The Legal 500 & The In-House Lawyer
Comparative Legal Guide
United Kingdom: Merger Control

This country-specific Q&A provides an overview to merger control laws and regulations that may occur in the United Kingdom (UK).

It will cover jurisdictional thresholds, the substantive test, process, remedies, penalties, appeals as well as the author's view on planned future reforms of the merger control regime.

This Q&A is part of the global guide to Merger Control. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/merger-control-second-edition/

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1. Overview

The UK merger control regime – which is contained in the Enterprise Act 2002 – is one of the few voluntary, non-suspensory filing regimes in the world. If a transaction meets the relevant jurisdictional thresholds, the UK competition authority – the Competition and Markets Authority (CMA) – will have jurisdiction to review the transaction and to impose remedies to address any substantial lessening of competition to which it considers the transaction may give rise. However, merging parties have no obligation to notify the CMA of a relevant transaction and are free to complete it unless and until the CMA decides to open a second-phase investigation, or imposes an ad-hoc prohibition on

closing during first-phase (it has never done the latter, to date).

If a transaction is completed without the parties having first sought a clearance from the CMA by making a voluntary filing, then the purchaser of the relevant target business effectively assumes all antitrust risk in the transaction, including: (i) the risk that the CMA subsequently opens an investigation, concludes that the transaction is likely to lessen competition substantially and imposes remedies (which could include a requirement to divest the entire target business at no minimum price); and (ii) the financial cost of complying with strict hold-separate obligations that are invariably imposed by the CMA on both the target business and the purchaser's business for the entire duration of its investigation, through to implementation of any remedies that are required.

2. Is mandatory notification compulsory or voluntary?

Notification is voluntary in the UK. There are no circumstances in which a merger filing is compulsory.

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

During the 'first-phase' investigation by the CMA (see section 19 below for details of the stages of the review process), there is no automatic obligation to suspend implementation of the transaction. An automatic prohibition only becomes applicable if and when a second-phase investigation is opened.

First-phase
The CMA has the power to impose an order prohibiting closing of an uncompleted transaction, for the purpose of preventing 'pre-emptive action'. Pre-emptive action is that which would prejudice the CMA's ability to investigate the merger or to remedy any competition concerns that it may subsequently identify. A prohibition on closing might therefore be necessary if the legal act of closing itself (as opposed to events that may take place after closing) will automatically impact the viability of the target as a standalone competing business. The CMA has given the example of a closing that would automatically lead to the loss of key staff or management capability for the target.

Another example might be where the target has important and irreplaceable contracts that contain change of control provisions that will inevitably be exercised on closing, for example because the other party to the contract is a competitor of the purchaser.

The power to prohibit closing during the first-phase investigation was introduced on 1 April 2014 but has not yet been used.

The CMA also has powers to impose 'hold-separate' orders to prevent pre-emptive action being taken, both for completed and uncompleted transactions. These typically require the target business and the purchaser's competing business to be held and operated separately for the duration of the CMA's review, and for the period of implementation of any remedies. Complying with these obligations is often costly and onerous.

'Hold-separate' undertakings/orders typically impose, among other things, obligations to:

- refrain from further integration of the target's business with those of the purchaser, or selling it to a third party;
- maintain as a going concern both the target's business and any competing businesses of the purchaser. This typically includes requirements to: (i) make available sufficient resources for the development of the business on the basis of pre-merger plans; (ii) not to change key staff, organisational structure or management responsibilities; (iii) take steps to encourage key staff to remain with the relevant business; (iv) preserve and maintain assets, facilities and goodwill; (v) not reduce the range and/or standard of goods and services supplied);
- prevent the flow of commercially sensitive information between the competing businesses of the target and the purchaser; and/or
- operate each business separately and independently, particularly as regards competitive decisions such as pricing.

For completed mergers, 'hold-separate' orders are almost invariably imposed. For uncompleted mergers, the CMA has stated that it will usually only impose 'hold-separate' orders if there is some evidence that pre-emptive action is already taking place (which is likely to be rare as, in many cases, such action would independently breach the separate prohibition on anticompetitive agreements under EU and/or UK competition laws).

Second-phase

If the CMA opens a second-phase investigation, the parties are automatically prohibited from completing any transfer of shares in relation to the transaction, or – where the merger is already completed – further integrating the relevant businesses, without the consent of the CMA (which is rarely granted). An exception to the prohibition on closing during the second-phase investigation applies where completion occurs pursuant to a pre-existing contractual obligation.

In addition, the CMA can impose 'hold-separate' orders (see above) during the second-phase investigation or can negotiate 'hold-separate' undertakings with the parties.

4. What are the conditions of the test for control?

The UK merger control regime applies to transactions that result in two or more businesses – referred to as 'enterprises' – 'ceasing to be distinct', and which meet the jurisdictional thresholds set out below.

Businesses will cease to be distinct if they are brought under common ownership or control. This covers three distinct stages of control:

- Acquisition of a legal, controlling interest in the target. This will be the case where, for example, there is an acquisition of all, or the majority of the shares in the target.
- Acquisition of an ability to control the policy (i.e. the competitive conduct) of the target. This broadly corresponds to the concept of decisive influence under the EU Merger Regulation, and can arise on a de facto basis, e.g. where a 40% shareholding in a public company would allow the holder to exercise the majority of the voting rights because only 60% of the shareholders attend and vote at shareholder meetings.
- Acquisition of an ability to exercise 'material influence' over a target. The test for material influence is described in section 5 below.

An acquisition which causes the purchaser to move from one stage of control to a higher stage of control will be caught by the merger control regime, and will therefore be reviewable by the UK merger control authorities. So, for example, if a purchaser is able to exercise material influence over the target and then increases its stake so that it then

has a controlling interest, that acquisition will be reviewable (provided the jurisdictional thresholds are met), irrespective of whether the earlier acquisition of material influence was reviewed by the CMA.

5. What are the conditions on minority interest in your jurisdiction?

An acquisition will be reviewable if it confers, at a minimum, the ability to exercise 'material influence' over the competitive conduct of the target. This is a lower threshold than the 'decisive influence' test under the EU Merger Regulation. As a general rule, a shareholding of more than 25% is likely to be viewed as giving rise to material influence, and shareholdings of as low as 10-15% (with no board representation or other governance rights) might be viewed as conferring material influence, depending on the circumstances.

For acquisitions of public companies, a shareholding that would allow the holder to veto a 'special' resolution (taking into account typical levels of shareholder attendance and voting at shareholder meetings) will usually be sufficient to confer material influence.

For example, an acquisition by BSkyB of a 17.9% interest in ITV was found to have satisfied the material influence test, a finding that was upheld on appeal by the Competition Appeal Tribunal (CAT). However, in practice the CMA is unlikely to exercise jurisdiction over an acquisition resulting in such a low shareholding unless the transaction gives rise to substantial potential competition concerns.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)?

A merger that satisfies the control test described insection 4 above can be reviewed by the CMA (and thus may be notified) if it: (i) is not notifiable under the EU Merger Regulation; and (ii) meets either of the following jurisdictional thresholds:

- The target's UK turnover exceeds GBP 70 million (approximately EUR 85.4 million). This is known as the 'turnover test'. In principle, this test can be met even if the purchaser has no sales or presence in the UK (although it is highly unlikely that the CMA would seek to investigate a transaction in those circumstances).

- The businesses which cease to be distinct will together supply or acquire at least 25% of a particular category or type of goods or services of any kind in the UK, or in a substantial part of the UK. This test is known as the 'share of supply' test. To qualify, the merger must result in an increment to the share of supply or consumption and the resulting share must be at least 25%. In practice, therefore, the share of supply test can only be met where the enterprises concerned both supply or acquire goods or services of a similar kind in the UK (i.e. a horizontal merger). The CMA has a broad discretion as to the category of goods or services that it uses as the frame of reference for assessing whether the share of supply test is met, and that category may be wider than the relevant economic product market to which the goods or services belong.

The CMA's jurisdiction to review a completed merger also has a temporal element. The CMA can open a second-phase investigation at any time up to four months from the date of completion of the transaction, or from the date on which facts about the transaction became public (e.g. when it is announced, or when it receives significant press coverage in the national or trade press), whichever is the later.

Different jurisdictional thresholds apply to qualifying transactions involving:

- government defence contractors; and
- newspaper publishers or broadcasters, where one of the parties to the transaction supplies or provides at least 25% of the newspapers of a particular type, or 25% of the broadcasting of any description (as the case may be), in the UK or a substantial part of the UK.

These transactions can be subject to an investigation by the CMA at the request of a government minister – the Secretary of State for Business, Energy and Industrial Strategy – even if they fall below the turnover and market share thresholds that apply to all other transactions. The investigation will be into public interest consideration specified by the Secretary of State (see section 15 below), with whom the final decision on those considerations rests. If the 'normal' jurisdictional thresholds are met, the CMA may also investigate and decide upon the competitive effects of the transaction.

7. How are turnover, assets and/or market shares valued or

determined for the purposes of jurisdictional thresholds?

Turnover is calculated broadly in the same way as it is for the purpose of the EU Merger Regulation, i.e. sales to third parties in the most recent financial year of goods and services, net of sales rebates, discounts and turnover-related taxes (such as VAT) and adjusted to take account fully of acquisitions and disposals of businesses. Turnover is usually (but not always) allocated geographically according to the location of the customer.

A party's turnover and/or share of supply should be taken as including the turnover or share of supply of entire group of companies to which it belongs. However, the turnover or share of supply of the seller (and any of the seller's group companies) is not taken into account when determining the turnover or share of supply of the target. In addition, the group of entities that is to be taken into account for the purposes of calculating turnover under the EA is slightly wider in scope than that which is taken into account for the purposes of the EU Merger Regulation. In particular, the following entities may be included in the turnover calculation:

- Entities or persons that are 'associated' with the target, for example because they are family relations, or because they carry on business 'in partnership' with the target.
- Where the target has material influence or control over the policy of an enterprise, but does not have a legally controlling interest (as defined in section 4 above), the CMA can include its turnover with that of the target for the purpose of assessing whether it has jurisdiction, although it is not required to. The same applies with respect to enterprises that have a material influence or control of the target's policy, but do not have a legal controlling interest.

For outsourcing transactions, the CMA may treat as turnover sales between the target and the seller, and may attribute such value to those sales as it considers appropriate to reflect their open market value.

For the share of supply test, the CMA has a broad discretion as to the category of goods or services that it uses as the frame of reference for assessing whether the test is met. In particular, the CMA will not – for the purposes of assessing whether it has jurisdiction – carry out a detailed assessment of the relevant economic market. Rather, it will consider the scope of products or services which appear to be broadly comparable, and

potentially substitutable, with the products or services of the merging parties. That category may be considerably wider or narrower than the proper relevant economic product market to which the goods or services belong. As regards the geographic area that is used as the frame of reference for the share of supply test, this may be national, regional or local, depending on the circumstances (again, the CMA has a broad discretion).

8. **Is there a particular exchange rate required to be used for turnover thresholds and asset values?**

   The CMA accepts the use of European Central Bank (ECB) exchange rates.

   For 2016, GBP 1 = EUR 1.22 = USD 1.351.

   ECB annual exchange rates for EUR / GBP and EUR / USD conversions are available at the ECB's website.

9. **Do merger control rules apply to joint ventures (both new joint ventures and acquisitions of joint control over an existing business?**

   In relation to joint ventures, where both/all parents are contributing assets to the new joint venture, turnover of each of the businesses being contributed to the joint venture must be assessed, with the lowest business turnover being deemed the 'target' in this respect.

   'Greenfield' joint ventures (i.e. joint ventures that commence a new business activity, rather than combining existing activities of the parent companies) are not notifiable under UK merger control rules, as such ventures have neither turnover nor share of supply.

10. **In relation to “foreign-to-foreign” mergers, do the jurisdictional thresholds vary?**

    The jurisdictional thresholds do not vary according to whether the transaction is 'foreign-

to-foreign' (i.e. whether the legal entities acquiring and being acquired are all located outside the UK).

11. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Whether or not to notify voluntarily a merger to the CMA is a question to be determined by a commercial risk assessment. The parties are likely to view the risks differently, but the following points can be made.

On the one hand there is the question whether the merger raises any competition concerns, and if so whether they are likely to elicit complaints from customers/competitors and/or are of sufficient magnitude that a second-phase investigation is a realistic prospect. The CMA can open such an investigation at any time up to four months from the date of completion of the transaction, or from the date on which facts about the transaction became public (e.g. when it is announced, or when it receives significant press coverage in the national or trade press), whichever is the later. Acquirers effectively face the risk of the CMA opening an investigation on its own initiative if transactions are not made 'sufficiently public'; this was underlined by a case involving Tesco's acquisition, through a nominee company, of a single grocery store operated under the Brian Ford fascia, which resulted in a first-phase review being commenced almost five years after the transaction completed.

On the other hand, there is the desire for legal certainty. If the parties and their advisers consider that the risk of a reference is low, the parties may decide not to notify. Equally, the parties may take the view that the transaction is low-profile enough to escape the CMA's attention (notwithstanding the CMA's dedicated mergers intelligence unit that monitors various sources of information). Or the parties may take the risk that, even if the CMA hears about it, a second-phase investigation is unlikely. However, the interests of the purchaser may be better served by insisting upon a notification being made, backed up by clearance being a condition of closing. The potential consequences for a purchaser of completing a transaction without having obtained prior clearance are set out in Section 1 above.

Finally, for takeovers of publicly listed companies, the UK City Code on Takeovers and

Mergers requires that any offer for a public company must lapse in the event of a second-phase investigation by the CMA, or the initiation of in-depth proceedings by the European Commission under the EU Merger Regulation. Consequently, if the CMA has jurisdiction to review an offer, the bidder will often opt to notify it to the CMA for clearance.

12. Additional information: Jurisdictional Test

In accordance with the referral system under the EU Merger Regulation, a transaction that is notifiable to the European Commission may, if certain criteria are met, be referred – in whole or in part – for review by the CMA, either at the request of the parties or at the request of the CMA.

In addition, a transaction (or the UK aspects of it) may be referred for review by the European Commission even if the parties do not meet the jurisdictional thresholds for review under the EU Merger Regulation or the UK merger control regime. Again, this can happen at the request of the parties or of the CMA.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies?

The CMA has a duty to open a detailed second-phase investigation (known as 'referring' or 'making a reference' of the merger) if it has a reasonable belief, objectively justified by the relevant facts, that there is a realistic prospect that the merger will or may be expected to result in a substantial lessening of competition (SLC) in any market. By 'realistic prospect' is meant not only a prospect that has a more than 50% chance of occurring, but also a prospect that has a less than 50% chance of occurring, but is more than fanciful, though within this latter range the CMA can exercise its judgement.

If a second-phase investigation is opened, the CMA must decide whether a relevant merger situation has been created and, if so, whether that situation is likely – on the balance of probabilities – to result, or to have resulted, in an SLC in any market.

14. Are non-competitive factors relevant?

Non-competition factors are relevant in certain 'public interest' cases – see Section 15 below.

In addition, for any type of case, the CMA may take into account the existence of transaction-specific efficiencies and 'relevant customer benefits'. If these outweigh a transaction's negative effects on competition, the CMA may decide to clear the merger. It may also take relevant customer benefits into account when assessing what remedies should be required in order to address any anticompetitive effects of a transaction.

Relevant customer benefits include lower prices, higher quality or greater choice of goods or services, or greater innovation in relation to such goods or services.

15. Are there different tests that apply to particular sectors?

Sector-specific tests apply in certain 'public interest' cases. Currently, the following constitute relevant 'public interests':

- national and public security (these considerations are typically applied to transactions in the defence sector);
- certain interests linked to the media, including the need for accurate presentation of the news and free expression of opinion, the need for (so far as reasonable and practicable) sufficient plurality of views in newspapers, the need for sufficient plurality of control of the media, the need for a wide variety of high quality broadcasting and the maintenance of broadcasting standards; and
- the maintenance of the stability of the UK financial system.

Further public interest considerations can be introduced by the Secretary of State.

In 'public interest' cases, the Secretary of State has the power to intervene and, if he or she chooses to do so, will then have the final decision as to whether to block a transaction, clear it, or clear it subject to conditions. In particular, the Secretary of State can decide:

- that the transaction gives rise to actual or potential competition concerns but that

the relevant public interest nonetheless justifies clearing the merger (this happened in 2008 with the merger between the financial institutions Lloyds and HBOS); or

- that the relevant public interest necessitates the imposition of remedies beyond those (if any) that are required to address the transaction's competition concerns.

In addition, the CMA is required to open a second-phase investigation into any transaction involving certain enterprises operating in the water sector, unless the turnover of either the target water enterprise or any water enterprise already controlled by the purchaser is GBP 10 million or less. Exceptions to this duty exist where (i) the merger is not likely to prejudice the ability of the water regulator (Ofwat) to make comparisons between water enterprises for the purpose of setting appropriate price controls, or where any such prejudice is outweighed by relevant customer benefits; and (ii) the CMA accepts undertakings-in-lieu of a reference for the purpose of remedying or mitigating the prejudicial impact of losing a comparator. If there is a second-phase investigation, the substantive question considered by the CMA is the same, i.e. whether the merger may be expected to prejudice the ability of the water regulator (Ofwat) to make comparisons between different water enterprises.

16. Are ancillary restraints covered by the authority's clearance decision?

The CMA follows the approach of the European Commission towards ancillary restraints (see the European Union chapter of this guide).

Parties are expected to self-assess their compliance with the Commission's notice on restrictions directly related and necessary to concentrations, although the CMA may provide guidance where a novel or unresolved issue arises.

17. What is the earliest time or stage in the transaction at which a notification can be made?

Transactions may be notified even if the parties have not yet signed a sale and purchase agreement. The CMA will generally expect the parties to be able to demonstrate a good faith intention to proceed with the transaction, by reference to, for example, adequate financing, heads of agreement or similar, or evidence of board-level consideration.

In addition, it is advisable to engage in a pre-notification dialogue with the CMA, because:

- The CMA's filing form (the 'merger notice') requires very extensive information (considerably more than the equivalent filing form of the European Commission, for example). For most transactions, at least some of this information will be irrelevant or unnecessary for the CMA's review. Notifying parties can therefore use pre-notification discussions with the CMA to confirm which information can be safely omitted.
- In complex cases, such pre-notification contacts can serve to inform the CMA case team about the relevant markets and to establish the appropriate frame of reference for the CMA's review. In some cases, lengthy pre-notification discussions may reduce the likelihood of a detailed second-phase investigation.

The CMA's guidance states that, in general, pre-notification contacts should commence at least two weeks before the parties' intended date of notification. In many cases, a significantly longer period will be appropriate.

As notification results in a public announcement by the CMA (see section 26), it is not, in practice, possible to notify a confidential transaction that has not been announced. For transactions that are not yet in the public domain, the parties can consider approaching the CMA for 'informal', non-binding advice on the likelihood that a second-phase investigation would be opened. Such advice is only available if certain criteria are met.

18. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

There is no filing deadline.

19. What is the basic timetable for the authority’s review?

First-phase
The CMA is required to complete its first-phase investigation within 40 working days. This runs from:

- in the case of notified mergers, the date on which the CMA confirms that the filing

form is complete (which it will typically do within five working days of the date on which the notice is submitted); or

- in the case of unnotified mergers (i.e., where the CMA decides to review a transaction on its own initiative), the date on which the CMA informs the parties that it has sufficient information to commence its first-phase investigation.

This 40 day period can be extended in the circumstances described in paragraph 5.4 below. In particular, if the parties offer remedies during the first-phase investigation, an additional period for negotiation and finalisation of those remedies will apply.

Second-phase
Where a second-phase investigation is opened, the CMA must publish its report within 24 weeks from the date of reference, subject to the possible extensions described in section 20 below. If it proposes to impose remedies as a condition of clearance, it will have an additional period of 12 weeks (which can be extended by 6 weeks) to implement those remedies.

20. Under what circumstances the basic timetable may be extended, reset or frozen?

First-phase
At the end of the 40 working day first-phase period the CMA must decide whether the transaction risks giving rise to a substantial lessening of competition and should therefore be subject to a second-phase investigation, unless remedies are agreed. This 40 day period may be extended in the following circumstances:

- Where the parties fail to provide information to the CMA by the deadline specified in a request for information.
- If the Secretary of State serves notice that a relevant public interest should be considered (see section 15), the CMA can extend the period for its investigation by 20 working days. (The Secretary of State, however, is not subject to any specified binding deadline for his or her decision as to whether a second-phase investigation should be opened on public interest grounds.)
- If the CMA asks the European Commission to review the merger under the EU Merger Regulation (see section 12 above).

In addition, if the parties offer remedies during the first-phase, an additional period for negotiation and finalisation of those remedies will apply – see section 31.

Second-phase

The CMA can extend the 24-week period by a further eight weeks for special reasons. It can also 'stop the clock' from running if one of the parties to the merger has failed to comply with a formal notice requiring the provision of information and documents or the appearance of witnesses.

For uncompleted mergers, the CMA can also extend the 24 week period for up to three weeks if the parties indicate that they are considering abandoning the transaction, in order to give the parties time to decide whether or not to do so.

In addition, in cases where the CMA proposes to impose remedies on the parties, or to clear the transaction on condition that remedies are implemented, it will have a period of 12 weeks from the date of its second-phase report within which to negotiate and finalise those remedies. That period can be extended by six weeks in certain circumstances.

21. Are there any circumstances in which the review timetable can be shortened?

There are no formal mechanisms for shortening the review period. However, the CMA may be prepared to give early clearance in cases where no competition concerns arise and where the parties can demonstrate a credible and urgent need for early clearance.

In addition, if a transaction gives rise to complex issues such that a second-phase investigation is likely, the CMA may exceptionally, at the parties' request, agree to make a referral on an accelerated timetable or 'fast track', if there is sufficient evidence available to meet the CMA’s statutory threshold for reference.

22. Which party is responsible for submitting the filing? Who is responsible for filing in cases of acquisitions of joint control and the creation of new joint ventures?

As there is no penalty for not filing, no party has a legal responsibility to file. However,

the usual practice is for the acquiring party to file, as it will be responsible for paying the filing fee. Where two parties are merging or forming a joint venture, it is usually the case that both file jointly.

23. What information is required in the filing form?

Because the UK filing regime is voluntary, transactions that are notified tend to be ones that raise at least potential or conceivable competition concerns. Consequently, the Merger Notice requires relatively extensive information. This includes information on the transaction itself, the parties' respective businesses, market definition, the nature of competitive constraints posed by the parties and their competitors, substitutability of their products (including any available bidding data), contact details for customers and competitors, the buying power of the parties and their customers, potential competition, the existence of horizontal, coordinated, conglomerate or vertical effects arising from the transaction, and barriers to entry and expansion in the relevant markets.

Where the parties' combined market share on a relevant market is below certain thresholds (15% for horizontally affected markets and 25% for vertically affected markets), the information to be provided is less extensive.

24. Which supporting documents, if any, must be filed with the authority?

The merger filing form requires submission of the following supporting documents:

- press releases and details of any notifications to listing authorities;
- transaction documents (including any heads of terms, memorandum of understanding and sale and purchase agreement) or drafts of such documents, if not finalised;
- if the offer is subject to the UK takeover code (for acquisitions and mergers of listed companies), copies of the offer document and listing particulars, or drafts of such documents;
- the most recent annual report and accounts and last set of monthly management accounts for each of the parties;
- copies of the most recent business plan for each of the parties, and for any specific

division or brand of the parties that is relevant to horizontal or vertical overlaps between them;

- copies of any documents (e.g. minutes of meetings, studies, reports, presentations, surveys, analyses etc.), prepared by, or for, or received by, any member of the board of directors (or equivalent body) or senior management or shareholders of either party, which either set out the rationale for the merger; or analyse the merger with respect to various factors of competition (e.g. competitors, market conditions, pricing, potential for sales growth or expansion into new product or geographic areas etc.); this includes information memoranda relating to the transaction and post-merger business plans (including integration plans and financial forecasts); and
- copies of recently-prepared documents (e.g. reports, presentations, studies, analysis, marketing and advertising strategies, industry/market reports, including customer research and pricing studies) which set out the competitive conditions, market conditions, market shares, or competitors in the industry or business areas where the merger parties have a horizontal overlap.

In some cases, it is possible to agree a narrower scope of required supporting documents, during pre-notification discussions with the CMA.

The CMA can also – and usually does – request these documents (or a sub-set of them) where there has been no notification and it has commenced a review of the transaction on its own initiative.

Documents that are submitted do not need to be legalised, certified or apostilled in any way. Where supporting documentation is in a foreign language, the parties are encouraged to provide a translation (if translations are not supplied, the CMA can ask for them).

A statutory merger notice must be signed by an 'authorised person', being a person with authority to bind the notifying party (or each notifying party, if the notification is submitted jointly).

25. **Is there a filing fee? If so, please specify the amount in local**

currency.

Subject to some limited exceptions, the notification of any qualifying merger is subject to a filing fee irrespective of whether a second-phase investigation is opened. The CMA will also require payment of a filing fee where it carries out an 'own initiative' investigation into a transaction that has not been notified, unless it concludes that it does not have jurisdiction to review the transaction. Fees vary according to the value of the UK turnover of the acquired enterprise:

- £40,000, where the UK turnover of the target is £20 million or less;
- £80,000, if the target's UK turnover is over £20 million but not over £70 million;
- £120,000, where the UK turnover of the target exceeds £70 million; and
- £160,000, where the UK turnover of the target exceeds £120 million.

The fee is payable when the CMA (or, if applicable, the Secretary of State) publishes its first-phase decision.

For mergers that are not notified to the CMA (i.e. where the CMA has commenced a review on its own initiative), no fee is payable if the transaction involves the acquisition of a material interest which falls short of a 'controlling interest' (see section 5 above).

26. Is there a public announcement that a notification has been filed?

Once notified or after the CMA begins an investigation on its own initiative (in the case of an un-notified merger), the CMA will publish an invitation to comment to third parties. This occurs on the CMA's website and on the Stock Exchange Regulatory News Service, typically within a day or two of notification or the commencement of the CMA's investigation. The announcement is brief and contains the names of the parties to the transaction, the relevant industry sector, whether the merger has already completed and an indication of the CMA's review timetable.

27. Does the authority seek or invite the views of third parties?

The CMA routinely – indeed, without exception – invites third parties to comment on

transactions that it is reviewing. In addition, within a few days of commencing its investigation, the CMA will usually directly contact relevant customers, suppliers and competitors of the parties, based on details supplied by the parties.

The CMA may also, where appropriate, solicit views on merger cases from other governmental departments, sectoral regulators, industry associations and consumer bodies.

28. What information may be published by the authority or made available to third parties?

Submissions to the CMA are treated in confidence, although the substance of the arguments put by the parties may be communicated by the CMA to interested third parties (except in cases where parties have sought informal advice from the CMA on a certain novel point of substantive assessment or procedure).

The CMA publishes all its decisions in cases where there is a relevant merger situation. Decisions not to open a second-phase investigation are announced briefly on the Stock Exchange Regulatory News Service. The full text of the CMA's decision is published shortly afterwards, subject to the excision of confidential information.

Decisions to open a second-phase investigation are also announced on the Regulatory News Service, but the CMA will also generally issue a press release stating the main concerns raised by the merger. The CMA will also publish a statement of the terms of reference. The full text of the CMA's decision to open a second-phase investigation will be published shortly afterwards, subject to the excision of confidential information.

The CMA's second-phase reports are published, as are its issues statements, provisional findings and remedies statements during the investigation, although specific items of confidential information are usually excluded. The CMA publishes key submissions made by the parties (e.g. the initial submission and responses to the provisional findings and remedies statement) as well as comments, or summaries of comments, received from third parties.

The parties (and third parties) are given an opportunity to request excisions from the

published documents of the CMA to protect confidentiality.

The CMA is required by the Enterprise Act to balance its obligation to be transparent with the confidentiality needs of the parties or third parties. In so doing, it takes into consideration whether the parties or third parties would be significantly harmed by the publication and whether the publication would be against the public interest.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

The CMA cooperates closely with the European Commission and national competition authorities of EEA Member States through the European Competition Authorities (ECA) network. In addition, an EU Merger Working Group comprising the European Commission and the competition authorities of EU member states has developed Best Practices on Cooperation between EU National Competition Authorities in Merger Review, which sets out non-binding principles of cooperation concerning mergers subject to review in more than one EU Member State. Parties that notify in these jurisdictions will generally be asked if they are notifying in any other ECA jurisdictions and, if so, officials from the relevant jurisdictions will liaise and coordinate their reviews (although confidential information will only be disclosed if permitted by national legislation or a waiver provided by the parties).

The CMA may also engage in similar cooperation with non-EU authorities, such as the US Department of Justice and Federal Trade Commission.

30. What kind of remedies are acceptable to the authority? How often are behavioural remedies accepted in comparison with major merger control jurisdictions, such as the EU or US?

Where competition problems are identified, remedies in the form of structural, behavioural or a combination of structural and behavioural, undertakings may be negotiated.

Remedies offered at the end of the first-phase review with a view to avoiding a second-phase investigation are known as 'undertakings in lieu'. These need to be 'clear cut'

solutions to the competition concerns. As such, structural remedies, in particular divestments, are likely to be considered more suitable than behavioural remedies. There is also a stated preference for structural remedies during the second-phase investigation.

There are examples of behavioural remedies being accepted by the CMA and its predecessors and, generally, the CMA is reasonably flexible regarding remedies.

Where divestments are required, but the CMA has doubts regarding the attractiveness of the divestment business to purchasers, or otherwise doubts the availability and interest of suitable purchasers for the business, the CMA will usually seek an 'up-front buyer' remedy. Where an up-front buyer remedy is required, the CMA will not issue its clearance decision unless and until the parties have entered into a legally binding agreement for the sale of the divestment business to a third party before the end of the period within which first-phase remedies must be finalised, such third party having been approved by the CMA as a suitable purchaser (that period will usually be extended to 90 working days where an up-front buyer is required). If a binding agreement for sale of the divestment business to a suitable purchaser cannot be concluded within the requisite timeframe, the CMA will proceed to open a second-phase investigation.

In principle, the CMA can require or accept remedies in respect of foreign-to-foreign mergers. In one case, a predecessor of the CMA (the Competition Commission) held that prohibition of a merger would be neither appropriate nor practicable given its global nature and because manufacturing took place overseas.

31. What procedure applies in the event that remedies are required in order to secure clearance?

During the first-phase investigation, remedies can be offered at any time up to five working days after the CMA has informed the parties of a decision that the merger risks giving rise to a substantial lessening of competition, and will therefore be subject to a second-phase investigation unless suitable remedies are agreed and implemented. This means that the parties are not required to offer remedies without having been informed of the substance of the CMA's concerns and the markets to which they relate. In practice, it is possible to commence a dialogue on remedies at any stage in the process, or even before the CMA begins its investigation.

After the CMA has issued its SLC decision, the parties have five working days within which to offer remedies, and the CMA will have up to 10 working days from the SLC decision within which to decide whether the offered remedies merit further negotiation (if it considers that they do not, it will open the second-phase investigation).

The CMA will then have up to 50 working days from the date of the SLC decision within which to negotiate, consult on, and finalise the remedies. This period can be extended to 90 working days if there are 'special reasons' (e.g. if an up-front buyer is required – see section 31 above).

During the second-phase investigation, the question of remedies will not normally be raised until the CMA has issued its provisional findings. The basic outline of any remedies will be finalised before the CMA takes its final second-phase decision on the merger. The detailed terms and conditions of the undertakings are negotiated after the final decision has been announced, and must be finalised within 12 weeks (which can be extended by six weeks, if there are special reasons). Where parties do not cooperate in the negotiation of second-phase remedies, the CMA can impose the required remedy in the form of an order on the parties.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

Regarding failure to notify and late notification, no such penalties apply, as there is no obligation to notify and no notification deadline. There is no prohibition on closing unless the CMA has either issued an order to that effect (in which case failure to comply with the order would give rise to penalties of up to 10% of the worldwide group turnover of the party in breach), or has initiated a second phase investigation (in which case a breach of the automatic prohibition on share dealing may result in injunctions and damages claims).

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority’s questions?

A person is liable to imprisonment for a term not exceeding two years, and/or to a fine if they:

- supply any information to the CMA which is false or misleading in a material respect and which they know to be false or misleading in a material respect (or if a person is reckless as to whether information is false or misleading in a material respect); or
- intentionally alter, suppress or destroy a document that the CMA has required to be produced.

In addition, the CMA can impose a fine of a fixed amount of up to £30,000, as well as daily fines of up to £15,000 for failure to comply with a binding CMA request for information, documents or attendance of witnesses, without reasonable excuse, or for intentionally obstructing the CMA from taking a copy of a document that is provided to it. This could apply, for example, if incomplete information is provided, or if information is not provided by the deadline specified in the request for information.

In addition, failure to provide information within the required timeframe may result in an extension of the CMA's first-phase or second-phase deadlines (see Section 19 above) and an extension of its four month deadline for jurisdiction to review completed mergers (see Section 6 above).

34. Can the authority’s decision be appealed to a court? In particular, can third parties who are not involved in the transaction appeal the decision?

Decisions of the CMA (or, in 'public interest' cases, the Secretary of State for Business, Energy and Industrial Strategy – see Section 15 above) can be appealed to the Competition Appeal Tribunal by the parties, or by third parties with sufficient standing. Appeals are judged on the basis of 'judicial review' standards, which means that the CAT will not review the merits of the relevant decision (i.e., it will not decide whether the decision was correct in every respect), but will instead consider whether, for example, the CMA acted unreasonably, considered factors that it ought not to have taken into account, failed to consider factors that it ought to have taken into account, or otherwise exceeded the bounds of its discretion.

Appeals must be lodged within four weeks of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is

the earlier.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment?

Following the introduction in 2014 of binding first-phase deadlines, new information-gathering powers and a revised filing form with substantial information requirements, the CMA has spent the past few years refining its procedures with a view to reducing the duration of its first-phase investigations and the (typically high) volume of its information requests, and imposing 'hold-separate' obligations that create fewer unnecessary burdens for merging parties. It has also introduced mechanisms that allow parties to seek some informal, non-binding comfort that the CMA will not 'call in' a merger for review.

36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

The government is expected shortly to announce details of proposals to allow the Secretary of State to intervene in acquisitions of 'critical infrastructure' in the UK, to ensure the protection of the national interest.

In the longer term, the exit of the UK from the European Union (Brexit), in accordance with the results of a referendum in June 2016, will have a significant impact on the UK merger control regime. While it remains unclear what form of Brexit will be negotiated, many of the likely models involve the EU Merger Regulation ceasing to apply under UK law. This would mean that:

- Large mergers involving UK businesses that raise competition concerns would face having two, parallel, reviews by each of the EU and UK authorities, instead of the present 'one-stop-shop' review by the European Commission.
- The exclusion of UK turnover when calculating whether the thresholds for an EUMR filing are met would push some transactions below those thresholds, and would likely mean fewer filings are required for joint ventures – including acquisitions of joint control over businesses – with activities in the UK, but not the EEA region.

- Finally, the UK government would have greater freedom to block or impose conditions on mergers on grounds that are unrelated to competition, such as the impact on employment, or a desire to limit foreign ownership of UK businesses. At present, the EU Merger Regulation restricts the circumstances in which the UK government can prohibit or impose remedies on mergers that are notifiable to the European Commission. Given the recent announcement of proposals for greater political scrutiny of acquisitions of 'critical infrastructure', it seems likely that the present government would seek to make use of this greater freedom.