



Competition Law Update for Commercial Lawyers

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INTRODUCTION

1. There are various aspects to competition law in the United Kingdom.¹ This Note will focus primarily on the Chapter I prohibition of the Competition Act 1998 ("**CA 1998**"; the criminal cartel offence (Part 6 of the Enterprise Act 2002 ("**EA 2002**")) and merger control (Part 3 of the EA 2002) are considered later.

2. Under s.2(1) of the CA 1998,

"agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom, and have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom"

are prohibited, unless excluded (under s.3) exempted or excluded (under ss.4 to 11). Prohibited agreements etc. are void: s.2(4). Art. 101 of the Treaty on the Functioning of the European Union ("**TFEU**") contains a

¹ This Note will not consider EU competition law in any detail. However, this may also be applicable to anti-competitive agreements etc. and abuses of a dominant position (where this may affect trade between Member States) (Articles 101 and 102 TFEU) and mergers (where the jurisdictional thresholds set out in the EU Merger Regulation, Regulation 139/2004, are satisfied).

similar prohibition in respect of agreements etc. which affect trade between EU Member States. S.18 of the CA 1998 (the Chapter II prohibition) and Art. 102 TFEU prohibit the abuse of a dominant position.

3. The Competition and Markets Authority ("**CMA**") is responsible for enforcing UK competition law, including the Chapter I and Chapter II prohibitions contained in the CA 1998. As a national competition authority, it shares – with the European Commission – jurisdiction for applying EU competition law. If an agreement etc. or abusive conduct may affect trade between Member States, a national competition authority must apply both national and EU competition law: Art. 3(1) of Council Regulation 1/2003.

COMPETITION LAW APPLIES TO ALL COMPANIES, LARGE AND SMALL

4. The CA 98 received Royal Assent on 9 November 1998, over 17 years ago. The EA 2002 received Royal Assent on 7 November 2002, over 13 years ago. Significant changes to both Acts were introduced by the Enterprise and Regulatory Reform Act 2013, which, amongst other things, created the CMA, gave it enhanced powers to investigate anti-competitive behaviour and revised the criminal cartel offence.

Knowledge and understanding of competition law by businesses remains low, particularly amongst SMEs

5. Competition law applies to all, but many smaller companies appear to take a different view. In research commissioned by the CMA, it was reported that

"...some SMEs mentioned that competition law was not relevant to businesses of their size. There were also preconceptions around the word 'cartel' as the more celebrated cases generally involve large corporations such as Virgin and British Airways or energy

suppliers. Indeed a minority seemed to think that they might be too small to be noticed!"²

6. Nevertheless, business's understanding of competition law remains low, particularly amongst SMEs. In May 2015, the CMA published the results of research commissioned by it into UK businesses' understanding of competition law.³ The respondents were senior managers of a range of businesses throughout the UK, primarily micro-businesses and SMEs.
7. Amongst the key findings were:
 - a. only 19% of businesses had senior level discussions about competition law and only 6% ran training sessions: this was significantly lower than other compliance and business risk subjects, particularly health and safety;
 - b. larger businesses were more likely to have discussions and run training on competition law compliance;
 - c. there was considerable regional variation in both awareness of and training on competition law. This was particularly low in Wales and the West Midlands. South West England was just above average for awareness and below average for training;
 - d. whilst 23% thought they had at least a good understanding of competition law a staggering 45% had either never heard of it or knew of it "not at all well". Knowledge was particularly low amongst SMEs, but even 17% of large companies had no or little knowledge. Knowledge was particularly low in the agriculture/mining/utilities, construction, accommodation/food and constructions sectors. Surprisingly, almost half of respondents in professional services had either neither heard of competition law or had little knowledge of it,

² BDRC Continental, *SMEs & Competition Law* (15 May 2015, published 18 November 2015), page 16.

³ IFF Research, *UK Businesses' understanding of competition law*, 27 May 2015. The research was undertaken in 2014.

- although those claiming better knowledge tended to have a better understanding than other sectors, when this was tested;
- e. in reality, businesses' actual understanding was even lower than claimed. For example, in relation to what are 'hard core' infringements of competition law:
 - i. 45% did not know it was illegal to fix prices to avoid losing money
 - ii. 47% did not know that price-fixing can lead to imprisonment
 - iii. 53% did not know it was illegal to discuss bids with competing bidders
 - iv. 60% did not know it was illegal to agree with competitors not to sell to the same customers
 - v. 71% did not know that setting resale prices was prohibited;
 - f. awareness of penalties for non-compliance with competition law was also low (70% either had no or very poor knowledge) but most could identify reasons why compliance was important;
 - g. 30% recognised at least a "medium risk" of competition infringements in their sectors and a similar number thought that they had been disadvantaged by what they saw as others' anti-competitive conduct (not all of which was in fact unlawful, e.g. price-cutting);
 - h. the most important source of information on competition law was the internet (30%) and only 13% used their lawyers; and
 - i. 57% of businesses had never heard of the CMA!

8. In November 2015, the CMA published further research into small businesses' understanding of, and attitudes towards, competition law.⁴ This also found low levels of awareness:

"SMEs' awareness of competition law is minimal. Most do not fully understand what these words mean, and very few of the sales people/business owners we spoke to had ever even considered that this might affect their business. However, they do have an intuitive understanding that some behaviours are wrong. Instead of referring to laws and regulations, they tend to view business practices through a moral and ethical framework. For the majority, doing business properly is a key foundation stone of their business' reputation".⁵

9. Other findings included that:
- a. many SMEs had been involved in, had been approached or had witnessed practices that are anti-competitive;
 - b. competition law is not on SMEs' radar: almost all had never considered it, unlike industry-specific regulations, health and safety, tax/VAT and employment law;
 - c. misconceptions are common: most think it concerns monopolies or dominant firms, so is not for SMEs, and it is often confused with anti-bribery, prohibitions on false advertising and 'competing fairly';
 - d. SMEs place a strong focus on what they think is 'morally right', 'ethical', 'the right thing to do' and protecting their reputation;
 - e. whilst most (but by no means all) identified that price-fixing and bid-rigging were illegal, many could not understand that market sharing (or agreeing not to compete) and 'cover pricing' were also wrong;

⁴ BDRC Continental, *SMEs & Competition Law* (15 May 2015). This was published on 18 November 2015.

⁵ *Ibid*, page 2.

- f. most SMEs had never heard of resale price maintenance or output restrictions and most did not consider that sharing sensitive information was wrong;
 - g. SMEs' attention-span is limited and they need straightforward 'brightline' advice as to what they can and cannot do;
10. The CMA has undertaken a number of initiatives to increase awareness. It has, for example: held a seminar in Cardiff for Welsh businesses;⁶ written to 130 law firms in the West Midlands encouraging them to share with their clients compliance guides prepared by the CMA;⁷ written to chartered accountants encouraging them to help their clients comply with competition law;⁸ and produced guidance for trade associations,⁹ internal auditors¹⁰ and company secretaries.¹¹
11. Nevertheless, there is much to be done in raising awareness of, and therefore compliance with, competition law. Perhaps there is a business opportunity for lawyers?

Recent CMA decisions involving small companies

12. Many CMA antitrust investigations involve larger businesses, for example investigations into: the distribution of road fuels in the Western Isles by Certas (formerly DCC Energy), which was closed after Certas gave commitments to open up access to its fuel terminals;¹² suspected retail

⁶ See CMA press release, [Business leaders to get crash course in competition law](#) (19 October 2015).

⁷ See CMA press release, [West Midlands lawyers asked to help competition law awareness](#) (19 January 2016). It is apparently rolling this out in other areas, starting with the East Midlands and the North west, with other regions being covered on a rolling basis over the coming months.

⁸ See CMA publication, [Competition law: information for chartered accountants](#) (2 September 2015).

⁹ See CMA publication, [Competition law: dos and don'ts for trade associations](#) (25 September 2014).

¹⁰ See CMA publication, [Internal auditors: advice on competition law](#) (2 July 2015).

¹¹ See CMA publication, [Company secretaries: advice on competition law](#) (27 March 2015).

¹² Case MP-SIP/0034 *Western Isles Road Fuels* (Commitments Decision 24 June 2014).

price maintenance relating to sports bras by DB Apparel (a manufacturer of sports bras) and three major retailers, Debenhams, House of Fraser and John Lewis;¹³ and price-fixing between British Airways and Virgin Atlantic on fuel surcharges for long-haul flights, which resulted in BA being fined £ 58.5 million.¹⁴

13. However, this is not always the case, as a number of recent OFT and CMA decisions between or involving small and medium-sized businesses demonstrate. These are decisions are discussed below.

Access control systems

14. On 6 December 2013, the OFT adopted a decision finding that four suppliers of access control systems had engaged in collusive tendering for the supply and installation of access control and alarm systems in retirement properties.¹⁵
15. The arrangements were organised by Cirrus (which subsequently informed the OFT and obtained immunity from fines). The managing agent of the properties (Peverel) would issue a tender to Cirrus. Peverel and Cirrus were associated companies. Cirrus agreed with one of the other parties (O'Rourke, Owens and Jackson) to rig the bids so that Cirrus's bid would be successful, as the 'lowest bidder'. Cirrus would then sub-contract the work to the other party (e.g. O'Rourke), which would then be guaranteed work. The total value of the contracts involved was approximately £ 1.4 million (average of £ 21,500).

¹³ Case CE/9610-12 *Sports bras RPM investigation*. The investigation was abandoned following written and oral submissions in response to the CMA's statement of objections, which showed that there were credible alternative explanations for the documentary evidence on which the CMA relied: see [Case Closure Summary](#) (13 June 2014).

¹⁴ Case CE/7961-06 *British Airways/Virgin Atlantic Airways*, [Decision](#) of 19 April 2012.

¹⁵ Case CA98/03/2013 (CE/9248-10), *Collusive tendering in the supply and installation of certain access control and alarm systems to retirement properties*, [Decision](#) of 6 December 2013.

16. The total fines imposed on O'Rourke, Owens and Jackson were £ 53,140.¹⁶ Their respective turnover figures are not known, but must have been small.

Mercedes-Benz commercial vehicles

17. On 27 March 2013, the OFT adopted a decision that Mercedes Benz UK and five of its commercial vehicle dealers had illegally infringed the Chapter I prohibition by entering into price coordination, market sharing and information sharing arrangements for commercial vans and trucks. It imposed total fines of £ 2.6 million.¹⁷ The five dealers each operated between four and six dealerships, with turnover of between £ 28 million and £ 65 million.

UK Asbestos Training Association

18. In 2013, the OFT investigated a suspected breach of competition law by the UK Asbestos Training Association, a trade association of businesses that provided training services to the construction industry. It was concerned that the UKATA had made pricing recommendations to its members, which would have lessened or removed price competition between its members. The UKATA agreed to withdraw its recommendations, not to make similar arrangements in the future and to provide guidance to its members on competition law compliance. The OFT thus closed its investigation without further action.¹⁸

¹⁶ See OFT press release, [Retirement home security suppliers breached competition law, OFT decides](#) (81/13, 6 December 2013).

¹⁷ Case CE/9161-09 *Distribution of Mercedes-Benz commercial vehicles* (Decisions of 27 March 2013). See OFT Press Release, [OFT issues statement of objections against Mercedes-Benz and five commercial vehicle dealers](#) (54/12, 28 June 2012).

¹⁸ See OFT Press Release, [OFT secures improved competition for asbestos awareness training](#) (29/13, 26 March 2013).

Mobility Scooters: Roma and Pride

19. In August 2013 and March 2014, respectively, the OFT adopted decisions finding that two manufacturers of mobility scooters, Roma¹⁹ and Pride,²⁰ respectively, and their respective dealers, had infringed the Chapter I prohibition by implementing restrictions on online sales by their retail distributors. Roma prohibited dealers from selling or advertising certain models online. Separately, Pride prohibited dealers from advertising prices online, except at its recommended retail price: dealers could, however, exhibit words such as 'call for best price'.
20. Roma's and Pride's policies restricted competition between their dealers and the OFT concluded that these were 'by object' restrictions of competition. However, neither Pride nor Roma, nor the retailers involved, were fined, as their turnover was below the £ 20 million threshold set out in s.39 of the CA 1998 (which exempts from fines parties to small agreements, provided that they are not price-fixing agreements and all parties' turnover is less than £ 20 million).²¹
21. It has since been reported that damages claims have been brought against Pride by the National Pensioners Convention on behalf of purchasers of mobility scooters, with a claim of £ 7.7 million.²²

Lloyds Pharmacy/Tomms Pharmacy

22. On 20 March 2014, in one of its last decisions before its functions were transferred to the CMA, the OFT found that two pharmacy groups, Tomms (a small group with turnover of only £ 3.4 million) and Lloyds

¹⁹ Case CE/9578-12 *Roma-branded mobility scooters: prohibitions on online sales and online price advertising*, [decision](#) of 5 August 2013.

²⁰ Case CE/9578-12 *Mobility Scooters supplied by Pride Mobility Products Limited: prohibition on online advertising of prices below Pride's RRP*, [decision](#) of 27 March 2014.

²¹ I discuss these cases in more detail in my article, [Pride before a fall in online advertising restrictions or getting away with illegal behaviour that harms vulnerable consumers?](#) (18 November 2014) on the [Kluwer Competition Law Blog](#).

²² *Daily Mail*, "[Pensioners angry at 'price fixing' on mobility scooters launch the UK's first class action lawsuit that could open the floodgates for campaigning consumers](#)" (5 March 2016).

Pharmacy (part of the German multinational, Celesio) had entered into an illegal market-sharing agreement for the supply of prescription medicines to care homes. Each agreed not to actively target care homes supplied by the other. The infringement lasted just under six months, from May to November 2011.

23. The background is that Tomms was acquired by Quantum in May 2011. Quantum was a drug manufacturer that supplied certain drugs to Lloyds. Quantum wished to continue and develop its commercial relationship with Lloyds, which it considered would have been difficult if it (through Tomms) was also a competitor to Lloyds. Lloyds also exerted pressure on Quantum to stop Tomms targeting care homes supplied by it, which led to the illegal agreement between Quantum and Lloyds. Quantum repeatedly instructed Tomms not to target care homes supplied by Lloyds. Later, Lloyds agreed not to target care homes supplied by Tomms.
24. Tomms was fined £ 370,226, which had been reduced by 25% for its cooperation with the OFT. The exemption for small agreements did not apply. Lloyds was not fined: it had obtained immunity.²³

Recent CMA decisions concerning consultant ophthalmologists and estate agents

25. More recently, in 2015 the CMA has adopted decisions (which are considered below in relation to anti-competitive behaviour by professionals, which would no doubt individually be small undertakings²⁴) finding infringements of the Chapter I prohibition by:
 - a. a membership organisation of private consultant ophthalmologists;
and
 - b. three Hampshire estate agents and a local newspaper.

²³ Case CE/9627/12 *Supply of care home medicines: market sharing agreement*, [decision](#) of 20 March 2014.

²⁴ See paragraphs 47 to 55 below.

On-going CMA investigations

26. In addition, the CMA has a number of on-going investigations that appear to involve small and medium-sized businesses, including:
- a. an investigation into online sales of licensed sports and entertainment merchandise and other consumer products, which involved a ‘dawn raid’ investigation of the headquarters of Trod Limited and also the domestic premises of one of its directors. Interestingly, the CMA’s dawn raid was coordinated with searches carried out by West Midlands Police on behalf of the Antitrust Division of the US Department of Justice, which is conducting a parallel criminal investigation under US antitrust law.²⁵
 - b. an investigation into alleged price-fixing in the supply of galvanised steel tanks for water storage,²⁶ into which there has already been a parallel criminal prosecution, leading to the conviction of one individual and the acquittal of two others.²⁷
 - c. an investigation into the alleged use of minimum advertised prices for internet sales by Ultra Finishing Limited, a supplier of bathroom fittings, which prevented retailers making sales at below a specified price. The CMA considers this to be a form of retail price maintenance and, on 28 January 2016, issued a statement of objections to Ultra.²⁸

²⁵ Case 50223 *Online sales of discretionary consumer products*. See <https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products>. It appears that Trod Limited, which is based in Birmingham, has annual turnover of approximately £ 15 million.

²⁶ Case CE/9691/12 *Supply of galvanised steel tanks for water storage: civil investigation*. See <https://www.gov.uk/cma-cases/investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>.

²⁷ This is considered below: see paras. 56 to 78.

²⁸ Case CE/9857-14 *Bathroom fittings sector: investigation into anti-competitive practices*. See CMA press release, [Statements of objections issued to fridge and bathroom suppliers](#) (28 January 2016). Ultra, which is based in Burnley, has turnover of approximately £ 93 million.

- d. an investigation into suspected anticompetitive behaviour involving model agencies, which are presumably small businesses.²⁹

Food packaging: a recent European Commission cartel decision involving small companies

27. Most antitrust investigations by the European Commission also involve large, often multinational, companies, and often involved in international or even global cartels, for example recent decisions imposing substantial fines on car parts manufacturers³⁰ and manufacturers of optical disk drives.³¹
28. Nevertheless, cartels investigated by the European Commission do sometimes include smaller companies. For example, in its recent investigation into a number of cartels between food packaging manufacturers, it appears (from the very small fines imposed on two of them, of € 65,000 and € 67,000) that some of the participants were very small companies, possibly active only in one Member State.³²

Conclusion

29. There appears to be very low levels of competition law awareness amongst SMEs and other smaller businesses. However, it is clear from past OFT and CMA decisions, as well as the CMA's on-going investigations, that SMEs and other smaller businesses can often find themselves involved in anti-competitive conduct, particularly when larger businesses are also involved. They can even find themselves dragged into conduct that is subsequently investigated by the European Commission under Article 101

²⁹ Case CE/9859-14 *Conduct in the Modelling Sector*. See <https://www.gov.uk/cma-cases/conduct-in-the-clothing-footwear-and-fashion-sector>.

³⁰ See Commission press release, *Antitrust: Commission fines car parts producers € 137,789,000 in cartel settlement* (IP/16/173, 27 January 2016).

³¹ See Commission Press Release, *Antitrust: Commission fines suppliers of optical disc drives € 116 million for cartel* (IP/15/5885, 21 October 2015).

³² Case 39563 *Retail Food Packaging*, decision of 24 June 2015. See Commission Press Release, *Antitrust: Commission fines producers and distributors € 115 865 000 for operating retail food packaging cartels* (IP/15/5253, 24 June 2015).

TFEU. This can be very costly, in terms of fines, potential damages actions, wasted management time and legal costs, it can also damage a company's reputation.

COMPETITION LAW AND COMMERCIAL PROPERTY LEASES

30. Property leases often contain covenants that restrict what either the landlord and/or the tenant can do with their property. Most of these will not raise competition concerns, although – in their proper legal and factual context - some may do so.³³ Until 6 April 2011, land agreements were actually excluded from the scope of the Chapter I prohibition. The OFT subsequently published guidance on how it considered that competition law would apply to land agreements.³⁴
31. The landlord may wish to restrict the types of goods that the tenant may sell or the services that it may provide, through 'permitted user' or 'restricted user' clauses. This may be so that a shopping centre, parade of shops, out of town shopping site or even an entire estate under the landlord's ownership or control has a broad 'tenant mix' or meets certain standards of 'quality' set down by the landlord. Landlords might also want to prevent tenants from also operating from competing shopping centres or out of town sites.
32. Alternatively, tenants - particularly those with bargaining power, such as 'anchor tenants' or other large multiples' - may wish to prevent competitors operating from the same shopping centre or site.

³³ For a fuller discussion of the issues raised by commercial property leases, see my article, [*European Court of Justice provides guidance on when provisions of property leases may be anti-competitive*](#) (2 December 2015).

³⁴ OFT, [*Land Agreements: The application of competition law following the revocation of the Land Agreements Exclusion Order*](#) (March 2011).

Maxima Latvija: terms of property leases do not restrict competition by object and negative effects on competition must be demonstrated

33. In *SIA 'Maxima Latvija'*,³⁵ the Court of Justice of the European Union provides useful guidance on when property leases may restrict competition. Maxima is the largest supermarket chain in Latvia. Some of its leases gave it, as anchor tenant in a shopping centre, the right to veto the grant of leases to other tenants. The Latvian Competition Authority found that this restricted competition by object.
34. The Court of Justice made the following findings:
- a. the terms of commercial property leases, even if they contain veto or exclusivity clauses, do not restrict competition by object [21 – 24];
 - b. accordingly, it must be shown that the terms of a lease (or leases) have actual or potential negative effects on competition on the relevant retail market by excluding rival retailers [26 – 29];
 - c. such foreclosure effects must be 'appreciable' and may result from the agreement itself or cumulatively with other similar agreements [26];
 - d. if appreciable foreclosure effects are identified, an individual lease is unlawful if it makes an appreciable contribution to the foreclosure, which depends on the parties' market position and the duration of the lease [29, 31]; and
 - e. establishing the effects of an agreement on competition requires a thorough analysis of the relevant market, taking account of all relevant factors [29].
35. The factors that should be taken into account in determining if the terms of a commercial property lease have an appreciable negative effect on competition include [27 – 28, 31]:

³⁵ Case C-345/14 *SIA 'Maxima Latvija' v Konkurences padome*, judgment of 26 November 2015, ECLI:EU:C:2015:784.

- a. whether competing retailers could trade from other premises, whether located in other shopping centres or in other locations;
 - b. economic, administrative or regulatory barriers to entry in the retail sector;
 - c. whether other landlords are subject to similar restrictions in their own leases; and
 - d. the nature of competition on the downstream retail market, including: the size of the market, the number of competitors, their market shares and the degree of market concentration and customer fidelity and shopping habits.
36. It is clear from *Maxima Latvija* that a full legal and economic analysis of the entire relevant market (which may well be local in scope and will depend on the type of retail or other commercial activity in question) is required in order to determine if terms of a property lease will appreciably restrict competition. It would seem that, in most cases, this will not be the case.

***Martin v Crawley*: if an appreciable restriction of competition is established, the party seeking to enforce the clause must demonstrate that it meets the criteria for exemption**

37. *Martin v Crawley Borough Council*³⁶ is a rare example of when a restrictive term in a commercial property lease has been litigated.
38. *Martin* concerned a restriction on Martin (a newsagent) selling alcohol and groceries, which were sold by an adjoining (family run) convenience store on the same parade of shops on a housing estate in Crawley. The landlord (the local authority) conceded that the clause was restrictive of competition, but argued that it met the requirements for exemption under s.9 of the CA 1998.

³⁶ *Martin Retail Group Limited v Crawley District Council* (24 June 2013, Central London County Court, HHJ Dight), available on the [bailii website](#).

39. The Council argued that the restriction was part of a 'letting scheme' (applied to all shops in the parade) that ensured an appropriate 'tenant mix' across the parade. It argued that this benefitted local residents who were ensured of a wide range of goods and services. It also appeared to argue that, by effectively excluding supermarkets, it protected smaller retailers.
40. The learned judge disagreed. He held that here was no objective evidence that the scheme benefitted shoppers and satisfied the four exemption criteria: the subjective views of the Council's officers and residents did not suffice [32 – 35]. The Council was required to, but did not, show how the letting scheme would improve consumer outcomes compared the absence of the scheme. It adduced no documentary evidence to support its case [36, 37]. Indeed, the learned judge was of the clear view that the letting scheme created local monopoly suppliers of specific goods, leading to higher prices [38 – 39].

Conclusion

41. Most property leases, even if they do restrain the tenant or landlord's commercial freedom, will not be restrictive of competition: usually, there will be suitable alternative sites from which competing retailers can and do trade. Appreciable negative effects are likely only where a party has market power and there are no or few realistic alternatives, such as to constitute an infringement of the Chapter I prohibition. However, even then, the clauses may meet the requirements for an exemption under s.9 of the CA 1998. To establish that the exemption criteria are satisfied, sufficient objective evidence is required: this will include documentary evidence and, likely, expert evidence.

COMPETITION LAW IN THE AGRICULTURAL SECTOR

42. In principle, competition law applies in the agricultural sector, as in any other. The competition rules for agricultural products are contained in Regulation 1308/2013, the 'Common Market Organisation Regulation,

which implemented reforms to the Common Agricultural Policy from 1 April 2014.³⁷ Under Article 206 of that Regulation, the competition rules apply to agricultural products, subject (in accordance with Articles 209 and 210) to specific exceptions where necessary to attain the CAP's objectives.

43. Under Articles 168 to 171 of the Regulation, joint commercial activities (including joint selling) through 'producer organisations' in relation to milk and milk products (Article 168), olive oil (Article 169), beef and veal (Article 170) and certain arable crops, such as wheat, barley and maize (Article 171) are permitted, in each case subject to certain conditions being satisfied, in particular that the producer organisations make farmers more efficient through other joint activities (such as storage and distribution) and volume thresholds are not exceeded. Provided that these conditions are satisfied, producers of these products may jointly sell their products, including by setting prices, volume and other trade conditions.
44. On 27 November 2015, the Commission adopted new guidelines on the implementation of the new rules for joint selling of olive oil, beef and veal, and arable crops.³⁸ The key aspects of this guidance are that:
 - a. the joint activities must be carried out through 'producer organisations' or 'associations of producer organisations' recognised by national authorities;
 - b. the quantities marketed jointly cannot exceed:
 - i. 15% of the national market (beef and veal, arable crops);
 - ii. 20% of the relevant market (olive oil);

³⁷ The fisheries sector is governed by Regulation 1379/2013.

³⁸ European Commission Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal, and arable crops sectors, 2015 OJEU C/431/1. See also Commission Press Release, *Antitrust: new Commission Guidelines on joint selling of olive oil, beef and veal, and arable crops* (IP/15/6187, 27 November 2015) and Commission Memo, *Antitrust: new Commission Guidelines on joint selling of olive oil, beef and veal, and arable crops - frequently asked questions* (MEMO/15/6188, 27 November 2015).

- c. the producer organisations must carry out other activities (e.g. storage, distribution or joint purchasing of inputs);
 - d. these activities must significantly improve farmers' competitiveness and efficiency; and
 - e. joint selling activities must be notified to the relevant national authorities (in the UK this is the Rural Payments Agency, in Reading).
45. The purpose of the new rules is to increase producers' bargaining power and to balance the buying power of the largest buyers of these products.
46. National competition authorities can verify that the conditions for this derogation to apply are in fact being met. Where these rules are not met, the normal competition rules set down in Article 101 TFEU and national competition law will continue to apply, although some activities undertaken by agricultural cooperatives will in any event often fall outside of the scope of the competition rules.³⁹

COMPETITION LAW AND THE PROFESSIONS

47. The professions are another area of economic activity to which competition authorities have turned their gaze. The European Commission has long applied the competition rules to the professional services sector, in particular as regards fee structures. Recent action by the CMA has focused on medical practitioners and estate agents. These cases are a reminder not only that competition law applies to the professions, but also to small organisations, including partnerships and sole traders.

Ophthalmologists: CMA takes formal action against medical professionals for the first time

48. In August 2015, the CMA announced that it had fined Consultant Eye Surgeons Partnership (CESP) £ 500,000, reduced to £ 382,500 for

³⁹ See e.g. Case C-250/92 *Gøttrup-Klim v Danske Landsburgs* ECLI:EU:C:1994:413.

settlement and compliance action taken by it.⁴⁰ This was the first time that formal enforcement action has been taken against medical professionals in the UK.

49. CESP was the largest group of consultant eye surgeons in the UK. Its members were 37 limited liability partnerships, of which consultant ophthalmologists were members. CESP provided various services to the LLPs. The CMA found that CESP had infringed the Chapter I prohibition by:
- a. negotiating prices with medical insurers (on the LLPs' behalf) and facilitating the exchange of commercially sensitive information;
 - b. recommending that members refuse to accept lower fees offered by medical insurers (including by delisting from one insurer's panel) and to charge insurers the higher fees charged to 'self-pay' patients;
 - c. circulating detailed price lists for different surgical procedures, which members could use in negotiations with medical insurers; and
 - d. facilitating the exchange of commercially sensitive information, including consultants' future pricing and business intentions, both between LLPs and individual consultants.
50. Through these practices, consultants' fees and negotiating strategies vis-à-vis insurers were aligned, leading to higher prices being charged and lower costs not being passed on to insurers. It is interesting that the CMA reduced the fine not only because CESP admitted the infringement (leading to 'settlement'), but also because CESP put in place a comprehensive compliance programme, both for itself and its members.

⁴⁰ Case CE/9784-13 *Conduct in the ophthalmology sector*, [decision](#) of 20 August 2015. See CMA Press Release, [CMA confirms fine as it completes eye surgeons investigation](#) (5 August 2015).

The additional reduction for the compliance programmes was £ 42,500, or 10% of the fine as reduced for settlement.⁴¹

51. Subsequently, the CMA published advice for medical practitioners in private practice, advising them that sharing prices or confidential information could infringe competition law.⁴²

Estate agents

52. In May 2015, the CMA imposed fines of over £ 735,000 on an association of Hampshire estate agencies, three of its members and Trinity Mirror, the publisher of a local newspaper, the *Surrey & Hants Star Courier*. The fines were reduced to take account of the parties admitting the CMA's allegations and entering into settlements in a streamlined administrative procedure. Two agents received a further 5% discount for implementing compliance programmes and making senior management accountable for future compliance.⁴³
53. The three agents entered into agreements that prevented members of the association (including them) from advertising fees or discounts in the *Star Courier*. The agents also agreed to negotiate collectively (through the association) with the publisher of the *Star Courier* for buying advertising; in this way, they subsequently eventually successfully pressurised Trinity Mirror to prevent all agents from advertising fees or discounts in the *Star Courier*, irrespective of whether they were members of the association. Finally, the association's membership rules prohibited members from advertising their fees or discounts in the newspaper and various steps were taken to enforce compliance with these rules, including taking steps to expel members and requesting the newspaper to charge higher rates to, or refuse to accept advertisements from, agents that did not comply

⁴¹ The CMA had earlier announced that it was minded to reduce the fine to £ 425,000 due to the settlement: CMA Press Release, [Eye surgeons' membership organisation fined £500,000](#) (14 July 2015).

⁴² A number of documents can be found on the [CMA website](#).

⁴³ Case CE/9827/13 *Restrictive arrangements preventing estate and letting agents from advertising their fees in a local newspaper*, [decision](#) of 8 May 2015.

with the rules. Eventually, the *Star Courier* agreed not to accept adverts that referred to agents' fees, whether by members or non-members.

54. The CMA considered that these arrangements (which lasted between 2005 and 2014) reduced competition between agents in the Fleet area and also made market entry harder, as new agents would not have been able to advertise their fees to prospective customers. The involvement of the newspaper publisher supported the agents' anti-competitive agreements, thus explaining its own liability, as a 'facilitator' of the arrangements, even though it was not active on the affected market, for estate agent services and was pressurised to assist the agents.
55. The CMA has received numerous complaints about similar arrangements between estate agents and local newspapers.⁴⁴ It has sent warning letters to a number of estate agents that it suspects have infringed competition law by restricting the advertising of their fees.⁴⁵ It also has at least one on-going investigation into such conduct.⁴⁶

THE CRIMINAL CARTEL OFFENCE: HOW TO STAY OUT OF PRISON

56. In 2002, the EA 2002 introduced the new criminal cartel offence. The maximum penalty, following conviction on indictment is five years' imprisonment and an unlimited fine. In addition, company directors can be disqualified for up to 15 years and convicted individuals may be made subject to confiscation proceedings under the Proceeds of Crime Act 2002. In England and Wales, prosecutions will normally be brought by the CMA, but may also be brought by the Serious Fraud Office.

⁴⁴ See CMA Press Release, [Companies fined over £775,000 in CMA investigation into advertising of agents' fees](#) (19 March 2015). The CMA issues a 'warning letter' where it considers that one or more businesses may be breaking competition law, but does not – as a matter of administrative priority – intend to open a formal investigation. A business receiving a warning letter must inform the CMA of steps taken and to be taken to ensure compliance. The CMA may also send an 'advisory letter': businesses are not required to inform the CMA of such compliance steps. In either case, the CMA may still open a formal investigation. The [CMA website](#) has further information on warning and advisory letters.

⁴⁵ See CMA Press Release, [CMA warns estate and lettings agents not to break competition law](#) (3 June 2015).

⁴⁶ See <https://www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anti-competitive-arrangement-s>.

The offence

57. As originally enacted, s.188(1) provided that:

"an individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or cause to be made or implemented arrangements of the following kind relating to at least two undertakings (A and B)"

58. The ERRA 2013 amended s.188(1) by removing the word "*dishonestly*". This took effect on 1 April 2014. For conduct taking place on or after this date, the prosecution is no longer required to demonstrate that the individual acted dishonestly. This change was made because it was considered to be too difficult to demonstrate to juries that defendants entered into 'hard core' cartel arrangements dishonestly.

59. S.188(2) sets out the prohibited arrangements. In terms, these are: price-fixing; limitation of supply or production; market or customer sharing; and bid-rigging. These are all 'hard core' cartel activities.

60. There are a number of exclusions from the offence and also a number of statutory defences.

61. By s.188A, the following conduct is excluded from the scope of the offence (i.e. the cartel offence is not committed):

- a. notification of the arrangements to customers (s.188A(1)(a));
- b. notification of bid-rigging arrangements to the person requesting the bid (s.188A(1)(b));
- c. publication of the arrangements (s.188A(1)(c)); and
- d. compliance with a legal requirement (s.188A(3)).

62. By s.188B, a defendant can rely upon the following defences:

- a. no intention to conceal the arrangements from customers (s.188B(1));

- b. no intention to conceal the arrangements from the CMA (s.188B(2));
and
 - c. legal advice: reasonable steps taken to disclose to legal advisers for the purposes of obtaining legal advice about the arrangements before their implementation (s.188B(3)).
63. The CMA has published guidance for prosecutions in respect of the cartel offence: *Cartel Offence: Prosecution Guidance*.⁴⁷

Recent prosecution and sentencing experience: *Galvanised Steel Tanks*

64. In 2014, three individuals, Peter Snee, Clive Dean and Nicholas Stringer were charged with committing the cartel offence. The CMA investigation followed an application for immunity by one of the companies involved.⁴⁸ As the alleged conduct took place before 1 April 2014, the original provisions of s.188(1) of the EA 2002 applied. The prosecution (the CMA) therefore had to prove that the defendants had dishonestly entered into a hard core cartel arrangement.
65. Mr Snee pleaded guilty. Following trial at Southwark Crown Court (in which Mr Snee was a witness for the prosecution), Messrs. Dean and Stringer were acquitted by the jury. Mr Snee was sentenced to six months' imprisonment, suspended for 12 months and ordered to do 120 hours community service within 12 months.⁴⁹ HHJ Goymer's sentencing remarks for Mr Snee included that "*the economic damage done by cartels is such that those involved must expect prison sentences to mark the seriousness of these offences and to act as a deterrent to others*". A prison sentence of two years would ordinarily have been appropriate, but this was reduced to six months due to Mr Snee's early guilty plea, voluntary

⁴⁷ See <https://www.gov.uk/government/publications/cartel-offence-prosecution-guidance>.

⁴⁸ See Blake, *The UK steel tanks criminal cartel trial: implications for criminalisation and leniency* (13 November 2015).

⁴⁹ See CMA Press Release, *Director sentenced to 6 months for criminal cartel* (14 September 2015).

cooperation with the CMA and personal mitigation. HHJ Goymer considered that it was appropriate to suspend this sentence.⁵⁰

66. Mr Snee was the former managing director of Franklin Hodge Industries. Mr Dean was a director of Kondea Water Supplies and Mr Stringer was managing director of Galglass. All three companies manufactured galvanised steel tanks used for water storage. Between 2005 and 2012, the three executives agreed to fix prices, share customers and rig bids. Messrs Dean and Stringer admitted this conduct, but denied doing so dishonestly; it appears that neither gave evidence in their own defence. This was accepted by the jury, after only two hours' deliberation.

67. So what was the basis of the successful defence? In essence, according to Mr Dean's solicitors:

*" the issue in the trial was whether there was greed, and there was none. Instead, the jury could see that Clive Dean was simply trying to maintain standards and safety in the GCST market, and to stave off wrongful bankruptcy and redundancies. The market was failing the product by creating unfair competition, which had become ruinous. It seems that a jury concluded that open competition is not always the only consideration in business."*⁵¹

68. The central importance to the trial of the issue of dishonesty was confirmed by a senior CMA official:

*" the only point in issue at the trial of Mr Snee's co-defendants was whether in agreeing to the cartel arrangements they had acted 'dishonestly'. No other element of the offence was contested at the trial."*⁵²

69. It is important to emphasise that the prosecution was under the original s.188(1) of the EA 2002. Now that the requirement for dishonesty has

⁵⁰ Blake, *op. cit.*

⁵¹ See *Financial Times*, '[UK antitrust watchdog loses criminal cartel case](#)' (24 June 2015).

⁵² Blake, *op. cit.*

been removed, it would seem that, were the same conduct have been committed after 1 April 2014, this defence would certainly have failed and convictions would have resulted.

The criminal cartel offence: *quo vadis*?

70. The CMA remains committed to conducting criminal investigations into suspected cartels. It has a specialist criminal cartel investigation team, the Cartels and Criminal Group, in which substantial investment has been made in enhanced human and other resources.⁵³ It has strong capabilities in intelligence and digital forensics and will use all investigation powers available to it, including covert investigation and surveillance under the Regulation of Investigatory Powers Act 2000. The Government's 'Strategic Steer' to the CMA includes an expectation that it should use its new powers to detect and punish cartels.⁵⁴ The CMA's current annual plan foresees opening new criminal investigations and pursuing prosecutions as appropriate.⁵⁵
71. The CMA has recently announced that it has charged a man, Barry Kenneth Cooper, of dishonestly agreeing to divide supply, fix prices and divide customers in respect of the supply of precast concrete drainage products between 2006 and 2013. Mr Cooper was therefore charged under the original wording of s.188 of the EA 2002.⁵⁶

How to avoid going to prison?

72. Individuals committing the criminal cartel offence can expect long custodial sentences. Despite pleading guilty, the defendants in the marine

⁵³ *Ibid.* Blake also sets out the extent of the CMA's investigation in *Galvanised Steel Tanks*, including: dawn raids at five sites, involving 70 investigators; four arrests; coordination with six police forces; over 38,000 digital items reviewed for disclosure; and 70 witness statements and over 49,000 pages of material served in evidence.

⁵⁴ Department for Business Innovation and Skills, *Government's response to the Consultation on the Strategic Steer to the Competition and Markets Authority* (December 2015).

⁵⁵ CMA, *Competition and Markets Authority Annual Plan consultation 2016/17* (December 2015).

⁵⁶ CMA Press Release, *Man charged in CMA criminal cartel investigation* (7 March 2014).

hoses cartel received sentences of between 20 months and 2.5 years.⁵⁷ Mr Snee was fortunate to escape imprisonment for his role in the *Galvanised Steel Tanks* cartel.

73. The most obvious way to avoid prison is not to participate in hard core cartel activity. With the removal of the need to show dishonesty, the mere fact of knowingly or recklessly agreeing to enter into a prohibited arrangement is likely to be sufficient to constitute an offence and render the individual at risk of prosecution and conviction, as the facts of the *Galvanised Steel Tanks* case (applied to the revised offence) would tend to confirm.
74. If there is any doubt at all as to the lawfulness of a proposed course of conduct, legal advice should be taken *before* an arrangement is made or entered into. Not only is this likely to avoid the arrangement being entered into, it may well constitute a defence under s.188B(1).
75. If the worst happens, and a prohibited arrangement is entered into, all is not lost. The CMA operates a leniency regime for businesses and a 'no-action' regime for individuals.⁵⁸ Individuals benefitting from individual immunity will receive a 'no-action' letter confirming that they will not be prosecuted under the criminal cartel offence.
76. Where a company is the first to report and provide evidence of a cartel to the CMA, and the CMA is not already undertaking an investigation, it may qualify for immunity from financial penalties. This will also provide 'blanket immunity' from criminal prosecution for all cooperating current and former employees and directors.⁵⁹ If the CMA is already undertaking

⁵⁷ *R v Whittle, Brammar and Allison* [2008] EWCA Crim 2560, available on the [bailii website](#). See <https://www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation>. The guilty pleas were in part because the defendants had already pleaded guilty to offences under US antitrust law relating to the same cartel conduct and, under a plea agreement with the US authorities, could avoid serving their sentences in US prisons if they received sentences of at least equivalent duration in the UK.

⁵⁸ See OFT, *Applications for leniency and no-action in cartel cases* (OFT 1495, July 2013). This guidance has been adopted by the CMA.

⁵⁹ *Ibid.*, paras. 2.9 to 2.14. This is known as 'Type A immunity'.

an investigation, corporate and individual immunity is at the CMA's discretion.⁶⁰ Immunity is also discretionary if an applicant is not the first to inform the CMA.⁶¹

77. Individuals can also themselves inform the CMA of illegal cartel activity and thereby benefit from individual immunity. The CMA's guidance indicates that "individual immunity is most likely to be granted where an individual makes an approach for criminal immunity on their own account", but it may also be granted where their employer or former employer qualifies for leniency.⁶² Immunity may be available to a self-reporting individual even if the CMA has already started an investigation, if his or her evidence adds 'significant value' to the investigation.⁶³
78. Whether or not to apply for immunity or leniency is a complex matter and requires legal advice. There are also likely to be, at least potential, conflicts between the interests of the company and individual employees and former employees. Employees may require individual advice and representation.

MERGER CONTROL: NOT JUST FOR THE "MEGA MERGERS"

79. In the United Kingdom, merger control exists at two levels: at the EU level, under the EU Merger Regulation (No 139/2004) ("**EUMR**"), and at the national level, under the mergers provisions of Part 3 of the EA 2002. If a merger meets the turnover thresholds of the EUMR,⁶⁴ it will be reviewed by the European Commission and national merger law does not apply (although there are provisions for jurisdiction to be transferred between the European Commission and the CMA⁶⁵).

⁶⁰ *Ibid.*, paras. 2.15 to 2.23. This is known as 'Type B immunity/leniency'.

⁶¹ *Ibid.*, paras. 2.24 to 2.32. This is known as 'Type C leniency'.

⁶² *Ibid.* paras.2.34.

⁶³ *Ibid.* para. 2.36.

⁶⁴ EU Merger Regulation, Art. 1. There are two alternative thresholds, based on turnover.

⁶⁵ EU Merger Regulation, Arts. 4, 9 and 22.

EU Merger Regulation

80. Even relatively small mergers may need to be reviewed in Brussels, for example where the acquiring company is a joint venture and its controlling shareholders individually satisfy the thresholds, or where there are two or more acquiring parties, each of which does so.
81. The Commission recently investigated (albeit using the 'simplified procedure') Netto UK's acquisition of a grocery store (formerly operated by Morrisons) in Little Hulton, a suburban village in the City of Salford.⁶⁶ Why? Because Netto UK is a 50/50 joint venture between Sainsbury's and the Danish retailer, Dansk Supermarked, each of which satisfies the applicable thresholds, even if the target store did not. However, the Commission concluded that the transaction did not in fact fall within the scope of the EUMR, as Morrison had already closed the store, such that it was not a business to which turnover could be attributed and there was no transfer of assets (other than the freehold property), goodwill or employees.⁶⁷
82. Netto had previously acquired three other grocery stores from the Co-operative Group, in Doncaster, Leeds and Hull. This transaction was notified to and cleared by the CMA on 24 July 2015.⁶⁸ However, it subsequently transpired that it met the EUMR thresholds and should have been notified to the European Commission instead. The CMA revoked its decision. It was then notified to the Commission, and on 22 January 2016 referred the case back to the CMA. The CMA subsequently reviewed and then approved the merger (which is now completed) for a second time.⁶⁹ As the merger was completed before being notified to the European Commission, it is likely that the parties are under investigation for failure

⁶⁶ Case M.7940 *Netto/Grocery Store at Armitage Avenue Little Hulton*.

⁶⁷ Commission Midday Express, *Mergers: Commission finds Netto's acquisition of the property of a supermarket falls outside EU merger control* (MEX/16/443, 29 February 2016).

⁶⁸ Case ME/6529-15 *Netto/Cooperative* (24 July 2015).

⁶⁹ *Netto/Co-operative (3 stores)*. The European Commission's referral decision, under Art.4(4) EUMR is not available on its website. Indeed, the case is not referred to at all.

to comply with the EUMR's mandatory pre-notification and suspension obligations.

Merger control under the Enterprise Act 2002

What is a merger?

83. A 'merger situation' arises when two 'enterprises' have ceased to be distinct: s.23(2)(a) of the EA 2002). An 'enterprise' means the "activities, or part of the activities, of a business": s.129(1). Enterprises cease to be distinct where they come under common ownership or control: s.26(1).
84. In its recent judgment in *Eurotunnel*, the Supreme Court provided guidance on the concept of an 'enterprise'. In this case, Eurotunnel acquired three ferries and various other assets⁷⁰ formerly owned by SeaFrance, an insolvent French ferry company that operated on the Dover/Calais route, from its liquidator. This merger was prohibited by the Competition Commission and, following a successful challenge before the Competition Appeal Tribunal,⁷¹ on remittal by the CMA.⁷² The Supreme Court had to consider whether Eurotunnel had acquired an 'enterprise' or merely 'bare' assets that might be used to create a new enterprise or as a means of achieving organic growth.⁷³
85. Lord Sumption, giving the judgment of the Court, held that:
- a. the focus of merger control is on the acquisition of the activities of a business and not on the acquisition of an entity carrying them on.

⁷⁰ As well as three vessels (*Rodin*, *Berlioz* and *Nord Pas-de- Calais*), Eurotunnel acquired: logos, brands and trade names; computer software; websites and domain names; IT systems and hardware; office equipment; customer lists and records; and an inventory of technical and spare parts. Eurotunnel did not acquire any employees, who had been made redundant some time earlier, when SeaFrance became insolvent. However, many of these employees had established a cooperative (the SCOP) which agreed with Eurotunnel to provide the necessary employees, supported with a payment of € 25,000 per worker from Sea France's former owner, SNCF.

⁷¹ [Groupe Eurotunnel S.A. and Société Coopérative de Production Sea France S.A.](#)[2013] CAT 30.

⁷² [Eurotunnel/SeaFrance \(remittal\)](#) (27 June 2014).

⁷³ [Société Coopérative de Production SeaFrance S.A. v The Competition and Markets Authority](#) [2015] UKSC 75.

Therefore, although SeaFrance may have ceased trading (upon entering into the French equivalent of administration), it could still have business activities that might constitute an 'enterprise', provided that there still existed the capacity to carry them on as part of the same business, whether in the hands of the existing proprietor or of someone else;⁷⁴

- b. the extent of any hiatus in activity is relevant but not decisive as to whether an 'enterprise' exists and this will vary from case to case;⁷⁵
- c. the key factor is 'economic continuity': for the target to constitute an 'enterprise', the purchaser must be acquiring more than it would by going into the market and buying factors of production (equipment, employees etc) because the assets acquired were previously employed in combination in the 'activities' of a business.⁷⁶ In other words, "*it depends on whether at the time of the acquisition one can still say that economically the whole is greater than the sum of its parts*".⁷⁷
- d. the CMA did not err in finding that Eurotunnel had acquired an enterprise. It acquired substantially all of SeaFrance's assets (so allowing it to recommence operations more quickly and at lower risk than if it had acquired such assets elsewhere) and goodwill. Whilst it did not engage directly its former employees, its arrangement with the SCOP provided the necessary economic continuity.⁷⁸

86. Therefore, looking at the economic substance of the transaction, although Eurotunnel did not acquire a ferry business that was a going concern, it

⁷⁴ *Ibid.*, paras. [32] – [35]. Therefore, for example, a seasonal business would still in principle be an 'enterprise' even if it were not trading it being out of season, as would a business which has been temporarily mothballed (e.g. pending a buyer being found) and also a business whose activities has been ceased immediately before it is sold to a competitor: paras. [34] and [35].

⁷⁵ *Ibid.* para. [36].

⁷⁶ *Ibid.*, para. [39].

⁷⁷ *Ibid.*, para. [40].

⁷⁸ *Ibid.*, para. [42].

did acquire much of the benefit of doing so and thereby acquired at least “the embers of an enterprise” capable of passing to Eurotunnel.⁷⁹

Jurisdiction⁸⁰

87. The CMA may investigate a ‘relevant merger situation’, which is where:
- a. the UK turnover of the enterprise being taken over exceeds £ 70 million: s.23(1)(a); or
 - b. as a result of the merger, 25% or more of “goods or services of any description” are supplied in the UK, or a substantial part of the UK, by or to one and the same person: s.23(2), (3) and (4).
88. In applying the ‘share of supply’ test there must be an increment in the share, but the CMA can apply such criterion or criteria as it considers appropriate: s23(5). A “substantial part of the UK” is a part “of such size, character and importance as to make it worth consideration for the purposes of merger control” .⁸¹
89. The CMA can therefore assert jurisdiction over a merger using very small reference markets. It has done so recently, in respect of the following:
- a. the supply of groceries from mid-sized grocery stores in Doncaster (*Netto/Cooperative*);⁸²
 - b. the supply of groceries from mid-sized grocery stores in Lincolnshire (*Lincolnshire Cooperative/Budgens*), which involved a single grocery store in Holbeach;⁸³

⁷⁹ *Ibid.*

⁸⁰ See generally, CMA *Mergers: Guidance on the CMA’s jurisdiction and procedure* (CMA2, January 2014).

⁸¹ *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport*, sub nom *South Yorkshire Transport v Monopolies and Mergers Commission* [1993] 1 All ER 289 (HL).

⁸² *Netto/Cooperative*, above.

⁸³ Case ME/6476/14 *Lincolnshire Co-operative/Budgens Store in Holbeach* (18 December 2014).

- c. the supply of groceries in Bridgend (*Asda/Co-operative Group (five stores and three petrol stations)*);⁸⁴
- d. serviced office space in central London and Reading (*Regus/Advanta*);⁸⁵
- e. electrocoating services in the United Kingdom (*Platinum Equity/Malcolm Enamellers*);⁸⁶
- f. taxi and private hire services in Sheffield (*Sheffield City Taxis/Mercury Taxis*);⁸⁷
- g. orthodontic services to NHS patients in the Tonbridge (TN) and Brighton (BN) postcode areas (*Oasis Dental Care/Total Orthodontics*);⁸⁸
- h. gyms in Derby (*Pure Gym/LA Fitness*);⁸⁹
- i. galvanizing services to external customers within 60 miles of Telford (*Joseph Ash/W Corbett*);⁹⁰
- j. engraved cattle tags (*Allflex/Cox*);⁹¹
- k. the distribution of dental consumables to dental professionals (*Henry Schein UK/Plandent*);⁹²

⁸⁴ Case ME/6466-14 *Asda/Co-operative Group (five stores and three petrol stations)* (28 November 2014).

⁸⁵ Case ME/6537-15 *Regus/Advanta Serviced Office Group* (18 November 2015).

⁸⁶ Case ME/6560-15 *Platinum Equity/Malcolm Enamellers* (9 November 2015);

⁸⁷ Case ME/6548-15 *Sheffield City Taxis/Mercury Taxis (Sheffield)* (13 October 2015).

⁸⁸ Case ME/6530/15 *Oasis Dental Care Services/Total Orthodontics* (2 September 2015).

⁸⁹ Case ME/6526-15 *Pure Gym/LA Fitness* (14 August 2015).

⁹⁰ Case ME/6518/15 *Joseph Ash/W Corbett & Co (Galvanizing)* (25 June 2015).

⁹¹ Case ME/6522/15 *Allflex/Cox Agri Limited* (7 May 2015).

⁹² Case ME/6515/15 *Henry Schein UK Holdings/Plandent dental consumables business* (21 April 2015). The CMA's substantive analysis of this merger is not considered below, but it is notable that:

- the merger was completed without publicity and the CMA only became aware of it after completion, following a third party complaint;

- l. the collection, treatment and disposal of healthcare risk waste within 50 miles of Leeds (*Healthcare Environmental Services/GW Butler*);⁹³ and
- m. newsstand sales of aviation magazines (*Key Publishing/Assets of Kelsey Publishing*).⁹⁴
90. In other cases, the CMA has undertaken an investigation, but found that the share of supply test was not satisfied. The CMA's decisions do not state why it has reached such a conclusion. Nevertheless, these cases have still involved an investigation and, in some cases, have involved an initial enforcement order (as to which, see further below). For example:
- a. *Grahams The Family Dairy/Quothquan Farms*,⁹⁵ which is considered in more detail below.
- b. *James Fisher and Sons plc/X-Subsea UK*: this concerned the acquisition of assets and intellectual property of X-Subsea, which was in administration⁹⁶ for £ 14.8 million.⁹⁷

-
- the merger was an 'asset deal', and was essentially an acquisition of business information, know-how, customer and supplier lists and sales representatives;
 - whilst the vendor had considered the closure of Plandent's distribution business, market exit was not inevitable and there were other potential purchasers, such that it was not appropriate to apply the 'failing firm' counterfactual;
 - whilst the CMA imposed an initial enforcement order, this was varied to ensure that the target business could continue to operate as a going concern and was then revoked once it became clear that the merger did not raise any competition concerns; and
 - the CMA's Phase I investigation was extended by 24 calendar days as Henry Schein failed to supply information required by the CMA.

⁹³ Case ME/6499-14 *Healthcare Environmental Services/GW Butler* (18 March 2015).

⁹⁴ Case ME/6492-14 *Key Publishing/Assets of Kelsey Publishing* (2 March 2015).

⁹⁵ Case ME/6480-14 *Graham's The Family Dairy Business/Quothquan Farms* (17 November 2014).

⁹⁶ Case ME/6543-15 *James Fisher and Sons plc/Assets of X-Subsea UK Holding Limited (in administration)* (30 July 2015).

⁹⁷ See press release, *James Fisher completes acquisition of X-Subsea assets and intellectual property to consolidate and strengthen its position as a subsea service provider*, which refers to X-Subsea as James Fisher's "main competitor".

- c. *Oasis Dental Care/Apex*: this concerned the merger of dental practices. The CMA imposed an interim enforcement order, but subsequently revoked it one month later, part way through its investigation.⁹⁸
 - d. *Asda/Co-op (Clacton on Sea)*⁹⁹ and *Asda/Budgens (Soham)*.¹⁰⁰ these each concerned the acquisition of one retail store.
91. It is important to note that once the CMA has asserted jurisdiction by using the 'share of supply' test, it can investigate not only the merger's effects of competition on that market, but also on any other local market, even it does not itself constitute a substantial part of the United Kingdom. The CMA recently did so when investigating the *Pure Gym/LA Fitness* merger between two chains of gym operators.¹⁰¹

Merger notifications are voluntary, but the CMA can investigate on its own initiative and prevent (further) integration whilst it does so

92. There is no obligation to notify a merger to the CMA and a merger can be completed without being approved by the CMA. Merger notifications are therefore voluntary. However:
- a. the CMA has a duty to keep itself informed of merger activity and has a well-functioning 'market intelligence' function for this purpose;
 - b. the CMA can, and frequently does, investigate non-notified mergers on its own initiative or following a complaint;
 - c. when investigating a completed merger, the CMA will routinely adopt an 'interim enforcement order', preventing the parties from taking further integration steps without the CMA's consent;¹⁰²

⁹⁸ Case ME/6446-14 *Oasis Dental Care/Apex* (11 July 2014).

⁹⁹ Case ME/6434-14 *Asda/Co-op store (Clacton on Sea)* (12 June 2014).

¹⁰⁰ Case ME/6433-14 *Asda/Budgens store (Soham)* (2 May 2014).

¹⁰¹ *Pure Gym/LA Fitness*, above. See paragraph 120 below.

¹⁰² See my article, *United Kingdom: Merger Control Interim Enforcement Orders* on the [Kluwer Competition Law Blog](#).

- d. an interim enforcement order may also require existing integration of the merging parties to be unwound; and
 - e. if it prohibits a merger, the CMA may require the merger to be unwound.
93. The CMA may impose an interim enforcement order where “it has reasonable grounds for suspecting that pre-emptive action has been or may be taken” and “for the purpose of restoring to the position to what it would have been had the action not been taken or otherwise for the purpose of mitigating its effects”: Enterprise Act 2002, s.72 (Phase I investigations) and ss.80 and 81 (Phase II investigations). “Pre-emptive action” is any action that could prejudice the CMA’s investigation and ability to impose remedies, in essence steps taken to integrate the businesses. The CMA can prevent further integration (without its consent) or require existing integration to be unwound.¹⁰³ This can significantly impede the acquiring party’s ability to implement its merger integration plans and to some extent negates the benefits of a voluntary notification regime. The CMA routinely and almost without exception imposes interim enforcement orders in the case of completed mergers, although it may exhibit some flexibility in permitting specific acts of integration, particularly if it is clear that a merger does not raise competition concerns.¹⁰⁴ This reflects the CMA’s broad discretion and margin of appreciation in adopting such orders.¹⁰⁵

¹⁰³ See generally, *CMA Mergers: Guidance on the CMA’s jurisdiction and procedure*, above, paras. 7.28 to 7.31 and Annexe C.

¹⁰⁴ See my article, [United Kingdom: Merger Control Interim Enforcement Orders](#) on the [Kluwer Competition Law Blog](#). See also my article, *United Kingdom: Merger Control* in “[The European Antitrust Review 2015](#)”.

¹⁰⁵ See *Stericycle v Competition Commission* [2006] CAT 21.

Substantive assessment of mergers

94. The substantive test used in UK merger control is that of a 'substantial lessening of competition' ("**SLC**").¹⁰⁶
95. In order to refer a merger for an in-depth, Phase II, investigation, the CMA must believe that the merger may be expected to result in an SLC: Enterprise Act 2002, ss.22 (completed mergers) and 33 (anticipated mergers): this merely requires that the CMA holds a reasonable and objectively justified belief that there is a prospect (which is more than fanciful, but may be below a 50% probability) that the merger will lead to an SLC.¹⁰⁷ The CMA does, however, have a discretion not to refer a merger if the market is not of sufficient importance to justify doing so, the so-called 'de minimis exception'.¹⁰⁸
96. After a Phase II investigation, the CMA bears the burden of proving, on the balance of probabilities,¹⁰⁹ that the merger will lead to an SLC. If it does so, it may prohibit the merger or impose remedies, in respect of which it has a broad discretion.¹¹⁰

Recent CMA practice in respect of 'small' mergers

97. Many mergers investigated by the CMA involve large, even multinational, companies. It has recently cleared (after a Phase II investigation and in a final report of 383 pages, plus appendices), BT's acquisition of EE, which

¹⁰⁶ In relation to procedure, see generally, CMA *Mergers: Guidance on the CMA's jurisdiction and procedure*, above and, in relation to substantive assessment, Office of Fair Trading and Competition Commission, *Merger Assessment Guidelines* (CC2 (Revised) OFT1254, September 2010). See also, in relation to judicial assessment of merger control, O'Regan and Jefferson, *Merger Litigation in the United Kingdom* [2013] 58 *The Antitrust Bulletin* 433.

¹⁰⁷ *Office of Fair Trading v. IBA Health* [2004] EWCA Civ 142.

¹⁰⁸ See OFT, *Mergers Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, December 2010).

¹⁰⁹ *British Sky Broadcasting Group and Virgin Media v. Competition Commission and Secretary of State for Business, Enterprise and Regulatory Reform* [2010] EWCA Civ 2.

¹¹⁰ *British Sky Broadcasting Group and Virgin Media v. Competition Commission and Secretary of State for Business, Enterprise and Regulatory Reform*, above. In relation to remedies, see generally Competition Commission, *Merger Remedies: Competition Commission Guidelines* (CC8, November 2008).

has created the largest telecoms group in the UK¹¹¹ and is presently undertaking Phase II investigations into both Celesio's proposed acquisition of Sainsbury's pharmacy business¹¹² and the merger of Ladbrokes with Coral's betting businesses.¹¹³

98. Nevertheless, the CMA has recently investigated a number of mergers between or involving smaller companies or businesses. These are considered below.

Grahams/Quothquan

99. *Grahams The Family Dairy/Quothquan Farms*¹¹⁴ concerned the merger of two Scottish family farming and dairy businesses in April 2014. The merger was not notified to the CMA and was not publicised, e.g. by press release or on the parties' websites. In July 2015, the CMA received a complaint and started an 'own initiative' investigation. In September 2015, the CMA imposed an interim enforcement order, which prevented further business integration for two months, until the CMA decided, on 14 November 2015, that the merger did not qualify for investigation.¹¹⁵

Regus/Advanta

100. This merger concerned the acquisition by Regus (the largest provider of serviced offices in the UK) of Advanta, its main rival in London, with a turnover of £ 65 million. The CMA asserted jurisdiction on the basis that the parties' combined share of serviced office space in central London and also in Reading (where Advanta had one branch) was over 25%.
101. The merger was not notified to the CMA, which received a complaint (five days after closing) and opened an own-initiative investigation. It

¹¹¹ [BT Group plc/EE Limited](#) (15 January 2016).

¹¹² [Celesio/Sainsbury's Pharmacy Business](#) (on-going).

¹¹³ [Ladbrokes/Coral](#) (on-going).

¹¹⁴ *Graham's The Family Dairy Business/Quothquan Farms*, above.

¹¹⁵ Case ME/6480-14 [Graham's The Family Dairy Business/Quothquan Farms](#) (17 November 2014).

apparently took Regus several months to provide the CMA with the information required for it to be able to start its investigation. The investigation involved contacting over 140 customers. It received submissions (many unsolicited) from customers, independent office space brokers and competitors. It analysed internal documents analysing competitive conditions in the London office space segment. Regus also submitted three pieces of economic analysis, which was submitted late in the investigation, so making it more difficult for the CMA to assess.

102. The CMA imposed an interim enforcement order, restraining further integration and steps that could damage the viability and competitiveness of Advanta. This required Regus: not to integrate, and to manage separately, the two companies; maintain each as a going concern operated under their own brands; and not to make changes to key staff.¹¹⁶ The CMA subsequently consented to certain Advanta employees being made redundant and banking, payroll and certain IT functions being centralised.
103. In London, the CMA's assessment was made on the basis of very local areas, e.g. Hammersmith (W6), Euston/King's Cross (NW1), Mayfair/St James's (W1K, W1J, W1S, W1B), City (EC3, EC4 and parts of EC1), Canary Wharf/Docklands (E14) and South Bank (SE1). In Reading, the merger was assessed using an area within 1 mile of Reading station.
104. The CMA found that there was a realistic prospect of an SLC in the supply of serviced office space in the Hammersmith, Victoria, Canary Wharf/Docklands, Euston/King's Cross, and Paddington areas of central London. The parties were close competitors in each area. Regus was required to divest Advanta's serviced office space in each area, as a going concern. As the lease on the Hammersmith site had less than one year to

¹¹⁶ [Regus/Advanta Initial Enforcement Order](#) (15 May 2015).

run, an alternative remedy would apply if the landlord would serve notice to terminate lease: in this case, Regus would not increase its prices.¹¹⁷

*Platinum Equity/Malcolm Enamellers*¹¹⁸

105. This merger concerned the acquisition by Platinum Equity (a US private equity group) of Malcolm Enamellers, a family-owned supplier of industrial coating services based in Wednesbury. Amongst Platinum's portfolio companies was Metokote UK, another provider of such services, with a plant in Daventry, which is 43 miles from Wednesbury.
106. Malcolm's turnover was £ 8.9 million. The CMA asserted jurisdiction on the basis that Metokote and Malcolm had a combined share of supply of electrocoating services in the UK of 20 – 30%.¹¹⁹
107. The CMA assessed the competitive effects of the merger by reference to an area with a radius of 50 miles from Wednesbury: customers valued a local service. Overlaps were identified for electrocoating, powder coating and wet spray coating, which the CMA considered were not substitutable, such that there was not a single market for all types of industrial coating services. However, it did not identify any competition concerns on even such narrow frames of references, as the parties were not particularly close competitors, there were sufficient alternative suppliers, several geographically closer to Malcolm's plant than that of Metokote) and customers used competitive tendering and could easily switch supplier.
108. Whilst the merger was approved, completion was conditional on CMA clearance. Accordingly, completion was delayed for at least two months, pending notification to and approval by the CMA.

¹¹⁷ Case ME/6537/15 *Regus/Advanta Serviced Office Group (UJL Decision)* (9 February 2016).

¹¹⁸ *Platinum Equity/Malcolm Enamellers*, above.

¹¹⁹ The actual share is not stated in the CMA Decision (being confidential), but is evidently over 25%.

*Sheffield City Taxis/Mercury Taxis (Sheffield)*¹²⁰

109. This merger concerned the acquisition of certain assets and the business of Mercury Taxis by Sheffield City Taxis. Both businesses provided private hire transport services ('minicabs') to cash and account customers and also to tender customers (such as large public bodies). City Taxis had a turnover of £ 7.2 million and Mercury of £ 2.3 million.
110. The merger was not notified and the CMA opened an own-initiative investigation. It asserted jurisdiction on the basis that the parties had a combined share of supply of taxi and minicab services in Sheffield of 50 – 60%. The CMA imposed an initial enforcement order.
111. The CMA considered that the transaction was more than the acquisition of mere assets and was thus a merger: City Taxis acquired the customer contracts, goodwill, IT systems, intellectual property, business name, signs and licences of Mercury Taxis and 34 employees (but not its drivers, who were self-employed) transferred to City Taxis. City Taxis thus acquired the activities of a business.
112. The CMA rejected an argument that Mercury was a 'failing firm' and would have exited the market in any event: whilst its owners may have been concerned that it could not compete with new entrants such as Uber, it was solvent and profitable.
113. Despite the merging parties' high combined share for taxi and minicab services to cash and account customers, the CMA found that there was not a realistic prospect of merger leading to an SLC: barriers to entry were low (particularly for minicabs and also following recent deregulation) and City Taxis would face competition from other minicab companies, taxis and recent entrants, such as Uber and Gett.
114. The CMA also examined the effects of the merger on the supply of minicab services for tender customers in Sheffield. The parties' share of

¹²⁰ *Sheffield City Taxis/Mercury Taxis (Sheffield)*, above.

supply was high, they were each other's main competitor, they faced few competitors and market entry was unlikely. City Taxis could thus raise its prices post-merger, such that an SLC was likely. However, the CMA did not open an in-depth Phase II investigation, as the market was not of sufficient importance to justify doing so: there were no clear-cut and proportionate divestment remedies in lieu of a reference, the market had a value of less than £ 3 million per year and there was little likelihood of the merger being replicated in other areas.

115. The CMA therefore cleared the merger unconditionally, notwithstanding high market shares.

*Oasis Dental Care/Total Orthodontics*¹²¹

116. Oasis is a leading provider of NHS and private dental and orthodontic services throughout the United Kingdom. In February 2015, it acquired Total Orthodontics, a specialist orthodontics business in south east England with an annual turnover of £ 7.8 million. The merger was not made public and was not notified to the CMA, which became aware of it in April 2015 and opened an own-initiative investigation. An interim enforcement order was imposed.
117. The parties overlapped in the supply of NHS orthodontic services in the Tonbridge (TN) postcode area (30 - 40%) and in the Brighton (BN) postcode area (40 - 50%), each a substantial part of the UK. The CMA therefore had jurisdiction to review the merger.
118. However, the CMA did not identify competition concerns in either the NHS market (where commissioning authorities contract with providers) or private patients: the parties did not compete to a significant extent with each other for NHS contracts and there remained sufficient providers of both NHS and private treatment to ensure prices would not rise and treatment quality would not fall as a result of the merger.

¹²¹ *Oasis Dental Care/Total Orthodontics*, above.

*Pure Gym/LA Fitness*¹²²

119. Pure Gym is an operator of 'low cost' gyms, whilst LA Fitness was an operator of 'mid-range' gyms, offering a pool in addition to classes and a core gym studio. In May 2015, Pure Gym acquired LA Fitness.
120. The CMA had jurisdiction to review the merger as the parties had a combined share of supply of all gyms in Derby of over 25%. However, the CMA also assessed the effects of the merger in Southampton, Shawsbridge (Belfast), Sale, Highgate, Finchley, New Barnet and Ewell. It also assessed the loss of potential competition in four areas in which LA Fitness operated a gym and Pure Gym had plans to open a gym. In each case, the CMA was satisfied that, other than in Derby, the parties were not close competitors and that in all areas where the parties overlapped, Pure Gym would continue to face effective competition from a sufficient number of other gyms.
121. It is noteworthy that the CMA imposed an interim enforcement order on 29 May 2015, but subsequently revoked it on 15 July 2015, which was only 15 days after its 40 business day initial review period started on 30 June 2015. It did so on the basis of "the evidence it has received in its assessment of the Transaction to date".¹²³ The CMA did not clear the merger until 14 August 2015, but presumably was already satisfied that it would not give rise to any competition concerns.

*Joseph Ash/W Corbett (Galvanizing)*¹²⁴

122. The merger concerned the proposed merger of two suppliers of industrial galvanizing services to external customers. Corbett had a turnover of £ 9.8 million and operated from one plant, in Telford. Joseph Ash was part of a larger corporate group, Hill & Smith Holdings, which had other

¹²² *Pure Gym/LA Fitness*, above.

¹²³ *Pure Gym/LA Fitness*, [Revocation Order](#) (15 July 2015).

¹²⁴ *Joseph Ash/W Corbett & Co (Galvanizing)*, above.

subsidiaries that also offered galvanizing services for steel finishing. The merger was conditional upon Phase I CMA approval.

123. As competition for these services occurs locally (as the costs of transporting steel are substantial), the CMA assessed the proposed merger's effects in a catchment area around Corbett's plant in Telford, which captured 80% of its customers. This area had a radius of 60 miles. Joseph Ash had several plants in this area. It found that the market was limited to galvanising services: other forms of protective coatings were not substitutable.
124. The CMA found that the parties were the two largest, and the closest, competitors in this local area with a combined share of supply of over 60% and only one significant other competitor (Wedge, with a 10-20% share). Corbett was seen by customers as a low price supplier and switching data showed considerable switching between the parties. The parties faced limited competition, such that customers would be disadvantaged by the merger in terms of the loss of competition and (despite there being numerous other suppliers in the Corbett catchment area) a lack of choice. It is notable that the CMA received numerous customer complaints. In reaching this conclusion the CMA also reviewed and relied on internal documents of both the parties and third parties.
125. The CMA therefore decided to refer the merger for Phase II investigation. Joseph Ash offered to enter into a toll manufacturing agreement for six years, on a 'cost plus' basis to resolve the CMA's concerns. This was rejected by the CMA, as a divestment remedy was not disproportionate or impractical and the proposed remedy did not restore competition to pre-merger levels on a lasting basis.¹²⁵ The transaction was subsequently abandoned.¹²⁶

¹²⁵ *Joseph Ash/Corbett* (reference decision, 9 July 2015).

¹²⁶ CMA Press Release, *Joseph Ash / W Corbett & Co (Galvanizing) merger inquiry formally cancelled* (24 July 2015).

*Allflex/Cox Agri*¹²⁷

126. Allflex and Cox Agri both manufactured engraved livestock tags for cattle and sheep, as well as other agricultural products. Cox's annual turnover was £ 7 million and that of Allflex's UK subsidiary was £ 12 million.
127. The CMA asserted jurisdiction on the basis that the parties had a combined share of supply in the UK for engraved cattle tags of 43%.
128. The CMA assessed the merger for each type of tag separately, in each case for both blank tags and for engraved tags. It did not identify any competition concerns. Although the parties' combined share for engraved cattle tags (40-50%) was substantially greater than their competitors (the next largest had 10-20% shares), competitors had sufficient spare capacity to impose a competitive constraint and there were low barriers to customers switching supplier. The parties would remain only the second largest supplier of sheep tags. They also had combined shares of over 25% for other agricultural products distributed by them, but the CMA did not identify any competition concerns: manufacturers could switch to alternative distributors if Allflex tried to increase prices post-merger.
129. The CMA also ruled out possible vertical effects: although Allflex supplied over 80% of blank cattle tags to UK engravers, there were sufficient suppliers of blank tags in the European Economic Area who could supply non-integrated engravers in the UK. Whilst taking note of complaints that Allflex was 'dominant' in the supply of blank tags and could predate on rivals, the CMA found that this was not merger specific, as the merger did not increase Allflex's share of supply of blank tags.

*Healthcare Environmental/GW Butler*¹²⁸

130. This merger concerned two providers of services for the collection, treatment and disposal of healthcare risk waste in the north of England.

¹²⁷ *Allflex/Cox Agri*, above.

¹²⁸ *Healthcare Environment/GW Butler*, above.

The CMA found that the parties had a combined 38% share of supply of such services within 50 miles of Leeds (the parties had plants in Bradford and Wakefield). The merger was not notified to the CMA, which opened an own-initiative investigation and imposed an interim enforcement order (which was subsequently revoked).

131. Although GW Butler was close to being declared insolvent (and so might have exited the market), there were a number of potential buyers and the CMA accordingly did not consider the possible application of the 'failing firm' defence.
132. The CMA found that, post-merger, there would be three main suppliers in the Leeds area, with the merged entity being the second largest. The CMA was satisfied that there would remain sufficient competition for future tenders for contracts. The merger was therefore approved.

*Key Publishing/Kelsey Publishing*¹²⁹

133. This merger involved the smallest target business of any merger reviewed by the CMA in the last 12 months. Key is a specialist publisher of transport and leisure magazines. It acquired three titles from Kelsey, *Jets*, *Aeroplane Monthly* and *Classic Military Vehicles*, together with contracts with freelance writers, customers and suppliers, certain 'bookazine' titles, a picture archive and intellectual property rights and one employee was transferred under TUPE. The CMA considered that these assets comprised an enterprise. It had annual turnover of under £ 2 million.
134. The CMA undertook an own-initiative investigation. The 'share of supply' test was satisfied in relation to newsstand sales of aviation magazines, for which the parties had a combined share of 65%. The CMA imposed an initial enforcement order, preventing integration of the two businesses.
135. Key argued that its military vehicles title, *Military Machines International*, was loss-making and had sales well below the level at which closure

¹²⁹ Key Publishing/Kelsey Publishing, above.

would be considered. However, the CMA did not reach a conclusion on whether to apply the 'exiting firm' scenario as the counterfactual against which to assess the competitive effects of the merger. This was because it decided to exercise its discretion apply the 'markets of insufficient importance' exception and not to refer the merger for a Phase II investigation.

136. The CMA found that the parties were strong and close competitors in the segments for historic aviation and military vehicles magazines (shares for both of over 90%), and also both had publications in that for mixed aviation magazines, although these did not compete strongly with each other (despite a combined share of over 80%). They faced limited competition from other titles, particularly for sales at newsstands. Online magazines also imposed only limited competitive constraints. It did not accept Key's efficiencies arguments that the merger would benefit consumers, firstly by reducing costs (as this was uncertain) and, secondly by allowing it to reposition the titles to improve their appeal to readers and advertisers (as this was not merger-specific).
137. The CMA therefore found that it could not be ruled out that the merger may have resulted in an SLC in one or more of the three market segments in which Key and Kelsey had overlapping titles. However, it did not reach a definitive view on whether the threshold for referring the merger for a Phase II investigation was satisfied. Instead, it applied the 'de minimis' exception not to refer. In particular, it found that there were no clear-cut remedies in this case: divestment of the *Aeroplane Monthly* title (which represented 83% of the transaction price) would have been disproportionate, as an effective prohibition of the merger.

Conclusions

138. In some, perhaps unusual, circumstances the acquisition of a small business may require to be notified to the European Commission under the EU Merger Regulation. More likely, it may fall within the CMA's jurisdiction under the mergers provisions of the Enterprise Act 2002.

139. The CMA can and does investigate mergers involving a small target business, including acquisitions of assets, provided that these assets represent the activities of a business and thus constitute an 'enterprise'. This includes mergers that are not notified to it, and of which the CMA subsequently becomes aware, for example because of a complaint by a competitor or customer, or as a result of the CMA's own mergers intelligence unit's market monitoring activities. If a merger is not made public (for example by way of a press release or an announcement on the parties' websites) the CMA investigation may be some time after completion.
140. The CMA can assert jurisdiction by defining very narrowly the goods or services against which the 'share of supply' test is to be applied. If a merger has been completed (as many small mergers it investigates are), it will impose an interim enforcement order, preventing further integration.
141. Small mergers may raise the same substantive competition issues as large mergers, including:
- a. whether the target business is an 'enterprise' such that the transaction is a merger;
 - b. application of the 'failing firm defence';
 - c. imposition of interim enforcement orders, preventing further integration without the CMA's consent;
 - d. high market shares on narrowly defined markets and analysis of the extent to which the parties competed pre-merger, giving rise to potential horizontal unilateral effects concerns;
 - e. vertical integration, giving rise to potential vertical foreclosure concerns;
 - f. the significance of barriers to entry and competition from new entrants;

- g. the elimination of potential competition where one party has plans to enter a market on which the other is already present;
 - h. Phase I remedies (undertakings in lieu of reference for a Phase II investigation); and
 - i. possible application of the 'markets of insignificance importance' (de minimis) exception to the duty to refer a merger for a Phase II investigation.
142. If UK merger control may be applicable to a transaction, consideration must be given as to whether the merger should be made conditional on CMA approval, which will depend on the merging parties' relative commercial bargaining positions and attitudes to and assessments of competition risk. If completion is not conditional on CMA approval, the purchaser should give consideration to the risk of customer and/or competitor complaints and as to whether the CMA would open an own-initiative investigation; the answers to these questions may inform a decision whether to voluntarily notify the transaction in any event, in particular given the intrusive nature of interim enforcement orders. At very least, the possibility of an own-initiative investigation should be recognised, so that the business is prepared for this and, in the meantime, does not create unhelpful internal documents.

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