UK Merger Remedies: Convergence or Conflict with Europe? A Comparative Assessment of Remedies in UK mergers

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Reprinted from
European Competition Law Review
Issue 2, 2009

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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UK Merger Remedies: Convergence or Conflict with Europe? A Comparative Assessment of Remedies in UK mergers

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LT Competition policy; EC law; Intellectual property; Mergers; Remedies

Introduction

The design, implementation and effectiveness of undertakings and commitments[1] given by the parties to a merger or acquisition to the competition authority charged with reviewing the proposed transaction is receiving increased attention among businesses, their transaction advisors and competition authorities themselves.

For example, the European Commission (EC) study on remedies in 2005[2] received a lot of publicity. The revised EC Remedies Notice, published in October 2008, draws heavily on the 2005 EC Merger Remedies Study, as well as more recent experience of the EC.[3] It provides more in-depth and up-to-date guidance on the types of remedies which the EC will consider, and the process and timing for proposing and implementing remedies. National authorities and researchers have also shown increased interest in the evaluation and assessment of merger remedies.[4] In the United Kingdom, both the Office of Fair Trading (OFT) and the Competition Commission (CC) have consulted on revised guidance. The CC published its new Guidelines on November 26, 2008.[5] The CC has also published its own study on the effectiveness of merger remedies in August 2008, updating its 2002 publication, "Understanding Past Merger Remedies".[6]

A number of trends are emerging from the decided cases and the developing guidance in terms of the types of remedies which are considered acceptable by the authorities and the way in which they are implemented. The area is rich with case law examples and guidance but is not as extensively covered by the legal and economic literature.[7] The aim of this article is to help fill a gap in the comparative empirical literature on merger remedies. The article investigates UK practice against the background of remedies policy and practice at the EU level. We do not have the ambition of arriving at a comprehensive synthesis. Instead, the article focuses on key issues and principles which, in the view of these authors, have been particularly prominent at both the EU and UK national level, and the main differences between them.

The article aims to contribute to the existing research at the UK level in particular, by providing a consolidated review of both the OFT and CC practice, drawing on an analysis of 42 merger decisions taken under the Enterprise Act 2002, a similar number to the EC Merger Remedies Study.

We examined all mergers which were considered by the OFT and the CC where remedies short of outright prohibition were accepted as conditions of clearance under the Enterprise Act 2002.[8] Owing to the voluntary

* *Thomas Hoehn is a partner in the Economics practice at PricewaterhouseCoopers LLP. Suzanne Rab is counsel in the Antitrust practice at Hogan & Hartson LLP in London.* *The authors would like to thank the e-Competitions Merger Remedies Matrix project, as well as Grant Saggers and Olga Nuryaeva, both of PricewaterhouseCoopers LLP, David Roberts (Head of Remedies, Competition Commission), and Alastair Mordaunt (Director of Mergers, Office of Fair Trading), for their comments and assistance in the preparation of this article. The views expressed remain those of the authors.*

1 Referred to as "remedies" in this article.

2 European Commission. *Merger Remedies Study (public version)*, DG COMP, (October 2005 (Hereinafter referred to as the EC Merger Remedies Study (2005)), available at *http://ec.europa.eu/comm/competition/mergers/others/remedies_study.pdf* [Accessed November 24, 2008].

3 Notice on remedies acceptable under Regulation 139/2004 and under Regulation 802/2004 (hereinafter referred to as the revised EC Remedies Notice) [2008] OJ C267/1.

4 This article is based on research undertaken as part of the e-Competitions Merger Remedies Matrix project, involving the review of over 470 merger remedies decisions in 30 countries. See *http://www.concurrences.com* for further details [Accessed December 16, 2008].

5 Competition Commission, Merger Remedies: Competition Commission Guidelines, November 2008, available at *http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/CC8.pdf* [Accessed November 24, 2008].

6 Competition Commission, "Understanding Past Merger Remedies: Report on Case Study Research" (August 2008), available at *http://www.competition-commission.org.uk/our_role/analysis/understanding_past_merger_remedies.pdf* [Accessed November 24, 2008].

7 See, for example, S. Davies and B. Lyons, *Mergers and Merger Remedies in the EU: Assessing the Consequences for Competition* (Cheltenham: Edward Elgar, 2008); F. Lévêque and H. Shelanski (eds), *Merger Remedies in American and European Union Competition Law* (Cheltenham: Edward Elgar, 2003); F. Lévêque, *A Preliminary Assessment of Merger Remedies in the EU Electricity Sector*, M&A in the European Electricity Sector, Symposium organised in Paris, Ecole de Mines, October 4, 2001.

8 This provides a logical starting point for our analysis, with the implementation of the majority of the new UK merger control

nature of UK merger control (i.e. there is no obligation on merging parties to notify and seek clearance for a merger prior to completion), some cases resulted in orders or undertakings to divest the entirety of the acquired business. As this is tantamount to complete prohibition, we have excluded such cases from our review.[9] This reflects our aim to capture cases which the authorities have been prepared to clear, albeit with commitments.

The article is organised as follows:

- Section 1 provides a brief overview of the merger control regulatory framework for remedies at EU and UK levels.
- Section 2 examines the preference for structural over behavioural remedies.
- Section 3 considers the approach taken to the scope of the divested business.
- Section 4 considers compliance monitoring, specifically the use of trustees in the remedies process and, particularly, the role of monitoring and divestiture trustees to preserve a business before its transfer to a buyer.
- Section 5 considers the approach to access remedies such as the termination of exclusive rights or granting access to key infrastructure.
- Section 6 considers the extent to which remedies involving intellectual property rights have been acceptable.

1. Regulatory framework

The EC and the UK competition authorities possess similar authority to impose/accept remedies to address competition issues in mergers.

European merger control and remedies

Transactions which meet the jurisdictional thresholds under the EC Merger Regulation (ECMR)[10] must be notified to the EC and, generally, cannot be completed prior to approval by the EC. A transaction raises competition concerns for ECMR purposes if it could significantly impede effective competition, in particular by the creation or strengthening of a dominant position.

Parties may offer commitments in the form of conditions and obligations, usually referred to as remedies, to the EC to attempt to meet competition concerns. If remedies are accepted, they are formally attached to the ECs's clearance decision as conditions, with additional supporting obligations. The EC's existing guidance on remedies is contained in its 2008 revised EC Remedies Notice.[11]

The revised EC Remedies Notice was issued in October 2008 following the results of an EC study on remedies in 2005[12] and recent developments in the case law of the European Courts. The study assessed the effectiveness of remedies applied during a reference period of five years (1996–2000) in 40 EC merger control cases. Among other things, the results of the study suggested that remedies which fell short of divesting a relatively self-standing part of the merging businesses were not effective to address competition concerns in most cases.

This article reflects on the EC's position as stated in the revised EC Remedies Notice and practice to date.

UK merger control and remedies

The main legal basis for merger control in the United Kingdom is the Enterprise Act 2002. Published guidance explains how the merger and remedies provisions work in practice.

The Enterprise Act 2002 establishes an administrative procedure for merger control involving the OFT at the first stage and the CC at the second stage.

The OFT has a duty to refer mergers (anticipated or completed) to the CC where it believes that it is or may be the case that arrangements are in progress (or in contemplation) which, if carried into effect, will result in the creation of a relevant merger situation; and the creation of that situation may be expected to result in a substantial lessening of competition (SLC) within any market or markets in the United Kingdom. Importantly, the UK regime does not have a pre-notification requirement, with the result that it needs to deal with completed as well as anticipated mergers.

On a reference to the CC, if the CC decides that the merger may be expected to result in an SLC, it must

provisions under the Enterprise Act 2002 on June 20, 2003. The first case in our review is *Ivax International/3M Company*, decided by the Office of Fair Trading (OFT) on January 9, 2004. This was the first case in which the OFT accepted undertakings in lieu of reference since the Enterprise Act 2002 came into force (see OFT, "OFT accepts undertakings from IVAX" (Press Release, January 9, 2004) available at *http://www.oft.gov.uk/news/press/2004/04-04* [Accessed November 24, 2008]). The end point of our analysis in this article is the end of July 2008.

9 The cases decided under the Enterprise Act 2002 which resulted in de facto (total) prohibition were: *Knauf Insulation/Superglass Insulation*, decision by the CC of November 26, 2004; *Emap/ABI*, decision by the CC of January 26, 2005; *Serviced Dispense Equipment (SDEL)/Coors Technical Services*, decision by the CC of March 11, 2005; and *Tesco/Co-operative (CWS)*, decision by the CC of November 28, 2007.

10 Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF* [Accessed November 24, 2008].

11 Notice on remedies acceptable under Regulation 139/2004 and under Regulation 802/2004 (revised EC Remedies Notice), October 2008.

12 EC Merger Remedies Study (2005).

consider how to remedy, mitigate or prevent the adverse effects.

Undertakings may be offered to remedy adverse competition concerns at both the OFT and CC stages. The focus of this article is on the procedure at the CC stage, although points of significance are also noted in relation to the OFT stage.

First, parties may be able to prevent a reference to the CC by offering appropriate undertakings to the OFT (these are referred to as "undertakings in lieu of reference").

Secondly, if the CC concludes that the merger will have an anti-competitive outcome, it may take remedial action itself or recommend the taking of remedial action by others.

Both the OFT and the CC have the power to take pre-emptive action to preclude conduct which may prejudice the appraisal of a merger and the ability to secure remedies.

Following completion, but prior to a decision whether to refer a completed merger to the CC, the OFT can require initial "hold-separate" undertakings or impose initial orders to prevent action that might prejudice a reference or the ability of the CC to act following a reference to the CC. This may include ring-fencing the acquired business. The OFT's template for initial undertakings (hold-separates), as published on its website, is very similar to that of the CC, reflecting the fact that OFT initial undertakings may be adopted by the CC if the case is referred.

If a reference is made to the CC, the Enterprise Act 2002 prohibits, except with the consent of the CC:

- any party to a completed merger from undertaking further integration; or
- any party to an anticipated merger from acquiring an "interest in shares" in another.

The CC will rarely grant its consent.

The CC has the power to accept undertakings or to make an order preventing the parties to a merger from taking action that might prejudice the final outcome of the merger reference.

In *Stericycle*, the parties had completed their merger and started to integrate the business before the OFT sought to agree any hold-separate undertakings. On a reference, the CC imposed an interim order requiring the parties to appoint a hold-separate manager to ensure business separation. The parties appealed the CC's interim order and directions to the Competition Appeal Tribunal (CAT). The CAT confirmed that the CC has a wide discretion to take reasonable action where there is a risk of pre-emptive action.[13]

13 *Stericycle/Competition Commission*, decision by the Competition Appeal Tribunal (CAT) of September 19, 2006.

Under the Enterprise Act 2002, the CC and the OFT are required to provide advice and information on their approach to merger cases.

On November 26, 2008, the CC published new guidelines on merger remedies (new Guidelines). The new Guidelines supersede the CC's existing guidance on divestiture remedies, guidance on interim measures and the guidelines on remedial measures contained in the CC's general merger guidelines. The new Guidelines are largely consistent with the CC's previous approach, but the CC has clarified and expanded on this. The OFT is also consulting on draft mergers jurisdictional and procedural guidance.[14]

At the time of writing, it is also expected that combined CC/OFT guidelines on substantive merger analysis will be issued in 2009, subject to consultation. We focus our observations largely on the CC's position and practice to date.

Comparative analysis

In broad terms, the EC adopts the following key principles when considering remedies:

- structural remedies are favoured over behavioural (commitments on conduct) remedies;
- a divestiture must include all the assets necessary for the purchaser to be an effective long term competitor; and be of an existing business entity unless a remedy can be structured to ensure the purchaser has all the assets necessary to be a viable competitor;
- the EC has tended to require the appointment of a monitoring trustee and a divestiture trustee to assist with supervising and, where necessary, implementing commitments; and
- the EC accepts commitments regarding access only if it is satisfied that competitors will use the relevant infrastructure and rights.

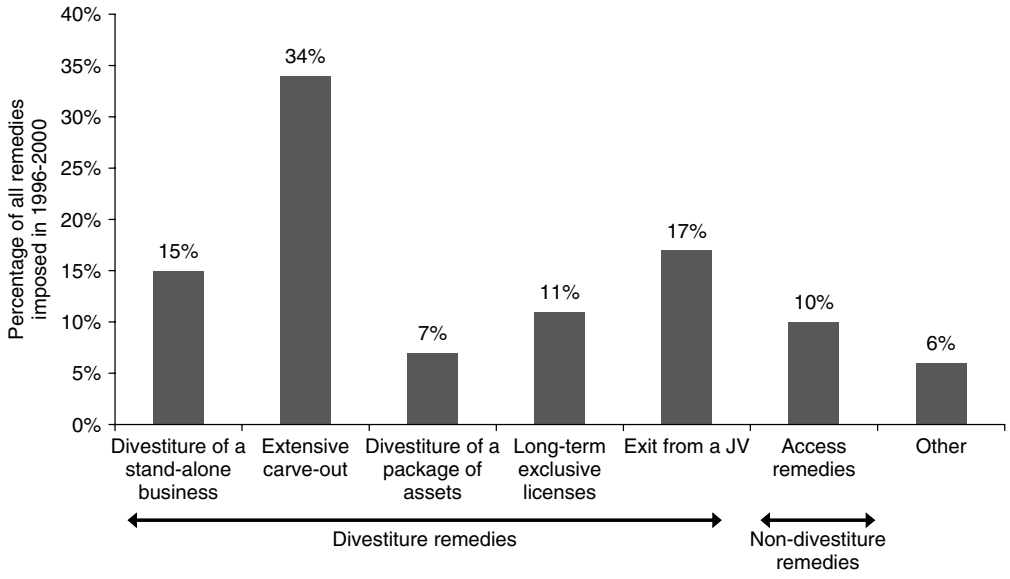
We sought to examine the extent to which there is convergence with these principles and practice in the experience of the UK authorities.

The results of our analysis are in sections 2 to 6 of this article.

2. Structural versus behavioural remedies

This section examines the respective position and priorities of the EC and UK competition authorities regarding two types of remedies: structural and behavioural (i.e. commitments on conduct).

14 OFT. *Mergers–jurisdictional and procedural guidance, Draft guidance consultation document*. 2008. OFT526con. Available at *http://www.oft.gov.uk/shared_oft/consultations/oft526con.pdf* [Accessed November 24, 2008].



Source: EC Merger Remedies Study (2005)

Figure 1: Types of remedies imposed by the EC 1996 to 2000.

European Union

Inevitably, regulatory bodies differ in their approaches to classifying remedies. The EC Remedies Study drew the main distinction between divestiture and non-divestiture remedies, which broadly corresponds with the behavioural/structural split commonly used in the United Kingdom. However, the revised EC Remedies Notice refers to access remedies as structural interventions. For the purposes of this article, we refer to divestiture remedies as structural and all others (including access remedies) as behavioural. Another convention is to refer to access remedies as "quasi-structural" remedies.

Divestitures are by far the EC's preferred method of dealing with competition concerns: between 1996 and 2000, two-thirds of all remedies imposed by the EC involved a divestiture (see Figure 1). Other structural commitments may be acceptable, provided that they are equivalent to divestitures in their effect. The revised EC Remedies Notice reiterates the EC's preference for divestiture remedies.
The EC specifies that:

> ". . . non-structural types of remedies, such as promises by the parties to abstain from certain commercial behaviour (e.g. bundling products), will generally not eliminate the competition concerns resulting from horizontal overlaps. In any case, it may be difficult to achieve the required degree of effectiveness of such a remedy due to the absence of effective monitoring of its implementation. . . Therefore, the Commission may examine other types of non-divestiture remedies, such as behavioural promises, only exceptionally in specific circumstances, such as in respect of competition concerns arising in conglomerate structures."[15]

15 Revised EC Remedies Notice, para.69.

The EC Merger Remedies Study provided evidence in support of this view. The study found that behavioural remedies, such as access remedies, were significantly less likely to be effective compared to divestiture remedies (see Figure 2).

United Kingdom

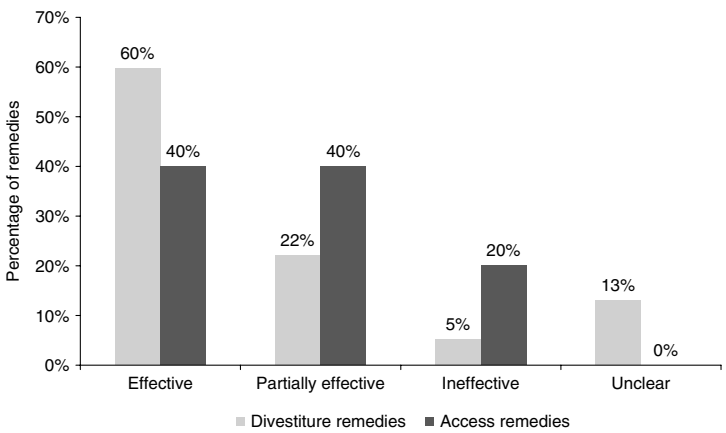
OFT

Undertakings in lieu of reference may be structural (i.e. divestment of a particular part of a standalone business) or behavioural (i.e. regulating the terms on which the merged entity may do business). The OFT has indicated in its published guidance that it will consider behavioural undertakings where it considers that a divestiture would be impractical, or disproportionate to the nature of the concerns identified. However, the OFT has indicated that it is unlikely to consider generally that behavioural undertakings have sufficiently clear effects to address competition concerns.[16]

CC

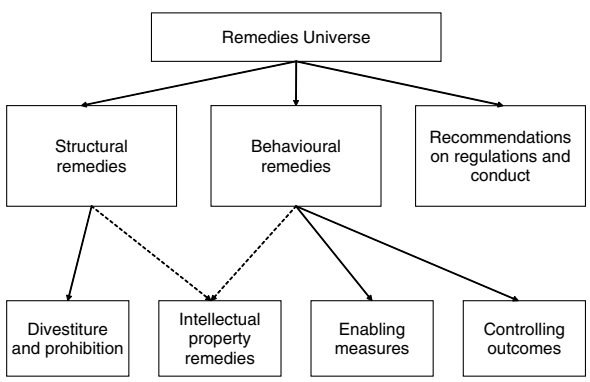
In its new Guidelines, the CC explains the basis on which it selects remedies. Figure 3 displays a diagrammatic representation of the universe of remedies available to the CC on the basis of the new Guidelines. Structural remedies are generally one-off measures such as divestment. Behavioural remedies are normally ongoing measures that regulate the behaviour of the merging parties. Some remedies, such as those relating

16 OFT. *Mergers Substantive Assessment Guidance*. 2003. OFT516, para.8.10. Available at *http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft516.pdf* [Accessed November 24, 2008].



Source: EC Merger Remedies Study (2005)

Figure 2: Effectiveness of divestiture remedies and access remedies.



Source: Merger Remedies: Competition Commission Guidelines (2008), Figure1, p.12

Figure 3: Remedies universe.

to intellectual property, may have features of structural or behavioural remedies.

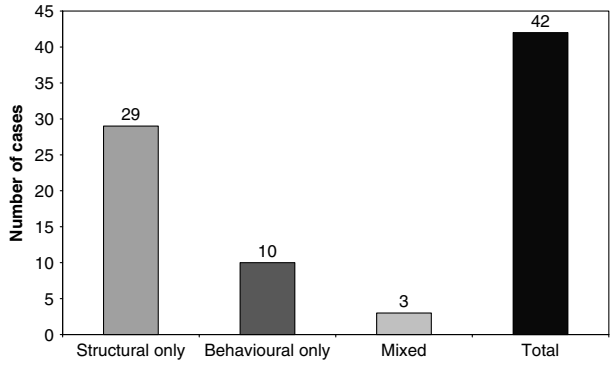
The CC also distinguishes between:

- Enabling measures: Certain forms of behavioural remedies enable competition by removing obstacles to competition (i.e. removing barriers such as long term contracts).
- Controlling outcomes: Price caps and supply commitments aim to control the adverse effects of an SLC.

Case experience

As with the EC, the UK authorities have tended to prefer structural over behavioural remedies. Figure 4 shows that, of the 42 cases in our review,[17] the UK authorities have chosen a purely structural remedy in over two-thirds of cases, and in a further seven per cent of cases have combined a structural remedy with commitments on conduct (a "mixed" remedy).

17 The full list of cases in our dataset is contained in Annex I. Cases that resulted in an outright prohibition of the transaction (either prospectively or retrospectively through a full divestiture of the acquired business) have been excluded from the dataset.

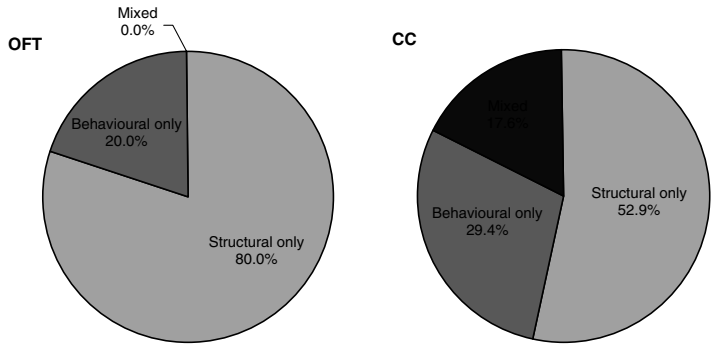


Source: Authors' calculations derived from the e-Competitions Merger Remedies Matrix project (http://www.concurrences.com)

Figure 4: UK merger remedies (OFT and CC)—structural versus behavioural.

Both Table 1 and Figure 5 indicate that the preference for structural over behavioural remedies is discernible in the practice of both the OFT and the CC.

The CC, however, has shown a greater willingness to accept commitments on conduct than the OFT—almost half of the remedy decisions by the CC contain conduct commitments, compared to a fifth for the OFT, although



Source: Authors' calculations derived from the e-Competitions Merger Remedies Matrix project (http://www.concurrences.com)

Figure 5: Comparison of remedy type chosen by OFT and CC.

Table 1: UK merger remedies cases by authority

Authority	Type	Number of cases	Share
OFT	Structural only	20	80.0%
	Behavioural only	5	20.0%
	Mixed	0	0.0%
	Total	*25*	*100.0%*
CC	Structural only	9	52.9%
	Behavioural only	5	29.4%
	Mixed	3	17.6%
	Total	*17*	*100.0%*

Source: Authors' calculations derived from the e-Competitions Merger Remedies Matrix project (http://www.concurrences.com). Note, the above cases exclude total prohibitions.

over 70 per cent of CC commitments are still wholly or partly structural. This at first may seem surprising, given that both agencies implement merger remedies under the same legislative framework. However, the longer time period for review gives the CC an opportunity to explore more complicated solutions in more detail; and the OFT, in seeking undertakings in lieu (necessarily, as a first stage authority), seeks clear-cut solutions to clear-cut problems.

In its new Guidelines, the CC has indicated that it will select behavioural remedies where divestiture or prohibition is not feasible or would be disproportionate (although substantial uncertainty as to a suitable purchaser will not be sufficient for these purposes), where the SLC is expected to have a relatively short duration (for example, the remaining duration of a contract or a patent), or where relevant customer benefits are likely to be substantial (for example, in a vertical merger).

Examples of behavioural remedies include:

- *FirstGroup/ScotRail*: FirstGroup committed to limit fares, maintain availability of certain ticket types, maintain service levels, establish a multi-modal ticket scheme that is available to competitors and provide information on competitors' bus services at train stations.[18]
- *Stonegate Farmers/Deans Foods*: The CC accepted a primary undertaking to divest the acquired business. However, in the event that this proved not to be possible, the CC agreed to accept behavioural undertakings whereby customers would be allowed to terminate supply contracts.[19]

The CC may recommend that others take remedial action to restore effective competition following a merger. This may include recommendations to government or government authorities. In making any recommendations to government, the CC has tended to consider the likelihood that they will be adopted. It will generally only make recommendations for action by others where it lacks jurisdiction to carry out the action itself, and only following consultation with the relevant organisation.

For example, the CC cleared the *Drager/Air-Shields* merger in 2004 with remedies including behavioural undertakings from Drager which would require it to maintain current pricing levels until 2007. The CC also made recommendations to the four UK Health Departments and their procurement agencies that they take action to strengthen the exercise of their buyer power and to encourage market entry. The merger would reduce the number of suppliers of closed care incubators in the United Kingdom from four to three and, for other types of incubator, from three to two. In this case, the major suppliers had manufacturing

18 *FirstGroup/ScotRail*, decision by the CC of June 25, 2004.
19 *Stonegate Farmers/Deans Foods*, decision by the CC of April 20, 2007.

facilities outside the United Kingdom and the CC was constrained to some extent by the territorial limits of its own powers.[20]

In practice, the CC has found a "mid-way" approach by accepting, in certain instances, mixed packages combining behavioural remedies and some divestitures. For example, in 2007, the CC resolved competition concerns emanating from a joint venture in the fertiliser and chemicals sector between Kemira GrowHow and Terra Industries, with a package of remedies including divestitures of certain commercial businesses and a commitment to modify an existing supply contract with a third party.[21]

However, these mixed packages may not be acceptable if they are too complex.

3. Scope of the divested business

This section examines the approach of the EC and the UK competition authorities to the scope of the divestment business, particularly what assets and rights need to be included to ensure that the divested business can compete effectively.

European Union

The EC requires that divested activities:

- must consist of a viable business divested as a going concern which, if operated by a single purchaser, can compete effectively with the merging entity on a lasting basis; and
- must be able to operate as a standalone entity.

The position in the revised EC Remedies Notice reflects the findings in the 2005 Merger Remedies Study. As regards the scope of the divested business, the Merger Remedies Study revealed that different types of issues in the divestiture process were not always given sufficient consideration such as the purchaser's continuing dependence on the merging parties for critical inputs, after sales services, or other key assets. In some cases, problems occurred in relation to the geographic scope of the divested business, which was sometimes found to be too small to be developed into an effective competitive asset.

The revised Remedies Notice specifies that the divested business has to include all the assets and personnel that are necessary to ensure its viability and competitiveness. Such assets have to be included even if they are part of another business unit.[22]

The EC specifies that a combination of assets belonging to different businesses will present risks as to the viability of the divested business. Although such remedies are not dismissed out of hand, it is clear that merging parties face a high bar in seeking to convince the EC of the effectiveness of such a remedy.

United Kingdom

In defining a package of assets, the UK authorities have tended to take as their starting point the divestiture of all or part of the acquired business. Figure 6 and Table 2 show that the UK authorities have shown a strong preference for carving out separate viable standalone businesses (in Annex II there is a full table of all cases involving structural remedies). This approach was upheld by the CAT in the Somerfield case in 2006 where the CAT stated:

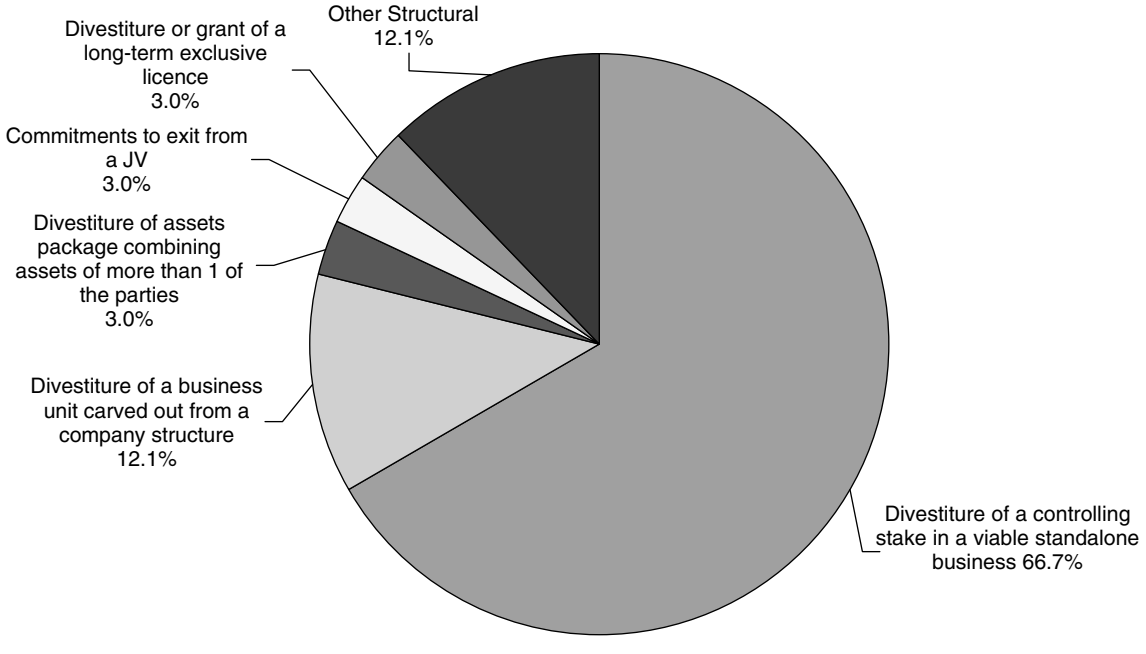
> ". . . in our view it is not unreasonable for the CC to consider, as a starting point, that 'restoring the status quo ante' would normally involve reversing the completed acquisition unless the contrary were shown".[23]

The CC has clarified in its new Guidelines that it considers that restoration of the pre-merger situation in the markets subject to the SLC will generally represent a straightforward remedy. It will consider divestiture from the acquiring business if this does not present any greater risk. The CC will generally seek to identify the smallest viable standalone business that can compete successfully on an ongoing basis and that includes all the relevant operations relating to the area of competitive overlap.

Where a proposed divestiture comprises part of a business or specified assets, this may be difficult to carve out of an underlying business and the CC may have less assurance that the purchaser will be supplied with all it requires to allow it to compete effectively. The EC's Merger Remedies Study similarly found that carve-out problems were a common cause of serious design and implementation issues in a significant proportion of the divestiture remedies that it analysed.

20 *Drager/Air-Shields*, decision by the CC of May 17, 2004.
21 *Kemira GrowHow/Terra Industries*, decision by the CC of July 11, 2007.

22 For example, in Decision 2007/595 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4404–*Universal/BMG Music Publishing*) [2007] OJ L230/12, the EC was concerned that Universal's acquisition of BMG's music publishing business would give Universal the incentive and ability to raise prices for online rights to Anglo-American song repertoires. Universal committed to divest a number of significant catalogues, covering Anglo-American copyrights and contracts with authors. Although the competition concern related to online rights only, to ensure that the buyer would be a viable competitor, the commitments covered the complete range of copyrights, including mechanical, performance, synchronisation and print rights.
23 *Somerfield Plc/Competition Commission*, decision by the CAT of February 13, 2006, para.99.



Source: Authors' calculations derived from the e-Competitions Merger Remedies Matrix project (http://www.concurrences.com)

Figure 6: UK merger remedies cases—scope of the divested business.

Table 2: UK merger remedies cases—scope of the divested business

Structural remedy type	Number of cases cases	Share
Divestiture of a controlling stake in a viable stand alone business	22	66.7%
Divestiture of a business unit carved out from a company structure	4	12.1%
Divestiture of assets package combining assets of more than one of the parties	1	3.0%
Commitments to exit from a joint venture	1	3.0%
Divestiture or grant of a long term exclusive licence	1	3.0%
Other structural	4	12.1%
Total	33	100.0%

Source: Authors' calculations derived from the e-Competitions Merger Remedies Matrix project (http://www.concurrences.com) Note: The total number of structural remedies exceeds the number of cases in which a structural remedy was used because in certain cases more than one type of structural remedy was imposed by the authorities.

In such circumstances, the CC is likely to require additional protective measures such as the identification of an upfront buyer to mitigate increased purchaser and competition risk.

The *Kemira GrowHow/Terra Industries* case is an example where the CC insisted on an upfront buyer where a business to be divested has been "carved out" of an existing business.[24] Another interesting aspect of the *Kemira GrowHow/Terra Industries* case is that the remedies imposed by the CC are currently being reviewed by the OFT. The OFT has a duty to monitor the carrying out of undertakings and give advice to the CC as to whether, by reason of any change of circumstances, the undertakings remain appropriate. In this case, Kemira requested that the OFT review and give advice to the CC as to the continued need for remedies in view of the sale of one of Kemira's plants and the closure of another plant by Terra. The OFT is, at the time of writing, carrying out such a review.

24 *Kemira GrowHow/Terra Industries*, decision by the CC of July 11, 2007.

4. Remedies compliance monitoring

This section considers compliance monitoring, specifically the use of trustees in the remedies process and particularly, the role of monitoring and divestiture trustees to preserve a business before its transfer to a buyer.

European Union

The EC will require a divested business to be held separate until its actual transfer to a buyer. Hold-separate and non-solicitation provisions are standard in conditional EC clearance decisions.[25]

The EC makes use of hold-separate managers and monitoring trustees to implement remedies and oversee the held-separate business and ensure that it operates independently of the merged company. The hold-separate manager is typically responsible for the day-to-day management of the business.

In addition to the hold-separate manager, the EC generally requires the appointment of a monitoring trustee and a divestiture trustee to assist with supervising implementation of the hold-separate and ring-fencing obligations.[26] The monitoring trustee is the "eyes and ears" of the EC and also acts as a contact for any request by third parties or potential buyers in relation to the commitments and regularly reports to the EC on the parties' compliance with the commitments.

The divestiture trustee may or may not be the same person or entity as the monitoring trustee. A divestiture trustee is used where the parties fail to provide a suitable purchaser for the business to be divested, within a certain period of time following conditional clearance. The divestiture trustee is given an irrevocable mandate to sell the business to be divested within a specific deadline, typically three months at no minimum price.[27]

The EC Merger Remedies Study found that trustees were appointed as part of the implementation process in all but two of the 69 divestiture remedies reviewed. In two non-divestiture cases, no monitoring trustee was appointed, despite being foreseen in the commitment case. In all instances where trustees were not appointed, the EC found evidence that they would have substantially reduced the risk of ineffective implementation of the remedies as a result of inadequate preservation of assets or incomplete information being provided to purchasers. The study recommended that going forward, monitoring trustees should be appointed as early as possible in all divestiture remedies. It was also suggested that an increasing emphasis must be placed on ensuring that trustees have the necessary qualifications to carry out the monitoring of carve-outs, interim preservation and hold-separate processes. The study recommended that the EC implement processes to ensure that all trustees have a clear understanding of their mandate. In the revised EC Remedies Notice, the EC has taken on board most of the lessons and recommendations from the 2005 EC Merger Remedies Study—and in some instances, has gone further. For example, it states that it reserves the right to approve the monitoring trustees proposed by the parties and to exercise discretion in the selection of the appropriate individual or firm.[28]

United Kingdom

Overview

The UK competition authorities have sometimes required the use of third party monitors or trustees to assist with supervising or implementing remedies. However, in contrast with the European Union position in the practice of the EC, it is not the norm to appoint a monitoring trustee to monitor hold-separate undertakings.

- Types of trustees:
  - — Divestiture trustees may be appointed to procure divestiture to a suitable purchaser if the merging parties are unable to secure divestiture within an initial divestiture period.
  - — Monitoring trustees may be required to monitor compliance by merging parties with interim (i.e. hold-separate) or final undertakings.
  - — Third party monitors may assist the OFT in fulfilling certain aspects of its role in monitoring the performance of undertakings.
- Qualification: Trustees should be independent of the parties, have appropriate qualifications and capacity for the task and should not be subject to any conflicts of interest. Trustees may be part of an accounting firm.
- Divestiture undertakings: Where divestiture undertakings are in place, the CC may require the appointment of an independent *monitoring trustee* to oversee the parties' compliance with the undertakings and, if applicable, the performance of a hold-separate manager. The trustee will have an overall duty to act in the best interest of securing an appropriate divestiture. The trustee will monitor the ongoing management of the divestiture package and the conduct of the divestiture process. The CC will have the right to propose and direct measures necessary to ensure compliance with the undertakings. If the merging parties cannot procure divestiture to a suitable purchaser within the initial divestiture period, then unless this period

25 Revised EC Remedies Notice, para.108.
26 Revised EC Remedies Notice, para.117.
27 Revised EC Remedies Notice, para.121.
28 Revised EC Remedies Notice, para.124.

is extended by the CC, an independent *divestiture trustee* may be mandated to dispose of the package within a specified period (the trustee divestiture period) at the best price in the circumstances, subject to the prior approval by the CC of the purchaser and the divestiture arrangements.

- Behavioural undertakings: Where behavioural undertakings are in place, in view of the constraints on the OFT's resources and the possible limitations in the reliance that can be placed on the reporting role of customers and competitors, it may be necessary for the CC to seek undertakings from the merging parties to appoint and remunerate a third party monitor to help the OFT to fulfil its monitoring responsibilities effectively.
- Remuneration: The merging parties are responsible for the remuneration of the trustee. The structure of remuneration must not compromise a trustee's independence and must provide a sufficient incentive to perform the required function to an appropriate standard.
- Supervision: In the case of divestiture undertakings, the CC will wish to ensure (before providing its final approval of the divestiture) at the end of the divestiture that the divestiture agreement and relevant supporting documentation cover all the assets required to be divested and contain no provisions that are inconsistent with the remedial objectives of the divestiture. For example, continued links between the purchaser and the parties may undermine the competitive incentives.

OFT

The OFT has not yet appointed a trustee at the time of undertakings in lieu of reference. However, in divestiture cases, the OFT typically leaves open the possibility of appointing a divestiture trustee to sell the assets at no minimum price, to a purchaser approved by the OFT should the merged entity have failed to find a suitable purchaser for the divested assets in line with the timetable agreed with the OFT.

There are examples of cases raising national security issues where the parties committed to appoint a compliance (or other) officer to secure compliance with the undertakings. For example, in *Lockheed Martin/Insys*, the UK Secretary of State accepted behavioural undertakings to address national security issues in relation to a merger in the technology and communications systems sector.[29] As well as appointing a security officer responsible for facilitating compliance with UK National Security Regulations, Lockheed Martin was required to appoint a compliance officer to be responsible for providing to the Ministry of Defence an annual report and particulars of any failure to comply with the undertakings.[30]

CC

Of the 17 CC cases in our review, only six required the appointment of a monitoring trustee (See Table 3). Of the six cases, four were structural (requiring divestments) and two were behavioural.

Of the 11 cases in which the CC did not appoint a trustee, six cases did not require any trustee appointments (monitoring or divestment), and five made allowance for a divestiture trustee to be appointed if the divestments were not completed on the (confidential) divestiture schedule agreed with the CC.

EWS/Marcroft (2006) provides an interesting example of the CC's use of trustees, as well as its flexibility in divestiture remedies. The merger inquiry involved the completed acquisition of Marcroft Holdings Ltd (Marcroft) by a subsidiary of English Welsh & Scottish Railway Holdings Limited (EWS). EWS was the largest rail freight haulier in the United Kingdom, and Marcroft was the largest supplier of third party freight wagon maintenance services. The CC concluded that the merger would lead to an SLC in the freight haulage market, as the merged entity may have the incentive to use Marcroft's strong market presence in wagon maintenance business to disadvantage EWS competitors (all of which used Marcroft) in the freight haulage market.

The CC, therefore, required the merged entity to divest all or part of Marcroft's outstation business (''outstations'' are maintenance services provided in the field rather than at a central workshop). In the agreed Final Undertakings, the CC lays out two divestiture scenarios. In an ''Initial Divestiture Package'' the merged entity would divest customer contracts, maintenance bases, employees, assets and sites in a confidential list approved by the CC. The monitoring trustee would at this stage monitor the negotiations for the divestiture of this package, reporting to the CC every two weeks on the progress of discussions with customers identified in the Initial Divestiture Package and with the proposed purchasers. If the monitoring trustee ultimately reported to the CC that the Initial Divestiture Package would not be sold within the agreed period, the CC could choose to extend the period, or in a second divestiture scenario, the CC could notify EWS to cease negotiations and implement the ''Secondary Divestiture Package''. EWS would then invite bids for this more extensive package. The monitoring trustee would again report to the CC every two weeks on the bids received. In the event that this Secondary Divestiture Package also failed to be sold, the CC would appoint a divestiture trustee.

29 *Lockheed Martin/Insys*, decision of September 19, 2005.

30 See also *Finmeccanica/BAES*, decision of March 14, 2005 for a similar approach.

Table 3: CC cases involving trustees

Case	Core remedy	Trustee/monitoring arrangements
Drager/Air-Shields (May 19, 2004)	Behavioural	Monitoring trustee required to ensure compliance with price cap provisions.
FirstGroup/ScotRail (June 25, 2004)	Behavioural	Monitoring trustee required within 60 days to monitor compliance with pricing commitments on bus fares.
EWS/Marcroft (September 12, 2006)	Structural–partial divesture	Continuation of monitoring trustee appointed as a result of earlier CC Interim Undertakings. Divestment trustee if sales not completed by date (confidential) set out in Undertakings to CC.
Stericycle/Sterile Technologies (December 12, 2006)	Structural–partial divestiture	Continuation of monitoring trustee appointed as a result of earlier CC Interim Order. Divestment trustee if sale not completed by date (confidential) set out in Undertakings to CC.
Stonegate/Dean Foods (April 20, 2007)	Structural–full divestiture of Stonegate	Continuation of monitoring trustee appointed as a result of earlier CC Interim Undertakings. Divestment trustee if sale not completed by date (confidential) set out in Undertakings to CC.
Thermo/GVI (July 31, 2007)	Structural–full divestiture of GVI	Continuation of monitoring trustee appointed as a result of earlier CC Interim Undertakings. Divestment trustee if sale not completed by date (confidential) set out in Undertakings to CC.

Another example of the use of third party supervisors to ensure compliance with commitments is *Macquarie/National Grid Wireless*.[31] The case related to the merger between Macquarie UK Broadcast Ventures (the owner of Arqiva) and National Grid Wireless (NGW). Both parties provide broadcast and telecoms infrastructure in the United Kingdom. The merger was cleared by the CC subject to an extensive package of behavioural commitments including access commitments, discounts and service guarantees. As part of the undertakings, an Adjudication Scheme was to be set up, whereby Ofcom, as UK communications regulator, would appoint an independent adjudicator. Arqiva was also required to appoint a compliance director, who must be a member of the Arqiva Operational Board. The compliance director was to be responsible for monitoring compliance and dealing with the OFT, Ofcom and the adjudicator.

31 *Macquarie/National Grid Wireless*, decision by the CC of March 11, 2008.

5. Access remedies

This section considers the approach of the EC and the UK competition authorities to access remedies such as the termination of exclusive rights or granting access to key infrastructure.

European Union

The EC Merger Remedies Study suggested that "access" remedies such as the termination of exclusive rights or granting of access to key infrastructure or technology have worked in a limited number of cases. A relatively small number of cases involved access remedies (10 per cent of the sample).

Only 40 per cent of all access remedies reviewed in the Merger Remedies Study were found to be effective in achieving their competition objective and ensuring that foreclosure concerns were eliminated (see Figure 2). By

contrast, 60 per cent of divestiture remedies imposed between 1996 and 2000 (which include commitments to exit a joint venture) were found to be effective. In 20 per cent of cases, access commitments were found to be ineffective compared to 5 per cent of all divestiture commitments.

The EC has accepted commitments regarding access, either to promote competitors entering the market or to avoid foreclosure. Examples include access to airport slots,[32] access to energy via gas release programmes,[33] supply contracts[34] and access to technical updates.[35]

In the revised EC Remedies Notice, the EC has made clear that the EC will accept access remedies only if satisfied that competitors will probably use the relevant assets or rights. Moreover, such remedies are regarded as complex and requiring constant monitoring to render them effective.

However, as indicated in the revised EC Remedies Notice,[36] such remedies may typically include measures that allow third parties themselves to enforce the commitments through a fast track dispute resolution mechanism.

In practice, it appears that the EC may be more likely to accept packages of remedies combining some access remedies with some divestiture. It will be important to see how the EC applies this approach in the future, given that an excessively rigid approach may not only limit the parties' options, but may also be at odds with the economic reality of increasingly complex mergers.

United Kingdom

The UK competition authorities have accepted access remedies in only a limited number of cases. Four out of the 42 cases, under 10 per cent in our review, comprised behavioural commitments related to access (other cases with behavioural commitments relate to other types of commitment on, for example, pricing). Figure 7 shows the types of access remedies the UK competition authorities have used.

The CC's new Guidelines indicate that an access commitment must be sufficiently clearly defined and should also include an explicit provision for accommodating future changes.

Where supply arrangements depend on subjective factors, this may undermine the purpose and suitability of an access remedy. In the London Stock Exchange merger inquiry in 2005, the CC rejected a solely behavioural access commitment to clearing and settlement services due in part to the likely effect of "soft biases".[37]

The use of a general obligation to supply on "fair reasonable and non-discriminatory" (FRAND) terms may simplify access but the CC is likely to require that such a term is accompanied by provisions to prevent against margin squeeze, such as cost reporting obligations.

6. Intellectual property remedies

This section considers the extent to which remedies involving intellectual property rights have been acceptable to the EC and the UK competition authorities.

European Union

The revised EC Remedies Notice reflects a stricter approach to intellectual property licensing remedies. While the EC accepts that where a competition issue arises from a market position in technology or intellectual property rights, a licence may be the best remedy, the revised EC Remedies Notice rejects the appropriateness of the granting of intellectual property licences in most other circumstances, stating that:

> "The granting of a licence will therefore generally not be considered appropriate where a divestiture of a business seems feasible. . . However, the Commission may accept licensing arrangements as an alternative to divestiture where, for instance, a divestiture would impede efficient, on-going research or where a divestiture would be impossible due to the nature of the business." [38]

This position seems to restrict significantly the instances where an intellectual property licence will be a suitable remedy.

The EC may accept licensing in certain circumstances, but emphasises that:

> "Where there might be any uncertainty as regards the scope of the licence or its terms and conditions, the parties will have to divest the underlying IP right, but may obtain a licence back." [39]

32 Decision of 4 July 2005 declaring a concentration to be compatible with the common market according to Regulation 139/2004 (COMP/M.3770-*Lufthansa/Swiss*) and Decision of 11 February 2004 declaring a concentration to be compatible with the common market according to Regulation 4064/89 (COMP/M.3280-*Air France/KLM*).

33 Decision 2006/622 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.3696-*E.ON/MOL*) [2006] OJ L253/20 and Decision 2007/353 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.3868-*DONG/Elsam/Energi E2*) [2007] OJ L133/24.

34 Decision 2006/430 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.3687-*Johnson & Johnson/Guidant*) [2006] OJ L173/16.

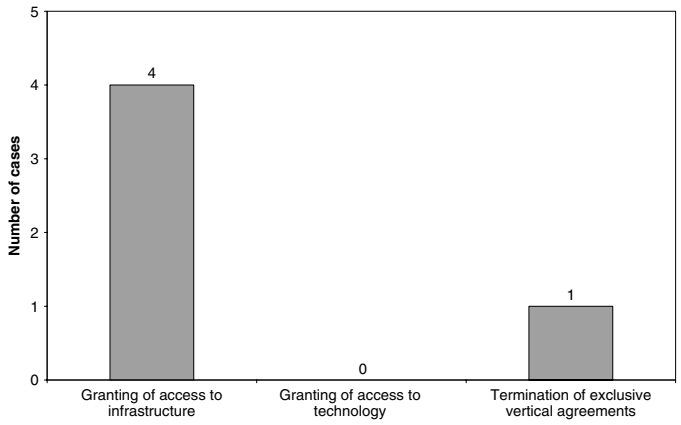
35 Decision of 19 February 2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (COMP/M.4726-*Thomson Corporation/Reuters Group*).

36 Revised EC Remedies Notice, para.66.

37 *Deutsche Börse AG/Euronext N/LSE*, decision by the CC of November 1, 2005.

38 Revised EC Remedies Notice, para.38.

39 Revised EC Remedies Notice, para.38.



Source: Authors' calculations derived from the e-Competitions Merger Remedies Matrix project (http://www.concurrences.com)

Figure 7: UK merger remedies cases—types of access remedy.
Note: The number of instances of access remedies exceeds the number of cases because in certain cases more than one type of access remedy is imposed.

Table 4 gives details of the four cases in which access remedies have been used.

Table 4: UK merger remedies cases—access remedies

Case	Remedy type (standalone or part of a package of remedies)	Description
FirstGroup/ScotRail (June 25, 2004)	Granting access to infrastructure (part of a package of behavioural commitments)	In conjunction with pricing commitments, the CC required that if the merged party ever rolled out a multi-modal ticket scheme for its own bus and train services, the merged entity would commit to allow other bus operators in Scotland to take part in the scheme on fair and reasonable terms.
Arriva/W&B Rail Franchise (July 9, 2004)	Granting access to infrastructure (standalone)	As a standalone condition, the OFT required that if the merged party ever rolled out a multi-modal ticket scheme for its own bus and train services, third party bus operators would be granted access to the scheme on terms no less favourable than the terms applicable to Arriva's own bus operations.
Deutsche Börse AG/Euronext NV/LSE (November 1, 2005)	Granting access to infrastructure (part of a package of structural and behavioural commitments)	In conjunction with other behavioural and divestiture commitments, the CC required guarantees of fair access to clearing services for competitors of the merging parties.
Macquarie/National Grid Wireless (March 11, 2008)	Granting access to infrastructure, and termination of exclusive vertical agreements (part of a package including other behavioural remedies)	The CC required various commitments. Since the industry was in the middle of a digital switchover process, the CC chose to implement access remedies instead of structural (although the merged entity was found by the CC to have significant market power). Macquarie (Arqiva) undertook to provide network access to any Managed Transmission Services (MTS) provider on fair terms, conditions and charges. Macquarie also committed to amend transmission agreements with customers and suppliers.

This preference for intellectual property divestitures as opposed to intellectual property licensing, as reflected in the revised EC Remedies Notice, will likely make it more difficult to address competition issues through remedies which relate to intellectual property.

However, the EC has accepted in exceptional circumstances a commitment to grant an exclusive time-limited licence for a brand—a so-called ''re-branding'' commitment. This aims to allow the licensee to use the period during which it can use the brand to put in place a re-branding strategy that will enable it to ensure that customers will transfer from the licensed brand to its own (new) brand. In a second phase, after the end of the licence, the merging parties commit to abstain from the use of any of the previously licensed brands (the black-out period). The revised EC Remedies Notice sets out a number of conditions that must be fulfilled for the re-branding remedy to be reasonably expected to be effective and for the EC to approve the remedy. In particular, the brand must be well known and assets or know-how related to the products marketed under the licensed brand should also be transferred.[40]

In practice, the EC may find a mid-way, combining licensing with other remedies. For example, in the *Proctor & Gamble/Gillette* merger, Proctor & Gamble undertook to divest its battery toothbrush business and grant a two-year exclusive licence for the co-brands used on the divested brand of battery toothbrushes in the European Economic Area (EEA).[41] It also committed not to reintroduce the licensed brands in the countries for which the licence has been granted within a minimum period of four years after the termination of the licence.

United Kingdom

In the practice of the CC, the divestiture or licensing of intellectual property including patents, licensing or brands may be seen as a special form of divestiture undertaking. However, such a remedy has behavioural aspects depending on the extent of ongoing relationship between the parties. Where a licensee relies on the licensor for updates or access to inputs, then it will be considered by the CC as a behavioural commitment.

Due to concerns relating to effectiveness, the UK competition authorities have generally preferred to divest a business including intellectual property rights rather than rely on intellectual property remedies alone.

In *Tetra Laval/CPS*, the OFT required divestment of intellectual property rights to a purchaser approved by the OFT.[42]

In this case, the OFT had concluded that the activities of the parties overlapped in the supply to UK customers of items of equipment for industrial cheese production. Post-merger, there would be only one other market participant, whose presence was not considered sufficient to offset the loss of competition brought about by the merger (potential countervailing buyer power and entry were similarly considered to be insufficient). The parties, therefore, offered the irrevocable exclusive perpetual licensing of all copyrights, design rights, know-how, manuals and confidential information relating to a group of (cheddar) cheese processing products, granting the licensee the right to use these intellectual property rights in the development and manufacture of the products for the marketing, sale and distribution of the products in the EEA.

Under the same conditions, the parties further offered all intellectual property rights in and to an established brand name (Wincanton) and its related logo. The geographic width and unlimited duration of these commitments would permit the purchaser to realise a high return on investment in innovation and marketing. Bearing in mind that all of the overlap products sold by CPS in the United Kingdom within the last 10 years carried the Wincanton brand name, its transfer would minimise the risk of confusion of brand ownership and maximise the new owner's incentive to invest in the brand. The potential purchaser (Moody Plc Group) against which the divestment package was tested indicated to the satisfaction of the OFT that it would, within a short period of time, be able to compete effectively with the merged entity. This case corresponds to a fully-fledged divestment remedy as the licensing agreement is irrevocable and exhaustive in nature. Vincent Smith, Senior Director for Competition at the OFT at the time, said of the case:

> ''This case is novel for the OFT under the Enterprise Act. It is the first time we have accepted the licence of intellectual property rights alone as a merger remedy; it is also the first time we requested and have approved an 'up-front purchaser' before accepting undertakings in lieu of reference. This case demonstrates the OFT's flexibility on merger remedies when parties show constructive engagement with the OFT on this issue at an early stage, as they did here. Accordingly, the need for a Competition Commission Investigation was avoided, while customers and consumers will be protected from the adverse effects of the merger.''[43]

For divestiture or licensing of intellectual property to be effective, the CC has indicated in its new Guidelines that it must be sufficient to enhance significantly the acquirer's ability to compete with the merging

40 Revised EC Remedies Notice, para.39 to 42.

41 Decision of 15 July 2005 declaring a concentration to be compatible with the common market according to Regulation 139/2004 (COMP M.3732-*Procter & Gamble/Gillette*).

42 *Tetra Laval/CPS*, decision by the OFT of November 20, 2006.

43 OFT, ''OFT accepts licensing of an 'up-front buyer' to protect UK competition in cheddar-cheese making equipment sector'' (Press Release, January 9, 2004), available at *http://www.oft.gov.uk/news/press/2004/04-04* [Accessed November 24, 2008].

parties and thus address the SLC. For example, in the *Thermo Electron Manufacturing/GV Instruments* merger inquiry in 2007, the CC rejected a licensing remedy proposed by the merging parties on the basis that it would not effectively restore competition lost by the merger.[44]

The CC explains in its new Guidelines the factors that influence the design of an intellectual property remedy, such as the form and jurisdiction of the relevant intellectual property, the relative specialisation of the intellectual property, the rate of innovation and the forms of payment. It will recognise the need for preserving incentives for innovation, while addressing competition concerns. The CC notes that co-operation with international competition authorities may be necessary due to the international context of the filing and licensing of intellectual property rights.

7. Conclusions

There is a considerable amount of convergence in the merger remedies practice of the EC and the UK competition authorities. At the same time, there are important differences in relation to certain aspects, particularly the approach to the use of trustees and third party monitors. Although it is difficult to be overly prescriptive where the final form of guidance on substantive merger analysis from the UK authorities is awaited, we expect that the following will likely influence the approach of the authorities to merger remedies in the future.

- Both the EC and the UK competition authorities will continue to favour structural (divestment) remedies.
- Both the EC and the United Kingdom will continue to emphasise the importance of the viability of the divested business and that in order to secure viability it may be necessary to transfer activities or assets which extend beyond the area of competitive overlap.
- The UK authorities are making increased use of trustees and third party monitors throughout the merger review process. Historically, the EC has used both monitoring and divestiture trustees to a greater extent than the UK authorities, but an increasing trend in the use of monitoring trustees can be discerned in the practice of the CC at least.
- Despite the voluntary nature of UK merger control, the increasing use of hold-separate obligations at the OFT stage can be expected to preserve the ability of the OFT (or the CC) to adopt intrusive remedies and, ultimately, divestment. For practical purposes, this brings the United Kingdom close to the European Union in terms of the scope for potential intervention in cases raising serious competition issues.
- The UK CC may look to more creative behavioural remedies, either alone or more likely in combination with a structural remedy. If anything, the United Kingdom has shown greater readiness than the EC to accept behavioural solutions, perhaps explicable by the role of the OFT and other sector regulators in assisting with monitoring. However, the UK regime also has to deal with completed mergers, which is generally not the case in the EC. This may mean that in the United Kingdom, structural commitments may be less viable or may need to be accompanied by behavioural measures to ensure that they are effective.
- Intellectual property licensing remedies will tend to be acceptable in limited cases only, perhaps where they accompany a divestment or the merger concerns a technology market.
- In an international merger, the authorities will consult to seek to achieve consistency and effectiveness in the approach to remedies. The choice of available remedies may, however, be limited by the constraints of extra-territorial enforcement.[45]
- Despite some clear points of similarity, the EC and the UK authorities will diverge on some key areas, due in part to the different regulatory enforcement context, not least the role of the OFT as first stage decision-maker and in some cases monitor and the absence of a pre-notification regime.

44 *Thermo Electron Manufacturing/GV Instruments*, decision by the CC of July 31, 2007.

45 The *Drager/Air-Shields* merger provides an example of the constraints on the CC's remedy selection in an international merger (*Drager/Air-Shields*, decision by the CC of May 19, 2004).

Annex I: Cases included in dataset

	Case	Date	Remedy type (high level classification)	OFT	CC
1	*Ivax International/3M Company*	January 9, 2004	Behavioural	X	
2	*Stena AB/P&O*	February 5, 2004	Behavioural		X
3	*iSoft/Torex*	April 29, 2004	Structural	X	
4	*Drager Medical/Air-Shields*	May 19, 2004	Behavioural		X
5	*FirstGroup/ScotRail*	June 25, 2004	Behavioural		X
6	*Arriva/W&B Rail Franchise*	July 9, 2004	Behavioural	X	
7	*Greene King/Laurel*	August 9, 2004	Structural	X	
8	*Capital Radio/GWR Group*	December 9, 2004	Structural	X	
9	*Terra Firma/UCI*	January 7, 2005	Structural	X	
10	*Finmeccanica/BAE*	March 14, 2005	Behavioural	X	
11	*Blackstone Group/UCG*	April 3, 2005	Structural	X	
12	*William Hill/Stanley Leisure*	August 1, 2005	Structural	X	
13	*Somerfield Plc/Wm Morrison*	September 2, 2005	Structural		X
14	*Lockheed/Insys*	September 19, 2005	Behavioural	X	
15	*Hilton Ladbroke/Jack Brown*	September 27, 2005	Structural	X	
16	*Deutsche Börse AG/Euronext NV/LSE*	November 1, 2005	Mixed		X
17	*Boots/Alliance*	February 6, 2006	Structural	X	
18	*Vue/A3 Cinema*	February 24, 2006	Structural		X
19	*CWS/Fairways*	July 19, 2006	Structural	X	
20	*Gala Leisure/County*	July 31, 2006	Structural	X	
21	*EWS/Marcroft*	September 12, 2006	Structural		X
22	*Johnston Press/Local Press*	October 6, 2006	Structural	X	
23	*Pendragon/Reg Vardy*	October 18, 2006	Structural	X	
24	*Stagecoach/Scottish Citylink*	October 23, 2006	Structural		X
25	*Tetra Laval/CPS*	November 20, 2006	Structural	X	
26	*Stericycle/Sterile Technologies*	December 12, 2006	Structural		X
27	*Aggregate Industries/Foster Yeoman*	December 22, 2006	Structural	X	
28	*Hamsard 2786/Academy*	January 23, 2007	Structural		X
29	Švitzerwijsmuller/dsteam Marine	February 9, 2007	Structural		X
30	*Inchcape/EMH*	March 26, 2007	Structural	X	
31	*Stonegate Farmers/Deans Food*	April 20, 2007	Structural		X
32	*General Electric/Smith Aerospace*	April 23, 2007	Behavioural	X	
33	*Mid Kent Water/South East Water*	May 1, 2007	Behavioural		X
34	*Admenta Lloyds/IPCC*	June 8, 2007	Structural	X	
35	*Flybe/BA Connect*	June 20, 2007	Structural	X	
36	*Kemira GrowHow/Terra Industries*	July 11, 2007	Mixed		X
37	*CGL/United*	July 23, 2007	Structural	X	
38	*Thermo International/GVI*	July 31, 2007	Structural		X

Annex I: (***Continued***)

39	*BSkyB/ITV*	January 29, 2008	Mixed		X
40	*Dunfermline Press Limited/Trinity Mirror*	February 4, 2008	Structural	X	
41	*Macquarie/National Grid Wireless*	March 11, 2008	Behavioural		X
42	*Transocean/GlobalSantaFe*	April 11, 2008	Structural	X	

Annex II: Description of cases involving structural remedies

Case	Date	Divestiture type	Brief description of remedy
iSoft/Torex	March 24, 2004	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of the entire Torex Laboratory Information Management Systems (LIMS) business, including all legacy contracts, staff and intellectual property rights to a buyer approved by the OFT.
Greene King/ Laurel	August 9, 2004	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of 13 pubs in certain Petty Sessional Division areas.
Capital Radio/ GWR Group	December 22, 2004	Divestiture of a controlling stake in a viable standalone business.	OFT mitigated concerns that the merger would lead to an SLC in the East Midlands with a divestiture of a station in Nottingham.
Terra Firma/UCI	January 7, 2005	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of one cinema in each of 11 localities (defined by 20 minute driving isochrones) to mitigate competition concerns at the local level.
Blackstone Group/UCG	April 3, 2005	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of six local cinemas.
William Hill/ Stanley Leisure	August 1, 2005	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture in each of 79 identified overlap areas.
Somerfield Plc/Wm Morrison	September 2, 2005	Divestiture of a controlling stake in a viable standalone business.	CC accepted divestiture of 12 stores in affected local markets. Somerfield's application for review of this decision was dismissed by the CAT.
Hilton Ladbroke/ Jack Brown	September 27, 2005	Divestiture of a controlling stake in a viable standalone business.	OFT concluded that the merger resulted in an SLC in the supply of betting services through licensed betting offices and accepted divestiture of one licensed betting office in each of four overlap areas.

Annex II: (***Continued***)

Case	Date	Divestiture type	Brief description of remedy
Deutsche Borse AG/Euronext NV/LSE	November 1, 2005	Other structural.	CC required a package of structural and behavioural remedies, targeted at ensuring the independence of the relevant clearing houses. These included limits on their voting rights together with guarantees of fair access to clearing services to competitors. In addition, Euronext committed to reduce its shareholdings in LCH.Clearnet to 15 per cent. The takeover ultimately failed for strategic/commercial reasons.
Boots/Alliance UniChem	February 6, 2006	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of 95 (mostly UniChem) stores to an approved purchaser.
Vue/A3 Cinema	February 24, 2006	Divestiture of a business unit carved out from a company structure.	CC cleared the merger conditional on the divestiture of one of the Basingstoke cinemas.
CWS/Fairways	July 19, 2006	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of specific funeral homes in five local areas of competition concern. In May 2007, CWS requested that the OFT vary the original undertakings to remove the obligation to divest the funeral business in Wychavon where it believed a new entrant had effectively resolved the competition problem. The OFT agreed and removed this particular obligation.
Gala Leisure/ County	July 31, 2006	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestment of one bingo club in the Glenrothes area.
EWS/Marcroft	September 12, 2006	Divestiture of a business unit carved out from a company structure.	CC required partial divestment of significant parts of EWS's outstation business. If the monitoring trustee advised that the initial divestiture package was unlikely to be sold within the initial divestiture period, the CC would consult the monitoring trustee about the progress of negotiations. Unless it was satisfied that the negotiations would conclude successfully within a further reasonable period, the CC would formally

Annex II: (*Continued*)

Case	Date	Divestiture type	Brief description of remedy
			notify EWS to cease negotiations and implement a more extensive "Secondary Divesture Package".
Johnston Press/ Local Press	October 6, 2006	Divestiture of a controlling stake in a viable standalone business.	OFT accepted the divestiture of the Northern Irish farming title *Farm Week*.
Pendragon/Reg Vardy	October 18, 2006	Divestiture of a controlling stake in a viable standalone business.	OFT accepted the divestiture of four dealership businesses in four affected areas.
Stagecoach/Scottish Citylink	October 23, 2006	Divestiture of a business unit carved out from a company structure.	CC required partial divestment on the "Saltire Cross" routes (the main routes of which are Glasgow-Aberdeen and Edinburgh-Inverness). The CC found an SLC on 10 of these routes and decided to pursue a divestiture remedy relating to the divestiture by Scottish Citylink of either its Saltire Megabus or its Saltire Scottish Citylink branded operations. The CC considered that both behavioural and structural remedies would be effective in redressing the competition concerns arising from the joint venture. However, in its final report, the CC expressed a clear preference for structural remedies. This is in line with the CC's guidelines and is easier to monitor. Nevertheless, the CC signalled a willingness to discuss behavioural remedies should the suggested divestments not be possible.
Tetra Laval/CPS	November 20, 2006	Divestiture or grant of a long-term exclusive licence.	OFT accepted divestiture of intellectual property rights to a purchaser approved by the OFT. This case corresponds to a fully fledged divestment remedy as the licensing agreement is irrevocable and exhaustive in nature.
Stericycle/Sterile Technologies	December 12, 2006	Divestiture of a controlling stake in a viable standalone business.	CC required the partial divestiture of incinerators and technology.

Annex II: (***Continued***)

Case	Date	Divestiture type	Brief description of remedy
Aggregate Industries/ Foster Yeoman	December 22, 2006	Divestiture of a controlling stake in a viable standalone business. Commitment to exit from a joint venture.	OFT accepted divestiture of asphalt plants in identified areas and that Aggregate Industries commit to divest its shareholding in the Harlow coated stone joint venture in the Hertford area.
Hamsard 2786/ Academy	January 23, 2007	Divestiture of assets package combining assets of more than one of the parties.	CC cleared a merger subject to divestiture of two venues within London—one comprising of Brixton Academy and the Hammersmith Apollo and one of SBE and the Forum. The divestitures were to include the management and booking teams for the relevant venues. The parties had to use reasonable endeavours to ensure that sponsorship contracts and customer and supplier contracts were also transferred to the purchasers.
Svitzerwijsmuller/ Adsteam Marine	February 9, 2007	Divestiture of a controlling stake in a viable standalone business.	CC required divestiture of either Adsteam's or Svitzer's Liverpool operations.
Inchcape/EMH	March 26, 2007	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of a dealership in one affected area.
Stonegate Farmers/ Deans Food	April 20, 2007	Divestiture of a business unit carved out from a company structure.	The merger had been completed before the OFT and CC investigated it. The CC required divestiture of the Stonegate business—in effect a full reversal of the merger. In the event that the full divestiture obligations could not be satisfied, the CC did propose an alternative behavioural remedy that would allow the merged parties' customers and suppliers to switch more easily.
Admenta Lloyds/ IPCC	June 8, 2007	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of a store in each of four local areas.
Flybe/BA Connect	June 20, 2007	Other structural.	Concerns about SLC on the Southampton–Manchester route were mitigated by the divestiture of an overnight parking stand at Southampton airport to allow a new entrant onto the route.

Annex II: (***Continued***)

Case	Date	Divestiture type	Brief description of remedy
Kemira GrowHow/ Terra Industries	July 11, 2007	Divestiture of a controlling stake in a viable standalone business.	CC sought divestiture of Kemira's outloading facilities at Ince for nitric acid, aqueous ammonia, and anhydrous ammonia. Kemira also agreed to lease certain storage and handling facilities to the purchaser. The parties also agreed a behavioural commitment regarding a supply arrangement with a third party. OFT is currently reconsidering the remedies agreed in this case in view of material changes in market circumstances.
CGL/United	July 23, 2007	Divestiture of a controlling stake in a viable standalone business.	OFT accepted divestiture of one retail pharmacy in two affected areas and divestiture of eight supermarkets in eight local areas. The OFT accepted also the divestiture of 14 funeral service branches.
Thermo/GVI	July 31, 2007	Other structural.	CC prescribed either a reversal of the merger or if that could not be successfully achieved, a partial divestiture in two particular markets where there was an SLC.
BSkyB/ITV	January 29, 2008	Other structural.	Partial divesture of BSkyB's shareholding together with behavioural commitments.
Dunfermline Press Limited/Trinity Mirror	February 4, 2008	Divestiture of a controlling stake in a viable standalone business.	OFT required divestiture of two titles from Trinity Mirror.
Transocean/ GlobalSantaFe	April 11, 2008	Divestiture of a controlling stake in a viable standalone business.	OFT required divestment of two of GlobalSantaFe's floating drilling rigs.

Notes:

- The CC issued a single decision in the *Deutsche Börse AG/Euronext NV/LSE* inquiry (2005) though it covered the separate bids for the London Stock Exchange of two separate companies. This decision has been treated as a single "case" in our analysis.
- The following cases have been excluded from the dataset as they amount to outright prohibition:
  - *Knauf Insulation/Superglass Insulation*, decision by the CC of November 26, 2004.
  - *Emap/ABI*, decision by the CC of January 26, 2005.
  - *Serviced Dispense Equipment (SDEL)/Coors Technical Services*, decision by the CC of March 11, 2005.
  - *Tesco/Co-operative (CWS)*, decision by the CC of November 28, 2007.