

Merger remedies

19 December 2025

CMA87

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1. Preface

- 1.1 This guidance forms part of the advice and information published by the Competition and Markets Authority (CMA) under Section 106 of the Enterprise Act 2002, as amended (the Act).
- 1.2 This guidance is intended for merger parties and their advisers. The primary purpose of this guidance is to explain the CMA's approach to the selection, design and implementation of remedies in:
- (a) phase 1 merger investigations, where the CMA must decide whether there is a realistic prospect that the merger gives rise to a substantial lessening of competition (SLC) and therefore, whether the CMA should refer the merger for an in-depth phase 2 investigation or accept undertakings in lieu (UILs) of a reference to phase 2;¹ and
 - (b) phase 2 merger investigations, where the CMA must decide whether the merger has resulted, or may be expected to result, in an SLC and therefore, whether action should be taken to remedy, mitigate or prevent the SLC and any adverse effect resulting from the SLC.
- 1.3 This guidance also sets out the CMA's approach to the monitoring and review of merger remedies.²
- 1.4 This document seeks to provide a single source of guidance on remedies for phase 1 and phase 2 merger investigations.³ It therefore supersedes previous remedies guidance documents.⁴ This guidance should be read alongside other CMA guidance including in particular: [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#); [Merger Assessment Guidelines \(CMA129\)](#); [Mergers: Exceptions to the duty to refer \(CMA64\)](#); [Interim measures in merger investigations \(CMA108\)](#); [Administrative Penalties:](#)

¹ In phase 1 merger investigations, the decision on whether to refer, including any decision on UILs, is made by either a Senior Director of Mergers or another senior member of CMA staff (the phase 1 decision maker). In phase 2 merger investigations, the final decision-making authority is an independent group of experts selected from a panel appointed by the Secretary of State (the CMA Group). In cases where a public interest intervention notice or special intervention notice has been issued, the decision is made by the Secretary of State.

² See Chapter 9.

³ Except in relation to the CMA merger process as it pertains to remedies, which is outlined in [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#).

⁴ In particular, this version of this guidance replaces the previous version of this document and supersedes the CMA's [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#) (as applied to merger undertakings and orders), and the CMA's [Merger and Market remedies – guidance on reporting, investigation and enforcement of potential breaches \(CMA136\)](#) (as applied to merger remedies).

[Statement of Policy on the CMA's Approach \(CMA4\)](#); and [Transparency and Disclosure: Statement of the CMA's Policy and Approach \(CMA6\)](#).

- 1.5 This version of the guidance has been updated and extended in light of the review of the CMA's approach to merger remedies that the CMA undertook in 2025 (the Merger Remedies Review). The Merger Remedies Review involved an evidence gathering exercise including a public call for evidence, a literature review, and direct third-party engagement, including with a number of international competition authorities, UK sectoral regulators, businesses and industry associations.
- 1.6 As with the previous version, these updates also take into account the CMA's experience of merger investigations in recent years, court judgments and the CMA's research into the outcomes of previous remedies.⁵ The guidance also takes into account the principles outlined by the International Competition Network, the work carried out by the Organisation for Economic Co-operation and Development and merger remedies guidance published by other international competition authorities.
- 1.7 This guidance reflects the views of the CMA at the time of publication and may be further revised from time to time to reflect changes in best practice, legislation, court judgments, research and experience. Where there is any difference in emphasis or detail between this guidance and other guidance produced or adopted by the CMA, the most recently published guidance takes precedence.
- 1.8 The CMA will have regard to this guidance in considering remedial action in merger investigations. However, in each investigation, the appropriate remedy will be determined by having regard to the particular circumstances of the case. The CMA will therefore apply this guidance flexibly and may depart from the approach described in the guidance where there are appropriate reasons for doing so.

⁵ See the CMA's most recent report on [Merger remedy evaluations \(CMA186\)](#) (24 October 2023).

2. Introduction

Scope of the guidance

- 2.1 This guidance sets out the CMA's approach to determining the appropriate remedial action in phase 1 and phase 2 merger investigations⁶ and to the monitoring and review of merger remedies following their implementation.
- 2.2 This guidance does not address whether the CMA has jurisdiction under the Act, and the policies and procedures that the CMA will use in discharging its functions under the Act.⁷ It also does not address the substantive SLC test against which the CMA assesses mergers.⁸

Structure of the guidance

- 2.3 This guidance explains the purpose of remedial action in merger investigations and the considerations for the selection, design, implementation, monitoring and enforcement of remedies. To this end, it is structured as follows:
- (a) Chapter 3 sets out the objectives and principles of remedial action and explains the CMA's overall framework for assessing remedies.
 - (b) Chapter 4 provides additional guidance on the CMA's approach to assessing remedies offered at phase 1 (UILs) and an explanation of the CMA's requirement for UILs to meet the clear-cut standard.
 - (c) Chapter 5 provides an overview of the different types of remedies available and in particular the distinction between structural and behavioural remedies.
 - (d) Chapter 6 provides more detailed guidance on effectiveness considerations in relation to structural remedies.

⁶ Considerations regarding the use, design and implementation of interim measures in phase 1 and phase 2 merger investigations, which are intended to prevent or unwind pre-emptive action which might prejudice the reference and/or impede the CMA taking appropriate remedial action, are set out in [Interim measures in merger investigations \(CMA108\)](#).

⁷ [Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2\)](#) provides advice and general information on the procedures used by the CMA in operating the merger control regime set out in the Act, as amended, including guidance on the processes the CMA follows when assessing remedies and how merger parties can engage effectively with the CMA during the remedies process in phase 1 and phase 2 merger investigations.

⁸ Detailed information on the application of the substantive test for mergers is provided in the [Merger Assessment Guidelines \(CMA129\)](#).

- (e) Chapter 7 provides more detailed guidance on effectiveness considerations in relation to behavioural remedies.
- (f) Chapter 8 provides guidance on the appointment, responsibilities and remuneration of trustees, independent experts and adjudicators during the remedies process.
- (g) Chapter 9 sets out the CMA's approach to the monitoring and review of merger remedies following their implementation.

3. Objectives and principles of remedial action

3.1 This chapter sets out:

- (a) the objectives of remedial action, the CMA's statutory duty to remedy the SLC, and the common principles that apply to the CMA's assessment of remedies at phase 1 and phase 2;
- (b) the framework for the assessment of the effectiveness of remedies;
- (c) the framework for the assessment of the proportionality of remedies; and
- (d) the framework for the CMA's consideration of relevant customer benefits (RCBs) in remedy selection.

Objectives of remedial action

- 3.2 At phase 1, where the CMA decides that there is a realistic prospect that the merger gives rise to an SLC, the CMA has discretion to accept UILs instead of making a reference to phase 2. In exercising this discretion, the CMA may accept from the merger parties undertakings (ie UILs) to take such action as the CMA considers appropriate to remedy, mitigate or prevent the SLC concerned and any adverse effect resulting from it.⁹
- 3.3 At phase 2, where the CMA concludes that a relevant merger situation has resulted, or may be expected to result, in an SLC, it is required to decide whether it should take action itself, or recommend the taking of action by others (such as Government, regulators or public authorities), to remedy, mitigate or prevent the SLC and any adverse effect resulting from it. In either case, the CMA must state in its final report the action to be taken and what it is designed to address.¹⁰ Following publication of the final report, the CMA has the choice of implementing the remedies in the final report by accepting undertakings (Final Undertakings) or making/imposing an order (Final Order).
- 3.4 At both phase 1 and phase 2, the Act requires that the CMA, when considering remedies, shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it'.¹¹

⁹ Section 73(2) of the Act.

¹⁰ Sections 35(3) and 36(2) of the Act.

¹¹ Section 73(3) of the Act at phase 1 and Sections 35(4) and 36(3) of the Act at phase 2.

3.5 The following principles apply to the assessment of remedies at phase 1 and phase 2, although their application will take account of the relevant differences in the decisions to be taken at each phase:

- (a) The CMA will first identify a remedy, or remedies, that is/are effective in resolving the SLC and its adverse effects. As such, the CMA's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively resolving the SLC.¹² The objective is to ensure that competition following the implementation of the remedy is as effective as the competition that would have prevailed absent the merger.¹³
- (b) The CMA will then assess whether the effective remedy or remedies it has identified are proportionate. The CMA will seek to select the least costly and intrusive remedy, and will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.
- (c) If the CMA reaches the view that there are no effective remedies, or that all effective remedies are disproportionate, it may consider remedies that mitigate the SLC and its adverse effects (ie are partially effective at resolving the SLC).
- (d) The CMA expects to have regard to the effect of any remedies on any RCBs arising from the merger.¹⁴ As further explained in paragraphs 3.27-3.36 below, the potential loss of RCBs is a factor the CMA may take into account when assessing the proportionality of effective remedies.

3.6 In practice, the CMA may sometimes decide to take several actions to remedy an SLC.¹⁵ The combination of remedial measures is often referred to as a 'package' of remedies. Unless otherwise specified, reference to a remedy in this guidance encompasses the package of remedial measures the CMA is taking.

¹² See [Co-operative Group \(CWS\) Limited v OFT \[2007\] CAT 24](#), where the Competition Appeal Tribunal (CAT) considered it was not unreasonable for the Office of Fair Trading (OFT) to adopt as its starting point the objective of restoring competition to pre-merger levels.

¹³ Although this is the CMA's starting point, it is open to the merger parties in any given case to persuade the CMA that a proposed remedy that does not directly restore competition to levels that would have prevailed absent the merger, nevertheless comprehensively resolves the SLC identified.

¹⁴ Sections [22\(2\)\(b\)](#) and [33\(2\)\(c\)](#) of the Act at phase 1 and Sections [35\(5\)](#) and [36\(4\)](#) of the Act at phase 2.

¹⁵ For example, if this is necessary to resolve an SLC in multiple distinct markets, or where a combination of distinct remedial measures is necessary to resolve an SLC.

- 3.7 The following sections of this chapter explain how the CMA will assess: (a) effectiveness; (b) proportionality; and (c) any RCBs that the relevant merger situation gives rise to.

Effectiveness

- 3.8 The CMA will assess the effectiveness of remedies before considering the proportionality of those remedies. An effective remedy should meet the following criteria (the Effectiveness Criteria):

- (a) *Impact on the SLC and its adverse effects.* Remedies need to be effective in resolving the SLC and its adverse effects. The CMA views competition as a dynamic process of rivalry between firms which are incentivised to win customers' business over time by offering them a better deal. Remedies which fully restore competitive rivalry in a lasting way directly address an SLC at source and are therefore generally more likely to fully resolve the SLC and its adverse effects than those which only partially restore competitive rivalry or address the adverse effects of an SLC without restoring this process of rivalry.
- (b) *Acceptable risk profile.* The effect of any remedy is likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the CMA will seek remedies for which it has a high degree of confidence that they will achieve their intended effect.¹⁶ Customers or suppliers of merger parties should not bear significant risks that remedies will not resolve the SLC and its adverse effects. The CMA will assess the risks involved in a merger remedy holistically.
- (c) *Practicality.* A practical remedy should be capable of effective implementation, monitoring and enforcement. To enable this to occur, the specification, operation and implications of the remedy need to be clear to the merger parties and other affected parties. The practicality of any remedy is likely to be reduced if, for example, elaborate and intrusive monitoring and compliance programmes are required, or if there are material separation risks associated with a divestiture of an asset package comprising less than a fully standalone business.
- (d) *Appropriate duration and timing.* Remedies need to resolve the SLC effectively throughout its expected duration. Remedies that act quickly

¹⁶ The CAT has held that it is reasonable for the CMA to not favour a remedy 'for which it cannot feel a high degree of confidence of success' (*Ecolab Inc. v CMA* [2020] CAT 12, at paragraph 83).

in resolving competitive concerns are preferable to remedies that are expected to have an effect only in the long term or where the timing of the effect is uncertain.

- 3.9 Remedies are conventionally classified into structural or behavioural remedies (see Chapter 5). While this classification is informative, as different considerations are likely to be relevant when assessing whether a structural or behavioural remedy meets the Effectiveness Criteria set out above, the CMA will assess each remedy on its merits with a particular focus on understanding how it will address the SLC and its adverse effects, and how it will affect competitive incentives in the market. In carrying out this assessment, the CMA will consider the risks to a remedy's effectiveness, which vary depending on whether the remedy is structural or behavioural.
- 3.10 In seeking a remedy that is effective in resolving the SLC and its adverse effects, the CMA will seek to ensure that a remedy satisfies all of the Effectiveness Criteria mentioned in paragraph 3.8. The relevant considerations that go to remedy effectiveness are discussed in more detail in Chapter 6 for structural remedies, and in Chapter 7 for behavioural remedies.

Proportionality

- 3.11 Having identified one or more remedies as effective in resolving the SLC and its adverse effects, the CMA will then consider whether the effective remedy (or remedies) is/are proportionate.
- 3.12 A proportionate remedy is one that:¹⁷
- (a) is effective in achieving a legitimate aim;¹⁸
 - (b) is no more onerous than it needs to be to achieve its legitimate aim;
 - (c) is the least onerous remedy, where the CMA has identified more than one effective remedy; and
 - (d) is not disproportionate to the SLC and its adverse effects.

¹⁷ The proportionality principles have been referred to by the CAT in various judgments including [Tesco v Competition Commission \[2009\] CAT 6](#), [Groupe Eurotunnel v Competition Commission \[2013\] CAT 30](#), [Ryanair v Competition Commission \[2014\] CAT 3](#) and [Intercontinental Exchange v CMA \[2017\] CAT 6](#).

¹⁸ The effectiveness of a remedy in addressing the SLC and its adverse effects is assessed as a separate step (see paragraphs 3.8-3.10 above).

3.13 The key steps of the proportionality assessment are explained below.

Assessing the onerousness of effective remedies

3.14 In order to assess the onerousness of effective remedies, the CMA will consider the relevant costs of the remedy or remedies under consideration.

3.15 The relevant costs of a remedy may arise in various forms, and may include:

- (a) distortions in market outcomes. For example, remedies can result in costs if they introduce inefficiencies over time, deter entry, or disincentivise growth, innovation and/or investment. This is more likely to be the case where certain behavioural remedies are used, which intervene directly in market outcomes, especially over a long period;
- (b) ongoing monitoring and compliance costs including to the CMA, sectoral regulators and third parties; and
- (c) the loss of RCBs.

3.16 The costs of a remedy may be incurred by a variety of parties, including the merger parties, third parties, the CMA and other monitoring agencies. As the merger parties have the choice of whether or not to proceed with the merger, the CMA will generally attribute considerably less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties, the CMA and other monitoring agencies.

3.17 With respect to completed mergers specifically, the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy, as it is open to the merger parties to make a merger conditional on the approval of the relevant competition authorities.¹⁹ It is for the merger parties to assess whether there is a risk that a completed merger would be subject to an SLC finding, and the CMA would expect this risk to be reflected in the agreed acquisition price. Since the cost of divestiture is, in essence, avoidable, the CMA will not, in the absence of exceptional circumstances, accept that the cost of divestiture should be considered as a relevant cost when selecting remedies. Furthermore, taking account of the

¹⁹ The CAT and the courts have upheld divestiture remedies in a number of investigations where this approach has been taken by the Competition Commission (CC) and the CMA. See [Groupe Eurotunnel S.A. v Competition Commission \[2013\] CAT 30](#), [Ryanair Holdings plc v Competition and Markets Authority \[2014\] CAT 3](#) and [Intercontinental Exchange, Inc v Competition and Markets Authority \[2017\] CAT 6](#).

costs of divestiture could result in different costs being considered depending on whether the merger was anticipated or completed, and could create incentives to undertake integration to increase the difficulty of unwinding.

Ensuring a remedy is no more onerous than it needs to be

- 3.18 The requirements of a remedy should only be those necessary to resolve the SLC and its adverse effects. The CMA will engage with the merger parties and third parties to seek to ensure that a remedy is no more onerous than it needs to be.

Choosing the least onerous remedy if there is more than one effective remedy

- 3.19 In situations where the CMA has identified more than one effective remedy, the CMA will seek to select the least costly and intrusive remedy.
- 3.20 Behavioural remedies may be less costly than structural remedies in certain circumstances. This could be the case, for example, where RCBs are likely to be substantial compared with the adverse effects of the merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies. The CMA also recognises in this respect that behavioural remedies will often be less intrusive from the merger parties' perspective than structural remedies.

Proportionality of the remedy in relation to the SLC and its adverse effects

- 3.21 The last step of the proportionality assessment involves considering whether the chosen remedy is proportionate in relation to the SLC and its adverse effects. This involves weighing the relevant costs of the remedy (including the loss of any RCBs) against the SLC and its adverse effects.
- 3.22 The CMA's ability to quantify the SLC (and its adverse effects) and the relevant costs of the remedy depends on the circumstances of a particular investigation. The CMA will make its assessment in the round, rather than seeking to quantify factors precisely.
- 3.23 In exceptional circumstances, even the least onerous but effective remedy might be expected to incur relevant costs that are disproportionate to the scale of the SLC and its adverse effects (eg if the relevant costs incurred by third parties as a result of the remedy and/or the RCBs lost as a result of a remedy are likely to outweigh the SLC and its adverse effects). In those exceptional circumstances, the CMA will not pursue the remedy in question and may consider remedies which will only be partially effective in resolving the SLC.

- 3.24 Alternatively, it is possible that all feasible remedies will only be partially effective in resolving an SLC. In such cases, the CMA will seek to select the most effective remedy that is available, provided that the relevant costs of this remedy are not disproportionate (as described above) in relation to the SLC and its adverse effects.
- 3.25 In rare cases, the CMA may decide that no remedy is appropriate (for example, see paragraph 3.33).
- 3.26 In assessing whether the remedy is proportionate to the SLC and its adverse effects, the CMA will focus on the costs of the remedy outlined above. Accordingly, the CMA does not have regard to factors such as the percentage of the merger parties' overall revenue that is generated in the market(s) where the CMA has found an SLC, or the size of the market(s) where the CMA has found an SLC relative to the size of the market(s) affected by the transaction as a whole.²⁰

Relevant customer benefits (RCBs)

- 3.27 RCBs are certain legislatively defined benefits to 'relevant customers' resulting from a merger (inside or outside the market relating to the SLC finding)²¹ in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not in the market(s) in which the SLC has occurred or may occur); or
 - (b) greater innovation in relation to such goods or services'.²²
- 3.28 'Relevant customers' for these purposes are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution and are therefore not limited to final consumers.²³

²⁰ The inclusion of such factors in a remedies assessment could otherwise result in a situation where the extent to which customers were protected from competitive harms following a merger was dependent on the structure of the merger parties' businesses (eg customers would be less likely to be protected where the merger parties were active across multiple markets than where they were active only in a single market).

²¹ This contrasts with rivalry enhancing efficiencies which will only be taken into account if they are expected to be realised in the market subject to a potential SLC finding (see [Merger Assessment Guidelines \(CMA129\)](#), Chapter 8).

²² [Section 30](#) of the Act.

²³ [Section 30\(4\)](#) of the Act.

- 3.29 The Act provides that a benefit is only an RCB if it accrues from the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period from the creation of that merger situation and would be unlikely to accrue ‘without the creation of that situation or a similar lessening of competition’.²⁴
- 3.30 Rivalry-enhancing efficiencies resulting from the Merger, which the CMA assesses as part of the merger assessment, have the potential to give rise to RCBs.²⁵

RCBs and remedies

- 3.31 At phase 1, the CMA may have regard to the effect of proposed UILs on any RCBs.²⁶ For instance, where there is a choice of two UILs offers that are both effective in terms of resolving the SLC identified, the CMA will generally prefer the remedy that preserves any RCBs. Where the RCBs lost as a result of any effective remedy are likely to outweigh the SLC and its adverse effects,²⁷ the CMA may be willing to accept partially effective UILs. The CMA also has the discretion not to make a reference to phase 2 if it believes that any RCBs in relation to the creation of the relevant merger situation outweigh the SLC concerned and any adverse effects of that SLC.²⁸
- 3.32 At phase 2, in deciding the question of remedies, the CMA is permitted to have ‘regard to the effects of any RCBs in relation to the creation of the relevant merger situation concerned’.²⁹ As set out above in paragraph 3.15, RCBs that will be foregone due to the implementation of a particular remedy may be considered as a relevant cost of that remedy by the CMA in its proportionality assessment. In practice, RCBs can influence the remedy assessment in a number of ways including:

²⁴ Section 30(2) and 30(3) of the Act.

²⁵ See the CMA’s investigation into the [anticipated merger between J Sainsbury PLC and Asda Group Ltd final report](#) where the CMA identified rivalry-enhancing efficiencies which it considered were also RCBs. The RCBs in this case did not outweigh the merger parties’ incentive to raise prices as a result of the loss of rivalry.

²⁶ Section 73(4) of the Act.

²⁷ As explained in paragraph 3.22, the CMA will make its assessment in the round, rather than seeking to quantify precisely the extent of any SLC and any claimed RCBs.

²⁸ Sections 22(2)(b) and 33(2)(c) of the Act. See the CMA’s investigations into [the anticipated merger between University Hospitals Birmingham NHS Foundation Trust and Heart of England NHS Foundation Trust \(2017\)](#) and [the anticipated merger between Derby Teaching Hospitals NHS Foundation Trust and Burton Hospitals NHS Foundation Trust \(2018\)](#).

²⁹ Sections 35(5) and 36(6) of the Act.

- (a) leading to modifications of a remedy (where feasible) in order to preserve RCBs to the extent possible without impairing the remedy's effectiveness;
- (b) influencing selection as between effective remedies; and/or
- (c) leading to a decision to mitigate the SLC, or take no remedial action where all effective remedies (and partially effective remedies) would be disproportionate to the SLC and its adverse effects.

3.33 For example, in the CMA's investigation into the anticipated merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust (2017),³⁰ the CMA found that the merger may be expected to give rise to an SLC in the provision of NHS elective and maternity services and NHS specialised services, and that prohibiting the merger was the only effective remedy. However, the CMA concluded that prohibition would result in the loss of substantial RCBs which may be expected to arise as a result of the merger, including in respect of improved patient access, outcomes and experience. The CMA found that the adverse effect likely to result from the SLC was substantially lower than the beneficial impact of the RCBs that would be lost as a result of a prohibition remedy. The CMA therefore concluded that it would be disproportionate to prohibit the merger, and that it should be cleared.

Examples of how the CMA will consider certain types of possible RCBs

3.34 This section explains how certain types of possible RCBs will be considered by the CMA:

- (a) A merger may lead to economies of scale, for example, in production or distribution, but if this benefit just accrued to the merged entity, it would not constitute an RCB. To qualify as an RCB, the prospective cost reductions must be expected to result in lower prices³¹ (or better quality, service, choice or innovation) than if the merger did not take place. In many instances, this may not be the case, as the merger parties may

³⁰ See the CMA's investigation into [the anticipated merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust \(2017\)](#).

³¹ For example, in the CC's investigation into the [completed acquisition by Macquarie UK Broadcast Ventures Limited of National Grid Telecoms Investment Limited, Lattice Telecommunications Asset Development Company Limited and National Grid Wireless No.2 Limited \(2008\)](#), the CC concluded that a behavioural remedy would preserve the benefits that could arise from the merger (which would be lost under a divestiture remedy), including passing back cost savings to customers and reducing the risks associated with the digital switchover process.

have scope to charge higher prices, or not pass on cost reductions, due to the reduction in competitive pressures resulting from the merger.³²

- (b) Where there are network effects, an increase in the number of access points to the network may result in an increase in the value of the network to customers. However, given that this would also be likely to increase the barriers to entry and expansion, the CMA would need to weigh up the overall effects.
- (c) Vertical mergers involve the merging of firms at different levels of the supply chain of a particular good or service. Vertical mergers may generate efficiencies³³ that could potentially result in benefits to customers, such as lower prices, improved quality or greater innovation, even when the merger also substantially lessens competition. Examples include improved coordination, for instance, in marketing and product design between firms at different stages of the supply chain; lower transaction and inventory costs; and removal of possible 'double marginalisation' that may occur when two non-integrated firms both have significant market power.³⁴ However, as for all RCBs, the CMA would need to be satisfied that these effects would not be likely to be achieved absent the merger.

Evidence and engagement with the CMA on RCBs

- 3.35 The merger parties will be expected to provide verifiable evidence regarding the nature and scale of RCBs that they claim to result from the merger and to demonstrate that these fall within the Act's definition of such benefits (see paragraphs 3.27-3.30). The CMA will typically consult relevant sectoral regulators regarding any claimed RCBs and may consult other industry experts where relevant.

³² For example, in the CMA's investigation into [the anticipated merger between J Sainsbury Plc and Asda Group Ltd \(2019\)](#), the CMA found that rivalry-enhancing efficiencies resulting from the merger had the potential to give rise to RCBs. This was because the CMA had found that the merged entity would be able to realise merger-specific procurement savings which would act as an incentive on the merger parties to improve their offer to customers (eg through lower prices, higher quality, greater choice of goods or service) in a timely manner. However, the CMA found that this incentive would only be likely to result in RCBs if it outweighed the merger parties' incentive to raise prices as a result of the loss of rivalry. The CMA ultimately found that it would not.

³³ The extent to which efficiencies may also be taken into account by the CMA in determining whether a merger gives rise to an SLC is considered in the CMA's [Merger Assessment Guidelines \(CMA129\)](#).

³⁴ Double marginalisation may occur because, in the absence of price discrimination, each non-integrated firm has the incentive to raise prices above cost without taking account of the fact that this lowers the output of the other. The result is lower output and profits (and higher prices) than if the two firms pursued a policy of joint profit maximisation.

- 3.36 Where merger parties believe that RCBs could have a significant bearing on the CMA's assessment of a merger, they should submit the relevant evidence to the CMA at the earliest possible opportunity. This helps to ensure that the CMA has the relevant information and evidence to assess any RCB claims effectively and engage with the merger parties (and also third parties, where appropriate to do so) within the constraints of the statutory timeframe. RCBs can result from a merger regardless of whether it gives rise to an SLC. For the avoidance of doubt, the CMA recognises that the provision of evidence by merger parties that RCBs will result from the merger does not imply that they accept the existence of an SLC.

4. Assessment of remedies offered at phase 1 (UILs)

- 4.1 At phase 1, Section 73(1) of the Act gives the CMA the power to accept UILs only where the CMA has concluded that the duty to refer is met and the CMA has decided not to apply any available exceptions to the duty to refer.³⁵ Any UILs accepted by the CMA must be for the purpose of remedying, mitigating or preventing the SLC concerned and any adverse effects identified.
- 4.2 The merger parties may be willing to resolve the competition concerns identified by offering UILs, for example to divest part of the merged entity, or the acquirer may offer UILs giving a formal commitment about its future conduct. However, it is always at the merger parties' discretion whether or not to offer UILs. The CMA cannot impose a remedy via an order at phase 1.³⁶ Where the CMA has concluded that the duty to refer is met and the merger parties do not offer UILs, or offer UILs that do not resolve the concerns arising from the merger, then the merger will be referred to phase 2 for an in-depth investigation.
- 4.3 In order to accept UILs, the CMA must be confident that all of the competition concerns that have been identified at phase 1 would be resolved by means of the UILs without the need for further investigation.³⁷ The need for confidence reflects the fact that, once UILs have been accepted, section 74(1) of the Act precludes a reference to a phase 2 investigation after that point. UILs are therefore appropriate only where the remedies proposed to resolve any competition concerns raised by the merger are clear-cut. Furthermore, those remedies must be capable of ready implementation.
- 4.4 For UILs to be clear-cut:
- (a) In relation to the substantive competition assessment, there must not be material doubts about the overall effectiveness of the remedy.

³⁵ In making its decision as to whether its duty to refer applies, the CMA will also consider whether it should exercise its discretion to apply any available exceptions to that duty to refer, such as where the markets concerned are not of sufficient importance to justify the making of a reference.

³⁶ Unless the CMA has previously accepted UILs and, for example, those undertakings are not being or will not be fulfilled, in which case the CMA gains order-making powers under [Section 75](#) of the Act.

³⁷ The Act does not allow the CMA to use its discretion not to refer in relation to certain SLC markets and accept UILs to resolve an SLC in another market. This is because the CMA has a duty to refer a 'relevant merger situation' (ie the full transaction) which results/has resulted in an SLC rather than aspects or parts of the transaction. This means that the CMA can only either accept UILs to resolve concerns arising from the relevant merger situation or apply the exemption to the duty to refer in relation to the relevant merger situation (where applicable).

(b) In practical terms, UILs must not be of such complexity that their assessment, specification and implementation are not feasible within the constraints of the phase 1 timetable.³⁸

4.5 Therefore, the more complex a UILs proposal, the greater the need for early dialogue between the CMA and the merger parties to ensure that there is sufficient time and information for the CMA to assess these complexities. The CMA is available to provide feedback to merger parties from an early stage (including during pre-notification) on remedy proposals.

4.6 The CMA's test for reference at phase 1 is whether there is a realistic prospect of an SLC, rather than establishing an SLC on the balance of probabilities, which is the test at phase 2. This means that the CMA may accept a more extensive remedy offer at phase 1 through UILs than might be needed following a detailed phase 2 investigation.³⁹

4.7 As a general rule, and in line with the CMA's starting point detailed in paragraph 3.5(a), the CMA will seek to resolve competition concerns rather than simply mitigate concerns. The CMA is mindful that at phase 2, it has significant remedy powers under Schedule 8 to the Act, including the ability to prohibit a merger, and that it has increased time available in the context of a phase 2 merger investigation to consider remedies in more detail. The CMA is therefore unlikely to accept an offer of UILs at phase 1 where these do not comprehensively resolve the SLC unless it is clear that at phase 2 it would be materially no better placed than it had been at phase 1 to achieve a remedy that would restore the levels of competition that would have prevailed absent the merger.⁴⁰

³⁸ For example, in cases where the merger parties are proposing to divest a large number of separate assets (eg sites) to multiple purchasers, the CMA may require the sale of assets to be grouped together in a limited number of packages, rather than implement the remedy through individual asset sales. For example, in the CMA's investigation into [the anticipated acquisition by Heineken UK Limited of Punch Taverns Holdco \(A\) Limited \(2017\)](#), the UILs given by Heineken to the CMA required that Heineken divest 30 pubs in no more than four packages. See also paragraph 6.19.

³⁹ The CMA is under a duty to refer where it believes that 'it is or may be the case that' a merger has resulted or may be expected to result in an SLC: [Section 22](#) and [Section 33](#) of the Act.

⁴⁰ See the OFT's investigation into [the anticipated acquisition by Co-operative Group Limited of Somerfield Limited \(2009\)](#), where the OFT, in its decision to accept the proposed UILs, stated that it approved a purchaser for one store, notwithstanding that it was a grocery retailer from outside the effective competitor set (as defined in the decision), given the demonstrable absence of any purchaser from within the effective competitor set. The OFT stated that approving that purchaser provided the most satisfactory and comprehensive means of restoring competition to pre-merger levels. The OFT stated that its decision was influenced by the fact that, were the merger to be referred to the CC for a phase 2 investigation, the CC would be no better placed than the OFT to identify an effective purchaser to resolve competition concerns in that local area.

- 4.8 Since structural remedies (see Chapter 6) are typically designed to address the SLC at source in order to restore the rivalry lost as a result of the merger, and most behavioural remedies do not do so (see Chapter 7), a structural remedy is more likely to be effective in resolving the SLC and its adverse effects than a behavioural remedy. In addition, the CMA's experience is that devising a workable and effective set of behavioural commitments within the context of a short, phase 1 timetable is typically more difficult than it would be for a structural remedy. Nevertheless, the CMA will consider behavioural remedy proposals put forward by merger parties in phase 1 with reference to the general approach outlined in Chapter 7, provided that these proposals fully substantiate, with appropriate evidence, the proposed remedy's effectiveness to the clear-cut standard.⁴¹
- 4.9 Where remedy proposals involve something other than the divestiture of a standalone business, merger parties are particularly advised to consider the following in light of the clear-cut standard:
- (a) engaging with the CMA sufficiently early on a without prejudice basis to ensure the CMA has sufficient time and information to fully assess the proposal (which may include engagement during pre-notification). In the CMA's experience, early constructive engagement on potential remedies can maximise the chance that a more complex remedy proposal will meet the clear-cut standard, as it gives the CMA time to fully assess the risks and consider appropriate safeguards; and
 - (b) if possible, facilitating early engagement between the CMA and third parties who would be affected by the proposed remedy. The CMA will seek to ensure that the merger parties are not in practice given a procedural advantage over interested third parties such as industry participants, for example because those third parties have much less time to comment on remedy proposals than the merger parties themselves. The merger parties' remedy proposal is more likely to be accepted where there is adequate time for robust third-party comment.
- 4.10 The CMA may have regard to the effect of any UILs on any RCBs (see paragraph 3.31).

⁴¹ See for example, the CMA's investigation into the [anticipated acquisition by Bouygues S.A. of Equans S.A.S \(2022\)](#), Decision that Undertakings might be accepted, at paragraphs 26-31.

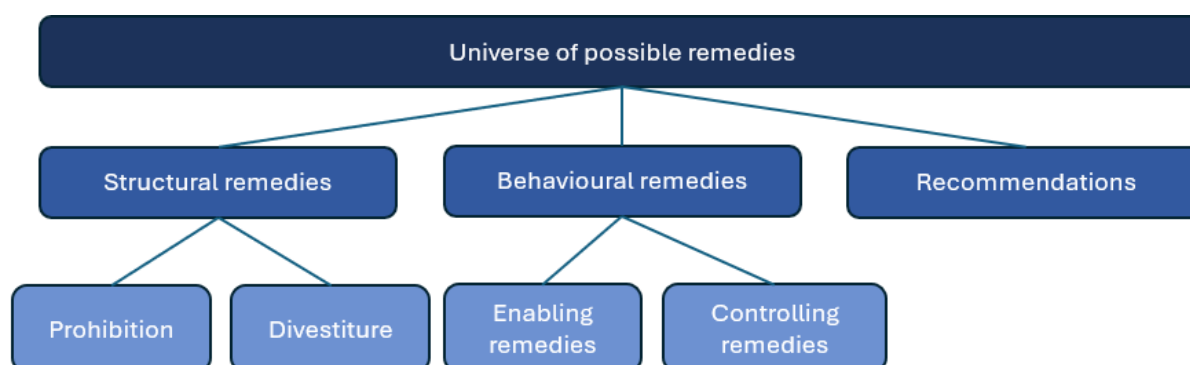
5. Overview of remedy types

- 5.1 This chapter provides an overview of possible remedy types.
- 5.2 The CMA assesses every remedy on its merits and whilst the distinction between types of remedies is not always clear cut, the classification of merger remedies can be helpful as different considerations apply when assessing their effectiveness. The relevant considerations that go to remedy effectiveness are discussed in more detail in Chapter 6 for structural remedies, and in Chapter 7 for behavioural remedies.

Remedy classification

- 5.3 As shown in Figure 1 and described below, remedies are conventionally classified as structural or behavioural. Some remedies, however, fall within a spectrum of the two classifications, with varying degrees of both structural and behavioural characteristics.⁴²

Figure 1: Overview of the universe of possible remedies



Source: CMA

- 5.4 The different possible types of merger remedies are explained in further detail below:

⁴² See for example, the CMA's investigation into [the anticipated acquisition by Reckitt Benckiser Group plc of the K-Y brand in the UK \(2015\)](#), where the CMA accepted undertakings which involved Reckitt Benckiser Group plc entering into an agreement to license the K-Y brand, rights and intellectual property rights in the UK in line with the criteria set out in section 12 of the final report, *inter alia*, on an exclusive, comprehensive and irrevocable basis for a total period of eight years, including a blackout period of at least one year, to enable the licensee to successfully transition from the K-Y brand to its own brand. The undertakings also involved Reckitt Benckiser Group plc entering into several transitional agreements with the licensee.

- (a) Structural remedies are generally one-off remedies that seek to reverse the changes to the structure of the market brought about by the merger under investigation, with the aim of re-establishing or maintaining the process of competitive rivalry which would be expected in the absence of the merger. Structural remedies can take various forms, ranging from prohibition of the merger to the divestiture of a standalone business, specific business units or assets. Once implemented, structural remedies typically result in a clean break, as they do not require ongoing regulatory oversight: divestiture remedies fully sever any material links between the merged entity and the purchaser and prohibitions prevent any future links between the merging parties.⁴³
- (b) Behavioural remedies are remedies that seek to regulate or constrain the ongoing behaviour of the merger parties and are aimed at modifying aspects of their conduct from what may be expected based on their incentives following the merger. Unlike structural remedies, they do not typically result in a clean break as they often require ongoing monitoring and enforcement. Behavioural remedies can take many forms, but it can be useful to distinguish between:
- (i) 'Enabling remedies', which seek to address competition concerns by removing obstacles to competition or stimulating the process of competition, such as requiring the newly merged entity to grant access to its competitors to a key input; and
 - (ii) 'Controlling remedies', which seek to restrict the adverse effects expected from a merger by regulating or controlling market outcomes, such as through a cap on prices, rather than addressing the source of the SLC.

Some enabling remedies, such as a remedy involving the licensing of intellectual property (IP) (eg patents, copyright and trademarks) could potentially stimulate competitive rivalry and/or enable market entry and therefore may have a similar effect to a structural remedy.⁴⁴ This may be

⁴³ See Dorte Hoeg, *European Merger Remedies, Law and Policy*, Hart Publishing, 2014 at p.43, citing work by Davies and Lyon.

⁴⁴ See the CMA's investigation into [the anticipated acquisition by Reckitt Benckiser Group plc of the K-Y brand in the UK \(2015\)](#), where the CMA decided that completion of the transaction would be conditional on Reckitt Benckiser Group plc agreeing a licensing agreement in line with criteria set out by the CMA. The purpose of the licensing agreement was to give a competitor (ie the licensee) an existing platform from which it could develop a new brand to rival the merger parties' offering. The ex-post case study on this merger remedy commissioned by the CMA (see the [Appendices to CMA186](#), 24 October 2023, paragraph 748) noted that while the licensee could have profitably exited the market before the end of its licensing agreement (a

the case where an enabling remedy initially seeks to regulate or constrain the ongoing behaviour of merger parties, but once implemented, would stimulate competitive rivalry such that it would continue having an impact in a long-lasting way even after the remedy is no longer in effect. In this case, as with structural remedies, this would mean that market outcomes can be determined by the competitive process without the need for ongoing intervention.⁴⁵ However, there are risks that an enabling remedy will not achieve its intended effect of stimulating competitive rivalry and/or enabling market entry, eg where the effects of the enabling remedy and its timing are uncertain and/or manifest only in the long term. The relevant considerations that go to the assessment of the effectiveness of behavioural remedies (including enabling remedies) are covered in more detail in Chapter 7.

- (c) Recommendations to others may vary in nature, depending on the particular circumstances of the case:
- (i) In some situations, certain regulations or conduct may inhibit entry or restrict market outcomes (eg planning or certification requirements). In these rare situations, the CMA may recommend modifications of these requirements to the Government or other controlling body to resolve an SLC or to control the adverse effects of a merger. For example, in a regulated sector, the CMA may seek to take steps to address the effects of a merger by recommending a modification to a licence condition.
 - (i) In deciding whether to make a recommendation to Government or other controlling body for remedial action, the CMA will consider the likelihood of its recommendation being adopted. In view of this uncertainty, the CMA will generally only make recommendations for action by others where it lacks the ability to implement relevant

significant risk to the effectiveness of this remedy), it chose instead to invest in the product, retaining competitive rivalry in the market.

⁴⁵ See the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#), where the CMA accepted an investment commitment remedy requiring the merged entity to legally commit to a network investment plan over an eight-year period. The CMA found that this commitment would increase the merged entity's network capacity, providing it with a strong incentive to fill that capacity by making more attractive offers to customers, and that over the longer-term this remedy would also reduce the merged entity's unit cost of expanding capacity in response to increased demand. This remedy could therefore be considered to have a structural effect as it would fundamentally change the incentives of the merged entity and its rivals, thereby strengthening competition without the need for ongoing intervention.

remedies itself, and only after consultation with the organisations possessing the relevant powers.⁴⁶

- 5.5 Whether a remedy is classified as structural or behavioural may depend on how it is specified. For example, a remedy involving IP could be: (a) structural if it involves a divestiture of the IP or a licence of an IP right that is exclusive, irrevocable and non-terminable with no performance-related royalties; (b) behavioural if it involves a licensee relying on the licensor for updates of the technology or continuing access to specialist inputs or know-how (see also footnote 42); or (c) a structural/behavioural hybrid if, for example, it involves divesting IP with some ongoing requirements.⁴⁷ The key distinguishing feature therefore with IP remedies is the extent to which there is any material ongoing link between the relevant parties.

⁴⁶ The CC's investigation into [the proposed acquisition of certain assets representing the Air-Shields business of Hill-Rom, Inc, a subsidiary of Hillenbrand Industries \(2004\)](#) is a rare example of the use of a recommendation. In this case, the package of remedies included the CC making recommendations to UK health departments and their procurement agencies that they take action to encourage market entry and strengthen the buyer power of NHS trusts in order to act as a further competitive restraint on the merged entity in the longer term.

⁴⁷ See the CMA's investigation into [the completed acquisition by Cerelia group holdings of certain assets relating to the UK and Ireland Dough business \(Jus-Rol\) of General Mills Inc \(2023\)](#), where Cérélia, as well as being required to divest the intangible assets and IP acquired by Cérélia from GMI Sarl in relation to the UK and the Republic of Ireland dough business operated under the 'Jus-Rol' brand, was also required to provide a supply contract with the approved purchaser.

6. Structural remedies – effectiveness considerations

- 6.1 As set out in Chapter 5, structural remedies are generally one-off remedies that seek to reverse the changes to the structure of the market brought about by the merger under investigation. Structural remedies include prohibition, various types of divestiture and certain other remedies such as some forms of IP licensing.
- 6.2 As outlined in Chapter 3, in assessing the effectiveness of a remedy, the CMA will take account of its impact on the SLC and its adverse effects; its risk profile; practicality; and duration and timing, ie the Effectiveness Criteria. In doing so, the CMA will have regard to particular categories of risk that may arise with structural remedies, in particular, composition, purchaser and asset risk (see paragraph 6.9).
- 6.3 This chapter provides guidance on the different types of, and considerations relating to, structural remedies. The chapter is structured as follows:
- (a) Prohibition;
 - (b) Divestiture remedies, and in particular it outlines:
 - (i) The CMA's overall approach to assessing the effectiveness of divestiture remedies; and
 - (ii) The relevance of each of asset, composition and purchaser risks to this assessment.
 - (c) IP divestitures;
 - (d) Mitigating the risks of complex structural remedies, and in particular the use of:
 - (i) Upfront buyers;
 - (ii) Divestiture trustees;
 - (iii) Monitoring trustees and / or independent experts; and
 - (iv) Fall-back remedies.
 - (e) The divestiture of minority shareholdings in the party to be acquired; and
 - (f) The review of divestiture transaction agreements.

Prohibition

- 6.4 The CMA will generally consider the full prohibition of an anticipated merger to be an effective remedy as it necessarily maintains competitive rivalry in a market that would have otherwise been changed by the merger. Prohibition of a merger will generally have a long-term effect, be capable of ready implementation and have a low risk of not achieving its intended effect.
- 6.5 Where a merger is prohibited by the CMA, the CMA will normally limit this prohibition period to 10 years.

Divestiture remedies

Overall approach to assessing the effectiveness of divestiture remedies

- 6.6 As outlined in Chapter 5, divestiture remedies are the primary form of structural remedy, aside from prohibition. Divestiture remedies can vary considerably in scope and may involve the sale of a standalone business, part of a business or a collection of assets.
- 6.7 Divestiture remedies generally seek to address the SLC at its source by transferring a business, part of a business or assets that gave rise to the SLC to a third party that will use the assets to compete with the merged entity. A divestiture remedy may restore competitive rivalry in a market where an SLC has been found by either creating a new source of competition, through disposal of a business, part of a business or a set of assets to a new market participant, or by strengthening an existing source of competition, through disposal to an existing market participant independent of the merger parties.
- 6.8 As divestiture remedies represent permanent changes to market structure, they typically have a long-term effect. The merger parties will generally be prohibited from subsequently purchasing assets or shareholdings sold as part of a divestiture remedy or acquiring material influence over them to prevent the SLC from re-emerging. The CMA will normally limit this prohibition to a period of 10 years.
- 6.9 In assessing the effectiveness of a proposed divestiture remedy, the CMA will have particular regard to the following categories of risk, which will affect the extent to which it resolves the SLC and its adverse effects, its practicality and overall risk profile. These are:
- (a) *Composition risks*: these are risks that the scope of the divestiture remedy 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. The CMA will consider whether the divestiture remedy includes all the assets the purchaser needs to compete effectively and restore rivalry in the market where an SLC has been found. The CMA will also consider the practicality of the remedy, including the feasibility of splitting assets from a wider business where the divestiture does not involve a standalone business and of obtaining any required third-party consents.

(b) *Purchaser risks*: these are risks that a suitable purchaser is not available or that the merger parties will dispose to a weak or otherwise inappropriate purchaser that fails to restore competitive rivalry in the market where an SLC has been found.

(c) *Asset risks*: these are risks that the competitive capability of a divestiture remedy will deteriorate before completion of the divestiture, for example, through the loss of customers or key members of staff.

6.10 While the assessment of remedies will reflect the particular circumstances of the case, the CMA's consideration of these risks (and any steps taken to mitigate them) will form a core part of the CMA's assessment of each of the Effectiveness Criteria.

6.11 The incentives of merger parties may serve to increase the composition, purchaser and asset risks of divestiture. Although merger parties will normally have an incentive to maximise the disposal proceeds of a divestiture, they will also have incentives to limit the future competitive impact of a divestiture on themselves. Merger parties may therefore seek to sell less competitive assets/businesses (composition risks) and target them to firms which they perceive as weaker competitors (purchaser risks). They may also allow the competitiveness of the divestiture remedy to decline during the divestiture process (asset risks).

6.12 The next sections of this chapter provide further detail on how the CMA considers the composition risk, purchaser risk and asset risk of divestiture remedies.

Composition risk – scope of the divestiture package

6.13 The specific composition of the divestiture package will affect the extent to which it addresses the SLC and its adverse effects, its risk profile and its practicability.

- 6.14 The scope of the divestiture package should be appropriately specified and configured to address the risk that the composition of the divestiture package may not allow a purchaser to operate as an effective competitor in the market or be too constrained or otherwise not appropriately specified to attract a suitable purchaser. In defining the scope of a divestiture remedy, the CMA will normally seek to identify the smallest viable, standalone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area or areas of competitive overlap. This may comprise a subsidiary or a division or the whole of the business acquired.
- 6.15 In identifying a divestiture remedy, the CMA will take, as its starting point, divestiture of all or part of the acquired business,⁴⁸ rather than the acquiring business. This will normally be an effective remedy because it will restore the status quo that existed prior to the merger. However, the CMA will consider a divestiture drawn from the acquiring business if this is not subject to greater risk in resolving the SLC.^{49,50} In appropriate cases, the CMA may be willing to leave open to the merger parties which of the overlapping businesses they wish to sell, with the UILs, Final Undertakings or Final Order stipulating that one of them must be sold.⁵¹
- 6.16 The CMA will generally require the divestiture of the entire overlap giving rise to an SLC. Doing so ensures that the SLC is addressed in full and avoids risks associated with carve-out divestitures (as set out in paragraphs 6.21-6.27). However, in phase 1 mergers involving local markets where the CMA

⁴⁸ See [Somerfield plc v Competition Commission \[2006\] CAT 4](#), where the CAT confirmed that it was reasonable for the CC, as a starting point, to consider that restoring the *status quo ante* would normally involve reversing the completed acquisition unless the contrary were shown.

⁴⁹ See the CMA's investigation into the [anticipated acquisition by Celesio AG of Sainsbury's Supermarkets Limited UK Pharmacy Business \(2017\)](#), where the CMA concluded that, with the exception of Christchurch and Sandy, the divestiture of a particular Lloyds pharmacy in each of the areas where the CMA had found an SLC would be an effective and proportionate remedy to resolve the SLC that had been identified. The CMA found that in Christchurch and Sandy, the divestiture of either of two particular Lloyds pharmacies in these areas would be an effective and proportionate remedy to resolve the SLC that had been identified. The CMA also decided that a number of other safeguards were required to protect the pharmacies to be divested to ensure that there were no risks of asset deterioration occurring during the sale process. See also, for example, the CMA's investigation into the [completed acquisition by Breedon Group plc of certain assets of Cemex Investments Limited \(2020\)](#), Decision on acceptance of undertakings in lieu of reference, where the CMA accepted UILs encompassing sites from both merger parties, and the CMA's investigation into the [anticipated acquisition by Safran S.A. of a part of Collins Aerospace's \(a business unit of RTX Corporation\) actuation and flight control business \(2025\)](#), Decision on Final Acceptance of Undertakings at Annex 1, paragraph 14.

⁵⁰ The CMA will (in line with statements of the CAT in [Somerfield plc v Competition Commission \[2006\] CAT 4](#)) not seek to prevent an acquirer from 'trading up' by selling its own business, but will consider whether a sale of the acquirer's own business raises its own competition concerns or issues of achievability of divestiture.

⁵¹ See the CMA's investigation into the [completed acquisition by Topps Tiles Plc of certain assets of Tildist Realisations Limited \(formerly CTD Tiles Limited\) \(2025\)](#), where the CMA gave Topps Tiles Plc the option to divest either Topps-branded stores or CTD-branded stores.

has applied a filter or decision-rule, it may accept divestitures that do not remove the entire increment caused by the merger in the market or markets in which it has identified a realistic prospect of an SLC. In such cases, the CMA may accept divestitures of local sites that reduce the merged entity's position below the threshold at which it considers there to be a realistic prospect of an SLC applying the filter or decision-rule.⁵² However, merger parties will need to provide robust evidence to demonstrate that divestiture remedies which do not remove the entire increment are nevertheless effective and will enable the purchaser to compete effectively having regard, for example, to the materiality of any economies of scale from operating multiple local sites.⁵³

- 6.17 In some circumstances, for example in a completed merger where there has been degradation of the acquired business, the CMA may require that the scope of the divestiture exceeds that which was purchased so as to fully restore the competitive potential of the acquired business to the position that would have existed in the absence of the merger.⁵⁴
- 6.18 In some cases, an effective divestiture may require supplementary behavioural remedies for a specified period (eg to secure supplies of an essential input or service from the merger parties to the divested business) (see also paragraph 6.31).⁵⁵

⁵² See the CMA's investigation into [the completed acquisition by Bellis Acquisition Company 3 Limited of Asda Group Limited \(2021\)](#), and the CMA's investigation into [the completed acquisition by Clayton, Dubilier & Rice Holdings, LLC \(2022\) of WM Morrison Supermarkets Limited \(2022\)](#). In both cases, the CMA accepted undertakings where the merger parties committed to divest a site or sites in each of the areas where the CMA found a realistic prospect of an SLC (SLC Area), such that no areas would fail the CMA's decision rule following the divestment (ie without necessarily removing the entire increment caused by the mergers). In both cases, the merger parties agreed to – in the event that the initial sets of divestment sites were found to be unsuitable or insufficient – divest in each SLC Area such other site or sites to address effectively the SLC up to and including the increment caused by the relevant mergers.

⁵³ Ibid. See also the CMA's investigation of the [completed acquisition by VetPartners Limited of Goddard Holdco Limited \(2022\)](#), at paragraphs 14-31 of the Decision that Undertakings Might be Accepted. VetPartners' preferred divestiture package included six sites which would result in no catchment area failing the CMA's filter. The CMA rejected this remedy and provisionally accepted VetPartners' alternative divestiture package, which included two additional sites, on the basis that it would maintain the existing hub-and-spoke arrangements of the divested sites.

⁵⁴ For example, see the CMA's investigation to the [completed acquisition by Facebook, Inc \(now Meta Platforms, Inc\) of Giphy, Inc \(2022\)](#), final report at paragraphs 11.42-11.43.

⁵⁵ See the CMA's investigation into [the anticipated acquisition by Liqui-Box, Inc. of the flexible and rigid plastic packaging business of DS Smith \(2019\)](#), where Liqui-Box, Inc. offered to supplement the divestment of a package of assets with, among other agreements, a transitional services agreement governing the transitional operation of the divested production lines by Liqui-Box from one of its facilities while the 'lift and lay' to the proposed purchaser's facility remained underway, and also the supply of inventory and raw materials, during the transitional period. See also the CMA's investigation into the [anticipated acquisition by Theramex HQ UK Limited of the European Rights to Viatrix' Femoston and Duphaston Products \(2024\)](#), where the merger parties agreed to divest the rights to commercialise Femoston and Duphaston in the UK, and to also (i) provide timely access to all

- 6.19 The divestiture may comprise the sale of all relevant assets in one package or the sale of assets grouped together in a limited number of packages. When considering whether a divestiture can be accomplished through the sale of multiple packages rather than a single package, the CMA will have regard in particular to the effect on the SLC and to the practicality of the remedy proposal.⁵⁶ The CMA will be less likely to accept divestiture of multiple packages where the scale of a business may affect its competitive strength or its ability to operate, or where there are interlinkages and/or business synergies between different parts of the proposed divestment business.⁵⁷ The CMA will be more likely to accept divestiture of multiple packages where the individual packages being divested can operate on a largely standalone basis (eg this may be the case for certain shops or local services businesses depending on how their operations are structured). In determining how many packages the remedy might be divided into, the CMA will have regard to the effect on the competitiveness of the divestment business and also the practicality of the remedy. Each package will require a separate assessment and a separate purchaser suitability assessment and it is not practicable to deploy public resources to carry out a large number of such assessments. Where the CMA has accepted a divestiture through multiple packages in past cases, these have typically been limited to two to three packages depending on the overall number of assets or business units to be divested.
- 6.20 The scope of a divestiture remedy will be outlined, with reasons, in the CMA's decision to accept UILs or the phase 2 final report, and will be specified in greater detail in the UILs accepted, the Final Undertakings accepted or the Final Order made by the CMA when implementing the remedy. The merger parties may subsequently decide to add further assets to the specified remedy with the approval of the CMA in order to achieve a sale. The UILs, Final Undertakings, or Final Order may include an obligation that requires additional assets to be included in the package in certain circumstances.

regulatory information and clinical data which is in the merger parties' possession, custody or control which is not jurisdiction-specific, and which is reasonably required by the buyer to commercialise Femoston and attempt to relaunch Duphaston in the UK, and (ii) support the buyer throughout the regulatory approval process for Duphaston in the UK to the extent this is reasonably requested by the buyer.

⁵⁶ See, for example, the CMA's investigation into the [anticipated acquisition by Heineken UK Limited of Punch Taverns Holdco \(A\) Limited \(2017\)](#), where the CMA required the sale of the divestment businesses in no more than four packages.

⁵⁷ See, for example, the CMA's investigation into the [anticipated merger of Cargotec Corporation and Konecranes Plc \(2022\)](#), final report at paragraphs 13.383-13.385.

Divestiture of an existing business or ‘carve-out’ package of assets

- 6.21 The divestiture of an existing business, which can compete effectively on a standalone basis, independently of the merger parties, is often more likely to be an effective remedy than the divestiture of part of a business or a collection of assets (carve-out remedies).⁵⁸ While remedies which comprise something less than the divestiture of an existing ‘standalone’ business can address the SLC at source and generally have a long-term effect, they will also be more complex and present additional risks that the CMA will need to consider.⁵⁹
- 6.22 Where the CMA is considering a carve-out remedy, it will seek to ensure that the carve-out package includes all assets, functions and capabilities necessary for the purchaser to operate it successfully and compete effectively.⁶⁰ The CMA will seek to understand, for example, where core assets and capabilities such as key customer relationships, technical expertise, research and development and strategic decision-making sit within the business and will seek to ensure that the divestiture package is structured in a way to ensure these capabilities transfer with the divestment business. The CMA may accept that some business functions are not core to the competitive capability of the carve-out business where it receives evidence that this is the case. Such functions may include (but not be limited to) certain back-office and/or non-strategic functions such as human resources and IT support (where a business is using common IT systems that could be supported by a new team).
- 6.23 Carve-out remedies typically present greater composition risks than divestments of standalone businesses or business units:

⁵⁸ See, for example, the CMA’s investigation into [the completed acquisition by CHC Group LLC of Offshore Helicopter Services UK Limited, Offshore Services Australasia Pty Ltd and Offshore Helicopter Services Denmark A/S \(previously part of Babcock International Group plc\) \(2022\)](#), final report at paragraph 9.45. See also the CMA’s investigation into [the completed acquisition by Ecolab Inc. of The Holchem Group Limited \(2019\)](#), final report at paragraph 10.143.

⁵⁹ These include composition risks discussed in this section and also purchaser risks discussed in the following section. See also, for example, the CMA’s investigation into [the anticipated merger of Cargotec Corporation and Konecranes Plc \(2022\)](#), where the CMA found substantial and wide-ranging composition risks associated with the merger parties’ carve-out proposal: final report at paragraphs 13.486–13.493 and the further paragraphs referred therein. If a carved-out remedy is proposed, the CMA will prefer that all the assets are provided by one of the merger parties unless it can be demonstrated to the CMA’s satisfaction that there is no significant increase in risk from a mix-and-match alternative or any additional risks resulting from a mix-and-match alternative can be adequately addressed.

⁶⁰ See for example, the CMA’s investigation into [the anticipated merger of Cargotec Corporation and Konecranes Plc \(2022\)](#), final report at paragraph 13.488.

- (a) The assets or part of a business to be divested may be more difficult to define or ‘carve-out’ from an underlying business and there are typically significant information asymmetries between the seller and purchaser/the CMA around what is needed for the divestment business to compete effectively.⁶¹ The ex-post review of carve-out remedies, summarised in CMA186, found that purchasers face challenges in conducting robust due diligence on divestiture packages in carve-out remedies, which limits the usefulness of such diligence against composition risk.⁶²
- (b) Where merger parties have more influence over the content of the divestiture package (eg where the CMA specifies a framework or minimum package and allows the merger parties to negotiate the details), this influence may provide merger parties with the ability to reduce the competitive capability of the divestment business.⁶³ For this reason, the CMA will typically seek to minimise the discretion for negotiations between merger parties and prospective purchasers over the content of divestiture packages and / or take a cautious approach when defining the extent of the minimum package.⁶⁴
- (c) A carve-out may unwind or undermine economies of scale, density or scope.⁶⁵ Such unwinding or undermining can significantly increase the risk that the remedy will be ineffective.⁶⁶
- (d) The transfer of customers to the purchaser will often depend on customer consent. The risk that a transfer will not be successful may vary according to the importance placed on the relevant merger party’s products or services by the customer. In some cases, the risk can be mitigated by designing the remedy as a ‘reverse carve-out’.⁶⁷ The CMA may also

⁶¹ See for example, the CMA’s investigation into [the anticipated merger of Cargotec Corporation and Konecranes Plc \(2022\)](#), final report at paragraph 13.124.

⁶² [Merger remedy evaluations \(CMA186\)](#), 24 October 2023, paragraph 4.26(d).

⁶³ [Merger remedy evaluations \(CMA186\)](#), 24 October 2023, paragraph 4.26(b) and footnote 21.

⁶⁴ [Merger remedy evaluations \(CMA186\)](#), 24 October 2023, paragraph 4.52(b) and (c).

⁶⁵ See, for example, the CMA’s investigation into [the anticipated merger of Cargotec Corporation and Konecranes Plc \(2022\)](#), final report at paragraphs 13.489-13.490 and the further paragraphs referred to therein.

⁶⁶ [Merger remedy evaluations \(CMA186\)](#), 24 October 2023, paragraph 4.26(a).

⁶⁷ A ‘reverse carve-out’ generally means the business is divested as a whole to a purchaser but the merged entity may retain, or buy back one or more assets that are not necessary for the viability and competitiveness of the divested business. See, for example, the CMA’s investigation into [the completed acquisition of GBST Holdings Limited by FNZ \(Australia\) Bidco Pty Ltd \(2021\)](#), where the CMA accepted that the full divestiture of GBST but with a right for FNZ to buy-back certain assets of GBST’s Capital Market business (divestiture with the right to buy-back certain assets) was an effective remedy, subject to certain safeguards built into the design of the remedy and sales process. See also the CMA’s investigation into [ION Investment Group Limited / Broadway Technology Holdings LLC - GOV.UK](#), where the CMA accepted, in phase 1, the sale of the entire share capital of Broadway (ie the entity and all its subsidiaries purchased by ION) to a suitable purchaser and the transfer back to

require the merger parties to secure consents from customers for the transfer of important contracts.⁶⁸

- 6.24 The CMA will also consider the feasibility and practicality of separation to ensure that a carve-out business retains its competitive capability in order to resolve the SLC effectively. The CMA will take into consideration factors such as how many assets are shared, and the feasibility and practicability of splitting those assets from a wider business. In general, the higher the degree of integration and the more complex the products and services, the greater the risk a carve-out business will lose some of its competitive capability on implementation.⁶⁹
- 6.25 The CMA will therefore generally prefer the divestiture of an existing business, which can compete effectively on a standalone basis, independently of the merger parties, because such a divestiture avoids many of the composition risks of carve-out remedies outlined above and can generally be achieved with greater speed. The CMA may, however, accept a divestiture of a carve-out business where it can be adequately specified and where it does not present material risks relating to losses of economies of scale, density or scope, or relating to the transfer of customers to the divestment business.
- 6.26 Given the composition risks outlined above, the CMA will require detailed specification of a carve-out remedy. The types of evidence that may be required by the CMA to allow it to fully assess composition risks include (to the extent available):
- (a) data on, and analysis of, the performance of previous comparable divestitures (within, or outside of merger control);
 - (b) any data merger parties have available regarding the performance of the relevant assets / business units (or of comparable assets / business units);

ION of the Broadway foreign exchange (FX) business. However, see also [Merger remedy evaluations \(CMA186\)](#), 24 October 2023, which noted that 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: see paragraph 4.26(c).

⁶⁸ See, for example, the CMA's investigation into [the anticipated acquisition by Hitachi Rail, Ltd of Thales SA's Ground Transportation Systems Business](#); and [the CMA's investigation into the completed acquisition by GXO Logistics, Inc. of Wincanton Plc](#).

⁶⁹ See, for example, the CMA's investigation into [the anticipated merger of Cargotec Corporation and Konecranes Plc \(2022\)](#), final report at paragraphs 13.490–13.491.

- (c) feedback from employees who are familiar with the relevant assets or who lead the relevant business units; and
 - (d) evidence on economies of scale, density or scope, as well as on the value of certain assets and the operational support they are likely to need.
- 6.27 In carve-out remedy cases, the CMA will generally expect the divesting party to provide a warranty in the transaction agreements that the assets transferred include all components necessary for the business to operate as an effective competitor in the relevant market, except as otherwise agreed with the purchaser and may require a ‘wrong pockets’ clause giving the purchaser the right to additional assets if the initial scope of the remedy is deemed insufficient.

Purchaser risk – suitable purchasers

- 6.28 The identity and capability of a purchaser will be of major importance in ensuring the success of a divestiture remedy. The ex-post evaluation of carve-out remedies, summarised in CMA186, noted that in certain circumstances, merger parties may be able to weaken future competition through their influence over the choice of the purchaser for a divestiture remedy.⁷⁰ The CMA’s purchaser approval process therefore requires the merger parties to obtain the CMA’s approval of the prospective purchaser. This mitigates purchaser risk by screening out prospective purchasers that do not meet certain minimum requirements.

Purchaser suitability criteria

- 6.29 The acquisition by the proposed purchaser must remedy, mitigate or prevent the SLC concerned and any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable. In order to assess whether acquisition by the proposed purchaser will adequately address the SLC, the CMA will need to be satisfied that: (a) the prospective purchaser is independent of the merger parties; (b) the prospective purchaser has the necessary capability to compete; (c) the prospective purchaser is committed to competing in the relevant market; and (d) divestiture to the purchaser will not create further competition concerns.

⁷⁰ [Merger remedy evaluations \(CMA186\)](#), 24 October 2023, paragraph 4.26(b).

Independence

- 6.30 The purchaser should have no significant connection to the merger parties that may compromise the purchaser's incentives to compete with the merged entity (eg an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance).⁷¹ It may also be appropriate to consider links between the purchaser and other market players.⁷² In requiring that the proposed purchaser be independent of and unconnected to the merger parties, the CMA will pay close attention to any links that would exist between the merger parties and the purchaser following divestiture. This includes any proprietary interest that the merger parties would retain in or over the divestment business that could impede the successful, independent operation of the divestment business.⁷³
- 6.31 Purchasers may require access to key inputs or services on appropriate terms from the merger parties, on an interim basis, in order to enable the divestment business to operate effectively. Such arrangements may be permitted by the CMA for a limited period.^{74,75} The CMA may also permit or require customer or key staff non-solicitation clauses or other measures to protect the purchaser from the merger parties for a limited period (eg generally up to one year, but where necessary to ensure the remedy's effectiveness, this may be a longer period of time) to enable the purchaser to become established as an effective competitor in the relevant market(s).

⁷¹ See [Co-Operative Group \(CWS\) Limited v Office of Fair Trading \[2007\] CAT 24](#), paragraph 195.

⁷² See the CMA's investigation into [the completed acquisition by Hain Frozen Foods UK Limited of Orchard House Foods Limited \(2016\)](#), in particular paragraph 9 of the UILs acceptance decision.

⁷³ The CMA may require that such links be severed or otherwise addressed as part of the remedy. See paragraph 2.5 of the [UILs given by SRCL Limited and Cliniserve Holdings Limited](#) to the OFT on 31 March 2009, and paragraph 10.2 of the [UILs given by Co-operative Group Limited](#) to the OFT in relation to its acquisition of Plymouth and South West Co-operative Limited on 26 March 2010.

⁷⁴ See the CMA's investigation into the [anticipated acquisition by Sika AG of MBCC Group \(2022\)](#), where the divestment business could, for a temporary transitional period, continue to receive certain products and services supplied by the selling party, subject to the adoption of strict firewall procedures to safeguard any competitively sensitive information related to, or arising from, such supply arrangements.

⁷⁵ It may be appropriate in certain circumstances for the purchaser of the divestment business to enter into a tolling or contract manufacturing agreement with the selling party, whereby the selling party will agree to provide the purchaser with certain services. Such an arrangement will typically be appropriate where this ensures the continuity of supply for the divestment business, but will normally be used: (a) to support a divestiture remedy; and (b) for a specified transitional period, and typically form part of a wider transitional services arrangement. The CMA will not typically consider such arrangements, eg a 'virtual divestiture' consisting of the divestiture of production capacity, to be appropriate as the primary remedy, given that they may have higher risks and costs than a conventional divestiture of a standalone business, and may require ongoing monitoring and compliance activity.

Capability

- 6.32 The purchaser must have access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets to enable the divestment business to be an effective competitor in the market. This access should be sufficient to enable the divestment business to continue to develop as an effective competitor. For example, a highly leveraged acquisition of the divestment business which leaves little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion.
- 6.33 The CMA will generally require that the divestment business include all capabilities required to operate the business. There may, however, be exceptional situations where the purchaser would also need to have certain capabilities to operate the business successfully (see also paragraph 6.40). In those exceptional circumstances, where the assets require considerable technical expertise and support (eg if they comprise highly specialised IP), the purchaser must not only possess the relevant expertise but also ensure that the relevant staff and support functions have sufficient capacity to give the relevant assets the support that they need.

Commitment

- 6.34 The CMA will wish to satisfy itself that the purchaser has an appropriate business plan and objectives for competing in the relevant market(s), and that the purchaser has the incentive and intention to maintain and operate the relevant business as part of a viable and active business⁷⁶ in competition with the merged entity and other competitors in the relevant market.^{77,78}

Absence of competitive or regulatory concerns.

- 6.35 Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns. On the basis that the CMA will approve a purchaser only where it is confident that the acquisition by that proposed

⁷⁶ The CMA will routinely ask to see the proposed purchaser's annual accounts and business plan for the divestment business in assessing whether this criterion is satisfied.

⁷⁷ This approach was upheld by the CAT in [Somerfield plc v Competition Commission \[2006\] CAT 4](#). The CC excluded limited assortment discount retailers from acquiring Somerfield stores on the basis that these were insufficiently close competitors to conventional supermarkets.

⁷⁸ The CMA will normally require the selling party to require from the purchaser a warranty reflecting this obligation, or a variant of it, in its transaction agreements. Such wording is included in the CMA's [UIL template](#). See paragraphs 2.5 and 3.1 of the [UILs given by Vision Express \(UK\) Limited](#) to the CMA on 15 November 2017 in relation to the CMA's investigation into [its acquisition of 209 Tesco Opticians outlets \(2017\)](#).

purchaser does not itself create a realistic prospect of an SLC within any market or markets in the UK, the CMA would not expect to investigate this transaction. This is regardless of whether or not the transaction constitutes a relevant merger situation under the Act.⁷⁹

- 6.36 The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority,⁸⁰ or satisfy the CMA that these requirements will be obtained within a reasonable timeframe.

Purchaser approval process

- 6.37 When determining whether the proposed purchaser has the financial resources, expertise, incentive and intention to maintain and operate the divestment business, the CMA will seek to assess whether the purchaser will compete vigorously in the future on the basis of what it has acquired to resolve the SLC and the adverse effects resulting from it. The CMA will consider carefully the evidential basis on which the merger parties (and the proposed purchaser) submit that the proposed purchaser will have an incentive to compete going forward.⁸¹
- 6.38 Except in circumstances where a divestiture trustee is in place (see paragraphs 6.68-6.69), the merger parties are responsible for securing a prospective purchaser and demonstrating that it satisfies the CMA's criteria for a suitable purchaser. However, the CMA seek to assess the suitability of a potential purchaser (through eg interviews and questionnaires) and will keep the progress of the divestiture under close scrutiny.
- 6.39 Where the merger parties receive interest in the divestiture remedy from multiple prospective purchasers, they may ask the CMA to evaluate the suitability of a small set of short-listed purchasers. This is to avoid the merger parties progressing one prospective purchaser, possibly through lengthy due diligence, but this purchaser then being found not to satisfy the CMA's purchaser suitability criteria, and the merger parties having to start the assessment process afresh.

⁷⁹ The transaction could still require merger control filings outside the UK, although the merger parties would generally be expected to satisfy the CMA that merger clearances will be obtained within a reasonable timeframe.

⁸⁰ This is because the CMA needs to be satisfied that the divestiture to the proposed purchaser will in fact go ahead. To the extent that a purchaser would face difficulties in obtaining such consents, this may call into question the suitability of the purchaser.

⁸¹ The CMA will scrutinise the purchaser's incentives particularly carefully in a situation in which the purchaser is paying no consideration for the divested assets or business, or a price that is materially below market value.

Specific purchaser risks associated with carve-out remedies

- 6.40 Where a proposed divestiture comprises part of a business or specified assets, such as IP rights, the capabilities and resources of prospective purchasers are likely to be more critical to a successful outcome than for a standalone business. A remedy of assets or a part of a business proposed for divestiture may, for example, lack an established infrastructure and its viability may therefore be more dependent on an appropriate match with the capabilities of the purchaser. However, the CMA will not typically accept that a purchaser will compensate for the deficiencies of a divestiture package,⁸² unless, for example, the CMA considers that these deficiencies do not give rise to material composition or purchaser risks.
- 6.41 The ex-post evaluation of carve-out remedies, summarised in CMA186, noted that merger parties may be able to weaken future competition through their influence over the choice of the purchaser for a divestiture remedy.⁸³ This risk is typically greater in carve-out remedies, where fewer prospective purchasers have the ability to become effective competitors. The CMA's purchaser approval process normally 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.⁸⁴ As a result, merger parties may have scope to promote weaker, rather than stronger, prospective purchasers.
- 6.42 The ex-post evaluation of carve-out remedies, summarised in CMA186, pointed to a number of steps the CMA can take to mitigate the purchaser risks set out above. In any individual case, the CMA will carefully consider the risks presented by the proposed remedy and the extent to which any mitigating steps can resolve those risks. In general, the use of upfront buyers and divestiture trustees are the primary means through which the CMA seeks to mitigate purchaser risk in carve-out remedies. These are discussed in detail at paragraphs 6.62-6.67 and paragraphs 6.68-6.69, respectively. In addition to

⁸² In the CMA's investigation into [the completed acquisition by Ecolab Inc. of The Holchem Group Limited \(2019\)](#), the CMA concluded that the purchasers proposed by the merger parties would not overcome the shortcomings of the design of the remedy put forward by Ecolab (final report at paragraph 10.235). This was upheld by the CAT, see [Ecolab Inc. v Competition and Markets Authority \[2020\] CAT 12](#) at paragraph 109, finding that 'on the basis of the evidence it had gathered, the CMA was within the bounds of its reasonable judgement in concluding that neither of the proposals from the two potential purchasers had a realistic prospect of meeting the basic deficiencies in the effectiveness' of the remedy put forward by Ecolab.

⁸³ [Merger remedy evaluations \(CMA186\)](#), 24 October 2023, paragraph 4.26(e).

⁸⁴ [Merger remedy evaluations \(CMA186\)](#), 24 October 2023, paragraph 4.26(e).

these primary measures, in most cases, the CMA is likely to adopt a higher threshold for judging prospective carve-out purchasers as suitable.

Asset risk – ensuring an effective divestiture process

- 6.43 Asset risks affect the practicality of a proposed remedy. An effective divestiture process will protect the competitive potential of the divestment business before disposal and will enable a suitable purchaser to be secured in an acceptable timescale. The process should also allow prospective purchasers to make an appropriately informed acquisition decision.
- 6.44 There are risks that the competitive capability of the divestment business (or the assets to be divested) may deteriorate either during the merger review or during the divestiture process. Where an acquirer believes it will be required to divest a business it may not have an incentive to invest to support the performance of that business, and may in fact be incentivised to run down or neglect the business or assets being divested, in order to reduce its future competitive impact. Once the decision has been made to divest a business or assets, that can introduce heightened uncertainty about that business for employees, customers and suppliers who will be unsure of the future ownership, and this uncertainty can create asset risk. Finally, the asset risk may also be influenced by such factors as the length and complexity of the divestiture process and the pace at which customer goodwill and employee relations may erode.

Merger parties' hold-separate and asset maintenance obligations

- 6.45 Prior to the acceptance of UILs or Final Undertakings or the making of a Final Order, the CMA can impose Interim Measures at any time during the CMA's review to prevent pre-emptive action.⁸⁵ Pre-emptive action is action which might prejudice the reference or might impede remedial action justified by the CMA's ultimate decision.⁸⁶ Interim Measures are designed to prevent integration between the acquirer and target, and ensure the competitive position of both businesses is maintained,⁸⁷ eg by ensuring each merger party continues to compete independently of each other; and placing obligations on

⁸⁵ If a merger has been notified to the CMA, then Interim Measures are likely to be put in place upon the completion of the merger (and, in some circumstances, in advance of completion). If the CMA investigates a completed merger which has not been notified to it, it is likely to impose an IEO very shortly after sending an initial enquiry letter. See [Interim measures in merger investigations \(CMA108\)](#), 2 January 2025, paragraph 2.2.

⁸⁶ See [Sections 72\(8\) and 80\(10\)](#) of the Act.

⁸⁷ Interim Measures include Initial Enforcement Orders (IEOs), which can be imposed at Phase 1. IEOs will generally continue at phase 2 or be replaced by an Interim Order or Interim Undertakings. See [Interim measures in merger investigations \(CMA108\)](#).

each merger party to maintain its respective business, eg to take steps to encourage all key staff to remain with its business; to maintain and preserve its existing business offering; and ensure sufficient resources are made available for the development of its business in accordance with its pre-merger business plan.⁸⁸ To the extent that Interim Measures are not already in place from the outset of a merger investigation, the CMA will consider imposing them at a later stage if it identifies an asset risk involving, in particular, a failure to sustain the competitive capability of, and/or independence of, the merger parties' respective businesses.⁸⁹

- 6.46 Interim Measures are superseded by the UILs or Final Undertakings following their acceptance, or by the Final Order once it is made. The obligations on the merger parties under the Interim Measures will normally be transferred across to the UILs, Final Undertakings or Final Order, for the purpose of preserving the divestment business during the divestiture process and until effective disposal is achieved. The CMA will consider on a case-by-case basis whether the scope of these hold-separate and asset maintenance obligations under the UILs, Final Undertakings or Final Order may be limited to obligations in relation to the divestment business, provided that this does not undermine the viability or competitive capability of the divestment business, and there are appropriate controls and safeguards in place, eg putting in place ringfencing measures to ensure that the retained businesses of the merger parties do not have access to confidential information relating to the divestment business.⁹⁰
- 6.47 The appointment of a hold-separate manager, or management team, may also be required to manage each merger party's business in order to ensure the independence and competitive position of each merger party's business is maintained.⁹¹ Depending on the particular circumstances of the case, a hold-separate manager can be appointed at any time during the CMA's review (whether under the CMA's Interim Measures or under the UILs, Final Undertakings or Final order). The CMA will consider in each case the

⁸⁸ See, for example, the CMA's [standard IEO template](#).

⁸⁹ See for example, the CMA's investigation into the [anticipated acquisition by Sika AG of MBCC Group \(2022\)](#) and the CMA's investigation into the [anticipated acquisition by Broadcom Inc. of VMware, Inc. \(2023\)](#). See also the CMA's investigation into the [anticipated acquisition by Theramex HQ UK Limited of the European Rights to Viatris' Femoston and Duphaston Products \(2024\)](#), where the IEO was varied shortly after the phase 1 decision to clarify the scope of the order.

⁹⁰ See, for example, the CMA's investigation into the [completed acquisition by GXO Logistics, Inc. of Wincanton Plc \(2025\)](#) where, at the outset of the remedy implementation phase, the IEO was replaced by an interim order permitting GXO to integrate with Wincanton, subject to the merger parties putting in place appropriate ringfencing measures to protect the divestment business. See also the CMA's investigation into the [anticipated acquisition by Hitachi Rail, Ltd of Thales SA's Ground Transportation Systems Business \(2023\)](#).

⁹¹ See [Interim measures in merger investigations \(CMA108\)](#), 2 January 2025, paragraphs 4.7-4.23.

appropriateness of the use of a hold-separate manager to manage the divestment business to ensure that the divestment business is managed independently of the merger parties during the divestiture phase, particularly in the case of complex carve-out remedies where the carve-out business may not have its own dedicated management team (or a management team that is not shared with the business that will be retained by the merged entity), to reduce asset risk.

The divestiture period

- 6.48 Where the CMA does not require an upfront buyer (see paragraph 6.63), the CMA will usually determine the period in which the merger parties should achieve effective disposal of a divestiture remedy to a suitable purchaser from the date UILs or Final Undertakings are accepted or a Final Order is made (ie the initial divestiture period). The CMA will state the initial divestiture period in its UILs or final report. However, this period may be excised if it is considered that disclosure to third parties may undermine the divestiture process.
- 6.49 The length of the initial divestiture period will depend on the circumstances of the case but will normally be a maximum period of six months. The CMA, when determining the initial divestiture period, will seek to balance factors which favour a shorter duration, such as minimising asset risk and giving rapid effect to the remedy, with factors that favour a longer duration, such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate due diligence. The initial divestiture period may be extended by the CMA where this is necessary to achieve an effective disposal. While the CMA will consider factors favouring a longer duration and may extend the initial divestiture period where necessary to achieve an effective disposal, asset risks will typically increase over time and the CMA will seek to manage these risks by ensuring the relevant time period is as short as possible. Where the initial divestiture period is longer, or is extended, the CMA will consider the need for additional measures to guard against asset risk such as the appointment of a monitoring trustee (if one has not yet been appointed) (see paragraphs 6.74 to 6.76), or a divestiture trustee (see paragraphs 6.68-6.69).
- 6.50 While the merger parties are responsible for securing a suitable purchaser during the initial divestiture period, the CMA will keep the progress of the divestiture process under close review, through regular reporting and, where applicable, through the scrutiny of a monitoring trustee.

IP divestitures

- 6.51 In some cases, structural remedies other than divestiture or prohibition might be sufficient to address the SLC and its adverse effects. A remedy might comprise, for example, an amendment to an IP licence to grant a licensee a perpetual and royalty-free licence.⁹²
- 6.52 For licensing of IP alone to address the SLC and any resulting adverse effects, it must be sufficient to allow the licensee to replicate the constraint that the relevant merger party provided prior to the merger.
- 6.53 When considering an IP licensing remedy, it is important that the scope of the overall package is appropriately specified and configured to address the composition risk that it may not allow a purchaser to operate as an effective competitor in the market. In particular, it will be important to understand what, if any, resources other than the IP licence would be required to replicate the competitive constraint (eg technical expertise, sales networks, or other operating resources). In the CMA's experience, it is rare for IP on its own to be sufficient to allow a purchaser to replicate the lost constraint.
- 6.54 An IP licensing remedy may not be practical and raise material composition and purchaser risks where the precise scope of the IP licences, technical expertise, or other resources a purchaser would need are unclear, or whether there would be significant complexity for a purchaser in commercialising the IP (or the products or services derived from the IP).
- 6.55 The CMA will, therefore, generally prefer to divest a business including IP rights, where this is feasible, rather than rely on licensing IP alone. This is because divestiture of a business including IP rights is more likely to include all that the purchaser needs to compete effectively with the merger parties.
- 6.56 Where merger parties propose divesting or licensing⁹³ IP (eg patents, copyrights and trademarks), the CMA will ensure that:
- (a) the IP rights divested or licensed are sufficient in duration and scope to enhance significantly the purchaser's or licensee's ability to compete

⁹² See the OFT's investigations into the [anticipated acquisition by Tetra Laval Group of part of Carlisle Process Systems \(2006\)](#), where the OFT accepted UILs focused on an irrevocable, perpetual and exclusive licence of certain IP rights, and the [completed acquisition by Unilever of Alberto Culver Company \(2011\)](#), where the OFT accepted UILs from Unilever to divest the bar soap business of Alberto Culver, including the divestment of the Simple brand, which was effected by a perpetual and royalty-free licence covering UK, Ireland and the Channel Islands.

⁹³ See paragraph 6.51.

with the merger parties and thus resolve the SLC and any resulting adverse effects.⁹⁴ This may sometimes require less easily transferable forms of IP like ‘know-how’ to form part of the remedy. Where such less easily transferable forms of IP are part of the remedy, in order to conclude that the remedy is practical, the CMA will require that there is a clear plan for the transfer of those forms of IP that is capable of effective implementation.

- (b) In some cases in order to manage specification risks such as uncertainty regarding the scope of a licence or its terms and conditions, the CMA may require that the merger parties divest the underlying rights and accept a licence back of those IP rights that the retained business will continue to require; and
- (c) the terms on which the IP rights are divested or licensed to the purchaser or licensee are appropriately designed such that the purchaser or licensee is not restricted in how it commercialises or further develops the IP.

Mitigating the risks of complex structural remedies

- 6.57 Structural remedies can vary considerably in scope and risk profile. More complex remedies (such as carve-outs and IP divestitures) typically involve greater risk than prohibition or divestments of a standalone business.
- 6.58 This section sets out a number of ways in which some of the risks arising from complex structural remedies (in particular composition and purchaser risk) may be mitigated, therefore increasing the prospect that they will be found to be effective.
- 6.59 Ultimately, however, the CMA’s assessment of a remedy is fact specific and even with these mitigations a remedy may be found to be ineffective.

Early engagement

- 6.60 Engaging with the CMA sufficiently early on in the process, including on a without prejudice basis, can help to ensure that the CMA has sufficient time and information to fully assess more complex proposals.

⁹⁴ See the CC’s investigation into the [completed acquisition of GV Instruments Limited by Thermo Electron Manufacturing Limited \(2007\)](#), where the CC rejected a licensing remedy proposed by the merger parties on the basis that it would not adequately restore competition lost as a result of the merger.

6.61 Similarly, early engagement by the CMA with customers and other stakeholders that will be affected by the proposed remedy can help the CMA to test the parties' remedy proposals.⁹⁵ Merger parties may be able facilitate such engagement by enabling the CMA to discuss confidential aspects of a proposed remedy with third parties.

Upfront buyer

6.62 Where the CMA is in doubt as to the viability or attractiveness to purchasers of a proposed divestiture remedy or believes there may be only a limited pool of suitable purchasers (ie purchaser risk),⁹⁶ it is likely to require the merger parties to obtain a suitable purchaser that is contractually committed⁹⁷ to the transaction before accepting the UILs or Final Undertakings.⁹⁸ This is because, while, at phase 1 or phase 2, undertakings given to the CMA without an upfront buyer will typically provide for the appointment of a divestiture trustee (see paragraph 6.68 below) to sell the divestiture business (or greater if necessary) at no minimum price in the event that the merger parties do not achieve a sale within the stated divestiture period, this is of limited benefit if there are no interested suitable purchasers.

6.63 The CMA generally adopts a more cautious approach with regard to these concerns at phase 1 than at phase 2. At phase 1, the CMA will generally require an upfront buyer unless it considers that there are reasonable grounds for not doing so and, in particular, where the risk profile of the remedy does not require it. This may be the case where, for example, there is a liquid

⁹⁵ See for example, the CMA's investigation into the [anticipated acquisition by Safran S.A. of a part of Collins Aerospace's \(a business unit of RTX Corporation\) actuation and flight control business \(2025\)](#), Decision on Final Acceptance of Undertakings at paragraphs 10-15.

⁹⁶ See the CMA's investigation into [the completed acquisition by Immediate Media Company Bristol Limited of certain assets of Future Publishing Limited \(2015\)](#), where the CMA, in deciding that an upfront buyer condition was required, noted that the proposed divestiture packages were not standalone businesses and the number of possible buyers was reduced. See also the CMA's investigation into [the anticipated acquisition by Adevinta ASA of eBay Classifieds Group from eBay Inc., and eBay Inc.'s acquisition of a minority stake in Adevinta ASA \(2021\)](#), where the CMA, in deciding that an upfront buyer condition was required for the divestment of Adevinta's Shpock business, noted that there were likely to be only a limited number of suitable purchasers for the business, and the CMA's investigation into [Medivet Group Limited / multiple independent veterinary businesses merger inquiries - GOV.UK \(2023\)](#), where the CMA considered that an upfront buyer condition was necessary for each of the divestment businesses because of certain risks relating to the proposed divestiture packages, including the fact that the mergers have been completed for a significant period of time and the divestment businesses, though capable of being separated, were currently integrated into the acquirer business.

⁹⁷ Contractual commitment may occur, for instance, through exchange of contracts, subject to limited conditions.

⁹⁸ See, the CC's investigations into [the anticipated joint venture between Kemira GrowHow Oyj and Terra Industries Inc \(2007\)](#) and [the proposed acquisition of a controlling interest in Academy Music Holdings Limited by Hamsard 2786 Limited \(2007\)](#).

market for the assets or business; the assets or business are viable and profitable; there are a number of potential purchasers; or discussions with purchasers are at an advanced stage.⁹⁹ Where the CMA considers an upfront buyer to be necessary but the merger parties are unable to identify a suitable purchaser at phase 1, the CMA will refer the merger to phase 2.¹⁰⁰

6.64 At both phase 1 and phase 2, the use of an upfront buyer has additional advantages in reducing the risk of an unsuccessful remedy:

- (a) The CMA is able to consult publicly on the identity and suitability of the proposed purchaser prior to accepting the UILs or Final Undertakings. This is particularly important where the identity of the purchaser is critical to the success of the divestiture remedy (eg where the purchaser will need to apply its existing resources and capability to exploit the divestiture remedy). The CMA is more likely to be confident to approve such a purchaser in cases where third parties have been formally given an opportunity to comment on that proposed purchaser.¹⁰¹
- (b) The certainty provided for by an upfront buyer may enable the CMA to explore a remedy that the CMA would not feel confident accepting in a non-upfront buyer context. The CMA may, for example, proceed with a remedy where there is some uncertainty about its saleability where this is going to be addressed prior to the UILs or Final Undertakings being accepted. In addition, the CMA may be more likely to accept a remedy that provides the merger parties with greater flexibility in determining which of the overlapping assets they wish to sell if there will be an upfront buyer.

6.65 Where the CMA considers that the competitive capability of the divestment business may deteriorate pending the divestiture (ie asset risk) or completion of the divestiture may be prolonged, it may also require an upfront buyer, and that the upfront buyer completes the acquisition of the divestment business

⁹⁹ See the CMA's investigation into [the anticipated acquisition by LKQ Corporation of Uni-Select Inc. \(2023\)](#), Decision that Undertakings might be accepted, at paragraph 13.

¹⁰⁰ For the merger parties, the upfront buyer mechanism provides them with the option of terminating divestiture discussions at phase 1 and continuing their case at phase 2 where they experience difficulty in agreeing satisfactory commercial terms with a potential divestment purchaser. This is in contrast to offering UILs without an upfront buyer where those UILs will typically provide for divestiture in these circumstances even at no minimum price.

¹⁰¹ See for example, the CMA's investigation into the [anticipated acquisition by Safran S.A. of a part of Collins Aerospace's \(a business unit of RTX Corporation\) actuation and flight control business \(2025\)](#), Decision on Final Acceptance of Undertakings at paragraphs 11-12.

under the divestiture remedy before the merger may complete¹⁰² or, in the case of a completed merger, before the merger parties may progress with integration.

- 6.66 In cases involving the divestiture of multiple discrete assets or businesses, of which only a minority raise divestiture risks justifying the use of an upfront buyer, the CMA may consider requiring a partial upfront buyer solution. In this situation, the merger parties may be required to sell to an upfront buyer those assets or businesses that raise concerns of the type listed in paragraph 6.9, whilst the CMA will permit the remainder of the assets or businesses to be sold following acceptance of the UILs or Final Undertakings, or the making of a Final Order.¹⁰³
- 6.67 An upfront buyer requirement can help reduce the risk of an unsuccessful divestiture remedy. However, divestiture remedies may still carry composition, purchaser and asset risks which an upfront buyer requirement alone cannot satisfactorily mitigate.¹⁰⁴ For instance, merger parties, who are normally responsible for securing a prospective buyer, may be incentivised to pick a relatively weak purchaser (see paragraph 6.28). Moreover, as noted in paragraph 6.23(a), there is likely to be an information asymmetry between the merger parties and the CMA / purchaser regarding what is necessary in order to compete effectively in the relevant market. Accordingly, the CMA would not accept that any composition risk has been satisfactorily mitigated purely because a potentially suitable purchaser is willing to buy the relevant divestment business under the divestiture remedy, particularly because deficiencies with the package may be factored into the consideration paid.

Divestiture trustees

- 6.68 If the merger parties cannot divest to a suitable purchaser within the terms of the UILs at phase 1, or within the specified initial divestiture period at phase 2, then, unless this period is extended by the CMA, the CMA may require the

¹⁰² See for example, the CMA's investigation into the [anticipated acquisition by Hanson Quarry Products Europe Limited of Mick George Limited \(2024\)](#), final UILs at paragraph 9.1(a), which provided that the primary transaction could not complete until the completion of the divestitures to the divestment purchasers.

¹⁰³ See the OFT's investigation into [the anticipated acquisition by Co-operative Group Limited of Somerfield Limited \(2009\)](#), where the OFT required divestment to an upfront buyer only in relation to those stores in which there were expected to be a limited number of potential effective purchasers. See also the CMA's investigation into [the anticipated acquisition by Adevinata ASA of eBay Classifieds Group from eBay Inc., and eBay Inc.'s acquisition of a minority stake in Adevinata ASA \(2021\)](#), where the CMA required an upfront buyer only in relation to the divestment of Adevinata's Shpock business (and not in relation to Gumtree's UK business),

¹⁰⁴ See, for example, the CMA's investigation into [the anticipated merger of Cargotec Corporation and Konecranes Plc \(2022\)](#), final report at paragraph 13.549.

merger parties to appoint an independent divestiture trustee to dispose of the remedy within a specified period. The divestiture will be at the best available price in the circumstances, but subject to prior approval by the CMA of the purchaser and the divestiture arrangements.

- 6.69 The CMA may require that a divestiture trustee is appointed before the end of the initial divestiture period (eg if the CMA is not satisfied that divestiture is likely to take place within that period) or at the outset of the divestiture process.¹⁰⁵ The role of a divestiture trustee is distinct from that of a monitoring trustee, but the two roles may be performed by the same person.

Monitoring trustees and/or independent experts

- 6.70 Monitoring trustees and independent experts can perform a number of functions that may reduce the risks of complex structural remedies (see below). Subject to separate suitability assessments, those functions may be performed by the same person or organisation.

Remedy assessment

- 6.71 Monitoring trustees and independent experts may be able to support the CMA in its assessment of complex remedies by providing an independent, arm's length assessment of the composition risk of a proposed remedy.
- 6.72 The CMA does not have the power to require merger parties to appoint a monitoring trustee or independent expert for these purposes. However, merger parties proposing a complex remedy may find it useful to appoint an independent expert to perform this role, or extend the role of a monitoring trustee to perform this role (for instance by agreeing a revised mandate with a monitoring trustee the merger parties have already appointed under Interim Measures, or by bringing forward the appointment of a monitoring trustee earmarked for a potential remedy's implementation to the remedy assessment stage). This could include providing views on the scope of the proposed divestiture package; verifying the merger parties' remedy proposal submissions; and undertaking site visits to inspect the relevant assets proposed for disposal.

Assessing purchaser suitability

¹⁰⁵ See the CC's investigations into [the acquisition of the Co-operative Group \(CWS\) Limited's store at Uxbridge Road, Slough by Tesco plc \(2007\)](#) and [the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc \(2015\)](#).

- 6.73 A monitoring trustee or independent expert may also play a role in assessing purchaser suitability. A monitoring trustee could be appointed to prepare a suitability report having regard to the CMA's purchaser suitability criteria in two circumstances: (a) where the merger parties offer to appoint a monitoring trustee to assist the CMA's assessment of a purchaser, eg where an upfront buyer is required, and where a purchaser must be approved prior to the acceptance of UILs or Final Undertakings; or (b) where required by the CMA under the UILs, Final Undertakings or Final Order, where a purchaser must be approved after the acceptance of UILs or Final Undertakings, or the making of a Final Order (see also Chapter 9).

Divestiture implementation

- 6.74 For divestiture and IP remedies, the CMA will normally require a monitoring trustee be appointed to monitor the merger parties' compliance with their obligations under the UILs, Final Undertakings or Final Order, and to remain in place at least until completion of the divestiture, and possibly for a period beyond completion (eg if there is a transitional services agreement between the merger parties and the purchaser post-completion).
- 6.75 During the monitoring and implementation phase of a carve-out remedy, the monitoring trustee (or independent expert where one is put in place for this purpose) will typically monitor the separation of assets and the allocation of personnel between the divestment business and the businesses retained by the merger parties, as well as the replication of assets and functions in the proposed divestment business previously provided by the merger parties.
- 6.76 See Chapter 8 for more information on the considerations regarding the appointment and role of trustees.

Fall-back remedies

- 6.77 As a further mitigation against potential divestiture risks, in some circumstances, it may be appropriate to define a more extensive and/or more marketable divestiture remedy (an 'alternative divestiture remedy', sometimes also known as a fall-back remedy), which the CMA would require the merger parties to sell if the initially proposed divestiture remedy were not sold within a specified period.¹⁰⁶

¹⁰⁶ Such remedies are sometimes referred to as 'crown jewel' remedies. However, in view of the wide variety of usage of this term, the CMA uses the more closely defined terminology of 'alternative divestiture remedies'.

- 6.78 Alternative divestiture remedies may be appropriate if there is doubt as to the marketability of the initially proposed divestiture remedy (ie purchaser risk) or where a business is subject to major asset risks and the speed of divestiture is likely to be a critical requirement. In such circumstances, the prior identification of an alternative, more extensive and more marketable remedy may be the most effective means of facilitating rapid disposal if the initial remedy cannot be sold to a suitable purchaser within a specified period.¹⁰⁷ The CMA may require that, in the event that the merger parties' preferred divestiture does not proceed to its satisfaction within the timescales set out in the UILs, Final Undertakings or Final Order, a divestiture trustee may be appointed to ensure the sale of an alternative divestiture remedy.
- 6.79 The alternative divestiture remedy will include all the core assets necessary to remedy the SLC. The CMA will wish to satisfy itself that the purchaser of such a remedy is committed to operating the core assets to compete effectively in the market(s) affected by the SLC and is not primarily attracted by the additional assets. The CMA will identify the alternative divestiture remedy in its final decision, but the existence of an alternative divestiture remedy will generally be excised from the published version to prevent the existence of the alternative divestiture remedy undermining the divestiture of the initial remedy.

Divestitures of minority shareholdings in the party to be acquired

- 6.80 In some mergers, a party to the merger may have built up a minority shareholding in the party to be acquired. In such instances, a decision to prohibit a merger may require the party to divest such a shareholding (or to reduce its shareholding to below a specified maximum level at which the CMA judges that the SLC will be resolved).¹⁰⁸

Review of transaction agreements

- 6.81 The CMA will wish to ensure, before providing its final approval of any divestiture, that the transaction agreements and relevant supporting

¹⁰⁷ See the CMA's investigation into the [completed acquisition by Euro Car Parts Limited of assets of the Andrew Page business \(2018\)](#), where the CMA reserved its right in each overlap area to require the divestiture of an alternative depot to those nominated by the merger parties.

¹⁰⁸ See the CC's investigation into [the acquisition by British Sky Broadcasting Group plc \(BSkyB\) of 17.9 per cent of the shares in ITV plc \(2008\)](#), where, in line with the CC's recommendation, the Secretary of State required the partial divestment of BSkyB's shares in ITV down to a level below 7.5%. See also the CC/CMA's investigation into [the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc \(2015\)](#), where the CMA required Ryanair to sell its 29.8% stake in Aer Lingus Group plc down to 5%.

documentation include all assets required to be divested and contain no provisions that are inconsistent with the remedial objectives of the divestiture. During the divestiture process, if a monitoring trustee is in place, the monitoring trustee is likely to be tasked with assisting the CMA in reviewing the transaction agreements to ensure their consistency with the CMA's remedy decision.

7. Behavioural Remedies – effectiveness considerations

- 7.1 As outlined in Chapter 5, behavioural remedies are designed to resolve an SLC and its adverse effects by regulating or constraining the ongoing behaviour of parties following a merger.
- 7.2 This chapter provides further detail on how the CMA assesses the effectiveness of behavioural remedies. It explains that, while most behavioural remedies do not directly address the SLC at source and are subject to a variety of risks which might limit their effectiveness,¹⁰⁹ they encompass a wide range of measures with different risk profiles. The CMA therefore considers that behavioural remedies can be effective in some cases.¹¹⁰
- 7.3 Behavioural remedies and the circumstances in which they may be proposed can vary considerably. The CMA will seek to take into consideration relevant industry dynamics in evaluating the risks and design of behavioural remedies. This guidance seeks to outline the CMA's general approach rather than deal with all possibilities.
- 7.4 This chapter provides:
- (a) an overview of the CMA's approach to assessing the effectiveness of behavioural remedies;
 - (b) considers three types of behavioural remedies:
 - (i) enabling remedies;
 - (ii) remedies to secure merger-specific rivalry-enhancing efficiencies; and

¹⁰⁹ See for example, Ariel Ezrachi, *Behavioural Remedies in EC Merger Control – Scope and Limitations* (2006) 29(1) World Competition 25, states that structural remedies are superior to behavioural remedies as they address the competitive detriment directly, require relatively limited monitoring post-transaction and are generally cost-efficient. John E Kwoka and Diana L Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement* (American Antitrust Institute 2011) similarly note that behavioural remedies are often difficult to fully specify, leading to subsequent enforcement issues. The [ICN's Merger Remedies Guide](#) (2016) states that competition authorities generally prefer structural remedies in the form of a divestiture as they tend to directly address the cause of competitive harm, result in low ongoing monitoring costs and can be simple, certain and be accomplished in a short period of time.

¹¹⁰ See for example, the CMA's investigation into the [anticipated acquisition by Bouygues S.A. of Equans S.A.S \(2022\)](#), where the CMA accepted UILs involving the appointment of an independent third-party expert to assess the bids submitted in the HS2 Tender by Colas Rail and the Rapide JV to determine which of the bids was the most economically advantageous to HS2 Ltd; and the CMA's investigation into [the anticipated merger of Cargotec Corporation and Konecranes Plc \(2022\)](#), where the CMA accepted that Konecranes' proposal to commit to terminate its partnership arrangement with Terberg would be effective in remedying the SLC in the supply of ATT, final report at paragraph 13.559.

- (iii) controlling remedies; and
- (c) considers the relevance of other aspects of competition law to the design of behavioural remedies.

Overall approach to assessing the effectiveness of behavioural remedies

- 7.5 In assessing the effectiveness of a behavioural remedy, the CMA will, as with structural remedies, take account of the Effectiveness Criteria; ie the impact of the remedy on the SLC and its adverse effects, as well as its risk profile, practicality, duration and timing. The CMA will assess the effectiveness of behavioural remedies on a case-by-case basis in line with the approach set out below.
- 7.6 As explained above, remedies need to be effective in resolving the SLC and its adverse effects. The CMA views competition as a dynamic process of rivalry between firms which are incentivised to win customers' business over time by offering them a better deal. Where the CMA finds that a merger may lead to an SLC, it finds that the merger will reduce this dynamic process of rivalry, which may lead to a worsening of the offer to customers.
- 7.7 In considering whether a behavioural remedy addresses an SLC, the CMA will consider if the behavioural remedy can restore this dynamic process of rivalry. For example, the CMA will consider whether the remedy would affect the incentives of market participants post-merger in a way that is likely to replicate pre-merger levels of rivalry, or whether it would involve ongoing intervention to try to counter the merged entity's incentives that exist post-merger to worsen its offer to customers. A remedy that addresses the adverse effects of an SLC without restoring the process of rivalry is less likely to provide a comprehensive solution.
- 7.8 An effective behavioural remedy will need to resolve the SLC and its adverse effects by ensuring that the relevant conduct (including any behaviour of concern) is comprehensively captured by the remedy.
- 7.9 There are four broad categories of risks that can undermine the effectiveness of behavioural remedies:
 - (a) *Specification risks*: these risks arise if the form of conduct required to address the SLC and its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance. The intended operation of the remedy needs to be clear to

the persons to whom it is directed and other relevant parties, so that it is apparent what conduct constitutes compliance and what does not. For example, a commitment to permit access 'on fair and reasonable' terms may create significant specification risk, as the provision may be insufficiently specific to allow effective enforcement.

- (b) *Circumvention risk*: as behavioural remedies generally do not address the source of an SLC, it is possible that other adverse forms of behaviour may arise if particular forms of behaviour are restricted. For example, if prices are controlled, a firm may reduce product quality. To avoid or reduce these risks, behavioural remedies need to deal with all the likely ways in which enhanced market power may be applied. In some cases, this may not be feasible or may make the behavioural remedy too complex to monitor.
- (c) *Distortion risks*: these are risks that behavioural remedies may create market distortions that reduce the effectiveness of these remedies and/or increase their effective costs. Distortion risks may result from remedies overriding market signals or encouraging circumvention behaviour. For example, prohibiting the use of long-term contracts may result in a lack of incentives to compete for new business.
- (d) *Monitoring and enforcement risks*: even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement, which can affect the practicality of the remedy. This may be due to a variety of causes, such as the volume and complexity of information required to monitor compliance; limitations in monitoring resources; asymmetry of information between the monitoring agency and the business concerned; and the long timescale of enforcement relative to a rapidly moving market. However, as outlined in paragraph 7.38, the CMA recognises that monitoring behavioural remedies may be more practicable in certain cases – for example, if the merger parties are active in an industry with a regulator with appropriate expertise, powers and resources;¹¹¹ the remedy aligns with existing commercial practices and norms in the relevant industry and/or stakeholders have a pre-existing enforcement mechanism other than reporting to the CMA; or stakeholders

¹¹¹ See the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#), and the CMA's investigation into [the anticipated acquisition by Abellio East Midlands Limited of the East Midlands rail franchise \(2019\)](#), Decision that UILs might be accepted at paragraph 15.

are otherwise in a strong position to identify and report to the CMA on instances of non-compliance.

- 7.10 As set out in paragraph 7.5, the CMA will closely assess the effectiveness of each proposed behavioural remedy.

Types of behavioural remedy

- 7.11 Behavioural remedies capture a broad range of remedies which can impact an SLC and its adverse effects in different ways and to different degrees. Behavioural remedies may be broadly categorised as:

- (a) Enabling remedies regulate the behaviour of the merger parties and seek to modify aspects of their conduct from what may be expected based on their incentives post-merger. They seek to address the causes of an SLC by removing obstacles to competition or stimulating the process of competition. However, they typically do not directly address the SLC at source as, in most cases, they are not a one-time remedy, but are required to remain in place to continue to modify the merger parties' conduct.
- (b) Controlling remedies, such as price caps, prevent merger parties from exercising some of the enhanced market power they are likely to gain from a merger. These measures generally focus on limiting the adverse effects of an SLC rather than addressing the source of the SLC itself.

- 7.12 To be effective, a remedies package may require both enabling remedies, which resolve an SLC by seeking to remove obstacles to competition or stimulating competition, and controlling remedies, ie remedies that control outcomes, which restrict the adverse effects of an SLC rather than resolve the SLC itself.¹¹²

¹¹² See the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#), where the CMA accepted both enabling measures and controlling measures. The enabling measures involved a commitment to invest in the merger parties' network infrastructure, which would likely elicit a competitive response from the remaining competitors, for example by way of further network investment, lower pricing or improved customer service. The CMA recognised that the network investments required a long-term perspective, and that additional protections would be needed in the short term for both retail and wholesale customers to ensure the SLCs identified would be properly addressed. These controlling measures included temporarily capping prices on selected retail plans in the short term, and offering wholesale customers temporary pre-agreed non-discriminatory wholesale terms (including prices).

- 7.13 A remedy that secures the likelihood or timeliness of merger-specific efficiencies which, if realised, would enhance rivalry, benefit UK customers and be sufficient to prevent an SLC would be an enabling remedy as it would seek to stimulate competition in future.¹¹³ A remedy that restrains the impact of a vertical merger (such as an access remedy) controls the terms on which access to certain products or services are made available; but may in some situations operate to preserve rivalry in the relevant downstream market (and therefore have an enabling effect).
- 7.14 As outlined above (see paragraph 7.2), because, unlike structural remedies, most behavioural remedies do not address an SLC and its adverse effects at source, it is more likely that a structural remedy will resolve the SLC and its adverse effects than a behavioural remedy will do. However, enabling remedies which ‘work with the grain of competition’, seek to address the causes of an SLC, and in certain cases, may directly stimulate competition in a long-lasting way. Controlling remedies that control market outcomes, such as price caps, seek to limit only some of the adverse effects of an SLC rather than address its causes. Therefore, they are unlikely to be appropriate other than for a limited duration,¹¹⁴ or unless there is no effective or practical alternative remedy.

Enabling remedies

Securing merger-specific rivalry-enhancing efficiencies

- 7.15 In some cases, efficiencies arising from a merger can change the incentives of the merger parties and induce them to act as stronger competitors. For example, efficiencies could reduce the marginal costs of the merger parties, which may give them the incentive to provide lower prices or better quality, range or service.¹¹⁵ This can in turn stimulate a competitive response from other parties in the market.

¹¹³ See the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#).

¹¹⁴ See the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#) and the CMA's investigation into [the anticipated acquisition by Abellio East Midlands Limited of the East Midlands rail franchise \(2019\)](#), Decision that UILs might be accepted at paragraph 15.

¹¹⁵ [Merger Assessment Guidelines \(CMA129\)](#), 18 March 2021, paragraph 8.3(a).

- 7.16 The CMA will consider the extent to which merger-specific efficiencies which enhance rivalry arise as part of its competitive assessment.^{116,117} In order for the CMA to take efficiencies into account in its competitive assessment, they must enhance rivalry in the market(s) where the merger raises competition concerns; be timely, likely and sufficient to prevent an SLC from arising; be merger-specific; and benefit customers in the UK.¹¹⁸ Where efficiencies satisfy these conditions and are sufficient to offset the SLC, no remedy will be required.
- 7.17 In some cases, the CMA may see the potential for efficiencies from the merger but may have concerns about their timeliness and/or likelihood. Where the CMA has concluded that, if realised, these efficiencies would enhance rivalry, benefit UK customers and be sufficient to prevent an SLC, it might be possible for remedies that secure those efficiencies to resolve the CMA's concerns. For example, if the CMA has found that specific infrastructure investments would give rise to efficiencies that would offset the anti-competitive effects of the merger, requiring the merger parties to make those investments may in certain circumstances be an effective remedy.¹¹⁹
- 7.18 The CMA considers that such remedies are likely to be appropriate where:
- (a) there is strong evidence that the efficiencies satisfy all other limbs of the test (ie they enhance rivalry, are sufficient to prevent an SLC, are merger-specific, and benefit customers in the UK);
 - (b) the remedy changes incentives in a way which is difficult to reverse; and
 - (c) it is possible to design a remedy that would ensure the timeliness and/or likelihood of the efficiencies which can be clearly specified, appropriately monitored and enforced and not easily circumventable. The CMA will have regard to the general factors outlined in paragraph 7.38 in making this assessment.

¹¹⁶ The CMA's competitive assessment is the CMA's assessment of whether the merger gives rise to competition concerns (ie an SLC), including any factors which may 'countervail' any competition concerns.

¹¹⁷ [Merger Assessment Guidelines \(CMA129\)](#), 18 March 2021, paragraph 8.3(a).

¹¹⁸ [Merger Assessment Guidelines \(CMA129\)](#), 18 March 2021, paragraph 8.8.

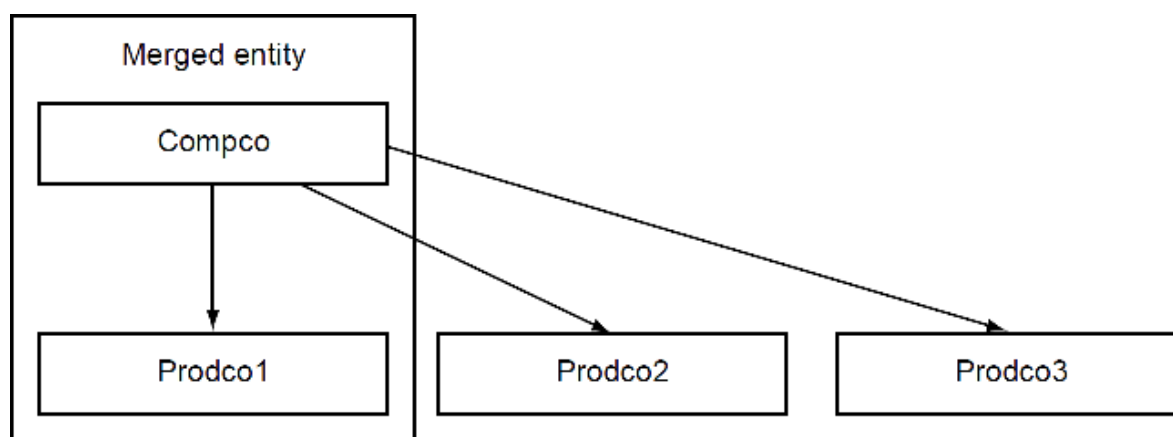
¹¹⁹ See the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#), where the CMA considered that while some efficiencies were likely, the merger parties were not likely to deliver the full extent of the efficiencies they had claimed. A remedy was therefore used to secure the merger parties' efficiency commitments.

Restraining the impact of vertical mergers

- 7.19 A vertical merger involves the merger of firms at different levels of the supply chain of particular goods or services. Where a party to such a merger has significant market power at one or more levels of the supply chain, the merger may result in an SLC, typically through the incentive and ability of the merged entity to disadvantage competitors by foreclosing access to key inputs, facilities or customers and/or exploiting access to confidential information.
- 7.20 There is some academic evidence that behavioural remedies may be more appropriate in certain cases involving vertical and/or conglomerate, rather than horizontal, theories of harm. This is particularly the case when the vertical and/or conglomerate merger in question involves significant efficiencies (which have been verified), and it is possible to design an effective remedy that preserves these whilst also addressing the competition concern.¹²⁰
- 7.21 For example, if, as illustrated in Figure 2 below, the manufacturer (Compco) of most of a key industry component acquired a major user of this component (Prodco1), the ability of other users (Prodco2 and Prodco3) to compete could be disadvantaged by the merged entity restricting supply of this component to Prodco2 and Prodco3 or making use of information concerning component orders by Prodco2 and Prodco3.

¹²⁰ For example, Ariel Ezrachi, *Behavioural Remedies in EC Merger Control – Scope and Limitations* (2006) 29(1) World Competition 25, states that behavioural remedies may better address foreclosure concerns in vertical mergers than structural remedies as they could address the competitive detriment whilst preserving the efficiencies associated with the transaction. John E Kwoka and Diana L Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement* (2012) 57(4) Antitrust Bulletin 979 similarly states that behavioural remedies may be acceptable in certain circumstances, including vertical mergers where efficiencies are large and can clearly be separated from anticompetitive actions by such remedies.

Figure 2: Vertical merger configuration



Source: CMA

- 7.22 An SLC arising from a vertical merger may be remedied effectively by structural remedies such as reversing the merger or partial divestiture, subject to the considerations outlined elsewhere in this guidance.
- 7.23 In some cases, it may be possible to use behavioural remedies to support continued access to necessary products, facilities or customers on appropriate terms, in order to preserve rivalry in the related upstream or downstream market.

Access remedies in vertical mergers

- 7.24 Access remedies seek to maintain or restore competition in one of the vertically affected markets by preserving competitors' access on appropriate terms to the products and facilities of a merged entity that they require to remain competitive. Access remedies generally seek to introduce requirements to control the merged entity's conduct in a way that does not align with its likely incentives across the time period during which such access is required. An access remedy may be appropriate where it would preserve efficiencies or RCBs resulting from a merger that would be lost through the implementation of an alternative remedy.
- 7.25 The extent to which an access remedy can preserve competition in a vertically related market will depend on the characteristics of the product or facility to which access is required. Where the product or facility that competitors need to access is stable and well-defined, and there are no relevant capacity constraints, it is more likely that it may be possible to preserve competition in the related market by controlling access to that product or facility. Where competition on the terms of access to the product or facility affects competitiveness in the downstream market, the product or facility changes

over time or there may be limitations on access to capacity in the product or facility, it is less likely that competition in the related market could be preserved by controlling access to that product or facility.

- 7.26 An access remedy will normally need to specify an access commitment by the merged entity to customers in significant detail so that customers and the CMA can monitor and enforce the commitment effectively. This will include details of the product or facility to be provided, including quality and technical parameters, and the terms of supply of the product or facility, including service levels and the basis of pricing. If the access commitment is not specified or monitored in sufficient detail, then the remedy will be vulnerable to specification risk and monitoring and enforcement risk, and the merged entity may be able to avoid its obligations.
- 7.27 Particular specification challenges arise where requirements are not easily subject to objective measurement, or where the product or access that is being provided will change over time.
- (a) *Lack of objective measurement standards*: in some supply arrangements, certain factors may be particularly important for competitive access that are not easily specified (eg quality of product support, priority for system upgrades, or quality of management assigned to a customer's account). Such factors may result in 'soft biases' in access to supply that may generate significant circumvention risk and may significantly undermine the purpose and suitability of an access remedy.¹²¹
- (b) *Changes in product or access*: the CMA will generally require that an access remedy should make explicit provision for accommodating future changes, for example, in product specifications or supply arrangements. This can be challenging where a market is likely to be subject to frequent technological change or other wide-ranging market developments, and there is likely to be a significant risk that an access remedy will become ineffective or create market distortions if the terms of the access commitment do not accommodate these changes.
- 7.28 A common approach to defining the terms for access is the use of fair, reasonable and non-discriminatory (**FRAND**) terms. In certain circumstances, it may be possible to simplify the specification of an access remedy by

¹²¹ See the CC's investigation into [the proposed acquisition of London Stock Exchange plc by Deutsche Börse AG or Euronext NV \(2005\)](#), where the CC rejected a solely behavioural access commitment to clearing and settlement services due, in part, to the likely difficulty of 'soft biases'.

obliging the merged entity to supply a particular product on FRAND terms, where supplies to external customers are provided on the same or similar terms as apply to its own businesses. For this to be effective, the nature of FRAND terms must deal adequately with the circumstances of external customers and must be transparent to customers and monitoring agencies in sufficient detail to enable effective enforcement.

- 7.29 The use of FRAND terms may still leave competitors vulnerable to a margin squeeze by the merged entity as it may have an incentive to charge all downstream businesses, including its own, a uniformly high price since reduced profitability in its downstream business can be offset by higher profitability in its upstream business. The CMA may therefore require that use of FRAND terms is accompanied by provisions to protect against a margin squeeze (eg submission of regular reports demonstrating full cost recovery in the downstream business). The need for additional reporting and monitoring to address the risk of a margin squeeze will be relevant to the assessment both of the practicality and of the overall risk profile of a proposed remedy.

Firewall remedies in vertical mergers

- 7.30 Firewall remedies seek to prevent a vertically integrated firm from accessing and using confidential information generated as a result of competitors' use of the merged entity's facilities or products. Since firewall remedies target this specific issue, they generally do not restore rivalry directly; where the CMA has accepted a firewall remedy, this has generally been as part of a package of remedies and often as part of a package of transitional arrangements. For example, in Figure 2, in the absence of firewall provisions, Prodco1 may be able to exploit confidential information regarding the orders and deliveries of key components from Compco to Prodco2 and Prodco3.
- 7.31 Firewall remedies prevent access to confidential information by insulating the firm or division generating the information from other group companies. This is generally achieved by restricting information flows and use of shared services, physically separating premises and staff, and regulating transfers of management and any permitted interactions between relevant staff.¹²² The feasibility of implementing a firewall will be affected by physical and digital business structures; for example, whether people within and without the

¹²² See the CC's investigation into [the completed acquisition by Centrica of Dynegy Storage Ltd and Dynegy Onshore Processing UK Ltd \(2006\)](#), which provides an example of the measures that may be required by the CMA to make firewalls effective.

firewall are working in close physical proximity and whether IT systems can fully segregate different sets of information.

- 7.32 Firewall remedies often raise practicality challenges relating to implementation, monitoring and enforcement. To ensure effective compliance with firewall provisions, the relevant firm will normally need to commit significant resources to educating staff about the requirements of the remedy and supporting the remedy with disciplinary procedures and independent monitoring. The effectiveness of a firewall remedy will also depend on the confidence of competitors in the effectiveness of the firewall and in their ability to monitor its operation. It will likely be more difficult to achieve the necessary level of competitor confidence the more sensitive or extensive the information is that they need to share with the relevant business.

Controlling remedies

- 7.33 Remedies that control or restrict the outcomes of business processes, such as price caps,¹²³ supply commitments and service level requirements, seek to prevent the merger parties from exercising the enhanced market power that they are likely to acquire from a merger. As such, these remedies seek to restrict the adverse effects expected from a merger rather than address the source of the SLC and will have less of an impact on the SLC than a remedy that restores rivalry in the market.
- 7.34 Remedies that seek to control outcomes also present specification challenges. Such remedies normally need to specify in significant detail the products or services that are subject to control and the basis of the control (eg the application of price indices to a price cap). The remedy will generally also need to specify how the control will deal with changes, such as the introduction of new products.

¹²³ See the CC's investigations into [the completed acquisition by Imerys Minerals Limited of the kaolin business of Goonvean Limited \(2013\)](#), where the CC concluded that the most effective and proportionate remedy was a price control remedy for five years for kaolin supplied for use in performance-mineral applications to existing Goonvean and Imerys customers, [the completed acquisition by Breedon Aggregates Limited of certain assets of Aggregate Industries UK Limited \(2014\)](#), where the CC implemented a price control for asphalt produced in the Inverness area, [the anticipated acquisition by Abellio East Midlands Limited of the East Midlands rail franchise \(2019\)](#), where the CMA accepted undertakings involving a price cap on certain fares along certain routes, and [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#), where the CMA accepted undertakings which included temporary price caps on selected retail plans in the short term.

- 7.35 This class of remedy is subject to several significant challenges regarding its effectiveness and in particular, its practicality:
- (a) Defining appropriate parameters for the controlling remedy (eg the level of a price cap) may be complex and impractical and the remedy may therefore be vulnerable to specification risks. This is especially likely where any of the following conditions apply:
 - (i) Pricing in the relevant market is volatile.
 - (ii) Products or services are differentiated rather than homogeneous.
 - (iii) Prices are individually negotiated.
 - (iv) Supply arrangements and products are subject to significant ongoing change.
 - (b) This class of remedy directly overrides market signals with the result that it may generate substantial distortion risks over time, increasing the effective cost of the remedy or reducing its effectiveness. For example, a price cap may deter entry, and a supply commitment may discourage product innovation.
 - (c) The remedy may be vulnerable to circumvention risks despite the addition of complex preventative provisions. For example, a price cap may be circumvented by a firm reducing the quality of controlled products or restricting the supply of controlled products.
 - (d) Monitoring and enforcement may be costly and intrusive and may not be effective, especially where the form of remedy is complex.
- 7.36 The effectiveness and practicality challenges outlined above generally increase over time; the longer the duration of the remedy the more significant these challenges are likely to be.
- 7.37 In view of these challenges, the CMA considers that remedies that control market outcomes are unlikely to be appropriate unless there is no effective alternative remedy. As explained at paragraph 6.18, controlling remedies might also be used during a transitional period of a limited duration to prevent harmful outcomes pending the full implementation of a broader remedy.¹²⁴

¹²⁴ See the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#), where the undertakings the

Measures to mitigate risks of behavioural remedies

7.38 The CMA considers that the following factors may help to reduce the risks associated with behavioural remedies, although as explained below there are also risks associated with some of these factors:

- (a) The remedy has a limited duration, as this reduces monitoring costs and reduces the risk that the remedy becomes ineffective or distorts market outcomes.¹²⁵ As behavioural remedies are designed to have ongoing effects on business conduct throughout the period they are in force, the duration of these remedies is a material consideration. The CMA may specify a limited duration if remedies are designed to have a transitional effect.
- (b) There is an industry regulator with appropriate expertise, powers and resources, as this increases the likelihood of effective monitoring and enforcement.
- (c) Industry characteristics, such as a high degree of market transparency, make it more likely that stakeholders – such as customers, competitors and suppliers of the merged entity, are in a strong position to identify and report to the CMA on instances of non-compliance. Whilst this may occur when stakeholders have sufficient resources and incentives, they may be inhibited from fulfilling this reporting role by lack of resources and verifiable information, lack of understanding of the remedies, fear of reprisals and other disincentives.
- (d) The remedy aligns with existing commercial practices and norms in the relevant industry. This can: (i) increase the feasibility of specifying the required conduct with sufficient clarity to enable effective monitoring and ensure that stakeholders clearly understand what constitutes compliance; and (ii) reduce the risk of market distortions.
- (e) The industry is sufficiently mature and stable such that there is a low risk that the market or competitive conditions change in ways which mean that the remedy becomes ineffective or starts to distort market outcomes.

CMA accepted contained short term controlling obligations to prevent harmful outcomes while the merger parties implemented a broader remedy (an investment in their networks) which would take time to address the SLCs identified.

¹²⁵ See for example, the CMA's investigation into the [anticipated acquisition by Bouygues S.A. of Equans S.A.S \(2022\)](#), Decision that Undertakings might be accepted at paragraphs 28 and 31, and the CMA's investigation into the [anticipated acquisition by Abellio East Midlands Limited of the East Midlands rail franchise \(2019\)](#), Decision that UILs might be accepted at paragraph 15.

However, the CMA notes that in highly mature and stable industries, behavioural remedies may need to be long-term in nature. This, in turn, increases the risks associated with monitoring, market distortion, and specification.

- (f) The merger parties appoint and remunerate a monitoring trustee to assist the CMA in fulfilling its monitoring responsibilities effectively. Where a behavioural remedy is used, in view of the constraints on the CMA's resources and the possible limitations on the reliance that can be placed on the reporting role of customers and competitors, the CMA is likely to require the merger parties to appoint and remunerate a monitoring trustee to assist the CMA. The appointment of an independent adjudicator to resolve any disputes between the merged entity and customers whose terms of supply are governed by the remedy may also reduce the risks of ineffective monitoring and enforcement.¹²⁶ The use of trustees and independent experts is described in more detail in Chapter 8.

Relevance of other aspects of competition law to the design of behavioural remedies

7.39 Where behavioural remedies are used, certain aspects of those remedies may overlap with general obligations on the merged entity under other aspects of competition law. For example, if the merged entity is considered to have a dominant market position, then certain types of conduct that behavioural remedies may seek to prevent (eg predation or foreclosure of access) may already be prohibited under Section 18 of the Competition Act 1998. Similarly, a behavioural remedy may seek to prevent the making of

¹²⁶ See the OFT's investigation into [the completed acquisition by Macquarie UK Broadcast Ventures Ltd of National Grid Telecoms Investment Ltd, Lattice Telecommunications Asset Development Company Ltd and National Grid Wireless No.2 Ltd \(2007\)](#), where the merger parties undertook to remunerate an adjudicator responsible to the OFT to resolve contractual issues as part of a package of behavioural remedies. See also the CMA's investigation into [the completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited and Wireless Group Limited, as well as the entire business of UKRD Group Limited \(2020\)](#), where Bauer committed to provide representation services to independent radio stations on at least the same or better terms than customers had with a company that would made unviable by the mergers. Bauer undertook to appoint a monitoring trustee to oversee its compliance with the undertakings, as well as an independent expert to adjudicate on disputes between the independent radio stations and Bauer. See also the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#) (see [Final undertakings](#), which provide that an independent adjudicator will resolve certain disputes that may arise between the merger parties and their customers with respect to the wholesale reference offer and 'roll-over' remedies.

agreements that may be prohibited under Section 2 of the Competition Act 1998.

- 7.40 The CMA recognises the importance of ex-post competition enforcement. However, the CMA has a legal obligation to achieve as comprehensive a solution to the SLC and its adverse effects as is reasonable and practicable. The CMA will therefore normally prefer to specify its own remedy rather than rely on the general provisions of competition law, as this has the advantages that the CMA's remedy can be designed to take account of the particular circumstances of the case, and the provisions for monitoring and enforcement can be fully defined.

8. Trustees, independent experts and adjudicators

- 8.1 This chapter covers the appointment and responsibilities of independent third-party firms, eg monitoring trustees, divestiture trustees, adjudicators and independent experts, during the phase 1 and phase 2 remedies process. It covers the appointment and responsibilities of these firms:
- (a) during the CMA's assessment of possible remedies, and in particular for the purpose of assessing the merger parties' remedy proposals prior to the CMA reaching its final decision on remedies; and
 - (b) following the acceptance of UILs or Final Undertakings or the imposition of a Final Order until the remedy has been fully put into effect.

Appointment and responsibilities for assessing remedy proposals

- 8.2 In some cases, the CMA's assessment of the merger parties' remedy proposal(s) may benefit from the early appointment of a monitoring trustee and/or industry expert. This section covers the possible appointment and responsibilities of monitoring trustees and independent experts during the CMA's assessment of possible remedies, and in particular for the purpose of assisting the CMA's assessment of the merger parties' remedy proposal(s) prior to the CMA reaching its final decision on remedies.
- 8.3 Where merger parties have made a remedy proposal either at phase 1 or phase 2, they may wish to offer to appoint a monitoring trustee or an independent expert to assist the CMA in its assessment of their remedy proposal prior to the CMA reaching a decision on remedies. This may particularly be the case where the merger parties' remedy proposal is complex, or highly technical in nature, or requires the input of an industry sector expert (eg in the remedy's specification, design or evaluating the remedy's likely effects on the market).
- 8.4 The appointment of a trustee or independent expert may provide additional comfort to the CMA that a remedy proposal will be effective, and enable the CMA to reach a decision on remedies within shorter timescales than would otherwise be the case.
- 8.5 The CMA recognises that there may be practical timing challenges of involving a monitoring trustee or an independent expert in supporting the CMA to reach a view on remedy design and effectiveness at phase 1 given the timing constraints of the CMA's phase 1 UILs process. These timing constraints can potentially be mitigated through early engagement by the

merger parties with a potential monitoring trustee or independent expert and/or the CMA.

- 8.6 If a monitoring trustee or an independent expert is appointed in advance of any UILs, Final Undertakings or a Final Order, the general considerations in relation to its appointment outlined below will apply:
- (a) A monitoring trustee or an independent expert should always be independent of the merger parties, have appropriate qualifications¹²⁷ and capacity to carry out its functions, and should not be subject to conflicts of interest.
 - (b) Potential candidate firms (whether a monitoring trustee or an independent expert) may be proposed by the merger parties, but should only be appointed by the merger parties following agreement from the CMA on the identity of the proposed firm and the terms of its engagement. Typically, once appointed, only the CMA can request the termination of the appointment before completion of the firm's responsibilities. However, the merger parties can make representations to the CMA to replace the monitoring trustee and/or independent expert if they have good cause.
 - (c) The monitoring trustee's or independent expert's responsibilities will be specified in the mandate or engagement letter, which will be approved by the CMA. Once appointed, they should only receive instructions from the CMA in accordance with the agreed mandate or engagement letter, and will not be permitted to accept instructions from the merger parties. The mandate or engagement letter will also have appropriate clauses governing conflicts of interest, the firm's liability and confidentiality.

Role of independent third-party firms in assessing divestiture remedies

- 8.7 Where the merger parties have proposed a divestiture remedy, and where composition, purchaser and asset risks associated with the divestiture remedy proposal appear significant, merger parties may wish to appoint a monitoring trustee (or if appropriate, an independent expert with the relevant skills and capabilities) to prepare a report¹²⁸ to assist the CMA's review of any divestiture remedy proposal (eg an assessment of its composition risks). In these circumstances, the input of the monitoring trustee and/or independent

¹²⁷ For example, an accounting firm, management consultancy, other professional organisation or as experts in the industry in which the merger takes place.

¹²⁸ Where there is a reporting requirement, the CMA will provide guidance to the merger parties and the monitoring trustee or industry expert on the specific requirements for the report, based on the particular case.

expert as early as practicable, will likely increase the prospects of the remedy being accepted.¹²⁹

- 8.8 This report would be used as an aid to the CMA's decision whether to accept the proposed remedy (and would therefore need to be provided sufficiently in advance of that decision to allow the CMA to properly consider it), but would not be binding upon the CMA or preclude the CMA from conducting its own assessment.
- 8.9 The potential role of independent third-party firms in the assessment of complex structural remedies is set out in paragraphs 6.71-6.72.

Appointment and responsibilities for remedy implementation

- 8.10 Once the CMA has made its final decision on remedies at phase 1 or phase 2, the CMA will implement the remedy by either accepting UILs or Final Undertakings, or making a Final Order. There is typically a further implementation period that commences from the date of accepting UILs, Final Undertakings or making the Final Order until the remedy has been fully put into effect (eg for a divestiture remedy this further implementation period typically ends with the effective disposal).
- 8.11 This section covers the appointment and responsibilities of monitoring trustees, divestiture trustees, adjudicators and independent experts following the acceptance of UILs or Final Undertakings or the imposition of a Final Order until the remedy has been fully put into effect.¹³⁰
- 8.12 The UILs, Final Undertakings or Final Order may include provisions regarding:¹³¹
- (a) the appointment of a monitoring trustee for the purpose of monitoring the merger parties' compliance with their obligations in the UILs, Final Undertakings or Final Order. The CMA will usually require the

¹²⁹ In the CMA's investigation into the [anticipated acquisition by Schlumberger Limited of ChampionX Corporation \(2025\)](#), a monitoring trustee was appointed during the UILs process and prior to the CMA's final acceptance of UILs to assist the CMA in the assessment of a potential upfront remedy taker's scale and capabilities and to provide independent advice on its overall suitability as a remedy taker (see also, the [UILs acceptance decision](#) at paragraphs 23 and 34).

¹³⁰ The general considerations in relation to the appointment of monitoring trustees and independent experts set out in paragraph 8.6 will also generally apply to the appointment of monitoring trustees and independent experts following the acceptance of UILs or Final Undertakings or the imposition of a Final Order.

¹³¹ Subject to separate suitability assessments, the roles set out in this paragraph may be performed by a single person or organisation.

appointment of a monitoring trustee unless there are compelling reasons not to do so. The appointment of a monitoring trustee will normally take place as soon as possible after the acceptance of UILs or Final Undertakings, or after a Final Order has been imposed. Where a monitoring trustee is in place for the purpose of implementing a divestiture remedy, the monitoring trustee may also be tasked with assisting the CMA in assessing the suitability of potential purchasers and reviewing the transaction agreements to ensure their consistency with the CMA's decision. The monitoring trustee will normally remain in place until such time as the remedy has been put into effect (eg until effective disposal has been achieved or once any transitional services arrangements requiring monitoring have concluded);

- (b) appointment of a divestiture trustee (for divestiture remedies). A divestiture trustee will typically only be appointed where the CMA considers it necessary to do so to ensure the timely conclusion of the divestiture remedy (eg in the event effective disposal is unlikely to take place within the required divestiture period) (see also paragraphs 6.68-6.69).
- (c) appointment of an adjudicator. An adjudicator may be appointed in certain specified circumstances (eg to resolve potential disputes between the merger parties and relevant third parties). Adjudication schemes will be fact-specific, but the CMA expects that adjudicators would typically be independent industry experts (which may be an individual, several individuals or an organisation) with the necessary qualifications and experience to resolve the issues in question;¹³² and
- (d) appointment of an independent expert (eg where the CMA has decided in its final remedy decision that ensuring an effective remedy will require independent and expert advice from a technical expert or a sector specialist).¹³³

¹³² Cases where the CMA has previously required an adjudication scheme as part of a package of remedies include the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#) (see [Final undertakings](#), which provide that an independent adjudicator will resolve certain disputes that may arise between the merger parties and their customers with respect to the wholesale reference offer and 'roll-over' remedies); and the CMA's investigation into [the completed acquisitions by Bauer Media Group of certain businesses of Celador Entertainment Limited, Lincs FM Group Limited and Wireless Group Limited, as well as the entire business of UKRD Group Limited \(2020\)](#) (see [Final undertakings](#), which provide an adjudication scheme to resolve certain disputes arising between Bauer and third-party stations).

¹³³ See for example, the CMA's investigation into the [anticipated acquisition by Bouygues S.A. of Equans S.A.S \(2022\)](#), Decision that Undertakings might be accepted, where the CMA required the Parties to appoint an independent expert to assess the competitiveness of two respective bids.

- 8.13 In order to ensure that behavioural remedies have the desired impact, it is essential that there are effective and adequately resourced arrangements in place for monitoring and enforcement, so that there is a powerful threat that non-compliance will be detected and that action will be taken to enforce compliance where this is necessary. Where a behavioural remedy is used, in view of the constraints on the CMA's resources and the possible limitations on the reliance that can be placed on the reporting role of customers and competitors, the CMA is likely to require the merger parties to appoint and remunerate a monitoring trustee to assist the CMA in fulfilling its monitoring responsibilities effectively.¹³⁴

Remuneration

- 8.14 The merger parties are responsible for the remuneration of independent third-party firms discussed in this chapter in all cases, including those where the appointment is made on voluntary basis by the merger parties, rather than under the UILs, Final Undertakings or a Final Order. The structure of remuneration must not compromise a third-party firm's independence and must provide sufficient incentive to perform the required function to an appropriate standard. To ensure this, the CMA must approve the remuneration agreement. The CMA also expects that merger parties would be responsible for funding any adjudication scheme required.

¹³⁴ See the CMA's investigation into [the anticipated joint venture between Vodafone Group Plc and CK Hutchison Holdings Limited concerning Vodafone Limited and Hutchison 3G UK Limited \(2024\)](#).

9. Monitoring and review of merger remedies

Introduction

- 9.1 This chapter sets out the CMA's approach to the monitoring and review of UILs and Final Undertakings or Final Orders following merger investigations.
- 9.2 It covers how the CMA:
- (a) monitors compliance with, and investigates breaches of, UILs, Final Undertakings and Final Orders; and
 - (b) amends or removes UILs, Final Undertakings and Final Orders under statutory powers where a change of circumstances is identified.
- 9.3 It does not cover:
- (a) initial and interim undertakings or orders, such as undertakings under Section 80 or orders under Section 72 or 81 of the Act;
 - (b) the process by which the CMA provides advice to the Secretary of State in relation to varying, superseding or terminating undertakings or orders following public interest cases;¹³⁵ and
 - (c) the CMA's approach to enforcement action in response to breaches of UILs, Final Undertakings or Final Orders. This is covered in [Administrative Penalties: Statement of Policy on the CMA's Approach \(CMA4\)](#).

CMA's statutory role

- 9.4 UILs, Final Undertakings and Final Orders are the primary means by which remedies are implemented following a merger investigation under the Act. Under the Act, UILs and Final Undertakings are accepted and Final Orders are imposed by the CMA,¹³⁶ except in certain public interest cases where the

¹³⁵ [Section 92\(3\)](#) of the Act. In addition, in a small number of instances, the CMA retains a duty to advise the Secretary of State on undertakings and orders made under the Fair Trading Act 1973 (FTA73) which have not been transferred from the Secretary of State to the CMA by statutory instrument.

¹³⁶ At phase 2, when implementing the remedies in its final report, the CMA exercises a discretion whether to make, or accept, provision for remedies in a single instrument, or to make provision across a number of Final Undertakings and Final Orders (eg where there are a number of distinct remedies or a mix of Final Undertakings and Final Orders).

Secretary of State is responsible for accepting undertakings or imposing orders.

- 9.5 The CMA has a statutory duty to keep under review UILs, Final Undertakings and Final Orders made under the Act.¹³⁷ The CMA must, from time to time, consider whether UILs, Final Undertakings, or Final Orders have been or are being complied with.¹³⁸ Moreover, the CMA must, from time to time, consider whether, by reason of any change of circumstances, UILs, Final Undertakings or Final Orders are no longer appropriate and need to be amended or removed.¹³⁹

Monitoring compliance with UILs, Final Undertakings and Final Orders

- 9.6 As noted above, the CMA must, from time to time, consider whether UILs, Final Undertakings, or Final Orders have been or are being complied with.¹⁴⁰
- 9.7 The CMA is committed to the effective and proportionate monitoring of compliance with its remedies. The CMA seeks to ensure that a remedy achieves its intended objective without placing unnecessary burden on the merger parties subject to the remedy. Where another regulator or regulations are present, the CMA will also seek to avoid inconsistency with, or duplication of, the existing regulatory regime.
- 9.8 The CMA's approach to monitoring compliance with UILs, Final Undertakings and Final Orders may change over time as the CMA seeks to recalibrate its approach to reflect, for example, whether the remedy has been put into effect, the levels of compliance with the remedy and the actions of the merger parties subject to the remedy in identifying and addressing any breaches of the remedy which have occurred.
- 9.9 The CMA will work closely with the merger parties subject to the UILs, Final Undertakings or Final Orders to ensure that they understand how to comply with their obligations, are able to achieve compliance in a timely manner and the action they must take when this is not the case.

¹³⁷ [Section 92\(1\)](#) of the Act.

¹³⁸ [Section 92\(2\)\(a\)](#) of the Act.

¹³⁹ [Section 92\(2\)\(b\) and \(c\)](#) of the Act. In addition, the CMA must, as soon as is reasonably practicable, consider any representations received by it in relation to varying or releasing UILs or Final Undertakings. (See [Sections 73\(7\)](#) and [82\(5\)](#) of the Act.)

¹⁴⁰ [Section 92\(2\)\(a\)](#) of the Act.

Compliance with UILs, Final Undertakings and Final Orders

- 9.10 Merger parties subject to UILs, Final Undertakings and Final Orders are required to comply with these at all times from their introduction and throughout the time they remain in force.
- 9.11 If a person fails to comply with any UILs or Final Undertakings that it has given or any Final Order imposed on it by the CMA, compliance may be enforced by means of civil proceedings brought by the CMA for an injunction or for interdict or for any other appropriate relief or remedy in one of the UK courts.¹⁴¹
- 9.12 Moreover, where the CMA considers that a person has failed to comply with UILs, Final Undertakings or a Final Order without reasonable excuse, it may also impose a fixed penalty and/or a daily penalty.¹⁴² A fixed penalty cannot exceed 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by the person or £30,000 if the person does not own or control an enterprise.¹⁴³ A daily penalty cannot, for each day, exceed 5% of the total value of the daily turnover (both in and outside the UK) of the enterprises owned or controlled by the person or £15,000 if the person does not own or control an enterprise.¹⁴⁴ Please refer to [Administrative penalties: Statement of Policy on the CMA's approach \(CMA4\)](#) for further information.
- 9.13 In addition to enforcement by the CMA, any person affected by the contravention of UILs, Final Undertakings or a Final Order who has sustained loss or damage as a result of such contravention may also bring an action against the merger party bound by the UILs, Final Undertakings or Final Order.
- 9.14 Taking action to address breaches of UILs, Final Undertakings or Final Orders is an important way in which the CMA delivers the outcomes of its work. Breaches of remedies can mean that benefits for customers from the CMA's work are not being realised, rivalry is reduced and competition in the relevant markets is not working as well as it otherwise would.

¹⁴¹ [Section 94](#) of the Act.

¹⁴² [Sections 94AA](#) and [94AB](#) of the Act.

¹⁴³ [Sections 94AB\(3\)\(a\)](#) and [94AB\(4\)\(a\)](#) of the Act.

¹⁴⁴ [Sections 94AB\(3\)\(a\)](#) and [94AB\(4\)\(a\)](#) of the Act.

Monitoring compliance

- 9.15 In most cases, the CMA is responsible for monitoring and enforcing compliance with UILs, Final Undertakings and Final Orders.¹⁴⁵ As set out in Chapter 8, the CMA will normally require merger parties to appoint a monitoring trustee responsible for monitoring the merger parties' compliance with their obligations under the UILs, Final Undertakings or Final Order until such time the remedy has been put into effect (eg until effective disposal has been achieved or once any transitional services arrangements requiring monitoring have concluded), although overall responsibility for monitoring compliance remains with the CMA.¹⁴⁶
- 9.16 UILs, Final Undertakings and Final Orders impose compliance reporting requirements on merger parties. The UILs, Final Undertakings and Final Orders will set out the frequency of and details to be included in compliance reports. For a structural divestment, this may be as simple as confirming compliance with a non-reacquisition clause on an annual basis. For a behavioural remedy compliance reporting will likely require significantly more information to be provided to the CMA.
- 9.17 For merger parties subject to UILs, Final Undertakings or a Final Order, it is their responsibility to report compliance to the CMA. In addition, the CMA proactively seeks information and monitors compliance, so merger parties should ensure the CMA is provided up to date contact details of an appropriately authorised company officer or equivalent or otherwise persons agreed with the CMA.
- 9.18 The CMA may find out about breaches of UILs, Final Undertakings and Final Orders through a variety of routes, including:
- (a) proactive monitoring of the merger parties;
 - (b) investigations of parties carried out by the CMA under a variety of tools;¹⁴⁷

¹⁴⁵ [Section 92](#) of the Act, *Duty of the CMA to monitor undertakings and orders*. See also [Schedule 24](#) of the Act for provision in respect of any remaining FTA73 remedies.

¹⁴⁶ See paragraph 9.70.

¹⁴⁷ Including competition and consumer investigations, Digital Market Unit investigations, merger investigations, market reviews, market studies, market investigations and investigations of previous breaches of UILs, Final Undertakings or Final Orders under the Act.

- (c) liaison with sectoral regulators and industry or other representative bodies;
- (d) third parties, including individual customers, consumer representative bodies or whistle-blowers, assessing and reporting on the compliance of others;
- (e) compliance reports submitted to the CMA by merger parties; and
- (f) self-assessments of compliance carried out at other times by merger parties.

Reporting breaches of UILs, Final Undertakings or Final Orders to the CMA

- 9.19 The CMA's portfolio of UILs, Final Undertakings and Final Orders includes different legal obligations in relation to reporting breaches, with some imposing specific deadlines on merger parties for reporting breaches while others require merger parties to report on an annual basis about breaches. The CMA will ensure that the legal obligations in relation to reporting breaches are appropriately configured to enable it to effectively monitor and enforce the relevant UILs, Final Undertakings or Final Order without placing unnecessary burden on merger parties.
- 9.20 The CMA encourages all parties to report to the CMA all breaches of UILs, Final Undertakings and Final Orders as soon as these are discovered, even where a full account of the details is not yet available. Such cooperation enables a timely and efficient assessment of the scale of the breach, and what action may be necessary in response, including potential enforcement action. This facilitates the efficient use of investigative resource both in the CMA and the merger party concerned.
- 9.21 If a merger party is aware of a breach and takes action to remedy the breach without informing the CMA at the time, there is a risk that the CMA may not be satisfied with the action taken, and this may lead to the merger party having to take separate and additional action to satisfy the CMA at additional cost. The CMA will take into account any action taken by the merger party to remedy the breach and the reporting of the breach to the CMA when it determines the appropriate enforcement action.¹⁴⁸

¹⁴⁸ See [Administrative Penalties: Statement of Policy on the CMA's Approach \(CMA4\)](#) for details of the factors the CMA considers in enforcement in relation to breaches of UILs, Final Undertakings and Final Orders.

- 9.22 Where a merger party becomes aware that it will breach UILs, Final Undertakings or a Final Order in the near future and this cannot be avoided, the CMA would also encourage the merger party to contact the CMA as soon as it is aware of this possibility, to explain the circumstances surrounding this and to explore with the CMA what actions the merger party can take to mitigate the duration and the effects of the breach.
- 9.23 All contact in relation to potential breaches of UILs, Final Undertakings and Final Orders should be with the CMA's merger remedies monitoring and enforcement team: (mergerremediesmonitoring@cma.gov.uk).¹⁴⁹
- 9.24 While this list is not exhaustive, the CMA would expect to receive the following information with all reports of breaches, while recognising that full details may not be available at the point at which a breach is first identified and notified to the CMA:
- (a) a description of the relevant provision(s) of the UILs, Final Undertakings or Final Order to which the breach relates;
 - (b) a full description of the breach itself, including whether, and if so how, it might have an impact on relevant third parties, and customers;
 - (c) how the breach occurred and how and when it was discovered;
 - (d) the duration of the breach and whether it is ongoing;
 - (e) the size and significance of the breach and likely harm caused, both for the merger party and for third parties and customers;
 - (f) details of whether any third parties are involved, including suppliers, systems providers and other contracted parties; and
 - (g) whether any relevant regulators have been informed (for breaches in regulated sectors).

Investigations of breaches of UILs, Final Undertakings and Final Orders

- 9.25 The CMA's approach to an investigation into potential breaches of its UILs, Final Undertakings and Final Orders will depend on the nature and severity of

¹⁴⁹ To facilitate prompt handling of correspondence, parties contacting the CMA via this email address should include a reference to the relevant UILs, Final Undertakings or Final Order in the email title.

the potential breach.¹⁵⁰ The CMA may use information-gathering powers contained in particular clauses of the UILs, Final Undertakings or Final Order, or broader information-gathering powers, such as notices under section 109 of the Act or use of the CMA's general function in section 5 of the Act to obtain, compile and keep under review information about matters relating to the carrying out of its functions.

- 9.26 Certain breaches of UILs, Final Undertakings and Final Orders could also represent a breach of other laws which the CMA is tasked with enforcing, including competition or consumer protection legislation. Where the CMA considers this to be the case, the CMA will prioritise the most appropriate tool or tools under which to conduct its investigation, based on the circumstances of the potential breach concerned, including, where appropriate, the enforcement mechanisms available to deliver redress to customers.

Public register of breaches of UILs, Final Undertakings and Final Orders

- 9.27 The CMA has two public registers on its website – a register of all UILs, Final Undertakings and Final Orders¹⁵¹ and a register of all material breaches of UILs, Final Undertakings and Final Orders.¹⁵² These registers are regularly updated.

- 9.28 To determine whether a breach should be included on the register of material breaches, the factors the CMA will consider include:

- (a) the actual or potential substantive effect (if any) on customers and/or the competitive process;
- (b) the impact (if any) on the CMA's ability to carry out its functions, particularly in relation to remedy monitoring and enforcement;
- (c) the duration of the breach and how quickly it was reported and rectified; and
- (d) the extent, if any, of any exacerbating factors, such as the extent of previous non-compliance by the merger party concerned or the extent to which a remedy and its requirements are well-established.

¹⁵⁰ In relation to UILs or Final Undertakings, the CMA can impose an order on a merger party concerned where the UILs or Final Undertakings are not being fulfilled (Sections 75 and 83 of the Act).

¹⁵¹ [Mergers orders and undertakings register](#).

¹⁵² [Breaches of the CMA's markets and mergers remedies](#).

9.29 The CMA will record the following information about material breaches in its register:

- (a) the UILs, Final Undertakings or Final Order breached;
- (b) the merger party that breached the UILs, Final Undertakings or Final Order;
- (c) a short description of the breach, including whether it is a breach of administrative, reporting or substantive obligations;
- (d) the duration of the breach;
- (e) when the breach was notified to the CMA;
- (f) any action taken by the merger party to address the breach and compensate customers (such as through providing refunds to compensate for any loss or damage); and
- (g) action taken by the CMA in response.

9.30 Prior to publishing details of a breach on the register of breaches, the CMA will notify the relevant merger party of its decision to make an entry in the register and provide its reasoning as the CMA considers appropriate in the circumstances.

Review of UILs, Final Undertakings and Final Orders

Introduction

9.31 As noted in paragraph 9.5, the CMA must, from time to time, consider whether, by reason of a change of circumstances, the UILs, Final Undertakings or Final Order are no longer appropriate and need to be amended or removed.¹⁵³

9.32 The review of UILs, Final Undertakings and Final Orders is the process that the CMA uses to determine whether the UILs, Final Undertakings or Final Order in question may no longer be appropriate and need to be amended or removed (see paragraphs 9.37-9.71 below).

¹⁵³ Sections 89(2), 92(2) and 92(4) of the Act.

- 9.33 In fulfilling its statutory duty, the CMA is committed to retaining only those UILs, Final Undertakings or Final Orders that remain appropriate, following a change of circumstances, on the basis that they continue to address the SLC and its adverse effects identified in the merger investigation. Where this is not the case, the CMA will review and amend or remove the UILs, Final Undertakings or Final Order concerned. The CMA will typically seek to remove the UILs, Final Undertakings or Final Orders and will only consider amending them instead if there is clear evidence that the SLC has endured. Where this is the case, the CMA would generally expect to narrow the scope of the remedy's application.

Changes of circumstances

- 9.34 To consider that UILs, Final Undertakings or Final Orders are no longer appropriate, the change of circumstances must be of sufficient magnitude, relevance and importance that the UILs, Final Undertakings or Final Orders are no longer appropriate in dealing with the SLC and its adverse effects which they were designed to remedy. For example, past changes of circumstances have included:
- (a) products or services being either changed in nature or no longer being offered by merger parties;¹⁵⁴
 - (b) changes in customer tastes and preferences over consumption of particular products or services;¹⁵⁵
 - (c) changes in market and broader industry supply conditions or structure that may affect the conditions of competition and the need for a particular UILs, Final Undertakings or Final Order;¹⁵⁶ or
 - (d) a range of legislative changes, including the requirements of UILs, Final Undertakings or a Final Order being superseded by other legislation or regulation, as well as other changes to legislation that may affect the application of UILs, Final Undertakings or a Final Order.
- 9.35 In cases where the changes are complex or uncertain, a detailed investigation will be required in order to evaluate whether or not there has been a change

¹⁵⁴ For example, the CMA's [review \(2015\) of undertakings given by the Littlewoods Organisation plc in relation to its acquisition of Freemans plc](#).

¹⁵⁵ For example, the CMA's [review \(2016\) of undertakings given by Thomas Cook Group Ltd in relation to its acquisition of Interpayment Services Ltd](#).

¹⁵⁶ For example, the CMA's [review \(2023\) of undertakings given by British Sky Broadcasting in relation to its increase of its shareholding in British Interactive Broadcasting Holdings Ltd](#).

of circumstances (and, if so, what, if any, changes to UILs, Final Undertakings or a Final Order may be appropriate). In these circumstances, the CMA will undertake a substantive review of the individual UILs, Final Undertakings or Final Order.

- 9.36 In contrast, where the changes of circumstances are clear and straightforward, and the action necessary is clear and straightforward to determine, the CMA may undertake a strategic review of a number of UILs, Final Undertakings and Final Orders together. A strategic review enables the CMA to review and amend or remove remedies efficiently, thereby reducing the regulatory burden on businesses subject to the UILs, Final Undertakings and Final Orders and allows the CMA to focus on monitoring and enforcing those UILs, Final Undertakings and Final Orders that remain appropriate.

Process for reviews of UILs, Final Undertakings and Final Orders

- 9.37 This section sets out the process for reviews of UILs, Final Undertakings and Final Orders, including the:
- (a) initial screening, including the ways in which a review may be initiated and the decision whether to conduct a review;
 - (b) process for a review, including the decision maker, the timescale, the key stages of the CMA's decision-making process, and the conclusion of a review; and
 - (c) procedure for dealing with UILs, Final Undertakings or Final Orders that are time-expired, lapsed or have been superseded by new UILs, Final Undertakings or Final Orders.
- 9.38 The CMA is committed to conducting reviews in an efficient and timely manner, so that it can amend or remove UILs, Final Undertakings or Final Orders and reduce the burden on businesses subject to UILs, Final Undertakings or Final Orders that are no longer appropriate and focus its monitoring and enforcement activity on those that continue to remain appropriate.

Initial screening

The ways in which a review may be initiated

- 9.39 A review may be initiated by the CMA on its own initiative or at the request of merger parties subject to the UILs, Final Undertakings or Final Order or other interested parties.¹⁵⁷

CMA's own-initiative activity

- 9.40 The CMA may begin a review on its own initiative when (a) it has identified a possible change of circumstances; or (b) where the decision in which the UILs, Final Undertakings or Final Order were originally determined recommended a timeframe to review their effectiveness or consider changes in circumstances.¹⁵⁸

Requests from merger parties or other interested parties

- 9.41 Any submission making a request for a review concerning a change of circumstances should set out clearly and with supporting evidence:
- (a) what the change of circumstances is;
 - (b) how and why this makes it appropriate to amend or remove the UILs, Final Undertakings or Final Order;
 - (c) the possible consequences for customers impacted by the UILs, Final Undertakings or Final Order which could result from it being amended or removed;¹⁵⁹
 - (d) why a review of the UILs, Final Undertakings or Final Order meets the CMA's published prioritisation principles; and

¹⁵⁷ Other interested parties (that is, those not subject to the UILs, Final Undertakings or Final Order) can include public bodies.

¹⁵⁸ Consistent with the CMA's objective to avoid retaining UILs, Final Undertakings or Final Orders when they are no longer needed, where a remedy is not automatically 'sunset' after 10 years from the date UILs or Final Undertakings are accepted or the Final Order is imposed, or if the sunset clause exceeds 10 years, the CMA will normally review, on its own initiative, whether the UILs, Final Undertakings or Final Order remain appropriate within 10 years of the UILs, Final Undertakings or Final Order coming into force.

¹⁵⁹ Where the request is made by other interested parties (that is, those not subject to the UILs, Final Undertakings or Final Order), they should explain their interest in the UILs, Final Undertakings or Final Order.

- (e) whether the request is related, at least in part, to a failure, or anticipated failure, to comply with the UILs, Final Undertakings or Final Order.¹⁶⁰

Deciding whether to conduct a review

- 9.42 The CMA may, upon receipt of a request for a review of UILs, Final Undertakings or a Final Order or following its own-initiative assessment, issue an invitation to comment.¹⁶¹ The form of publication, duration of the period for public comment (typically three weeks) and extent of detail will depend on the circumstances of the case.
- 9.43 In some cases, the publication of an invitation to comment may not occur if, for example, the CMA believes that it has sufficient information to reach a decision on whether to launch a review or on the most appropriate provisional outcome without the need for consultation, or where the information supporting a review constitutes specified information which would need to be excluded from disclosure.¹⁶²
- 9.44 The CMA will assess the responses to any consultation and then decide whether a review should take place. In doing so, the CMA will consider whether there is a realistic prospect of finding a change of circumstances that would suggest the remedy is no longer appropriate and justify amending or removing it.
- 9.45 In deciding whether to conduct a review, the CMA will act in accordance with its published prioritisation principles. This may mean that the CMA will choose not to conduct a review within timeframes recommended in the relevant decision in which the UILs, Final Undertakings or Final Order were originally determined. However, where the decision indicates that a remedy should be reviewed within a specified timeframe, the CMA will apply a strong presumption in favour of conducting a review in line with that indication.

¹⁶⁰ Where the possible change of circumstances is such that it would lead to a breach of the UILs, Final Undertakings or Final Order, the CMA may be able to prioritise considering it as quickly as possible. However, merger parties can assist the CMA by giving it notice of such changes of circumstances in good time and thereby avoid being placed in potential breach.

¹⁶¹ Where the request for a review has been made by other interested parties (that is, those not subject to the UILs, Final Undertakings or Final Order) or the review is an own-initiative CMA review, and in order to ensure an effective public consultation and to establish whether such a public consultation can take place, the CMA will normally consult informally with those directly affected by the UILs, Final Undertakings or Final Order prior to the public consultation. This informal consultation is likely to be a short period of no more than two weeks.

¹⁶² See [Part 9](#) of the Act.

- 9.46 If the CMA decides not to proceed with a review, in the case of a requested review, it will inform the relevant stakeholder(s) that a review will not take place and may set out briefly its reasons for not conducting a review at that time. This decision may be published, although the CMA will have due regard to its obligations in relation to specified information, as set out in Part 9 of the Act.
- 9.47 For a strategic review (see paragraph 9.36), when publishing an invitation to comment, the CMA will include a brief description of the UILs, Final Undertakings or Final Orders included in the strategic review and the reasons for considering that those remedies are no longer appropriate.

The process for a review

Decision maker

- 9.48 The CMA has a discretion in whom to appoint as decision maker for most remedy reviews.¹⁶³ The CMA either appoints a Remedy Group drawn from the CMA panel¹⁶⁴ or appoints an appropriate senior CMA member of staff or members of staff to conduct the review. The merger parties will be informed of the relevant decision maker when the review is launched.

Timescales for reviews

- 9.49 Once the decision maker(s) for a review have been appointed, they will decide upon an appropriate timetable for the review. The CMA will endeavour to conduct its review as efficiently as possible. However, the time taken to conduct a review will vary depending on the complexity of the issues involved, the available resources at the time and the extent to which stakeholders engage in a timely manner.

¹⁶³ This is because when a review of Final Undertakings or Final Order is launched, the original CMA Group will generally have ceased to exist and so the decision reverts to the CMA Board to be delegated as appropriate (Sections 34C(1)(c) and (3)(e) of the Act). The exceptions are a small number of remaining undertakings and orders made under the FTA73, where responsibility for their review has been passed from the Secretary of State to the CMA, and the legislation prescribes the appointment of a CMA Group (see [Schedule 24](#) to the Act).

¹⁶⁴ For more information on delegation to Remedy Groups, see the published [Case and Policy Committee terms of reference](#). The Remedy Group is a sub-committee of the Case and Policy Committee, accountable to the CMA Board. The Remedy Group will follow broadly the same approach to its decision making as other groups of panel members.

- 9.50 The CMA will publish its decision to launch a review on its website.¹⁶⁵ At the same time or shortly thereafter, the CMA will also publish information about the review including:
- (a) a brief description of the case, the relevant legislation, the industry sector concerned and the CMA's reasons for commencing a review – the level of information may vary according to the circumstances of the case;
 - (b) an indicative timetable showing the anticipated dates of key milestones; and
 - (c) details of how to respond to the consultation, including the first point of contact for general queries and submission of information.
- 9.51 The CMA will keep up to date the information provided to the merger parties and published about the review and its progress.

Key stages of the CMA's decision-making process

Initial assessment

- 9.52 The CMA will consider whether the initial submissions from the invitation to comment received from all relevant parties are sufficient to allow it to reach a provisional decision:
- (a) If the CMA considers that relevant parties have had sufficient opportunity to make their case and the initial submissions indicate clear-cut grounds for amendment or removal, it will provisionally decide whether the UILs, Final Undertakings or Final Order should be amended (and how) or removed. Where amendments are minor or urgent, the CMA will seek to deal with these as swiftly as possible.
 - (b) If the CMA considers that further information and/or analysis is necessary before it can reach a provisional decision, it will consider what steps should be undertaken and how the further information and/or analysis required affects the timetable for the review.

¹⁶⁵ The CMA will inform relevant parties as soon as practicable of its intention to commence a review (see paragraph 3.13 of [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA11\)](#), August 2015, and paragraph 3.5 of [Transparency and Disclosure: Statement of the CMA's Policy and Approach \(CMA6\)](#), 19 December 2024).

- 9.53 Where the CMA has identified the need for further information and/or analysis, it may invite or request submissions from those merger parties subject to the UILs, Final Undertakings or Final Order and/or relevant third parties, including those that have not responded to any initial invitation to comment. In certain circumstances, particularly for complex reviews,¹⁶⁶ the CMA may consider it necessary to hold a hearing with relevant parties.
- 9.54 The CMA will have regard to the need to ensure due process for both merger parties directly involved and other interested third parties. The CMA will also have regard to the need to conduct reviews effectively and efficiently, and the need to reach properly reasoned decisions.
- 9.55 Where the CMA wishes to test some of its initial thinking on the review, it may decide to disclose this to the merger parties for comment. The CMA will take a flexible approach to sharing its developing thinking and/or evidence with merger parties directly involved and other interested third parties, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of the review.
- 9.56 When considering what documents may be disclosed during the course of a review, the CMA will have regard to [Transparency and Disclosure: Statement of the CMA's Policy and Approach \(CMA6\)](#) and [Disclosure of information in CMA work \(CC7\)](#).

Provisional decision

- 9.57 Before reaching a final decision, the CMA will make a provisional decision on which it will consult publicly. The provisional decision will be published on its website.
- 9.58 The CMA's provisional decision will address whether there has been a change of circumstances and whether the CMA intends to amend or remove the remedy.
- 9.59 If the CMA is proposing to amend a remedy, it will seek views on the nature and scope of the proposed amendment at the time of publishing the provisional decision. The CMA will consider amendments proposed by merger parties and other interested parties (if any) as well as its own proposals. Merger parties and other interested parties will be expected to explain how

¹⁶⁶ For example, where there are changes in market conditions which require detailed analysis, or where the change of circumstances suggests a range of possible variations for the UILs, Final Undertakings or the Final Order.

their proposed amendments will effectively address the original SLC, including in light of any change of circumstances provisionally identified. The CMA will set out a time limit within which any proposed amendments must be submitted.

- 9.60 In some reviews, the case for removal or the precise nature of the appropriate amendment may be sufficiently clear at the time of making the provisional decision that the CMA may draft the text of revised UILs, Final Undertakings or Final Order at the same time as its provisional decision. The CMA may therefore decide to set out its provisional decision and reasoning, including a notice of intention to amend or remove the UILs, Final Undertakings or Final Order. Such a notice will be given in accordance with the procedural requirements set out in Schedule 10 to the Act. Where this is not the case, the CMA may consider it appropriate to consult on a range of possible amendments and the CMA's provisional decision will include a notice of possible amendments.
- 9.61 The consultation period for proposed changes will typically be 15 days for UILs and Final Undertakings and 30 days for Final Orders, in accordance with Schedule 10 of the Act. In cases where the provisional decision is to retain the remedy, the consultation period may be shorter, but generally no less than 14 days.

Final decision

- 9.62 The CMA will consider all submissions received during the consultation period before reaching a final decision. The final decision and the reasons for it will be published.
- 9.63 The UILs, Final Undertakings or Final Order in question will remain in place if the final decision is any of the following:
- (a) the CMA has identified no change of circumstances; or
 - (b) the CMA finds that the change of circumstances does not warrant any amendment or removal.
- 9.64 If the final decision is that there has been a change of circumstances and that amendment or removal is appropriate, at the same time as the CMA's final decision or as soon as possible thereafter, the CMA will, unless it has already done so at the provisional decision stage, give notice of its intention to amend or remove the UILs, Final Undertakings or Final Order.

- 9.65 Such notice shall be given in accordance with the procedural requirements set out in Schedule 10 to the Act. Changes to UILs or Final Undertakings will be consulted upon for at least 15 days and changes to a Final Order will be consulted upon for at least 30 days.¹⁶⁷
- 9.66 The CMA will have regard to any representations made in response to the notice and may make modifications to the proposed revised UILs, Final Undertakings or Final Order as a result. If the CMA considers that any representation necessitates material change to the proposed revised UILs, Final Undertakings or Final Order, it will give notice of the proposed modifications with a further consultation period of no less than seven days.
- 9.67 On consideration of representations made on a notice of intention to amend, or in the absence of any such representations, the CMA will proceed with accepting and publishing revised UILs or Final Undertakings or by publishing an amendment Order.
- 9.68 On consideration of representations made in response to a notice of intention to remove the UILs, Final Undertakings or Final Order, or in the absence of any such representations, the CMA will proceed to remove the UILs, Final Undertakings or Final Order. In the case of UILs or Final Undertakings, the CMA will notify relevant merger parties of the release. In the case of Orders, the CMA will publish a revocation order.

Conclusion of a review

- 9.69 The CMA's review concludes either once a final decision has been made that there are no amendments to be made to the UILs, Final Undertakings or Final Order, or once the UILs, Final Undertakings or Final Order have been amended or removed. For a strategic review, the CMA will also list any UILs, Final Undertakings or Final Orders that are retained and the rationale for this decision.
- 9.70 Following the conclusion of a review, the CMA will make any appropriate amendment to its published register of UILs, Final Undertakings and Final Orders. The CMA is responsible for monitoring and enforcing any UILs, Final Undertakings and Final Orders that remain in force, except where specifically indicated otherwise.¹⁶⁸

¹⁶⁷ [Schedule 10](#), paragraph 7(2) of the Act.

¹⁶⁸ For example, sectoral regulators may be responsible for monitoring compliance with the UILs, Final Undertakings or Final Orders in certain cases, where this is specified by the CMA.

- 9.71 For a strategic review, in some circumstances, responses may suggest that UILs, Final Undertakings or a Final Order should not be amended or removed without further consideration. Where this is the case, the CMA will decide whether to retain the UILs, Final Undertakings or Final Order, or whether the UILs, Final Undertakings or Final Order require further consideration under a separate, substantive review, because, for example, the issues appear to be complex or the UILs, Final Undertakings or Final Order require amendment rather than removal. If the CMA decides that the UILs, Final Undertakings or Final Order require further consideration under a separate, substantive review, it may deprioritise enforcement of the UILs, Final Undertakings or Final Order until it is able to conduct this further review.

Procedure where UILs, Final Undertakings or Final Orders are time-expired, lapsed or superseded by new UILs, Final Undertakings or Final Orders

- 9.72 There will be cases in which UILs, Final Undertakings or Final Orders are time-expired or have lapsed. This may be as the result of a predetermined event having taken place or where a specified timescale has elapsed, or where they have been superseded by new UILs, Final Undertakings or Final Orders. For example:

- (a) Where UILs, Final Undertakings or a Final Order include a specified time period for the application for the substantive elements of the remedy and that period has ended, or where UILs, Final Undertakings or Final Orders include an overall expiry date (sunset clause) which has now passed;
- (b) Where UILs, Final Undertakings or a Final Order specify that they will expire upon a certain specified event happening; or
- (c) Where it is clear-cut that the substantive obligations have been superseded by new UILs, Final Undertakings or a new Final Order resulting from a new CMA inquiry.

- 9.73 In the case of such time-expired, lapsed or superseded UILs, Final Undertakings or Final Orders, there is no requirement for further investigation or consultation, as the UILs, Final Undertakings or Final Orders will already have ceased to have effect. In such circumstances, the CMA will remove the UILs, Final Undertakings or Final Orders from its register of UILs, Final Undertakings and Final Orders, notify the merger parties subject to the UILs, Final Undertakings or Final Order, and publish a notice that the UILs, Final Undertakings or Final Order have been amended or removed.

- 9.74 Some of the CMA's UILs, Final Undertakings or Final Orders contain a specified time period or event beyond which they cease to have practical effect, but do not provide for the UILs, Final Undertakings or Final Order to automatically terminate. In these cases, the CMA will discharge its duty under Schedule 10 to the Act by publishing a notice of its intention to remove such UILs, Final Undertakings or Final Orders and to consult on that notice for a minimum of 15 days (in the case of UILs or Final Undertakings) or 30 days (in the case of Final Orders). This will allow the UILs, Final Undertakings or Final Order to be removed as quickly as possible, thus reducing the burden on merger parties subject to the UILs, Final Undertakings or Final Order.