UNITED KINGDOM

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Merger remedies are an integral part of UK merger control under the Enterprise Act 2002 (EA02). They allow an otherwise problematic transaction to proceed, either by the parties offering remedies in order to avoid an in-depth investigation or, at the end of the investigation, as the price for clearance. Significant changes were made to the UK competition regime including merger control by the Enterprise and Regulatory Reform Act 2013 (ERRA13). As a result, from 1 April 2014 the functions of the former UK competition bodies (the Office of Fair Trading ("OFT") and the Competition Commission ("CC")) have been transferred to a new merged authority, the Competition and Markets Authority ("CMA"). Although the broad elements of UK merger control and remedies remain the same under the new regime, ERRA13 introduced important changes for remedies practice including specific timelines for offering and implementing remedies.

OVERVIEW OF THE LEGAL FRAMEWORK

UK merger control is described as 'voluntary'. There is no general impediment to the completion of a merger that qualifies for investigation or obligation on merging parties to seek advance approval from the CMA. However, the CMA has a duty to refer (completed or anticipated) mergers for a Phase II investigation where it believes that there is, or may be, a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition ("SLC") in the UK where the relevant jurisdictional thresholds are met (some exceptions apply).

Generally, a merger will not qualify for a reference after the expiration of four months from the date of implementation of the merger. In order to achieve legal certainty and manage the risk of potentially costly remedies or even prohibition in the event that the CMA makes an adverse finding, parties to transactions that qualify for investigation under UK merger control regularly seek upfront comfort from the CMA that there will be no Phase II investigation.

Remedies may be offered to remedy competition concerns at both Phase I and Phase II. First, parties may offer appropriate undertakings to the CMA in order to prevent a Phase II reference. The CMA may only accept remedies or undertakings in lieu of reference ("UIL") if it has concluded that the merger should be referred for a Phase II investigation. Second, where there is a Phase II investigation and the CMA makes an adverse finding on competition issues (i.e. that the merger gives rise or may be expected to give rise to an SLC) it must make a determination as to whether it is appropriate for it to seek remedies and the appropriate action for it to take. It must have regard to the need to achieve as comprehensive an outcome as is reasonable in relation to the identified SLC. The CMA has the choice of seeking remedies or imposing orders. The CMA's order-making powers are more limited and, as a result, it may proceed by seeking remedies from the parties.

On the initiation a Phase II reference, there are various consequences.

- In relation to mergers that have not been completed, the parties are automatically prohibited from acquiring interests in each other's shares until determination of the reference.
- In relation to completed mergers, the parties are prohibited from any further integration or transfer of ownership or control of any business to which the reference relates. This prohibition, which subsists during the reference, may be lifted only with the CMA's consent.
- The CMA may by order impose obligations on the parties to preserve assets, which

order may continue until final remedies are determined. The CMA may also accept legally binding undertakings from one or more party to a (completed or anticipated) merger that it will not take action that might prejudice the outcome of the reference

ENHANCED POWERS ON PROTECTIVE AND REMEDIAL ACTION

Although the UK merger regime remains voluntary, ERRA13 introduced a number of amendments designed to strengthen the voluntary system and speed up the procedure. Past experience on remedies revealed problems with the voluntary regime in cases where integration had already taken place. For example, some final divestment remedies have not been straightforward to implement. The case of *Stonegate/ Deans Food* involved the completed merger of the two biggest suppliers of processed and shell eggs. Following an adverse CC reference, the merged company was required to sell off Stonegate but this proved a resource-intensive and complicated process. This challenge of seeking to restore the pre-merger position through remedies has been described as the problem of 'unscrambling the eggs'.

From the perspective of remedies the following changes were introduced by ERRA13:

- The CMA (or the Secretary of State in public interest cases) has enhanced powers to impose interim measures requiring the merging parties to cease or reverse pre-emptive action that would prejudice any reference or the ability of the CMA to remedy any competition issues consequent upon a Phase II decision. The CMA may thus issue initial enforcement orders to prevent pre-emptive action and to unwind pre-emptive action that has occurred. This represents a clarification of the OFT's and the CC's former powers to reverse pre-emptive action.
- The CMA's initial enforcement orders cover both anticipated and completed mergers. This contrasts with the previous position where the OFT was unable to impose or accept interim measures in respect of anticipated mergers.
- Any orders issued by the CMA at Phase I will remain in force throughout a Phase II investigation unless revoked, amended or replaced at Phase II. This contrasts with the previous position where interim measures that were imposed by the OFT would expire on a reference unless accepted by the CC.
- The CMA will be able to impose penalties of up to 5 per cent of turnover where there has been pre-emptive action in violation of CMA interim orders.
- A new 40 working day statutory time limit has been introduced for Phase I, running from the first day following receipt by the CMA of a satisfactory merger notice or the CMA otherwise informs the parties that it has sufficient information to start an investigation.
- There is a new statutory time limit for UIL: (1) a party wanting to offer UIL must do so within 5 working days of the CMA's Phase I decision; (2) the CMA will then have 10 working days to decide whether to pursue the proposed UIL; (3) if the CMA issues a notice of suspension of its duty to refer, it has a further period of up to 50 working days (extendible by up to 40 working days if there are special reasons) to decide whether to accept the UIL.
- A new 12 week statutory time limit has been introduced for the implementation of remedies.

THE PREFERENCE FOR STRUCTURAL OVER BEHAVIOURAL REMEDIES

A broad distinction can be drawn between structural remedies (essentially divestments) and behavioural remedies (commitments on conduct).

UIL may be structural or behavioural. The CMA will only accept UIL where it is satisfied that all competition concerns it has identified can be allayed without a reference. This will

tend to be the case where the competition issues are clear-cut and the remedies are amenable to ready application. Structural remedies tend to be the preferred solution for UIL. The OFT has in the past required parties to provide a buyer upfront and has made a reference in circumstances where the parties were unable to identify such a buyer.

The CC published guidance on its approach to merger remedies which has been adopted by the CMA (*Merger Remedies* (CC8)). This sets out the 'remedies universe' which distinguishes between structural and behavioural remedies. This notes that remedies relating to intellectual property may have features of both structural and behavioural remedies, for example an assignment or grant of a long-term exclusive licence may be tantamount to a divestment. The guidance indicates that the CMA will selected behavioural remedies where divestiture or prohibition is not feasible or would be disproportionate, where the SLC is expected to have a relatively short duration, or where relevant customer benefits are likely to be substantial (for example, in a vertical merger).

Behavioural remedies have been accepted in the past. For example, in *FirstGroup/ ScotRail* FirstGroup committed to limit fares, maintain availability of certain types of ticket, maintain service levels, establish a multi-modal ticket scheme and provide information on competitors' bus services at train stations.

In some cases it has been possible to combine structural remedies with behavioural through mixed remedies packages. In 2007 the CC accepted a package of remedies in relation to a joint venture in the fertiliser and chemicals sector which combined divestitures of commercial businesses and a commitment to modify a supply contract with a third party (*Kemira GrowHow/Terra Industries*).

When considering remedies in the context of a completed merger, the CMA will not normally consider the costs of divestment to the parties as it is open to the parties to make merger proposals conditional on competition authorities' approval.

COMPLIANCE MONITORING

The CMA accepts that divestiture risks can be overcome in part by adopting protective measures such as appointment of divestiture and monitoring trustees.

If the parties cannot procure divestiture to a suitable purchaser within the initial divestiture period, then, unless this period is extended by the CMA, an independent divestiture trustee may be mandated to dispose of the package within a specified period at the best available price in the circumstances, subject to prior approval by the CMA of the purchaser and the divestiture arrangements.

Where divestiture undertakings are in place, the CMA may require the appointment of an independent monitoring trustee to oversee the parties' compliance and, if applicable, the performance of the hold-separate manager. The trustee will have an overall duty to act in the best interests of securing an appropriate divestiture. The trustee will monitor the ongoing management of the divestiture package and the conduct of the divestiture process.

The case of EWS/Marcroft illustrates the use of trustees. The merger concerned the completed acquisition of Marcroft Holdings by a subsidiary of English Welsh & Scottish Railway Holdings Limited (EWS). Marcroft was the largest supplier of third party freight wagon maintenance services and EWS was the largest rail freight haulier in the UK. The CC required the divestiture of all or part of Marcroft's maintenance services business. The Final Undertakings set out two divestiture scenarios and provided for the appointment of a monitoring trustee and, in the event that the secondary divestiture package failed to be sold, the CC would appoint a divestiture trustee.

JUDICIAL REVIEW

The Competition Appeal Tribunal ("CAT") has the power to review certain decisions of the

UK competition and regulatory authorities including in merger cases. Any person aggrieved by a decision of the CMA (or the Secretary of State) in relation to a reference or a possible reference can apply to the CAT. The CAT must apply 'the same principles as [those] applied by a court on a judicial review'. The issue in judicial review proceedings is not whether the decision was right or wrong, nor whether the court agrees with it, but whether it was a decision which the decision-maker was lawfully entitled to make. This contrasts judicial review with a review of the merits.

There have been challenges to decisions of the UK competition authorities in relation to mergers and merger remedies. In *Somerfield/ Morrisons* the CAT held that the CC had a clear margin of appreciation in deciding what action was appropriate in remedying, mitigating or preventing an SLC; here an order that Somerfield should divest itself of certain stores to approved buyers. In January 2010 the Court of Appeal reviewed a decision of the CAT and upheld decisions of the CC and the Secretary of State to order satellite broadcaster BSkyB to reduce its acquisition of a 17.9% interest in ITV plc to below 7.5%. In Stericycle/ STG the CAT held that the CC had acted within its powers and discretion when ordering the parties to unwind parts of the transaction and in appointing a hold separate manager pending conclusion of the Phase II review.

PRACTICAL CONSIDERATIONS FOR MERGER REMEDIES STRATEGY

The changes to UK competition law which were brought into force last year preserve a considerable amount of the previous rules and practice in the area of merger control and specifically, remedies. Nevertheless, there are important changes which need to be taken into account for transaction planning. As the new regime beds down, the following are trends that are likely to shape the approach of the CMA towards merger remedies in the future.

- The enhanced powers of the CMA to secure interim remedies including the power to unwind a completed merger pending its investigation are intended to preserve the ability of the CMA to impose appropriate remedies and, ultimately, impose a prohibition where appropriate. Depending on the CMA's readiness to deploy these powers this brings the UK merger control regime much closer to the suspensory regimes in other jurisdictions, including in the USA and the EU under the EU Merger Regulation, at least in cases raising material competition concerns
- With the retention of a voluntary merger control regime, however, the CMA is unlikely to be able to address the full effects of completed mergers (the 'unscrambling the eggs' issue). This remains so despite its enhanced interim remedy powers.
- It is important to consider whether there are potential remedies to competition problems and how far in advance of any deadlines for submission of remedies these need to be discussed with the CMA in order to make the best arguments for clearance. The new time limits bring enhanced predictability, at least to Phase I in merger cases. However, this could be as long as 90 working days or more where remedies are offered and which is one of the longest Phase I periods internationally.
- The tight timeframe for implementation of remedies raises a potential concern that acquirers could be pushed into 'fire sales'. Concerns have been raised that they would have to accept whatever price was on offer - unless the CMA deems special reasons exist allowing for an extension to the normal timetable. So far there has been limited experience to suggest that this is a real concern in practice but it is a factor that should not be overlooked when assessing the likely realisable commercial value of a proposed transaction – with or without remedies.
- The UK competition authorities have shown readiness to use trustees and third party monitors to oversee the remedies process. Although the use of monitoring trustees has not been widespread historically, a trend in such use can be identified.
- Now as previously it will always be a tactical and strategic decision for an acquirer

to decide whether it offers a clear-cut divestment remedy as UIL at Phase I in order to avoid a Phase I investigation. Alternatively, it may take its chances at Phase II in the expectation that the longer review will allow for consideration of substantive issues and arguments that could persuade the CMA that there is no SLC at all and no remedies are needed.

- With the abandonment of a two-stage decision-making process (with the OFT at Phase I and the CC at Phase II) one might expect the CAT to play an enhanced role in ensuring that due process has been followed. Thus, decision-making within a combined CMA on mergers (and indeed other areas) may be a rich area for judicial review in the future.