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.
2. 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.
3. 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.
4. Particularly relevant to the Order, and in summary, the CMA found that:<sup>13</sup>
  - 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

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<sup>13</sup> See [Summary of AECs and Remedies](#).

unhelpful to customers in understanding the relationship between the energy they consume and the amount they ultimately pay.

- 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.
5. The Order addressed these specific concerns by placing a requirement on energy providers to supply certain information to price comparison websites.

## Changes in circumstance

6. 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.<sup>14</sup>
7. 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 RECCo, and the REC now contains the relevant obligations to supply retail electricity and gas data to Third Party Intermediaries such as Price Comparison Websites.<sup>15</sup>
8. As a result, the obligations in the Order have been superseded by the new requirements in the REC and the obligations in the Order are no longer appropriate.

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<sup>14</sup> Article 3 of the Order imposes an obligation on Master Registration Agreement Service Company to give PCWs access to the 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 DES upon written request.

<sup>15</sup> Paragraph 4.3(a) of the Retail Energy Code.



## ***Representations received***

9. The CMA received two submissions in relation to this remedy, both in support of revocation.

### ***Xoserve***

10. Xoserve is the gas industry's central data service provider. Xoserve explained that in July 2022 a number of services were transferred into the REC governance for provision by the RECCo, and as a result DES no longer exists. In its place is the wider GES that includes provision of access to data to PCWs. It follows that RECCo now provides access to gas data in accordance with the rules of the REC. It is the opinion of Xoserve that the intent of the Order has been fulfilled and it can now be revoked.

### ***RECCo***

11. RECCo is the operator of the REC and acts as an 'intelligent customer' by procuring and managing services on behalf of REC Parties and others. RECCo explained that it was created as part of the Ofgem Retail Code Consolidation project and that, from September 2021 the REC incorporated the provisions previously set out in several different industry codes, most significantly the MRA previously overseen by MRASCo Ltd, and the SPAA previously overseen by SPAA Ltd.
12. RECCo told us that, at the same time as taking over management of the new industry code, it assumed contractual responsibility for the provision of services offered pursuant to that code, including ECOES. Subsequently, as part of the Ofgem Switching Programme, it took over responsibility for DES. It is RECCo's understanding that the intent of the Order had been fully discharged prior to the responsibility of the enquiry services transferring to the REC. RECCo confirmed that all previous access to ECOES or DES data was maintained when those services transferred to the governance of the REC, including that of PCWs and Third-Party Intermediaries. It added that since September 2021 it has continued to grant reasonable requests for access in accordance with the rules set out in the REC, as overseen by the REC Performance Assurance Board and ultimately by Ofgem.

## ***Provisional Decision***

13. In light of the evidence available to it, the CMA's Provisional Decision is that the Order is no longer appropriate and should be revoked.