THE

Merger Control Review

Eighth Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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UNITED KINGDOM

Jordan Ellison and Paul Walter[1]

I INTRODUCTION

Anticipated or completed mergers qualify for review under the UK rules if they meet a test relating to the turnover of the target or, alternatively, a 'share of supply' test. Where the UK turnover of the target exceeds £70 million, the turnover test will be satisfied. The share of supply test will be satisfied where the merger creates an enlarged business supplying 25 per cent or more of goods or services of any reasonable description or enhances a pre-existing share of supply of 25 per cent or more.

The Competition and Markets Authority (CMA) has the power to carry out an initial Phase I investigation, and has a duty to refer any qualifying transaction for a detailed Phase II investigation where it believes that the merger could give rise to a substantial lessening of competition. Phase I decision-making is undertaken by the Senior Director of Mergers or another senior CMA official, while Phase II decision-making is undertaken by an independent panel of experts drawn from a pool of senior experts in a variety of fields.

Remedial undertakings in lieu of a Phase II reference may be accepted by the CMA. The CMA's in-depth Phase II investigation may lead to a prohibition decision, a decision that the transaction should be allowed to proceed subject to undertakings, or an unconditional clearance.

Notification under the UK system of merger control is 'voluntary' in the sense that there is no obligation under the Enterprise Act 2002 (EA) to apply for CMA clearance before completing a transaction. The CMA may, however, become aware of the transaction through its market intelligence functions (including through the receipt of complaints) and impose interim orders preventing integration of the two enterprises pending its review. There is a risk that it may then refer the transaction for a Phase II investigation, which could ultimately result in an order for divestment.

In certain limited circumstances (where the merger raises a defined public interest consideration), the UK system allows the relevant Secretary of State to intervene in relation to mergers. Currently, public interest considerations are limited to national security, quality and plurality in the media, accurate presentation of news and free expression in newspaper mergers, and the maintenance of stability in the UK financial system.[2]

1 Jordan Ellison is a partner and Paul Walter is a special adviser at Slaughter and May. The authors would also like to thank Isabel Agnew, professional support lawyer, and Henry Llewellyn, associate at Slaughter and May, for their help in preparing this chapter.

2 The Secretary of State has recently issued intervention notices in two transactions: (i) in March 2017, a European Intervention Notice in 21st Century Fox's acquisition of Sky on media plurality grounds (the European Commission cleared the deal in April 2017; the outcome of the UK's intervention is pending

The CMA has published detailed non-binding guidelines on jurisdictional issues and its procedures for the review of mergers.[3] It has also adopted other guidance documents published by its predecessor organisations, the Office of Fair Trading (OFT) and the Competition Commission (CC).[4]

The Competition Appeal Tribunal (CAT) may review decisions made by the CMA or the Secretary of State in connection with a reference, or possible reference, of a merger. An appeal lies, on a point of law only, from a decision of the CAT to the Court of Appeal and requires the leave of either the CAT or the Court of Appeal.

II YEAR IN REVIEW

i Workload

The number of Phase I merger decisions made by the CMA in the 2016–2017 financial year (57) was slightly down from the 62 decisions taken in the preceding financial year, and significantly down from the peak of 210 merger decisions made by the OFT in the 2005–2006 financial year.[5] Since 1 April 2004, 57 is the lowest annual figure for Phase I decisions, with the average number being 101 decisions per year.

Of the 57 cases decided during the year, 42 were cleared unconditionally, representing around 74 per cent of cases, up from 65 per cent in the preceding year (including cases cleared under the *de minimis* exception – see Section III.vii, *infra*). Five cases were referred for Phase II review, which is around 9 per cent of cases, down from 18 per cent in the preceding year. Undertakings in lieu of a reference were accepted in nine cases, the same as in the preceding year.

At the time of writing, one of the five transactions referred to Phase II has been cleared unconditionally, two have been cleared with remedies and two are still under review.[6]

A total of seven Phase II decisions were published by the CMA in the 2016–2017 financial year, down from nine published by the CMA in the previous year. One was an unconditional clearance, four were granted clearance subject to divestiture remedies and one permitted the transaction to proceed subject to behavioural remedies. The CMA prohibited one merger during the 2016–2017 financial year,[7] whereas it did not prohibit any in the preceding year.

Overall, the CMA intervened (i.e., prohibited or accepted remedies) in around 23 per cent of cases in the 2016–2017 financial year, which is around three times the rate of intervention from the European Commission over a similar period. The higher intervention rate may be explained by the voluntary nature of the UK merger control regime, which means that parties may elect not to notify transactions that do not give rise to significant competition issues.

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at the time of writing) and (ii) in April 2017, a public interest intervention notice in Hytera's acquisition of Sepura on national security grounds (in May 2017, the Secretary of State for Business, Energy and Industrial Strategy accepted undertakings offered by the parties in lieu of a reference to the CMA for a Phase II investigation). Prior to this, the Secretary of State last issued an intervention notice in 2012.

3 Mergers: Guidance on the CMA's jurisdiction and procedure (January 2014) CMA2.

4 On 1 April 2014, the CMA assumed the competition powers and responsibilities of the OFT and the CC as part of a series of reforms intended to strengthen the UK merger control regime.

5 For the CMA case directory, see www.gov.uk/cma-cases.

6 This includes ICE/Trayport – see further Section III.ix, *infra*.

7 *ICE/Trayport*. ICE appealed the CMA's decision to the CAT - see further Section III.ix, *infra*.

ii Interim measures

The CMA has powers to impose interim measures to freeze or unwind integration and prevent pre-emptive action, including in relation to anticipated mergers at Phase I (see Section III.vi, *infra*). This ensures that, while notification is voluntary in the UK, the CMA is able to prevent action being taken that would result in irreversible damage to competition. The CMA imposed initial enforcement orders in 47 per cent of Phase I cases decided in the 2016–2017 financial year. This represents an increase from the 32 per cent of Phase I cases decided in the 2015–2016 financial year in which initial enforcement orders were imposed. Interim undertakings were given or interim orders were imposed in six Phase II cases decided in the 2016–2017 financial year, which is around 86 per cent of cases. This represents a significant increase from the 44 per cent of Phase II cases decided in the 2015–2016 financial year in which interim undertakings were given. The CMA granted a total of 72 derogations from initial enforcement orders in the 2016–2017 financial year, up quite significantly from 47 derogations in the previous year.[8] At the time of writing, the CMA has not yet used its powers to reverse integration steps taken before issuing an order.

iii Information requirements and timetables

The CMA merger notice requires a large amount of information. The CMA therefore strongly encourages parties to make contact in advance of notification to seek advice on their submission, not only to ensure that the notification is complete, but also to lessen the risk of burdensome information requests post-notification.

One of the key features of the UK regime is the existence of a statutory 40-working day timetable at Phase I. The CMA recognises that this presents its own challenges, in particular balancing the need to obtain as much information as possible upfront (before the clock starts running) against the burden such information requests may place on businesses. The CMA has also acknowledged the need to take care that pre-notification discussions do not extend for longer than is appropriate. The CMA aims to start the statutory clock within 20 working days (on average across all cases) of submission of a substantially complete draft merger notice. The CMA appears to be meeting its target: during the 2016–2017 financial year, the period between submission of a substantially complete draft merger notice and formal notification took on average 11 working days,[9] similar to the average of 10 working days it took in the preceding year.[10] The average length of the total pre-notification period was 33 working days in the 2016–2017 financial year, and 34 working days in the previous year.[11] Some cases, however, still require long pre-notification periods. The CMA has emphasised that pre-notification will be quicker the more complete the draft notification is, including draft annexes containing internal documents, contact details, etc.[12]

While the CMA has indicated its willingness to adopt a reasonable approach to assessing what type of information will be required for a complete notification, it also retains

8 Mergers updates, Law Society Competition Section seminar, 14 March 2017. The figure for the 2016–2017 financial year is accurate as at 28 February 2017.
9 Ibid. This figure is accurate as at 28 February 2017.
10 Speech by Alex Chisholm on the CMA's achievements over the last two years, 11 May 2016.
11 Mergers updates, Law Society Competition Section seminar, 14 March 2017. The figure for the 2016–2017 financial year is accurate as at 28 February 2017.
12 Ibid.

the power to 'stop the clock' where the parties have failed to comply with the requirements of a post-notification formal information request (see Section III.iv, *infra*). The CMA formally paused the statutory timetable in 13 Phase I cases during the 2016–2017 financial year.[13]

During the 2016–2017 financial year, the CMA completed all cases within the Phase I statutory deadline. The average length of Phase I was 35 working days, compared to 34 working days in the preceding year.[14]

iv Local market analysis

When examining retail mergers, the CMA tends to assess the impact on competition both at a national level and at a narrower local level. This approach often results in the merging parties offering to divest a number of businesses in local areas in order to secure clearance for the overall transaction. This trend has continued during the last year. In *Ladbrokes/Coral*, the CMA's final report identified 642 local areas in which the merger may be expected to result in a substantial lessening of competition and required the divestment of around 350 to 400 licensed betting offices. The CMA subsequently approved the sale by Ladbrokes and Coral of 360 shops, which represents the largest ever UK retail divestiture. The CMA found that the transaction would have led to a substantial lessening of competition at national level as a result of the aggregated loss of competition at local level, and that this was capable of being remedied by local divestments. In *Celesio/Sainsbury's Pharmacy Business*, the CMA found that the transaction would have led to a substantial lessening of competition in 12 local areas and required the divestiture of a Lloyds Pharmacy in each of those areas.

The CMA has recently published revised commentary on the assessment of retail mergers,[15] which explains the principles applied in past retail mergers and the issues frequently involved. In addition to updating the text on catchment areas, effects on local and national competition and upward price pressure indices, the new commentary also provides a more detailed explanation of the use of filters, diversion ratios and econometric evidence, and includes an assessment of the competitive interaction between bricks-and-mortar and online retail businesses.

v Online constraints

Online constraints are increasingly an important feature in some mergers (in particular in retail and media cases). The CMA has demonstrated its approach to analysing the impact of such constraints in several recent cases. In *Future/Miura*, the CMA noted that there had been a material level of migration from printed magazines to online content but that there was a significant variation in the constraint exercised by digital content within different categories of interest. For example, evidence showed that the constraint imposed by online content was particularly robust within the gaming category. Although the parties would have a combined share of 100 per cent in gaming magazines, the CMA found no realistic prospect of a substantial lessening of competition based, among other things, on the strong competitive constraint imposed by online content. In *Ladbrokes/Coral*, the CMA also considered the nature of competition between online and retail suppliers. It did not include online supply

13 Ibid. This figure is accurate as at 28 February 2017. The CMA has indicated that the statutory clock was only stopped in cases which had been referred to it from the European Commission under Article 4(4) of the EUMR, not in mergers that were originally notified to the CMA.

14 Ibid. The figure for the 2016–2017 financial year is accurate as at 28 February 2017.

15 Retail mergers commentary: CMA62 (April 2017).

in the product market due to the relatively low levels of online diversion, price differentials and differences in use, but did note that online constraint was inherently incorporated in the evidence underlying its local competition assessment.

In its revised retail mergers commentary (see further Section II.iv, *supra*), the CMA notes that it has found that in some retail sectors the competitive interaction between the online and bricks-and-mortar channels is evolving rapidly and this needs to be taken into account in its analysis. The CMA typically uses customer surveys, internal documents, econometric analysis and third party views to assess the strength of constraint imposed by online retailers on bricks-and-mortar retailers (and vice versa).

III THE MERGER CONTROL REGIME

i Threshold issues

Under the UK system, a 'relevant merger situation' (i.e., a transaction potentially qualifying for review) occurs when two or more enterprises have ceased to be distinct. This can occur either through common ownership or common control. Common ownership involves the acquisition of an enterprise so that two previously distinct enterprises become one. Common control involves the acquisition of at least one of the following: *de jure* or legal control (a controlling interest); *de facto* control (control of commercial policy); or material influence (the ability to make or influence commercial policy).

The concept of material influence has been drawn widely by the UK competition authorities.[16] It formed the jurisdictional basis for the investigations by the OFT and the CC in relation to the 29.82 per cent shareholding acquired by Ryanair in Aer Lingus in the context of a takeover bid. The CC ultimately found that the existence of Ryanair's minority shareholding led or may have been expected to lead to a substantial lessening of competition in the markets concerned and decided that the most effective and proportionate remedy was to compel the airline to reduce its stake in Aer Lingus to 5 per cent. This case illustrates how a would-be acquirer who builds a minority stake in advance of a full takeover bid remains exposed to a CMA investigation and ultimately risks being ordered to divest the stake, even if the takeover bid fails.

A merger situation will qualify for review if it meets the turnover test or the share of supply test (see Section I, *supra*). If the CMA believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in a UK market, then it will refer the merger for a Phase II investigation.

In general, a completed merger will no longer qualify for a Phase II reference four months after the date of implementation of the merger. Time will not begin to run, however, until the 'material facts' of the merger (i.e., the names of the parties, nature of the transaction and completion date) have been made public or are given to the CMA (if neither occurs prior to completion). Time will not run where undertakings in lieu of reference are under negotiation, where the parties are yet to comply with an information request from the CMA, or where a request has been made by the UK for review of the transaction by the European Commission in accordance with Article 22(3) of the EU Merger Regulation (EUMR) (see

16 The breadth of the concept can be seen in *JCDecaux/Concourse* where the OFT found that, even in the absence of an equity stake, material influence had been acquired by virtue of an option to appoint two out of three board members and the ability to restrict the target's capability for expansion.

the European Union chapter for details of this procedure). The four-month period may also be extended by agreement between the CMA and the merging enterprises, but for no more than 20 days.

ii Substantive test

In its assessment of mergers, the CMA considers whether the transaction may be expected to give rise to a substantial lessening of competition. At Phase I, a reference must be made if it is or may be the case that a merger may give rise to a substantial lessening of competition (known as the 'realistic prospect' threshold), while at Phase II a 'balance of probabilities' threshold applies.[17] As a result, it is relatively common for mergers to be referred to Phase II and subsequently cleared unconditionally.

The CMA has adopted substantive assessment guidelines[18] that illustrate, in particular, the shift away from traditional merger control analysis, which proceeds from the definition of the relevant product and geographical markets to measure post-merger levels of concentration, towards a more direct assessment of competitive effects taking into account factors such as differentiated products, closeness of competition and price sensitivity of customers. For example, the CMA will often use margin and switching data (commonly based on customer surveys) to estimate the upward pricing pressure arising from a merger. For these purposes, the CMA has adopted guidance on the design and presentation of consumer survey evidence in merger inquiries.[19] The CMA has also published commentary on the assessment of retail mergers (see Section II.iv, *supra*).

iii Counterfactuals

The CMA applies different approaches at Phase I and Phase II to assessing the merger counterfactual. At Phase I, the transaction is generally measured against the prevailing conditions of competition (unless it is unrealistic to do so or there is a realistic counterfactual that is more competitive than the pre-merger conditions of competition). At Phase II, the CMA will measure the transaction against the 'most likely scenario'.

The most notable situation where the CMA may use a counterfactual different to the prevailing conditions of competition is in a failing firm scenario. However, in practice, it is often difficult to argue for its application, especially at Phase I. The CMA considered the failing firm test in respect of four Phase I cases in the 2016–2017 financial year. Of these:

a one provided sufficient evidence for the counterfactual to be satisfied;
b one failed to provide sufficient evidence of a probability of market exit by the failing firm;
c in one case, the CMA concluded that, absent the merger, there was a realistic prospect that the business would have been acquired by a less anti-competitive purchaser; and
d in the remaining case, it was considered unnecessary to reach a definitive conclusion.

The CMA was also asked to apply the failing firm scenario in one Phase II case.[20] It found that there was sufficient evidence to show that, absent the merger, the target would have

17 See *OFT v. IBA Health Ltd* [2004] EWCA Civ 142.
18 Merger Assessment Guidelines (September 2010) OFT 1254, CC 2.
19 Good practice in the design and presentation of consumer survey evidence in merger inquiries (March 2011) OFT 1230, CC2 com 1.
20 *Vtech Holdings/Leapfrog*.

failed financially and exited the market, but there would have been an alternative purchaser for it. The CMA, therefore, concluded that the exiting firm scenario did not apply and that the appropriate counterfactual was the prevailing conditions of competition (with the target remaining in the market under alternative ownership).

iv The notification procedure

An application for clearance is made using a formal merger notice.[21] The initial period within which the CMA must make a decision whether to make a reference is 40 working days from the first working day after the CMA confirms to the parties that the merger notice is complete. This initial period may be extended where the parties have failed to comply with the requirements of a formal information request under Section 109 of the EA, where the Secretary of State has served a public interest intervention notice, or where the European Commission is considering whether to accept a request from the UK for the merger to be referred to Brussels under Article 22(3) of the EUMR.

As noted in Section II.iii, *supra*, the CMA encourages parties to enter into pre-notification discussions at an early stage both to ensure that the notification is complete and to avoid as far as possible the need for extensions to the statutory timetable. Pre-notification discussions will also help the CMA to determine any jurisdictional issues (e.g., whether the CMA is best placed to review the case or whether a reference to the European Commission should be sought under the EUMR – see Section IV.ii, *infra*) and whether a case is likely to give rise to any substantive issues that might trigger its duty to refer.

It is possible for the parties to request that the CMA 'fast-tracks' a merger reference where there is evidence that an in-depth review is likely to be required. The OFT used this procedure on only two occasions: *Thomas Cook/Co-operative Group Limited/Midlands Co-operative Society* and *Global Radio/GMG Radio*,[22] while the CMA has granted three 'fast-track' requests so far: *BT/EE*, *Ladbrokes/Coral* and *Central Manchester University Hospitals/University Hospital of South Manchester*. This option may be attractive to parties in cases where a reference appears inevitable, as it allows for Phase I of the review process to be truncated.

The CMA levies substantial filing fees in respect of the mergers it reviews, with fees of between £40,000 and £160,000 depending on the turnover of the target business.

v Informal advice

Where there is evidence of a good-faith intention to proceed and there is a genuine competition issue, prior to submitting a merger notice or initiating pre-notification discussions, it may be possible to obtain informal advice from the CMA as to whether it is likely to refer the merger for a Phase II investigation. There is no standard timetable for the provision of informal

21 The CMA is in the process of consulting on proposed guidance in relation to the merger notice form. The guidance, when published, will provide further clarification in relation to the information that is likely to be required by the CMA in a given case and, in particular, will clarify the circumstances in which it may not be necessary to provide certain information requested in the merger notice.

22 In *Global Radio/GMG Radio*, the issuance by the Secretary of State of a public interest intervention notice meant that the fast-track procedure was delayed for several months. It was only once the Secretary of State had concluded that there were no media plurality issues that the decision to refer to the CC could be made by the OFT.

advice, but where it is intended that the advice will be given following the conclusion of a meeting, the CMA will endeavour to schedule that meeting within 10 working days of receipt of the original application. The resulting advice is confidential and does not bind the CMA.

vi Interim measures

As outlined above, the CMA has powers to impose interim measures to freeze or unwind integration and prevent pre-emptive action. Financial penalties may be imposed for breaches of such measures (capped at 5 per cent of the aggregate group worldwide turnover). In certain circumstances, the CMA also has the power to require a monitoring trustee to be appointed in order to ensure compliance with the interim orders.

The CMA will normally make an interim order where it has reasonable grounds to suspect that two or more enterprises have ceased to be distinct (i.e., in respect of completed mergers) and will normally do so almost immediately. Given that the risk of pre-emptive action is generally much lower in relation to anticipated mergers, the CMA has noted that it would typically engage with parties before making an order in those circumstances.

The CMA has stated that it would generally not expect to impose an order limiting the parties' ability to complete an anticipated merger unless it had strong reasons to believe that completion will occur prior to the end of Phase I and the act of completion itself might amount to pre-emptive action that would be difficult or costly to reverse (e.g., where the act of completion would automatically lead to the loss of key staff or management capability for the acquired business). Therefore, absent exceptional circumstances, it is expected that parties will still be able to complete transactions prior to CMA clearance.

Out of the 27 Phase I cases decided in the 2016–2017 financial year in which initial enforcement orders were imposed, 26 of these were completed mergers and only one was an anticipated merger.

Derogations from interim orders are available and the CMA's approach to granting derogations remains broadly consistent. Whereas previously interim orders were released only at the time of the final clearance decision, the CMA may now release such orders following a state of play meeting if it is decided that the case will be cleared.

Some commentators have raised concerns that initial enforcement orders place undue restrictions on the parties' businesses, even in cases where no competition concerns arise, and that the process of negotiating derogations from the standard form can sometimes be unduly onerous. The CMA is in the process of consulting on proposed guidance in relation to its use of interim measures. The guidance, when published, will provide further clarification in relation to the circumstances in which interim measures will typically be imposed; the form that interim measures will typically take; the types of derogation that the CMA is likely to grant; and the timing for imposing and revoking interim measures and granting derogations.

vii Exceptions to the duty to refer

As explained above, the CMA has a statutory duty to refer a relevant merger situation for a Phase II investigation where it believes that it is or may be the case that a merger has resulted

or may be expected to result in a substantial lessening of competition in a UK market. The CMA has adopted guidance on the statutory exceptions that apply to the duty to refer potentially problematic mergers to a Phase II investigation.[23]

The guidance sets out the criteria for accepting undertakings that may be offered by the merging parties in lieu of a reference. To discharge the CMA's duty to refer, any undertakings offered by the parties should restore competitiveness to pre-merger levels and must be proportionate. It is most common for undertakings to relate to the sale of a part of the merged assets; the CMA is generally reluctant to accept behavioural remedies, although it has recently accepted a number of 'quasi-structural' remedies with behavioural features.[24] It is becoming increasingly common for the CMA to require an 'upfront buyer', in other words, for a buyer of the divestment assets to be identified and approved by the CMA before clearance is granted.

The merging parties have five working days from the issuance of a substantial lessening of competition decision (SLC decision) to offer undertakings to the CMA, although they may offer them in advance should they wish to do so. The CMA then has until the 10th working day after the SLC decision to decide whether the offered undertakings might, in principle, be acceptable as a suitable remedy to the substantial lessening of competition. If the CMA decides the offer might, in principle, be acceptable, a period of negotiation and third-party consultation follows. The CMA is required to decide formally whether to accept the offered undertakings, or a modified form of them, within 50 working days of providing the parties with the SLC decision, subject to an extension of up to 40 working days if there are special reasons for doing so.

The CMA's duty to refer may also be discharged in other circumstances, namely in respect of small markets (*de minimis* mergers), mergers where there are sufficient efficiencies to offset any competition concerns and merger arrangements that are insufficiently advanced. In relation to *de minimis* mergers, the guidance states that, for markets with an aggregate turnover exceeding £10 million, the benefits of an in-depth Phase II investigation may be expected to outweigh the costs. However, for markets with an aggregate turnover of less than £3 million, the CMA will generally not consider a reference to be cost-effective or justified provided that there is, in principle, no clear-cut undertaking in lieu of reference available. For markets with an aggregate turnover of between £3 million and £10 million, the CMA will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a Phase II reference.[25] The CMA applied the *de minimis* exception in three cases during the 2016–2017 financial year.

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23 Exceptions to the Duty to Refer and Undertakings in Lieu of Reference Guidance (December 2010) OFT 1122.

24 For example, in *Mastercard/VocaLink* the CMA accepted a network access remedy under which VocaLink agreed to make its connectivity infrastructure available to a new supplier of infrastructure services to the LINK ATM network. In addition, VocaLink agreed to transfer to LINK the intellectual property rights relating to a particular messaging standard and MasterCard agreed to contribute to LINK members' switching costs. In *Müller UK & Ireland/Dairy Crest*, the CMA accepted a toll-processing agreement as a remedy, taking comfort from the fact that these were relatively common in the dairy industry and that it would have the ability to approve the counterparty to the agreement. In *Reckitt Benckiser/K-Y brand*, the CMA accepted the licensing of the relevant UK rights to the K-Y brand to a third party as a final undertaking at Phase II. The CMA was concerned that there would be significant practical difficulties associated with a divestment of the K-Y brand and that a prohibition would not be effective due to the high risk that the seller would close the business.

25 The CMA is currently considering possible changes to the *de minimis* exception, including whether to increase the upper threshold for markets considered to be sufficiently important to justify a reference to

viii Phase II investigations

Upon the making of a Phase II reference, there are a number of consequences for the transaction – some arising automatically, some relevant only if invoked by the CMA. When a reference is made in relation to a merger that has not yet been completed, the EA automatically prohibits the parties from acquiring interests in each other's shares until such time as the Phase II inquiry is finally determined. This restriction can be lifted only with the CMA's consent.

In relation to completed mergers, from the point of reference, the EA prohibits any further integration of the businesses or any transfer of ownership or control of businesses to which the reference relates (although in practice, the CMA is likely to have imposed an interim order at Phase I in any event).

Unless the CMA releases or replaces an interim order made during Phase I, it will continue in force for the duration of the Phase II inquiry. If an interim order was not made at Phase I or if it is necessary to supplement the measures previously put in place at Phase I, the CMA may impose a new order or accept interim undertakings from the parties.

The CMA is obliged to publish a report, setting out its reasoned decisions, within a statutory maximum of 24 weeks (extendible in special cases for a period of up to eight weeks). The CMA has a statutory period of 12 weeks (which may be extended by up to six weeks) following the Phase II review within which to implement any remedies offered by the parties.

ix Appeals

Any party aggrieved by a decision of the CMA (including a decision not to refer a merger for a Phase II investigation) or the Secretary of State may apply to the CAT for a review of that decision. Appeals against merger decisions must be lodged within four weeks of the date the applicant was notified of the disputed decision or the date of publication, if earlier. Lodging an appeal does not have a suspensory effect on the decision to which the appeal relates. In determining an application for review, the CAT is statutorily bound to apply the same principles as would be applied by the High Court on an application for judicial review.

Appeals against merger decisions have been relatively rare since the establishment of the CAT. In the previous year, only one merger case was subject to judgment from the court. In November 2016, Intercontinental Exchange (ICE) appealed the CMA's decision prohibiting its completed acquisition of Trayport. The CMA had concluded that only complete divestiture of Trayport by ICE would address its competition concerns and that the parties must unwind an ancillary post-transaction agreement. ICE argued that the CMA had failed to properly assess its proposed remedies and that it had no statutory power to require the parties to unwind the agreement. The CAT quashed the CMA's final report to the extent that it required the unwinding of the agreement and remitted the point to the CMA to reconsider.[26] At the time of writing, the CMA has provisionally concluded that it is necessary for the parties to terminate the relevant agreement. The CAT dismissed ICE's other claims. ICE requested permission to appeal to the Court of Appeal, which was refused.[27]

£15 million and to raise the lower threshold for markets not considered to be sufficiently important to below £5 million. This is likely to reduce the number of smaller merger investigations carried out by the CMA and may give smaller businesses more scope to self-assess whether to make a merger filing.

26 *Intercontinental Exchange, INC v. CMA* [2017] CAT 6.

27 *Intercontinental Exchange, INC v. CMA* [2017] CAT 8.

IV OTHER STRATEGIC CONSIDERATIONS

i Whether to notify

Given that notification under the UK system is voluntary, the question of whether clearance should be sought from the CMA in a particular case is one for the parties – and, in particular, the purchaser – to consider. This is essentially a question of what level of commercial risk is acceptable.

Where the parties elect not to notify a transaction, the CMA may still become aware of it as a result of its own market intelligence functions, including through the receipt of complaints. The CMA has a dedicated Mergers Intelligence Committee responsible for monitoring non-notified merger activity and liaising with other competition authorities, and is increasingly focusing on this. The CMA has recently published guidance on its mergers intelligence function, in an attempt to increase transparency in this area.[28]

The Committee reviewed over 650 transactions during the 2016–2017 financial year, which represents an increase from the previous year during which it reviewed over 600 transactions. During the 2016–2017 financial year, 13 Phase I investigations were launched as a result of the Committee's work, comparable to the 14 Phase I investigations launched during the previous year. During the 2016–2017 financial year, three of these cases resulted in an SLC decision (compared to six in the previous year) and one in clearance under the *de minimis* exception (the same as in the previous year). During the 2016–2017 financial year, two Phase II investigations were launched in cases that were originally called in by the Committee, whereas one Phase II investigation was launched during the previous year. The CMA issued its first prohibition decision in a case called in by the Committee during the 2016–2017 financial year.[29]

When deciding whether to call in a non-notified merger, the CMA has powers to request information from the parties and will also accept submissions from the parties on jurisdictional, *de minimis* and substantive issues. The CMA is willing to give an informal indication that it does not at that point in time intend to call in a merger.

As noted above, the fact that a merger has been completed does not prevent the CMA from investigating and referring it for a Phase II investigation or accepting undertakings in lieu of a reference. While the substantive assessment of anticipated and completed mergers ought to be identical, the CMA can be expected to impose interim orders while it considers a completed merger. In addition to ordering the parties to stop any integration that might constitute pre-emptive action, the CMA may also require the parties to unwind any integration steps that have already taken place.

An additional risk to bear in mind is that the initial period for a Phase I investigation may be reduced to less than 40 working days if the parties elect not to notify a completed merger. The CMA must comply with the four-month statutory deadline for a reference under the EA, which will start to run when the 'material facts' of the merger have been made public or are given to the CMA. If the CMA's timetable is compressed in this manner, it may mean that it has insufficient time to obtain evidence that would support a Phase I clearance, without the need for a Phase II investigation.

28 CMA's mergers intelligence function: CMA56 (June 2016).

29 This case was *ICE/Trayport*. Mergers updates, Law Society Competition Section seminar, 14 March 2017. The figures for the 2016–2017 financial year are accurate as at 28 February 2017.

ii UK or EU?

If a merger has an 'EU dimension', as defined in the EUMR, it falls under the exclusive jurisdiction of the European Commission and cannot be completed until it has been notified and cleared. Conversely, the CMA is in principle competent to investigate mergers that do not have an EU dimension but qualify for review under the UK rules. This is often referred to as the 'one-stop-shop' principle. This simple allocation of jurisdiction is, however, subject to the EUMR processes relating to the reallocation of jurisdiction (see the European Union chapter for details of these procedures).

The decision whether to make a pre-notification referral request is a strategic issue for the parties, and will depend on where the competition issues lie and the degree of risk that the Member States may request a post-notification referral. The European Commission granted Article 4(4) requests by parties to transactions with an EU dimension for the case to be referred to the CMA on five occasions in the 2016–2017 financial year. In the same period, the European Commission concluded cases following Article 4(5) requests to refer a case from the CMA on at least four occasions.[30]

As regards post-notification referrals, in the 2016–2017 financial year, the CMA did not make any Article 9 requests for cases to be referred from the European Commission, or any Article 22 requests for cases to be referred to the European Commission.

The CMA's mergers guidance recommends that, in all cases in which a referral back might be considered appropriate, parties contact the CMA prior to notification to the European Commission to discuss any UK issues raised by the transaction.

iii Cross-border cooperation

Parties should be aware that the CMA is part of the European Competition Network, and as such is informed of mergers notified to the competition authorities of the other 27 EU Member States and the European Commission. It also participates in the International Competition Network, an informal network that seeks to develop best practice among competition agencies around the world.

V OUTLOOK & CONCLUSIONS

In its Annual Plan 2017–18, the CMA stated that it will build on the recent changes it has made in order to ensure an efficient, effective and targeted merger control end-to-end process during both Phase I and Phase II. In particular, Phase I initiatives include:

a improvements to pre-notification processes;
b updates to the merger notice;
c appropriate use of initial enforcement orders and derogations;
d measures to ensure efficient Phase I investigation processes; and
e improvements to the use of undertakings in lieu.

The CMA stated that it will continue to improve the process and procedure in Phase II investigations, in order to support decision-makers in taking effective and robust decisions, and to ensure efficiency and proportionate use of resources. In addition, the CMA alleges

30 It is not possible to reach a definitive figure for Article 4(5) referrals from the UK based on publicly available information.

that it will ensure that remedies in merger cases are proportionate, timely and reflect a clear understanding of consumer behaviour. It states that it will commence an internal review of the rules and guidance applicable to merger remedies at Phase I and Phase II.

The CMA announced three targets for its assessment of mergers in its Annual Plan 2017–18:

a to clear at least 70 per cent of merger cases that are less complex within 35 working days;

b to complete 70 per cent of Phase II merger cases without an extension to the statutory deadline; and

c to implement Phase II merger remedies without the need for an extension to the statutory deadline in at least 80 per cent of cases.

The government is yet to publish its response to the consultation on refinement options for various elements of the UK competition law regime (including merger control), launched by the Department for Business, Innovation and Skills in May 2016. The consultation notes the CMA's intention to improve the merger control process but also refers to concerns raised by some stakeholders in relation to information requirements, inefficiencies between Phase I and Phase II investigations and the intrusiveness of hold-separate undertakings, and therefore sets out a number of proposals and options for reform. As noted in Section III.iv and vi, *supra*, the CMA has launched consultations on proposed guidance in relation to the information required in the merger notice form and on proposed guidance in relation to the CMA's use of interim measures.

On 23 June 2016, the UK electorate voted to leave the EU. At the time of writing, it is expected that the UK will withdraw from both the EU and European Economic Area (EEA), which could cause significant changes to merger control regulation. It is likely that businesses may need to submit parallel notifications in the UK and EU in order to obtain clearance for a deal, as the 'one-stop-shop' principle may no longer apply. This could lead to a number of challenges for merging businesses, including increased regulatory burden. The CMA has indicated that, from its perspective, the removal of the 'one-stop-shop' principle would lead to an increased workload and consequently have an effect on resources. In addition, this might affect the CMA's role in global mergers and its relationships with foreign regulators.[31] Other changes to the UK merger control rules may be introduced as result of Brexit (for example, moving to a mandatory rather than voluntary regime (or possibly a hybrid between the two) or changes to the notification thresholds), although this is currently uncertain.[32] Transitional arrangements would also need to be made to clarify how cases currently in train would be handled.

It is also possible that the UK government's development of a new industrial strategy could affect the national merger control regime. In particular, this may entail changes to the regime relating to public interest interventions in mergers, with the current government suggesting that the UK may develop a more politically interventionist approach to the ownership and control of critical infrastructure.

31 Mergers updates, Law Society Competition Section seminar, 14 March 2017.

32 Ibid.

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