OF 2025 – G3 – Guidelines on Merger Control Remedies

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The following has been adapted from the UK Competition and Markets Authority's guidance for Merger Remedies, specific for the Cayman Islands.

Contents

1. PREFACE

1.1 This Guidance forms part of the advice and information published by the Utility Regulation and Competition Office (Office) under section 6(2)(e) of the Utility Regulation and Competition Act (2024 Revision) (the Act).[1] All references to legislation sections below are to the Act unless otherwise indicated. Further, unless the context dictates otherwise, references to "*merger*" and "*change of control*" are used interchangeable.

1.2 This Guidance is intended for the public, merger parties and their advisers, its purpose being to set out the Office's general approach and requirements in the selection, design and implementation of remedies in relation to:

(a) The Screening Process (Phase 1), where the Office decides whether there is a "*significant prospect that the change of control is likely to have adverse effects, and the parties have not volunteered any proposals to eliminate the Office's concerns*" such that the merger should be referred for an In-depth Investigation;[2] and

(b) In-depth Investigation (Phase 2), where the Office must decide whether or not:

(i) the merger *would have, or be likely to have, the effect of substantially lessening competition* [SLC] *in the market in the Islands"* ;[3] and,

(ii) in relation to media mergers, "*whether the change of control would have an effect, or would be likely to have an effect contrary to the public interest*";[4]

and, therefore, whether appropriate action should be taken by the merger parties to eliminate or avoid (remedy, mitigate or prevent) that identified concern.

Media Mergers – as defined at section 25A of the Information and Communications Technology Authority Act (2019 Revision) (ICTA).

1.3 This document seeks to provide a source of guidance on potential remedies to address adverse effects arising from a change of control, and the options available to the merger parties to provide Undertakings In Lieu of a Phase 2 in-

[1] https://www.ofreg.ky/upimages/commonfiles/1624380541UtilityRegulationandCompetitionAct2021Revision.pdf
[2] Section 54(2) of the Act.
[3] Section 49(a) of the Act.
[4] Section 49(b) of the Act.

depth investigation (UILs).

1.4 The approach outlined in this document is informed by the CMA's guidance on and experience of merger investigations in recent years, judgments of the UK Competition Appeal Tribunal (CAT) and the CMA's research into the outcomes of remedies.[5]

1.5 This Guidance takes into account the fact that the Cayman Islands is a 'microstate' (i.e., a very small jurisdiction with limited population and land area), and, in consequence, recognises that competition principles, including remedies, are to be applied appropriately and proportionately in that context.

1.6 This Guidance sets out the views of the Office at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments and research. Where there is any difference in emphasis or detail between this Guidance and other guidance produced or adopted by the Office, the most recently published guidance takes precedence.

1.7 This Guidance is meant to assist sectoral providers and other interested parties in understanding how the Office will apply certain provisions of the Act. They indicate the Office's usual position on the above-mentioned subjects, and the Office will generally follow the principles and approach outlined herein.

1.8 This Guidance sets out "*advisory guidelines*" as defined under section 2(1) of the Act. They should not be taken as a statement of law, and they do not have binding legal effect. The Office reserves the right to consider other factors not covered in this Guidance, where necessary. If the Office decides to depart from this Guidance, the Office will inform the public of its reasons for doing so.

1.9 The Office will generally have regard to this Guidance in considering remedial action in its appraisal of change in control. However, in each appraisal of change in control, the appropriate remedy will be determined by having regard to the particular circumstances of the proposed merger. The Office will therefore apply this Guidance flexibly and may depart from the approach described herein where there are appropriate reasons for doing so.[6]

[5] See CMA, Understanding past merger remedies. Report on case study research, 6 April 2017.
[6] In Phase 1 merger investigations, the decision on whether to open an in-depth investigation, including any decision on UILs, is made by the Executive Group. In Phase 2 merger investigations, the final decision-making body is the Board of Directors or a sub-group thereof.

Table of Abbreviations

Act	Utility Regulation and Competition Act (as revised)
CAT	Competition Appeal Tribunal
CC	Competition Commission (UK)
CMA	Competition & Markets Authority
ESRA	Electricity Sector Regulation Act (as revised)
FRAND	fair, reasonable and non-discriminatory
ICTA	Information and Communications Technology Act (as revised)
Office	Utility Regulation and Competition Office
OFT	Office of Fair Trading
PIT	media public interest test
RCB	relevant customer benefits
SLC	substantial lessening of competition
UIL	undertakings in lieu of reference

2. INTRODUCTION

Scope of the guidance

2.1 This Guidance sets out the criteria that the Office will normally apply in determining the appropriate remedial action in Phase 1 and Phase 2 of its appraisal of change in control.

Structure of the guidance

2.2 This Guidance explains the purpose of remedial action and the process for the selection, design, implementation and monitoring and enforcement of remedies. To this end, it is structured as follows:

(a) Chapter 3 explains the purpose and key principles of remedial action, including a summary of the various types of remedies available to the Office.

(b) Chapter 4 outlines the process for remedial action in Phase 1 and Phase 2 of the appraisal of change in control, from the merger parties' initial contact with the Office (prior to the commencement of a Phase 1 merger investigation), through to the implementation, monitoring and review of remedies following the outcome of a Phase 2 in-depth investigation.[7]

(c) Chapters 5 to 7 provide more detailed guidance on divestiture remedies, intellectual property (IP) remedies and behavioural remedies respectively.

(d) Chapter 8 explains the Office's approach in relation to the use of trustees and third-party monitors.

[7] The CMA's approach to the review of remedies is set out in Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders (CMA11).

3. PURPOSE AND PRINCIPLES OF REMEDIAL ACTION

Objectives of remedial action

3.1 At Phase 1, where the Office decides that there is a *significant prospect that the change of control is likely to have adverse effects*, the Office has discretion to accept UILs instead of moving to Phase 2. In exercising this discretion, the Office may accept from the merger parties' undertakings to take such action as the Office considers appropriate to remedy, mitigate or prevent the identified concern and any adverse effect resulting from it.[8]

3.2 At Phase 2, where the Office concludes that a relevant merger situation *would have, or be likely to have, the effect of SLC* - or in media mergers, whether the change of control *would or would be likely to have an effect contrary to the public interest* - it decides whether action should be taken to remedy, mitigate or prevent the SLC and any adverse effect resulting from the SLC or effect contrary to the public interest in media mergers.[9] The Office may also decide whether such action should be taken by itself or recommended for others such as Government,[10] Director of Public Prosecutions, other regulators or public authorities. In any case, the Office will state in its final report the action to be taken and what it is designed to address.

3.3 At both Phase 1 and Phase 2, the Office will have regard to, among other things, the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC or where relevant the effect contrary to the public interest relating to media mergers.

3.4 There are common principles that apply to the assessment of remedies at Phase 1 and Phase 2, although the application of these principles will take account of the relevant differences in the decisions to be taken at each phase. The Office will seek remedies that are effective in addressing the SLC and, where applicable, the media public interest and its resulting adverse effects, and will then select the least costly and intrusive r emedy that it considers to be effective. The Office will seek to ensure that no remedy is disproportionate in relation to the concern.

3.5 The Office may also have regard to any relevant customer benefits (**RCBs**) arising from the merger in a 'microstate' jurisdiction. In the following paragraphs, we consider these factors and their interaction in greater detail in relation to SLC and its resulting adverse effects.

[8] Section 54(2) and Section 52(b)(ii) of the Act.
[9] Section 49 of the Act.
[10] E.g., section 31 of the ICTA.

The Cayman Islands as a 'microstate' jurisdiction

3.6 The Office will consider each Notification on its own merits, including for each assessment and applicable remedy the relevance of the Cayman Islands being a 'microstate' jurisdiction, in that it:

(a) supports a relatively small sized service market (e.g., c90,000 population out of which a lower subset purchase the utility services);

(b) has services provided over three Islands, with each Island having its own particular characteristics (e.g., population density, diversity of business activities, cost of service);

(c) there are lower economies of scale (unless it relates to international sectoral providers);

(d) likely that purchasers exert lower countervailing buyer power on monopoly pricing throughout the value chain; and

(e) increased provision costs (as most goods/utility specialists need to be imported, thus increasing capital and operating costs).

Effectiveness

3.7 The Office will assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies. The Office expects the merger parties[11] to provide relevant evidence to support their submissions on this, including where relevant expert evidence. Assessing the effectiveness of a remedy involves several distinct dimensions:

(a) **Impact on SLC and resulting adverse effects**. The Office views competition as a dynamic process of rivalry between firms seeking to win customers and the corresponding business revenues over time.

Restoring this process of rivalry through ***structural remedies***, such as divestitures, which re-establish the structure of the market expected in the absence of the merger, should be expected to address the adverse effects at source. However, measures that seek to regulate the ongoing behaviour of the merger parties (***behavioural remedies***), such as price caps, supply

[11] For a discussion on "merger parties", please see para 2.2 of the Office's Guidelines on URCO's Assessment of Mergers.

commitments or restrictions on use of long term contracts, may be more appropriate in the identified circumstances.

(b) Appropriate duration and timing. Remedies need to address the SLC effectively throughout its expected duration.

(c) Practicality. A practical remedy should be capable of effective implementation, monitoring and enforcement.

(d) Acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the Office will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or suppliers of merger parties should not bear significant risks that remedies will not have the requisite impact on the SLC and its adverse effects.

Cost of remedies and proportionality

3.8 Having decided which of the remedy options would be effective in addressing the SLC and resulting adverse effects, the Office will then consider the costs of those remedies. If the Office is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive on the merger parties. The Office will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.

At Phase 1, the Office may accept UILs provided these remedies clearly remedy the identified concerns.

3.9 The costs of a remedy may be incurred by a variety of parties, including the merger parties, third parties, the Office and other monitoring agencies. As the merger parties have the choice of whether or not to proceed with the merger, the Office will generally attribute less significance to the costs of a remedy that will be incurred by the merger parties than the costs that will be imposed by a remedy on third parties, the Office and other monitoring agencies. In particular, for completed mergers, the Office will not normally take account of costs or losses that will be incurred by the merger parties as a result of a structural remedy, as it is open to the merger parties to make merger proposals conditional on the approval of the relevant competition authorities.[12] It is for the merger parties to assess whether there is a risk that a completed merger would be subject to an SLC finding, and the Office would expect this risk to be reflected

[12] The Office notes that the CAT and the courts have upheld structural remedies in a number of investigations where this approach has been taken by the CC and the CMA. See e.g. Groupe Eurotunnel S.A. v Competition Commission [2013] CAT 30, Ryanair Holdings plc v Competition and Markets Authority [2014] CAT 3 and Intercontinental Exchange, Inc v Competition and Markets Authority [2017] CAT 6.

in the agreed acquisition price. Since the cost of divestiture is, in essence, avoidable, the Office will not, in the absence of exceptional circumstances, accept that the cost of divestiture should be considered when selecting remedies.

3.10 The costs of a remedy may arise in various forms. Remedies may result in costs through distortions in market outcomes. This is more likely to be the case where behavioural remedies are used, which intervene directly in market outcomes, especially over a long period. Remedies may also result in significant ongoing compliance costs. The Office will endeavour to minimise such costs, subject to the effectiveness of the remedy not being reduced and will have regard to the costs to the Office and other monitoring agencies in ensuring compliance. At Phase 2, if remedies extinguish RCBs then, as we discuss below, the benefits foregone may be considered to be a relevant cost of the remedy.

3.11 In exceptional circumstances, even the least costly but effective remedy might be expected to incur costs for the merger parties that are disproportionate to the scale of the SLC and its adverse effects (e.g., if the costs incurred by the remedy on third parties are likely to be greater than the likely scale of adverse effects). In these exceptional circumstances, the Office will not pursue the remedy in question.

3.12 In unusual situations, it is possible that all feasible remedies will only be partially effective in remedying an SLC. In such cases, the Office will select the most effective remedy or package of remedies that is available, provided that the costs of this remedy are not disproportionate (as described above) in relation to the SLC.

3.13 At Phase 1, the voluntary nature of the UILs process means that the Office will not reject an offer of UILs on the basis that it forms too great a proportion of the wider transaction. The Office would, in principle, be prepared to accept the abandoning or complete unwinding of a transaction if this were offered by the merger parties.

Relevant customer benefits

3.14 At Phase 1, the Office has a discretion not to make a reference to Phase 2 if it considers that any RCBs in relation to the creation of the relevant merger situation outweigh the SLC concerned and any adverse effects of that SLC.[13] [14] In addition, the Office may have regard to the effect of Phase 1 UILs on any

[13] Sections 50(1)(a) (promotion of sustainable competition) and 52(1)(b)(ii) (eliminate or avoid negative effects) of the Act.
[14] See the CMA's investigations into the anticipated merger between University Hospitals Birmingham NHS Foundation Trust and Heart of England NHS Foundation Trust (2017) and the anticipated merger between Derby Teaching Hospitals NHS Foundation Trust and Burton Hospitals NHS Foundation Trust (2018).

RCBs.

3.15 At Phase 2, in deciding the question of remedies, the Office will have regard to the effects of any action on any RCBs in relation to the creation of the relevant merger situation concerned'. At Phase 2, the Office will normally take RCBs into account by considering the extent to which alternative remedies may preserve such benefits.

3.16 RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy by the Office. The Office may modify a remedy to ensure retention of an RCB or it may change its remedy selection. For instance, it may decide to implement a remedy other than p rohibition[15] or, in rare cases, it may decide that no remedy is appropriate.[16]

3.17 RCBs are outcomes of a change of control, which are in the consumer's interest or advantage,[17] and usually take the form of:

(a) lower prices, higher quality or greater choice of goods or services in any market (whether or not in the market(s) in which the SLC has occurred or may occur); and/or

(b) greater innovation in relation to such goods or services.

3.18 Relevant customers for these purposes are direct and indirect customers (including future customers) of the merger parties at any point in the chain of production and distribution and are therefore not limited to final consumers.

3.19 The Office considers that a benefit is only an RCB if it accrues from the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period from the creation of that merger situation and would be unlikely to accrue without the creation of that situation or a similar lessening of competition.

3.20 The merger parties will be expected to provide cogent evidence regarding the

[15] See for example the UK Competition Commission's (**CC**) investigation into the completed acquisition by Macquarie UK Broadcast Ventures Limited of National Grid Telecoms Investment Limited, Lattice Telecommunications Asset Development Company Limited and National Grid Wireless No.2 Limited (2008). The CC concluded that a package of behavioural remedies had a high probability of being effective in addressing the adverse effects of the merger and would pass back to customers a significant proportion of the relevant merger synergies and substantial compensation in lieu of the loss of future competition.

[16] See the CMA's investigation into the anticipated merger between Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust (2017). The CMA found that the merger may be expected to give rise to an SLC in the provision of NHS elective and maternity services and NHS specialised services, and that prohibiting the merger was the only practicable and effective remedy. However, the CMA concluded that prohibition would result in the loss of substantial RCBs which may be expected to arise as a result of the merger. The CMA found that, when balanced against the nature of the SLC and its resulting adverse effects, the RCBs were likely to be more significant. The CMA therefore concluded that it would be disproportionate to prohibit the merger, and that it should be cleared.

[17] Section 50(1)(b) of the Act.

nature and scale of RCBs that they claim to result from the merger and to demonstrate that these are relevant.

3.21 The following paragraphs provide examples of possible RCBs and how these will be considered by the Office.

- A merger may lead to economies of scale, for example, in production or distribution, but if this benefit just accrued to the merged firm, it would not constitute an RCB. To qualify as an RCB, the prospective cost reductions must be expected to result in lower prices (or better quality, service, choice or innovation) than if the merger did not take place. In many instances, this may not be the case, as the parties may have scope to charge higher prices, or not pass on cost reductions, due to the reduction in competitive pressures resulting from the merger.

- Where there are network effects, an increase in the number of access points to the network may result in an increase in the value of the network to customers. However, given that this would also be likely to increase the barriers to entry and expansion, the Office would need to weigh up the effects.

- Vertical mergers involve the merging of firms at different levels of the supply chain of a particular good or service. Vertical mergers may generate efficiencies[18] that could potentially result in benefits to customers, such as lower prices, improved quality or greater innovation, even when the merger also substantially lessens competition. Examples include improved coordination, for instance, in marketing and product design between firms at different stages of the supply chain; lower transaction and inventory costs; and removal of possible 'double marginalisation' that may occur when two non-integrated firms both have significant market power. [19] However, as for all RCBs, it would be necessary for the Office to be satisfied that these effects could not be achieved by plausible less anti-competitive alternatives to the proposed merger.

Undertakings in lieu of reference to Phase 2

3.22 Section 54(2) of the Act gives the Office the opportunity to open an in-depth investigation. It may do so where it considers that there is a significant prospect that the change of control is likely to have adverse effects and the parties have

[18] The extent to which efficiencies may also be taken into account by the CMA in determining whether a merger gives rise to an SLC is considered in OFT1254/CC2, which was adopted by the CMA.
[19] Double marginalisation may occur because, in the absence of price discrimination, each non-integrated firm has the incentive to raise prices above cost without taking account of the fact that this lowers the output of the other. The result is lower output and profits (and higher prices) than if the two firms pursued a policy of joint profit maximization.

not volunteered any proposals to eliminate the Office's concerns, i.e., UILs. Any UILs accepted by the Office must be for the purpose of eliminating the identified concerns, which include remedying, mitigating or preventing the SLC concerned, and any adverse effects identified.

3.23 The merger parties may be willing to resolve the problems identified by offering to divest part of the merged business (***structural undertakings***), or the acquirer may give a formal commitment about its future conduct (***behavioural undertakings***). However, it is always at the merger parties' discretion whether or not to offer UILs. The Office can impose a remedy via an order at Phase 2 where the Office can give its consent subject to "*an order that the acquirer or the licensee concerned takes the action that the Office considers necessary to eliminate or avoid any such effect."*[20]

3.24 In order to accept UILs, the Office must consider that all of the concerns that have been identified at Phase 1 would be resolved by means of the UILs without the need for further investigation. This reflects the fact that, once UILs have been accepted, section 54(2) of the Act precludes a reference to Stage 2 after that point. UILs are, therefore, appropriate only where the remedies proposed to address any competition concerns raised by the merger are clear-cut. Furthermore, those remedies must be capable of ready implementation.

3.25 The clear-cut requirement has two separate dimensions:

(a) In relation to the substantive competition assessment, it means that there must not be material doubts about the overall effectiveness of the remedy.

The more extensive the competition concerns, in terms of magnitude of potential customer harm, the more significant the error costs of an ineffective remedy, and hence the greater the belief must be that the UILs will comprehensively resolve those concerns.

Whilst the Office will require that the clear-cut standard is applied to any remedy where the test for reference has been met, in those cases where the potential magnitude of harm is especially large, the Office will be particularly cautious in its approach to accepting UILs.

(b) In practical terms, it means that UILs of such complexity that their implementation is not feasible within the constraints of the Phase 1 timetable are unlikely to be accepted.

[20] Section 52(1)(b)(ii) of the Act.

This practical requirement, in terms of assessment and implementation, may impact on the specifications of a divestment package, in order to ensure it remains practicable.

Therefore, there is a greater need for early dialogue between the Office and the merger parties on the specifications of the divestiture package.[21] Under these circumstances, the Office case team may provide guidance to the merger parties on which of the possible remedies being considered by the parties might be suitable.

3.26 In some cases, there may remain some doubt over the precise nature of the SLC or how any merger effect would likely be felt.[22] This, in itself, will not exclude the possibility of UILs being acceptable. The question for the Office is whether the remedy proposed would act in a clear-cut manner to remove all the identified concerns i.e., the likely adverse effects.

3.27 Section 54(2) of the Act provides the Office with the ability to accept UILs "*to eliminate the Office's concerns*" (the purpose of remedying, mitigating or preventing competition concerns). **The Office's starting point is to seek an outcome that restores competition to the level that would have prevailed absent the merger**, thereby comprehensively remedying the SLC.[23] The objective is to ensure that competition following the implementation of the remedy is as effective as pre-merger competition.[24]

3.28 As a general rule, and in line with the Office's starting point detailed above, the Office considers that at Phase 1, it is appropriate for it to seek to remedy or prevent competition concerns rather than simply mitigate concerns. The Office is mindful that at Phase 2, it has significant remedy powers, including the ability to prohibit a merger, and that it has increased time available in the context of a Phase 2 in-depth investigation to consider more detailed remedies. The Office is, therefore, unlikely to accept an offer of UILs at Phase 1 where these do not comprehensively address the SLC unless it was abundantly clear that at Phase 2, it would be materially no better placed than it had been at Phase 1 to achieve a remedy that would restore the levels of competition that existed pre-merger.[25]

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[21] The Office notes the UILs given by Boots Group plc to the UK OFT in relation to its acquisition of Alliance UniChem plc (2008), where the OFT required that 96 pharmacy stores be divested in no more than 25 packages, and the UILs given by Co-operative Group Limited to the OFT in relation to its acquisition of Somerfield Limited (2009), where the OFT required that 109 grocery stores be divested in no more than 25 packages.

[22] This reflects the fact that the Office's test for reference at Phase 1 is whether there is a *significant prospect that the change of control is likely to have adverse effects*, rather than establishing an SLC on the balance of probabilities, which is the test at Phase 2.

[23] See the judgment in Co-operative Group (CWS) Limited v OFT [2007] CAT 24, where the CAT considered it was not unreasonable for the OFT to adopt as its starting point the objective of restoring competition to pre-merger levels.

[24] This is without prejudice in any given case to the ability of the merger parties to persuade the Office that a proposed remedy that does not directly restore competition to pre-merger levels nevertheless clearly and comprehensively removes the SLC identified.

[25] The Office notes the OFT's investigation into the anticipated acquisition by Co-operative Group Limited of Somerfield

3.29 At Phase 1, the Office accepts the CMA's experience (and that of its predecessor, the OFT) that devising a workable and effective set of behavioural commitments within the context of a short Phase 1 timetable is difficult. Nevertheless, the Office does not inevitably refuse behavioural remedy offers, in particular where divestment would be clearly impractical or is otherwise unavailable.[26] Further, mergers raising vertical concerns are potentially more suitable to some forms of behavioural undertaking, as are mergers in markets in which there already exists a significant degree of regulation.

3.30 The Office may have regard to the effect of any UILs on any RCBs (see paragraph 3.14 et seq. above). In practice, this means that where there is a choice of two UILs offers that are equally effective in terms of remedying the SLC identified, the Office will prefer the remedy that preserves any RCBs.

Choice of remedies

Types of remedies

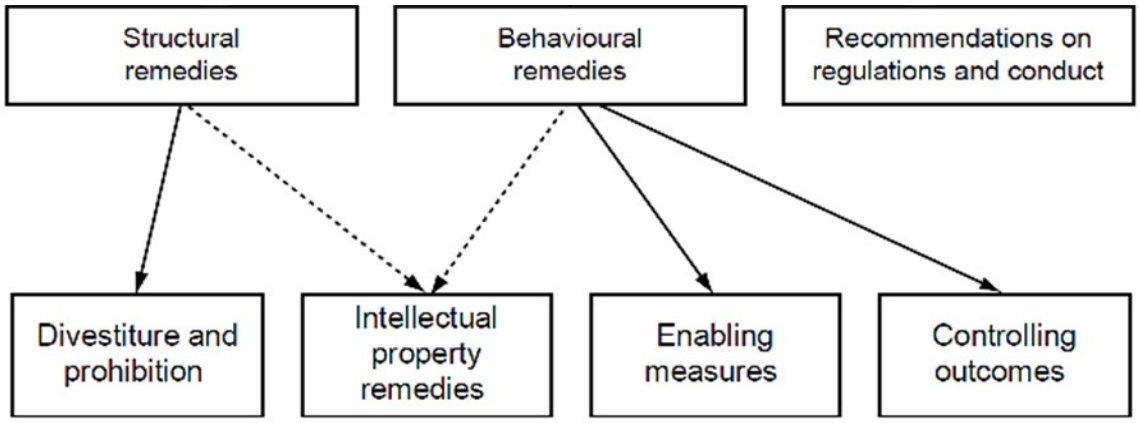
3.31 Figure 1 below outlines the possible types of merger remedy. Remedies are conventionally classified as either *structural* or *behavioural*. Structural remedies, such as prohibition and divestiture, are generally one-off measures that seek to restore or maintain the competitive structure of the market by addressing the market participants and/or their shares of the market.

Behavioural remedies are normally ongoing measures that are designed to regulate or constrain the behaviour of merger parties. Some remedies, such as those relating to access to IP rights, may have features of structural or behavioural remedies depending on their particular formulation.

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

[26] See the CMA's investigations into the anticipated acquisition by Inter City Railways Limited of the InterCity East Coast rail franchise (2015), the completed acquisition by Regus Group Limited of Avanta Serviced Office Group plc (2016), and the award of the South Western rail franchise to FirstGroup plc and MTR Corporation (2017).

Figure 1: Possible remedies



Source: CMA.

Prohibition

3.32 Full prohibition of an anticipated merger is an effective remedy as it necessarily maintains the competitive structure of a market that would have otherwise been changed by the merger. Partial rather than full prohibition may be appropriate, if feasible, where the merger parties carry out activities in a market or markets other than those that are expected to give rise to an SLC.[27]

3.33 In some mergers, a party to the merger may have built up a minority shareholding in the party to be acquired. In such instances, a decision to prohibit a merger may require the party to divest such a shareholding (or to reduce its shareholding to below a specified maximum level at which the Office considers that the SLC will be remedied).[28]

Divestiture

3.34 The aim of divestiture is to address an SLC through the disposal of a business or assets from the merger parties to create a new source of competition (if sold to a new market participant) or to strengthen an existing source of competition (if sold to an existing participant independent of the merger parties).

3.35 A successful divestiture will effectively address at source the loss of rivalry resulting from the merger by changing or restoring the structure of the market.

[27] The Office notes the CC's investigations into the proposed acquisition by Stena AB of certain assets relating to the supply of ferry services operated by The Peninsular and Oriental Steam Navigation Company on the Irish Sea between Liverpool to Dublin and Fleetwood to Larne (2004), and the anticipated acquisition by The Rank Group Plc of Gala Casinos Limited (2013), where the CC found that in one local area, the least costly and least intrusive effective remedy was partial prohibition through the divestiture of a 'cold licence'.

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

Divestitures will generally not require detailed monitoring following implementation, although, in some cases, an effective divestiture may require supplementary behavioural measures for a specified period (e.g., to secure supplies of an essential input or service from the merger parties to the divested business). The design and implementation of divestiture remedies is considered in Chapter 5 below.

IP remedies

3.36 Remedies that provide access to IP by licensing or assignment of patents, brands, data or other IP rights may be viewed in general as a specialised form of asset divestiture. The parties acquiring the IP rights should be able to compete effectively with the merger parties as a result of the acquisition.
Where the terms of an IP remedy result in a material ongoing link between the merger parties and the parties gaining the IP (e.g., providing access to new releases or upgrades of technology or data), the measure may take on some of the characteristics of a behavioural commitment, which requires ongoing monitoring and enforcement.[29] The design and implementation of IP remedies is considered in Chapter 6 below.

Enabling measures

3.37 Certain forms of behavioural remedy operate principally to enable competition by removing obstacles to competition or stimulating potential competition.[30] These include measures that seek to prevent merger parties from restricting access to their customers. Such measures may, for example, limit the merger parties' ability to:

(a) require their customers to enter into long term or exclusive contracts;

(b) create switching costs for customers; and/or

(c) bundle or tie the sale of particular products.

3.38 In the context of vertical mergers, if the merged entity controls key facilities or inputs required by other firms to compete effectively, then enabling measures may include:

(a) provisions governing access to and pricing of facilities and products (e.g.,

[29] The Office notes the CMA's investigation into the anticipated acquisition by Reckitt Benckiser Group plc of the K-Y brand in the UK (2015), where the CMA decided that completion of the transaction would be conditional on Reckitt Benckiser Group plc agreeing a licensing agreement in line with criteria set out by the CMA.
[30] The Office notes the CMA's investigation into the anticipated acquisition by Muller UK & Ireland Group LLP of the dairy operations of Dairy Crest Group plc (2015), where the CMA accepted UILs by Muller UK & Ireland Group LLP that included arrangements to provide for the expansion of an existing supplier to serve national grocery retailers.

commitments from the merged entity not to discriminate in access to the facility or input as between itself and its competitors); and,

(b) restrictions of access to confidential information ('firewall provisions') generated by competitors' use of the merged companies' facilities or products.

3.39 A key question in evaluating the expected effectiveness of enabling measures is whether the response to these measures is likely to be of sufficient scale and timeliness to restore adequately the rivalry lost as a result of the merger. Enabling measures are likely to require ongoing intervention and monitoring and, in some instances, this may involve highly complex issues (e.g., the pricing of access to facilities). The design and implementation of behavioural remedies is considered in Chapter 7 below.

Controlling outcomes

3.40 Certain types of behavioural remedy, such as price caps,[31] supply commitments and service level undertakings, control or restrict the outcomes of business processes. These remedies aim to control the adverse effects expected from a merger rather than addressing the source of the SLC. This type of remedy may not only be complex to implement and monitor but may also create significant market distortions.

Recommendations on regulations or conduct

3.41 In some situations, certain regulations or conduct may inhibit entry or restrict market outcomes (e.g., planning or certification requirements). In these rare situations, the Office may recommend modifications of these requirements to the Government or other controlling body to help address an SLC or to control the adverse effects of a merger. For example, in a regulated sector, the Office may seek to take steps to address the effects of a merger by recommending a modification to a licence condition.

Selection of remedies

3.42 The choice of remedies will reflect the particular circumstances of each investigation. The Office will seek to select remedies that will effectively address

[31] The Office notes the CC's investigations into the completed acquisition by Imerys Minerals Limited of the kaolin business of Goonvean Limited (2013), where the CC concluded that the most effective and proportionate remedy was a price control remedy for five years for kaolin supplied for use in performance-mineral applications to existing Goonvean and Imerys customers, and the completed acquisition by Breedon Aggregates Limited of certain assets of Aggregate Industries UK Limited (2014), where the CC implemented a price control for asphalt produced in the Inverness area.

the SLC and its resulting adverse effects in the least costly way.

3.44 That said, behavioural remedies can operate satisfactorily in limited circumstances, especially where the company operates in a regulated environment and where there are expert monitors, such as the Office. In general, one or more of the following conditions will normally apply in the circumstances where the Office selects behavioural remedies as the primary source of remedial action in a merger appraisal:

(a) Divestiture and/or prohibition is not feasible, or the relevant costs of any feasible structural remedy far exceed the scale of the adverse effects of the SLC.

(b) The SLC is expected to have a relatively short duration (e.g., two to three years) due, for example, to the limited remaining term of a patent or exclusive contract.[32]

(c) RCBs are likely to be substantial compared with the adverse effects of the merger, and these benefits would be largely preserved by behavioural remedies but not by structural remedies.[33]

3.45 In general, in the above circumstances, the Office will prefer to use enabling measures that 'work with the grain of competition', such as *access remedies*, and measures that remove obstacles to competition, rather than measures that control market outcomes, such as *price caps*. The latter measures tend to be onerous to operate and monitor, may create significant market distortions and do not address the root causes of an SLC. Therefore, they are unlikely to be appropriate other than for a limited duration, unless there is no effective or practical alternative remedy.

3.46 Where behavioural remedies are needed, enabling measures may be expected to work relatively slowly in addressing an SLC. In these circumstances, measures that control market outcomes may be needed to supplement enabling measures for a limited period to provide protection to customers from the adverse effects of an SLC.

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[32] The Office notes the CC's investigation into the completed acquisition by Nufarm Crop Products UK Limited of AH Marks Holdings Ltd (2009), where the CC concluded that a package of behavioural remedies, including supply agreements and the transfer of a registration of a product to a third party, would be more targeted in addressing the SLCs that the CC had identified than the divestiture of the AH Marks business. The CC concluded that the behavioural remedies would: (a) not affect other markets where no SLC had been found; (b) directly address the key barriers to entry; and (c) have a fixed duration, appropriate to the limited expected duration of the SLCs.

[33] The Office notes the CC's investigations into the completed acquisition by Macquarie UK Broadcast Ventures Limited of National Grid Telecoms Investment Limited, Lattice Telecommunications Asset Development Company Limited and National Grid Wireless No.2 Limited (2008), where significant RCBs contributed to the selection of a behavioural remedy, and the completed acquisition by Imerys Minerals Limited of the kaolin business of Goonvean Limited (2013), where the CMA, in selecting a behavioural remedy, noted that to the extent that efficiencies existed, these would be eliminated if full divestiture had been required.

3.47 In relation to whether divestiture is feasible, substantial uncertainty as to whether a suitable buyer will emerge will generally not be sufficient for the Office to conclude that any form of divestiture remedy is not feasible. The Office notes that the CMA has found that it is normally possible to implement divestiture remedies, despite such uncertainties, given flexibility in the disposal price.

3.48 Where vertical mergers are expected to result in substantial RCBs, the Office could select enabling measures, such as access remedies and/or firewall provisions, rather than structural remedies.

3.49 It is possible that, in specific circumstances, any effective remedy will result in disproportionate costs that far exceed the scale of the SLC or a disproportionate loss of RCBs. In such circumstances, the Office will select the effective remedy that minimises the level of costs or loss of RCBs. In cases where all feasible remedies are likely to be disproportionate, the Office may conclude that no remedial action should be taken.

Recommendations

3.50 In deciding whether to make a recommendation to Government or other controlling body for remedial action, the Office will consider the likelihood of whether its recommendation will be adopted. In view of this uncertainty, the Office will generally only make recommendations for action by others where it lacks the ability to carry out relevant measures itself, and only after consultation with the organisations possessing the relevant powers.[34]

International constraints

3.51 The Office's jurisdiction pertains to the Cayman Islands. Where competition authorities in other jurisdictions are considering a change of control which is also subject of the Office's appraisal, the Office will normally consult with some or all of these authorities to seek consistency and effectiveness in the approach to remedies.[35] It will normally be in the interests of the competition authorities and the merger parties for such consultation to take place at an early stage to prevent inconsistent approaches or outcomes. The consultation will also generally be more effective if the merger parties give their consent to sharing relevant information between the Office and other competition authorities at an early

[34] The CC's investigation into the proposed acquisition of certain assets representing the Air-Shields business of Hill-Rom, Inc, a subsidiary of Hillenbrand Industries (2004) is a rare example of the use of a recommendation.
[35] See the CMA's investigation into the completed acquisition by Diageo plc of a shareholding and voting rights and other associated rights in United Spirits Limited (2014), a company based in India. The CMA accepted UILs from Diageo plc, which involved the divestment of its Whyte & Mackay business (apart from 2 malt distilleries, Dalmore and Tamnavulin, and their associated brands) and was subject to a regulatory review by the Reserve Bank of India and the approval of United Spirits Limited's shareholders in line with Indian law. The CMA did not accept the UILs until all other third-party steps had been completed.

stage.

4. REMEDIES PROCESS

Phase 1: Screening Phase

4.1 The Office must promptly review a written notification of a change of control and shall, within thirty days of receiving a *complete* notification, issue its adjudication or inform the merger parties that it is opening an In-depth Investigation under Phase 2.[36]

4.2 For the purposes of the Office, a *complete* notification is a notification which provides the information as set out in the Office's Merger Notice. In this regard, the Office draws the merger parties' attention to the criminal offences as described in that document relating to providing false or misleading information, and the obstruction of an investigation.

Phase 2: In-depth Investigation

4.3 At Phase 2, the Office has within ninety days to issue its adjudication.[37] During this period, the Office will continue to gather information on possible remedies and consider relevant options after the basis of a possible SLC/ PIT concern has been identified.

4.4 In exceptional circumstances (e.g., where the remedies are likely to be complex in design and/or implementation or where competition authorities in other jurisdictions are considering a merger which the Office is also investigating) or when requested by the merger parties, the Office may consider possible remedies prior to having identified to the merger parties the basis of a possible SLC/ PIT finding. The merger parties will be informed if the Office considers that this is appropriate.

4.5 The early consideration of possible remedies may necessitate the Executive Group engaging with the merger parties. This does not restrict the power of the Office to serve formal requests for information on the merger parties. The Office will consider on a case-by-case basis whether additional procedural safeguards are necessary to ensure that the early discussion of remedies does not prejudice the SLC/ decision.

4.6 Where the Office reaches a provisional finding of an SLC/ PIT, at the same time as publishing its provisional finding (or as soon as practicable thereafter), the Office will consult on possible remedies to address the SLC/ PIT. The statutory timetables for the Phase 2 consideration will be paused while the Office undertakes such consultations.

[36] Per section 54(1) of the Act.
[37] Per section 54(3) of the Act.

4.7 The Office will consider remedy options proposed by the merger parties and others, in addition to its own proposals. Parties will be expected to demonstrate that their proposed remedy options will address effectively the provisional SLC/ PIT and the resulting identified concerns. The merger parties will also be expected to provide cogent evidence to support any claims concerning RCBs and their potential for pass through to relevant customers.

4.8 Where the Office reaches a provisional finding of an SLC/ PIT, written responses may be submitted after the publication of the provisional findings and notice of possible remedies. Responses may be considered from the merger parties and sometimes also third parties who are likely to provide useful evidence or views (e.g., potential buyers, significant customers or other relevant stakeholders).

4.9 Written responses may be submitted where the provisional finding is that no SLC/ PIT arises as a result of the change of control, although merger parties can waive their right to a response under these circumstances.

4.10 The Office will publish its final decision, together with its supporting reasons and information, in a final report. The report will contain sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation by the Office.

4.11 Following publication of the 'final' decision of the Office in any matter, the Office will make its final order including the UILs.

4.12 The Office will have an ongoing responsibility for the monitoring and enforcement of any behavioural remedies.

4.13 The Office will publish and update an administrative timetable regarding the implementation of remedies.

4.14 The action the Office takes in implementing remedies must be consistent with the decisions in the final report unless there has been a material change of circumstances since the preparation of the report or the Office has a special reason for acting differently.

4.15 If a person fails to comply with any decision of the Office, compliance may be enforced by means of Administrative Fines under section 91 of the Act not exceeding five hundred thousand dollars in respect of each failure and twenty-five thousand dollars for each day that the failure or contravention occurs.

4.16 The Office will keep undertakings and orders under the Act under review. From time to time, the Office will consider whether, by reason of a change in circumstances (e.g., significant changes in market structure or changes in laws and regulations affecting a market), the undertakings in the final order made by

the Office are no longer appropriate and should be varied or terminated.

Consultation

4.17 Where appropriate to do so, including under section 7 of the Act, third parties will be consulted prior to the Office's determination on either Phase 1 or Phase 2 decisions, including the acceptance of UILs.

4.18 Where the Office consults, it will follow its published consultation procedures,[38] which includes publishing the details of and inviting comments on the provisional existence and scope of the identified concerns and the draft of the provisionally agreed UILs on its website. Depending on the complexity of the matters before the Office, the statutory timetables for each Phase consideration may need to be paused while the Office undertakes such consultations.

4.19 The Office will give third parties a period of not less than 10 working days in which to respond with comments on the identified concerns and the purpose and effect of the proposed UIL. To the extent that, as a result of the consultation process or otherwise, the originally published UILs are materially modified, a second consultation period may be required.

Procedure for submission of UILs

4.20 The Office may open an In-depth Investigation (Phase 2) where it considers that there is a "*significant prospect that the change of control is likely to have adverse effects"* and the parties have not volunteered proposals (i.e., UILs) to address the Office's concerns.[39]

UILs proposals in advance of the SLC/ Media Public Interest Test (PIT) decision

4.21 Therefore, merger parties can put forward possible UILs to the Office's merger case team at any stage during the Phase 1 Screening Process or indeed during pre-notification.[40] The Office strongly recommends that merger parties, including their legal advisers, consider possible UILs early in the process, even if this is not communicated to the Office; especially noting that the Office has a short deadline to decide its next step.

4.22 This ensures that, if there is pending a finding of a significant prospect of

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[38] https://www.ofreg.ky/upimages/commonfiles/1499722759OF20171DeterminationandConsultationProcedureGuidelines.pdf

[39] Section 54(2) of the Act.

[40] Such discussions with the case team will not impact on the prospect that the decision maker ultimately determines that the test for reference is not met; nor will they prejudice the merger parties' right to decide not to offer any UILs.

adverse effects (an SLC/PIT decision), the parties will be better able to submit their proposed UILs and engage in any related discussions with the Office rapidly, maximising the chance of the Office accepting UILs as an alternative to a Phase 2 In-depth Investigation. If acceptable, the Office will then confirm those UILs as part of its determination of Phase 1.

4.23 In advance of the Phase 1 SLC/PIT decision, the case team will assist merger parties in understanding the function of UILs. They may, where possible, provide guidance to parties on which of the possible remedies being considered by the parties might be suitable. However, these discussions will be conducted on a hypothetical basis, as the case team will not be able to inform the parties of the Office's likely decision on whether there is a significant prospect that the merger gives rise to identified concerns (i.e., SLC/PIT) prior to the announcement of the decision. Any discussion of UILs prior to the decision will not prejudice that decision.

4.24 While the decision on the existence and scope of the SLC/PIT at Phase 1 and Phase 2 is independent of the decision on whether any UILs offered address the concerns identified, noting the short timescales at each Phase of the appraisal of change in control, in practice there is likely to be a need to run the two in parallel so that the decision for the decision maker to be made at each Phase includes both.

4.25 Discussions as to appropriate UILs are to be in writing. Given that the period for making a UILs offer is short, merger parties should not expect to engage in iterative discussions or negotiations with the Office. Parties may formally submit two or three written versions of their offer,[41] which the Office will consider to select the least intrusive effective clear-cut remedy, but parties should be careful to include the offer they consider will address fully the identified concerns as indicated by the Office.[42]Parties should also clearly indicate their preferred remedy, providing reasons.

4.26 In exceptional circumstances (e.g., where the remedies are likely to be complex in design and/or implementation or where competition authorities in other jurisdictions are considering a merger which the Office is also investigating),[43] the Office may choose also to hold a meeting to discuss the proposed UILs. The Office will consider on a case-by-case basis whether additional procedural safeguards are necessary to ensure that the early discussion of remedies does not prejudice the SLC/ PIT decision.

[41] Parties should submit their best offer. However, on occasion, there can be uncertainty about what exactly needs to be included for the remedy to be fully effective in addressing the competition concerns identified.
[42] See the CMA's investigation into the anticipated acquisition by John Wood Group plc of Amec Foster Wheeler plc (2017), where the CMA did not take up the option of an upfront buyer, as it did not consider that this was necessary.
[43] At Phase 1, the Office will look to proceed with its appraisal of change in control in parallel with any investigations taking place in other jurisdictions.

4.27 If parties do not wish to submit an UILs offer, they may wish to inform the Office (in writing) so that, where appropriate, the Office can proceed to make a decision.

Remedies Form

4.28 UILs offers (accompanied by the merger parties' proposed draft text of their UILs) should be made formally in writing.

4.29 When making the UIL offer, merger parties should bear in mind, among other things, the following points:

(a) A UILs offer merely to 'remedy the identified concern', without specifying how this will be achieved, will be considered insufficiently clear-cut.

(b) A UILs offer which proposes a behavioural remedy rather than a structural remedy must be detailed to be considered sufficiently clear-cut.

(c) Where parties are offering a structural remedy in the form of divestment, they should state in their UILs offer whether they are proposing an upfront buyer.[44] Merger parties are allowed to offer two or more versions of their UILs offer. They might, as their preference, submit a divestment proposal with a non-upfront buyer offer, while stating that, in the alternative, they would also be willing to offer a divestment proposal with an upfront buyer.

(d) A UILs offer to remedy the identified concern through divestment of one of the overlapping businesses should make it clear which of the overlapping businesses the merger parties are proposing to divest. Where the merger parties are equally willing to divest either business, they should state this in their UILs offer. Parties should be aware that, in certain cases, the Office may consider that divestment of one particular business may not be sufficient to remove the competition concerns, given the need for the divestment to be a viable business and to be capable of attracting a suitable buyer. In this situation, a UILs offer might include a fall-back proposal to divest another business should a buyer not be found quickly for the first business.

4.30 The level of information required by the Office will vary according to the type and structure of the remedy proposed. Merger parties are encouraged to discuss with

[44] This is a commitment to find a buyer which will be assessed and approved by the Office, and to conclude an agreement with this buyer, prior to the Office's final acceptance of UILs.

the case team the likely requirements of the Office before completing their offer.

Office discretion to propose modifications to UILs offers

4.31 The Office expects that, in the vast majority of cases, the merger parties will be in a position to assess whether to make a UILs offer capable of providing a clear-cut remedy to the identified SLC/ PIT. However, the Office is mindful of the significant public policy benefits achieved through the UILs process. Therefore, the Office reserves the right, where appropriate, to revert to the merger parties following receipt of their UILs offer to inform them that it could be suitable to address the SLC/ PIT identified, subject to specified modifications.

4.32 Where the Office proposes modifications to a UILs offer, it will ask the merger parties whether they agree to the proposed modifications. The merger parties will be given a short period in which to state whether or not they wish to offer the modified UILs.

Acceptance

4.33 Following the necessary consultations, the Office will ask the merger parties to sign the final version of the UILs, after which they will be formally accepted by the Office by way of making an order under Section 52(1)(b)(ii) of the Act. The Office will announce publicly that it has formally accepted the UILs, thereby ending the identified concern, and will publish the final version of the accepted UILs and the Order on the Office's website.

Upfront buyer cases

4.34 Where the Office decides that UILs will be accepted only where the merger parties have identified an upfront buyer, the Office will not accept the UILs unless a sale agreement, generally conditional from the buyer's perspective only on acceptance of the UILs by the Office (and the completion of the main transaction if it remains anticipated), has been agreed with a buyer for the divestment business and the Office considers that the buyer would be acceptable.

4.35 Where merger parties wish to offer an upfront buyer in their UILs offer, they may either identify a proposed buyer straight away or make the offer on the basis that any divestment proposal would be limited to an upfront buyer. After the merger parties have proposed their upfront buyer, the Office will assess the suitability of the proposed buyer. The Office may specify the proposed buyer in any public consultation.

4.36 Once the merger parties have obtained provisional confirmation from the Office that the buyer is likely to be acceptable, they will enter into a sale agreement on the terms set out in paragraph 4.34 above.

4.37 Given the statutory deadline by which UILs must be finally accepted, merger parties are advised to give early consideration to the possible need for, and identity of, an upfront buyer.

Following final acceptance of UILs in non-upfront buyer cases

4.38 Where no upfront buyer provision is required, the Office will continue to have an active role to play after it has formally accepted the UILs from the parties.

4.39 Where the UILs are structural in nature, they will provide for a divestment period within which the merger parties must identify a suitable buyer for the divestment business and conclude a sale agreement with that buyer. As for an upfront buyer case, the Office will assess the suitability of the proposed buyer.

4.40 Once the proposed buyer has been formally approved by the Office, the merger parties are able to proceed with the divestment. Depending on the terms of the UILs, the merger parties may be required to enter into the relevant contractual document for the divestment and/or to complete the divestment by a date specified in the UILs.

Assessing the suitability of a buyer

4.41 In a divestiture remedy, the merger parties must among other things satisfy the Office that their proposed buyer is independent of the merger parties; has the necessary capability to compete; is committed to competing in the relevant market(s) and fulfilling the Licensee's commitments; and that a divestiture to this buyer will not create further competition or regulatory concern (e.g., that they meet the general criteria to be granted a licence).[45]

4.42 In assessing whether a proposed buyer should be approved, the Office will examine information presented by the merger parties carefully and impartially but will only undertake a proportionate amount of investigation and analysis at this Phase.[46] If approval of a proposed buyer requires a detailed investigation, it is likely that the Office will choose not to approve that buyer rather than to undertake

[45] The general criteria include, for example, whether the applicant possesses the technical qualification necessary to perform fully the obligations in the licence, has financial soundness and is generally fit and proper (section 26 of the ICTA, and section 23 of the ESRA).

[46] This is consistent with the requirement that UILs should provide a clear-cut solution to the SLC identified at Phase 1.

an in-depth analysis.[47]

4.43 In principle, divestitures as a result of UILs may result in the creation of a new identified concern in relation to the change of control, which the Office could investigate. However, in practice, where a proposed divestment to a buyer raises competition concerns,[48] the Office will notify the merger parties that the proposed buyer does not satisfy the buyer suitability criteria.

Monitoring trustee

4.44 The Office will assess on a case-by-case basis whether a monitoring trustee should be appointed to oversee and report on the divestiture process.[49]The Office may appoint a monitoring trustee at Phase 1 or Phase 2.

4.45 Monitoring trustees help ensure that the Office better understands the progress being made in a divestiture by reporting on the merger parties' compliance with the agreed timetable. A monitoring trustee can also be used to review the separation of a business and ensure the divestiture package is as described in the proposed UILs.

4.46 The need for a monitoring trustee will depend, among other things, upon the nature of the divestiture package and the risk profile of the remedy. The need for a monitoring trustee in an upfront buyer case is likely to be lower than in a non-upfront buyer case, as the incentives for the parties to complete the divestment in good time is likely to be greater. A monitoring trustee is more likely to be appointed where:

(a) the divestiture package is not an existing business;

(b) significant assets are to be excluded from the existing business;

(c) significant transitional arrangements are required; and/or

(d) buyer risks are particularly high.

4.47 If the merger parties consider that a monitoring trustee is not required, they

[47] The Office notes in this regard the UK judgment, Co-operative Group (CWS) Limited v Office of Fair Trading [2007] CAT 24.

[48] The fact that the acquisition by a proposed purchaser would qualify for investigation pursuant to the share of supply test does not necessarily mean that it would create substantive competition concerns; this will depend on the circumstances of the case and the market(s) in question

[49] The parties will be responsible for the remuneration of the monitoring trustee. To ensure that the structure of such remuneration does not compromise the monitoring trustee's independence and provides sufficient incentive to perform the required function to an appropriate standard, the Office must approve the remuneration agreement with the monitoring trustee.

should include their reasons for this in their Notification.

4.48 Please see Chapter 8 below for more information on trustees and third-party monitors.

Divestiture trustee and Office intervention

4.49 In a non-upfront buyer case, if merger parties are unable to find a suitable buyer capable of being approved by the Office within the time period specified within the UILs, the UILs will typically provide for the Office to be able to appoint a divestiture trustee to sell the divestment business on behalf of the merger parties at no minimum price, or for the Office to direct the parties to sell at no minimum price.

4.50 Whether UILs are structural or behavioural in nature, if, after accepting the UILs it becomes apparent to the Office that the undertakings are not being or will not be fulfilled, the order forming part of the UIL[50] can be enforced including by an Administrative Fine (s 91 of the Act).

UILs in media public interest cases

4.51 In media public interest cases, the Office considers at Phase 1 whether the competition and plurality issues that arise are such that the Office would commence an In-depth Investigation. If the Office is minded to commence an In-depth Investigation, the Office will consider whether or not these concerns could be resolved by UILs. However, this consideration will be done recognising the context of the specific media public interests concerns, given in particular the microstate nature of the jurisdiction.

4.52 The plurality concerns allow the Office to decide that media public interest issues require a different outcome to that which would be required to address the competition issues. This could include a decision to consent to the merger, to conduct an In-depth Investigation, or to accept undertakings, which might be different from those usually considered by the Office to resolve any competition concerns. Also, the consent can be denied, when, for example, the competition concern is addressed, but the merger may be expected still to operate against the public interest.

Ongoing role for the Office in behavioural UILs

4.53 For behavioural UILs, under section 91 of the Act, the Office has an ongoing monitoring role for the duration of the UILs Order.

[50] Section 52(1)(b)(ii) of the Act.

Remedies for breach of UILs

4.54 Once UILs have been accepted, the Office is released from its duty to examine the merger. UILs and the order therefore become the definitive solution to any identified concerns. Enforcement occurs in accordance with section 91 of the Act.

Remedies implementation during litigation

4.55 Merger parties have the right to apply to the Grand Court for a review of a decision by the Office. However, such an application does not suspend the effect of the decision, except insofar as an order to the contrary is made by the Grand Court.

4.56 The Office will aim to work with the merger parties to progress as far as practicable the prompt implementation of remedies, while paying appropriate respect to merger parties' legitimate rights of defence and the role of the courts.

Completed mergers

4.57 The Office's approach to its consideration of a completed mergers, where appropriate to do so, will follow similar principles for anticipated mergers. The Office reminds merger parties that in stated circumstances they have an obligation not to issue or transfer shares of a licensee without the approval of the Office (see e.g., section 46 of the Act).

4.58 However, the remedies process in completed merger investigations may often face circumstances which, in practice, increase the risks of not achieving an effective solution compared with anticipated merger investigations. For example, there may be greater difficulty in separating a divestiture package or the merger parties may have weaker incentives to pursue timely divestiture.

4.59 The Office will take action to limit these risks and ensure an effective outcome. Completed merger cases, therefore, may require interim measures, such as the appointment of a monitoring trustee.[51] As noted in paragraph 3.9 above, the Office will not normally consider the cost of divestiture to the merger parties in selecting appropriate remedies.

[51] Considerations regarding the use, design and implementation of interim measures, including interim orders, are set out in the CMA's Guidance document - CMA60.

5. DIVESTITURE REMEDIES

Introduction

5.1 A divestiture seeks to remedy an identified concern in SLC/PIT by either creating a new source of competition, through disposal of a business or set of assets to a new market participant, or by strengthening an existing source of competition, through disposal to an existing market participant independent of the merger parties.

5.2 A divestiture seeks to remedy an identified concern in the media public interest such as those set out at paragraph 7.40 *et seq.* below.

5.3 To be effective in restoring or maintaining rivalry in a market where the Office has decided that there is an identified concern, a divestiture remedy will involve the sale of an appropriate divestiture package to a suitable buyer through an effective divestiture process.

Divestiture risks

5.4 Divestitures may be subject to a variety of risks that may limit their effectiveness in addressing an identified concern. It is helpful to distinguish between three broad categories of risks that may impair the effectiveness of divestiture remedies, as follows:

(a) Composition risks: these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable buyer or may not allow a buyer to operate as an effective competitor and/or media contributor in the market.

(b) Buyer risks: these are risks that a suitable buyer is not available or that the merger parties will divest to a weak or otherwise inappropriate buyer.

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

5.5 The incentives of merger parties may serve to increase the risks of divestiture. Although merger parties will normally have an incentive to maximise the disposal proceeds of a divestiture, they will also have incentives to limit the future competitive impact of a divestiture on themselves. Merger parties may therefore seek to sell their less competitive assets/businesses and target them to firms which they perceive as weaker competitors. They may also allow the

competitiveness of the divestiture package to decline during the divestiture process.

5.6 Divestiture risks can be overcome, at least in part, through the design of the divestiture package and by adopting protective measures, such as the appointment of a monitoring trustee, divestiture trustee and/or requiring an upfront buyer.

Scope of divestiture packages

Package definition

5.7 In identifying a divestiture package, the Office will take, as its starting point, divestiture of all or part of the acquired business.[52] This is because restoration of the pre-merger situation in the markets subject to an identified concern will generally represent a straightforward remedy. The Office will consider a divestiture drawn from the acquiring business if this is not subject to greater risk in addressing the identified concern. [53] In appropriate cases, the Office may be willing to leave open to the merger parties which of the overlapping businesses they wish to sell, with the UILs or final order of the Office stipulating that one of them must be sold.[54]

5.8 In defining the scope of a divestiture package that will satisfactorily address the identified concern, the Office will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis and that includes all the relevant operations pertinent to the area of competitive overlap. This may comprise a subsidiary or a division or the whole of the business to be acquired. Following discussion with the merger parties, the Office may modify the scope of the proposed divestiture package, provided that the parties can demonstrate, to the Office's satisfaction, that the modified package addresses the identified concern, and the modification does not create significant composition, buyer or asset risks, or media public interest risks after taking account of protective measures.

5.9 The divestiture may comprise the sale of all relevant assets in one package, or

[52] The Office notes the UK judgment in Somerfield plc v Competition Commission [2006] CAT 4, where the CAT confirmed that it was reasonable for the CC, as a starting point, to consider that restoring the *status quo ante* would normally involve reversing the completed acquisition unless the contrary were shown.
[53] The Office notes the CMA's investigation into the anticipated acquisition by Celesio AG of Sainsbury's Supermarkets Limited UK Pharmacy Business (2017), where the CMA concluded that, with the exception of Christchurch and Sandy, the divestiture of a particular Lloyds pharmacy in each of the areas where the CMA had found an SLC would be an effective and proportionate remedy to address the SLC that had been identified. The CMA found that in Christchurch and Sandy, the divestiture of either of two particular Lloyds pharmacies in these areas would be an effective and proportionate remedy to address the SLC that had been identified. The CMA also decided that a number of other safeguards were required to protect the pharmacies to be divested to ensure that there were no risks of asset deterioration occurring during the sale process.
[54] See the UILs given by MRH (GB) Limited to the CMA in relation to its acquisition of 78 petrol stations from Esso Petroleum Company Limited (2016).

the sale of assets grouped together in a limited number of packages. The scope of the package will reflect the particular circumstances of the case.[55]

5.10 The scope of a divestiture package will be outlined, with reasons, in the Office's decision or final report, and will be specified in greater detail in the UILs accepted in the final order made by the Office when implementing the remedy. The merger parties may subsequently add further assets to the specified package with the approval of the Office or may be required to do so by the Office, to secure divestment to a suitable buyer.

5.11 The merger parties will generally be prohibited from subsequently purchasing assets or shareholdings sold as part of a divestiture package or acquiring material influence over them. The Office will normally limit this prohibition to a period of five years.

5.12 In appropriate cases, the Office will consider other structural or quasi-structural remedies. A structural remedy other than divestiture might comprise, for example, an amendment to IP licences to grant a divestment buyer a perpetual and royalty-free licence.[56]

Divestiture of an existing business or package of assets

5.13 The Office will generally prefer the divestiture of an existing business, which can compete and contribute effectively on a stand-alone basis, independently of the merger parties, to the divestiture of part of a business or a collection of assets. This is because divestiture of a complete business is less likely to be subject to buyer and composition risk and can generally be achieved with greater speed.

5.14 Where a proposed divestiture comprises part of a business or a collection of assets, such as IP rights, the capabilities and resources of prospective buyers are likely to be more critical to a successful outcome than for a standalone business. A package of assets proposed for divestiture may, for example, lack an established infrastructure and its viability may therefore be more dependent on an appropriate match with the capabilities of the buyer.

5.15 A package of assets may also be far more difficult to define or 'carve out' from an underlying business,[57] and the Office may have less assurance that the buyer

[55] The Office notes the anticipated acquisition by Heineken UK Limited of Punch Taverns Holdco (A) Limited (2017), where the CMA required the sale of the Divestment Businesses in no more than 4 packages.
[56] See the OFT's investigations into the anticipated acquisition by Tetra Laval Group of part of Carlisle Process Systems (2006), where the OFT accepted UILs focused on an irrevocable, perpetual and exclusive licence of certain IP rights, and the completed acquisition by Unilever of Alberto Culver Company (2011), where the OFT accepted UILs from Unilever to divest the bar soap business of Alberto Culver, including the divestment of the Simple brand, which was effected by a perpetual and royalty-free licence covering UK, Ireland and the Channel Islands.
[57] DG COMP's Merger Remedies Study found that carve out problems were a common cause of serious design and implementation issues in a significant proportion of divestiture remedies within its purview.

will be supplied with all it requires to operate competitively or contribute in the media public interest. In such circumstances, the Office is likely to require additional protective measures, such as the identification of an upfront buyer (see paragraphs 5.28 and 5.32) to mitigate increased buyer and composition risk.[58] Where a package of assets is proposed for divestiture, the Office will require the merger parties to specify the composition and operation of the package in detail.

5.16 In particular circumstances, merger parties may propose a '*virtual divestiture*' consisting of the divestiture of production capacity[59] for a specified period rather than the conventional disposal of a business or a collection of assets.
Such a proposal may have higher risks and costs than a conventional divestiture and may require ongoing monitoring and compliance activity. The Office would need to satisfy itself that there was good reason to justify such a proposal in preference to a conventional divestiture and that the risks of the proposal could be appropriately contained.

Preference for avoiding 'mix-and-match' divestitures

5.17 Divestiture of a mixture of assets from both merger parties (a so-called 'mix- and-match' approach) may create additional composition risks such that the divestiture package will not function effectively. Therefore, if divestiture of a collection of assets or parts of a business is proposed, it will normally be preferable for all the assets to be provided by one of the merger parties unless it can be demonstrated to the Office's satisfaction that there is no significant increase in risk from a mix-and-match alternative.

Alternative divestiture packages

5.18 In some circumstances, it may be appropriate to define a more extensive and/or more marketable divestiture package (an 'alternative divestiture package'), which the Office would require the merger parties to sell if the initially proposed divestiture package were not sold within a specified period.[60]

5.19 Alternative divestiture packages may be appropriate if there is doubt as to the marketability of the initially proposed divestiture package or where a business is subject to major asset risks, and the speed of divestiture is likely to be a critical requirement. In such circumstances, the prior identification of an alternative, more extensive and more marketable package may be the most effective means

[58] See the CMA's investigation into the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited (2016), where the CMA found there would be significant composition risk in the divestiture of several hundred licensed betting offices.
[59] So-called 'virtual power plant' remedies are examples of this type of remedy.
[60] Such packages are sometimes referred to as 'crown jewel' packages. However, in view of the wide variety of usage of this term, the Office uses the more closely defined terminology of 'alternative divestiture packages'.

of facilitating rapid disposal if the initial package cannot be sold to a suitable buyer within a specified period.[61] Alternatively, the Office may require that, in the event that the merger parties' preferred divestiture does not proceed to its satisfaction within the timescales set out in the UILs in the Office's final order, a divestiture trustee may be appointed to ensure the sale of an alternative package.

5.20 The alternative divestiture package will include all the core assets necessary to remedy the identified concern. The Office will wish to satisfy itself that the buyer of such a package is committed to operating the core assets to compete effectively in the market(s) affected by the identified concern and is not primarily attracted by the additional assets. (In the context of media public interest, the motivation of profit, propaganda or prestige above public interest is part of this consideration.) The Office will identify the alternative package in its final report, but the existence of an alternative package will generally be excised from the published version of the final report to prevent the existence of the alternative package undermining the divestiture of the initial package.

Suitable buyers

Criteria

5.21 The identity and capability of a buyer will be of major importance in ensuring the success of a divestiture remedy. The merger parties will therefore need to obtain the Office's approval of the prospective buyer.

5.22 The Office will wish to satisfy itself that a prospective buyer is independent of the merger parties; has the necessary capability to compete; is committed to competing in the relevant market; and divestiture to the buyer will not create further competition concerns or operate against the public interest in the media. The relative importance that the Office attributes to each of these criteria will depend on the circumstances of the investigation. These criteria are considered in more detail below:

(a) Remedy. The acquisition by the proposed buyer must remedy, mitigate or prevent the SLC/PIT concerned or any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable.

(b) Independence. The buyer should have no significant connection to the merger parties that may compromise the buyer's incentives to compete

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

with the merged entity (e.g., an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance).[62] It may also be appropriate to consider links between the buyer and other market players.[63]

(c) Capability. The buyer must have access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets to enable the divested business to be an effective competitor and contributor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor and contributor. For example, a highly leveraged acquisition of the divestiture package which left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion. The proposed buyer will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority.[64]

(d) Commitment. The Office will wish to satisfy itself that the buyer has an appropriate business plan and objectives for competing and contributing in the relevant market(s), and that the buyer has the incentive and intention to maintain and operate the relevant business as part of a viable and active business[65] in competition with the merged party and other competitors in the relevant market.[66] [67]

(e) Absence of competitive or regulatory concerns. Divestiture to the buyer should not create a realistic prospect of further competition or public interest or regulatory concerns.

(f) Media Public Interest. Further, with regard to media public interest, divestiture to the buyer should provide submissions and evidence that address the matters set out at paragraph 5.20 above.

5.23 Except in circumstances where a divestiture trustee is in place, the merger

[62] See Co-Operative Group (CWS) Limited v OFT [2007] CAT 24, paragraph 195.
[63] The Office notes the CMA's investigation into the completed acquisition by Hain Frozen Foods UK Limited of Orchard House Foods Limited (2016).
[64] This is because the Office wishes to be satisfied that the divestment to the proposed purchaser will in fact go ahead. To the extent that a purchaser would face difficulties in obtaining such consents, this may call into question the suitability of the purchaser.
[65] The Office will routinely ask to see the proposed purchaser's annual accounts and business plan for the acquired business in assessing whether this criterion is satisfied.
[66] This approach was upheld by the CAT in Somerfield plc v Competition Commission (2006). The CC excluded limited assortment discount retailers from acquiring Somerfield stores on the basis that these were insufficiently close competitors to conventional supermarkets.
[67] The Office notes that the CMA will normally require the selling party to require from the divestment purchaser a warranty reflecting this obligation, or a variant of it, in its sale and purchase documentation. Such wording is included in the CMA's UIL template. See paragraph 2.5 and 3.1 of the UILs given by Vision Express (UK) Limited to the CMA on 15 November 2017 in relation to its acquisition of 209 Tesco Opticians outlets (2017).

parties are responsible for securing a prospective buyer and demonstrating that it satisfies the Office's criteria for a suitable buyer. However, the Office will keep the progress of the divestiture under close scrutiny.

5.24 Where the merger parties receive interest in the divestiture package from multiple prospective buyers, they may ask the Office to evaluate the suitability of two of the short-listed buyers. This is to avoid the merger parties progressing one prospective buyer, possibly through lengthy due diligence, but this buyer then being found not to satisfy the Office's buyer suitability criteria, and the merger parties having to start the assessment process afresh.

5.25 In requiring that the proposed buyer be independent of and unconnected to the merger parties, the Office will pay close attention to any links that would exist between the merger parties and the buyer following divestment. This includes any proprietary interest that the merger parties would retain in or over the divested business that could impede the successful, independent operation of the divested business.[68]

5.26 Buyers may require access to key inputs or services at appropriate terms from the merger parties, on an interim basis, in order to enable the divestiture to operate effectively. Such arrangements may be permitted by the Office for a limited period.[69] The Office may also permit or require non-solicitation clauses or other measures to protect the buyer from the merger parties for a limited period (e.g., up to one year) to enable the buyer to become established as an effective competitor and contributor in the relevant market(s).

5.27 The Office is seeking to assess whether the buyer will compete vigorously, and, where appropriate, contribute to the media public interest in the future on the basis of what it has acquired to address the identified concern or the adverse effect resulting from it. The Office will consider the evidential basis on which the merger parties (and the proposed buyer) assert that the proposed buyer will have an incentive to compete and contribute going forward.[70]

5.28 On the basis that the Office will approve a divestment buyer only where it is confident that the acquisition by that proposed buyer does not itself create a realistic prospect of an identified concern within any market or markets in the

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

[69] The Office notes the CMA's investigation into the anticipated acquisition by Muller UK & Ireland Group LLP of the dairy operations of Dairy Crest Group plc (2015), where the CMA accepted UILs by Muller UK & Ireland Group LLP that included arrangements to provide for the expansion of an existing supplier to serve national grocery retailers with fresh liquid milk in the areas where the CMA found competition concerns.

[70] The Office will scrutinise the purchaser's incentives particularly carefully in a situation in which the purchaser is paying no compensation for the divested assets or business, or a price that is materially below market value.

Islands, the Office would not expect to investigate this transaction.[71]

Upfront buyers

5.29 Where the Office is in doubt as to the viability or attractiveness to buyers of a proposed divestiture package (i.e. composition risk) or believes there may be only a limited pool of suitable buyers (i.e. buyer risk),[72] it may require the merger parties to obtain a suitable buyer that is contractually committed[73] to the transaction before approving the UILs (at Phase 1) or it may accept UIL that the transaction will only proceed once a suitable buyer is contractually committed (Phase 2).[74] This is because, at either Phase 1 or Phase 2, undertakings given to the Office without an upfront buyer usually require appointing a divestiture trustee to sell the divestiture package (or more, if needed) at no minimum price if the parties fail to complete a sale within the set divestment period. However, this offers limited benefit if there are no suitable buyers interested in purchasing.

5.30 The Office generally adopts a more cautious approach with regard to these concerns at Phase 1 than at Phase 2. At Phase 1, the Office will generally require an upfront buyer unless it considers that there are reasonable grounds for not doing so and, in particular, where the risk profile of the remedy does not require it. This may be the case where, for example, there is a liquid market for the assets or business; the assets or business are viable and profitable; there are a number of potential buyers; and discussions with buyers are at an advanced stage. To the extent that the merger parties are unable to identify a suitable buyer at Phase 1 and so cannot offer an upfront buyer, the Office can move the merger to Phase 2.[75] This helps to align the interests of the merger parties with those of the Office and customers, as the merger parties are motivated to achieve a sale swiftly to end their exposure to the possibility of a reference, minimising risks around deterioration of the divestiture package, and avoiding any continuation of the identified concerns in the market if the merger is completed.

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[71] The transaction could still require merger control filings outside the Cayman Islands.

[72] See the CC's investigation into the completed acquisition by Sports Direct International plc of a number of stores from JJB Sports plc (2010). In assessing the need for an upfront buyer, the CMA will often consider the number of potential purchasers that could reasonably be expected to be able and willing to acquire the divestment business. See the CMA's investigation into the completed acquisition by Immediate Media Company Bristol Limited of certain assets of Future Publishing Limited (2015), where the CMA, in deciding that an upfront buyer condition was required, noted that the proposed divestment packages were not standalone businesses, and the number of possible buyers was reduced.

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

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

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

5.31 At both Phase 1 and Phase 2, the use of an upfront buyer brings other advantages in reducing the risk of an unsuccessful remedy:

(a) The Office is able to consult publicly on the identity and suitability of the proposed buyer prior to accepting the UILs. This is particularly important where the identity of the buyer is critical to the success of the divestment remedy (e.g., where the buyer will need to apply its existing resources and capability to exploit the divestiture package). The Office is more likely to be confident to approve such a buyer in cases where third parties have been formally given an opportunity to comment on that proposed buyer.

(b) The certainty provided for by an upfront buyer may provide latitude for the Office to explore a remedy option that the Office would not feel confident accepting in a non-upfront buyer context. Certainty around saleability becomes less important where this is going to be addressed prior to the UILs or the Office's final order being accepted. For this reason, the Office is likely to be less prescriptive where an upfront buyer is used, possibly providing merger parties with greater flexibility in determining, for example, which of the overlapping assets they wish to sell.

5.32 Where the Office considers that the competitive capability of the divestiture package may deteriorate pending the divestiture (i.e., asset risk) or completion of the divestiture may be prolonged, it may also require that the upfront buyer completes the acquisition of the divestiture package before the merger may proceed or, in the case of a completed merger, before the merger parties may progress with integration.

5.33 In cases involving the divestment of multiple discrete assets or businesses, of which only a minority raise divestment risks justifying the use of an upfront buyer, the Office may consider requiring a partial upfront buyer solution. In this situation, the merger parties may be required to sell to an upfront buyer those assets or businesses that raise concerns of the type outlined previously, whilst the Office will permit the remainder of the assets or businesses to be sold following acceptance of the UILs or Final Order.[76]

Effective divestiture process

Objective of process

5.34 An effective divestiture process will protect the competitive, and where relevant, the media public interest potential of the divestiture package before disposal and

[76] The Office notes the OFT's investigation into the anticipated acquisition by Co-operative Group Limited of Somerfield Limited (2009), where the OFT required divestment to an upfront buyer only in relation to those stores in which there were expected to be a limited number of potential effective purchasers.

will enable a suitable buyer to be secured in an acceptable timescale. The process should also allow prospective buyers to make an appropriately informed acquisition decision.

Protecting the divestiture package

5.35 The merger parties may have significant incentives to run down or neglect the business or assets of a divestiture package, in order to reduce its future competitive impact. The resulting asset risk may also be influenced by such factors as the length and complexity of the divestiture process and the pace at which customer goodwill and employee relations may erode.

5.36 To protect against asset risk, the Office will generally seek an interim undertaking from the merger parties. This is to maintain the divestiture package and ensure the competitive position of the package is not undermined. Generally, it will require the divestiture package to be held and managed separately from the retained business. The failure to honour an undertaking may affect a licensing decision.[77]

5.37 The appointment of a 'hold-separate' manager, or management team, may also be required to manage the assets/business to be divested, in order to maintain their competitiveness and separation from the retained assets.

Use of monitoring trustees

5.38 For completed mergers, where a monitoring trustee has not already been appointed at the point at which UILs are put in place, the Office will normally require the appointment of a monitoring trustee to oversee the merger parties' compliance and, if applicable, the performance of the hold-separate manager. A monitoring trustee may also be required for anticipated mergers where the Office determines that the risks associated with the divestment remedy warrant it.

5.39 The monitoring trustee will have an overall duty to act in the best interests of securing an appropriate divestiture. The monitoring trustee will monitor the ongoing management of the divestiture package and the conduct of the divestiture process. The Office will have the right to propose and direct measures necessary to ensure compliance with the UILs in the Office's final order (which would be reflected in the wording of any final order).

5.40 Please see paragraphs 4.44 to 4.49 and Chapter 8 for more information on the considerations regarding the appointment of trustees.

[77] The Office notes the considerations regarding the use, design and implementation of interim measures as set out in the CMA's CMA60.

The divestiture period

5.41 At Phase 2, the Office will state in its final report the period in which the merger parties should achieve effective disposal of a divestiture package to a suitable buyer (i.e., the '*initial divestiture period*'). However, this period may be excised from the final report if it is considered that disclosure to third parties may undermine the divestiture process.

5.42 The length of this period will depend on the circumstances of the merger but will normally be a maximum period of six months. The Office, when determining the divestiture period, will seek to balance factors which favour a shorter duration, such as minimising asset risk and giving rapid effect to the remedy, with factors that favour a longer duration, such as canvassing a sufficient selection of potential suitable buyers and facilitating adequate due diligence. The divestiture period may be extended by the Office where this is necessary to achieve an effective disposal.

5.43 While the merger parties are responsible for securing a suitable buyer in the divestiture period, the Office will keep the progress of the divestiture process under review, through regular reporting and, where applicable, through the scrutiny of a monitoring trustee.

Use of divestiture trustees

5.44 If the merger parties cannot procure divestiture to a suitable buyer within the terms of their UILs, then the Office may require the parties to appoint an independent divestiture trustee to dispose of the package within a specified period (the '*trustee's divestiture period*'). The divestiture will be at the best available price in the circumstances, but subject to prior approval by the Office of the buyer and the divestiture arrangements.

5.45 The Office may require that a divestiture trustee is appointed before the end of the initial divestiture period (e.g., if the Office is not satisfied that divestiture is likely to take place within that period) or at the outset of the divestiture process.[78] The role of a divestiture trustee is distinct from that of a monitoring trustee, but the two roles may be performed by the same person.

Review of divestiture documentation

5.46 The Office will wish to ensure, before providing its final approval of any divestiture, that the divestiture agreement and relevant supporting

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

documentation include all assets required to be divested and contain no provisions that are inconsistent with the remedial objectives of the divestiture.

6. IP REMEDIES

Introduction

6.1 The licensing or assignment of IP, including patents, licences, brands and data, may be viewed generally as a specialised form of asset divestiture. However, in certain cases, the terms of a licence may contain ongoing behavioural elements such that the remedy is a structural/behavioural hybrid. The key element is the extent to which any material link between licensor and licensee will exist following award of the licence.

6.2 A remedy that requires an assignment or licence of an IP right that is exclusive, irrevocable and non-terminable with no performance-related royalties will effectively be treated by the Office as structural in form and subject to similar consideration and evaluation as an asset divestiture. A licence that requires a licensee to rely on the licensor for updates of the technology or continuing access to specialist inputs or know-how will be regarded as a behavioural commitment, which is subject to significant risks of not being an effective remedy.

6.3 For licensing of IP alone to be effective as a remedy, it must be sufficient to significantly enhance the acquirer's ability to compete with the merger parties and thus address the identified concern and any resulting adverse effects.[79] Such a remedy may not be effective if the IP needs to be accompanied by other resources (e.g., technical expertise and sales networks) to enable effective competition if these resources are unlikely to be available to the potential buyers of the IP.

6.4 In view of the possible risks to effectiveness that may result from using IP remedies, the Office will generally prefer to divest a business including IP rights, where this is feasible, rather than rely on licensing IP alone. This is because divestiture of a business including IP rights is more likely to include all that the buyer needs to compete effectively with the merger parties.

Design factors

6.5 The appropriate design of an IP remedy may be influenced by a number of factors specific to the investigation, such as:

(a) the form and jurisdiction of the relevant IP (e.g., patent, exclusive licence

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

and trademark). The Office will wish to ensure that the IP to be divested is sufficient to enable a buyer to compete effectively. This may sometimes include less easily transferable forms of IP (e.g., 'know-how').[80] Where there is uncertainty regarding the scope of a licence or its terms and conditions, the parties may be required to divest the underlying right and accept a licence back;

(b) the relative specialisation of the IP. Highly specialised IP may impose particular constraints on selecting a suitable buyer, as there may be few parties competent to use the IP;

(c) the rate of innovation expected in the relevant market. A high rate of innovation may imply a shorter required duration for a licensing remedy than in a more stable market; and

(d) forms of payment for IP. The form of payment (e.g., one-off payment, royalties or profit shares) may have an effect on competitive incentives.

6.6 IP rights generally enable the remuneration of investment in innovation by granting time-limited exclusivity. In considering the design and scope of IP remedies, the Office will recognise the need for preserving incentives for innovation while addressing competitive concerns.

6.7 Mergers critically dependent on IP rights may have international repercussions due, for instance, to international filing and licensing of patent rights. International cooperation with other competition authorities is therefore often particularly necessary in these cases.

[80] See the European Commission's investigation into the creation of a jointly controlled full function joint venture between Shell and BASF (2000), where the European Commission found that certain difficulties in transferring 'know-how' and other types of IP would have significantly reduced the scope and effectiveness of a licensing commitment.

7. BEHAVIOURAL REMEDIES

Introduction and general principles

7.1 Behavioural remedies are designed to address an identified concern and/or its adverse effects by regulating the ongoing conduct of parties following a merger.

7.2 The Office tends to use behavioural remedies as the primary source of remedial action where:

(a) structural remedies are not feasible;

(b) the identified concern is expected to have a short duration;

(c) at Phase 2, behavioural measures will preserve substantial RCBs that would be largely removed by structural measures; or

(d) better address media public interest concerns.

7.3 The Office may also use behavioural measures as an adjunct to structural measures.

Design, monitoring and enforcement

7.4 Behavioural remedies seek to change aspects of business conduct from what may be expected, based on businesses' incentives and resources, or the public interest in the media. The design of behavioural remedies should seek to avoid four particular forms of risk to enable these measures to be as effective as possible:

(a) Specification risks: these risks arise if the form of conduct required to address the identified concern, or its adverse effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance. The intended operation of the measure needs to be clear to the persons to whom it is directed and other relevant parties, so that it is apparent what conduct constitutes compliance and what does not. For example, a commitment to permit access '*on fair and reasonable*' terms may create significant specification risk, as the provision may be insufficiently specific to allow effective enforcement. Markets that are subject to frequent change in products or supply arrangements may be particularly prone to specification risk if the definition of required conduct is vulnerable to such changes.

(b) Circumvention risk: as behavioural remedies generally do not deal with the source of an identifiable concern, it is possible that other adverse forms of

behaviour may arise if particular forms of behaviour are restricted.[81] For example, if prices are controlled, a firm may reduce product quality. To avoid or reduce these risks, behavioural measures need to deal with all the likely substantial forms in which enhanced market power may be applied. In practice, this may not be feasible or may make the behavioural measures too complex to monitor.

(c) Distortion risks: these are risks that behavioural remedies may create market distortions that reduce the effectiveness of these measures and/or increase their effective costs. Distortion risks may result from remedies overriding market signals or encouraging circumvention behaviour. For example, prohibiting the use of long-term contracts may result in a lack of incentives to compete for new business.

(d) Monitoring and enforcement risks: even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement. This may be due to a variety of causes, such as the volume and complexity of information required to monitor compliance; limitations in monitoring resources; asymmetry of information between the monitoring agency and the business concerned; and the long timescale of enforcement relative to a rapidly moving market.

7.5 For behavioural remedies to have the desired impact, it is essential that there are effective and adequately resourced arrangements in place for monitoring and enforcement, so that there is a powerful threat that non-compliance will be detected, and that action will be taken to enforce compliance where this is necessary.

7.6 The Office is responsible for the monitoring and enforcing compliance of remedies under the Act.[82] Customers and competitors of the merged entity may be in a strong position to report to the Office on instances of non-compliance where they have appropriate resources and incentives. However, such persons may be inhibited from fulfilling this reporting role by lack of resources and verifiable information, lack of understanding of the measures, fear of reprisals and other disincentives. The likelihood of effective monitoring will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime.

7.7 In view of the constraints on the Office's resources and the possible limitations on the reliance that can be placed on the reporting role of customers and competitors, it may be necessary for the Office to require the merger parties to appoint and remunerate a third-party monitor to enable the Office to fulfil its

[81] This may be sometimes referred to as a 'waterbed effect'.
[82] Section 91 of the Act.

monitoring responsibilities effectively.[83]

7.8 If the merged entity is considered to have a dominant market position, then certain types of conduct that behavioural remedies may seek to prevent (e.g., predation or foreclosure of access) may already be prohibited under section 70 of the Act.

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

Duration

7.10 As behavioural remedies are designed to have ongoing effects on business conduct throughout the period they are in force, the duration of these measures is a material consideration.

7.11 The Office may specify a limited duration if measures are designed to have a transitional effect. Where measures need to apply as long as an identified concern persists and as this period can rarely be predicted during the course of an investigation, the Office will generally rely on the merged parties applying for variation or cancellation of the measures on the basis of a significant change of circumstances[84] or possibly recommend that the Office reviews the need for the measures after a given period. However, the Office may, in addition, specify a long-stop date in a '*sunset clause*' beyond which the measures will definitely not apply. The period used for the long-stop date will depend on the circumstances of the investigation.[85]

Types of behavioural remedy

7.12 Effective remedy packages may require both enabling measures, which address an SLC by seeking to remove obstacles to competition or stimulating competition, and measures that control outcomes, which restrict the adverse effects of an SLC rather than address the SLC itself. Enabling measures may be further subdivided between measures that restrain the impact of vertical

[83] See the OFT's investigation into the completed acquisition by Macquarie UK Broadcast Ventures Ltd of National Grid Telecoms Investment Ltd, Lattice Telecommunications Asset Development Company Ltd and National Grid Wireless No.2 Ltd (2007), where the merger parties undertook to remunerate an adjudicator responsible to the OFT to resolve contractual issues as part of a package of behavioural remedies.

[84] This may be terms of the Office's final order, and subject to further consultation.

[85] See the CMA's investigation into the anticipated acquisition by Mastercard UK Holdco Limited of Vocalink Holdings Limited (2017).

mergers and measures that restrain market power in a horizontal market context.

7.13 The variety of circumstances, conduct and possible behavioural measures that may be encountered on individual investigations is extensive. This guidance therefore seeks to outline the Office's general approach rather than deal with all possibilities. Immediately below is a discussion of enabling measures and SLC. Later in this chapter a discussion of the protection of the public interest in the context of media plurality.

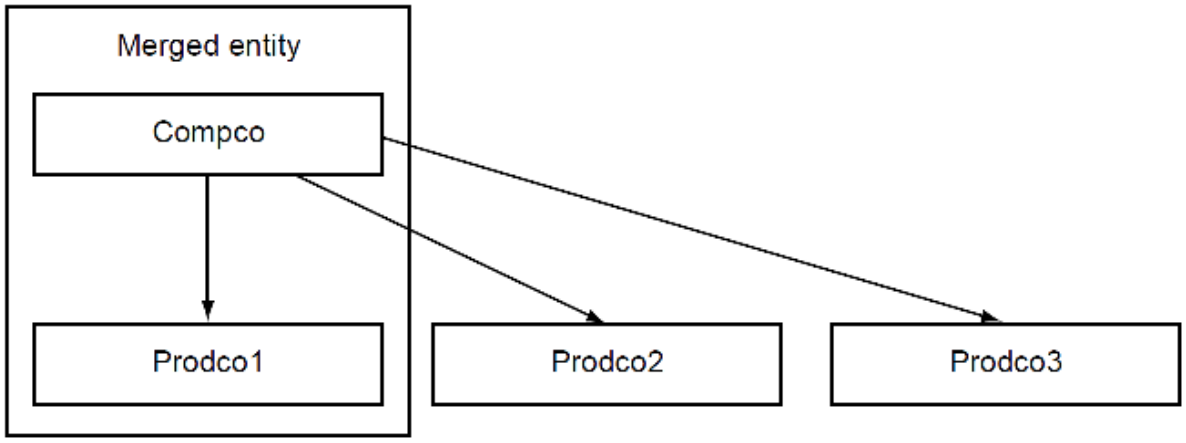
Enabling measures

Restraining the impact of vertical mergers

7.14 A vertical merger involves the merger of firms at different levels of the supply chain of particular goods or services. Where a party to such a merger has significant market power at one or more levels of the supply chain, the resulting merger may result in an SLC, typically through the incentive and ability of the merged entity to disadvantage competitors by foreclosing access to key inputs, facilities or customers and/or exploiting access to confidential information.

7.15 For example, if, as illustrated in Figure 3 below, the manufacturer (Compco) of most of a key industry component acquired a major user of this component (Prodco1), the ability of other users (Prodco2 and Prodco3) to compete could be disadvantaged by the merged entity through restricting supply of this component to Prodco2 and Prodco3 or making use of information concerning component orders by Prodco2 and Prodco3.

Figure 3: Vertical merger configuration



Source: CMA.

7.16 An SLC arising from a vertical merger may be remedied effectively by structural measures. Such measures might involve reversing the merger but could also

involve reducing the market power that the merged entity has at the critical stage of the supply chain (e.g., partial divestiture of Compco). However, if divestiture is not appropriate or feasible, then behavioural measures may enable continued access to necessary products or facilities on appropriate terms or prevent the merged entity exploiting privileged access to information.

Access remedies

7.17 Access remedies seek to maintain or restore competition by enabling competitors to have access on appropriate terms to the products and facilities of a merged entity that they require to remain competitive.

7.18 An access remedy will normally need to specify an access commitment by the merged entity to customers in significant detail so that customers and monitoring agencies can enforce the commitment effectively. This will include details of the product or facility to be provided, including quality and technical parameters, and the terms of supply of the product or facility, including service levels and the basis of pricing. The latter may be particularly complex and will be subject to many of the same issues that are encountered with price caps. If the access commitment is not specified or monitored in sufficient detail, then the measure will be vulnerable to specification risk and the merged entity may be able to avoid its obligations. In such circumstances, the Office will consider alternative forms of remedy (e.g., divestiture) that are likely to be more effective.

7.19 To overcome specification risk, the Office will generally require that an access remedy should make explicit provision for accommodating future changes, for example, in product specifications or supply arrangements. Where a market is likely to be subject to frequent technological change or other wide-ranging market developments, there is likely to be a significant risk that an access remedy will become ineffective if the terms of the access commitment do not accommodate these changes. However, significant technological change might also reduce the market power that results in the SLC (e.g., effective substitutes are developed for the component supplied by Compco).

7.20 In some supply arrangements, certain factors may be particularly important for competitive access that are not easily specified (e.g., quality of product support, priority for system upgrades, or quality of management assigned to a customer's account). Such factors may result in 'soft biases' in access to supply that may generate significant circumvention risk and may significantly undermine the purpose and suitability of an access remedy.[86]

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

7.21 In certain circumstances, it may be possible to simplify the specification of an access remedy by obliging the merged entity to supply a particular product on ' *fair, reasonable and non-discriminatory*' (FRAND) terms, where supplies to external customers are provided on the same or similar terms as apply to its own businesses. For this to be effective, the nature of FRAND terms must deal adequately with the circumstances of external customers and must be transparent to customers and monitoring agencies in sufficient detail to enable effective enforcement.

7.22 The use of FRAND terms may still leave competitors vulnerable to a margin-squeeze by the merged entity as it may have an incentive to charge all downstream businesses, including its own, a uniformly high price since reduced profitability in its downstream business can be offset by higher profitability in its upstream business. The Office may therefore require that use of FRAND terms is accompanied by provisions to protect against a margin squeeze (e.g., submission of regular reports demonstrating full cost recovery in the downstream business).

7.23 Where it is necessary to preserve access to a key facility owned or controlled by a vertically merged company, and the usage and capacity of the facility is readily assessed, the Office may determine that the most practical and effective means of providing access to competitors is to cap usage of the facility by the merged company and require it to auction remaining capacity to third parties.[87] This would be effectively a form of '*virtual divestiture*' (see paragraph 5.16).

Firewall measures

7.24 Firewall measures seek to prevent a vertically integrated company from accessing and using confidential or privileged information generated by competitors' use of the merged company's facilities or products. For example, in Figure 3, in the absence of firewall provisions, Prodco1 may be able to exploit privileged information regarding the orders and deliveries of key components from Compco to Prodco2 and Prodco3.

7.25 Firewall measures prevent access to confidential or privileged information by effectively insulating the firm or division generating the information from other group companies. This is generally achieved by restricting information flows and use of shared services, physically separating premises and staff, and regulating transfers of management and any permitted interactions between relevant

[87] See the CC's investigation into the completed acquisition by Centrica of Dynegy Storage Ltd and Dynegy Onshore Processing UK Ltd (2006), where the CC required Centrica to restrict its usage of the Rough Gas Storage Facility to a percentage of total capacity to prevent foreclosure of access.

staff.[88]

7.26 To ensure effective compliance with firewall provisions, the relevant firm will normally need to commit significant resources to educating staff about the requirements of the measures and supporting the measures with disciplinary procedures and independent monitoring.

Restraining horizontal market power

7.27 Where a firm gains market power as a result of a horizontal merger, it may be able to use the strength of this position in a number of ways to limit or restrain competition, including by:

(a) requiring customers to enter into long-term and/or exclusive contracts;

(b) creating switching costs for customers through, for example, volume discounts, contractual penalties or requiring complex switching procedures;

(c) bundling or tying the sale of particular products; and

(d) selective discounting or predation.

7.28 This category of remedies comprises measures that prohibit, restrict or discourage types of behaviour, such as those listed above, that may limit or restrain competition. The selection and design of these measures will depend critically on the circumstances revealed by the investigation and the need to avoid specification, circumvention, and monitoring and enforcement risks. Where circumstances point to the use of these measures, the Office will follow the general approach of considering the likely anti-competitive behaviours that the merger parties may have an incentive and ability to engage in. It will then consider the measures that may be taken to prevent or limit these behaviours and the effectiveness and costs of these measures.

7.29 As an example of this approach, the use of long-term and/or exclusive contracts may create a significant barrier to entry or expansion. However, if, in the market in question, firms need to invest heavily to acquire new customers (e.g., by investing in new facilities or systems), then requiring that all contracts are short term in nature may generate significant distortion risks, as this would reduce incentives for firm to compete for new contracts due to insufficient opportunity to recoup their investment. In implementing a constraint on the use of long-term contracts, the Office will therefore seek an appropriate balance between

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

facilitating switching and permitting sufficient incentives to compete for new contracts.

7.30 Selective discounting or price discrimination can also have the effect of creating barriers to entry or expansion when used systematically to reduce prices to particular customers that are more likely to switch to other suppliers. Measures to restrict selective discounting or price discrimination may therefore be necessary where enabling entry and expansion is appropriate to address the SLC. However, such a restriction may only be necessary for a limited period until other sources of competition develop. Measures restricting selective discounting or price discrimination could generate significant distortion risk by adversely affecting the competitive dynamics of a market if maintained in the long term.

7.31 The Office will have particular regard to avoiding circumvention risk in implementing measures limiting behaviour that would restrict competition. This is because firms with enhanced market power may readily evolve new forms of behaviour to replace restricted conduct.

Controlling outcomes

7.32 Remedies that control or restrict the outcomes of business processes, such as price caps, supply commitments and service level requirements, seek to prevent the merger parties from exercising the enhanced market power that they are likely to acquire from a merger. As such, these remedies seek to restrict the adverse effects expected from a merger rather than addressing the source of the SLC.

7.33 In order to overcome specification risk, remedies that control outcomes normally need to specify in significant detail the products or services that are subject to control and the basis of the control (e.g., the application of price indices to a price cap). The remedy will generally also need to specify how the control will deal with changes, such as the introduction of new products.

7.34 This class of remedy is subject to several significant disadvantages regarding its effectiveness and cost:

(a) Defining appropriate parameters for the control measure (e.g., the level of a price cap) may be complex and impractical and the measure may therefore be vulnerable to specification risks. This is especially likely where any of the following conditions apply:

(i) Pricing in the relevant market is volatile.

(ii) Products or services are differentiated rather than

homogeneous.

(iii) Prices are individually negotiated.

(iv) Supply arrangements and products are subject to significant ongoing change.

(b) This class of remedy directly overrides market signals with the result that it may generate substantial distortion risks over time, increasing the effective cost of the remedy or reducing its effectiveness. For example, a price cap may deter entry, or a supply commitment may discourage product innovation.

(c) The measure may be vulnerable to circumvention risks despite the addition of complex preventative provisions. For example, a price cap may be circumvented by a firm reducing the quality of controlled products or restricting the supply of controlled products.

(d) Monitoring and enforcement may be costly and intrusive and may lack effectiveness, especially where the form of remedy is complex.

7.35 In view of these disadvantages, the Office will only use remedies that control outcomes where other, more effective, remedies are not feasible or appropriate. In addition, where this class of remedy is employed, it is most likely to be used on a temporary basis unless there is no alternative to a continuing regulatory solution.

Price caps

7.36 Price caps are likely to be the most common form of measure for controlling outcomes and illustrate many of the issues outlined above.

7.37 Different approaches may be adopted to defining the products and prices to be controlled depending on the circumstances of the investigation:

(a) Prices of all affected products may be individually capped. This may be impractical where a large number of products are involved and may be inflexible in dealing with product changes.

(b) The average price of a basket of products may be capped. This allows greater flexibility in taking account of shifts in demand between products, but the weighting of the constituents of the basket may be problematic and subject to distortion, for example, if revenue-weighting is used and the firm introduces a number of low cost product variants.

(c) The price cap may be restricted to key benchmark products. This

approach could greatly simplify monitoring and compliance but is only likely to be effective if a few key products continue to account for a large proportion of sales, and the pricing of other products is expected to remain closely related to the benchmark products.

7.38 The Office will seek a basis for the price cap which will prevent the enhanced market power acquired through the merger from being reflected in prices. The basis of a price cap may take a variety of forms:

(a) Prices may be benchmarked to the prices of products in analogous markets that are determined by competition. In practice, this may only be feasible in limited circumstances due to the lack of an analogous market.

(b) Prices may be determined on the basis of input cost data and an approved return on capital. This resembles the approach adopted by many sectoral regulators, but generally requires a highly resource-intensive regulatory process backed by extensive information gathering and enforcement powers to be effective.

(c) The price cap may be indexed to pre-merger prices using an index that is representative of input cost changes after incorporating current productivity gains. The Office will want to use an index which has robust data sources and is constructed independently of the merger parties. Use of such an index may provide a broad approximation to a competitive price outcome in the short term but is at risk of departing significantly from such an outcome in the medium to long term.

7.39 The Office will generally require that price caps are accompanied by measures to prevent circumvention risk that may arise, for example, through the merged entity restricting the supply or service levels of price-controlled products or reducing product quality.

The protection of the public interest in the context of media plurality

7.40 Media plurality goes to the heart of the democratic process and is protected by the law.

7.41 In determining whether a proposed change of control would be contrary to the public interest, the Office considers the following:[89]

(a) the need for the accurate presentation of news and the free expression of opinion in media;

[89] Section 25A.(3) ICTA.

(b) the need, in relation to every different audience in the Islands, for there to be a sufficient plurality of persons with control of the media enterprises serving the audience;

(c) the need for the availability throughout the Islands of a wide range of content service, which (taken as a whole) are both of high quality and calculated to appeal to a wide variety of tastes and interests; and

(d) the need for persons carrying on media enterprises, and for those with control of such enterprises to have a genuine commitment to the attainment of the information and communications technologies policy objectives, when they are promulgated.

7.42 Many of the divestiture and behavioural remedies, and implementation policies discussed earlier, can be applied in this context.

7.43 For example, the plurality of media ownership may be addressed by the divestment of shares held. In the UK, the issue arose following the purchase by BSkyB (39.1% owned by the News Corporation) of a 17.9% stake in ITV, the UK's second largest 'free-to-air' broadcaster after the BBC. The then competition regulator in this context, the Competition Commission, determined[90] that a stake of even as low of 17.9% gave BSkyB a material amount of influence over the strategic direction of ITV and concluded that a divestment of shares to below 7.5% would be effective in remedying the SLC and the consequent adverse effects on the public interest.[91]

7.44 Other remedies may include altering the constitution of a body corporate, whether in connection with the appointment of directors or the establishment of an editorial board. It may be appropriate to accept a UIL to let the independent board members select the editor of the newspaper or allow the Office to appoint a qualified person to act as a shadow director (generally or for the specific purpose of the appointment or dismissal of editor or journalists).

7.45 Attaching conditions to the operation of the enterprise itself may also be appropriate.

7.46 The combination of the merger provisions and the licensing provisions in the sectoral legislation also facilitate the discussion matters such as whether the parties' senior executives were "fit and proper persons". Such a concern may

[90] https://webarchive.nationalarchives.gov.uk/ukgwa/20110708171031/http://www.competition-commission.org.uk//rep_pub/reports/2007/535itv.htm

[91] The CC conclusion on plurality was upheld by the courts - https://www.catribunal.org.uk/sites/default/files/1095_Sky_1096_Virgin_CoA_Judgment_21.01.10.pdf

be addressed by the termination of certain senior executives.[92]

[92] In 2011 it came to light in the UK that News International journalists and their associates had hacked into private mobile phone voice mails of a wide range of victims, celebrities and politicians. Eventually, the scandal resulted in the closure of the News of the World.

8. TRUSTEES AND THIRD-PARTY MONITORS

Appointment and responsibilities

8.1 Trustees or third-party monitors (collectively 'trustees') may be used by the Office in a variety of circumstances to assist in the monitoring and implementation of UILs and Final Orders.

8.2 Trustees should always be independent of the parties, have appropriate qualifications and capacity for the task, and should not be subject to conflicts of interest. Trustees may be part of an accounting firm, management consultancy or other professional organisation. Trustee candidates may be proposed by the merger parties but can only be appointed by the parties following approval by the Office.

8.3 The Office may set a timetable for the appointment of trustees and would normally expect a trustee to be nominated and approved before UILs or a Final Order made. Typically, only the Office can terminate the appointment of trustees before completion of their responsibilities. However, the merger parties can make representations to the Office to replace the trustees if they have good cause.

8.4 The trustee's responsibilities will be specified in the trustee mandate/letter of engagement, which will be approved by the Office. The trustee will perform the directions of the Office in accordance with the mandate/letter and will not be permitted to accept instructions from the merger parties. The mandate/letter will also have appropriate clauses governing conflict of interest, trustee liability and confidentiality.

Remuneration

8.5 The merger parties are responsible for the remuneration of trustees. The structure of remuneration must not compromise a trustee's independence and must provide sufficient incentive to perform the required function to an appropriate standard. To ensure that this is so, the Office must approve the remuneration agreement.

[End of Document]