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The consistency and compatibility of transactional resolutions of antitrust proceedings (such as settlement processes, leniencies, transactions, commitments, and amicable agreements) with the due process and fundamental rights of the parties

1 Introduction

In April 2014, a number of significant reforms to the UK competition law regime were introduced. These were given effect through the Enterprise and Regulatory Reform Act 2013 (**ERRA13**), which received Royal Assent on 25 April 2013.

The principal change for the UK competition regime has been the establishment of a new unified competition authority, the Competition & Markets Authority (**CMA**). The CMA was formally established in October 2013 and operated in "shadow form" prior to becoming fully operational on 1 April 2014 and assuming the competition functions of the Office of Fair Trading (**OFT**) and all the functions of the Competition Commission (**CC**). The OFT and CC have now been abolished[1].

The CMA has a range of statutory powers to address competition issues[2]. These include the power under the Competition Act 1998 (**CA98**) to investigate undertakings or groups of undertakings suspected of infringing the UK and/or EU prohibitions against anti-competitive agreements and the abuse of a dominant position[3]. In addition, under the Enterprise Act 2002 (**EA02**)[4], the CMA is able to investigate mergers (provided they meet the jurisdictional thresholds) and take action in respect of those that may give rise to a substantial lessening of competition, and also has the ability to impose measures on the merging parties to protect competition pending the outcome of the CMA's investigation. Furthermore, under EA02, the CMA has the power to conduct market studies and market investigations into markets in which the CMA considers that competition may not be working effectively, with the ability, inter alia, to impose wide-ranging remedies to address any concerns that are identified. Finally, the CMA is also able to bring criminal proceedings against individuals who are suspected of having committed the cartel offence under section 188 EA02[5].

On 22 January 2014 the CMA published a document setting out its vision, values and strategy. This sets out the CMA's mission to make markets work well in the interests of consumers, businesses and the economy; and its overall ambition is to be one of

[1] The various UK sectoral regulators – CAA (air traffic services), Monitor (healthcare sector), Ofcom (communications/post), Ofgem (and NIAUR in Northern Ireland) (electricity and gas), Ofwat (water and sewerage), ORR (rail) – will retain their concurrent competition powers.

[2] The CMA will also have powers to enforce a range of consumer protection legislation, and will also take on the CC's powers and duties in relation to the conduct of appeals regarding regulatory determinations.

[3] The UK equivalents of Article 101 TFEU and Article 102 TFEU are known, respectively, as the "Chapter I prohibition" and the "Chapter II prohibition".

[4] References in this paper are to the EA02 as amended by the ERRA13, unless otherwise stated.

[5] Prosecutions may only be brought by the CMA or the Serious Fraud Office, or with the consent of the CMA. Prosecutions will generally be undertaken by the CMA. The settlement of criminal cases under the UK's competition regime is not considered in this paper.

the leading competition authorities in the world. In order to achieve its overall ambition the CMA has set itself five strategic goals: to deliver effective enforcement; to extend competition frontiers; to refocus consumer protection; to develop integrated performance; and to achieve professional excellence[6].

The CMA is also expected to have regard to the Government's performance management framework, which sets out the performance that the Government expects of the CMA[7]. In summary, the Government expects the CMA to have a beneficial impact on consumers, on business behaviour and on productivity and growth in the economy, and to make robust decisions and implement effective and proportionate remedies. In line with its overall mission, the CMA is expected, amongst other things, to increase the number of competition cases it deals with (compared to the OFT), make strong and effective use of all its competition tools across a range of projects, and reduce the time taken for cases to reach conclusion.

At the same time, alongside the establishment of the CMA, a number of important changes to the UK competition regime were also introduced, including in relation to antitrust investigations, mergers and market investigations. These aim to strengthen the UK competition regime (by giving the CMA new and enhanced investigation and enforcement powers), and also to streamline its processes in order to improve the effectiveness and efficiency of the competition regime (and to ensure that any burdens on business are no greater than those necessary and proportionate).

Against this background, there is no doubt that the various types of transactional resolutions that are available (such as "commitments", "undertakings-in-lieu", "voluntary assurances" and other forms of negotiated solutions) will be a valuable part of the CMA's toolkit. Transactional resolutions can be expected to assist the CMA in delivering effective and efficient competition enforcement.

However, the success of the available transactional resolution mechanisms (and parties' willingness to use them) will, to a large extent, depend on ensuring procedural fairness and transparency, as well as on safeguarding the fundamental rights of the parties involved. The CMA has published extensive guidance on its antitrust and merger investigation proceedings (including with regard to transactional resolutions), aiming to increase certainty and predictability as well as to ensure fair treatment for the parties involved. Such predictability and fairness in decision-making processes is also fostered by transparency with respect to: the substantive legal standards; policies, practices, and procedures; the order and likely timetable of key stages in proceedings; and the process for appealing CMA decisions.

In the context of competition investigations in the UK, there is a certain degree of formal and informal interaction between the authorities and the parties involved in

[6] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274059/CMA13_Vision_and_Values_Strategy_document.pdf

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274146/bis-14-559-competition-and-markets-authority-performance-management-framework.pdf. In October 2013, the Government also published a non-binding ministerial statement of strategic priorities for the CMA which include: identifying markets where competition is not working well and tackling constraints on competition; defending fair competition and enforcing antitrust rules robustly; challenging governmental barriers to competition; and delivering positive competition outcomes.

the proceedings. Such interaction enhances the parties' knowledge of the facts underpinning the investigation (and therefore the case they need to address), and allows them to consider the appropriateness of a settlement balanced against the CMA's theory of harm. For example, in CA98 cases, if the CMA is of the view that the conduct under investigation amounts to an infringement, it will issue a Statement of Objections (**SO**) in which it will set out its case against the parties and its proposed next steps, and will also give the parties an opportunity to respond in writing and orally if they so wish. At the same time, the CMA will also give recipients of the SO access to file in order to ensure that they can properly defend themselves against the allegation of having infringed competition law. At that stage, and even pre-SO, the CMA may also inform the parties that they can contact the CMA if they wish to enter into discussions on possible settlement – one of the key transactional resolution mechanisms available. Parties may also approach the CMA at any time to explore the possibility of resolving an investigation through a transactional resolution (and the different options are considered further below). Any type of transactional resolution is, however, voluntary, and the parties involved are under no obligation to settle or enter into any settlement discussions where these are offered by the CMA. In fact, even if a party decides to settle its case with the CMA it still has the opportunity to appeal any subsequent infringement decision[8]. Conversely, parties do not have a right to settle and the CMA has a wide discretion in deciding which cases are suitable for transactional resolution.

In merger investigations, the case against the parties will be set out, in Phase 1, in an "issues letter" and subsequently in the CMA's decision; and in "provisional findings" (**Provisional Findings**) in Phase 2. In Phase 1, the parties will have an opportunity to respond and consider (especially after seeing the CMA's decision) whether they wish to offer commitments to avoid an in-depth Phase 2 investigation.

In market studies and investigations, parties will also be presented with the CMA's views and will have an opportunity to comment and assess whether to offer commitments or assurances in order to address any CMA concerns if it is minded to initiate a Phase 2 investigation.

Transactional resolutions are available for all types of competition investigation in the UK. In this paper, we have sought to answer the various questions posed by the International Rapporteur[9] and have focussed on transactional resolutions in the context of: (i) antitrust investigations; (ii) merger control; and (iii) market studies and investigations.

[8] This occurred in the OFT's tobacco products investigation (http://www.oft.gov.uk/news-and-updates/press/2010/39-10). A number of parties settled, two of which (Gallaher and Somerfield) then challenged the infringement decision. The appeals were ultimately dismissed; see further section 2.3 below.

[9] Although this paper does not consider in any detail the rights of third parties, we consider that the relevant legislation and guidance, together with legal precedent, ensures that there are sufficient mechanisms to safeguard the legitimate interests of third parties in UK competition proceedings. For example, the ability to: obtain "Formal Complainant" status in CA98 cases (which gives third parties the opportunity to become involved in key stages of an investigation); make representations on draft commitments; be consulted about the proposed scope of remedies in merger and market study/investigation cases; and appeal against decisions made under the CA98 or the EA02.

2 CA98 investigations

As noted above, the CMA is primarily responsible for enforcement of the Chapter I (anti-competitive agreements and practices between undertakings) and Chapter II (abuse of a dominant position) prohibitions of the CA98, as well as Articles 101 and 102 TFEU[10].

Although transactional resolutions of antitrust investigations have been possible for some time, parties and regulators have become increasingly willing to consider them over the past few years. In particular, by leading to a more effective and efficient use of resources, transactional resolutions can enable the CMA to undertake more high-impact projects and increase deterrence. Accordingly, a number of antitrust investigations in the UK have been resolved either informally, or through some form of formal resolution process such as by accepting binding commitments or settlements[11]. Depending on the nature of the case, transactional resolution may result in the CMA closing its file without making a finding of infringement, or leading to a reduced fine in the context of an infringement decision.

2.1 Informal resolution

Not all antitrust investigations result in a finding that there has, or has not, been a breach of competition law. A number of antitrust investigations in the UK have been resolved informally, either because the authorities are satisfied that there has been no infringement or that the evidence is insufficient to reach a finding of infringement, or because the parties have given certain voluntary assurances to address potential concerns.

In a number of cases the OFT accepted voluntary assurances offered by parties under investigation, as a result of which the OFT closed its preliminary inquiry (without opening a formal investigation) or its formal investigation (without making any finding of infringement)[12]. Voluntary assurances are not legally binding and companies may give them in order to avoid the time and expense of a formal investigation.

Although the CMA has yet to close an investigation by accepting voluntary assurances, the table below sets out details of cases in which the OFT accepted voluntary assurances.

[10] Certain sectoral regulators have concurrent jurisdiction to enforce the Chapter I and II prohibitions within their regulated sectors. The Chapter I and Chapter II prohibitions (and Articles 101 and 102 TFEU) may also be invoked in private litigation in the UK courts.

[11] Settlements have also been described as 'early resolution agreements'. However in this paper the term 'settlement' will be used throughout.

[12] Voluntary assurances do not however preclude further investigation should further evidence of potential infringements become available.

Case	Suspected infringement	Outcome	Year
NHS Hospital Trusts[13]	Chapter I prohibition	Eight NHS Hospital Trusts gave voluntary assurances to the OFT that they would no longer exchange confidential pricing information and would provide further training to their staff on the importance of complying with competition law. As a result, the OFT closed its preliminary inquiry without opening a formal CA98 investigation.	2012
Street furniture advertising / outdoor advertising[14]	Chapter I prohibition	Clear Channel and JCDecaux, two of the major outdoor advertising companies in the UK, offered voluntary assurances and agreed to make changes to the way they enforce their street furniture advertising contracts (advertising on bus shelters and information panels) with Local Authorities. In the light of the assurances, the OFT closed its investigation without making any finding of infringement under CA98. Alongside the voluntary assurances given by Clear Channel and JCDecaux, the OFT also made certain non-binding best practice recommendations to Local Authorities in relation to their procurement of street furniture advertising.	2012
School Suppliers[15]	Chapter I prohibition	A group of school suppliers in the public sector provided voluntary assurances in relation to the way in which they compete for business from schools in England. In the light of the assurances, the OFT closed its preliminary inquiry without opening a formal CA98 investigation.	2011
Bacardi-Martini[16]	Chapter II prohibition	Bacardi-Martini gave the OFT assurances that it would not enter into, or maintain,	2003

[13] http://www.oft.gov.uk/news-and-updates/press/2012/71-12

[14] http://www.oft.gov.uk/news-and-updates/press/2012/39-12

[15] http://www.oft.gov.uk/news-and-updates/press/2011/130-11

[16] http://www.oft.gov.uk/news-and-updates/press/2003/pn_10-03

		certain types of exclusive distribution agreements. In the light of the assurances, the OFT closed its investigation without making a finding of any infringement of CA98.	
Robert Wiseman Dairies[17]	Chapter II prohibition	In 2001 Robert Wiseman Dairies gave voluntary assurances concerning the sale of milk to certain customers in Scotland. Robert Wiseman Dairies was released from voluntary assurances in 2002 when the OFT decided to close the investigation on the basis that, although Robert Wiseman Dairies probably held a dominant position in the relevant market, the evidence was insufficient to lead to a finding of infringement.	2001

2.2 Commitments

In certain cases, instead of continuing with its investigation and making an infringement decision, the CMA may be prepared to accept legally binding promises (or 'commitments') offered by the parties involved relating to their future conduct[18].

The CMA is likely to consider it appropriate to accept commitments and bring its investigation to an end only in cases where the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time[19]. Commitments may be structural and/or behavioural (for example, modifying or ceasing specific conduct, terminating an exclusive arrangement or licensing specific IP). Commitments are generally adopted for a specified period of time, after which the parties which offered them are released from their obligations under the commitments. During the period in which commitments are in force, they may be reviewed in order to take account of any changes in circumstances which may mean they are no longer appropriate or necessary.

Commitments can be accepted by the CMA (at its complete discretion) at any time during the course of an investigation, until a decision on infringement is made. However, the CMA is unlikely to consider it appropriate to accept commitments at a

[17] http://www.investegate.co.uk/ArticlePrint.aspx?id=200109141115010117K

[18] Section 31A CA98 gives the CMA the power to accept legally binding commitments.

[19] The CMA is very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position. The CMA is also less likely to accept commitments if it would be difficult to monitor compliance with the commitments and their effectiveness.

very late stage in an investigation, for example after it has considered representations on an SO[20].

The procedure followed by the CMA for negotiating and accepting commitments is set out in the *CMA Guidance and Rules of Procedure for Investigation Procedures under the CA98* (**CMA Guidance**). If a party informs the CMA that it would like to discuss the possibility of offering commitments, the CMA will consider whether commitments may be appropriate in the circumstances of the case. If so, due process is observed by the CMA sending the party a summary of its competition concerns which may then be discussed with the party concerned. If the CMA proposes to accept commitments offered by any party, it will consult those who are likely to be affected by them and will also give interested third parties the opportunity to make representations[21]. Any subsequent material modifications will, again, be subject to third party consultation (although the CMA may make non-material modifications without further consultation). Once accepted, binding commitments will be published by the CMA.

If an investigation is closed with commitments the CMA will not reach any conclusion as to the legality or otherwise of the agreement or conduct in question. For the parties concerned, this removes the risk of a finding of infringement which third parties could use as the basis for bringing a "follow-on" private action in the High Court or Competition Appeal Tribunal (**CAT**), in which case the finding of infringement would be binding. Although third parties could bring legal proceedings following a commitments decision, in the absence of a finding by the CMA they would need to prove liability for the infringement as well as the fact that the agreement or conduct had caused them loss and damage. Therefore, in addition to the benefits in terms of both time and cost to the parties (as well as the CMA) of resolving a case with commitments, there is an added benefit to the parties. This is because a transactional resolution through commitments can be expected to reduce the likelihood of private actions based on the agreement or conduct concerned.

Although the CMA has yet to close an investigation by accepting legally binding commitments, the table below sets out details of cases in which the OFT accepted binding commitments.

Case	**Suspected infringement**	**Commitments**	**Year**
Hotel Online Booking[22]	Chapter I prohibition / Article 101 TFEU	The OFT accepted commitments addressing concerns in relation to the online offering of room-only hotel accommodation bookings by online travel agencies. The OFT investigated agreements between each of Booking.com	2014

[20] Although the SO is never published in any form, a non-confidential version may be shared with interested third parties (e.g. a complainant).

[21] Third parties will be given at least 11 working days to comment.

[22] http://www.oft.gov.uk/news-and-updates/press/2014/06-14

		and Expedia, and InterContinental Hotels, under which online travel agents were restricted in terms of the travel agents' ability to offer discounts on room-only hotel bookings. The OFT accepted commitments which ensure that online travel agents will be able to offer discounts on headline room-only rates, as long as the customers fulfil certain requirements.	
Private Motor Insurance[23]	Chapter I prohibition / Article 101 TFEU	The OFT accepted commitments addressing concerns that arose out of the exchange of pricing information via the *WhatIf?* market analysis tool. The commitments require that any data less than 6 months old must be anonymised, aggregated and only provided if the prices in question had already been used in motor insurance policies sold by brokers.	2011
Associated Newspapers Ltd[24]	Chapter I and Chapter II prohibition	The OFT accepted commitments from Associated Newspapers Limited in relation to its exclusive distribution agreements with London Underground, Network Rail and other train operating companies, allowing competitors to distribute free weekend or evening newspapers at the stations in question, and to use its distribution racks.	2006
TV Eye[25]	Chapter I prohibition	TV Eye was a company owned by various broadcasters which sold advertising airtime. The OFT accepted commitments to address its concerns that the terms and conditions under which those broadcasters sold advertising airtime to media agencies infringed CA98 by unduly reducing the bargaining power of the media agencies.	2005
British Horseracing Board[26]	Chapter I prohibition	The OFT accepted commitments from the British Horseracing Board (**BHB**) addressing its concerns about the running of British horse racing. The commitments included removing BHB's limits on the number of races per year, changes to how	2004

[23] http://www.oft.gov.uk/news-and-updates/press/2011/129-11

[24] http://www.oft.gov.uk/news-and-updates/press/2006/44-06

[25] http://www.oft.gov.uk/news-and-updates/press/2005/93-05

[26] http://www.oft.gov.uk/news-and-updates/press/2004/94-04

		racecourses could bid for existing and new events and protections against the unfair pricing of access to BHB's racing database.	

As noted above, whilst commitments are in force, the CMA may review their effectiveness from time to time, and undertake such action as regards their variation or release as it deems appropriate. In cases where the parties fail to comply with their commitments, the CMA can apply to the court for an order requiring compliance. Commitments may be reviewed, and revoked or amended, if there has been a "material change of circumstances". The CMA may initiate a review of commitments itself or at the request of a party that had given the commitments.

2.3 Settlement procedure

Until recently, there was no formal settlement procedure in the UK. However, despite this, in a number of CA98 cases the OFT reached settlements with one or more parties under investigation, prior to issuing an infringement decision. In fact, most infringement decisions reached by the OFT in recent years have been resolved through some sort of settlement (resulting in a reduction in the level of fines imposed) with at least some of the parties involved.

In all such cases, the terms of the settlement (formerly known as "early resolution agreements") included an admission of liability for the alleged infringement(s) and a commitment to co-operate fully with the OFT's investigation. In return, the OFT offered a reduction in the fines that would otherwise have been imposed. The CMA has not yet closed a case following settlement, but examples of settlements reached by the OFT are listed in the table below.

Case	Infringement	Settlement	Year
Care home medicine cartel[27]	Chapter I prohibition	In December 2013 the OFT announced a settlement with Hamsard 3149 Limited (**Hamsard**) under which it agreed to pay a fine of GBP 387,856 in relation to a market-sharing agreement with Lloyds Pharmacy Limited (with which Hamsard's subsidiaries agreed not to supply prescription medicines to each other's existing care home customers). The settlement was agreed before the SO was issued, and a 40% reduction was applied to the penalty. The OFT has stated that the reduced penalty reflected Hamsard's "*admission and agreement to co-operate under the OFT's leniency policy and in light of the settlement*". However, only when the full decision is published will the reduction attributable to the settlement become known.	2013

[27] http://www.oft.gov.uk/news-and-updates/press/2013/82-13

Care home security suppliers[28]	Chapter I prohibition	In December 2013 the OFT announced its decision that four providers of security systems to care homes had entered into a number of collusive tendering agreements. One of the companies, Owens Installations Limited entered into a settlement agreement (before the SO was issued) as a result of which it received a 20% reduction of its fine.	2013
Mercedes-Benz commercial vehicles[29]	Chapter I prohibition	In February 2013, the OFT announced that it had concluded settlement agreements with Mercedes-Benz and three commercial vehicle dealers. A fourth dealer received immunity from penalties under the OFT's leniency policy. The companies admitted breach of the Chapter I prohibition in relation to the distribution of Mercedes-Benz commercial vehicles (trucks and vans) by dealers, who were mainly active in the North of England and parts of Wales and Scotland. The case involved three separate admitted infringements, involving various different parties. The nature of the infringements varied, relating to market-sharing, price co-ordination or the exchange of commercially sensitive information. The parties to the settlement agreement agreed to pay fines totalling GBP 2.6 million following the application of a reduction of 15%. The settlement agreements were entered into after the SO was issued, and the 15% reduction is to reflect the agreement to settle.	2013
Gaviscon[30]	Chapter II prohibition / Article 102	In April 2011, the OFT announced that it had issued a decision finding that Reckitt Benckiser had infringed the Chapter II prohibition and Article 102, and imposed a fine of GBP 10.2 million. The OFT found that Reckitt Benckiser had abused its dominant position by withdrawing and de-listing Gaviscon Original Liquid from the NHS	2010

[28] http://www.oft.gov.uk/news-and-updates/press/2013/81-13

[29] http://www.oft.gov.uk/news-and-updates/press/2013/16-13

[30] http://www.oft.gov.uk/news-and-updates/press/2010/106-10

		prescription channel in 2005, following expiry of its patent but before the publication of the generic name for the drug. This meant that NHS prescriptions were subsequently issued for the patent-protected Gaviscon Advance rather than for generic alternatives to Gaviscon Original Liquid. The settlement involved Reckitt Benckiser admitting the infringement (post-SO) and agreeing to pay GBP 10.2 million which reflected a 15% reduction for settlement.	
Loan pricing[31]	Chapter I prohibition	In March 2010 the OFT announced that the Royal Bank of Scotland had agreed to pay a fine of GBP 28.59 million following admissions that it had breached competition law by disclosing generic and specified confidential future pricing information to counterparts at Barclays Bank. The settlement was reached before the SO was issued and the OFT applied a 15% reduction for early resolution, in addition to a 10% reduction for co-operation with the investigation. Barclays was not fined as it had benefited from leniency.	2010
Tobacco products[32]	Chapter I prohibition	The OFT reached an early resolution agreement with six of the parties (Asda, First Quench, Gallaher, One Stop Stores, Somerfield, and TM Retail) involved in its investigation into alleged breaches of competition law with regard to the retail pricing of cigarettes (in particular, arrangements between cigarette manufacturers and retailers to link the retail prices of cigarettes to the prices of competing brands). Each of the parties admitted liability in respect of all the infringements alleged against it (receiving a significant reduction in the financial penalty that might otherwise have been imposed). The total fines imposed by the OFT on the six settling parties amounted to just under GBP 73 million. Settlement was reached after the SO had been issued and a 20% reduction in penalties was applied for early resolution, in addition to the	2008

[31] http://www.oft.gov.uk/news-and-updates/press/2010/34-10

[32] http://www.oft.gov.uk/news-and-updates/press/2008/82-08

		various leniency discounts granted to the settling parties. While the terms of the early resolution agreements entitled the parties to withdraw from them if, having seen the OFT's ultimate decision, they wished to appeal to the CAT, only Asda did so within the permitted time. Several other, non-settling, addressees of the OFT's decision, including Imperial Tobacco, appealed the OFT's decision. The decision was quashed after the OFT wished to support the decision on the basis of a refined case that was not set out in the decision. Subsequently Gallaher and Somerfield applied to the CAT for permission to appeal out of time alleging that a late appeal was justified on the basis of "*exceptional circumstances*" and in Gallaher's case that it had been misled by the early resolution agreement. In a judgment of 27 March 2013 the CAT granted Gallaher and Somerfield permission to appeal out of time, finding that the early resolution agreement gave rise to a legitimate expectation that the OFT "*had the wherewithal to make good the factual basis on which the Decision rested*" and would be "*able to defend (even if not necessarily successfully) its Decision on the merits*". However, on 7 April 2014 the Court of Appeal reversed this finding, concluding that the CAT's finding of a legitimate expectation was unjustifiable; that the main focus under the exceptional circumstances test should be on the reasons why the would-be appellants did not appeal in time; that the later events on the appeals by Imperial Tobacco and others were not exceptional circumstances justifying a late appeal by Gallaher and Somerfield; and that the CAT's misapplication of the exceptional circumstances test was an error of law (thus justifying intervention by the Court of Appeal).	

Airline fuel surcharges[33]	Chapter I prohibition	In April 2012 the OFT imposed a fine of GBP 58.5 million on British Airways (**BA**), (a further reduction from the fine of GBP 121.5 million originally agreed upon in the 2007 settlement between BA and the OFT) in relation to its co-ordination with Virgin Atlantic Airways with regard to fuel surcharge pricing on long-haul passenger flights to and from the UK (through the exchange of pricing and other commercially-sensitive information). The reduction reflected a reassessment of the value added by BA's co-operation with the OFT and legal developments relating to penalty setting. The settlement was reached before the SO was issued, and included a reduction of 20% for early resolution.	2007
Dairy products[34]	Chapter I prohibition	Following the OFT's investigation of collusion by supermarkets and dairy processors (by co-ordinating increases in the prices paid by consumers for certain dairy products in 2002 and/or 2003, with the supermarkets having indirectly exchanged retail pricing intentions with each other via dairy processors), a number of dairy processors and supermarkets (with the exception of Tesco) agreed to an early resolution following receipt of the SO. In return for their full co-operation and their admission of liability, the OFT imposed substantially reduced fines. Most parties who settled received a discount in the penalty of 35%.	2007
Independent Schools[35]	Chapter I prohibition	Following issuing an SO, the OFT agreed a settlement with a number of fee-paying independent schools in relation to an agreement operated by those schools whereby they illegally exchanged information relating to their intended fee increases and fee levels. The OFT imposed a fine of GBP 10,000 on most of the schools, and the schools also agreed to set up a fund totalling GBP 3	2006

[33] http://www.oft.gov.uk/news-and-updates/press/2012/33-12

[34] http://www.oft.gov.uk/news-and-updates/press/2011/89-11

[35] http://www.oft.gov.uk/news-and-updates/press/2006/88-06

		million for the benefit of those pupils who might have been affected by the infringing activity in question.	

On 1 April 2014, a more formal settlement procedure was introduced as part of the reform of the UK competition regime. The CMA Guidance sets out in detail the process to be followed by the CMA and settling parties during the course of settlement discussions. However, the new settlement procedure retains much of the flexibility of the procedure followed by the OFT, and is expected to allow the CMA to achieve efficiencies, resulting in the earlier adoption of infringement decisions, and/or resource savings.

Under its settlement procedure the CMA can, at its discretion, consider settlement of any CA98 case (both Chapter I and Chapter II), provided the evidential standard for issuing an SO is met. In determining which cases are suitable for settlement, the CMA will take into consideration, among other factors: the stage at which a particular case is; the number of businesses involved in an investigation and the number of businesses interested in settlement; the number of alleged infringements in the case; and the prospect of reaching settlement in a reasonable timeframe. However, parties involved in an investigation are under no obligation to settle or enter into any settlement discussions where these are offered by the CMA.

When a party approaches the CMA to discuss the possibility of exploring settlement (whether of its own initiative or at the invitation of the CMA), it is important to appreciate that the CMA will not make any assumptions about that party's liability from the fact that is interested in engaging in, or actually engages in, settlement discussions. For those parties wishing to settle, the CMA Guidance provides that the following minimum (non-negotiable) requirements will be imposed on them if they decide to settle. First, a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement [36]. Secondly, the immediate termination of the infringing behaviour, if this has not already happened. Thirdly, confirmation in principle that the settling party will pay a penalty set at a maximum amount, including a settlement discount which will be capped at 20% for settlement pre-SO and 10% for settlement post-SO. The actual discount awarded will take account of the resource savings achieved in settling that particular case at that particular stage in the investigation. The CMA Guidance gives greater clarity to parties wishing to consider settlement. This is because whereas the maximum discount for settling before or after the SO was previously unclear (and applied inconsistently) that will no longer be the case[37]. This greater clarity is welcome as it enhances parties' rights by allowing them to weigh up in a more informed manner the advantages and potential disadvantages of settlement.

[36] The scope of the infringement will include as a minimum the material facts of the infringement as well as the legal characterisation of the infringement. An admission of the facts alone is not sufficient to constitute an admission of liability sufficient to form the basis of a settlement.

[37] For example, the CMA Guidance states that the discount for settlement post-SO will be 10%. In some previous cases the settlement discount was as high or higher for post-SO settlement (e.g. 20% in *Tobacco* and 30%-35% in *Dairy*) than for settlement pre-SO (e.g. 15% in *Loan pricing* and 20% in *Care home security*).

Following the conclusion of settlement discussions, if the CMA does not substantially reflect a settling party's admission either in the SO or in its final position before taking an infringement decision the party that is proposing to settle will be given the opportunity to withdraw from the settlement procedure[38]. If the party does withdraw (or the settlement discussions are not successful), the case will revert to the usual administrative procedure, and any admissions made during the failed settlement discussions will not be disclosed to other parties to the investigation or, absent exceptional circumstances, to the CMA decision makers in the case.

A settling party nevertheless retains the right to appeal the infringement decision to the CAT. However, if the party chooses to do so, the settlement discount set out in the infringement decision will no longer apply (and the CAT will have full jurisdiction to review the appropriate level of penalty). Following the *Tobacco Products* case the CMA Guidance now explicitly states that unless the settling party itself successfully appeals the infringement decision, it must confirm that it accepts that the decision will remain final and binding as against it even if another addressee of the infringement decision successfully appeals the decision.

In order to achieve the CMA's objective of resolving the case efficiently, settling parties must also confirm that they accept a number of other conditions. Of particular relevance to the questions of due process and fundamental rights of the parties, the conditions include acceptance that there will be a streamlined administrative process for the remainder of the investigation with limited access to file (for example through access to key documents only and/or through the use of a 'confidentiality ring'), no written representations on the SO (except in relation to manifest factual inaccuracies), and no oral hearing.

In terms of due process, it is important to recognise that any decision to settle a case is made entirely by the party concerned (although the CMA must, of course, agree to settle the case). Furthermore, a decision to settle will be based on a party's full awareness of the requirements of settlement (which are clearly set out in the CMA Guidance) as well as the consequences of settling. Therefore, whilst settlement necessarily requires an admission of liability (with the consequences, inter alia, that third parties can rely on such admission in subsequent private litigation), the settling party is likely to have assessed the strength of the evidence against it – especially in cases where settlement discussions commence post-SO. Given the requirement for a clear admission of liability, settlements are most likely to be considered by parties in cases in which they consider the evidence of which they are aware may be sufficient to lead to a finding of infringement. In cases in which the evidence is less clear, parties can be expected to be less willing to settle. Therefore, in practical terms, it may be the case that the settling party reaches a view that the CMA may be expected to make a finding of infringement, which has led the party to consider settlement. If so, a decision to settle is unlikely to materially affect the eventual ability of third parties to rely on a finding of infringement in private litigation; however the settling party will have been able to secure a reduction in the fine that might otherwise have been imposed (as well as saving management time and cost resulting from the

[38] The CMA retains the right to withdraw from the settlement procedure if the settling party, after having made its admission, fails to follow the requirements for settlement. In such circumstances, prior to withdrawing from the settlement process, the CMA will notify the settling party that it considers that it is not following the requirements of settlement and will give the party the opportunity to respond.

streamlined administrative procedure). Importantly, a decision to settle does not preclude a party from subsequently appealing the CMA's decision, which it may decide is appropriate following receipt of the CMA's reasoned decision. In such circumstances the CMA will remain free to use the admissions made by the settling party and any documents, information or witness evidence provided by it (although admissions made in the context of failed settlement discussions will not).

2.4 Leniency programme

While the transactional resolution instruments described above (such as the acceptance of commitments by the CMA and the formal settlement procedure) are distinct from the CMA's leniency policy, they are not always mutually exclusive. For example it is possible for a leniency applicant to settle a CA98 case and therefore benefit from both leniency and settlement discounts[39].

Under the UK's leniency programme, as is the case in most antitrust regimes, companies can obtain immunity from fines if they are the first to report an infringement of the Chapter I prohibition and/or Article 101 TFEU[40]. The policy not only applies to horizontal arrangements (such as horizontal price-fixing and market-sharing) but also to vertical price-fixing (i.e. retail price maintenance conduct). Details of the CMA's corporate leniency policy are set out in the recent OFT guidance on "Applications for leniency and no-action in cartel cases" (**Leniency Guidance**) published in July 2013, now adopted by the CMA.

The Leniency Guidance lists the following four types of leniency that are available under EA02. First, there is 'Type A immunity' where a party is the first to apply for leniency and there is no pre-existing investigation. In these circumstances, the applicant may qualify for complete immunity from administrative fines, in which case its former and current directors and employees who cooperate will be granted guaranteed 'blanket' criminal immunity if the conduct is also potentially an infringement of section 188 EA02. Secondly, there is 'Type B immunity' where a party is the first to apply for leniency but there is a pre-existing investigation, in which case the applicant may, at the discretion of the CMA qualify for complete immunity from financial penalties and for criminal immunity for its former and current directors and employees who cooperate (as under Type A)[41]. Thirdly, there is 'Type B leniency' where a party is the first to apply for leniency but there is a pre-existing investigation and the CMA exercises its discretion not to offer Type B immunity to the applicant. In such circumstances, the applicant may still qualify for a

[39] In this respect it should be noted that, under the CMA's new procedure, settlement discounts are capped at 20%, partly to ensure that there is sufficient distinction between immunity and the discounts available to leniency applicants that also choose to settle with the CMA. In other words, in order to ensure that the settlement procedure (which applies after the CMA has begun investigating the case) does not disincentivise parties from seeking leniency (including applying for leniency before the CMA begins an investigation), the levels of reductions in fine must be sufficiently material.

[40] In the UK, depending on the circumstances, immunity from criminal prosecution may also be possible.

[41] Whereas Type A immunity is available as of right if the necessary conditions are met, Type B immunity is discretionary. However, the Leniency Guidance states that although Type B does not offer guaranteed immunity, Type B applications made at an early stage of the CMA's investigation are more likely to result in the grant of corporate immunity and/or criminal immunity than late-stage Type B applications or Type C applications.

reduction in fines of up to 100%. Finally, there is 'Type C leniency' which applies when a party is not the first to approach the CMA (regardless of whether there is a pre-existing investigation) but can 'add significant value' to the CMA's investigation. In those circumstances, the CMA may, at its discretion, grant a reduction of up to 50% in the level of financial penalty imposed. The value of any reduction granted will primarily depend on the evidence provided by the applicant compared with the information already in the CMA's possession at the time of the application[42].

The CMA also operates a 'leniency plus' policy, whereby an applicant who already benefits from a reduction in financial penalty (but not immunity) under leniency in relation to one case, and then subsequently makes a distinct leniency application in relation to an unrelated matter and obtains immunity as a result, will be offered a small, additional increase in its leniency discount in the first case.

In order to benefit from leniency in respect of financial penalties (or immunity from criminal prosecution) and subject to the limitations on availability as described above, an applicant must – as is the case in many other jurisdictions – meet certain conditions, each of which will apply throughout the application process and until final determination of any proceedings. The applicant must accept that it participated in anti-competitive activity and, where relevant, individuals must admit participation in the cartel offence. The applicant must also provide the CMA with all the (non-legally privileged) information, documents and evidence available to it regarding the infringing activity. In addition, the applicant must maintain continuous and complete co-operation throughout the investigation and refrain from further participation in the infringing activity from the time of its disclosure to the CMA. And, finally, the applicant must not have taken steps to coerce another undertaking to take part in the infringing activity.

The condition for leniency that is most relevant to the International Rapporteur's questions is that the applicant must admit its participation in the infringing activity. In this respect, the issues concerning due process and the fundamental rights of the applicant are no different to those that are referred to above in section 2.3 on settlements.

3 Merger control

On 1 April 2014 new procedures relating to UK merger control came into effect although the substantive features of the previous regime were retained[43]. In particular, the voluntary nature of the regime (i.e. the fact that parties are not obliged to seek CMA approval if a merger satisfies the jurisdictional thresholds) was preserved as was the two-phase decision-making process with the separation of decision-making responsibility at Phases 1 and 2 of an investigation. Although the two-phase decision making process has been retained, the CMA is now responsible

[42] Under Type C leniency criminal immunity for implicated former and current directors and employees may be agreed on an individual basis with the CMA.

[43] The new regime is intended, among other things to make merger reviews faster and more efficient. See also *Mergers: Guidance on the CMA's jurisdiction and procedure* (**Mergers Guidance**), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270256/CMA2_Mergers_Guidance.pdf.

for both phases of the investigation[44]. In addition, whilst the substantive tests relating to mergers have not changed, there have been a number of material procedural changes (although these are outside the scope of this paper).

Remedies may be accepted by the CMA. These may be at Phase 1 as undertakings-in-lieu of reference (**UILs**) to an in-depth, Phase 2 investigation, or at Phase 2 as a solution to identified competition problems.

3.1 Phase 1

At Phase 1, the CMA is under a duty to identify those mergers which raise a realistic prospect of a substantial lessening of competition (**SLC**) and to refer such mergers to Phase 2 for an in-depth investigation.

However, the merging parties may have an opportunity to avoid that outcome by offering binding UILs to the CMA[45]. The CMA cannot impose remedies in Phase 1 – it is up to the merging parties to offer UILs to the CMA in order to avoid a Phase 2 investigation. Such UILs must "remedy, mitigate or prevent" the SLC or any adverse effects identified in a clear-cut manner. The CMA will therefore typically expect UILs offered by parties to be structural, rather than behavioural, in nature. According to its Mergers Guidance, the CMA is highly unlikely to accept behavioural remedies at Phase 1.

In terms of the process for considering UILs, the acquiring party may take the initiative to propose suitable UILs to the CMA case team at any stage of the Phase 1 investigation, or during pre-notification (i.e. the period in which confidential discussions may take place prior to formal notification)[46]. Alternatively, the parties may choose to wait until they receive the CMA's decision to see if it concludes that the merger is likely to result in an SLC before raising the matter of UILs with the CMA case team[47]. A decision finding an SLC will set out the CMA's competition concerns, and therefore provide the parties with sufficient information to assess the nature of those concerns and whether the parties are willing to offer UILs that would provide a clear-cut remedy to them[48].

Once the CMA is satisfied that the UILs offered could be accepted as a suitable remedy, the CMA is required to publicly consult on the proposed UILs. For UILs in cases in which the CMA considers that an upfront buyer is required, the CMA will consult on the effectiveness of both the proposed remedy and the proposed purchaser.

[44] Phase 1 decisions are formally taken by the CMA Board, while Phase 2 decisions are made by an inquiry group of at least three people, selected for each case from the independent expects appointed to the CMA's panel by the Secretary of State.

[45] UILs may be accepted by the CMA only where it has concluded that the test for referring the case to Phase 2 is met.

[46] Taking the initiative in this way will not impact on the prospect that the CMA ultimately determines that the test for a reference has not been met.

[47] This is one of the procedural reforms introduced into the UK merger control regime by ERRA13.

[48] Parties have up to five working days after receiving the CMA's reasons for its SLC decision to offer UILs.

For cases with no upfront buyer the CMA will consult on the proposed remedy only. Following necessary consultations (and any modifications to the UILs) the CMA will ask the parties to sign the final version of the UILs, which will then be formally accepted by the CMA. The CMA will announce publicly that it has formally accepted the UILs, and will publish the final version of the UILs (as well as the SLC decision) on its website.

Parties offering UILs in Phase 1 do so only if they so wish and, following the procedural changes to the UK's merger control regime, are now able to do so after having seen the CMA's reasoned decision. As such, due process and the parties' fundamental rights appear to be well protected – and indeed enhanced as a result of the changes introduced by ERRA13. However, parties only have up to five working days to offer UILs after receiving the CMA's reasoned decision. Nonetheless, although no case has yet been resolved with UILs since the new procedures came into force, that timeframe should be sufficient without infringing due process or upon the parties' fundamental rights. This is because, whilst the parties may only have five working days to propose UILs, they will have engaged with the CMA for some time before receiving the decision (and will have seen an "issues letter").

3.2 Phase 2

At Phase 2, where the CMA finds that a relevant merger situation has resulted, or is expected to result, in an SLC, it is required to decide whether action should be taken to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC.

The CMA is required to have regard to the need to achieve "as comprehensive a solution as is reasonable and practicable" to the SLC and any adverse effects resulting from it. In assessing possible remedies, the CMA seeks those that are effective in addressing the SLC and its adverse effects and selects the least costly and intrusive remedy that it considers to be effective, subject to the remedy not being disproportionate. The CMA has a choice between implementing remedies either by accepting undertakings that have been negotiated with the relevant merger parties or by exercising its statutory power to make an order.

The CMA remedies process is set out in the detail in the new Mergers Guidance and in the Merger Remedies Guidelines[49] (which also explains how the CMA conducts its substantive assessment of remedies options). The Phase 2 remedies process and the extent of consultation with the relevant merger parties and other interested parties[50] can be summarised as follows. First, if an SLC has been identified, a notice of possible remedies (**Notice**) is published, usually at the same time as the summary of the CMA's Provisional Findings. The Notice acts as a formal starting point for discussion of remedies with the relevant parties, containing details of possible ways to address the SLC[51]. The Notice will invite comments by a given date from all

[49] *CC8*, published by the CC in November 2008, adopted by the CMA.

[50] During this process, all interested parties have the opportunity to provide their comments, which will be taken into account by the CMA.

[51] If parties wish to propose potential remedies in advance of publication of the Provisional Findings, details of the proposals should be provided in writing and may be discussed with the case team without prejudice to the Provisional Findings. For anticipated mergers, one possibility will be prohibition of the merger; for completed mergers (as the UK does not have a mandatory system of merger control requiring parties to seek and obtain

interested parties on the possible remedies and will also invite parties to suggest alternatives. In addition, a remedies working paper (**Working Paper**), containing a detailed assessment of the different remedies options and setting out a provisional decision on remedies, will be sent to the main parties for comment following the response hearings[52]. Third parties may also be consulted about the proposed scope of the remedies and the Working Paper may in some cases be published on the CMA's website. Following consultation with the parties on the Working Paper and any further discussions and meetings with the parties that the CMA considers necessary, the CMA takes its final decisions on both the competition issues and any remedies. The CMA will set out its final decision on remedies in its final report. If the CMA concludes that remedies are appropriate, the CMA can, as noted above, accept undertakings or exercise its statutory powers to make an order[53]. When a version of the undertakings has been provisionally agreed, on which the CMA is willing to consult publicly, the CMA will then publish a 'notice of intention to accept final undertakings' or a 'notice of intention to make an order', to which the agreed draft undertakings or order are annexed. A minimum consultation period (15 days for undertakings and 30 days for an order) must be provided for interested parties to comment. Subsequently, the CMA will decide whether any changes need to be made to the draft undertakings or order in light of responses to the consultation (if any material changes are required, a further minimum seven day consultation period is required). The CMA then publishes a 'notice of acceptance of undertakings' or a 'notice of making an order'. At this point, its Phase 2 inquiry is finally determined.

In those cases in which an SLC is found and UILs are not offered, the parties' position is protected by their ability to seek a review of any Phase 2 decision imposing remedies. Applications for review were brought in a number of merger cases in which the CC determined (at the end of Phase 2) that remedies were required[54].

4 Market studies and investigations

Market studies and investigations are conducted under the EA02. They are used by the CMA (and other sectoral regulators[55]) to investigate markets in the UK where the CMA considers that competition may not be working effectively (and where an

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clearance before a merger can be completed), remedies including the possibility of divestment of, inter alia, the acquired business will be considered.

[52] Following the Provisional Findings, response hearings will take place. These will generally be held with the main parties and potentially with key third parties (this could include potential buyers, customers or relevant economic regulators) likely to provide evidence or views useful for reaching a final decision on the competition questions and/or on remedies.

[53] The process of agreeing undertakings or making an order will involve informal consultation between the CMA and the main parties. Third parties may also be consulted where relevant. Parties will be asked to comment both on the substance of the draft undertakings or order, and on any material which they consider to be confidential and which they would want to be excised from the published version.

[54] For example, *Stericycle International v CC* (2006); *Somerfield v CC* (2006); *Stagecoach Group v CC* (2010); *Groupe Eurotunnel v CC* (2013); *Ryanair v CC* (2014). In some cases, such as *Groupe Eurotunnel* and *Ryanair*, parties also challenged the CC's jurisdiction to investigate the merger as well as its decision on remedies.

[55] Sectoral regulators have concurrent competition law powers in respect of market studies and investigations.

investigation under the CA98 may not be appropriate). Under EA02 the CMA may impose remedies to address any adverse effect on competition (**AEC**) that may be identfied[56].

On 1 April 2014, a number of changes to the market studies/investigations regime were introduced designed to make it faster and more efficient[57]. The CMA is now responsible for the conduct of both market studies and market investigations (whereas previously the OFT would conduct market studies and refer the market to the CC if it considered a more detailed market investigation was warranted). In addition, shorter statutory time limits were introduced for both market studies and investigations and, to complement these, the CMA now has enhanced information gathering powers.

4.1 Market studies

Market studies are examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour. The CMA Board is responsible for key decisions relating to market studies and the making of market investigation references. The CMA must, within 12 months from commencement of a market study, publish a report setting out its findings and the action (if any) it proposes taking.

The principal outcomes of a market study are one or more of the following: a clean bill of health for the market; consumer-focused action (e.g. a CMA-led information campaign); recommendations to business (e.g. that businesses in the market develop a voluntary code of conduct or improve an existing one); recommendations to Government (where the CMA concludes that changes to the law may be necessary); investigation and enforcement action under CA98; and a market investigation reference (essentially a more detailed Phase 2 investigation).

When the findings of a market study by the CMA give rise to reasonable grounds to suspect that a feature or combination of features of a market in the UK prevents, restricts or distorts competition, and a market investigation reference appears to be an appropriate and proportionate response, the CMA is able to make such a reference.

However, in certain cases, the CMA may accept UILs instead of making a market investigation reference. In exercising this power, and in determining the scope of the UILs, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to any AEC identified (and any detrimental effects on

[56] Adverse effects on competition that do not involve either agreements between undertakings or abuses of dominance are outside the scope of CA98. Market investigation references are therefore likely to focus on competition problems arising from unco-ordinated parallel conduct by several firms or industry-wide features of a market in cases where the CMA does not have reasonable grounds to suspect the existence of anti-competitive agreements or dominance. They are in some respects similar to EU sector inquiries, except the CMA has the power to impose remedies if considered appropriate even in the absence of any infringement of the Chapter 1 prohibition/Article 101 TFEU or the Chapter 2 prohibition/Article 102 TFEU.

[57] An overview of the changes to the markets regime introduced by the ERRA13 is provided in the CMA guidance *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (January 2014) - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270354/CMA3_Markets_Guidance.pdf

customers so far as they result or may be expected to result from such adverse effects). The CMA should also consider the effect of the remedy on any consumer benefits arising from the feature of the market that is causing the adverse effect on competition (for example, lower prices, higher quality, greater choice or greater innovation). Before accepting any UILs the CMA is obliged to publish and consult on the terms of the proposed UILs.

However, according to published guidance on market investigation references[58], UILs to avoid a market investigation will only be accepted rarely. This is principally for two reasons. First, during a market study the CMA is unlikely to be able to undertake a sufficiently detailed analysis of the likely anti-competitive effects of a particular market feature, nor to judge with any certainty whether particular UILs will be a suitable and robust remedy. Secondly, there are likely to be practical difficulties in trying to negotiate UILs with several parties in order to address industry-wide issues (and indeed issues that may be present in a number of different markets). Instead, UILs are most likely to be used by the CMA where an AEC can be addressed by a small number of firms, provided the CMA is confident that the UILs will achieve a comprehensive solution.

To date, UILs have been accepted only in two market studies, although voluntary assurances have been accepted in others. The table below sets out these cases:

Case	Outcome	Year
Extended warranties on domestic electrical goods[59]	The OFT accepted UILs from Dixons, Comet and Argos (the major extended warranty providers) aimed at helping consumers make more informed purchasing decisions and enabling them to shop around more easily. The UILs involved setting up an independent price comparison website for extended warranties, providing clearer information in stores about pricing and the availability of alternative suppliers, providing clearer pricing, especially of monthly rolling contracts, and conducting regular 'mystery shopping' to assess information being provided by staff.	2012
Travel money[60]	Following an investigation, the OFT found that bank charges for purchasing foreign currency and using debit and credit cards abroad were confusing to customers. Various banks agreed to remove charges for using cards abroad, to give clearer information about such charges and to display amounts charged more clearly on	2011

[58] http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft511.pdf

[59] http://www.oft.gov.uk/news-and-updates/press/2012/53-12

[60] http://www.oft.gov.uk/news-and-updates/press/2011/138-11

	statements.	
Off-grid energy[61]	Following an investigation, the OFT concluded that there was effective competition in the provision of off-grid energy (for example heating oil, solar panels and LPG). However, during the market study, the OFT took action (under consumer protection legislation) against certain heating oil companies and price comparison websites which then gave undertakings to improve transparency and thereby reduce the likelihood of consumers being misled.	2011
Isle of Wight Ferry Services[62]	The OFT decided not to refer the market to the CC on the basis of limited evidence of consumer detriment, yet parties subject to the study offered certain voluntary assurances to introduce measures to improve communication with, and improve services to, ferry passengers.	2009
Postal franking machines[63]	The OFT accepted UILs from Royal Mail and the two leading suppliers of postal franking machines in relation to the supply of postal franking machines and their ink cartridges and the provision of related maintenance and inspection services.	2005

Once UILs have been accepted to address a particular feature of the market, the CMA may not make a market investigation reference in relation to the same market for 12 months, unless the UILs have been breached or were based upon false or misleading information by the company(ies) giving them.

As with CA98 cases, a decision to offer UILs following a market study is voluntary and the parties will be able to engage with the CMA to understand the nature of its concerns before deciding whether to offer UILs. However, as noted above, the CMA is unlikely to consider UILs are appropriate in many cases. Therefore, transactional resolution is more likely to be a feature of CA98 and merger cases than in market study or market investigation cases.

4.2 Market investigations

If a market investigation reference is made, the CMA is required to undertake a detailed examination into whether there is an AEC in the market(s) concerned and, if

[61] http://www.oft.gov.uk/news-and-updates/press/2011/112-11

[62] http://www.oft.gov.uk/news-and-updates/press/2009/124a-09

[63] http://www.oft.gov.uk/news-and-updates/press/2005/110-05

so, decide what remedial action may be appropriate. A market investigation must be completed and a report published within 18 months of the date of reference[64].

The CMA's approach to the issue of whether there is an AEC is set out in detail in the guidelines published by the CC in April 2013 (now adopted by the CMA)[65]. According to the guidelines, the CMA will look at three main issues: (i) the main characteristics of the market and the outcomes of the competitive process; (ii) the boundaries of the relevant market within which competition may be harmed (market definition); and (iii) the features which may harm competition in the relevant market (the competitive assessment).

If, following its market investigation, the CMA finds an AEC, it is required to consider whether remedies are appropriate. If the CMA decides to take action itself to remedy, mitigate or prevent an AEC, it has the choice of accepting undertakings from the relevant parties and/or of making an order. The CMA must accept final undertakings or make a final order within six months of the date of publication of the market investigation report. This six-month period includes a period of formal public consultation.

The CMA's decision as to whether to implement remedies by means of accepting undertakings or making an order is determined on a case-by-case basis. It primarily depends on the scope of the CMA's order-making powers (and whether the remedy it is considering falls within those powers)[66] and by practical issues such as the number of parties concerned and their willingness to negotiate and agree undertakings.

In practice, because market investigations are likely to be market-wide rather than focused on the conduct of one firm, it is usually more practical to implement remedies by order rather than through undertakings, so as to avoid the likely delay and complexity of negotiating undertakings with several parties. For example, in *Home credit (2011)* and *Payment protection insurance (2011)* the remedies imposed by the CC were implemented by means of orders as they applied to a large number of parties. By contrast, in *Classified directory advertising services (2007)*, the remedies applied to only one party and undertakings were preferred. In other cases, for example in *Rolling stock (2009)* and *Supply of groceries (2009)* some measures were implemented by means of orders, while others were implemented through undertakings.

In *BAA airports (2009)*, and more recently in *Aggregates, cement and ready-mix concrete (2014)* and *Private healthcare (2014)*, the CC (and in the latter case the CMA) invoked its divestiture powers in a market investigation context[67].

[64] This period can be extended by up to a further six months if the CMA considers that there are special reasons why the investigation cannot be completed and the report published within 18 months.

[65] Guidelines for market investigations CC3 (revised) - http://www.competition-commission.org.uk/assets/competitioncommission/docs/2013/publications/cc3_revised_.pdf

[66] The content of any orders made by the CMA is limited by the EA02, whereas the subject matter of an undertaking is not similarly limited.

[67] In 2009, in *BAA airports*, the CC required BAA to divest its airports at Gatwick, Stansted and either Glasgow or Edinburgh. In January 2014, in *Aggregates, cement and ready-mix concrete*, the CC ordered, inter alia, Lafarge Tarmac to divest a cement plant and, if required by the purchaser, a number of ready-mix concrete plants and

Following a market study parties may be willing to offer UILs to avoid a long and detailed market investigation, notwithstanding the likelihood that the CMA may be willing to accept them. However, once a Phase 2 investigation begins there is little, or no, incentive on parties to a market investigation reference to offer remedies to resolve the investigation. Also, unlike CA98 cases in which fines can be imposed, settling a market investigation will not reduce or avoid a penalty or the sanction that the CMA might otherwise impose. Therefore, whilst due process and fundamental rights are important to ensure that a market investigation is conducted properly and that the parties are aware of the case and evidence against them, these questions are less relevant in the context of settling such investigations.

However, it should be noted that parties to a market investigation may seek a review of a decision by the CMA to impose remedies. The remedies determined by the CC in several market investigation cases have been challenged[68].

5 Conclusion

In the UK, the transactional resolution of competition law cases is well-established and such resolution processes are a valuable part of the investigation and enforcement process. Following the recent reforms to the UK competition regime and the creation of the CMA it is expected that the continued (and enhanced) availability of these transactional resolution processes will be welcomed by parties subject to investigation. This is because they offer flexibility to those parties that are willing to explore settlement, whilst all types of settlement remain wholly voluntary. In addition, the transactional resolution of competition cases seeks to ensure that due process and the parties' rights are respected.

It is clear that there are benefits in settling competition disputes, both for settling parties and the CMA. These include resource savings and faster resolution of proceedings and, for the CMA, the ability to focus on other cases and/or more high-impact enforcement activity. However, it should be recognised that there are certain risks associated with settlement if the procedure is not used appropriately. The principal risks are a potential weakening of the deterrent effects of enforcement, as well as increasing the unpredictability of competition law, if more cases are settled – especially through commitments as a result of which the CMA will not reach any conclusion as to the legality or otherwise of the agreement or conduct concerned. This may lead to a dearth of decisions, particularly in CA98 cases that raise novel points that have either not previously been considered, or considered many years ago before the development of the digital economy[69]. In such cases, a reasoned decision

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Hanson to divest one of its ground granulated blast furnace slag production facilities. In April 2014, in *Private healthcare*, the CMA (in a case inherited from the CC) required the divestment by HCA International of two hospitals in central London.

[68] For example, *Supply of groceries* (see *Tesco PLC v CC* – http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal) and *Payment protection insurance* (see *Barclays Bank PLC v CC* – http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ppi-market-investigation-and-remittal).

[69] For example, the *Hotel Online Booking* case raised issues about the discounting of room-only hotel accommodation booked through on-line travel agents (**OTA**) which, arguably, may have been better suited to have been concluded with a reasoned decision (whether an infringement, or non-infringement, decision). In fact,

(including a non-infringement decision if the CMA ultimately concludes that the law has not been broken) may provide greater clarity and benefit in the longer term.

Consequently, when considering whether to exercise its discretion to conclude a case through transactional resolution, the CMA should carefully assess the benefits of so doing against the potential risks. This is to ensure that the value of transactional resolutions as an enforcement tool, which is a welcome development of the UK competition regime, is not diminished.

this case is now subject to an appeal to the CAT by a third party OTA. It is the first CA98 commitments decision that has been appealed and the judgment which is due later this year is awaited with interest.