SLAUGHTER AND MAY

UK merger control under the Enterprise Act 2002

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Contents

1. Introduction

1.1 The merger control rules of the United Kingdom are contained in the Enterprise Act 2002, as amended (the Act). The rules do not generally apply to mergers in relation to which the European Commission (Commission) has exclusive jurisdiction under the EU Merger Regulation (the EUMR).[1]

1.2 Mergers qualify for review under the UK rules if they meet either of the following tests:

- the UK turnover of the business to be acquired exceeds £70 million; or
- the merger creates an enlarged business supplying or purchasing 25% or more of goods or services of any description in the UK, or in a substantial part of the UK.

1.3 In contrast to the position under the EUMR, there is no system of mandatory notification of mergers. In practice, however, many mergers are notified in the UK on a voluntary basis, usually prior to completion.

1.4 On 1 April 2014, the competition functions (including the merger review functions) of the Office of Fair Trading (OFT) and Competition Commission (CC) were merged into the Competition and Markets Authority (CMA).[2]

1.5 Transactions that qualify for review may be investigated by the CMA in an initial Phase 1 investigation. The CMA has a general duty to refer mergers for a detailed Phase 2 investigation on the basis of a statutorily-defined competition test – the substantial lessening of competition (SLC) test.[3] The duty arises where the CMA has a reasonable belief, objectively justified by relevant facts that the merger has resulted, or may be expected to result, in an SLC in a market in the UK. Undertakings in lieu of a reference may be accepted by the CMA. The CMA's in-depth Phase 2 investigation may lead to a prohibition decision, a decision that the transaction should be allowed to proceed subject to commitments, or clearance. The CMA also applies the SLC test in its Phase 2 decision-making but must reach a decision based on the balance of probabilities.

1.6 Where the merger raises a defined "public interest consideration", the UK system allows the Secretary of State for Business, Innovation and Skills (Secretary of State) to intervene. Currently, public interest considerations are limited to considerations relating to national security, quality and plurality in the case of media mergers, accurate presentation of news and free expression in newspapers, and the maintenance of the stability of the UK financial system.

1.7 Merger decisions of the CMA and the Secretary of State may be appealed to the Competition Appeal Tribunal (CAT).

[1] Council Regulation (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004). See separate Slaughter and May publication *The EU Merger Regulation*.

[2] These changes as well as various other reforms of the UK competition regime were brought into force by the Enterprise and Regulatory Reform Act 2013 (ERRA).

[3] There is, however, a different test for mergers between two or more water enterprises where either the target or the acquirer's enterprises has an annual turnover exceeding £10 million. The CMA must determine whether the merger may prejudice the ability of the Water Services Regulation Authority (Ofwat) to make comparisons between water enterprises in the performance of its functions under the Water Industry Act 1991 (in particular, in relation to the setting of price controls). In the event of an adverse finding, the CMA determines what remedial action needs to be taken.

1.8 The CMA has published detailed non-binding guidelines on the procedures they will adopt for the review of mergers (the Merger Procedural Guidance).[4] The CMA has also adopted the substantive merger guidelines previously published by the OFT and CC (the Merger Assessment Guidelines).[5]

1.9 This publication considers transactions to which the UK merger control provisions apply, jurisdictional thresholds for review, procedures followed by the institutions responsible for application of the rules and appraisal of mergers that qualify for review.

[4] Mergers: Guidance on the CMA's jurisdiction and procedure (CMA 2, January 2014).

[5] Merger Assessment Guidelines: a joint publication of the Competition Commission and the Office of Fair Trading, (CC2 (Revised) /OFT 1254, September 2010). It should be noted that CMA has also adopted the OFT's specific guidance entitled Mergers – exceptions to the duty to refer and undertakings in lieu of reference (OFT1122, December 2010) which should be read in conjunction with the Merger Assessment Guidelines.

2. Interrelationship with the EUMR

2.1 The European Commission's jurisdiction under the EUMR extends only to mergers which have an "EU dimension". The EUMR sets out two circumstances in which a "concentration" is regarded as having an "EU dimension":[6]

- Where: (i) the combined aggregate worldwide turnover of all the parties is more than €5,000 million; and (ii) the aggregate Community-wide turnover of each of at least two of the parties is more than €250 million. The merger will not, however, fall under the EUMR where each of the parties concerned achieves more than two-thirds of its total EU-wide turnover in the same Member State.[7]

- Alternatively, where: (i) the parties to the transaction have a global turnover of at least €2,500 million; (ii) at least two of the parties have a total EU turnover of more than €100 million; and (iii) there are at least three Member States in which the parties' combined turnover is €100 million and at least two of the parties each have a turnover of more than €25 million. Again, the merger will not fall under the EUMR where each of the parties concerned achieves more than two thirds of its total EU-wide turnover in the same Member State.[8]

2.2 Concentrations with an "EU dimension" must be notified to the Commission for investigation and approval before they may be put into effect. Procedures also exist which allow jurisdiction to be transferred between the Commission and the national competition authorities (in either direction) in certain circumstances:

- Under Article 4(4) of the EUMR, the parties to a merger may request that the merger, though falling under the Commission's jurisdiction, be examined in whole or in part by a particular Member State if it may significantly affect competition within that Member State. Likewise, under Article 4(5), there is provision for the parties to request, by means of a reasoned submission that a merger, not having an EU dimension, is nonetheless capable of being reviewed under the national competition laws of at least three Member States and should be examined by the Commission.

- Under Article 9 of the EUMR, the competent authority of a Member State can request that the Commission refer a merger to that authority where the merger affects or threatens to affect significantly competition within a market in the relevant Member State. Where the Commission concludes that there is such a distinct market and that such a threat exists, it is a matter for the Commission's discretion whether to deal with the case itself under the EUMR or to refer the whole or part of the case to the relevant Member State(s). The Commission's discretion does not, however, extend to cases where the merger affects competition in a distinct market that does not form a substantial part of the common market; in such cases the Commission is required to

[6] A "concentration" arises under the EUMR where there is a change of control on a lasting basis resulting from: (i) the merger of two or more previously independent undertakings or parts of undertakings; (ii) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, of direct or indirect control of the whole or parts of one or more other undertakings; or (iii) the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity. The scope of this definition is in some respects narrower than the set of possible "merger" situations under the Act. For example, under the latter, the ability to exercise "material influence" may give rise to a relevant merger. The CMA may examine any shareholding of 15% or more to assess material influence, although lower shareholdings may also (exceptionally) give rise to material influence.

[7] Art. 1(3) EUMR.

[8] Art. 1(4) EUMR.

refer the whole or part of the case relating to the distinct market to that Member State. Likewise, Article 22 allows one or more Member States to refer to the Commission a merger that will affect trade between Member States and threatens to significantly affect competition within the territory of the Member State concerned.

2.3 Where a transaction does not have an EU dimension, it may instead be subject to scrutiny under national merger control rules, such as the UK merger control rules considered in this publication.

3. Merger situations

3.1 The Act provides that its merger control provisions may apply where "two or more enterprises have ceased to be distinct" or where "arrangements are in progress or in contemplation" which, if carried into effect, will lead to the enterprises ceasing to be distinct.[9]

3.2 It is clear from this definition that it is open to the CMA to refer proposed, as well as completed, mergers for an in-depth Phase 2 investigation.

Enterprise

3.3 An "enterprise" for the purpose of the merger control rules is defined as "the activities, or part of the activities, of a business".[10]

3.4 The Merger Procedural Guidance and recent jurisprudence provide that the transfer of physical assets alone may constitute an enterprise, for example where facilities or premises transferred allow for a particular business activity to be carried on.[11] Intangible assets alone such as intellectual property rights are unlikely to constitute an enterprise.[12] There are certain factors that will be persuasive in the CMA's assessment of whether an enterprise is being transferred: whether "customer records" are transferred; whether the TUPE regulations apply to the transfer;[13] the existence of a direct contractual relationship between seller and purchaser; and the existence of a premium over the value of the land and assets indicative of the transfer of goodwill.[14]

Ceasing to be distinct

3.5 The Act states that any two enterprises cease to be distinct if they are brought under "common ownership or common control".[15]

3.6 The concept of enterprises coming under common ownership is simple: A owns enterprise X and then acquires from B enterprise Y; A then owns both enterprises (X and Y), which have accordingly come under common ownership and thus ceased to be distinct.

3.7 As regards common control, the Act recognises three degrees of control, an acquisition of each of which – including changes from one degree of control to another - can give rise to a qualifying merger.[16]

[9] Ss. 23 (completed mergers) and 33 (proposed mergers) of the Act.

[10] S. 129 of the Act.

[11] Para. 4.8, Merger Procedural Guidance. See also *Société Coopérative de Production SeaFrance SA v The Competition and Markets Authority and another* [2015] UKSC 75, in which the Supreme Court agreed with the CMA that a "relevant merger situation" had been created and that the enterprise of SeaFrance, which had been liquidated, continued because its activities continued, despite a seven month hiatus.

[12] Para. 4.8, Merger Procedural Guidance.

[13] The Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246

[14] Para. 4.8, Merger Procedural Guidance.

[15] S. 26(1) of the Act

[16] S. 26(2) to (4), *ibid*.

3.8 The three degrees of control are normally referred to as:

- *de jure* or legal control (that is, a controlling interest);
- *de facto control* (that is, control of commercial policy); and
- material influence (that is, ability materially to influence commercial policy).[17]

3.9 Note that it is the ability to control, rather than the actual exercise (or intended exercise) of control which is relevant.

3.10 It should be noted that the concept of "joint control" does not exist under the Act (in contrast to the position under the EUMR). The concepts of *de jure* or *de facto* control only apply if one shareholder holds those rights on its own. Thus in an EUMR joint control situation, neither party may have *de jure* control for the purposes of the Act, although each of the parties individually may have the ability to exercise at least material influence.

3.11 For the purposes of reference to Phase 2, where a level of control is acquired through a series of transactions occurring within a two-year period, the CMA may treat those transactions as having occurred simultaneously on the date on which the latest of them occurred[18] (or in the case of anticipated mergers, on the date on which the latest of the transactions will occur).[19]

De jure control

3.12 A controlling interest normally means anything over 50% of the voting rights in a general meeting.[20]

De facto control

3.13 The ability to control commercial policy is not defined in the Act and there are no precise criteria for determining at what point a shareholding gives its holder *de facto* control. The determination of whether that point has been reached will depend upon a close examination of the particular facts in a given case. It is generally considered that de facto control arises on the acquisition of a shareholding of around 30% if other shareholdings are widely dispersed.[21]

3.14 In practice, if the existing influence of one enterprise over the commercial policy of another is "material" (see below), then any increase in that position short of attaining outright control has the potential to involve the acquisition of *de facto* control.

[17] Note that this is a lower threshold than the "decisive influence" test set out in the EU merger control rules (see further below and the Slaughter and May publication *The EU Merger Regulation* for more details).

[18] S. 29(1), *ibid*.

[19] A Phase 2 reference can be made in relation to a series of transactions some of which are completed and some of which are contemplated or in progress.

[20] Para. 4.30, Merger Procedural Guidance.

[21] See *West Midlands Travel Limited/Laing Infrastructure Holdings Limited/Ansaldo Transporti Sistemi Ferroviari SpA/Altram LRT Limited* (ME/2012/05), OFT decision of 2 March 2006.

Material influence

3.15 The lowest degree of relationship that can cause the enterprise affected to cease to be distinct is acquisition by another of the ability materially to influence the policy of that enterprise. The Act is silent as to what constitutes material influence and there are no precise criteria for determining the point at which a person acquires the ability materially to influence policy. As with *de facto* control, it is a matter that has to be decided on a case by case basis by reference to the detailed facts. This will involve consideration of a number of factors that will normally – but need not – include an equity shareholding.

3.16 As a rule of thumb, material influence will be regarded as being conferred by a shareholding of over 25% in a UK company since a shareholding of that size enables the holder to block a special resolution and so to exert negative influence.[22] However, the CMA may examine any case in which the value of the shareholding is 15% or more in order to ascertain whether the holder may be able to materially influence the company's policy.[23] Occasionally, a shareholding of less than 15% may be subject to scrutiny where other indications of the ability to exercise influence exist.[24]

3.17 In deciding whether a minority equity shareholding is capable of conferring material influence, the CMA will consider several factors, including the size of the relevant shareholding, the identity of the shareholder, the way in which the other shares are dispersed, the existence of special rights attaching to the holding and restrictions on voting rights. The CMA will also consider all surrounding factors such as whether the acquirer has board representation, the status and experience of the acquirer, the level of influence they have over shareholders and the existence of any consultancy agreement between the acquirer and the company.[25]

Acquiring control by stages

3.18 The degree of control may pass through each level in turn: moving from ability materially to influence, to ability to control commercial policy, through to a controlling interest. Each transition from one level to the next may give rise to a separate relevant merger situation.

[22] A special resolution requires 75% of the votes passed in a general meeting and is required for important matters such as change in the company's objectives.

[23] Para. 4.20, Merger Procedural Guidance.

[24] Paras. 4.14 – 4.27, *ibid*.

[25] *Ibid*.

4. Jurisdictional thresholds

4.1 Where enterprises have ceased to be distinct in the sense described above, the transaction will qualify for review if it meets either the turnover or share of supply jurisdictional test.

Turnover test

4.2 Where the annual value of the UK turnover of the enterprise being acquired exceeds £70 million, the turnover test will be satisfied. For these purposes one looks to turnover generated by sales to customers located in the UK in the business year preceding the completion of the merger or, for mergers "in contemplation", the business year preceding the date of the reference decision. Whilst the turnover figures from an enterprise's latest statutory accounts will normally suffice for the purposes of applying the test, adjustments may be required if, for example, significant acquisitions or disposals have been made since the closing of the accounts. Variations to these rules apply to transactions involving credit institutions, financial institutions and insurance undertakings.[26]

4.3 In "pure mergers", i.e. where no enterprise stays under the same ownership (because two businesses are merged into one, and the owners become common to both), the normal "target's turnover" rule cannot apply. In such a case, the turnovers of all the enterprises involved are added together and the turnover of the highest value deducted from the total.[27]

Share of supply test

4.4 The share of supply test is satisfied if the merged enterprises:

- Both supply or purchase goods or services of a particular description; and
- As a result of the merger, a 25% share of supply or purchase of goods or services is created or enhanced in the UK as a whole or in a substantial part of it.

4.5 While this is sometimes referred to as the "market share" test, this is a misnomer. The test is framed not in terms of a share of a "market" in an economic sense, but rather in terms of a share of supply or purchase of goods or services "of any description".[28] Once within the ambit of the Act, the issues of market definition and market power in an economic sense will assume greater importance in determining whether or not the merger will result in a SLC such as to warrant reference to Phase 2.

[26] See further s.28 of the Act and The Enterprise Act 2002 (Determination of Turnover) Order 2003, SI 2003/1370.

[27] S. 28(1)(b), *ibid*.

[28] S. 23(3) and (4), *ibid*.

4.6 The CMA enjoys a wide discretion in describing the relevant goods or services and in selecting the criterion (value, volume, capacity, number of workers, etc.) for determining whether the 25% threshold is satisfied. In applying the share of supply test, the CMA will have regard to "any reasonable description of a set of goods or services".[29]

4.7 The share of supply test may be satisfied in relation to the UK as a whole or in relation to a "substantial part" of the UK. Whilst not a defined term under the Act, a House of Lords ruling indicates that to constitute a substantial part of the UK, an area must be of such size, character and importance as to make it worthy of consideration for the purposes of the merger control rules.[30] In addition to absolute and relative size, the CMA will take into account the social, political, economic, financial and geographic significance of the relevant area.[31]

[29] Para. 4.56, Merger Procedural Guidance.

[30] *R v MMC ex parte South Yorkshire Transport Authority* [1993] All ER 289.

[31] In *Tesco/Co-operative store acquisition in Slough*, CC decision of 28 November 2007, the CC applied the House of Lords ruling in its finding that the Borough of Slough represented a substantial part of the UK. In reaching this decision, the CC took into account population and economic factors as well as the fact that the markets in which the merging parties competed were local in nature.

5. Time limits for reference

5.1 Generally, the CMA is required to decide whether the test for reference is met within a timetable of 40 working days from when an investigation is commenced, after which time it cannot make a reference.[32] The timetable starts:

- where the parties have notified the CMA using a Merger Notice, on the first working day after the CMA confirms to the parties that the Merger Notice is complete;[33] or
- in other cases, the first working day after the CMA confirms that it has received sufficient information to enable it to begin its investigation (i.e. where the parties do not voluntarily notify).[34]

5.2 Further, a merger will (generally) no longer qualify for reference following the expiry of four months after the date of implementation of the merger.[35] For the purpose of this rule, time will not begin until the "material facts" of the merger (i.e. names of the parties, nature of the transaction and completion date)[36] have been made public or are given to the CMA.[37] Facts are deemed to have been made public when they are 'so publicised as to be generally known or readily ascertainable'[38] at national level or in the relevant trade press, or by means of a press release on the acquirer's website.[39]

5.3 There are a number of important exceptions to this general rule. In particular, the CMA may extend the four-month period where undertakings in lieu of reference are under negotiation; where the parties have yet to fully 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 EUMR. The four-month period may also be extended by agreement between the CMA and the merging enterprises, but for no more than 20 days.[40]

5.4 The four-month rule is also adjusted where there has been a "creeping merger" by which a person has obtained control of an enterprise through a series of transactions over a period of two years. In such cases, the CMA may treat them as a single event taking place on the date of the last transaction in the series. Thus, a reference may be made despite the fact that it may be unclear at the date of reference when the "trigger" degree of control was obtained.[41]

[32] S. 34ZA(1) of the Act. In certain situations, the CMA may extend the initial period of 40 working days – see s. 34ZB.

[33] S. 34ZA(3)(a), *ibid*.

[34] S. 34ZA(3)(b), *ibid*.

[35] S. 24(1)(a), *ibid*.

[36] Para. 4.44, Merger Procedural Guidance. In cases of completed mergers, the CMA must make a reference within four months of the merger taking place, or, where the merger was not made public and the CMA was not informed of it, within four months of the material facts being made public or the CMA being informed of them.

[37] S. 24(2)(b) of the Act.

[38] S. 24(3), *ibid*.

[39] Para. 4.44, Merger Procedural Guidance.

[40] See further s. 25 of the Act.

[41] Ss. 27(5) and 29(1), *ibid*. See also the Enterprise Act (Anticipated Mergers) Order 2003, SI 2003/1595.

6. Phase 1 procedure

6.1 Notification under the UK system of merger control is "voluntary" in the sense that there is no obligation under the merger control rules to apply for clearance before implementation of a transaction. In practice, however, there may be compelling reasons to apply for clearance prior to completion of the transaction. In particular:

- The CMA will normally make an interim order in respect of completed mergers to freeze or unwind integration until the merger has been cleared.[42]
- There is the risk of ultimately being ordered to divest in the event that a Phase 2 reference is made which results in an adverse outcome.
- Where a merger situation qualifying for review falls within the Takeover Code,[43] Rule 12 requires it to be a term of the offer that it will lapse should a Phase 2 reference be made before the first closing date of the offer (21 days after posting of the offer) or the date the offer goes unconditional as to acceptances, whichever is the later.
- The fact that a merger has not been notified does not mean that it will not be reviewed. The CMA has a dedicated Mergers Intelligence Committee responsible for monitoring mergers that have not been notified and liaising with other competition authorities. Third parties are invited to contact the Mergers Intelligence Committee about any mergers they may consider anti-competitive.[44]

6.2 To manage these risks, CMA clearance is often a contractual pre-condition to completion of a transaction that, when implemented, would constitute a qualifying merger. In this way, the parties, as a matter of private contract, mandate a prior application for clearance.

6.3 The question of whether prior clearance should be actively sought from the CMA in relation to a particular case is one for the parties – and, in particular, the acquirer – to consider with their advisers. Normally it will be wise to do so where a material competition issue is involved.

6.4 A flowchart indicating the typical shape of a Phase 1 merger inquiry is attached as Annex 1.

Applying for clearance

6.5 Under the old regime, it was possible to make an informal application for clearance that did not involve any prescribed form or process. However, the submission of a formal Merger Notice is now the only means of applying for clearance (as discussed in Chapter 5, the CMA may also initiate an investigation where parties do not voluntarily notify).

[42] See Annex C, Merger Procedural Guidance.

[43] The Takeover Code applies as a rule to all takeovers of, or mergers with, listed UK companies and to certain limited categories of acquisitions of private companies. Although it does not have the force of law and so is not legally enforceable, the Takeover Code – which operates mainly to secure fair and equal treatment of shareholders in relation to the takeovers and mergers to which it applies – forms the basis for the structure and conduct of takeover and merger activity in the UK.

[44] Paras. 6.7 - 6.13, Merger Procedural Guidance.

Pre-notification discussions

6.6 The CMA encourages parties to make contact in advance of notification and seek advice on a draft Merger Notice – preferably at least two weeks before the intended notification date, given the tight 40 working day statutory deadline.[45] This process may assist both the CMA in learning about complex and unfamiliar markets and the parties in ensuring the Merger Notice is complete. It may also help to avoid the need for burdensome information requests post-notification.[46] In order to make use of this process, parties must satisfy the CMA that there is a good faith intention to proceed with the transaction.[47]

6.7 Pre-notification discussions are available for all transactions – whether or not they are in the public domain. Typically, pre-notification discussions will focus on the contents of a draft notification and will be on a confidential basis.

Formal Merger Notice procedure

6.8 As noted above, parties must use the Merger Notice procedure to apply for CMA clearance. The CMA should be satisfied that there is at least a good faith intention to proceed with the transaction. In general, this will be evidenced by a signed share purchase agreement or equivalent or, if not yet signed, by heads of terms, or similar, or evidence of adequate financing and/or board level consideration. Where there is a public bid, the CMA will expect at least a public announcement of a firm intention to make an offer, or a possible offer, to justify opening a Phase 1 investigation.[48]

6.9 Information required to be set out in the Merger Notice includes details of the parties to the proposed merger, a description of the type of transaction, proposed timing, whether it is being notified in any other jurisdictions and the strategic and economic rationale for the transaction.[49] Supporting documentation to be provided with the Merger Notice includes a press release or report, details of any notifications to listing authorities, copies of transaction documents, the most recent annual report and accounts of the parties and copies of reports, presentations or studies from the past two years that set out competitive conditions, market conditions, market shares, competitors, or areas where the merger parties overlap. Contact details for each party's top (typically ten) customers and competitors for each "Candidate Market"[50] must also be provided.[51]

6.10 The 40 working day period within which the CMA must decide whether the test for reference is met will commence on the working day after the CMA has confirmed to the parties that it has received a complete Merger Notice (or, in other cases, the first working day after the CMA confirms that it has received sufficient information to enable it to begin its investigation).[52] For practical purposes, the CMA cannot confirm that it has received a complete Merger Notice until the merger has been announced, as the Act requires that the Merger Notice states the existence of the proposed merger has been made public.[53]

[45] Para. 6.39, *ibid*.

[46] Para. 6.40, *ibid*.

[47] Para. 6.44, *ibid*.

[48] Para. 6.49, *ibid*.

[49] See CMA Merger Notice and s. 96 of the Act.

[50] CMA Template Merger Notice. A "candidate market" is the narrowest product/service and geographic market(s) (and plausible alternative markets) where the merger parties overlap, have a vertical relationship, or supply related products/services.

[51] Contact details for suppliers are also often required.

[52] S. 34ZA(3) of the Act.

[53] S. 96(2)(b), *ibid*.

6.11 The CMA will endeavour to confirm whether the draft notice is complete as promptly as is practicable in the circumstances – which is typically within five (and no more than ten) working days of receipt of the Merger Notice (depending on factors such as the length of submissions and the available CMA resources).[54]

6.12 Even where the CMA has accepted a Merger Notice and confirmed that the 40 working day initial period has commenced, it can, at any time during this initial period, reject a notice for four reasons:

- it suspects the parties have given false or misleading information in the Merger Notice, or subsequently;
- it suspects that the parties do not intend to carry out the notified arrangements;
- if the parties fail to provide relevant information in the Merger Notice, or fail (without a reasonable excuse) to provide on time information the CMA requested under section 109 of the Act; or
- the notified arrangements appear to be a concentration with an EU dimension under the EUMR.[55]

6.13 The CMA may also suspend the 40 working day initial period where the notifying party fails to disclose information material to the transaction or the information provided by the notifying party or any connected person is false or misleading in a material respect.[56]

6.14 Any person that carries on an enterprise to which the notified arrangements relate may submit a Merger Notice. A Merger Notice may be submitted jointly by the parties to the proposed merger, with each submitting party taking responsibility for its accuracy and completeness of information. However, it is usual practice for the acquirer to submit the Merger Notice.

6.15 A case officer, responsible for day to day management of the case, will be appointed. Normally, further questions will be put to the parties – possibly several series of further questions if the case is complicated or third party complaints are received. The CMA will typically require one or more meetings with the parties and, in more complex cases, supplementary submissions may be made. It is a flexible procedure that takes on its own momentum to a large extent.

6.16 As indicated above, the CMA will require the merger parties to supply details of their main customers and competitors (and often suppliers) and will contact these third parties directly to seek their views on the merger. The CMA will also invite comments from interested third parties, by publishing an invitation to comment notice through the Regulatory News Service and on its website and will consider any unsolicited comments that it receives.[57]

6.17 In some cases, the CMA may also engage with other governmental departments, regulators, industry associations and consumer bodies for views on a specific case.[58]

[54] Para. 6.58, Merger Procedural Guidance.

[55] S. 99(5) of the Act.

[56] Para. 7.19, Merger Procedure Guidance

[57] Para. 7.9, *ibid*.

[58] Para. 7.13, *ibid*.

6.18 In difficult cases, the CMA will summon the parties to attend an issues meeting. Such meetings are typically held between days 25 to 35 of the 40 working day initial period. This will be preceded by an issues letter sent to the parties at least two working days ahead of the meeting, setting out all the possible arguments in favour of a reference in that case so that parties are able to respond.[59] Parties may respond to the issues letter in writing, orally at the issues meeting, or both.[60] The issues meetings will generally be chaired by a Deputy Director or Director of the Mergers Unit and attended by the case team, the Phase 1 decision maker (unless the CMA considers in a particular case it would be impractical for the decision maker to attend) and an individual from outside the Mergers Unit who is charged with acting as a "devil's advocate".

6.19 Following the issues meeting, the CMA will hold an internal case review meeting (CRM), which is usually chaired by the Director of Mergers and attended by the CMA staff who attended the issues meeting, including the "devil's advocate", and potentially others from the CMA.[61]

6.20 A meeting, chaired by the Phase 1 decision maker (either the Senior Director of Mergers or another senior member of the CMA staff), is held following the CRM to make the SLC decision. The officials who attended the CRM, the chair at the CRM and the devil's advocate all attend the SLC decision meeting. The Phase 1 decision maker receives a report at the meeting on the CRM discussions with an overall recommendation. The Phase 1 decision maker will then decide (based on his/her view of the evidence) whether he/she agrees with the recommendations; he/she will not be notified of any discussions regarding possible undertakings in lieu of reference (discussed below) at this time.[62]

6.21 On the day the decision is finalised, the CMA's reasoned decision is communicated to the parties/ their advisers and then the outcome of the SLC decision is announced publicly one hour later. The CMA will usually issue a press release where it finds the duty to refer applies and may exceptionally issue a press release in a clearance case where the facts of the case warrant it. The decision itself is later published on the CMA's website (with redactions to take account of information confidential to the merging parties).[63]

Phase 1 remedies – undertakings in lieu of reference

6.22 Offering binding undertakings in lieu of reference (UILs) for the CMA or the Secretary of State in public interest cases to accept may allow parties to avoid a reference to Phase 2. The CMA (or Secretary of State) may only accept UILs:

- where it has concluded that the merger should be referred for a Phase 2 investigation; and
- for the purpose of remedying, mitigating or preventing the SLC or other adverse effects identified.[64]

6.23 The CMA must be confident that the UILs will resolve the competition concerns it identified without requiring further investigation. [65]

[59] Paras. 7.36 – 7.38, *ibid*.

[60] Para. 7.39, *ibid*.

[61] Para. 7.44, *ibid*.

[62] Paras. 7.45 – 7.46, *ibid*.

[63] Para. 7.49, *ibid*.

[64] Paras. 8.1 and 8.2, *ibid*. See also Mergers: Exceptions to the duty to refer and undertakings in lieu of reference (OFT1122, December 2010) (adopted by the CMA board and available on its website).

[65] S. 73 of the Act.

6.24 The UILs may be structural (e.g. divestment of one of the overlapping businesses) or behavioural (e.g. a commitment to observe a price cap for a period of time). Structural UILs which do not require ongoing monitoring and which address the structural changes giving rise to the competition issue are preferred by the CMA.[66] This reflects in part the provisions of the Act which require the CMA, in exercise of its powers to accept UILs, "to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable".[67] Behavioural UILs will be considered by the CMA in practice only where divestment would be impractical or disproportionate to the nature of the concerns identified.[68]

6.25 Where the CMA considers the risks associated with a proposed package of divestments to be high (for example, where it has concerns for the long-term sustainability of the divestment package or there is only a limited pool of suitable candidate buyers), it will require the parties to find an up-front buyer. In such cases, the CMA will require a sale agreement first to be agreed with a suitable buyer before the UILs can be accepted (the CMA will consult on the identity of the buyer at the same time as the undertakings more generally).[69] The parties will usually be given a short time period (the CMA's guidance states that this may be a matter of weeks, not months) within which to identify a proposed up-front buyer, obtain (provisional) confirmation from the CMA that the identified buyer is likely to be acceptable, and enter into a binding sale agreement.[70] During this period, the CMA will "suspend" its duty to refer the transaction. Where the CMA does not believe that there are good reasons to consider that a suitable up-front buyer will be found within a reasonable timeframe, it may decide that its duty to refer the transaction should no longer be suspended, in which case a reference will follow.[71]

6.26 Parties may propose UILs either before, or after, the SLC decision (and the decision as to whether the CMA has a duty to refer). Ahead of an SLC decision, the CMA case team will assist merger parties (where possible) by providing guidance on the possible remedies that are under consideration by the parties, and which may be suitable; however, the case team cannot formally agree with the parties on the specific package of UILs.[72]

6.27 The parties may wish to see the CMA's reasons for its SLC decision before offering UILs. The parties have only five working days from the date they received the SLC decision to offer UILs formally in writing.[73] After this five working day period, the CMA cannot consider further offers of UILs.

6.28 The CMA has until the tenth working day after the parties receive the reasons for its SLC decision to decide whether the UIL offer (or a modified version of it)[74] might be acceptable as a suitable remedy to the SLC or the identified adverse effects arising from it.[75]

[66] Para. 8.4, Merger Procedural Guidance.

[67] S. 73(3) of the Act.

[68] Para. 5.39, Mergers – exceptions to the duty to refer and undertakings in lieu of reference (OFT 1122, December 2010).

[69] Paras. 8.32 – 8.39, Merger Procedural Guidance.

[70] Para. 8.35, *ibid*.

[71] This approach was adopted by the OFT in its decision to refer the completed acquisition by Sports Direct plc of a number of retail stores from JJB Sports plc. See *Sports Direct/JJB Sports* (ME/3986/08), OFT decision of 7 August 2009.

[72] Para. 8.8, Merger Procedural Guidance.

[73] Para. 8.11, *ibid*; s. 73A(1) of the Act.

[74] If the CMA considers it appropriate, it may contact the parties after receiving the UIL offer to inform them that the UIL offer, subject to specific modifications, may be suitable. The parties would then be given a short window to decide whether to accept the modifications: see paras. 8.20 and 8.21, Merger Procedural Guidance.

[75] S. 73A(2) of the Act.

6.29 Where the CMA decides that the UIL offer (or a modified version of it) might be acceptable, it will confirm this to the parties and issue a public announcement to that effect. This will also state whether an up-front buyer is likely to be required for any divestiture remedy. If an up-front buyer is required, this will impact upon the process for final acceptance of UILs.[76]

6.30 The CMA has to decide whether formally to accept the offered UILs (as modified if necessary) within 50 working days of providing the parties with reasons for its SLC decision, subject to an extension of up to 40 working days if it considers there are special circumstances.[77]

6.31 The CMA is also required to consult with interested third parties prior to formally accepting any UILs; third parties will be provided with no less than 15 calendar days in which to respond with comments.[78] After the relevant consultations are complete, the CMA will request that the parties sign final versions of the UILs, and the CMA will then formally accept them and make a public announcement on its website.[79]

Exceptions to the duty to refer

6.32 There are four exceptions to the CMA's statutory duty to refer a merger considered likely to result in a SLC. In essence, a merger need not be referred where:

- The SLC can be addressed by undertakings in lieu (see above);[80]
- The proposals for a merger are not sufficiently advanced to warrant reference. Where a public statement of an intention to merge or to acquire has been made, this exception is unlikely to apply;[81]
- The market is not of sufficient importance to warrant a reference. In other words, where the costs of a reference would be disproportionate to the value of the relevant market (see below on the "de minimis exception");[82] or
- The merger is likely to lead to customer benefits (see below on the customer benefits exception).[83]

[76] Paras. 8.27 - 8.39, *ibid*.

[77] S. 73A(4) of the Act. The CMA may also extend the period for considering UILs if it considers that a relevant person has failed to comply with a notice requiring evidence issued under s. 109 of the Act.

[78] Para. 2 Schedule 10, *ibid*. If, following the consultation or otherwise, the originally published UILs are modified in any material respect, a second consultation period of no less than 7 calendar days will be required.

[79] Para. 8.31, Merger Procedural Guidance.

[80] S. 74(1) of the Act.

[81] S. 33(2)(b), *ibid*.

[82] Ss. 22(2)(a) and 33(2)(a), *ibid*.

[83] Ss. 22(2)(b) and 33(2)(c), *ibid*.

The *de minimis* exception

6.33 The CMA guidance states that where the statutory duty arises a reference will in general be made where the annual market value exceeds £10 million. A market is likely to be of insufficient importance to warrant reference where the annual market value is below £3 million. However, in exceptional cases, a reference may be made below this value where the potential consumer harm is particularly significant or where the merger is highly replicable in the sector concerned (and so a decision not to refer could have precedent value). Where the market value is between £3-10 million, the CMA will conduct a broad analysis of whether the cost of making a reference exceeds the expected consumer harm.

6.34 The CMA's stated policy is that the *de minimis* exception will not be applied where the detriment to competition can be remedied clearly by undertakings in lieu as these avoid the risk of consumer harm and the cost of a reference.[84]

The customer benefits exception

6.35 Although efficiency and other benefits are often claimed for mergers, the customer benefits exception to the duty to refer is likely to be available only in very rare cases.[85]

6.36 The types of benefits that may be relevant include lower prices, greater innovation and improved choice or quality.[86] Benefits to the merging parties in terms of increased economies of scale or otherwise are not necessarily relevant. The benefits claimed for the merger must pertain to customers, be quantifiable and must clearly derive from the merger.[87] Benefits that may arise at some remote or uncertain time in the future will not be relevant for these purposes.[88]

6.37 "Customers" for the purposes of the exception include the customers of the parties to the merger, so that it is not necessary to demonstrate that the benefits will necessarily flow through to final consumers. Moreover, the benefits may arise in a market other than the market in which the SLC is considered to arise.[89]

6.38 Where the customer benefits exception may be relevant, arguments as to why it should apply must be raised with the CMA at an early stage in the process.[90]

[84] Para. 2.21, Mergers – exceptions to the duty to refer and undertakings in lieu of reference (OFT 1122, December 2010).

[85] Para. 4.8, *ibid*. The OFT relied on the efficiencies argument for the first time in *Global Radio UK Limited/GCap Media plc* (ME/3638/08), OFT decision of 1 July 2009, to conclude that any lessening of competition in a particular region would not be substantial. The OFT concluded that in two other regions the evidence of any pro-competitive efficiencies did not outweigh the prospect of anti-competitive harm and accepted undertakings in lieu to remedy competition. Global Radio offered undertakings in lieu of a Phase 2 reference with respect to these two other regions.

[86] Paras. 4.6 and 4.12, *ibid*.

[87] Para. 4.9, *ibid*.

[88] Paras. 4.7, *ibid*.

[89] Para. 4.13, *ibid*.

[90] See *Global Radio UK Limited/GCap Media plc*.

Information gathering powers

6.39 In most cases, the commercial imperatives to complete the deal will operate to ensure that the parties provide the CMA with extensive information from the outset of the process.

6.40 Under section 109 of the Act, the CMA can issue a notice requiring a person to provide information or documents, or give evidence as a witness (Section 109 Notice). The CMA is likely to use a Section 109 Notice where:

- there is a risk it will not receive the information sufficiently in advance of its statutory deadline for the information to be analysed and taken into account in its decision(s);
- it has doubts that the recipient will comply with an informal request and/or the recipient has previously failed to respond to such an informal request; or
- there is a risk that relevant evidence may be destroyed.[91]

6.41 Failure to comply with a Section 109 Notice, without a reasonable excuse, can cause delay to the review timetable and may also result in a fine. It is a criminal offence, punishable by a fine or a maximum of two years imprisonment (or both), to knowingly or recklessly supply false or misleading information to the CMA, Ofcom, monitor or the Secretary of State in connection with any of their merger control functions.[92]

Informal advice

6.42 To assist companies and their advisers to assess future mergers, the CMA is prepared (where certain conditions are met) to give advice on an informal and confidential basis on competition issues (such as its potential approach to a counterfactual, a "failing firm" defence[93] or its substantive views regarding the likelihood of a Phase 2 reference).[94] However, advice may also be provided on jurisdictional issues, such as questions relating to the share of supply test or material influence. Informal advice is only available for transactions that are neither hypothetical nor in the public domain.[95] Essentially, the CMA will do so in the case of good faith confidential transactions and where its duty to refer is a genuine issue.[96]

6.43 Any resulting advice is likely to be modest and qualified and is largely intended to supplement the assessment of the parties' legal advisers. It is not binding on the CMA.[97] The quality of the advice will depend to a large extent on the quality of the information provided. Although there is no administrative timetable for the informal advice process, the CMA will endeavour to indicate whether a request for advice has been accepted within five working days. Where the advice is to be given immediately following a meeting, the CMA will endeavour to schedule the meeting within 10 working days of receipt of the original application; however, urgent cases may be handled more quickly.[98]

[91] Para. 7.3, *ibid*.
[92] S. 117 of the Act.
[93] Para. 6.25, Merger Procedural Guidance.
[94] *Ibid*.
[95] Para. 6.27, *ibid*.
[96] Para. 6.28, *ibid*.
[97] Para. 6.34, *ibid*.
[98] Para. 6.36, *ibid*.

Fast track reference cases

6.44 It is possible for parties to request that the CMA "fast track" a reference where an in-depth Phase 2 investigation is likely to be required.

6.45 The usual steps such as the issues meeting and CRM may be dispensed with, and the time taken to investigate (e.g. conducting third party enquiries) will be shortened where possible. For a case to be fast tracked, there must be sufficient evidence available to meet the CMA's statutory threshold for reference. Fast track references will be most suitable for cases where competition concerns impact the whole or substantially all of the transaction, rather than just one part of the transaction which is capable of being resolved by structural undertakings in lieu of a reference.[99] It is open to the parties to inform the CMA that they seek a fast track reference either at the time of notification or at any point during the course of the CMA's investigation.[100] Generally, it would be expected that the overall time taken from formal notification to reference decision would be 10 to 15 working days.[101]

Merger fees

6.46 Subject to limited exceptions,[102] fees have to be paid in respect of a merger in which a Merger Notice is submitted or in respect of which the CMA has reached a decision on whether to refer.[103] Where a fee is due, it becomes payable on the publication by the CMA of either a reference decision or a decision not to make a reference. For cases resolved by UILs, the fees become payable when the CMA formally accepts the UILs. An invoice is issued and payment must be made within 30 days of the date of the invoice.

6.47 There are three bands of merger fees which apply according to the value of the turnover in the UK of the enterprise which has been / is to be acquired.

6.48 The current scale is as follows:

Turnover merger fee

- £20 million or less: £40,000
- over £20 million, but not over £70 million: £80,000
- over £70 million but not over 120 million: £120,000
- over £120 million: £160,000

6.49 No fee will be payable if the exemption for acquisitions by small/medium sized enterprises applies.[104]

[99] Paras. 6.63 – 6.64, *ibid*.
[100] Para. 6.65, *ibid*.
[101] Para. 6.64, *ibid*.
[102] See s. 4, Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370.
[103] See s. 121 of the Act and s. 3, *ibid*.
[104] S. 7 (Merger Fees and Determination of Turnover) Order 2003.

7. Phase 2 procedure

Phase 2 overview

7.1 A Phase 2 investigation typically has four main stages:

- *Information gathering*: The CMA considers the potential anti-competitive effects of the proposed merger ("theories of harm") early in its Phase 2 inquiry; this will frame its substantive assessment and focus its further information gathering and analysis. The CMA may gather information by (among other things) questionnaires, submissions, hearings, surveys and site visits.[105]

- *Phase 2 assessment*: This is conducted on the basis of an issues statement that is produced by the CMA, with an accompanying news release, followed by hearings with the parties and others.[106]

- *After provisional findings*: The CMA will publish a notice of provisional findings recording its provisional conclusions and an explanation of its reasoning. The Notice will identify a period of at least 21 days for the parties to comment.[107] If the CMA has provisionally identified a SLC, a notice of possible remedies is also published, which will act as a formal starting point for discussion of remedies.[108] Response hearings may also take place. The CMA will then publish its final report.

- *Implementation of remedies:* This occurs after the publication of a final report, where the CMA has concluded that the merger would give rise to a SLC and remedial action should be taken. Remedies may be implemented either by the CMA accepting undertakings from the parties, or by the CMA exercising its power to make an order.[109]

7.2 The Rules of Procedure for CMA Groups require an administrative timetable to be published as soon as practicable after the Phase 2 Inquiry Group has been appointed, setting out the timing of the major stages of the Phase 2 investigation.

Interim measures following a Phase 2 reference

7.3 Upon the making of a reference, there are a number of consequences for the transaction – some arising automatically, some relevant only if invoked by the authorities.

Temporary restriction on share dealings

7.4 When a merger reference is made in relation to an anticipated merger, the Act automatically prohibits (in broad terms) the parties from acquiring interests in each other's shares until such time as the CMA inquiry is finally determined.[110] This restriction can only be lifted with the consent of the CMA.

[105] Paras. 11.2 and 11.11, Merger Procedural Guidance.
[106] Para. 11.39, *ibid.*
[107] Para. 13.1, *ibid.*
[108] Paras. 12.16 – 12.22, *ibid.*
[109] S. 41(3) of the Act, para. 14.1, *ibid.*
[110] S. 78 of the Act.

Restrictions on further integration

7.5 In relation to completed mergers, the Act prohibits from the point of reference 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 1 in any event).[111] The purpose of the prohibition is to prevent the parties from taking any steps which might prejudice or make it difficult for the CMA to implement any remedies which might ultimately prove necessary. Again, this prohibition, which lasts until the reference has been finally determined, may be relaxed only with the consent of the CMA.

Interim undertakings and orders

7.6 The CMA also has available a wide range of interim order-making powers including powers to impose obligations to safeguard assets and to continue to carry on certain businesses, supplemented if necessary by the appointment of a trustee. Any such order may continue in force after the report is made until final remedies have been determined.[112] As an alternative to the exercise of its interim order-making powers, the CMA can accept legally binding undertakings from one or more parties to a completed or anticipated merger that they will not take any action that might prejudice the outcome of the merger reference.[113]

7.7 Orders made by the CMA in the course of its Phase 1 investigation of completed (or anticipated) mergers will remain in force until the merger is cleared or until implementation of any remedies unless released or replaced by a new interim order or undertakings by the CMA in the course of its Phase 2 investigation.[114]

Lapse of public takeover bid

7.8 Under Rule 12 of the City Code on Takeovers (the Code), a bid subject to the Code must be subject to a term that the bid will lapse if a CMA reference is made before the latter of the first closing date and the date the bid goes unconditional as to acceptances. In these circumstances, Rule 35 of the Code provides, in broad terms, that the bidder may not bid again for the target for a period of 12 months following the date the bid lapses. However, if the bid is cleared by the CMA following an inquiry, the Takeover Panel will normally permit a fresh bid to be made, provided it is made within 21 days of the CMA's clearance being announced.

Phase 2 investigations

7.9 The CMA rules of procedure on Phase 2 merger investigations are governed by the Act, Schedule 7 of the Competition Act 1998 and the Rules of procedure for CMA groups,[115] and any guidance issued by the CMA Board (such as the Merger Procedural Guidance).[116] Subject to those provisions (and to generally applicable principles of English administrative law, including the principles set out in the European Convention on Human Rights, directly enforceable in the UK under the Human Rights Act 1998) the Phase 2 Inquiry Groups have a broad discretion in determining how inquiries ought to be conducted.

[111] S. 77, *ibid*.

[112] Ss. 80 and 81, *ibid*.

[113] S. 80, *ibid*.

[114] Para. 11.9, Merger Procedural Guidelines.

[115] CMA rules of procedure for merger, market and special reference groups (CMA17, March 2014) (corrected November 2015).

[116] Schedule 4, Para. 52(1) of ERRA.

7.10 Decisions in Phase 2 merger cases are made by an Inquiry Group, appointed by the Chair of the CMA from a group of panel members. The groups generally consist of at least three (and typically no more than five) members, including the Chair of the Inquiry Group. In making group appointments, the Chair must avoid situations which might give rise to a conflict of interests, or otherwise undermine or call into question, the independence and impartiality of the CMA.[117]

7.11 Each group is supported by a team of CMA staff (economists, accountants, lawyers, clerical staff and so on) and may, on occasion, use external advisers and consultants.

7.12 The CMA is obliged to publish a report, setting out its reasoned decisions, within a statutory maximum period of 24 weeks (extendable in special cases for a period of up to eight weeks) from the date of reference.[118] A period shorter than 24 weeks may apply when a merger has been referred back to the UK under Article 9(6) of the EUMR.[119]

7.13 A flowchart indicating the typical shape of a Phase 2 investigation is attached as Annex 2.

Information gathering powers

7.14 As is the case at Phase 1, the CMA has wide statutory powers to require the parties and third parties to produce information and documents for the purposes of a merger investigation.[120] Legally privileged documents do not, however, have to be disclosed to the CMA. The CMA can also compel witnesses to attend in person before the CMA.

7.15 Hearings are held with the parties prior to the group reaching its provisional findings. There will often be a separate hearing to discuss remedies. CMA hearings are generally held in private.[121] Transcripts of hearings are made available to attendees, to allow them to check for accuracy and to make additional substantive points in writing.

7.16 The CMA invites evidence from a wide range of third parties and routinely invites third parties to appear before it in person. Third party comment is also more generally solicited by means of advertisements in the trade press and by notices on the CMA's website.

Publications

7.17 The administrative timetable for the reference, the notice of provisional findings and the remedies letter are posted on the CMA's website, together with the main submissions of the parties during the reference and a summary of third party comment. The CMA also publishes its reports, both in hard copy and on its website. Prior to publication, the CMA may "put-back" chapters of its draft report (other than those that deal with its conclusions) to the parties for their comments.[122]

[117] Para. 10.5, Merger Procedural Guidance.

[118] Ss. 39(1) and 51 of the Act.

[119] S. 39(2), *ibid*.

[120] S. 109 *ibid*.

[121] Para. 11.34, Merger Procedural Guidance.

[122] Paras. 12.5 – 12.9, *ibid*.

7.18 The Act provides that information should be excluded from the published report where the CMA considers that publication would harm the public interest, the legitimate interests of a business or, where the information relates to the private affairs of an individual, the interests of that individual.[123] However, the CMA must balance against these restrictions its statutory obligation to include within its report the information necessary to understand its decision and the reasoning for its decision.[124]

Remedies

7.19 Subject to rare exceptions, where the CMA concludes at Phase 2 that a SLC may be expected to arise from a merger, it must recommend remedies.

7.20 The CMA has adopted the CC's former guidelines[125] which explain its approach and requirements in exercising its wide-ranging and flexible powers in relation to remedies.[126] The remedies that the CMA may require from the parties may be either structural (e.g. prohibition, or complete or partial divestment) and/or behavioural (e.g. licensing of intellectual property rights or price caps). It may also recommend that steps be taken by others, for example, that regulators should change the terms of operating licences or take steps to increase market transparency.[127] In choosing between the remedies available to it, the CMA will take into account the likely effectiveness of the remedy, the costs to the parties and to the CMA of compliance with the remedy and the proportionality of the remedy to the SLC identified.[128] However, in relation to completed mergers, the costs to the parties of compliance with the remedy will not normally be relevant on the basis that these could have been avoided by a prior application for clearance.[129]

7.21 The Act requires the CMA to have particular regard to the need to achieve "as comprehensive a solution as is reasonable and practicable" to remedy the SLC.[130] As noted above, a preference for structural rather than behavioural remedies has evolved. The costs associated with ongoing monitoring of behavioural remedies by the CMA, and the susceptibility of such remedies to be made inappropriate or irrelevant by changes in market conditions, mean that behavioural remedies are more likely to be a supplement to structural remedies rather than a substitute for such remedies.[131]

7.22 Where the CMA recommends divestment it will generally insist upon the appointment of a trustee to safeguard the business pending its disposal and to monitor the parties' compliance with undertakings and will generally require the subsequent disposal to be approved by the CMA. Where the CMA recommends partial divestment, it will be particularly concerned to ensure that the package of assets to be divested can form the basis of a business that will be effective in the hands of a purchaser to restore the status quo ante.[132]

[123] S. 244 of the Act.

[124] S. 38(2)(c), *ibid*.

[125] Merger Remedies: Competition Commission Guidelines, (CC8, 1 November 2008). Appendix A of the CC Guidelines has, however, been replaced by the Merger Procedural Guidance (see para. D1 of the Merger Procedural Guidance).

[126] Ss. 82 to 84 of the Act.

[127] Where such a recommendation is made to the Government, the latter must issue a public response within 90 days of receipt of the recommendation.

[128] Para. 1.9 Merger Remedies: CC Guidelines.

[129] Para. 1.10, *ibid*.

[130] S. 41(4) of the Act.

[131] Para. 1.11, Merger Remedies: CC Guidelines.

[132] Para. 3.7, *ibid*.

7.23 Situations in which the costs of the remedy appear disproportionate to the issue identified may be one of the exceptional cases in which the CMA may decide not to take remedial steps.[133] Insofar as any remedies ordered by the CMA may prejudice any customer benefits that may arise from the merger, this may lead the CMA to clear the merger unconditionally or to modify a remedy or impose a lesser remedy than might otherwise be deemed appropriate.[134] The concept of customer benefits for the purpose of the remedies assessment is broadly the same as the concept of customer benefits that may justify a decision by the CMA not to refer notwithstanding a SLC (see above). In other words, there must be evidence of objective, merger-specific benefits that can be quantified and that are likely to materialise within a reasonable period of time. Cases in which these criteria will be met are likely to be exceptional.

7.24 Remedies may be imposed by order. However, in most cases, the CMA will accept undertakings from the parties in preference to exercise of its order-making powers. Undertakings become legally binding from the moment they are accepted by the CMA. The types of provisions that may be included in orders are restricted to those set out in Schedule 8 to the Act but no such limitation applies to undertakings.[135] Schedule 8, however, is broad enough to cover most forms of remedies that the CMA is likely to wish to impose.

7.25 Remedial undertakings – and indeed all forms of undertakings accepted by the authorities in exercise of their functions under the Act – can be enforced by the authorities in the same way as orders, that is, by civil proceedings for injunctive or other relief.[136] Parties in breach of orders or undertakings may also face third party claims for damages or other relief.[137]

7.26 The CMA maintains a register of final undertakings and orders and has a duty to monitor the implementation of undertakings and orders. In addition, the CMA has published guidance on its approach to the variation of remedial undertakings and orders in merger (and other) cases.[138]

7.27 The procedure to be observed in negotiating orders and undertakings is set out in Schedule 10 of the Act. This procedure provides for publication of the proposed undertaking or order for third party consultation.

[133] Para. 1.12, *ibid*.

[134] S. 41(5) of the Act and para. 1.15, *ibid*.

[135] This limitation applies even if the order is made in consequence of a breach of a remedy undertaking.

[136] Ss. 94(6), (7) of the Act.

[137] Ss. 94(3), (4) *ibid*.

[138] Remedies: Guidance on the CMA's approach to the variation and determination of merger, monopoly and market undertakings and orders (CMA II, January 2014) (available on the CMA's website).

8. Substantive appraisal of mergers

8.1 The CMA has a statutory duty to refer a relevant merger situation to a Phase 2 review where it has a reasonably held belief that there is a significant prospect that the merger may result in a SLC. The CMA's powers at Phase 2 to prohibit mergers or require remedies from the merging parties arise where it concludes on the balance of probabilities that a SLC has resulted, or may be expected to result, from the merger.

8.2 In *Office of Fair Trading and others v IBA Health Limited* (IBA Health), the Court of Appeal (CA) considered the extent of the discretion afforded the OFT (now CMA) by the Phase 1 statutory duty.[139] It concluded that the duty to refer arose where the OFT (now CMA) formed a reasonable belief that there was a possibility that the merger would result in a SLC.

8.3 Possibility, for these purposes, means something more than fanciful, but less likely than a "significant prospect".[140] The CMA therefore has discretion to make a reference in cases where the degree of likelihood is somewhere between "greater than fanciful" and below 50%, but is obliged to do so where a merger is more likely than not to result in a SLC.

8.4 Where the relevant likelihood is "greater than fanciful" but below 50%, the Merger Assessment Guidelines indicate that key factors for the CMA will be (i) the evidence available; (ii) the potential customer benefits outweighing the SLC; (iii) and any adverse effects of the SLC.[141]

Appraisal by the CMA

8.5 In making the SLC assessment, the CMA will start with a comparison of the prospects for competition if the merger proceeds and if it does not proceed (the "counterfactual").[142] However the CMA may take differing approaches to the counterfactual between Phase 1 and Phase 2 in certain circumstances. At Phase 1, the CMA considers the effect of a merger compared with the most competitive counterfactual, provided it is realistic. At Phase 2, the CMA might examine several possible scenarios before deciding upon the most appropriate counterfactual. It will rely on the facts available to it at the time of the assessment and foreseeable future developments.

8.6 The CMA identifies two types of merger: horizontal and non-horizontal (vertical or conglomerate) mergers. The CMA will identify one or more theories of harm that it will use as a framework for substantive merger analysis.[143]

[139] *Office of Fair Trading and Others v IBA Health Limited* [2004] EWCA Civ 142, 19 February 2004.

[140] Prior to the CA decision, the OFT had applied the "significant prospect" test to mergers.

[141] Paras. 2.7 and 2.8, Merger Assessment Guidelines.

[142] Para. 4.3, *ibid.*

[143] Para. 4.2, *ibid.*

Horizontal mergers

8.7 Various measures of post-merger concentration levels can be used by the CMA to identify competitive pressures in a market (and therefore whether the merger may lead to a SLC in that market).[144] The tools used by the authorities for these purposes may include market shares, concentration ratios (the aggregate market share of the leading firms in the market) or the Herfindahl-Hirschman Index (HHI) (a calculation based on the sum of the squares of the market shares of all the market participants). Whilst the CMA will not employ a mechanistic approach to the use of measures of concentration, a merger meeting particular concentration levels will provide an indication of whether it is likely to raise competition concerns.[145]

8.8 Having examined the post-merger concentration levels in the relevant market, the authorities will review whether a horizontal merger will give rise to "unilateral" or "co-ordinated" anti-competitive effects.

Unilateral effects

8.9 Unilateral effects will be deemed to arise where the merged firm would find it profitable to raise prices or reduce output or quality following the merger.

8.10 The following factors, amongst others, will be taken into account in assessing whether unilateral effects may arise from a merger:[146]

- Loss of a significant competitive force in the market (or potential competition).
- Buyer power and the practical ability of customers to switch to alternative suppliers.
- Ease of new entry or expansion of existing capacity levels.

8.11 Over recent years, there has been a noticeable shift 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 to estimate the upward pricing pressure from a merger.

Coordinated effects

8.12 Coordinated anti-competitive effects will arise where the merger situation increases the likelihood that competitors will "coordinate" or increases the prospects that such coordination will be successful.[147] For these purposes, the coordination may be explicit or tacit. As well as considering the existence of pre-existing (i.e. pre-merger) coordination, the authorities will examine whether the merger makes it more likely that competitor firms will start to coordinate given market characteristics. Three conditions must be satisfied for coordination to be possible:

[144] Para. 5.3, *ibid.*

[145] Para. 5.3.5, *ibid.* states: "…any market with a post-merger HHI exceeding 1,000 may be regarded as concentrated and any market with a post-merger HHI exceeding 2,000 as highly concentrated. In a concentrated market, a horizontal merger generating a delta of less than 250 is not likely to give cause for concern. In a highly concentrated market, a horizontal merger generating a delta of less than 150 is not likely to give cause for concern."

[146] Para. 5.5, *ibid.*

[147] *Ibid.*

- market participants must be able to reach and monitor the terms of co-ordination;
- coordination needs to be *internally* sustainable among the coordinating group – market participants have to find it in their individual interests to adhere to the coordinated outcome; and
- coordination needs to be externally sustainable – other competitive constraints in the market must not be such as to undermine the sustainability of the collusion.[148]

Non-horizontal (vertical and conglomerate) mergers

8.13 Non-horizontal mergers, that is, mergers where there is no direct loss of competition, often lead to efficiencies and enhanced competition. They may however weaken competition and may lead to a SLC where products are related – for example, where an upstream supplier and a downstream customer merge or where two suppliers of related goods merge and a variation in the price of one good affects the customer's demand for the other good (a "conglomerate" merger). In terms of unilateral effects, the authorities have stated that they will assess non-horizontal mergers by reference to three questions:

- whether the merged firm has the ability to harm rivals (through price increases or refusal to supply);
- whether it would be profitable to do so; and
- whether competition on the market would be thereby reduced to such an extent that it gave rise to an SLC.

8.14 Coordinated effects arising from non-horizontal mergers are essentially assessed within the same framework as horizontal mergers (see above), however the details of the analysis might differ – for example, a vertical merger could allow the merged entity to gain access to commercially sensitive information about non-integrated rivals and facilitate coordination or reduce the number of players in the affected market and thereby facilitate coordination for the remaining firms.[149]

Appraisal after referral

8.15 Having first satisfied itself that a relevant merger situation for the purposes of the Act exists, the Phase 2 Inquiry Group then considers whether or not a SLC has resulted, or is likely to result, from that situation. This assessment will be conducted in accordance with the analytical framework described above. If it concludes that a SLC can be expected to result from a merger, its extensive remedial powers, including its powers of prohibition, then become operative.

[148] Para. 5.5.9, *ibid.*

[149] Para. 5.6.15, *ibid.*

Inter-relationship with the Competition Act 1998

8.16 Arrangements which result in mergers within the meaning of the Act are generally excluded from the regime for the control of anti-competitive behaviour established by the Competition Act 1998.[150]

8.17 The exclusion is automatic and extends to "any provision directly related and necessary to the implementation of the merger provisions", i.e. ancillary restraints such as non-competition clauses (subject to appropriate limitations of scope and duration), licences of industrial, intellectual and commercial property rights, and purchase and supply agreements. The assessment of whether a restraint is truly ancillary to a merger or concentration is made by the CMA, in consultation with sectoral regulators where appropriate. There is case law under the EUMR as well as European Commission guidance as to what constitutes an ancillary restraint, to which the CMA is required to have regard in applying the Act.[151]

8.18 To benefit from the exclusion, it is not necessary that the merger should also "qualify for investigation" (i.e. the exclusion applies irrespective of the turnover of the business being acquired, or of the market share being created or strengthened).

8.19 There is, however, in relation to the prohibition on anti-competitive agreements a mechanism for withdrawal or "clawback" of the exclusion for mergers.[152] The purported purpose of this clawback is to prevent an anti-competitive agreement from being structured in such a way as to fall outside the scope of competition scrutiny.

8.20 An agreement may be "clawed back" by a CMA direction in writing. Such a direction may be issued only where:

(a) the CMA considers:

(i) that the agreement will, if not excluded, infringe the Chapter I prohibition; and

(ii) that it is unlikely to merit unconditional individual exemption; and

(b) the agreement is not a "protected agreement". Protected agreements fall broadly into three categories:

(i) mergers qualifying for investigation which the CMA has decided not to refer to Phase 2;

(ii) qualifying mergers found to be such by the CMA on a reference, including on the mandatory reference of a water merger; and

(iii) qualifying and non-qualifying mergers based on the acquisition of legal control, e.g. the acquisition of more than 50% of the voting rights of a company conferring on the acquirer of the shares the ability to pass ordinary resolutions.[153]

[150] Para. 3, Schedule 1, Competition Act 1998.

[151] See Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C56/24, 05.03.2005).

[152] Para. 4, Schedule 1, Competition Act 1998.

[153] Para. 5, Schedule 1, *ibid*.

8.21 Significantly, a merger that has not been cleared by the CMA (or, if referred to Phase 2, formally classified as a merger) will not be protected from clawback where it is based on the acquisition of less than a legal controlling interest, e.g. where only de facto control or material influence is transferred. These arrangements may be clawed back for assessment under the prohibition of anti-competitive agreements, notwithstanding the expiry of the four-month review period applicable to mergers under the Act.

9. Public interest cases

9.1 One of the primary objectives of the reforms to UK merger control introduced by the Act in 2003 was the de-politicisation of the system of control. Under the old merger regime, the Secretary of State was the ultimate decision-maker. Decisions to refer mergers to Phase 2 were taken by the Secretary of State taking into account the advice of the Director General of Fair Trading. Where the CC concluded that a merger was likely to harm the public interest, it fell to the Secretary of State to decide what action, if any, ought to be taken in consequence. Persistent criticism of this form of political involvement in UK merger control led the Government to commit to take politics out of merger control.

Intervention notices

9.2 The Secretary of State does, however, retain powers of intervention in relation to certain mergers, including mergers otherwise falling within the European Commission's exclusive jurisdiction under the EUMR. The Secretary of State may issue an intervention notice if a merger raises a "public interest consideration".[154] The types of public interest that are relevant for this purpose are defined, either by the Act or other legislation or by statutory instrument. For example:

- The public interest consideration of national security was drafted into the Act.
- Under the Communications Act 2003 (Communications Act), there are public interest considerations in relation to newspaper and media mergers. In the case of newspaper mergers, there are powers to intervene to ensure plurality of media ownership, accurate presentation of the news, free expression of opinion and a plurality of views in each newspaper market.[155] In media mergers, the Secretary of State may intervene to ensure plurality of media ownership, a wide range of high quality broadcasting and the attainment of certain standards for programme content.[156] Guidance on the operation of the public interest provisions relating to newspaper and other media mergers was issued by the DTI (now BIS) in May 2004.
- In October 2008, the Secretary of State introduced the public interest consideration of "maintaining the stability of the UK financial system" in the context of the proposed *Lloyds/HBOS* merger, later incorporated into the Enterprise Act by order.[157]

9.3 The Secretary of State has the power to issue an intervention notice whilst simultaneously seeking Parliament's approval for the recognition of a further category of public interest consideration (as exercised in the *Lloyds/HBOS* merger). Should Parliament decline to recognise the proposed new category within 24 weeks, the intervention notice, in effect, ceases to operate and the reference (if already made) is cancelled.[158] Nevertheless, if the CMA's report to the Secretary of State prior to the reference indicates that it believes that the merger would result in a SLC, the CMA can continue as if a Phase 2 reference had been made under section 56(3) of the Act.

[154] S. 42(2) of the Act.

[155] S.s 375 (2A) and (2B) Communications Act 2003.

[156] S. 375 (2C), *ibid.*

[157] S. 58 of the Act (as amended by The Enterprise Act 2002 (Specification of Additional S. 58 Consideration) Order, SI 2008/2645).

[158] S. 53(2), *ibid.*

The issue of an intervention notice has the following effects:

- In tandem with its consideration of the competition issues, the CMA at Phase 1 will invite representations on the public interest consideration which it will summarise in a report to the Secretary of State.[159] This public interest report will be presented to the Secretary of State along with the CMA's findings on the competition and jurisdictional issues (which the Secretary of State is bound to accept).[160]

- Should the Secretary of State conclude that public interest issues are not material to the outcome, the case will be processed by the CMA in the usual way.[161]

- If the Secretary of State concludes that the public interest issues are material, he/she has broad discretion in deciding whether the transaction ought to be cleared or referred to Phase 2 or whether to seek undertakings in lieu from the parties.[162] However, in reaching a decision, the Secretary of State may take into account only the specified public interest consideration(s) or both the public interest consideration(s) and the likelihood of a SLC. The Secretary of State must also believe that a "relevant merger situation" has been or will be created, and to this end, is obliged to accept the advice of the CMA on the existence of a "relevant merger situation" and on competition issues, including the likelihood of a SLC,[163] but may make a reference on the basis of specified public interest considerations. Where the CMA advises that the merger should be referred to Phase 2 on substantive competition grounds as well, the merger will be referred on both grounds in tandem.

- If the transaction is referred on public interest grounds alone, the reference will restrict the CMA's investigation to the public interest issues raised by the transaction. If SLC issues are also raised, the reference will cover both the competition and the public interest issues. In the event of a combined reference, the CMA is required to decide the issue of whether a merger situation has arisen which is likely to lead to an SLC, and must then reach a conclusion on the overall public interest (taking into account both any SLC and specified public interest consideration(s) (but not other factors)).[164] These findings may include recommendations for remedial action.[165]

- The CMA's findings at Phase 2 on the overall public interest are advisory only; the Secretary of State decides whether to make an adverse public interest finding and if so what remedial action ought to be taken in the event of such a finding.[166] Following receipt of the CMA's report in cases involving newspaper and media considerations, the Secretary of State will also be advised by Ofcom.[167] However, the findings of the CMA on the SLC issue (assuming it forms part of the reference) bind the Secretary of State.[168]

[159] S. 44(3), *ibid.*

[160] S. 44(2), *ibid.* Also note that the Communications Act requires Ofcom to produce a report in newspaper and media cases where the Secretary of State has issued an intervention notice. The reporting obligations of the CMA are amended in such cases to avoid duplication of work.

[161] S. 56(1) of the Act.

[162] S. 45 and Schedule 7, para. 3, *ibid*

[163] S. 46(2), *ibid.*

[164] Ss. 47(5), (6) *ibid.*

[165] Ss. 47(7), (8), *ibid.* The remedial powers of the Secretary of State mirror those accorded to the authorities by Schedule 8 of the Act.

[166] S. 55(2), *ibid.*

[167] Para. 16.7, Merger Procedural Guidance.

[168] S. 54(7) of the Act.

- If the Secretary of State concludes, following the report of the CMA, that no public interest consideration is relevant to the case, the CMA deals with the SLC and, if relevant, the issue of remedies in the normal way.[169]

9.4 A flowchart indicating the typical shape of a merger inquiry raising public interest considerations is attached as Annex 3.

Special merger situations

9.5 The Act also gives the Secretary of State a pre-eminent role in the case of mergers that do not meet the jurisdictional thresholds but which do raise defined public interest issues. Originally, such cases were restricted to Government contractors holding confidential materials relating to defence. However, the Communications Act extended the relevant category of cases to certain media mergers. In cases involving either the supply of newspapers of a particular description or broadcasting of any description, carried out in the UK or a substantial part of it, a special merger situation arises where at least 25% of the media is supplied by the person or persons by whom one of the enterprises concerned is carried on.[170] There is no requirement that this share of supply should increase as a result of the merger.

9.6 The Secretary of State must issue an intervention notice to start the merger control procedure in relation to these so-called "special merger situations".[171] That notice must specify the defined public interest consideration that the Secretary of State believes to be raised by the merger.[172] Taking into account a report from the CMA as to whether a special merger situation has arisen, which may include advice and recommendations in relation to the specified public interest consideration and which will include a summary of representations received by the CMA, the Secretary of State decides whether or not to refer the merger. This decision is based on the specified public interest consideration; the SLC test does not apply.[173] However, the decision of the CMA on whether or not a special merger situation has arisen binds the Secretary of State. The CMA's substantive report is confined to the public interest consideration specified in the reference. Following the CMA report, the Secretary of State decides (within 30 days) if remedial action is appropriate and, if so, what form it should take.[174]

[169] S. 56(6) *ibid*.
[170] S. 378 of the Communications Act 2003.
[171] S. 59(2) of the Act.
[172] S. 60(1)(b), *ibid*.
[173] S. 62(2), *ibid*.
[174] S. 54(5), *ibid*.

10. Judicial review

10.1 Any party aggrieved by a decision of the CMA or Secretary of State in relation to the merger review process may apply to the CAT for a review of that decision.[175] For these purposes, 'decision' is broadly defined so that it could include, for example, a decision by the CMA to reject a competitor or customer complaint in respect of a merger.[176] The right of appeal also extends to a decision by the CMA to impose monetary penalties.

10.2 Appeals to the CAT are heard by a chairman (the President of the CAT or a person drawn from a panel of chairmen appointed by the Lord Chancellor) and two other members (drawn from a panel appointed by the Secretary of State). The CAT is supported in the performance of its functions by the Competition Service. The procedure followed by the CAT is set out in the Competition Appeal Tribunal Rules.

10.3 Appeals against merger decisions must be lodged within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication if earlier.[177] Lodging an appeal does not have a suspensory effect on the decision to which the appeal relates.[178]

10.4 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.[179] Judicial review is the means by which the High Court supervises the administrative acts of public bodies or other individuals or bodies charged with public functions. It follows that the grounds of review include error of law; manifest error of appreciation of the facts (for example, where the reasoning in an appealed decision is logically unsound); manifest unreasonableness; bias; or procedural irregularity.[180] The review process under the Act is concerned with the procedure and decision-making process used by the public body, and it is not a means for the reviewing body to substitute its own decision for that of the body whose decision is being reviewed.

10.5 *IBA Health* clarified the CAT's scope of review under the Act. In considering the appeal from the decision of the OFT to clear the merger, the CAT claimed that it was incumbent upon it to consider whether the decision taken by the OFT was one "reasonably" open to it.[181] In judging whether or not the OFT had acted "reasonably", the CAT indicated that it would be guided by the ordinary and natural meaning of that standard. On appeal from the CAT, however, the CA rejected the CAT's more expansive interpretation of the review standard. Instead, it confirmed that the test was whether the decision was so unreasonable that no reasonable person could have reached it, that is, the orthodox Wednesbury standard.[182]

[175] S. 120, *ibid.*

[176] S. 120(2), *ibid.*

[177] Rule 25(1), Competition Appeal Tribunal Rules 2015.

[178] S. 120(3) of the Act.

[179] S. 120(4), *ibid.* Where, however, the appeal is against the imposition of a penalty, the CAT will conduct a full rehearing on the merits of the case (s. 114(5), ibid.).

[180] "[T]he Tribunal has jurisdiction, acting in a supervisory rather than appellate capacity, to determine whether the OFT's conclusions are adequately supported by evidence, that the facts have been properly found, that all material factual considerations have been taken into account, and that material facts have not been omitted" (*Unichem Limited v OFT*, Case no. 1049/4/1/05, para. 174).

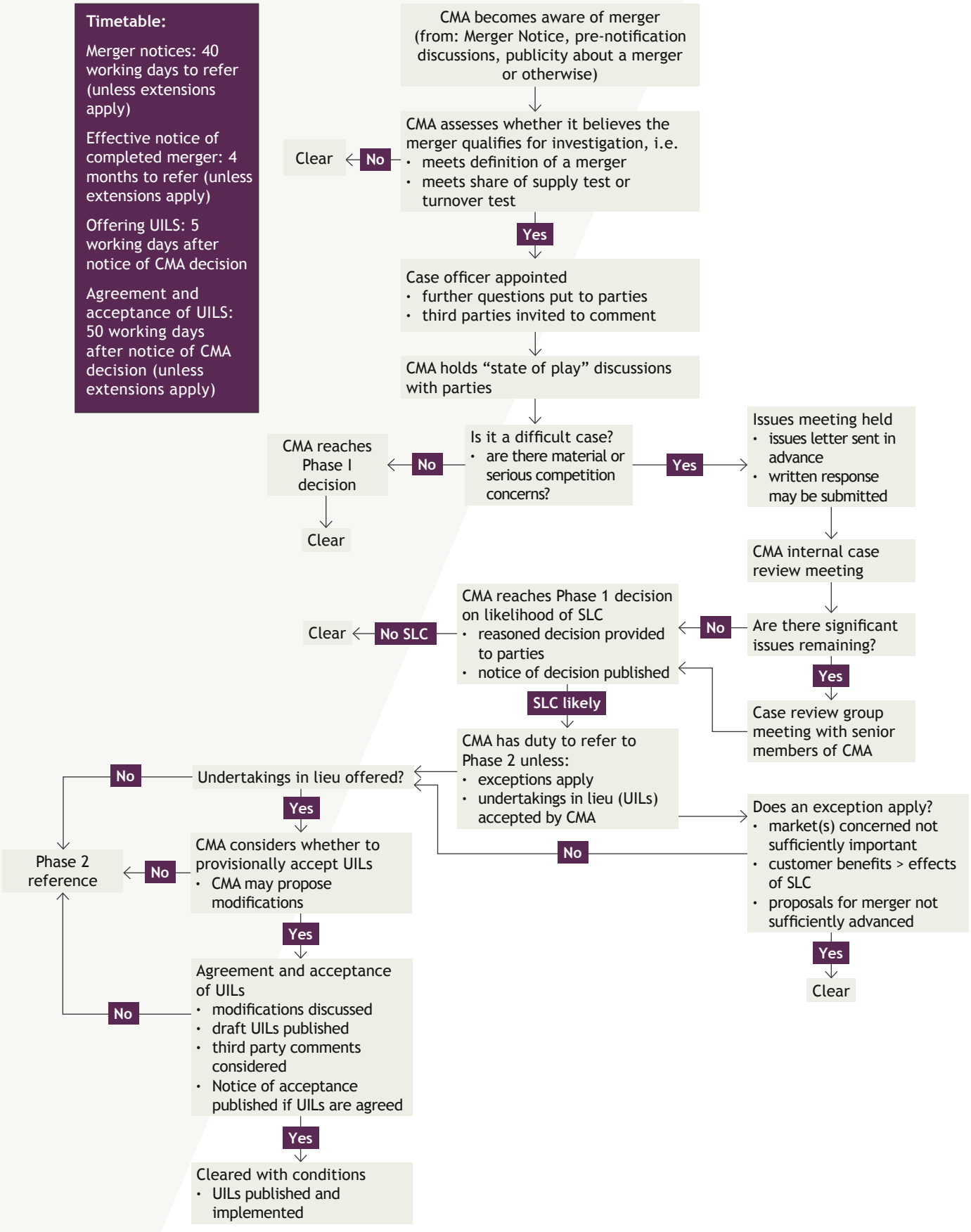
[181] *IBA Health v Office of Fair Trading*, Case no. 1023/4/1/03, para. 225 et seq.

[182] *IBA Healthcare Limited v Office of Fair Trading & Ors* [2004] EWCA Civ 142.

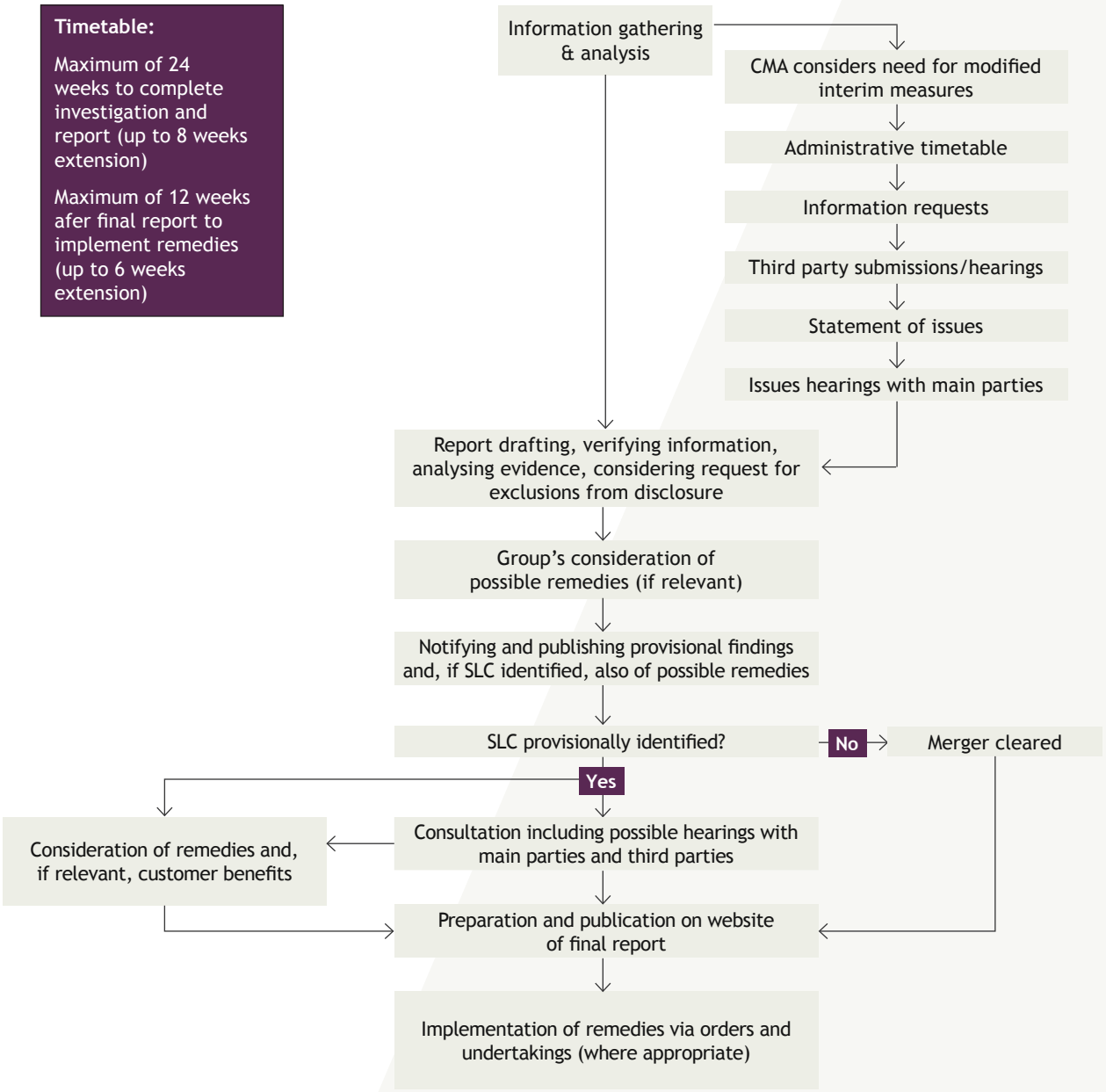
10.6 The CAT can either dismiss an appeal or quash the decision in whole or in part. Where the CAT quashes a decision, it will refer the matter back to the original decision-maker with a direction to re-make the decision in accordance with the CAT ruling.

10.7 It should be noted that an appeal lies, on points of law only, from a decision of the CAT to the CA and requires the leave of either the CAT or the CA.

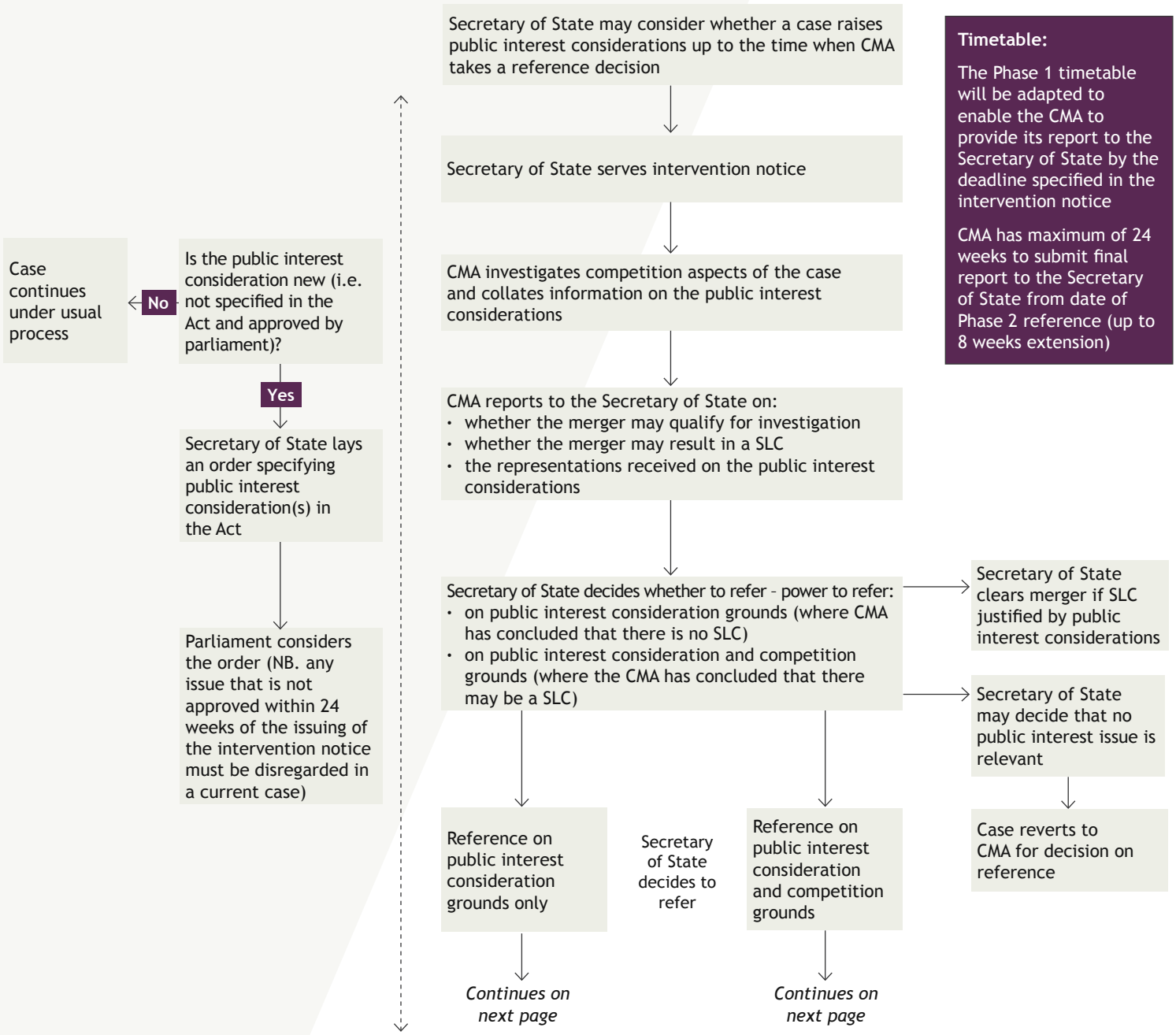
Annex 1: Flowchart indicating a typical Phase 1 merger inquiry

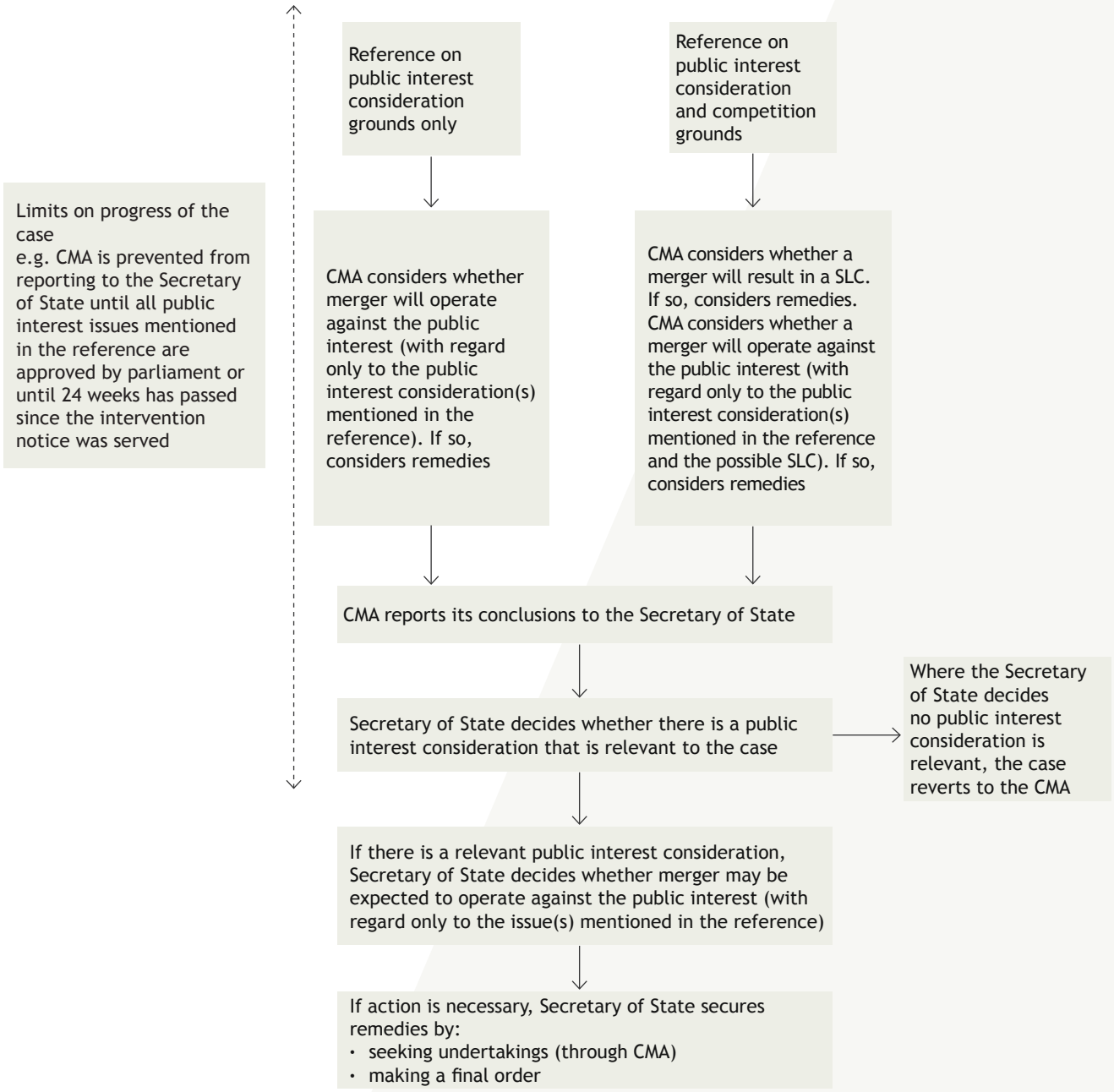


Annex 2: Flowchart indicating a typical Phase 2 merger inquiry



Annex 3: Flowchart indictating a typical merger raising public interest considerations




Reference on public interest consideration grounds only
Reference on public interest consideration and competition grounds
Limits on progress of the case
e.g. CMA is prevented from reporting to the Secretary of State until all public interest issues mentioned in the reference are approved by parliament or until 24 weeks has passed since the intervention notice was served
CMA considers whether merger will operate against the public interest (with regard only to the public interest consideration(s) mentioned in the reference). If so, considers remedies
CMA considers whether a merger will result in a SLC. If so, considers remedies. CMA considers whether a merger will operate against the public interest (with regard only to the public interest consideration(s) mentioned in the reference and the possible SLC). If so, considers remedies
CMA reports its conclusions to the Secretary of State
Secretary of State decides whether there is a public interest consideration that is relevant to the case
Where the Secretary of State decides no public interest consideration is relevant, the case reverts to the CMA
If there is a relevant public interest consideration, Secretary of State decides whether merger may be expected to operate against the public interest (with regard only to the issue(s) mentioned in the reference)
If action is necessary, Secretary of State secures remedies by:
• seeking undertakings (through CMA)
• making a final order

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