Merger Control

UK – Law & Practice

Contributed by
Arnold & Porter (UK) LLP

2016
LAW & PRACTICE: 

Contributed by Arnold & Porter (UK) LLP

The ‘Law & Practice’ sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.
Law & Practice

Contributed by Arnold & Porter (UK) LLP

CONTENTS

1. Legislation and Enforcing Authorities p.5
   1.1 Merger Control Legislation p.5
   1.2 Enforcement p.5
2. Jurisdiction p.5
   2.1 Notification p.5
   2.2 Failing to Notify p.5
   2.3 Types of Transactions that are Caught p.6
   2.4 Definition of Control p.7
   2.5 Jurisdictional Thresholds p.7
   2.6 Calculating Thresholds p.7
   2.7 Foreign-to-Foreign Transactions p.8
   2.8 Market Share Jurisdictional Thresholds p.8
   2.9 Joint Ventures p.9
   2.10 Powers to Investigate a Transaction p.9
   2.11 Closing Before Clearance p.9
   2.12 Exceptions to Suspensive Effect p.9
3. Procedure: Notification to Clearance p.10
   3.1 Deadlines for Notification p.10
   3.2 Requirement for a Binding Agreement p.10
   3.3 Filing Fees p.10
   3.4 Information Required for Filing p.10
   3.5 Penalties for Incomplete Notification p.11
   3.6 Phases of the Review Process p.11
   3.7 Accelerated Procedure for Review p.11
4. Substance of Review p.11
   4.1 Substantive Test p.11
   4.2 Competition Concerns p.11
   4.3 Economic Efficiencies p.12
   4.4 Non-Competition Issues p.12
   4.5 Joint Ventures p.13
5. Decision: Prohibitions and Remedies p.13
   5.1 Prohibition of Transactions p.13
   5.2 Negotiation of Remedies p.14
   5.3 Typical Remedies p.14
   5.4 Remedial Procedures p.14
   5.5 Standard Approach for Divestitures and Other Remedies p.15
   5.6 Formal Decisions p.15
   5.7 Examples of Prohibitions and Remedies p.15
6. Ancillary Restraints p.15
7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.16
   7.1 Third Parties’ Involvement p.16
   7.2 Confidentiality p.16
   7.3 Co-operation with Other Jurisdictions p.16
8. Appeals and Judicial Review p.16
9. Recent Developments p.16
   9.1 Recent or Impending Changes to Legislation p.16
   9.2 Recent Enforcement Record of Authorities p.16
   9.3 Current Competition Concerns p.17
Arnold & Porter (UK) LLP EU competition practice's London-based team members advise on both EU and UK competition law issues. It represents clients from a broad range of industries before the UK Office of Fair Trading and the Competition Commission in relation to competition concerns, including merger control and allegations of abuse of dominant position or anti-competitive practices.

The practice has extensive experience in dealing with major antitrust inquiries and audits, price-fixing issues, distribution and licensing agreements, strategic alliances, and joint ventures. It also advises on other aspects of EU law, particularly those relating to public procurement, the free movement of goods, advertising, and other regulatory laws within the EU.

**Authors**

**Tim Frazer**’s practice focuses on pharmaceuticals, fast-moving consumer goods, financial services and IP-rich sectors. He advises on both conduct and merger cases in the EU and UK, and on compliance and audit processes in various jurisdictions worldwide that have adopted the EU approach to competition law. Frazer also represents clients challenging public procurement tenders under EU and UK rules. He has obtained merger clearance at the European Commission and national competition authorities for complex cases requiring econometric evidence and Phase 1 or Phase 2 disposals. He advises pharmaceutical and medical device companies on pricing, parallel trade and supply chain design. He divides his time between the firm’s London and Brussels offices. He is the author of several books on competition law and was previously a Professor and Dean of Law at Newcastle University.

**Mark Gardner** has experience of advising in relation to both UK and EU competition law, on matters including merger control, abusive conduct, restrictive practices, commercial agreements, and compliance issues. Gardner has advised a variety of clients (corporations, trade associations and financial investors) across a number of different industries, including fast-moving consumer goods, media, energy, pharmaceutical, high-tech and finance. He has particular experience of advising clients in the alcoholic beverage industry and in the tobacco sector. Gardner has worked “in-house” on two occasions; once as competition counsel at a major FTSE 100 company and most recently as senior regional counsel for a large multinational. He has also undertaken a traineeship at the European Commission (DG Internal Market).

**Susan Hinchliffe** advises clients operating in a variety of industry sectors including: automotive components, pharmaceuticals and agrochemicals, telecommunications, branded consumer goods, and tobacco on a broad range of EU and UK competition law issues. Her practice has a particular focus on merger control, and she has advised on all aspects of the European Commission (EC) Merger Regulation in relation to numerous transactions. She also advises on UK merger control issues and has extensive experience in co-ordinating multi-jurisdictional mergers. Her practice includes counselling and compliance including the conduct of compliance auditing projects. She also advises on cartel matters including strategic issues, investigations and the management of large document review processes. Hinchliffe also advises on European product regulations applying to a broad range of sectors including electrical goods, chemicals (including registration, evaluation, authorisation and restriction of chemical substances), food and tobacco. This advice includes issues of interpretation and national implementation, and is frequently provided to clients in the context of their overall strategic planning.

**Karoline Zwierzynska** has experience of a wide range of transactional and conduct-related UK and EU competition law issues, including EU and multi-jurisdictional merger clearances, abuse of dominance investigations including by dawn raid, commercial agreements, regulatory matters, commercial due diligence and e-disclosure. She has assisted multinational corporations operating in a variety of industries, including pharmaceutical, fast-moving consumer goods, agriculture, energy, media, clothing, telecoms and financial services. In addition, she has also advised non-governmental organisations and has particular experience of delivering training on UK and EU competition law compliance. Prior to joining the firm, Zwierzynska worked in the field of academic research and has co-authored several peer-reviewed publications in developmental and clinical psychology.
1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation
UK merger control legislation is contained in the Enterprise Act 2002 (the “Act”). The Act has been amended by the Enterprise and Regulatory Reform Act 2013, which brought the Competition and Markets Authority into existence and made other changes to competition law. The primary enforcement of this legislation is undertaken by the Competition and Markets Authority (the “CMA”). The CMA came into existence on 1 April 2014. Prior to this date there were two principal competition authorities in the UK: the Office of Fair Trading and the Competition Commission.

The CMA has published a series of guidance papers on a range of topics in merger control, including jurisdiction and procedure, substantive assessment, remedies, exceptions to the duty to refer, retail mergers, NHS mergers and best practice in the submission of economic analysis. The full list can be obtained on the CMA’s website, at the following address: www.gov.uk/topic/competition/mergers.

Foreign transactions will be assessed against the same jurisdictional thresholds for UK merger control (see 2.5 below) and, if met, will qualify for review by the CMA. The CMA does not consider matters relating to foreign investment into the UK as part of its review.

In addition, the UK government has the ability to intervene in transactions in the defence, media (broadcasting and newspapers) and financial services sectors on public interest grounds. Such scrutiny is in addition to the assessment of the transaction on competition grounds.

1.2 Enforcement
The relevant legislation is enforced by the CMA. The CMA will routinely consult the UK sectoral regulators regarding mergers in which they are likely to have industry-specific knowledge. In addition, two UK sectoral regulators - Ofcom and Monitor - have statutory roles in the assessment of certain media mergers and mergers involving NHS foundation trusts, respectively.

The CMA may contact other governmental departments, regulators (including the sectoral regulators), industry associations and consumer bodies for their views on merger cases where appropriate. In addition, sectoral regulators may carry out their own public consultation before providing comments to the CMA.

There is a special merger regime for water companies. Under the Water Industry Act 1991, the CMA must undertake an in-depth investigation, unless the turnover of the merging parties falls below certain thresholds (see 2.5).

2. Jurisdiction

2.1 Notification
The UK merger control regime is voluntary: there is no obligation to seek clearance from the CMA, even where the transaction meets the jurisdictional thresholds. This differentiates the UK system from most merger control regimes in the world, including under the EU Merger Regulation.

Notwithstanding the voluntary nature of the UK merger control system, a significant number of deals are, in practice, notified in the UK. According to statistics published in August 2015, a total of 82 mergers were reviewed by the CMA in the financial year 2014/15. The vast majority received unconditional clearance in Phase 1; only 9 of the transactions were referred to an in-depth Phase 2 investigation or had undertakings accepted in lieu of a reference.

The decision on whether to notify the transaction to the CMA is primarily a question of risk assessment. If the parties choose to complete without notifying, they do so at the risk that the CMA will launch an investigation into the merger on its own initiative (see 2.2). Most parties will typically consider notifying a deal that meets the share of supply threshold (or the turnover threshold in the case of vertical mergers), where there are substantive competition issues, particularly if the transaction is to be announced in public. If legal certainty is important, it will be advisable to notify and obtain clearance from the CMA even in the absence of substantive issues, to ensure the transaction can be implemented fully without the threat of later intervention.

2.2 Failing to Notify
As notification is voluntary there are no sanctions or penalties for failure to notify. However, completing a transaction without notifying comes at a risk that the CMA will subsequently investigate the transaction and require remedies. Remedies for completed mergers are typically structural, requiring a disposal of businesses or assets (see 5.4 - 5.6), which can significantly undermine the envisaged benefits of the transaction.

The CMA may, on its own initiative, launch an investigation into both completed and anticipated mergers, where it has a reasonable belief that the transaction may result in a substantial lessening of competition in the UK. This power is regularly used in practice. The CMA is an active authority and routinely monitors markets and the media for transactions potentially falling within its remit. It will also consider customer and competitor complaints (although it will not be required to investigate a merger simply on the basis of a complaint).

In completed mergers which it chooses to review, the CMA will as a matter of course impose interim orders prevent-
The concept of control under the Act is multifaceted and - unlike the concept of sole control under EU merger law - is not restricted to the ability to control the activities of the target (see 2.4). Transactions which can be caught include acquisitions of shares or assets, as well as joint ventures. Changes to shareholders’ agreements or articles of associations are capable of constituting relevant merger situations - for example where they result in an existing shareholder acquiring greater control by way of voting or veto rights or a right to appoint board members. Internal restructurings or reorganisations are not typically caught as they do not involve previously independent enterprises being brought into being the parties from taking pre-emptive action (ie, action which might prejudice the outcome of the reference and/or or impede appropriate remedial action being taken by the CMA). Interim orders stop the businesses from further integrating, and can even reverse any integration steps that have already been taken. Interim orders are published on the CMA’s website and remain in force until the merger is cleared unconditionally or acceptable remedies are put in place. For more details on remedies, see section 5.

There is a longstop limit on the CMA’s power to investigate mergers which have not been voluntarily notified. The CMA may only refer a completed merger for an in-depth Phase 2 investigation within four months of material facts about the deal becoming public (eg, by way of announcement by the parties or press coverage). If the deal was not made public, the four-month longstop starts to run from the time the CMA was informed about the material facts. The deadline may only be extended in limited circumstances. The effect of the longstop is that parties who publicise the deal in national or trade media in sufficient detail (including, at the very least, information on the identity of the parties, whether the transaction has completed or is anticipated and whether any conditions precedent have been satisfied) can be certain that the implementation of the transaction can proceed without action by the regulator, if they subsequently wait four months without hearing from the CMA.

2.3 Types of Transactions that are Caught

The UK merger control system applies to “relevant merger situations”, which occur when two or more enterprises cease to be distinct (ie, where they are brought under common ownership or control) and one of the jurisdictional thresholds is met (see 2.5).

An “enterprise” constitutes the activities or part of the activities of a business carried out for gain or reward. There is no requirement that the enterprise must be a separate legal entity; the CMA will look at the substance of the arrangement, rather than its legal form. An enterprise will typically consist of the assets, records, contracts and goodwill needed to trade as a going concern and be capable of directly generating turnover. The mere transfer of assets is not typically an “enterprise”, unless it can be demonstrated that the facilities or site enable the continuation of a particular business activity and are not simply “bare assets” on the market. It is also not a requirement for the business to be currently trading - a business which has recently ceased trading but which still retains sufficient goodwill to resume trading is likely to qualify as an “enterprise”.

The distinction between an acquisition of “bare assets” and an “enterprise” can be complex, as demonstrated by the litigation concerning the prohibition decision of the Competition Commission (“CC”) in Eurotunnel/SeaFrance. Eurotunnel acquired the trademarks, goodwill and several ferries of SeaFrance, a ferry operator which had been put into liquidation, and commenced operating on the same route. In addition, some of SeaFrance’s former employees were re-employed by Groupe Eurotunnel to operate the resumed service. The parties appealed, arguing that the regulator did not have jurisdiction to review the merger, as the assets did not constitute an “enterprise”. When re-evaluating the transaction, the CMA upheld the CC’s conclusion that there had been an acquisition of “activities or parts of the activities” of a business, on the basis that the workforce required for the carrying on of SeaFrance’s business had been effectively transferred to the purchaser. This conclusion was challenged before the Court of Appeal in May 2015, which ruled that the employees had been made redundant due to SeaFrance’s liquidation and the fact that some were subsequently re-employed by the purchaser was insufficient to constitute a transfer of business activities.

The Court of Appeal’s approach was rejected by the Supreme Court in a judgment handed down on 16 December 2015. The Supreme Court considered that assets are to be regarded as an “enterprise”, where (i) they give the purchaser more than he might have acquired by going into the market and buying factors of production (eg, purchasing equipment, hiring employees), and (ii) the extra must be attributable to the fact that the assets were previously employed in combination in the “activities” of the target enterprise. On the facts of the case, resuming the ferry service with largely the same personnel created operational advantages and the formal redundancies did not substantively remove the link between the ex-SeaFrance employees and SeaFrance’s business, as the redundancy process expressly provided for a future re-employment plan for affected staff. The CMA’s conclusion that there was economic continuity between the acquired assets and the business previously operated by SeaFrance was upheld. Whilst the Supreme Court has now offered helpful clarification on the meaning of “enterprise”, the case illustrates the difficulties which can arise in the application of the UK merger control rules to acquisitions of assets, where the business is no longer trading.
under common control - the businesses in question were already under the control of the ultimate holding company.

2.4 Definition of Control

The acquisition of any of three levels of control will be sufficient to give rise to a change in control, as will a movement from one level to a level of greater control:

- **De jure control:** having a controlling interest over an enterprise. This typically involves a shareholding conferring more than 50% of the voting rights.
- **De facto control:** control over the policy of an enterprise, even where there is no de jure control. This may occur through the ability to appoint directors or through holding a minority shareholding - for example where, due to attendance patterns at shareholder meetings, the minority shareholder in practice has the ability to determine the outcome of resolutions, or where it has particular expertise which leads the business to heed its advice. A finding of de facto control is highly fact-dependent and is likely to be explored by the CMA in cases of significant minority shareholdings (25-30%).
- **Material influence:** the ability materially to influence the management, strategic direction and commercial objectives of a business, whilst falling below the level of de facto control. A shareholding of 25% will give rise to a rebuttable presumption of material influence as, under UK company law, a 25% shareholding generally enables the blocking of a special resolution. However, any finding of material influence will turn on the specific facts. Shareholdings below 25% may confer material influence where the shareholder in practice block special resolutions due to attendance patterns at shareholder meetings, the distribution of the remaining shareholders is fragmented, the shareholder has special voting or veto rights, can nominate members of the board, or has particular expertise or expertise offered at either shareholder or board level. For example, in BSkyB/ITV, a shareholding above 7.5% could in practice enable the blocking of special resolutions, due to the pattern of attendance at ITV shareholder meetings.

A "relevant merger situation" will arise where there is an acquisition of any of the above levels of control, or if a purchaser increases their level of control (eg, from de facto to de jure control). Once a purchaser acquires de jure control, subsequent share acquisitions in the same enterprise will not be considered a relevant merger situation.

De facto control and material influence are necessarily exercised in the absence of a controlling interest. Acquisitions of minority interests are therefore capable of being caught by the UK merger control regime if they confer de facto control or material influence, as long as the jurisdictional thresholds are also met.

2.5 Jurisdictional Thresholds

If a merger satisfies either of the following thresholds, it will fall within the CMA’s jurisdiction and could in principle be subject to review via:

- **The turnover test:** if the annual value of the UK turnover of the enterprise being taken over exceeds GBP70 million (approx. EUR87 million and USD109 million)

OR

- **The share of supply test:** this applies only to horizontal mergers where there is an overlap between the parties and as a result of the merger, the enterprises ceasing to be distinct will increase their share of the supply or acquisition to at least 25% of goods or services of a particular description in the UK or a substantial part of it.

Special considerations apply to mergers between two water enterprises, under the Water Industry Act 1991. In a water merger, the CMA is under a duty to refer the merger to a Phase 2 review unless the value of the turnover of the enterprise being acquired does not exceed GBP10 million (approx. EUR12.4 million and USD15.6 million) or the turnover of water enterprises already owned by the acquirer each does not exceed GBP10 million.

2.6 Calculating Thresholds

The turnover figure is derived from the sale of goods and supply of services in the UK, which form part of the party’s ordinary activities, net of rebates, VAT and other direct taxes. The relevant period for determining turnover is the ‘business year’ preceding either the date the enterprises ceased to be distinct or the date of notification (for completed mergers) or the date of notification (for anticipated mergers). In most cases, the business year will correspond to the last 12-month period for which accounts have been, or are due to be, prepared. The figures will normally be taken from the last set of published accounts, unless more recent unpublished accounts are a better source - for example, where a significant acquisition or divestment has taken place since the end of the last business year, or where only a part of the enterprise is being transferred.

Calculating the share of supply is different from calculating market shares, as it is not necessary to define the relevant product and geographic markets in order to determine whether the share of supply threshold is met. Rather, the combined threshold can be met in respect of the parties’ activities in any type of goods and services (in relation to sales or purchases), regardless of whether that category would be considered a separate product market in the substantive review. In practice, however, the CMA will not seek to assert jurisdiction if the activities carried on by the enterprises are so differentiated that they evidently do not compete with each other.
The volume or value of goods or services will typically be used as an input to determine the share of supply, although the CMA may consider non-standard parameters such as price, capacity, quantity or number of employees. It should also be noted that the share of supply test can be met in relation to a substantial part of the UK, which - in cases such as supermarket mergers - could be restricted to a single town or district. In practice this means that where a merger raises substantial competition concerns, it is unlikely to escape the CMAs jurisdiction simply on the basis that it affects one or more small geographical areas.

Both turnover and supply will be geographically allocated to the UK if the goods or services are provided to UK-based customers, regardless of the location of the selling entity. In some cases, it may be more appropriate to consider the location of the procurement or strategic decisions, rather than where the goods are ultimately supplied. Where sales are incurred in foreign currency, the CMA will normally accept conversions based on the approved exchange rate applicable at the date of the last accounts. Usually only external sales will be taken into account, but in limited cases (eg, where part of a vertically integrated business is transferred to third party ownership), the CMA may also include (and assign market value to) intra-group sales.

Determining the relevant turnover can be complex. It is calculated by aggregating the turnover of all enterprises ceasing to be distinct after the merger, and deducting either:

(a) the turnover of the parties which remain under the same ownership or control after the merger; or
(b) if no enterprise continues to be carried on under the same ownership and control after the merger, the turnover of the enterprise with the highest UK turnover.

Situations falling under (a) above include acquisitions, where the relevant turnover for the purpose of the jurisdictional threshold will be that of the target. The turnover of the acquiring entity will be effectively ignored, as it will remain under the same ownership or control after completion. The turnover of seller will not be relevant. This approach also applies to newly created joint ventures incorporating selected assets/businesses of the parents - the relevant turnover will be the aggregate turnover of the enterprises contributed to the joint venture.

True legal mergers, where two parties are subsumed under a new parent company, or joint ventures where all of the parents’ businesses are contributed, will fall under category (b). The relevant turnover is the sum of the turnover generated by all the companies existing before the transaction, minus the one with the highest UK turnover.

For the purposes of the share of supply test, the relevant supply is that of the parties ceasing to be distinct - such as that of the acquirer and the target business (not the seller) in the case of an acquisition. For joint ventures, the relevant supply will include the activities of the contributed businesses, together with any continuing activities of the parents, as long as they are of the same type as the activities of the joint venture. Activities of the parents which do not overlap with those of the joint venture (even if overlapping with each other), are not relevant.

For both tests, it may be necessary to consider not just the enterprises ceasing to be distinct but also “linked” enterprises which they control. “Control” here refers to a degree of influence which may go beyond holding a majority of the voting rights (see 2.4). Accordingly, it may be requisite to include the UK share of supply of the particular goods or service or the UK turnover of the parties’ subsidiaries and potentially other companies in which the parties hold significant minority shareholdings.

2.7 Foreign-to-Foreign Transactions

There is a local effects test, which is derived from the jurisdictional thresholds. To satisfy the turnover test, the target needs to have turnover in excess of GBP70 million from activities in the UK. To satisfy the share of supply test, there must be an increment (see 2.8) - ie, at least one of the parties must be active in the UK. Accordingly, transactions, where the enterprises concerned do not have any activities in or connection with the UK will not fall within the scope of UK merger control.

The assessment of “activity” in the UK is fairly broad. It is not necessary to be incorporated in the UK or have any physical local presence. A company may be active in the UK indirectly, for example through sales carried out via agents or distributors, or by exercising a strategic management role over the activities of a UK company.

2.8 Market Share Jurisdictional Thresholds

The UK does not have a true market share test, because “share of supply” is not necessarily based on the definition of relevant markets (see 2.6). However, the share of supply test can only be satisfied if the merger creates or increases a 25% share - ie, there must be an increment in the parties’ existing share of supply or purchase. The size of the increment is not important and even a de minimis increase to an existing share of supply which brings the total to at least 25% will trigger the threshold. For this reason, purely vertical mergers which do not involve any horizontal overlaps cannot, by definition, satisfy the share of supply test (although they could fall within the jurisdiction of the UK law if they satisfy the turnover threshold).
2.9 Joint Ventures
Joint ventures are capable of giving rise to a "relevant merger situation" and being caught by UK merger control rules. There are no separate or special rules for joint ventures. Firstly, there must be two distinct "enterprises" with respect to the joint venture - ie, activities of a business. For this reason, a greenfield joint venture or start-up, where no pre-existing business is contributed by the parents or acquired from elsewhere, will not typically fall within the remit of UK merger control. The joint venture does not need to be "full-function" - it will be caught even if its purpose is to supply goods or services to the parents and not to the open market.

Secondly, the two enterprises must cease to be distinct, which can be a complex consideration in a joint venture context. Examples of joint ventures which can be caught include:

- A new joint venture company incorporating businesses contributed by each of the parents;
- A contractual joint venture, whereby the parties enter into sale of assets and supply arrangements with each other, but no separate legal entity is created; or
- The admission of a new partner to an existing joint venture, via an acquisition of a minority shareholding in the joint venture company.

One of the jurisdictional thresholds must also be met. See 2.6 for a discussion of the rules for calculating turnover and share of supply in relation to joint ventures.

2.10 Powers to Investigate a Transaction
There is no limit on the CMA’s ability to investigate an eligible transaction, where the merger has not yet taken place (ie, anticipated mergers). For completed deals, the CMA may only refer the merger to an in-depth Phase 2 investigation within four months of the time that material facts about the deal are made public or, if the transaction was not publicised, the time the CMA was informed about such material facts (see 2.2).

Where the transaction does not meet the jurisdictional thresholds, the CMA has no power to investigate the deal. However, the Secretary of State for Business, Innovation and Skills may intervene instead, if the merger is a so-called special public interest case. These are mergers concerning either a government contractor with access to confidential information relating to defence, or where one of the enterprises is carried on by a person responsible for providing 25% of a particular type of newspaper or media broadcasting in the UK. The Secretary of State may only intervene on the basis of specified public interest grounds, rather than competition concerns - ie, national security (including public security), plurality and other considerations relating to newspapers and other media, and the stability of the UK financial system.

The decision on whether to refer a special public interest merger to Phase 2 is taken by the Secretary of State on the basis of public interest concerns only, given that there is no jurisdiction to investigate competition issues.

2.11 Closing Before Clearance
In light of the voluntary nature of the regime, in general the merging parties are not required to suspend implementation of the transaction until clearance is received and there are no penalties for failing to do so. However, where the transaction is referred for an in-depth Phase 2 investigation, the acquirer is prevented from acquiring any interest in shares in a company to which the reference relates without the CMA’s consent.

In addition, at any time during the review process, the CMA may impose an interim order to prevent or unwind pre-emptive action between the merging parties. Pre-emptive action is defined as action which might prejudice the outcome of the reference and/or impede the CMA taking appropriate remedial action that may be required. Interim orders stop the merger parties from starting integration (or prevent further integration) while the CMA’s investigation and possible remedy implementation is ongoing. In a Phase 2 investigation, the CMA can accept interim undertakings from the parties to take any (further) action it considers necessary to prevent or unwind pre-emptive action.

To ensure compliance with interim measures, the CMA can require chief executive officers (or equivalent, or other persons) of the companies providing interim measures to provide a compliance statement to the authority confirming that the interim measure is being adhered to. It is a criminal offence to provide false or misleading information to the CMA regarding a company’s compliance with such a measure. The CMA can also impose a fixed penalty for failure to comply with an interim measure of up to 5% of a party’s global turnover.

2.12 Exceptions to Suspensive Effect
There is no general requirement to suspend implementation of a transaction prior to clearance (see 2.11). Where a transaction concerns a public company and is subject to the City Code on Takeovers and Mergers, the decision to open a Phase 2 investigation by the CMA automatically causes the offer to lapse, unless the offer has become unconditional by the time this decision is made. Where the CMA has made an interim order, the parties may request the CMA to grant a derogation, giving consent to the parties to undertake certain actions prohibited by the interim order (or the interim undertakings). For examples of such derogation, see the response to 5.1 below.
Except in limited circumstances, there is no requirement on the parties to refrain from implementing the transaction prior to clearance (see 2.11). However, where the CMA does require the parties not to implement the transaction prior to receiving its consent, it may be possible to ‘close around the UK’ if the UK part of the transaction is readily identifiable and separable, such that it could operate on a standalone basis. However, the parties would have to ensure such steps would not be considered ‘pre-emptive action’ by the CMA (see 2.11).

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification
Given the voluntary nature of the regime (see 2.1), there are no deadlines for notification.

3.2 Requirement for a Binding Agreement
The CMA will generally accept a notification provided there is a good faith intention to proceed, evidenced by, for example, adequate financing, heads of agreements or similar, or evidence of board-level consideration. Where a transaction involves a public bid, the CMA will expect at least a public announcement of a firm intention to make an offer or the announcement of a possible offer.

3.3 Filing Fees
Filing fees are payable in the UK. The currently applicable fees (as at August 2015) are as follows:

- GBP40,000 - where the value of the UK turnover of the enterprises being acquired is GBP20 million or less;
- GBP80,000 - where the value of the UK turnover of the enterprises being acquired is over GBP20 million but not over GBP70 million;
- GBP120,000 - where the value of the UK turnover of the enterprises being acquired exceeds GBP70 million, but does not exceed GBP120 million;
- GBP160,000 - where the value of the UK turnover of the enterprises being acquired exceeds GBP120 million.

The fee is payable when the CMA makes its Phase 1 merger decision.

As notification is voluntary, no party is legally responsible for the filing. In the case of an acquisition, it would be customary for the acquirer to make the filing. But in the case of anticipated mergers, where the acquirer may not have all the required information concerning the target, it might be necessary for both acquirer and seller to make the notification jointly.

3.4 Information Required for Filing
Since 1 April 2014, a merger must be notified to the CMA using a prescribed form, the CMA Merger Notice (which is available on the CMA’s website). The information required by the Merger Notice includes the following:

- Contact details of the merger parties (ie, the parties to the merger agreement) and their legal representatives;
- Information regarding the transaction, the merger parties, their businesses, the key terms of the deal, the strategic and economic rationale for the transaction and whether the transaction is subject to merger control procedures in any other jurisdictions;
- An explanation as to why the transaction meets the jurisdictional thresholds (see 2.3-2.5);
- The annual UK, EEA and worldwide turnover of the acquirer (including group companies, where relevant) and the target;
- A number of supporting documents, including press releases or other documentation evidencing that the merger is public, copies of the documents bringing about the merger situation (eg, memorandum of understanding or purchase agreement), copies of the Offer Document (where the deal concerns a public company), the most recent annual report and accounts and the last set of monthly management accounts for both the acquirer and the target, copies of any documents, studies or reports that have been prepared for or by the senior management of either party which set out the rationale for the transaction or analyse the merger with respect to competitive conditions;
- If the parties wish the CMA to assess the transaction against the competitive situation that would have arisen absent the merger, an explanation of such a counter factual;
- Description and explanation of the relevant product and geographic markets concerned;
- An assessment of any horizontal effects of the transaction, where the activities of the parties overlap;
- The names and contact details of the parties’ customers and competitors;
- An assessment as to whether the transaction will increase the buyer power of the merger parties;
- The contact details of the parties’ suppliers and an estimate of the annual value and volume of their purchases;
- An explanation of any barriers to entry or expansion in the relevant markets;
- An assessment of any vertical effects of the transaction, where the activities of the parties are upstream or downstream from one another;
- An assessment of any conglomerate effect of the transaction, where the parties provide related goods or services;
- An explanation of, and evidence for, whether the merged entity will be subject to any countervailing buyer power; and
3.5 Penalties for Incomplete Notification

Given the voluntary nature of the UK regime, there are no penalties if the notification is incomplete. However, the CMA will not accept a notification that is incomplete and its review of the transaction cannot commence. There are criminal penalties for the submission of false or misleading information.

3.6 Phases of the Review Process

There are two Phases of the review process, Phase 1 and Phase 2. The statutory period for Phase 1 is 40 working days. Day 1 of this investigation period begins on the first working day after the CMA confirms it has received a complete notification. The CMA has up to 24 weeks to conduct its Phase 2 investigation and issue its report. This period can be extended by up to eight weeks.

During a review, the CMA can issue the parties with requests for additional information. These requests can sometimes be extensive. If the information is not provided in time, the CMA has the power to stop the review timetable until such information is provided.

The vast majority of mergers are cleared within Phase 1 (see the recent statistics in the response to 2.1). Allowing for a minimum of two weeks for pre-notification and a 40 working day Phase 1, the minimum overall timetable that parties should allow to obtain clearance from the CMA is approximately three months.

3.7 Accelerated Procedure for Review

There is no fast-track or otherwise simplified procedure for transactions that do not raise competition concerns. However, there are provisions to allow, exceptionally, the acceleration of cases for referral to a Phase 2 investigation. The parties must request such an acceleration and there must be sufficient evidence available to meet the CMA’s statutory threshold for a Phase 2 investigation - ie, as a realistic prospect of a substantial lessening of competition in relation to the supply of goods or services in the UK (see 4.1 below). A recent example of such a fast-track process was BT Group plc’s anticipated acquisition of EE Limited, fast-tracked to Phase 2 in June 2015.

4. Substance of Review

4.1 Substantive Test

The CMA must assess whether the transaction has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets for goods or services in the UK. During a Phase 2 investigation, the CMA will apply a ‘balance of probabilities’ threshold to its analysis; ie, it addresses the question of whether it is more likely than not that a substantial lessening of competition will result from the transaction. It must therefore form an expectation which has a higher level of probability than that required during a Phase 1 investigation.

In relation to horizontal unilateral effects, the CMA will consider whether the merger would, or is likely to, lead to the loss of existing competition, the elimination of potential competition or increased buyer power (or monopsony power). In relation to differentiated products, such as branded fast-moving consumer goods, the CMA will especially consider whether the products of the merging parties are close competitors, and whether unilateral effects are more likely.

In relation to horizontal co-ordinated effects, the CMA will analyse the characteristics of the market to assess whether it could be conducive to co-ordination. In particular, the CMA will examine whether there is evidence that the firms in the market were co-ordinating pre-merger and, if so, whether the merger will make co-ordination more stable or effective. If there is no evidence of pre-merger co-ordination, the CMA will examine whether the merger makes it more likely that firms in the market will start to co-ordinate, given the characteristics of the market.

In relation to vertical effects, the CMA will consider whether the merger would, or is likely to, limit the supply of inputs or access to customers such that downstream or upstream rivals would face higher costs post-acquisition, full or partial foreclosure of key inputs or of access to customers. When assessing the likelihood of vertical effects arising from the
transaction the CMA will in particular consider the following three questions:

• Would the merged firm have the ability to harm rivals; for example, through raising prices or refusing to supply them?
• Would it find it profitable to do so (ie, would it have an incentive to raise prices)?
• Would the effect of any action by the merged firm be sufficient to give rise to a substantial lessening of competition? In relation to conglomerate effects, the CMA will consider whether the merged firm might increase the selling price of one of its products when bought on a stand-alone basis but might not do so (or even reduce the price) if customers buy both of the merged firm’s products. In other words, the CMA will ask whether customers would have an incentive to buy the second product from the merged firm as well, putting rivals in the second product market at a disadvantage. As with vertical effects, the CMA’s approach involves analysing the ability, incentive and the effect of this strategy, which takes into account the following factors:

• Whether customers have a demand for more than one of the products, and whether the products are complements;
• Customer preferences for variety and one-stop shopping; and
• The costs to rivals of providing variety and one-stop shopping at a scale to enable them to compete effectively with the merged firm.

4.3 Economic Efficiencies
The CMA will consider economic efficiencies arising from the transaction. Specifically, the Act enables the CMA to consider benefits to customers in the form of:

• Lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not these are the markets where the competition concerns arise); or
• Greater innovation in relation to such goods or services.

In order for the CMA to conclude that the claimed efficiencies will enhance rivalry and so avoid the merger giving rise to a substantial lessening of competition, the efficiencies must be:

• Timely, likely and sufficient to prevent a substantial lessening of competition from arising; and
• Merger specific; ie, a direct consequence of the merger.

Efficiencies typically claimed by merging parties and assessed by the CMA include supply-side efficiencies such as cost reductions, the removal of double marginalisation in vertical mergers and product repositioning, and demand-side efficiencies such as network effects, pricing effects and one-stop shopping.

4.4 Non-Competition Issues
The Act provides that the decision on whether or not to refer a merger for a Phase 2 investigation (and that, in turn, the decision in Phase 1 as to whether any issues arise) is based purely on competition grounds. However, where certain public interest considerations are potentially relevant, the Act also allows for the Secretary of State (a member of the UK government) to assume responsibility for determining whether or not to refer a merger. Where the Secretary of State does refer a merger on public interest grounds, he or she also takes the final decision on whether the merger operates (or may be expected to operate) against the public interest, and on any remedies for the identified public interest concerns.

Public interest considerations are currently limited to national security (including public security), plurality and other considerations relating to newspapers and other media, and the stability of the UK financial system. In addition to these specified considerations discussed above, the Act also allows the Secretary of State to intervene on the basis of a consideration which is not specified but which he or she believes ought to be specified. To the extent that the Secretary intervenes on this basis, he or she must have the consideration(s) in question subsequently inserted into the Act by means of an order approved by both UK Houses of Parliament.

In order to intervene in a merger on public interest grounds, the Secretary of State must issue a public interest intervention notice (“PIIN”). Where a PIIN is issued, the CMA will carry out its review of the jurisdictional and competition issues in the same way as it would for any other case, with the caveat that its Phase 1 timetable will be adapted in order to enable it to provide a report to the Secretary of State by the deadline specified in the PIIN. Where a PIIN is issued in a Phase 2 investigation, the overall Phase 2 timeline should not be effected.

A high-profile example of a public interest intervention occurred during the height of the global financial crisis in 2008, when the Secretary of State intervened in the merger of the Lloyds and HBOS banks. Despite the finding of the Office of Fair Trading that there was a realistic prospect that the deal would result in a substantial lessening of competition, the Secretary of State decided not to refer the merger for a Phase 2 investigation on the basis that maintaining the stability of the financial system outweighed any competition concerns. A notable feature of this case was that at the time, the stability of the financial system was not one of the permitted public interest considerations under the Act. The Secretary of State was required to obtain the approval of Parliament for its introduction.
In addition to public interest considerations, the CMA may decide not to open a Phase 2 investigation if it believes that the market(s) where the competition concerns arise is/are not of sufficient importance to justify a reference. The CMA considers that the market(s) concerned will generally be of sufficient importance to justify a reference where their annual value in the UK, in aggregate, is more than EUR10 million. By contrast, where the annual value in the UK of the market(s) concerned is, in aggregate, less than EUR3 million, the CMA will generally not consider that a reference is justified. Where the annual value in the UK, in aggregate, of the market(s) concerned is between EUR3 million and EUR10 million, the CMA will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a Phase 2 investigation (approximately EUR400,000).

4.5 Joint Ventures
There is no special consideration or test applied to joint ventures. Such transactions will be assessed on the basis of the substantive grounds described above, which may include consideration of possible co-ordination between joint venture parents.

5. Decision: Prohibitions and Remedies

5.1 Prohibition of Transactions
The CMA has very broad-ranging powers and is able to prohibit a transaction, approve it subject to conditions (such as requiring a sale of a business or part of a business), or prohibit or restrict the activities of a merged business. Notification is voluntary, but if parties choose to complete a transaction without notifying, they do so at the risk that the CMA will intervene (see 2.2). The CMA can order an acquirer to dispose of a business but cannot require the seller to re-acquire a business. The deal risk can therefore be allocated by the parties as a matter of contract but - unless accepted by the seller - the latter cannot be subject to continuing risk post-sale. The ability to accept remedies occurs at two phases. At the end of a Phase 1 investigation, the CMA can accept remedies as a means of avoiding opening a Phase 2 investigation. It can also accept or impose remedies during the Phase 2 investigation.

In order to accept, or impose, remedies, the CMA must have decided that a transaction or proposed transaction has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services. In that event, the CMA must ensure that the remedy achieves as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it. On 12 August 2015, the Competition and Markets Authority (CMA) published an updated version of its guidance on the variation and termination of undertakings and orders.

Proposed mergers
Where the purchaser notifies prior to closing, and suspends closing pending the outcome of the CMA’s investigation, the position is similar to that in the EU or other suspensory jurisdictions. The CMA would not normally make an order to prevent the transaction being closed though it is free to do so if it has reasonable cause to suspect that the merger has been completed and pre-emptive action is in effect or contemplated.

Completed mergers
While the CMA is contemplating whether to open an investigation into a completed transaction, it can accept undertakings from the acquirer or other parties to do, or not do, something in order to prevent pre-emptive action taking place. Pre-emptive action is anything which might prejudice the CMA opening an investigation or impede the taking of any action under the UK merger legislation. In other words, undertakings are intended to prevent further integration of the acquired business with the business(es) of the acquirer - effectively to require a hold-separate arrangement - pending the outcome of the CMA’s investigation. This enables the CMA to preserve the status quo.

Alternatively the CMA may make an initial order to prevent any pre-emptive action, by prohibiting any action, or obliging the acquirer or a third party to take certain action. The CMA can even appoint a hold-separate manager to supervise the acquired business. The CMA is only required to show that it has reasonable grounds for suspecting that: (a) a relevant merger situation may have been created, and (b) pre-emptive action may be in progress or contemplation. The CMA may also make orders to prevent any outstanding matters, such as transfers of shares, being completed without the consent of the CMA. These powers to require a disposal or a hold-separate arrangement reflect the fact that a merger does not need to be notified prior to closing, under the voluntary merger control system in the UK. The CMA therefore retains the power to protect the status quo, where possible, until it has completed its investigation.

In 2014/15, the CMA accepted such undertakings or made orders in 30 cases. For example, in the 2015 investigation of a transaction in which Shell sold 90 petrol stations to Motor Fuel Limited, the CMA first ordered that no pre-emptive action may occur if it would lead to the integration of the businesses, a transfer of ownership of any target business or an impairment in independent competition between the target and acquiring businesses. It also ordered a range of hold separate arrangements. The CMA issued two derogations from that initial order, permitting the transfer of petrol stations where there was no overlap between the parties. It also permitted a derogation from the hold-separate arrangements to allow the efficient back office supervision of the
target business. It later varied the order by excluding further petrol stations from the initial arrangements.

5.2 Negotiation of Remedies
The parties are able to propose remedies at an early stage in the CMA’s investigation - when the CMA is deciding whether or not to refer the transaction to a Phase 2 investigation. These remedies are known as “undertakings in lieu” of a reference. Remedies can also be submitted or imposed during the Phase 2 investigation. The CMA will prefer structural remedies to behavioural ones because it sees these as being more effective and less burdensome by way of supervision and enforcement. The CMA is also concerned that behavioural remedies may themselves distort competition. Remedies must have an immediate and enduring effect in removing a substantial lessening of competition and must be practical, avoiding the need for elaborate and intrusive supervision.

The CMA will itself consider what remedies may serve the purpose of removing a substantial lessening of competition, as well as assessing the adequacy of any remedies proposed by the parties. If remedies which are proposed by the parties are eventually acceptable to the CMA, the remedies will be implemented either through undertakings provided by the parties or - where that is not successful - by way of orders made by the CMA. Disposals of businesses are the most common form of remedy. The CMA will also assess whether intellectual property licences will operate in the same way as disposals. For example, in 2014, Reckitt Benckiser agreed to purchase the KY brand of personal lubricant. In August 2015, the CMA required Reckitt Benckiser to license the brand to a competitor in the UK for eight years to enable it to develop a rival brand.

The CMA has indicated that behavioural remedies may be appropriate to limit the ability of the parties to require long-term or exclusive contracts from customers, or create switching costs or bundle the sale of products. In the case of vertical mergers, behavioural remedies may also be suitable to preserve non-discriminatory access and to put firewall provisions into place.

None of these possibilities should mask the fact that structural remedies remain the preferred approach of the CMA in most cases. This is evident not only from the CMA’s guidance on remedies but also from the outcomes of completed investigations. In the last complete ten years, the CMA and its predecessor authority have imposed or accepted behavioural remedies at Phase 2 in only four cases. In the same period, there were 21 structural remedies at Phase 2.

5.3 Typical Remedies
As stated above, the CMA prefers structural remedies in order to restore the conditions of competition and remove the substantial lessening of competition. This will normally take the form of divesting overlaps. In some cases, this will not be appropriate, such as in a vertical merger. In other cases, remedies providing for access to brands or other intellectual property will be a suitable means to provide for a structural remedy. Behavioural remedies are far less common, as can be seen from the data provided in the response to the previous question. Price cap remedies may be agreed to by the CMA, where appropriate, so long as they can be properly designed for their purpose. Remedies are exclusively intended for the purpose of removing the substantial lessening of competition, and not for non-competition concerns.

5.4 Remedial Procedures
Remedies can be negotiated with the CMA at any time, including in pre-notification discussions. The parties can offer “undertakings in lieu of reference” in order to avoid a Phase 2 investigation by the CMA. The CMA will generally seek to complete Phase 1 in 40 working days (see 3.6). The parties have five working days in which to offer undertakings in lieu, following the date of the CMA’s notification of its decision to open a Phase 2 investigation. In the absence of such undertakings, the transaction is referred to a Phase 2 investigation. Remedies in Phase 1 will almost certainly be structural and not behavioural. A rare exception is the CMA’s proposal to accept a behavioural remedy in lieu of reference in the Muller/Dairy Crest transaction in August 2015. The CMA has no power to impose remedies in Phase 1, so the initiative is entirely on the parties.

If the parties wish to offer undertakings in lieu, they must complete a Remedies Form and send that, together with draft undertakings, to the CMA. Where such remedies have been submitted in a timely way, the CMA will take up to 10 working days, from the notification of the decision to open a Phase 2 investigation, to determine whether the undertakings are acceptable in principle. Although the CMA has no power to impose remedies in Phase 1, it may suggest modifications to the remedies proposed by the parties. If the CMA decides that the remedies are not provisionally acceptable, it will open a Phase 2 investigation. If it decides that they are, it will examine them in more detail and open a consultation with third parties. The CMA will give third parties at least 15 days to comment on the remedies. This might lead to a modification of the remedies by the parties and a further consultation of third parties (of at least seven days).

At the end of the consultation process, the CMA will either accept the remedies (as amended during the consultation process) and clear the transaction, or it will reject them and open a Phase 2 investigation. The entire process will take...
up to 50 working days from the conclusion of the Phase 1 investigation. This may be extendable by the CMA by up to a further 40 working days.

Remedies may also be offered during Phase 2, but during this Phase the initiative will also pass to the CMA. Where the parties are minded to offer remedies, this is best done before the CMA publishes its “Notice of Possible Remedies,” which it will do somewhere around week 15 of the Phase 2 investigation. This Notice will set out the CMA’s thinking on what might constitute acceptable remedies, based on its provisional findings on the possible competition concerns arising from the proposed or completed transaction. It may include remedies that have been offered by the parties, but it will not identify them as having been offered by the parties. The Notice will be open for third party consultation. The parties may also respond to the Notice as well as to the CMA’s provisional findings on the substance and any such responses will be published on the CMA’s website in a non-confidential form. The CMA will hold hearings at which the parties and third parties can comment, inter alia, on the possible remedies. Following these hearings, the parties can submit revised or further remedies; these will again be published by the CMA in a non-confidential form.

Following this process, the CMA will issue a “remedies working paper” and send it to the parties. This will set out the CMA’s provisional view on the remedies to be adopted. After this consultative stage, the CMA takes a final decision on remedies.

5.5 Standard Approach for Divestitures and Other Remedies

The CMA may require an up-front purchaser for a divestment remedy. If this is required in Phase 1, as an acceptable undertaking in lieu of reference to Phase 2, the sale agreement must have been agreed and the purchaser must be approved by the CMA before the remedy is accepted as an alternative to a reference. Where the parties agree to an upfront purchaser process as a matter of principle, they must identify a suitable purchaser and enter into an agreement in the time permitted by the CMA, in order to avoid the reference. The CMA has said that this period will be weeks not months, and will be set individually.

In general, a divestiture period of up to six months will be permitted. The CMA can require the appointment of a monitoring and divesting trustee; where the parties are not required to find an upfront buyer and have not disposed of the relevant business within the divestiture period, the trustee will have the right to dispose of it.

There are fixed penalties of up to 5% of global turnover for non-compliance with undertakings and orders. In addition, where remedies are not complied with, they can be enforced by the CMA, or an interested third party, through civil proceedings for an injunction.

5.6 Formal Decisions

A formal and detailed decision permitting or prohibiting the transaction is issued to the parties. This is then made available to the public, in a non-confidential form, on the CMA’s website. Each investigation has a dedicated page on the CMA’s website. This includes the relevant timetable and all documents, working papers and provisional and final findings. These are available at https://www.gov.uk/cma-cases.

5.7 Examples of Prohibitions and Remedies

Foreign to foreign transactions are dealt with in the UK in exactly the same way as domestic transactions. The CMA has jurisdiction where there is UK-derived revenues of EUR70 million or a share of supply in the UK of at least 25%. The latter is the more common reason for voluntary notifications of horizontal mergers or for the CMA investigating a transaction on its own initiative. That means that to be investigated, foreign-to-foreign transactions would need a substantial connection with the UK. In the financial year 2014 to 2015 (and, in brackets, the corresponding data for 2013/14), the CMA referred 6 (8) transactions to Phase 2, accepted remedies in the form of undertakings in lieu of reference in 3 (0) cases, unconditionally cleared 56 (42) cases in Phase 1 and 2 (6) cases in Phase 2. It required Phase 2 remedies in 1 (4) case, though 1 (0) further case was abandoned by the parties in Phase 2. No (2) cases were prohibited in 2014/15. There were only 4 (12) Phase 2 cases in 2014/15, a sharp reduction from previous years, even though the total number of transactions investigated increased in 2014/15.

6. Ancillary Restraints

Restrictions agreed by the merging parties that are directly related to and necessary for the merger are treated as ancillary restraints and are outside the scope of the UK competition rules. The CMA’s approach to the analysis of ancillary restraints is consistent with the approach taken by the European Commission in its Consolidated Jurisdictional Notice. Ancillary restraints are only expressly included in the clearance decision by the CMA where the parties ask the CMA specifically to confirm that they qualify as ancillary. The CMA generally considers that it is for the parties to make that assessment; ancillary restraints will therefore only be considered in the clearance decision if they raise novel or unresolved issues warranting the attention of the CMA.
7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third Parties' Involvement
Third parties, including customers, competitors and complainants, play an important role in the merger review process. Upon receipt of the merger notification, the CMA will publish an invitation to comment that is open to all third parties. Importantly, as part of the notification, the parties will be asked to provide contact details for major customers and competitors and the CMA will contact them directly to seek their views on the arguments put forward by the parties in relation to the merger. In Phase 2 cases, third parties can be sent further information requests; they may be invited to attend hearings with the case team and may even be sent drafts of working papers or provisional findings and proposed remedies for comment. In certain circumstances, the CMA can compel the provision of information from third parties in both Phase 1 and Phase 2.

The Phase 2 merger process in the UK is quite transparent; the CMA publishes non-confidential versions of submissions by the parties and third parties, as well as documents produced by the CMA, such as issues statements, provisional findings on substance and proposed remedies. Therefore third parties will automatically have access to such documents.

7.2 Confidentiality
Upon receipt of the notification, the CMA will publish the fact that it is investigating the transaction on its website. The information included in that publication will be limited to the names of the parties and the identification of the transaction, as well as an invitation to comment and relevant procedural dates. No business secrets or confidential information are included in that publication regarding the initiation of an investigation.

7.3 Co-operation with Other Jurisdictions
As a competition authority within the EEA, the CMA is a member of the European Competition Authorities (“ECA”) network. The ECA shares information on all aspects of competition law, including in relation to both specific cases and general policy matters. According to the best practices of the ECA, when a National Competition Authority (“NCA”) with responsibility for merger review within an ECA country is informed by the parties to a merger that they have also notified or will be notifying the merger to other NCAs within the ECA, the relevant official within that authority will, as soon as possible, send an ECA Notice by email to the relevant officials in the other NCAs informing them of the fact of notification, and seeking the names of the relevant officials in other NCAs to whom the merger has been notified. The relevant officials of the notified NCAs will then make direct contact with the appropriate case officer and exchange views on the case without exchanging confidential information (unless national legislation or a waiver from the parties makes this possible). The relevant officials will keep each other informed of the development of the case as appropriate, including whether the case is referred to Phase 2 or resolved by means of a Phase 1 remedy, and, if it is to be referred to Phase 2, the outcome of the Phase 2 investigation.

The CMA cannot share confidential information with other competition authorities without a waiver from the parties. The CMA will consider seeking such a waiver where it seems likely to the CMA that the analysis of the merger will demonstrate a competition problem worthy of further investigation or, potentially, of remedy, and an exchange of confidential information will benefit the analysis of the case or make it easier to identify an appropriate remedy.

8. Appeals and Judicial Review
Any aggrieved person may appeal a decision of the CMA before the Competition Appeal Tribunal (“CAT”). The right to appeal applies to any decision of the CMA, including a decision not to act, as well as decisions relating to the imposition of a financial penalty. Any appeal of a decision relating to a merger must be made within four weeks of the decision being notified to the applicant or of it being published. Appeals relating to decisions to impose financial penalties will involve a full re-hearing on the merits. All other decisions are reviewed according to the standards of a judicial review. This includes the CAT considering whether there has been an error of law, a manifest error of appreciation of the facts, manifest unreasonableness, bias or procedural irregularities.

A decision of the CAT may be appealed to the Court of Appeal on points of law only.

Only a very small percentage of decisions of the CMA relating to merger cases are appealed and, of those, very few appeals have been successful.

9. Recent Developments

9.1 Recent or Impending Changes to Legislation
Since the reforms to the merger control regime in the UK in 2013, there have been no significant changes to the legislation or implementing regulations governing UK merger control, nor are any anticipated.

9.2 Recent Enforcement Record of Authorities
There are no fines for failure to notify, because the legislation provides for voluntary notification (see 2.2). Gun-jumping is not therefore an issue unless the CMA has issued an interim order to preserve the status quo. There are fixed penalties of up to 5% of global turnover for non-compliance with undertakings and orders. In addition, compliance with an order, or an undertaking provided in lieu of an order, is enforceable by
the CMA or any person affected by it, by civil proceedings for an injunction or other relief.

For the recent enforcement record relating to remedies and prohibitions, see the answer to 7.1.

9.3 Current Competition Concerns
In July 2015, the UK government issued a consultative version of its non-binding Ministerial Strategic Steer, which outlines the government’s strategic priorities for the CMA. It encouraged the CMA to focus on: exploring markets where competition could be improved to promote greater consumer choice and encourage more innovation and productivity in sectors; safeguarding fair competition and enforcing anti-trust rules effectively; and removing unnecessary regulatory burdens on businesses wherever possible.