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Highly regarded for its in-depth technical knowledge, innovative tactical input and involvement in the most high-profile, complex antitrust cases, Linklaters is known for providing pragmatic, business-oriented advice. Its work ranges from strategic merger control cases to cutting-edge behavioural and regulatory matters at a national, EU and global level; the group in London is an integral part of the global competition team. With a wide network of offices located in the key competition hubs, including Washington, New York, Brussels, London, Beijing and Hong Kong, the team is able to advise clients on a fully integrated basis, strategically and consistently on a global level while maintaining an excellent understanding of competition law and the ability to implement tactics domestically via their excellent regulator relationships.
Legislation and Enforcing Authorities

Merger control legislation
Merger control in the UK is governed by Part 3 of the Enterprise Act 2002 (as amended). The Enterprise Act 2002 was amended by the Enterprise and Regulatory Reform Act 2013, taking effect from 1 April 2014. This Note discusses the relevant rules and procedures under the UK merger control regime.

Authorities
Since 1 April 2014, the competent authority for UK merger control has been the Competition and Markets Authority (“CMA”). The CMA is an administrative authority that brings together the functions previously carried out by the OFT and the Competition Commission (“CC”), whilst retaining a distinction between phase one and phase two review stages. The CMA operates independently from the UK Government (subject to the Government’s explicit role in reviewing an individual transaction when it intervenes on public interest grounds).

Summary of the legislative changes in 2014
As noted above, the merger control regime changed significantly in April 2014 by bringing together into one body, the CMA, the functions previously carried out at phase one (by the OFT) and at phase two (by the CC). However, the two-phase process remained within the CMA, with phase one cases being decided by CMA officials, and phase two cases being decided by an Inquiry Group panel of expert CMA Members. In addition to merging the OFT and CC into a single institution, the reforms which took effect in April 2014 gave the CMA enhanced powers to protect its remedial options in situations in which the parties have already completed the acquisition (i.e. by keeping the businesses separate in operational terms) and also the power to impose such hold-separate requirements (including potentially to prevent completion) in anticipated mergers (in very exceptional cases). The reforms also saw the CMA subject to a 40-working day statutory timetable in all phase one cases (see The review process, page 14), and imposed statutory time limits for the first time in the context of remedies at phase one and phase two (see Procedural steps, page 19). Finally, the CMA gained the ability to compel merging parties and third parties to provide information at phase one, a power which the OFT did not have.

Additional legislation
The merger control provisions contained in the Enterprise Act 2002 apply to all sectors, and there is no separate foreign investment regime in the UK. Mergers in certain sectors may, in addition to the competition-based merger control regime, be subject to scrutiny on public interest grounds if the UK Government chooses to intervene in a particular merger. These sectors are currently defence, media (including broadcasting and newspapers) and financial services (see Non-competition issues, page 18). The UK Government also retains golden shares in the defence sector that it may use to control investments in applicable companies.

In addition, there is a specific merger regime applicable to water (and sewerage) mergers. Under the Water Industry Act 1991 (as amended by the Water Act 2014), there are provisions for the CMA to refer mergers involving two or more “water enterprises” for a phase two investigation unless the turnover of one or both of them falls below certain thresholds, or the CMA believes that one of the exceptions to its duty to refer applies or accepts undertakings in lieu of a phase two reference. The function of the special water merger control regime is to ensure that the ability of the water regulator, Ofwat, to make efficiency comparisons between suppliers in carrying out its regulatory functions is not compromised.
Enforcement
As discussed in Notification (see page 10), the fact that a notification is not mandatory, even in circumstances in which the jurisdictional thresholds are met, means that the CMA does not have an interest in investigating transactions where there is no overlap between the parties’ activities in the UK. Where the transaction does have an impact on a market in the UK, or might be thought to do so, merging parties should consider the level of likely competition concern and the probability of the CMA proactively choosing to investigate the transaction on its own initiative by sending the parties an enquiry letter. The strategic risk assessment in determining whether to notify in the UK is therefore a reasonably nuanced one in some cases. The CMA will investigate transactions that are between foreign-to-foreign parties where the transaction may have a substantive effect in the UK. There are a number of cases in which the share transfer has taken place outside of the UK but the merger has had competitive effects in markets in the UK and has been subject to UK merger review as a result (and occasionally has given rise to remedies). The judgment of the Court of Appeal in the AkzoNobel/Metlac Holding case (see Remedies in foreign-to-foreign transactions, page 20) may give the CMA renewed confidence in its remedy powers as regards foreign-to-foreign mergers.

Implications of the UK leaving the European Union
On 23 June 2016, the UK Government held a referendum about the UK’s future membership of the European Union, and the vote was a popular mandate to leave the European Union. The referendum vote itself had no direct legal consequences and, at the time of writing, the UK remains part of the European Union. It therefore continues at present to be part of the European Union merger control regime and the European Competition Network. If/when the UK does leave the European Union, this would have implications for the review of mergers in the UK. Specifically, notifications involving UK corporates to the European Commission would continue, as many such transactions would still meet the thresholds for review by the European Commission. In the absence of any particular arrangements negotiated with the European Union, there would be parallel review: transactions that are now reviewed only by the European Commission would also be subject to review by the CMA where they meet the UK jurisdictional thresholds and raise UK competition issues, raising the potential for parallel reviews (with implications in terms of cost, timing and consistency). There has been also some speculation that the UK Government might, upon becoming responsible for parallel review of large global mergers from a UK perspective, consider it appropriate to move to a mandatory notification system. In practical terms, what the future system of merger control in the UK will look like depends upon the wider terms of exit of the European Union by the UK. In particular, if the UK were to re-join the European Economic Area on terms comparable to those of Norway currently, mergers might be referred to the EFTA Surveillance Authority for review. Finally, it is important to remember that the UK Enterprise Act 2002 provides for the possibility for UK Government intervention in mergers on public interest grounds; to the extent that the UK does leave the European Union, this raises the wider question of whether the level of UK Government involvement in merger control is the right one, or whether a greater degree of intervention is appropriate.

At the time of writing, it remains unclear when the UK will trigger (under “Article 50 TEU”) the two year period leading to formal exit from the European Union. But what is clear is that the UK’s exit from the European Union will have implications for merger control in the UK. This paper describes the current position which is expected to last for at least the next two years until the UK actually does exit the European Union.
Scope of Control

Relevant transactions
The UK merger legislation catches a wide variety of different transactions beyond 100 per cent share acquisitions of pre-existing companies. The key question is whether, in essence, there has been a change in control (broadly defined) over a business.

The UK legislation captures transactions which constitute a “relevant merger situation”. A relevant merger situation arises where the jurisdictional thresholds are met (discussed in Jurisdictional thresholds, page 8) and where two or more “enterprises” cease to be distinct, or where there are arrangements in progress or in contemplation which, if carried into effect, would lead to enterprises ceasing to be distinct.

An “enterprise” for these purposes comprises the activities, or part of the activities, of a business, provided that the activities in question could be carried on for gain or reward (regardless of whether any actual gain or profit is made). In determining this question, the CMA considers the substance of the arrangements under consideration, rather than merely their legal form. Therefore, activities may constitute an enterprise, and UK merger control may apply, even if the target is not a separate legal entity.

Factors that are likely to indicate that the activities involved constitute an enterprise are the transfer of customer records, the application of the UK Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) or a price premium being paid over the value of the land and assets transferred (suggesting a transfer of goodwill). Physical assets may also constitute an enterprise, depending on the facts.

Whilst it is not necessary for the target to be actually trading at the moment of the acquisition, it must, however, constitute something more than “bare assets”. This is a question of “economic continuity” and depends on whether, at the time of the acquisition, the whole is greater than the sum of its parts (see the recent judgment of the Supreme Court in the Eurotunnel/SeaFrance case).

Two or more enterprises “cease to be distinct” if they are brought under common ownership or common control. Such transactions can include mergers, full and partial share acquisitions, business or asset acquisitions, conversions of debt for equity, and joint ventures (including non “full-function” joint ventures).

Internal restructurings and reorganisations do not generally give rise to a relevant merger situation as there is no change in control over the relevant businesses.

The CMA has the discretion to review transactions which result in an increase in the level of control exercised over a business. This will be the case where a person that already has the lowest level of control, so called “material influence”, acquires the practical ability to exercise control (known as “de facto” control); similarly a shift from material influence or de facto control to a controlling interest (known as “legal control”) may also be reviewed (see further Definition of control, below).

Definition of control
Material influence, the lowest level of control that may give rise to a reviewable merger, arises from the acquirer’s ability to materially influence the strategic, commercial policy of the target business that is relevant to its behaviour in the marketplace. In determining whether material influence exists, the CMA takes account of shareholding, board representation and other factors and, as there is no “bright line” test for material influence, the facts need to be considered as a whole. The most important factor is typically the level of the acquirer’s shareholding (see below). Board representation alone can, exceptionally, give rise to material influence, for example, where the board representative has particular expertise or experience in the markets in which the enterprise operates (see the OFT decision in JC Decaux UK/Concourse Initiatives and Media Initiatives, 19 March 2012). However, it is more typical that board presence will be a supporting factor in a finding of material influence when coupled with a shareholding. Agreements
and financial arrangements may also confer material influence, for example, where the acquirer provides consultancy services to the target or where the conditions are such that the target becomes so dependent on the acquirer that the latter gains material influence over the target’s commercial policy.

De facto control arises when, in practice, an entity controls the target’s policy, notwithstanding that it does not have a majority of the voting rights (and therefore does not have the legal right to do so). Most commonly, it arises where attendance and voting patterns at shareholders’ meetings are such that the acquirer has control over more than half of the votes cast. It may also arise where, due to the acquirer’s industry expertise, its views/advice carry more weight than its shareholding would otherwise warrant (a factor which, as indicated above, may also be relevant to a finding of material influence).

A controlling interest is a shareholding conferring more than 50 per cent of the voting rights in the target company. While only one shareholder can have a controlling interest, other shareholders may, concurrently, also have control over the joint venture (in the sense of material influence or de facto control).

The authorities have the ability to review acquisitions of minority interests resulting in material influence or de facto control (as discussed in Relevant transactions, page 7), as well as a move from material influence to de facto control (and from either of these to a controlling interest).

There is no specific shareholding level at which material influence (or de facto control) will arise. Typically, a shareholding over 25 per cent will be presumed to amount to material influence as it enables the holder to block special resolutions as a matter of UK corporate law. The authorities will consider whether shareholdings of 15 per cent or more give the holder material influence; for example, material influence was found to exist by the OFT and CC (and upheld by the Court of Appeal) in relation to BSkyB’s holding of 17.9 per cent in ITV, a publicly listed company. Material influence is unlikely to arise from shareholdings of less than 15 per cent, but cannot be ruled out in exceptional cases (taking account of the factors discussed above). It should be recalled that, even in the absence of a shareholding, factors such as board representation or other arrangements alone may, in exceptional circumstances, confer material influence.

The material influence test is designed to enable the CMA to review a wide range of transactions, and it is a reasonably discretionary concept. However, the UK merger control regime is a voluntary one, meaning that the CMA is likely to seek to investigate such minority interests only where they raise genuine competition issues (for example, where they raise structural links between actual or potential competitors – see Notification, page 10).

**Jurisdictional thresholds**

There are two alternative jurisdictional thresholds, often referred to as the turnover test and the “share of supply” test.

The turnover test is met when the UK turnover associated with the business which is being acquired (i.e. the target) exceeds GBP70 million.

The share of supply test is met when the businesses which cease to be distinct from each other (i.e. generally the acquirer and the target) have overlapping activities and, after the merger, together supply or acquire at least 25 per cent of any description of goods or services supplied in the UK or a substantial part of the UK. The test is satisfied only if the parties both supply or acquire the same category of goods or services and will not be met where the merging parties are active at different levels of the supply chain (i.e. a purely vertical merger).

The legislation and the CMA’s jurisdictional and procedural guidance (at paragraph 4.56) are clear that the share of supply test is not the same as a market share test, as the group
of goods or services used to determine the share of supply need not amount to a relevant economic market; any “reasonable description” of a set of goods or services will suffice. In addition, the test can be based on a wide geographic area (e.g. the UK as a whole, Great Britain, England, Scotland, Wales or Northern Ireland) or a smaller area, provided this can be said to constitute a “substantial part of the UK”. In assessing whether an area constitutes a “substantial part of the UK” the CMA will consider its size, population, social/political/economic/financial and geographic significance and any other factors which make it special or significant. Such areas have included counties (e.g. Yorkshire) or towns with a population of around or above 100,000 people (e.g. Slough).

The share of supply test is intentionally a wide and very discretionary one, but the fact that it is or may be satisfied does not mean that the merger in question must be notified to the CMA; it simply means that it may be reviewed by the CMA (whether as a result of a proactive notification or on the CMA’s own initiative – see Notification, page 10).

The turnover test and share of supply test apply to all sectors, and there are no specific jurisdictional rules for particular sectors in relation to review of mergers on competition grounds, except in water (and sewerage) mergers as discussed in Additional legislation (see page 5). However, as discussed in Transactions outside the jurisdictional thresholds (see page 11), transactions in the media and defence sectors that do not meet these thresholds may in some circumstances be reviewed on public interest grounds if there is an intervention by the UK Government.

The turnover test applies to the UK turnover of the target in the business year preceding the date of completion of the merger or, if the merger has not yet taken place, the date of the phase two reference decision. The CMA typically follows the European Commission’s guidelines on turnover allocation; therefore UK turnover is determined on the basis of where competition takes place, and this will generally equate to turnover derived from customers within the UK.

The turnover of the seller in an acquisition scenario is not relevant to the turnover test. The seller’s share of supply is similarly not relevant for the share of supply test.

The local effects test
There is a local effects test under UK merger control, insofar as the target must always have some activities in the UK for the transaction to meet either of the jurisdictional thresholds. To meet the turnover test, the target must have a UK turnover of over GBP70 million. To meet the share of supply test, there must always be an increment, meaning that, no matter how large the acquirer’s pre-existing share of supply, the target must be active with some degree of sales into, or purchases from, the UK.

Joint ventures
Joint ventures are subject to merger control in the UK whenever a parent acquires control over a new or pre-existing joint venture or increases the level of control that it has over the joint venture. As such, joint ventures will normally be caught where the level of the shareholding acquired is above 25 per cent, however, they may also be caught at levels below this (see Definition of control, page 7).

There are no special rules for joint ventures, and therefore a joint venture need not be “full-function” (as required under the EU Merger Regulation). However, the subject of the joint venture must comprise an “enterprise” (see Relevant transactions, page 7).

The application of the jurisdictional thresholds in the context of joint ventures is relatively complicated, and reference should be made to the CMA’s jurisdictional and procedural guidance in this area. Essentially, the turnover test is met when the businesses that are contributed to the joint venture cumulatively achieve more than GBP70 million turnover in the UK. The share of supply test is typically calculated by reference to the businesses
The existence and severity of these hold-separate powers mean that purchasers may be unwilling, in some cases, to complete the transaction without obtaining approval from the CMA.

Contributed to the joint venture, but may also extend to include the activities of the parent companies where they remain active in the same area as the joint venture. The share of supply test will not be applied by reference to the parent companies’ activities (even if overlapping) outside the activities of the joint venture.

**Notification**

By way of overview, the UK operates a voluntary notification regime. Mergers that meet the jurisdictional thresholds may, as a basic rule, be completed (i.e. with title to the assets or shares being transferred) without being notified to the CMA, without the risk of sanctions. However, as discussed below, integration of the acquired business may be prevented via “hold-separate” measures being imposed by the CMA and, in exceptional cases, there is a risk that completion could even be prevented.

Although notification is not required in all qualifying cases, the CMA currently has an active policy of sending enquiry letters to parties in both anticipated (where they have been publicly announced) and completed transactions, where it considers, on the basis of public information and/or its own intelligence, that competition concerns may arise (known as “calling in” a transaction). The CMA may also engage with merging parties to ascertain basic information about the parties, the transaction and the markets involved prior to deciding whether to send an enquiry letter. In practice, companies that receive a formal enquiry letter are effectively then required to notify the transaction (or to provide sufficient information to confirm to the CMA that the transaction does not meet the jurisdictional thresholds) and to pay filing fees for reviewable transactions (see Filing Fees, page 14). In terms of timing, the CMA can investigate completed transactions provided that it refers such transactions for a phase two review (if required) within four months of the transaction completing or four months of relevant details about the completed transaction being made public (as described in the CMA’s jurisdictional and procedural guidance), whichever is the later.

Regardless of whether the transaction has been voluntarily notified by the parties, the CMA has significant powers to take so-called “hold-separate” measures in both anticipated and completed transactions to preserve its remedy options in the event it ultimately finds competition concerns. In most cases these interim measures, applied in completed mergers, will require the merging businesses not to be integrated, or further integrated, before clearance is granted. The CMA also has the power (which has not yet been used however) to prohibit completion in an exceptional anticipated case where it considers that the act of completion may itself be prejudicial.

The CMA also has the power to require “reversal” of integration steps that have already been taken by the parties, although this does not include unwinding of the transaction itself. The CMA has the power to fine companies up to 5 per cent of their global turnover if they breach these interim measures once they have been imposed. In addition, third parties suffering loss as a result of a breach of such hold-separate restrictions may bring actions for damages. The existence and severity of these hold-separate powers mean that purchasers may be unwilling, in some cases, to complete the transaction without obtaining approval from the CMA.

It should be noted that compliance with interim measures can impose significant costs on the acquirer (e.g. it may be ordered to retain key staff and possibly to pay for a Monitoring Trustee) and can delay realisation of merger synergies.

Given the risk of being called in, companies that have overlapping activities in the UK therefore often proactively choose to notify transactions to the CMA rather than waiting for an enquiry letter to be sent to them. In particular, purchasers that do not wish to assume merger control risk in the UK will notify the transaction in order to receive clearance. Even those purchasers that are willing to assume merger control risk will in some cases choose to notify (whether before or immediately after completion) in order to present their case proactively to the CMA, rather than waiting for an enquiry letter to be sent to them.
Requirements to suspend completion
As a general rule, completion is permitted without clearance being obtained. The main exception to this is where the transaction has been referred for a phase two investigation and there is no pre-existing contractual obligation on the purchaser to proceed with the acquisition. In these circumstances, unless the CMA consents to the acquisition, there is a statutory prohibition on completing a share acquisition, meaning that completion may not occur until the merger is cleared either unconditionally or with remedies (which may need to be implemented prior to the main transaction completing in an upfront buyer scenario).

In addition, the CMA has the power to take steps to preserve its remedial options in cases that have not yet completed. The CMA’s jurisdictional and procedural guidance in this area implies that these powers could be used in exceptional cases to prohibit completion of a transaction. However, the guidance is clear that this power will be used very rarely (there have been no such examples to date) and should not be expected to be a practical concern in most cases.

Exceptions to the suspensive effect
As noted in Requirements to suspend completion (see page 11), the UK regime does not, in general terms, have a suspensive effect. As such, in scenarios such as a failing firm situation where there is a clear timing imperative to complete the transaction, the parties may do this without obtaining approval provided the purchaser is willing to assume UK merger control risk.

Although there is a statutory prohibition on completing a share acquisition when the merger has been referred to phase two, this is not generally a practical issue in relation to public bids in the UK. This is because Rule 12 of the UK Takeover Code requires as a condition of the offer that a public bid that has not otherwise become unconditional at the date of the phase one decision will lapse if it is referred for a phase two investigation by either the CMA or the European Commission.

Foreign-to-foreign transactions
Foreign to foreign mergers are subject to merger control if they meet the relevant jurisdictional thresholds set out in Jurisdictional thresholds (see page 8). The UK competition authorities have taken enforcement action against foreign-to-foreign transactions having anti-competitive effects in the UK (see for example the CC Report in AkzoNobel/Metlac Holding, discussed in Remedies in foreign-to-foreign transactions, page 20). To the extent that the target business is not active (i.e. does not make sales or purchases) in the UK, the jurisdictional thresholds will not be satisfied.

Transactions outside the jurisdictional thresholds
The CMA has no ability to investigate a transaction that does not meet the jurisdictional thresholds. However, two points should be borne in mind here. First, the CMA may send an enquiry letter asking for a notification of a transaction (or may contact the parties more informally to seek information) where publicly available information indicates that the jurisdictional thresholds might be met, and it will then be for the parties to provide evidence to the CMA that the transaction does not meet the jurisdictional thresholds. Second, the share of supply test is (as described in Jurisdictional thresholds, page 8) particularly wide and discretionary in scope. As such, it is likely that any case that does raise material horizontal unilateral effects issues from a substantive perspective will fall under the CMA’s jurisdiction.

The UK Government can intervene on public interest grounds in very limited categories of cases where the jurisdictional thresholds for competition review are not satisfied.
These “special merger situations” exist either in the defence sector, where one of the merging parties is a relevant Government contractor, or in the media sector, where the merger involves a supplier or suppliers of at least 25 per cent of any description of newspapers or broadcasting in the UK (but no increment to that share of supply is required). In such circumstances, there will not be a competition assessment but there will be public interest scrutiny if the UK Government makes a positive decision to intervene.
Procedure: Notification to Clearance

Deadlines
Given that the UK operates a voluntary notification regime, there is no deadline for notification.

However, the CMA can exercise its formal information gathering powers to require a response to an enquiry letter within a specified time period, most likely to be two to three weeks after sending the enquiry letter (with the threat of financial penalties for non-compliance without reasonable excuse).

Pre-notification requirements
A binding agreement is not required prior to notification, provided the parties show a good faith intention to proceed with the transaction. The CMA will generally accept a notification where a public announcement has been made by the parties concerned. This includes, in the context of a public bid, the announcement of a possible offer or a firm intention to make an offer.

Responsibility for filing
Either the purchaser or the target may choose to file a Merger Notice although, in practice, this tends to be done by the purchaser. There is no responsibility on the seller to notify.

Information required
A significant amount of information is currently typically required for a filing to be considered complete. The CMA’s Merger Notice requires detailed information to be provided on the transaction itself, the markets potentially affected by the transaction, market share data on the basis of credible candidate markets, bidding data, switching data, capacity data and data regarding variable profit margins. Contact details are required for the parties’ customers, competitors and suppliers, and the CMA may request a significant number of contact details (for example, up to 50 of the top customers).

In terms of documents, the CMA is likely to require copies of any documents (including minutes of meetings, studies, reports, presentations, surveys, analyses or recommendations including where these are contained in substantive/key e-mails) prepared internally or by external consultants for the purpose of assessing or analysing the transaction with respect to competitive conditions, competitors (actual and potential), potential for sales growth or expansion into new product or geographic areas, market conditions, market shares, the benefits of the acquisition, the investment case and/or the price to be paid and to indicate (if not contained in the document itself) the date of preparation and the identity and role of the author(s) within the business. This should include: documents prepared by or for the deal team, documents prepared by or for senior management and/or member(s) of the Board, post-merger business plans or strategy, including integration plans and financial forecasts, and all information memoranda that specifically relate to the sale of the target.

In addition, the CMA is likely to require copies of documents (including reports, presentations, studies, analysis, industry/market reports or analysis – including customer research and pricing studies) in the acquirer’s and/or target’s possession or which are readily available and prepared or published in the last two years setting out the competitive conditions, market conditions, market shares, or competitors in the industry or business areas where the merger parties have a horizontal overlap, as well as any marketing and advertising strategy documents generated by, or on behalf of, either of the merger parties in the last year relating to the relevant product(s) or service(s).

The filing must be submitted in English but there are no specific requirements for submission of documents (such as certifications, notarisations or apostilles).
As a matter of practice, the extent to which all of the above information is required in a particular case will depend upon the profile of the competition issues raised by the transaction in question. The CMA will often not insist on full information being given in circumstances where it does not perceive there to be credible concerns. Conversely, the analytical data it insists on is likely to be extensive where it regards competition concerns as more likely.

Failure to notify
There are no penalties for failing to notify, including in the case of a completed merger where the CMA subsequently investigates the transaction and identifies competition concerns (although remedies may be imposed and, in the worst case, the transaction may be prohibited or the acquired business may be required to be divested in its entirely).

Filing fees
Filing fees are payable in relation to investigated mergers where one of the jurisdictional tests is met, regardless of whether the decision is to clear the transaction or to refer it for a phase two investigation and regardless of whether the parties proactively decided to notify the merger or whether they were prompted to do so by an enquiry letter sent by the CMA.

The amount of the fee payable depends on the UK turnover of the target. The fee rates are currently: GBP40,000, where the value of the UK turnover of the target is GBP20 million or less, GBP80,000 where it is over GBP20 million but not over GBP70 million, GBP120,000 where it is over GBP70 million but not over GBP120 million and GBP160,000 where it is over GBP120 million.

The fee is payable by the party filing the Merger Notice or (if none) by the party acquiring control. It is payable within 30 days of the date of the invoice issued upon publication by the CMA of its decision on its duty to refer.

The review process
The CMA has indicated a very strong preference for pre-notification discussions where a decision to notify has been made and the transaction is not merely hypothetical.

The CMA has indicated a very strong preference for pre-notification discussions where a decision to notify has been made and the transaction is not merely hypothetical.
Both of the timetables described above may be extended where the CMA is waiting for information to be provided in response to a formal information request made to the merging parties.

The CMA’s jurisdictional and procedural guidance offers the prospect of a fast-track referral to a phase two investigation, in cases where the existence of potential competition concerns is clear and acknowledged by the parties, and this has been used in a handful of cases before the CMA in order to expedite (to varying degrees) the length of the phase one review process.

In practice, in straightforward cases, the CMA is often willing to dispense with some of the information that would be required in a notification of a more complex case. This highlights the importance of pre-notification discussions with the CMA which, whilst not legally required, are strongly encouraged.

Closing before clearance

There are no financial penalties or share invalidity for a party that closes before clearance is obtained. In very exceptional circumstances, the CMA has the power and reserves the right to issue an interim order in relation to a proposed merger which would prohibit the parties from completing. In these circumstances, breach of this order would render the acquirer liable for penalties. However, this is not a power which has yet been used or is likely to be used frequently in practice by the CMA.

There is no prohibition on closing before clearance unless the transaction is referred to phase two and there is no pre-existing contractual obligation to close (see Requirements to suspend completion, page 11).

However, as discussed in Notification (see page 10), the CMA has the power to require the acquirer to “hold-separate” the acquired business (i.e. such that there is no commercial integration of the overlapping businesses, despite their being under the same ownership and control) in order to preserve the CMA’s remedy options.

For completed mergers, subject to the four month statutory deadline discussed in Notification (see page 10), the CMA is able to “reverse” integration steps that have already taken place (although this does not extend to unwinding of the merger transaction itself). Breach of interim measures may lead to significant financial penalties.

Timeline for clearance

As discussed in The review process (see page 14), the statutory timetable for phase one is 40 working days and in phase two is 24 weeks (extendable by eight weeks). These periods do not include pre-notification discussions prior to the submission of a satisfactory notification, which will typically take a number of weeks for straightforward cases and may take significantly longer for particularly complex cases. The statutory time periods are also subject to extension if the CMA is waiting for information from the merging parties.
Substance of the Review

The substantive test
The CMA is required to decide whether a transaction has resulted or may be expected to result in a substantial lessening of competition (“SLC”). In the phase one review, the test applied is whether the CMA believes there is a “realistic prospect” of a SLC. If so, there is a duty on the CMA to refer the case for a phase two investigation, though this may be avoided if the parties give remedies (see Economic efficiencies below and Negotiated remedies, page 19). In addition, the CMA has the discretion to decide not to refer a case for a phase two investigation when the markets concerned are of insufficient importance (i.e. where it considers it is not worth expending public money on a phase two review), when the anti-competitive harm occasioned by the merger is outweighed by relevant customer benefits (see Non-competition issues, page 18) or when the proposed merger is insufficiently far advanced or insufficiently likely to proceed. The statutory test for the second phase review body, the Inquiry Group panel of expert Members within the CMA, is whether it believes a SLC has been created or may be expected on the balance of probabilities. If the Inquiry Group decides by a two-thirds majority or more that the merger has resulted or may be expected to result in a SLC, then it is required to consider remedial action.

Competition concerns
The decisional practice of the CMA (and before it the OFT and CC) shows clearly that the large majority of cases in which some form of intervention has taken place (whether in the form of a requirement for remedies or prohibition) involve horizontal unilateral effects. In assessing whether a merger may result in a SLC based on horizontal unilateral effects, the CMA considers data on market share levels, but focuses particularly on the extent to which the parties are close competitors prior to the merger, taking account of both quantitative and qualitative data to understand the degree of competition that would be lost as a result of the merger, measured by reference to the competitive conditions that would prevail in the absence of the merger (the “counterfactual”). In retail and consumer goods cases, the CMA will often consider survey evidence to understand the extent to which the parties’ products competed against each other pre-merger. The CMA will consider both the loss of pre-existing actual competition and the elimination of potential competition (whether actual or perceived).

Although horizontal unilateral effects are by far the most common theory of harm identified, the CMA will also consider vertical unilateral effects, as well as co-ordinated and conglomerate effects in appropriate cases. Enforcement action in relation to these theories of harm is comparatively rare.

In the 10 years prior to 1 April 2014, the OFT reviewed, on average, around 100 mergers per year (including mergers which were ultimately found not to qualify) and referred approximately 10 per cent of these cases to phase two each year, on average. In the past two years, the CMA has reviewed fewer mergers, with a referral rate of approximately 7 per cent (in 2014/15) and approximately 18 per cent (in 2015/16). The CMA is likely to continue to use upfront buyers in phase one remedies (meaning that the threat of a phase two investigation is not removed unless and until the merging parties have identified, and agreed sales to, suitable divestment purchasers). This mechanism was favoured by the OFT to reduce remedy risk in difficult economic conditions, but is a trend which has been continued by the CMA.

Economic efficiencies
The UK merger control regime permits the CMA to consider efficiencies in two ways. To the extent that a merger produces rivalry-enhancing efficiencies (for example, two smaller suppliers merging to compete more effectively against a larger one) then these efficiencies are considered as part of the primary competition analysis (to determine
whether the merger has or may be expected to result in a SLC). In addition, the CMA can take account of certain “relevant customer benefits” (defined as “lower prices, higher quality or greater choice of goods or services in the UK”). If the parties are able to demonstrate that the merger will give rise to such relevant customer benefits, the CMA has the discretion to clear unconditionally at phase one a merger that would otherwise be referred for a phase two investigation. However, in practice, the evidential burden upon the merging parties of satisfying the CMA that such relevant customer benefits will arise, and that they will outweigh the detriment caused by the loss of competition, means that the CMA (and before it the OFT) has not cleared a merger on this basis since the current legislation came into force in 2003. In addition, the CMA may take account of relevant customer benefits when determining the extent and scope of any remedies required in the context of a phase two investigation.

**Non-competition issues**

The legislation requires the CMA to decide cases based purely on competition grounds, together with a very closely defined ability to give weight to particular efficiencies (relevant customer benefits) that result from the merger (see Economic efficiencies, opposite and above). Wider public policy considerations are not part of the normal review process. However, the legislation does expressly permit the UK Government to intervene in certain mergers by issuing a public interest intervention notice. The result of such intervention (which has occurred to date in a very small minority of cases) is that the ultimate decision on the merger is taken by a Government minister who may weigh the competition assessment carried out by the CMA alongside the particular public interest consideration. The public interest considerations currently recognised are national security, media plurality and the maintenance of the stability of the UK financial system. However, the UK Government may intervene based on additional considerations, provided that these are subsequently approved by the UK Parliament (as was the case in the Lloyds/HBOS merger in 2008 when the UK Government intervened on financial stability grounds which had not hitherto been a specified consideration). The most recent intervention to date was in the Global/GMG Radio case in 2012; the intervention was made on media plurality grounds but, based on advice from the media regulator, Ofcom, the case was referred to the CC only on competition grounds.

**Joint ventures**

Joint ventures are analysed under the standard merger framework to determine whether they may result in a SLC. The CMA will also consider possible co-ordination issues (spillover effects) between joint venture parents.
Decision: Prohibitions and Remedies

Prohibitions
At the end of a phase one investigation, the CMA is not able to prohibit the transaction. It may, however, accept remedies (so called “undertakings in lieu of reference”) offered by the parties instead of referring the transaction for a phase two investigation. At the end of a phase two investigation, the CMA is able to prohibit a transaction (i.e. one that has not yet completed) or to require divestments of all or part of the target company (in the case of a transaction that has already completed) if it believes on the balance of probabilities that the merger has resulted or may be expected to result in a SLC. Prohibitions, or requirements to divest the target company in full, are relatively rare, in part because the CMA is required to consider whether a less intrusive remedy would be more proportionate and to preserve relevant customer benefits where applicable.

Negotiated remedies
The parties are able to offer remedies to resolve concerns identified by the CMA during the phase one investigation. These are referred to as “undertakings in lieu of reference”. They must be offered to the CMA within five working days of it reaching its phase one decision. Such phase one remedies will be considered only where the CMA is confident that they will resolve the identified competition issues in a clear-cut and comprehensive manner and are capable of ready implementation. As a result, phase one remedies are almost exclusively structural (i.e. divestment) remedies, with behavioural remedies accepted extremely rarely. At the end of a phase two investigation, the parties may offer undertakings to remedy the concerns or the CMA may impose remedies by way of an order. Such remedies will also tend to be structural in nature, but behavioural remedies may on occasion be accepted or imposed (for example where a structural remedy would be disproportionate given the nature or duration of the competition concerns identified – see the CMA’s 2014 Final Report in Breedon Aggregates/Aggregate Industries, where the competition concerns in the Inverness area were considered to be of a relatively short duration, and so the CMA agreed that Breedon could undertake to cap the price at which it sells asphalt from the two relevant plants, instead of divestment – or where there is a sectoral regulator able to monitor compliance).

Procedural steps
The parties will be given the reasons for the CMA’s competition decision at the end of its phase one investigation and will then have a period of five working days in which to offer remedies to address those concerns.

Such an offer should be made using the CMA’s template Remedies Form (and accompanied by the draft actual remedy text). Following the parties’ offer, the CMA then has a further five working days to decide whether it is provisionally minded to accept the parties’ offer, subject to public consultation. If it is, then it will announce this and the parties and the CMA will then agree the text of the remedy. This is then published for a 15-day public consultation.

In total, the CMA has 50 working days from the date of its phase one decision to accept the undertakings (although this may be extended by a further 40 working days). Once phase one undertakings are accepted, no reference to phase two may be made.

In practice, the CMA case team is willing to discuss the design of remedies on a hypothetical basis at any stage during the phase one process (or indeed, pre-notification) to the extent that the merging parties wish to engage in such a discussion on a without-prejudice basis.

As regards phase two remedies, if the CMA provisionally finds that the merger gives rise to competition concerns, it will publish a Notice of Possible Remedies at the time of its Provisional Findings on the SLC question. The Notice will invite comments on a
number of alternative potential remedy structures. The parties are then invited to respond to this and to attend a Remedies Hearing with the CMA Inquiry Group. The CMA will then publish its Final Report, which will include its decision on what form of remedy is required if a competition concern is found. The CMA has a statutory obligation to accept undertakings or make an order within 12 weeks (extendable by 6 weeks) from the date of its Final Report, which will include a period of public consultation on the proposed form of remedies.

Conditions and timing for remedies
The UK merger control system allows the parties to complete a transaction before approval is obtained unless the merger has already been referred for a phase two investigation and the parties are not under a pre-existing contractual obligation to complete the transaction (see Requirements to suspend completion, page 11). As such, the parties are in principle able to complete the transaction before remedies are complied with (although they may be subject to hold separate obligations – see Notification, page 10). However, where a transaction that has not been completed is the subject of a phase two remedy, the CMA sometimes requires that the remedy is implemented prior to the parties being permitted to proceed with the main transaction (a so-called “upfront buyer” requirement).

In terms of time periods, the time permitted for the parties to make a divestment following acceptance of a remedy will vary; such time periods are not typically made public in individual cases, but a period of three to six months is reasonably typical. The CMA currently also adopts a procedure in some phase one remedy cases whereby the parties are given a specified period of time to conclude an agreement with a suitable buyer for divestment assets before the remedy is accepted. The consequence of this procedure is that if a suitable buyer cannot be found for the divestment business or assets within a specified period, the transaction is then referred for a phase two investigation.

The decision
All phase one decisions, with reasoning, are provided to the merging parties and are subsequently published on the CMA’s website, once confidential information has been redacted. The parties (and, where relevant, third parties) are given an opportunity to make submissions on confidentiality prior to the decision being made public. Such decisions are 20 to 30 pages in length on average, but can be significantly longer for complex phase one investigations. Phase two decisions take the form of formal reports (“Final Reports”) which are published on the CMA’s website, with confidential information redacted.

Remedies in foreign-to-foreign transactions
It is relatively rare for the CMA to find concerns in foreign-to-foreign transactions given that the UK merger control legislation only concerns transactions creating a SLC in a market or markets in the UK. However, the UK competition authorities have previously required remedies in respect of foreign-to-foreign transactions, including Dräger/Air-Shields in 2004, a case where price control undertakings were required by the CC in relation to incubator machines. In 2012, the CC prohibited the proposed acquisition by AkzoNobel of Metlac Holding on the grounds that it would lead to a SLC in the supply of metal packaging coatings for beer and beverage cans in the UK. AkzoNobel challenged the CC’s jurisdiction to prohibit the transaction on the ground that the UK legislation only permits the CC to impose an order impacting on conduct outside the UK (i.e. including prohibition of the acquisition of an Italian company) on a non-UK national where that person carries on business in the UK. The CAT upheld the reasoning of the CC that AkzoNobel was a person carrying on business in the UK and that the CC was entitled to prohibit the transaction.
On 14 April 2014, the Court of Appeal dismissed AkzoNobel’s appeal against the CAT’s judgment and confirmed that remedies can indeed extend to a business’ conduct outside the UK as long as that business is carrying on business in the UK, and that there does not have to be a link between its UK activities and the markets being considered in the merger analysis. This means that remedies can be (and regularly are) imposed on parent companies outside the UK as well as on its subsidiaries which are directly involved in the merger (provided that the parent business has some involvement in UK business activities).

That said, if there is a foreign-to-foreign transaction that may have an impact on a market that is wider than, but including, the UK, then the CMA may consider whether such a case would be suitable for referral to the European Commission under Article 22 of the EU Merger Regulation. Such a referral would be more likely in a situation in which the CMA believed that its remedy options might ultimately be limited.

“Remedies can be (and regularly are) imposed on parent companies outside the UK as well as on its subsidiaries which are directly involved in the merger (provided that the parent business has some involvement in UK business activities)."
Ancillary Restraints

Clearance decisions and related arrangements
A merger clearance decision will, as a matter of law, cover restrictions that are ancillary (i.e. that are “directly related and necessary”) to the merger. The current practice of the CMA is to align its analysis of ancillary restraints with that of the European Commission, as set out in its Notice on Restrictions Directly Related and Necessary to Concentrations (OJ 2005 C56/24), to which reference should be made. As is the case at EU level, the responsibility for determining whether a particular restriction may be described as directly related and necessary falls on the merging parties under the principle of self-assessment. As such, no separate notification is required regarding ancillary restraints. The CMA does not typically express any view as to whether a restriction of which it is aware is ancillary or not. The CMA’s jurisdictional and procedural guidance states (at paragraph 6.70) that it will, exceptionally, and upon request by the parties, provide guidance on the ancillary nature of a restriction where the request raises novel or unresolved questions giving rise to genuine uncertainty (for an example of such views being expressed, see the OFT decision in AB Agri/Uffculme Feed Mill, 1 September 2011 commenting on a supply agreement). However, it is very rare for this to happen in practice.
Third Party Rights, Confidentiality and Cross-Border Co-operation

Third party rights
The CMA is under a duty to publicise mergers to those who might be affected by the merger. In practice, the CMA currently publishes details of the parties to the merger on its website and issues a public “invitation to comment” through the London Stock Exchange regulatory news service. In addition, it sends written questions (normally by e-mail) to major customers, competitors and suppliers of the merging parties, seeking views on the merger. Third parties therefore have an active role in providing information to the CMA in the context of a phase one investigation and may, in some cases, be invited to meet the CMA case team to provide their views directly (although there is no specific right to such a meeting). Third parties are not given access to the issues letter sent by the CMA to the merging parties. At phase two, the CMA also sends detailed questionnaires to relevant third parties. It will conduct formal, third-party hearings with relevant third parties and will often receive detailed submissions from them.

Confidentiality
The fact of the notification is made public on the CMA’s website and the CMA issues a public invitation to comment (as described in Third party rights, above). The publicised information includes details of the sector in which the parties operate, but does not contain further details. As noted in The decision (page 20), the CMA’s decision in phase one cases is published on its website following consultation with the merging parties (and where relevant, third parties) regarding redactions on the ground of confidentiality. The CMA is required to consider when publishing information whether its disclosure could significantly harm the legitimate business interests of the parties (or third parties) involved, and must weigh this against their obligation to publish reasons for their decisions. For phase one cases, neither the notification nor any other submissions by the merging parties (or third parties) are published. However, in phase two cases, non-confidential versions of merging parties’ submissions, and those of third parties, will be placed on the CMA website, and summaries of hearings held with third parties will also be published.

Although the CMA is subject to the Freedom of Information Act 2000, in practice there are exemptions from the general obligation to disclose requested information covering commercial information that is provided to the authorities in the context of their merger review investigations.

Cross-border co-operation
The CMA does co-operate with other competition authorities both in the EU and more widely. The CMA will often exchange intelligence about transactions with other competition authorities with a view to understanding whether there are transactions that have not been notified to it but which it would wish to investigate by sending an enquiry letter. In particular, the CMA is a member of the network of European Competition Authorities, whose merger control authority members routinely liaise where multiple notifications have been made to different European agencies. However, there are statutory prohibitions on the exchange of confidential data that means that this is not exchanged unless and until a waiver from the merging parties is obtained. For this reason, in cases raising material competition concerns that are notified in multiple jurisdictions, the CMA often requests a waiver from the merging parties to be able to provide information to other competition authorities, thereby allowing a more detailed discussion about potential theories of harm. Whilst merging parties are under no obligation to provide such a waiver, they typically will do so.

It should also be noted that there are specific provisions within the EU Merger Regulation that provide both for the transfer of cases between the UK authorities and the European Commission, and for the involvement of the CMA within the EU decision-making process.
Appeals and Judicial Review

Appealing decisions
Merging parties and third parties (where they are “persons aggrieved” by a decision) are able to apply to the CAT for judicial review of decisions taken by the authority in the context of a merger. Such decisions include the decision whether to refer the merger for a phase two investigation and whether, at the end of the phase two investigation, to prohibit or clear the merger, and on what terms. In addition, challenges may be brought in relation to decisions by the authorities regarding the disclosure or otherwise of information during the process and other key procedural issues, as well as on issues of jurisdiction. Such actions must be brought within four weeks of the date on which the applicant was notified of the disputed decision, or from the date of publication of the decision, whichever is the earlier. As a specialist competition tribunal, the CAT has demonstrated that it is able to hear appeals in merger cases quickly, and in some circumstances has given judgment within a couple of months. Although, strictly speaking, the review by the CAT is one of judicial review, not a full merits appeal, challenges brought before the CAT are often both factually and legally intensive, reflecting the specialist nature of the CAT. An appeal from the CAT may be made to the Court of Appeal but only if permission is granted.
Simon was the UK’s first Senior Director, Mergers and a member of the Senior Executive Team (SET) at the Office of Fair Trading (OFT), the CMA’s predecessor. In addition to deciding the outcome of complex UK Phase I merger cases, he considered all strategic UK competition issues as part of SET, including a senior advisory role on certain investigations.

Significant transactions on which Simon has led include advising Live Nation / Ticketmaster (for CTS Eventim; event promotion and ticketing; UK Phase II); advising CCMP Capital / Pure Gym - in relation to the acquisition of LA Fitness in the gyms sector; advising Novartis in connection with its 2015 $16bn oncology acquisition/vaccines sale with GSK (EU Phase I conditional clearance; awarded Global Competition Review’s Matter of the Year 2015).

Simon is regarded as an “outstanding merger control expert”. He is widely recognised by peers, with his experience of working at the OFT seen as making him a valuable asset: Chambers 2014. Simon is also the editor of UK Merger Control (Hart, 2011).

Nicole is the National Practice Head and has practiced EU and UK competition law since 2001; she was made partner in 2006. She specialises in UK merger control and has acted on more than 40 significant merger control matters over her career to date, successfully obtaining clearances for clients in relation to their complex global and UK based transactions.

Significant recent transactions on which Nicole has advised include obtaining unconditional Phase I clearance for Dixons plc the merger of equals with Carphone Warehouse; obtaining Phase II clearance with remedies in the formation of the Lafarge/Tarmac JV – the largest Phase II investigation ever undertaken by the former Competition Commission; obtaining Phase I clearance without significant remedies in the Carlyle backed formation of the largest dental body corporate in the UK; advising BlackRock on its acquisition of Credit Suisse’s ETF business; Barclays on its acquisition of ING’s UK business; R&R on its acquisition of Fredericks Dairies; and advising McKesson/Celesio on its acquisitions of UDG’s Northern Irish pharmaceutical wholesale business and Bupa’s home healthcare business.

Nicole is Vice Chair of the City of London Solicitors’ Competition Committee, which has proved an influential voice in the shaping of the current UK merger control regime; a committee member of the Regulatory Policy Committee within the Department of Business, Innovation and Skills and is a regular IBA, IBC, GCR and BIICL conference speaker on global, EU and UK competition law issues.

Nicole is a top ranked practitioner in Chambers and Legal 500 and described as “an excellent lawyer who understands the business requirements as well as the technical legal issues”: Chambers 2015.
Michael has been practising UK and EU competition law since 1988 and has been a partner in Linklaters’ competition practice since 1995.

Michael’s UK Phase 2 merger experience includes representing Anglo American Plc in relation to its building materials JV with Lafarge; Pennon on its acquisition of Bournemouth Water; Centrica/Dynergy (and 2 subsequent reviews of the remedies in that case before the Phase 2 body); Mid Kent Water/South East Water; Panfish/Marine Harvest; Lloyds TSB/Abbey National; BA/Sabena/KLM and BAE/Thomson CSF. All those cases were cleared (some conditionally) save for Lloyds TSB/Abbey National.

Michael’s EU merger control experience includes BP Amoco’s acquisition of Burmah Castrol, BP/Rosneft/TNK, Manitowoc/Enodis, Vodafone/C&W Worldwide, and Vodafone/Telefonica (UK network sharing).

Michael has also dealt with the UK’s Phase 2 competition authority in relation to industry investigations into Gas/British Gas; the UK Audit Market; and the Supply of Energy.


Michael is ranked in the top tier of leading individuals by Chambers. According to the directory, Michael is viewed as “a strategic thinker and an excellent resource for clients” (2014).

Meredith is a Counsel in the Competition practice and has practiced EU and UK competition law since 2002. Meredith has experience advising clients on EU, UK and multi-jurisdictional merger control.

Meredith has significant experience across a wide range of sectors, including private equity, chemicals, FMCG, pharmaceuticals, infrastructure and construction.

Meredith’s recent matters include advising Deutsche Boerse in relation to its merger with the London Stock Exchange; Visa Europe in relation to its merger with Visa Inc; Swedish Private Equity house, EQT on the acquisition by its portfolio company, Atos Medical of Countrywide Supplies (UK merger control); Vodafone in relation to its acquisition of various Pones4U stores out of administration (UK merger control); Friends Life in relation to its takeover by Aviva (EU merger control); and Britvic in relation to its proposed takeover by AG Barr (Phase 2 UK merger control).
Helen has practiced EU and UK competition law since 2003; was made Counsel in 2013, and has expertise in all areas of UK and EU competition law.

Her UK experience includes a range of merger work, including a number of in-depth merger investigations, most recently that relating to Celesio’s acquisition of Sainsbury’s UK pharmacy business. Other notable transactions include Centrica / Rough, Barclays / ING, and a range of transactions in the grocery retail sector.

She also has extensive experience in relation to CMA and FCA market studies and market investigations, including those relating to groceries, private healthcare and investment banking.

Nick advises on a range of merger control and behavioural issues under EU and UK law.

Nick has extensive experience of advising clients on UK merger cases before the CMA and its predecessors, at both Phase I and Phase II, including unconditional clearances in R&R/Frederick’s Dairies, BlackRock/Credit Suisse ETF, WPP/PPG and DS Smith/ Linpac Containers and Phase 1 remedies in William Hill/Stanley Betting. Nick has also advised clients on a number of European merger cases, including most recently Novartis’ asset-swap with GlaxoSmithKline and Siemens’ acquisition of Rolls-Royce aeroderivative gas turbine business.

Before joining Linklaters, Nick was Deputy Director of Mergers at the CMA predecessor (the OFT), where he worked on the analysis and delivery of UK Phase 1 merger cases, including the negotiation and implementation of remedies. In his role at the OFT, Nick had responsibility for legal and policy input into the OFT’s merger guidance publications (both procedural and substantive).

Nick is recognised in Who’s Who Legal Competition 2015 as a leading practitioner.