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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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ALTUS
ANDERSON MÔRI & TOMOTSUNE
ANDREAS NEOCLEOUS & CO LLC
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BREDIN PRAT
CAIAZZO DONNINI PAPPALARDO & ASSOCIATI – CDP STUDIO LEGALE
COCALIS & PSARRAS
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ELIG, ATTORNEYS-AT-LAW
ENSAFRICA (EDWARD NATHAN SONNENBERGS)
GIANNI, ORIGONI, GRIPPO, CAPPELLI & PARTNERS
HOUTHOFF BURUMA
JEFF LEONG, POON & WONG
KARANOVIĆ & NIKOLIĆ
KING & WOOD MALLESONS
Acknowledgements

LCS & PARTNERS
MATHESON
MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA ADVOGADOS
MJLA LEGAL
MOTIEKA & AUDZEVIČIUS
PACHECO, ODIO & ALFARO
PELI FILIP SCA
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WILSON SONSINI GOODRICH & ROSATI, LLP
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YULCHON LLC
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Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In Phonak/ReSound (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 45 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a de minimis exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use ‘market share’ indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require
that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV’s products ‘could be’ imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of ‘competitively significant influence’. Although a few merger notification jurisdictions remain ‘voluntary’ (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for ‘late’ notifications (e.g., Bosnia and Herzegovina, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal). Brazil issued its first ‘gun jumping’ fine this year. In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to ‘stop the clock’ on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales
in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in merger hearings before the Competition Tribunal, and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection to a clearance decision.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction’s legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent CSC/Complete transaction). Norway is a bit unusual, in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction’s consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil’s CADE, which in turn has worked with Chile. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has ‘consulted’ with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an ‘acquisition of control’. Many of these jurisdictions, however, will include as a reportable situation the creation of ‘joint control’, ‘negative (e.g., veto) control’ rights to the extent that they may give rise to de jure or de facto control (e.g., Turkey), or a change from ‘joint control’ to ‘sole control’ (e.g., EU and Lithuania). Minority holdings and concerns over ‘creeping acquisitions’, in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and
insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. Several agencies in the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an ‘acquisition’ subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, International Merger Remedies, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that ‘structural’ remedies are preferable to ‘behavioural’ conditions, a number of jurisdictions in the past year have imposed a variety of such behavioural remedies (e.g., China, the EU, France, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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July 2014
INTRODUCTION

There have been significant institutional and procedural reforms to the UK merger control regime this year.

Prior to 1 April 2014, there were two main competition authorities in the UK for the purposes of merger control. The Office of Fair Trading (OFT) had the power to carry out an initial Phase 1 investigation of any qualifying transaction and had a duty to refer an anticipated or completed merger to the Competition Commission (CC) for a detailed Phase 2 investigation where it believed that it was or may be the case that the merger could give rise to competition concerns.

On 1 April 2014, a new body, the Competition and Markets Authority (CMA) became the principal competition authority in the UK. The Enterprise Act 2002 (EA) was amended by virtue of the Enterprise and Regulatory Reform Act 2013, and the competition powers and responsibilities of the OFT and the CC were transferred to the CMA. One of the principal objectives of the reforms has been to strengthen the UK merger control regime by extending the CMA’s formal information-gathering powers, and to increase its ability to prevent parties from taking pre-emptive steps that may prejudice the outcome of an investigation. The reforms are also intended to streamline the merger control process through the use of new statutory time limits and by capturing the efficiencies of having a unitary authority.

Anticipated or completed mergers qualify for review under the UK rules if they meet a test relating to the turnover of the target or, alternatively, a ‘share of supply’ test. Where the UK turnover of the target exceeds £70 million, the turnover test will be
satisfied. The share of supply test will be satisfied where the merger creates an enlarged business supplying 25 per cent or more of goods or services of any reasonable description or enhances a pre-existing share of supply of 25 per cent or more.

Under the new regime, separation between Phase 1 and Phase 2 review has been retained, with the test for reference to Phase 2 remaining the same. Phase 1 decision-making is now undertaken by the Senior Director of Mergers or another senior CMA official, while Phase 2 decision-making is undertaken by an independent panel of experts. In much the same way as CC panels were formed under the old system, these experts are drawn from a pool of senior experts in a variety of fields.

Remedial undertakings in lieu of a Phase 2 reference may be accepted by the CMA. The CMA's in-depth Phase 2 investigation may lead to a prohibition decision, a decision that the transaction should be allowed to proceed subject to undertakings or an unconditional clearance. The CMA also applies the substantial lessening of competition standard in its decision-making at Phase 2.

Notification under the UK system of merger control continues to be ‘voluntary’ in the sense that there is no obligation under the EA to apply for CMA clearance before completing a transaction. The CMA may, however, become aware of the transaction through its market intelligence functions (including through the receipt of complaints) and impose interim orders preventing further integration of the two enterprises pending its review. There is a risk that it may then refer the merger for a Phase 2 investigation, which could ultimately result in an order for divestment.

In certain limited circumstances (where the merger raises a defined public interest consideration), the UK system allows the Secretary of State for Business, Innovation and Skills (Secretary of State) to intervene in relation to mergers. Currently, public interest considerations are limited to national security, quality and plurality in the media, accurate presentation of news and free expression in newspaper mergers, and the maintenance of stability in the UK financial system.

The CMA has published a new set of detailed non-binding guidelines on jurisdictional issues and the procedures it will adopt for the review of mergers. It has also adopted other guidance documents, including various pre-existing OFT and CC guidelines such as the guidance on how the substantial lessening of competition test is applied.

In terms of appeals, the EA established the Competition Appeal Tribunal (CAT), which may review decisions made by the CMA (and previously the OFT and CC) or the Secretary of State in connection with a reference, or possible reference, of a merger. An appeal lies, on a point of law only, from a decision of the CAT to the Court of Appeal and requires the leave of either the CAT or the Court of Appeal.

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II YEAR IN REVIEW

i Workload

The number of merger decisions made by the OFT in the 2013–2014 financial year (65) fell sharply from the 100 decisions taken in the preceding financial year, which represented a further decrease from the peak of 210 merger decisions made in the 2005–2006 financial year. This notable drop in decisions may partly be due to a decrease in the number of relevant mergers – the Office for National Statistics notes that there were 450 domestic and cross-border acquisitions involving UK companies (excluding disposals by UK companies of foreign interests) during 2013 compared with 965 transactions in 2011.

Although the number of decisions taken by the OFT dropped during this period, the proportion of cases in which the OFT required the parties to provide initial undertakings (which prevent pre-emptive action while the OFT considers whether to make a reference) increased significantly from 23 per cent in the preceding financial year to 40 per cent in the 2013–2014 financial year.

Of the 65 cases decided in the OFT’s final year of operation, eight were referred to the CC. The OFT only issued one decision suspending its duty to refer while it considered potential undertakings in lieu of reference decision (at the time of writing, the CMA has yet to accept the final undertakings in that case). The proportion of cases reviewed by the OFT that were referred to the CC remained relatively stable compared with the preceding year, decreasing from around 14 to 12 per cent.

Of the eight references made to the CC during the 2013–2014 financial year, three transactions were cleared unconditionally, two were cleared subject to remedies and three investigations were transferred to the CMA on 1 April 2014. A total of 10 final reports on merger inquiries were published by the CC in its final year of operation: six were unconditional clearances, two permitted the transactions to proceed subject to divestments and one on condition of a behavioural price control remedy. The only transaction to be prohibited by the CC during this period was the first of the proposed mergers between NHS Foundation Trusts to be reviewed since the Health and Social Care Act 2012 formally brought such mergers within the jurisdiction of the UK competition authorities.

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4 See Diageo plc/United Spirits Limited.

5 For cases considered by the CC, see www.competition-commission.org.uk/our-work/directory-of-all-inquiries?botype=selectedthemes1&byid=mergers.

6 See Imerys/Goonvean. Behavioural remedies are relatively rare because of the increased onus of supervision they place on the authorities.
ii Counterfactuals

Continuing the trend of recent years, the last financial year saw sustained emphasis on considerations relating to the counterfactual, particularly in failing firm scenarios. The CMA has adopted the joint OFT and CC Merger Assessment Guidelines, which suggests that it intends to continue the practice of applying a different approach to the counterfactual between the Phase 1 and Phase 2 review procedures. In Phase 1, the transaction is generally measured against the prevailing conditions of competition unless the prospect of the prevailing conditions continuing is not realistic (or where there is a realistic counterfactual that is more competitive than the pre-merger conditions of competition). In contrast, during the Phase 2 investigation, the CMA will measure the transaction against the ‘most likely scenario’. This distinction is reflected in recent practice: for example, the OFT and the CC came to different conclusions on the appropriate counterfactual in Optimax/Ultralase (see below).

In a failing firm scenario, the CMA will consider whether the firm would have exited (through failure or otherwise); whether there would have been an alternative purchaser for the firm or its assets to the acquirer under consideration; and what would have happened to the sales of the firm in the event of its exit. When assessing whether a firm would have exited the market, the CMA will apply a high threshold at Phase 1, with the parties having to show that exit was not merely likely (on the balance of probabilities) but was ‘inevitable’.

In practice, the authorities have only been willing to depart from using the prevailing conditions of competition as the appropriate counterfactual in comparatively few cases (even when presented with compelling evidence that the failing firm would inevitably exit the market). A particular challenge, especially at Phase 1 of the review, has been to satisfy the authorities that no less anti-competitive purchaser for the failing firm or its assets is available. Of the 10 cases in which the OFT applied the failing firm test in its last financial year, six failed on this second limb of the test. For example, in Optimax/Ultralase, which concerned the combination of two laser eye surgery providers, the OFT considered that a private equity firm that had made an initial bid for Ultralase represented a realistic and substantially less anti-competitive purchaser, despite the fact that the firm’s bid was considered by the sellers to have a higher execution risk than that of the ultimate purchaser. The OFT also noted that the possible unwillingness of alternative purchasers to pay the asking price, or the highest price, to a seller does not mean that there is no less anti-competitive purchaser, especially if the OFT considered it realistic that an offer had been, or would be likely to have been, made above liquidation value. However, in applying its different approach at Phase 2, the CC found that there was no credible alternative purchaser to Optimax, and ultimately cleared the merger based on the counterfactual that Ultralase would have exited the market.

iii Closeness of competition and pricing pressure metrics

The year has seen a continuation of the shift away from traditional merger control analysis, which proceeds from the definition of the relevant product and geographical markets to measure post-merger levels of concentration towards a more direct assessment of competitive effects. The OFT and the CC continued the practice of measuring closeness of competition through analysis of customer switching behaviour (often derived from
consumer surveys or retail scanner data). This switching analysis is then expressed in the form of ‘diversion ratios’ and combined with gross margin data to estimate the upward pricing pressure arising from the merger. This approach has been used for some time to calculate illustrative price rises (IPRs) in grocery retail mergers but is becoming increasingly common in other sectors. The OFT and the CC also used diversion ratios and margin data to calculate gross upward pricing pressure indices (GUPPIs). The OFT has indicated in the past that GUPPIs will tend to be used where persuasive evidence on pass through rates is available; and IPRs where it is not.

The OFT used these pricing pressure indicators in a number of recent cases, including in relation to retail convenience stores (One Stop Convenience Stores/Alfred Jones) and cinemas (Cineworld/City Screen). The CC similarly used them in a number of recent cases, including in relation to grocery wholesaling (Booker/Makro), the manufacture and distribution of soft drinks (Barr/Britvic), cinemas (Cineworld/City Screen) and short sea transport services (Eurotunnel/Sea France assets).

No formal threshold has been established at which a GUPPI or IPR gives rise to competition concerns, but the cases suggest that a GUPPI or IPR in excess of 5 per cent will generally give rise to prima facie concerns absent countervailing evidence (although a GUPPI or IPR below this level does not necessarily provide a safe harbour). The OFT emphasised in Ryanair/Aer Lingus that its decisional practice has never been to apply an absolute value under which no unilateral effects concerns arise, and that on those occasions where the OFT applied a threshold, the purpose has been as a mechanism to focus the competitive assessment on those overlaps that the OFT considered likely to raise greatest concern. The OFT and the CC had been keen to stress that this type of analysis does not replace a more general assessment of the evidence. Nonetheless, it is expected that the trend of using upward pricing pressure analyses will continue under the CMA regime.

### III THE MERGER CONTROL REGIME

#### i Threshold issues

Under the UK system, a ‘relevant merger situation’ (i.e., a transaction potentially qualifying for review) occurs when two or more enterprises have ceased to be distinct. This can occur either through common ownership or common control. Common ownership involves the acquisition of an enterprise so that two previously distinct enterprises become one. Common control involves the acquisition of at least one of the following: de jure or legal control (a controlling interest); de facto control (control of commercial policy); or material influence (the ability to make or influence commercial policy).

The concept of material influence has been drawn widely by the UK competition authorities. It formed the jurisdictional basis for the investigations by the OFT and the

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7 The breadth of the concept can be seen in the OFT’s decision on the acquisition by JCDecaux UK Limited of an option to acquire Concourse Initiatives Limited and Media Initiatives Limited. Even though JCDecaux held no equity stake in Concourse, the OFT concluded that
CC in relation to the 29.82 per cent shareholding acquired by Ryanair in Aer Lingus in the context of a takeover bid. The CC ultimately found that the existence of the minority shareholding led or may be expected to lead to a substantial lessening of competition in the markets concerned and decided that the most effective and proportionate remedy was to compel Ryanair to reduce its stake in Aer Lingus to five per cent. This case illustrates how a would-be acquirer who builds a minority stake in advance of a full takeover bid remains exposed to a CMA investigation and ultimately risks being ordered to divest the stake, even if the takeover bid fails. 8

A merger situation will qualify for review if it meets the turnover test or the share of supply test (see Section I, supra). If the CMA believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition in a UK market, then it will refer the merger for a Phase 2 investigation. 9

In general, a merger will no longer qualify for a reference four months after the date of implementation of the merger. Time will not begin to run, however, until the ‘material facts’ of the merger (i.e., the names of the parties, nature of the transaction and completion date) have been made public or are given to the CMA (if this does not happen prior to completion). Time will not run where undertakings in lieu of reference are under negotiation, where the parties are yet to comply with an information request from the CMA, or where a request has been made by the UK for review of the transaction by the European Commission in accordance with Article 22(3) of the EUMR (see the European Union chapter for details of this procedure). The four-month period may also be extended by agreement between the OFT and the merging enterprises, but for no more than 20 days.

ii Substantive test

In its assessment of mergers, the CMA considers whether the transaction may be expected to give rise to a substantial lessening of competition. As mentioned in Sections I and II, supra, the CMA has adopted the substantive assessment guidelines jointly published

JCDecaux had already acquired (or at least may have already acquired) the ability to influence materially the commercial behaviour of Concourse. Crucial to this finding was the fact that the option allowed JCDecaux to appoint two out of the three members of Concourse's board (giving it a majority of voting rights on the board), and restricted Concourse's ability to expand the remit of its business or to enter into certain commercial agreements without the consent of a JCDecaux director.

8 Ryanair appealed this decision to the CAT and lost on all grounds. It likewise lost a subsequent appeal to the Court of Appeal, and the Supreme Court has refused it permission to appeal further (See Section III.ix, infra).

9 While the same ‘substantial lessening of competition’ test is applied both in Phase 1 and in Phase 2, the CMA (previously the CC) applies a higher standard of proof in Phase 2. Whereas the CMA must make a reference if it is or may be the case that a merger may give rise to a substantial lessening of competition, in Phase 2 it must prove any concerns on the balance of probabilities (see OFT v. IBA Health Ltd [2004] EWCA Civ 142). As a result, it is relatively common for mergers to be referred to Phase 2 and subsequently cleared unconditionally.
by the OFT and CC in September 2010. These guidelines illustrate, in particular, the shift away from traditional market concentration analysis towards a more direct assessment of competitive effects. The CMA has also adopted the OFT and CC joint discussion paper on the assessment of retail mergers, which details the local market analysis methodology that is increasingly employed to assess mergers between competing retail businesses. Guidance on the design and presentation of consumer survey evidence in merger inquiries, which reflects the increasing use of survey evidence in assessing the likely price effects of a merger, has likewise been adopted by the CMA.

iii The notification procedure

Under the old regime, it was possible to make an informal application for clearance, which did not involve any prescribed form or process. However, the submission of a formal merger notice is now the only means of applying for clearance. The merger notice requires a large amount of information; much more than previously required by the OFT. However, the CMA has indicated that it will adopt a reasonable approach to assessing what type of information will be required in non-complex cases.

The initial period within which the CMA must make a decision whether to make a reference is 40 working days from the first working day after the CMA confirms to the parties that the merger notice is complete. This initial period may be extended where the parties have failed to comply with the requirements of a formal information request under Section 109 of the EA, where the Secretary of State has served a public interest intervention notice, or where the European Commission is considering whether to accept a request from the UK for the merger to be referred to Brussels under Article 22(3) of the EU Merger Regulation.

It is possible for the parties to request that the CMA ‘fast track’ a merger reference where there is evidence that an in-depth review is likely to be required. There have only been two cases to date involving fast track references: Thomas Cook/Co-operative Group Limited/Midlands Co-operative Society and Global Radio/GMG Radio. This option may be attractive to parties in cases where a reference appears inevitable, as it allows for Phase 1 of the review process to be truncated.

The CMA levies substantial filing fees in respect of the mergers it reviews, with fees of between £40,000 and £160,000 depending on the turnover of the target business.

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10 Merger Assessment Guidelines (September 2010) OFT 1254, CC 2.
11 Commentary on Retail Mergers (March 2011) OFT 1305, CC 2 com 2.
12 Good practice in the design and presentation of consumer survey evidence in merger inquiries (March 2011) OFT 1230, CC2 com 1.
13 In Global Radio/GMG Radio, the issuance by the Secretary of State of a public interest intervention notice meant that the fast-track procedure was delayed for several months. It was only once the Secretary of State had concluded that there were no media plurality issues that the decision to refer to the CC could be made by the OFT.
iv Pre-notification discussions
The CMA encourages parties to make contact in advance of notification and seek advice on the merger notice submission. This usually involves submitting a draft of the notification. In addition to helping the CMA to learn about complex and unfamiliar markets, this process is intended to allow the parties to ensure that their notification is complete. It may also help to avoid the need for burdensome information requests post-notification. To make use of this process, parties must satisfy the CMA that there is a good-faith intention to proceed with the transaction. While maintaining that the extent of these discussions will vary depending on the complexity of the case, the CMA has acknowledged the need to take care that such discussions do not extend for longer than is appropriate.

v Informal advice
Where there is evidence of a good-faith intention to proceed and there is a genuine competition issue, prior to submitting a merger notice or initiating pre-notification discussions, it may be possible to obtain informal advice from the CMA as to whether it is likely to refer the merger for a Phase 2 investigation. There is no standard timetable for the provision of informal advice, but where it is intended that the advice will be given following the conclusion of a meeting, the CMA will endeavour to schedule that meeting within 10 working days of receipt of the original application. The resulting advice is confidential and does not bind the CMA.

vi Interim orders and undertakings
Under the new regime, the CMA has increased powers to impose interim measures to freeze or unwind integration and prevent pre-emptive action, including in relation to anticipated mergers at Phase 1. Financial penalties may be imposed for breaches of such measures (capped at 5 per cent of the aggregate group worldwide turnover).

The CMA will normally make an interim order where it has reasonable grounds to suspect that two or more enterprises have ceased to be distinct (i.e., in respect of completed mergers). The CMA has noted that, since the risk of pre-emptive action is generally much lower in relation to anticipated mergers than completed mergers, it would typically engage with parties before making an order in relation to the former.

The CMA has stated that it would generally not expect to impose an order limiting the parties’ ability to complete an anticipated merger unless it had strong reasons to believe that completion will occur prior to the end of Phase 1, and the act of completion itself might amount to pre-emptive action that would be difficult or costly to reverse (e.g., where the act of completion would automatically lead to the loss of key staff or management capability for the acquired business). Therefore, absent exceptional circumstances, it is expected that parties will still be able to complete transactions prior to CMA clearance.

vii Exceptions of the duty to refer
The CMA has a statutory duty to refer a relevant merger situation for a Phase 2 investigation where it believes that it is or may be the case that a merger has resulted or may be expected to result in a substantial lessening of competition in a UK market.
The CMA has adopted the OFT’s guidance on the statutory exceptions that apply to the duty to refer potentially problematic mergers to a Phase 2 investigation. This guidance sets out criteria for accepting undertakings in lieu of reference that may be offered by the merging parties. To discharge the CMA’s duty to refer, any undertakings in lieu should restore competitiveness to pre-merger levels and must be proportionate. It is most common for undertakings to relate to the sale of part of the merged assets. The UK competition authorities have generally been reluctant to accept behavioural remedies, particularly at Phase 1. It was common practice for the OFT to require an ‘upfront buyer’, i.e., for a buyer of the divestment assets to be identified and approved by the OFT before clearance is granted. It is expected that the CMA will adopt a similar approach where it is merited by the risk profile of the assets to be divested.

While undertakings in lieu of reference to the CC had to be given in anticipation of an adverse decision, under the new regime, the merging parties have five working days from the substantial lessening of competition decision (SLC decision) to offer undertakings to the CMA (although they may still offer them in advance should they wish to do so). Where the parties offer undertakings, the CMA has until the 10th working day after the parties receive the SLC decision to decide whether the offer might be acceptable as a suitable remedy to the substantial lessening of competition. If the CMA decides the offer might be acceptable, a period of negotiation and third-party consultation follows. The CMA is required to decide whether to accept the offered undertakings, or a modified form of them, within 50 working days of providing the parties with the SLC decision, subject to an extension of up to 40 working days if there are special reasons for doing so.

The CMA’s approach to the other exceptions to its duty to refer mergers is also covered in the adopted guidance, namely in respect of small markets (de minimis mergers), mergers where there are sufficient efficiencies to offset any competition concerns and merger arrangements that are insufficiently advanced.

In relation to de minimis mergers, the guidance states that, for markets with an aggregate turnover exceeding £10 million, the benefits of an in-depth Phase 2 investigation may be expected to outweigh the costs. However, for markets with an aggregate turnover of less than £3 million, the CMA expects that a reference will be cost-effective only in exceptional circumstances.

viii. Phase 2 investigations

Upon the making of a Phase 2 reference, there are a number of consequences for the transaction – some arising automatically, some relevant only if invoked by the CMA. When a merger reference is made in relation to a merger that has not yet been completed, the EA automatically prohibits the parties from acquiring interests in each other’s shares until such time as the Phase 2 inquiry is finally determined. This restriction can be lifted only with the CMA’s consent.

In relation to completed mergers, from the point of reference, the EA prohibits any further integration of the businesses or any transfer of ownership or control of

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14 Exceptions to the Duty to Refer and Undertakings in Lieu of Reference Guidance (December 2010) OFT 1122.
businesses to which the reference relates (although in practice, the CMA is likely to have imposed an interim order at Phase 1 in any event).

Unless the CMA releases or replaces an interim order made during Phase 1, it will continue in force for the duration of the Phase 2 inquiry. If an interim order was not made at Phase 1 or if it is necessary to supplement the measures previously put in place at Phase 1, the CMA may impose a new order or accept interim undertakings from the parties.

The CMA is obliged to publish a report, setting out its reasoned decisions, within a statutory maximum of 24 weeks (extendible in special cases for a period of up to eight weeks). Under the new regime, the CMA has a statutory period of 12 weeks (which may be extended by up to six weeks) following the Phase 2 review within which to implement any remedies offered by the parties (no fixed period was previously imposed upon the CC to consider or implement any remedies offered by the parties following its final report).

ix Appeals

Any party aggrieved by a decision of the CMA (including a decision not to refer a merger for a Phase 2 investigation) or the Secretary of State may apply to the CAT for a review of that decision. Appeals against merger decisions must be lodged within four weeks of the date the applicant was notified of the disputed decision or the date of publication, if earlier. Lodging an appeal does not have a suspensory effect on the decision to which the appeal relates. In determining an application for review, the CAT is statutorily bound to apply the same principles as would be applied by the High Court on an application for judicial review.

Appeals against merger decisions have been relatively rare since the establishment of the CAT. Nevertheless, there has been a recent upsurge in such challenges in the past year or so, with appeals against four CC merger decisions and one OFT merger decision.

In January 2013, Akzo Nobel appealed, \textit{inter alia}, the CC’s findings in \textit{Akzo Nobel/Metlac} that it could be the subject of a prohibition order on the basis that it had been ‘carrying on a business in the UK’ through its subsidiaries. The CC’s findings were upheld by both the CAT\footnote{\textit{Akzo Nobel NV v. Competition Commission} [2013] CAT 13.} and the Court of Appeal.\footnote{\textit{Akzo Nobel NV v. Competition Commission} [2014] EWCA Civ 482.} Akzo Nobel has now appealed to the Supreme Court.

In June 2013, Global Radio appealed the CC’s decision in respect of its acquisition of GMG Radio Holdings Limited. Global argued, \textit{inter alia}, that a ‘substantial’ lessening of competition must be construed as being ‘large’, ‘considerable’ or ‘weighty’ in order for the CC to intervene. The CAT dismissed the appeal holding that a finding that there was a substantial lessening of competition should suffice for the CC to impose remedies, regardless of whether that lessening was large in absolute terms.\footnote{\textit{Global Radio Holdings Limited v. Competition Commission} [2013] CAT 26.}

In September 2013, Ryanair appealed the CC’s decision that its acquisition of a 29.82 per cent shareholding in Aer Lingus had led or may be expected to lead to a substantial lessening of competition. Ryanair argued, \textit{inter alia}, that the CC’s decision to require a divestiture was contrary to the EU duty of sincere cooperation in circumstances where an
appeal to the European Courts was still outstanding in respect of European Commission’s 2013 decision to prohibit a merger between the two Irish carriers. The CAT\textsuperscript{18} dismissed Ryanair’s appeal on all grounds, and a subsequent appeal to the Court of Appeal\textsuperscript{19} was similarly dismissed. The Supreme Court refused Ryanair permission to appeal.

In December 2013, Groupe Eurotunnel and Société Coopérative de Production Sea France appealed the CC’s decision in respect of the former’s acquisition of three ferries and related assets from the liquidated Sea France business. The parties argued, \textit{inter alia}, that the CC had erred in its consideration of whether, in purchasing the Sea France assets, Eurotunnel had acquired an ‘enterprise’ for the purposes of the EA. The CAT agreed with the parties\textsuperscript{20} and remitted the case back to the CC for its reconsideration. However, the CMA published revised provisional findings in March 2014 that the Sea France assets did indeed constitute an enterprise and so it does have jurisdiction over the acquisition. At the time of writing, the case is still ongoing.

In April 2014, AC Nielsen appealed the OFT’s decision not to refer the completed acquisition Information Resources Inc of Aztec Group.\textsuperscript{21} Nielsen argues that the OFT’s conclusion that the completed merger did not give rise to a realistic prospect of a substantial lessening of competition is unsustainable. Judgment is awaited.

IV OTHER STRATEGIC CONSIDERATIONS

i Whether to notify

As previously mentioned, notification under the UK system of merger control is voluntary. The question of whether clearance should be sought from the CMA in a particular case is one for the parties – and, in particular, the purchaser – to consider. This is essentially a question of what level of commercial risk is acceptable.

Where the parties elect not to notify a transaction, the CMA may still become aware of it as a result of its own market intelligence functions, including through the receipt of complaints. The CMA has dedicated mergers intelligence staff responsible for monitoring non-notified merger activity and liaising with other competition authorities.

The fact that a merger has been completed does not prevent the CMA from investigating and referring it for a Phase 2 investigation or accepting undertakings in lieu of a reference. While the substantive assessment of anticipated and completed mergers ought to be identical, the CMA can be expected to impose interim orders while it considers a completed merger. In addition to ordering the parties to stop any integration that might constitute pre-emptive action, the CMA may also require the parties to unwind any integration steps that have already taken place.

An additional risk to bear in mind is that the initial period for a Phase 1 investigation may be reduced to less than 40 working days if the parties elect not to notify

\textsuperscript{19} Ryanair v. Competition Commission [2012] EWCA Civ 1632.
\textsuperscript{21} AC Nielsen Company Limited v. Competition and Markets Authority (Case No. 1227/4/12/14).
a completed merger. The CMA must comply with the four-month statutory deadline for a reference under the EA, which will start to run when the ‘material facts’ of the merger have been made public or are given to the CMA. If the CMA’s timetable is compressed in this manner, it may mean that it has insufficient time to obtain evidence that would support a Phase 1 clearance, without the need for a Phase 2 investigation.

ii UK or EU?

If a merger has an ‘EU dimension’, as defined in the EUMR, it falls under the exclusive jurisdiction of the European Commission and cannot be completed until it has been notified and cleared. Conversely, the CMA is in principle competent to investigate mergers that do not have an EU dimension but qualify for review under the UK rules. This simple allocation of jurisdiction is, however, subject to the EUMR processes relating to the reallocation of jurisdiction (see the European Union chapter for details of these procedures). The decision whether to make a pre-notification referral request is a strategic issue for the parties, and will depend on where the competition issues lie and the degree of risk that the Member States may request a post-notification referral. The OFT was willing to request the post-notification referral of transactions when it considered it appropriate to do so: in 2010, it made two Article 9 requests for cases to be referred from the European Commission, and in both 2010 and 2011, it made an Article 22 reference to the Commission. The CMA can be expected to take a similar stance: its mergers guidance recommends that, in all cases in which a referral back might be considered appropriate, parties contact the CMA prior to notification to the European Commission to discuss any UK issues raised by the transaction.

iii Cross-border cooperation

Parties should be aware that the CMA is part of the European Competition Network, and as such is informed of mergers notified to the competition authorities of the other 26 EU Member States and the European Commission. It also participates in the International Competition Network, an informal network that seeks to develop best practice among competition agencies around the world.

V OUTLOOK AND CONCLUSIONS

The implementation of the new regime is not expected to result in immediate or dramatic changes to the substantive assessment of mergers. However, the procedural changes are significant, and the ‘bedding in’ of the new procedures is likely to result in some uncertainty and delays in the early months of the new regime.

The CMA has already started to use its new powers to impose interim orders in Phase 1 merger cases. These orders are expected to become a familiar feature of the UK mergers regime and may result in a greater number of transactions being voluntarily notified to the CMA. The CMA has recently noted that its work on mergers scrutiny is expanding significantly, with around 30 cases under consideration at the time of writing, with sectors such as transport, health care, technology and retail markets among those where the number of deals is increasing.
Appendix 1

ABOUT THE AUTHORS

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Jordan Ellison joined Slaughter and May in 2005 and became a partner in 2014. He has significant experience of UK merger cases, including references to the Competition Commission, in sectors ranging from consumer goods to telecommunications. He previously worked on secondment in the mergers division of the OFT. He also has substantial experience representing clients before the European Commission in merger and antitrust cases.

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