

MERGER PROCEDURAL GUIDELINES

A guide to procedure prepared by the Competition Commission to assist parties and their advisers involved in merger inquiries under section 106(3) of the Enterprise Act 2002

Consultation draft, April 2011

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Part 1: Introduction

- 1.1 The Competition Commission (CC) is a second-phase merger review body. It conducts inquiries in response to a merger reference from the Office of Fair Trading (OFT) (or the Secretary of State).¹
- 1.2 The CC's merger inquiries are conducted openly and transparently within a strict statutory deadline. The procedures described in this document are designed to ensure that the CC is able to reach a fair and robust decision within the statutory deadline while respecting the confidentiality of information it obtains during the process of conducting those inquiries.

Purpose of this guidance

- 1.3 This guidance forms part of the advice and information published by the CC under section 106(3) of the Enterprise Act 2002 (the Act).
- 1.4 The Chairman of the CC is required to issue rules of procedure for merger reference groups (see paragraph 2.6). The current rules of procedure² are published on the CC website and may be revised from time to time. A CC group carrying out an investigation is required to comply with these rules. The rules require groups:
- (a) to draw up and notify the parties of the administrative timetable for each inquiry (and to prepare a revised timetable if required);
 - (b) to decide the forms of hearings (public or private, joint or individual) and who should attend them;
 - (c) to notify the main parties of their provisional findings on the statutory questions and allow the parties at least 21 days to comment on the provisional findings; and

¹See paragraphs 8.1–8.9 for circumstances in which the Secretary of State has the power to make references following issue of an intervention notice.

²CC1, *Competition Commission Rules of Procedure 2006*.
www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc1.pdf.

(d) to notify the main parties of actions which may be taken to remedy the effects of a merger and give the parties the chance to make representations about its proposed actions.

- 1.5 Subject to complying with these rules, and to any guidance issued by the CC Chairman, CC groups are free to decide how they conduct a merger inquiry. In practice inquiries usually follow a fairly standard pattern, which is described in this guidance, but groups have flexibility to vary the way they operate in order to carry out their legal responsibilities effectively and within the strict statutory deadlines. The duties and powers of groups conducting a merger inquiry are set out in the Act.³
- 1.6 This guidance describes the main stages of a merger inquiry and outlines the key interactions which the CC has with parties and their advisers in the course of a typical inquiry. It is not intended to be binding and may be adapted to take account of the particular circumstances of an inquiry, in which case parties will be notified of the reasons for departures from our usual procedures. It is intended to help parties to prepare for participation in merger inquiries conducted by the CC. This guidance will be reviewed periodically in the light of the CC's experience of conducting inquiries and any relevant judgments of the Competition Appeal Tribunal (the CAT) and the appeal courts. The latest version of the guidance is always the one published on the CC's website.
- 1.7 This guidance should be read in conjunction with:
- (a) the CC's Rule of Procedure (see paragraph 1.4);
 - (b) the joint OFT/CC merger assessment guidelines⁴ which explain the OFT's and CC's approach to the assessment of mergers;

³See Parts 3 and 9 of, and Schedules 8 and 10 to, the Act and Schedule 7 to the Competition Act 1998.

⁴*Merger Assessment Guidelines, CC2 (Revised)*, September 2010. www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/pdf/100916_merger_assessment_guidelines.pdf.

- (c) the CC Merger Remedies guidance⁵ which explains the CC's approach to remedies and describes how the remedies process is carried out; and
- (d) the CC's Disclosure Guidance which explains the CC's approach to disclosure of information during merger and market references.⁶

1.8 This guidance comprises the following sections:

- (a) **Part 2: Overview of the merger inquiry process.** Inquiries can conveniently be seen as falling into three stages (which may overlap to some extent) up to final report: information gathering (see Part 3), assessment (see Part 4) and after provisional findings (see Part 5). In addition, in the event of a 'substantial lessening of competition' (SLC) finding in the final report, there will, save in exceptional circumstances, be a remedies implementation stage (see Part 6). This section contains an outline of these four key stages.
- (b) **Part 3: Information gathering.** This section contains guidance for parties on how evidence is collected, the form of submissions and hearings with third parties and how evidence is disclosed.⁷
- (c) **Part 4: Assessment.** This section sets out how the CC analyses the evidence gathered, how working papers are produced and shared with the main parties and how evidence is probed through hearings with the main parties. At the end of this stage provisional findings are published.
- (d) **Part 5: After provisional findings.** This section explains how the CC consults on its provisional findings (and Notice of Possible Remedies, if an SLC has provisionally been found), how it has a second hearing (response hearing) with the main parties (and response hearings with third parties if necessary) based on the CC's provisional findings, and how responses to provisional findings are handled in the lead up to publication of its final report.

⁵CC8, *Merger Remedies: Competition Commission Guidance*, November 2008.
www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc8.pdf.

⁶CC7, *Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries*, July 2003.
www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc7.pdf.

⁷When considering disclosure the CC has regard to the need to protect sensitive information: see [Annex D](#).

- (e) [Part 6: Implementation of remedies](#). This section describes the steps taken to implement the remedies identified in the final report in the event of an SLC finding. If the CC clears the merger in its final report, this stage does not take place.
- (f) [Part 7: The cancellation process](#). Following reference from the OFT, some merger parties decide not to proceed with the merger and the reference to the CC is cancelled. This section sets out the cancellation process generally followed.
- (g) [Part 8: Special types of mergers: public interest references, media mergers and water mergers](#). This section describes some of the procedural differences associated with special types of mergers.
- (h) [Part 9: Procedural issues in completed mergers](#). This section describes the particular procedural issues that apply in relation to completed mergers.

Part 2: Overview of the merger inquiry process

The statutory questions that the CC must answer

- 2.1 The CC has no power to initiate investigations. Instead, every inquiry is conducted in response to a merger reference from the OFT (or the Secretary of State).
- 2.2 The OFT has a duty to make a reference to the CC if it believes that it is or may be the case that a relevant merger has been or will be created and that the creation of that situation has resulted, or may be expected to result, in an SLC in any market in the United Kingdom for goods or services. A reference can be made if the OFT believes that arrangements which will lead to the creation of a relevant merger situation are in progress or in contemplation (an 'anticipated merger reference' under section 33 of the Act) or if a relevant merger situation has already been created (a

‘completed merger reference’ under section 23 of the Act).⁸ A relevant merger situation arises where two or more enterprises cease to be distinct.⁹ Further guidance on the procedures and the approach of the OFT can be found in the OFT jurisdictional and procedural guidance¹⁰ and the joint OFT/CC merger assessment guidelines.¹¹

- 2.3 Where the OFT has made a reference to the CC, the CC must conduct an investigation, and publish a report setting out its conclusions on certain statutory questions. These statutory questions provide the framework for the investigation and analysis that takes place during a CC merger inquiry.
- 2.4 Under section 35 of the Act on a completed merger reference the CC must decide:
- (a) whether a relevant merger situation has been created; and
 - (b) if so, whether the creation of that situation has resulted or may be expected to result in an SLC in any UK market (this is known as ‘an anticompetitive outcome’).¹²
 - (c) If the group finds an anticompetitive outcome, whether action should be taken (by the CC or by another person) to address the SLC or its adverse effects and, if so, what form such action should take.¹³
- 2.5 On the reference of an anticipated merger under section 33 of the Act, the CC has to answer the questions on a forward-looking basis in relation to the arrangements which are in progress or in contemplation at the time of the reference.

⁸Such a reference must be made not more than four months after the merger takes place or of the OFT receiving notice of material facts about the merger (or of such facts being made public).

⁹Sections 23 and 26 of the Act.

¹⁰*Mergers: jurisdictional and procedural guidance* www.ofg.gov.uk/shared_ofg/mergers_ea02/ofg527.pdf.

¹¹*CC2 (Revised)*.

¹²Section 35(2).

¹³Competition Act 1998, Schedule 7, paragraph 20, requires that a group must reach a decision that there is an anti-competitive outcome by a two-thirds majority if it is to go on to consider remedial action. However, only a simple majority is required for decisions on the questions relating to remedies. The Chairman of a group has a casting vote on any question to be decided by the group (Competition Act 1998, Schedule 7, paragraph 21).

The CC inquiry team

- 2.6 All the general functions of the CC, including the carrying out of merger inquiries, are performed by small groups of members. An inquiry team is set up for each merger referred to the CC comprising members and staff.
- 2.7 As soon as possible after the CC receives a reference the Chairman identifies and appoints a group of CC members to conduct the inquiry (the group) and selects one of that group (normally the Chairman of the CC or one of the Deputy Chairmen)¹⁴ to chair the group. Members come from a variety of backgrounds and are usually appointed for their expertise in economics, law, accountancy and/or business. The membership of a group usually reflects a mix of expertise and experience. For a merger inquiry a group will usually comprise between three and five members including the group Chairman.
- 2.8 In some cases there may be a short delay before the group is appointed due to the need to identify members' availability and consider whether their outside interests could affect the impartiality of the group. Outside interests of appointed members are disclosed on the CC website. In some cases the CC may contact main parties to disclose particular interests and give them an opportunity to comment before deciding whether to make a proposed appointment.¹⁵ Until the group is appointed the Chairman of the CC may take steps required to facilitate the work of the group.¹⁶ CC groups are appointed for the duration of the inquiry, up to the point at which the reference is 'finally determined'.¹⁷ In cases where a merger is found to give rise to an SLC, the merger is finally determined when remedy undertakings¹⁸ are accepted by

¹⁴The Chairman and Deputy Chairmen are also members of the CC.

¹⁵If at any time during an inquiry it appears to the Chairman that because of a particular interest of a member it is inappropriate for them to remain in the group, the Chairman may appoint a replacement. Competition Act 1998, Schedule 7, paragraph 17(1)(c). See Guidance on conflicts of interest on the CC website:

www.competition-commission.org.uk/our_peop/conflicts_of_interest.htm.

¹⁶Competition Act 1998, Schedule 7, paragraph 15(7).

¹⁷Section 79(1) and (2) of the Act.

¹⁸Under section 82 of the Act.

the CC or a final remedy order is made and if no SLC is found, the reference is finally determined when the final report is published.¹⁹

- 2.9 The group of members appointed are the decision-makers on a particular inquiry. Their role is to set the overall direction of the inquiry, review the appropriate evidence and analysis, and answer the statutory questions on the case (see paragraph 2.4). They also hear directly from the main parties in a formal hearing during the assessment phase of the case (see paragraphs 4.12 to 4.17), and will usually attend a site visit (see paragraph 3.41).
- 2.10 CC groups are supported by a staff team, led by an Inquiry Director. The staff team includes both administrative staff and specialist professional staff. The administrative staff are responsible for the day-to-day running of the inquiry, and ensure that inquiry procedures are followed correctly and that the inquiry progresses according to the published timetable. The key point of contact at the CC for the main parties is likely to be the Inquiry Manager, who runs the administrative team.²⁰ The specialist professional staff on the inquiry team provide advice to the group in their areas of expertise and are responsible for analysing and advising the group on the substantive issues that arise during the inquiry. There are usually one or more economists, lawyers, and business/financial advisors assigned to each merger inquiry as well as other professional experts as appropriate.

The key stages of a merger inquiry

- 2.11 The key stages of a typical merger inquiry are shown in Figure 1. This indicates the steps the CC will usually take and what the main and third parties will usually need to

¹⁹Under section 84 of the Act.

²⁰Third parties may be asked to have contact with the Inquiry Manager or another member of the administrative team. Main parties and third parties will be given details of the relevant contact and notified of any changes.

do at each key stage of an inquiry. The steps described may not, in practice, always take place or may not take place sequentially and may sometimes overlap.

FIGURE 1

The key stages of a typical merger inquiry

	<i>Milestones</i>	<i>CC</i>	<i>Parties</i>
Stage 1: Information gathering			
	Reference	CC issues first day letter including an initial factual information request to main parties.	Main parties respond to the initial factual information request. Main parties attend initial meeting and data meeting with CC staff team. Main parties submit their initial submission.
		CC adopts any initial undertakings accepted by the OFT and considers need for modified interim undertakings.	Main parties discuss with the CC interim undertakings and reporting on compliance. Main parties offer modified interim undertakings if necessary.
		CC creates administrative timetable. Timetable is published after consultation with main parties.	Main parties comment on administrative timetable.
		CC invites third party submissions on the transaction.	Third parties make written submissions to the CC.
		CC issues market and financial information requests to main (and third) parties.	Main (and third) parties respond to market and financial information requests.
		CC develops any surveys of customers or suppliers.	Main parties comment on any draft survey.
		CC attends site visit.	Main parties organize site visit.
		CC holds third party hearings and discloses any summaries of these hearings.	Third parties participate in hearings and check hearing summaries prior to disclosure.
	Publication of issues statement, reflecting theories of harm on which the CC is focusing.	CC publishes issues statement and considers responses to it.	Parties respond to issues statement.

	<i>Milestones</i>	<i>CC</i>	<i>Parties</i>
Stage 2: Assessment			
		<p>CC conducts analysis of evidence and produces working papers. Working papers (or extracts of them) are disclosed to parties as appropriate.</p> <p>Where relevant, an annotated issues statement is sent to parties in advance of main party hearing.</p>	Parties respond to working papers (or extracts of working papers) disclosed to them.
		CC holds main party hearing.	Main parties attend hearing.
		Put-back of further material to main (and third) parties for checking prior to publication of provisional findings.	Main (and third) parties check further put-back.
Around week 15	Publication of Notice of provisional findings, provisional findings and (if relevant) Notice of Possible Remedies.		
Stage 3: After provisional findings			
		CC considers the responses to provisional findings and (if relevant) Notice of Possible Remedies.	Main (and third) parties comment on provisional findings and Notice of Possible Remedies.
		Put-back of further material to main (and third) parties for checking prior to publication of final report.	Main (and third) parties check further put-back.
		Where relevant the CC will conduct subsequent hearings to receive evidence on provisional findings and remedies proposals (response hearings).	Main (and third) parties attend response hearings to provide evidence on provisional findings and remedies proposals.
		CC considers remedies working paper and discloses to main (and, where relevant, third) parties for comment.	Main (and, where relevant, third) parties comment on remedies working paper.
Week 24	Statutory deadline for publication of the final report.	CC publishes final report by the end of week 24 (subject to any extension of statutory deadline).	

	<i>Milestones</i>	<i>CC</i>	<i>Parties</i>
Stage 4: Implementation of remedies			
		CC considers whether any variation to interim measures is necessary.	Main parties offer updated interim undertakings if appropriate.
		CC creates timetable for implementation of undertakings/order, and informs main parties of key milestones.	
		CC consults main (and third) parties on draft undertakings/order.	Main (and third) parties comment on draft undertakings/order and request excisions (if any) prior to publication.
		CC consults publicly on draft undertakings/order.	Main (and third) parties comment further on draft undertakings/order.
		CC accepts final undertakings/makes final order. Responsibility for further implementation is assigned to the inquiry group, re-appointed for this purpose, or to a special group, or to the Remedies Standing Group.	

2.12 The key actions during these four stages are described in more detail below.

Part 3: Information gathering

Preparatory work

- 3.1 A merger inquiry starts with the making of a reference by the OFT.²¹ The OFT's terms of reference specify the transaction which is to be investigated, and summarize at a high level the basis on which the reference is made (the market in which the OFT believes there is a SLC and whether the merger appears to meet the turnover or share of supply test).²² The OFT publishes the terms of reference and issues a press notice. The reference decision, explaining the OFT's reasons for making the reference, is also provided to the CC and is published by the OFT once a non-confidential version has been prepared.
- 3.2 When it makes a reference to the CC the OFT will send the CC pre-reference background material. Under the Act,²³ the OFT is required to provide the CC with:
- (a) such information in its possession as the CC might reasonably require;
 - (b) any other assistance which the CC may reasonably require to carry out its inquiry and which it is in the OFT's power to give; and
 - (c) information in its possession which, although not requested by the CC, is appropriate for the OFT to give the CC to assist it in carrying out its functions.
- 3.3 The CC generally also holds a meeting with the OFT to discuss the OFT's experience of the case and the issues that have emerged.
- 3.4 At an early stage in its inquiry the CC considers the 'theories of harm' which will frame its substantive assessment of the statutory competition questions and focus its

²¹Pursuant to either section 22 or section 33 of the Act (depending on whether the merger is completed or anticipated). In certain cases raising public interest considerations the reference is made by the Secretary of State, see paragraphs 8.1–8.9.

²²See *CC2 (Revised)*, paragraphs 3.3.1–3.3.8.

²³Section 105 of the Act.

information gathering. The theories of harm describe hypothetically the possible effects of the merger on competition, and are derived from the initial information the CC has received, in particular from the OFT and from an initial look at publicly available market information. They are normally reflected in the issues statement when it is published (see paragraph 3.42), and evolve during the course of the inquiry in light of the evidence and analysis. The CC also considers how best to conduct the inquiry and draws up an administrative timetable²⁴ which reflects the statutory time limits for investigations (see paragraph 2.11 and Figure 1). The main parties are sent a draft of the administrative timetable for comment.²⁵ A copy of the final version of the administrative timetable is published on the CC's website. The CC will consider the conduct of any hearings to be held in the course of the inquiry (see paragraphs 3.32 to 3.36, 4.12 to 4.17 and 5.4 to 5.7), including whether any hearings should be held in public²⁶ (see paragraph 3.36) or jointly with one or more parties.²⁷ In considering how to organize hearings the CC will consider several matters including the views of main and third parties, confidentiality, and the efficient and proper conduct of the reference.²⁸

Initial contact with the main parties

3.5 Upon receipt of a reference from the OFT the CC will send the parties to the merger a first day letter,²⁹ usually on the day the merger is referred. This letter marks the formal launch of the CC's inquiry. The first day letter:

- (a) covers important administrative details, requesting contact details for the parties and information about availability of parties or advisers during the inquiry period;

²⁴CC1, Rule 6.2.

²⁵CC1, Rule 6.4.

²⁶CC1, Rule 7.1.

²⁷CC1, Rule 7.4.

²⁸See Rule 7.2 for the full list of considerations.

²⁹See Annex A.

- (b) invites the parties to provide an initial submission on issues outlined in the letter (for example, details of the transaction, the relevant markets, barriers to entry, the counterfactual and the competitive effects of the merger);
- (c) includes a preliminary data request, usually known as the ‘initial factual information request’, normally with a response date of one week. This will contain, for example, requests for pre-existing internal documents regarding the transaction, the corporate and financial structure of the parties, the parties’ business strategies and competitor and accounting information. [Annex A](#) sets out the types of information typically included in this request;
- (d) invites the parties to attend an initial meeting with the CC staff team. This meeting is an important opportunity for parties to discuss the timetable and administrative arrangements, including suggestions for site visits, and to ask questions about the process;
- (e) invites the parties to attend a data meeting (sometimes on the same day as the initial staff meeting). This is a chance for the CC staff team to find out what data and other information sources relevant to the issues in the inquiry are available and have a first discussion about the operation of the relevant business sector. This helps to focus subsequent information requests. The CC will therefore request that representatives of the main party who are familiar with that party’s data systems (including its IT systems where these may impact on the ability to search for or deliver data) attend this meeting; and
- (f) refers, in the case of completed mergers, to the likely need for the parties to agree interim undertakings with the CC. In the case of anticipated mergers, there is less likely to be a need for interim undertakings as, once a reference has been made to the CC, section 78 of the Act prohibits the acquiring company from buying, without the CC’s consent, an interest in shares in a company if any enterprise to which the reference relates is carried on by or under the control of

that company. However, interim undertakings may still be required in certain circumstances (see paragraphs 3.7 to 3.8 and [Part 9](#)).

- 3.6 The CC will publish on its website a news release which explains briefly the subject of the inquiry and invites submissions of written evidence within two or three weeks. An advertisement inviting submissions may be placed by the CC in suitable publications (and/or websites where appropriate). The CC will also ask potentially interested third parties such as competitors, customers, suppliers, sectoral or other relevant regulators, relevant public authorities and industry experts for views or information on the merger.

Interim measures

- 3.7 Once a merger has been referred to the CC the CC has the power to take any action (by interim order³⁰) or accept interim undertakings³¹ from the parties to take action it considers necessary to prevent pre-emptive action. This is defined as action which might prejudice the reference or impede the taking of action following the reference.³²
- 3.8 Where a reference relates to a completed merger the CC will normally seek interim undertakings (or adopt³³ initial undertakings already accepted by or order made by the OFT³⁴) or impose interim measures by order. Whilst these measures are often referred to as 'hold separate' measures, they go beyond simply requiring the merged enterprises to be kept separate from one another. In such cases, the CC is likely to be particularly concerned about restricting information flows between the businesses,

³⁰Section 81 of the Act.

³¹Section 80 of the Act.

³²Section 80(10) of the Act.

³³Section 80(3) enables the CC to adopt an initial undertaking that has been accepted by the OFT, provided that the undertaking is still in force at the time that the CC accepts it. Initial undertakings accepted by the OFT cease to be in force at the end of the period of 7 days beginning with the making of the reference (section 71(6)(a)).

³⁴Section 71 enables the OFT to accept initial undertakings for the purpose of preventing pre-emptive action in relation to a completed merger. Pre-emptive action for these purposes is defined as action which might prejudice the reference concerned or impede the taking of any action under Part 3 of the Act which may be justified by the CC's decisions on the reference (section 71(8)). Under section 72, the OFT has the power to make initial orders preventing pre-emptive action where it has reasonable grounds for suspecting that a relevant merger situation has been created and that pre-emptive action is in progress or in contemplation.

preserving the business assets of each of the enterprises and unwinding any problematic integration between the businesses that may have already taken place. In some cases a hold separate manager and/or a monitoring trustee may be appointed to facilitate this.³⁵ In the case of anticipated mergers, the CC will also have regard to whether interim measures are necessary to restrict information flows between parties but its main concern will be whether it needs to seek interim undertakings, or make an interim order, in relation both to asset acquisitions and certain share acquisitions.³⁶ Further information on interim measures is set out in [Part 9](#) of this guidance.

Liaison with other jurisdictions

3.9 Where the merger is subject to investigation in other jurisdictions, the CC may wish to discuss with those jurisdictions the approach being taken in their investigation, the issues identified, and whether there is any commonality in issues or potential remedies (where relevant). To facilitate this, the main parties will be expected to provide a waiver authorizing the exchange of information between the CC and the relevant competition authorities in those jurisdictions. The International Competition Network (ICN) has developed a template for use in such circumstances.³⁷

Information gathering

3.10 The theories of harm (see paragraph 3.4) form the framework for subsequent information gathering by the CC from both the main and third parties. Information may be gathered by various means, including questionnaires, submissions, hearings, surveys and site visits.

³⁵See [CC8](#), Appendix A, paragraphs 12–15.

³⁶See [CC8](#), Appendix A, paragraphs 16 & 17.

³⁷See www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf, Appendix A.

Questionnaires and data requests

- 3.11 As soon as practicable after the start of the inquiry the CC will issue the main parties with questionnaires requesting detailed financial and market information. The market questionnaire will typically seek information about customers, suppliers, product characteristics, market shares, competition, pricing, marketing and barriers to entry, expansion and exit. It will usually also contain (or be supplemented by) an initial data request focusing on the quantitative information at the parties' disposal that will enable the analysis of the effects of the merger on competition. Such information might include sales figures, pricing information and cost data, among other things. The financial questionnaire is likely to focus on financial performance and projections, including margin calculations. Main parties are generally given between two and three weeks to provide the information requested. [Annex B](#) provides a description of the types of information typically sought in these requests.
- 3.12 Third parties will generally be less involved in the merger inquiry process than main parties. However, many will receive data requests (see paragraph 3.11) and some will be invited to participate in hearings with staff (before and/or after provisional findings—see paragraphs 3.32 to 3.35 and 5.4 to 5.7). Third parties may also receive extracts of working papers or provisional findings for put-back purposes (see paragraphs 4.8 to 4.11).
- 3.13 The CC may send further requests for data and information to parties during the inquiry as the issues to be addressed become clearer.
- 3.14 It is very important that parties respond to information requests fully and accurately. Intentional or reckless provision of false or misleading information is a criminal offence, regardless of whether that information has been required by a notice under

section 109 of the Act or has been provided voluntarily.³⁸ Intentional alteration, suppression or destruction of any documents a person is required to produce by a notice under section 109 of the Act is also an offence.

- 3.15 Because of the strict statutory deadlines that the CC has to meet, it is essential that the CC gathers the bulk of the information that it requires for its analysis early in the process (notwithstanding that it may need to make further requests for information as the inquiry progresses—see paragraph 3.13).
- 3.16 The CC recognizes that providing timely information can place a burden on parties to an inquiry and parties are encouraged to discuss with staff any difficulties in providing the requested information, providing it in the form requested, or meeting any deadlines for provision of information as early as possible. Often requests for information are made without formally exercising the CC's section 109 powers. However, delays in the provision of information can have significant repercussions for inquiries, and in the event of delay or failure to respond to its specific requests, the CC is likely to issue formal notices under section 109.
- 3.17 The CC's information-gathering powers under section 109 of the Act include the power to require persons to attend and give evidence to the CC,³⁹ to produce specified or described documents that are within that person's custody or under their control⁴⁰ and, in the case of a person carrying on a business, to supply estimates, forecasts, returns or other information as may be specified.⁴¹
- 3.18 A party may also request that the CC issue it with a section 109 notice (for example, where the relevant party is subject to restrictions on disclosure of information without

³⁸Section 117; section 110(5).

³⁹Section 109(1).

⁴⁰Section 109(2).

⁴¹Section 109(3).

compulsion). Such a request, and the reason for it, should be made by the party concerned as early as possible in the inquiry process. The CC is usually able to accommodate such requests.

- 3.19 If the CC decides to issue a section 109 notice,⁴² it is required to state what information or documents are required, or identify the person whose attendance is required,⁴³ and also include information about the consequences of not complying with the notice. If the section 109 notice is issued following an earlier request for the same information, the section 109 notice is likely to allow only a short additional period for provision of the information. However, where a notice is requested by a party from the outset, a longer deadline may be set.
- 3.20 In the event of late provision or non-provision of information required by notice under section 109, the CC has the power to impose a monetary penalty.⁴⁴ In merger cases, if the person who has failed to comply with the notice is a main party, the CC may also extend the period in which it must publish its report.⁴⁵ The CC is not obliged to have regard to any information that it receives after the date reasonably specified for its receipt.⁴⁶

Submissions

- 3.21 In addition to requesting specific information from parties, the CC invites submissions at different stages in the process, including an initial submission and a response to the issues statement and, later in the process, a response to the provisional findings and, if relevant, a response to the Notice of Possible Remedies.

⁴²Section 109 notices are served in accordance with section 126 of the Act.

⁴³This may specify an individual or the holder of a particular post within the organization in question.

⁴⁴Section 110 (1). Depending on the circumstances and nature of the infringement, the penalty may be fixed (up to a maximum of £20,000) or set at a daily rate (of up to a daily maximum of £5,000) or a combination of both. See *CC5, Statement of Policy on Penalties*, June 2003: www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc5.pdf.

⁴⁵Section 39(4).

⁴⁶CC1, Rule 9.3.

3.22 In making submissions to the CC, parties should provide the reasoning and evidence (including supporting documents) necessary to support the arguments or contentions made.

3.23 Guidance for parties on the format for responses and submissions is set out at [Annex C](#).

The initial submission

3.24 The initial submission from the main parties should set out background information on the businesses involved in the transaction. This should cover the history of the businesses and include details of market entry or exit in relation to the market(s) affected by the merger, and any related markets. The CC will wish to understand the organization of the businesses and the extent to which they have reached their current position through acquisition or organic growth. Full details of the transaction will also be required, including information on any previous relationship between the merger parties.

3.25 The initial submission should include the main parties' views on the economic markets affected by the merger, both in terms of product or service and the geographic market. It should also cover their views on competitive conditions in those markets and identify the principal competitors, customers and suppliers. The CC will want to understand the current business strategy of the main parties in relation to the products or services affected by the merger. The initial submission should also deal with barriers to entry, expansion or exit that may exist.

3.26 In assessing the effects of the merger, the CC will consider the prospects for competition with the merger and compare this with the competitive situation without

the merger (the latter is called the counterfactual).⁴⁷ The initial submission should set out the main parties' views on what would have happened to the businesses involved in the merger, and in the market in general, in the absence of the merger situation. Finally, the initial submission should set the main parties' views on the expected impact of the merger on competition, in particular the expected effects on customers (including effects on prices, quality, availability and innovation). In doing so, it should address the issues set out in the OFT's decision document, which form the basis for the CC's investigation.

Submissions of technical economic analysis

3.27 When making submissions of technical economic analysis, parties should refer to the principles set out in the CC's publication *Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission*.⁴⁸

Submissions of evidence based on surveys

3.28 In some cases parties submit to the OFT or the CC evidence derived from surveys of consumers or suppliers commissioned for the specific purpose of helping understand aspects of a merger. In such cases it is important that the research is statistically robust. The CC, in collaboration with the OFT, has produced a guide to good practice in the design and presentation of such consumer survey evidence.⁴⁹

Publication of submissions

3.29 The CC generally discloses initial submissions and responses made by parties to the issues statement through publication on the CC website.⁵⁰ Parties should provide non-confidential versions of all submissions for publication on the CC's website at the

⁴⁷See CC2 (Revised), Section 4.3.

⁴⁸*Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission*. www.competition-commission.org.uk/rep_pub/corporate_documents/corporate_policies/best_practice.pdf.

⁴⁹*Good practice in the design and presentation of consumer survey evidence in merger inquiries*, March 2011. www.competition-commission.org.uk/rep_pub/consultations/past/pdf/Good_practice_guide.pdf.

⁵⁰The CC may also publish other submissions received from parties.

same time as their full submissions. If this is not possible, parties should discuss this with CC staff and will be expected to provide appropriate non-confidential versions as soon as possible thereafter and in any event within a week. The non-confidential version of the submission must set out the fundamentals of the relevant party's case, with a sufficient description of the evidence relied upon to enable other parties to understand, and if appropriate, rebut this evidence. Parties should accompany the non-confidential version with a detailed explanation of why they consider that particular parts of their submissions should not be disclosed, including explaining the nature of the information, the harm that could be caused, and the likelihood and magnitude of that harm. Requests for confidential treatment of information should be limited to information that is genuinely sensitive, the disclosure or publication of which would be likely to cause significant harm to their legitimate business interests or to the interests of any individual to whom the information relates.

- 3.30 The final decision on disclosure lies with the CC, having regard to its powers and duties under the Act as described in [Annex D](#) and *CC7, Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries*.⁵¹ By publishing a non-confidential version of a party's submission on its website, the CC does not necessarily accept that the excised material should not be published or disclosed at some future stage of the inquiry, if such disclosure becomes necessary to fulfil the CC's functions under the Act.
- 3.31 If the CC accepts that there are issues of confidentiality, it may be possible to avoid disclosure of sensitive information by, for example, publishing an anonymous version of the submission or publishing the confidential information in a way that avoids confidentiality problems, for example replacing specific figures with ranges. In the event of a disagreement on the matter with the group, parties may make

⁵¹CC7, *Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries*, July 2003. www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc7.pdf.

representations to the CC's Chief Executive. The Chief Executive will advise the group following consideration of the parties' representations. The group will have regard to that advice, but the final decision remains with the group.

Third party hearings

- 3.32 The CC identifies third parties to be invited to hearings as soon as possible following the reference.⁵² Third party hearings are usually held early in the investigation, during the information-gathering phase and before the main party hearing (see paragraphs 4.12 to 4.16) so that any significant points that emerge can be put to the main parties. Third parties may be selected on the strength of their position in the market(s) affected by the merger (eg key customers or competitors), their role in the industry (eg relevant regulators or other public authorities), whether they have been actively involved in the OFT process, their response, or anticipated response, to the third party letters, or their ability to contribute to a representative range of views.
- 3.33 The majority of third party hearings and evidence gathering will be conducted at staff level, although group members may attend. Hearings with third parties may often be conducted by telephone. In advance of the hearing, CC staff will send third parties a note of the topics likely to be raised. A record of the hearing will be made, either in the form of a transcript⁵³ or as a staff note of the key points discussed which will be agreed with the third party concerned, and will be provided to the group.
- 3.34 The staff team may prepare summaries of the evidence given at third party hearings for disclosure by publication on the CC website. If so, prior to its publication, the summary may be sent to the relevant third party for checking of factual accuracy and for the identification of any confidential material that it would not wish to be disclosed.

⁵²CC1, Rule 8.

⁵³Where the hearing is conducted by telephone, and a transcript produced, the telephone call will be recorded for the purposes of preparing the transcript.

Third parties should explain why they consider that particular parts of the hearing summary should not be disclosed at the same time as they identify the material in question (see paragraph 3.29 and [Annex D](#) on confidentiality and disclosure).

- 3.35 There may be other meetings or phone calls with third parties to clarify specific facts. A transcript is not normally taken, nor, necessarily, are notes prepared for sharing with the third parties concerned. Summaries are not normally disclosed. Any key information derived from such meetings and phone calls, however, will be disclosed to the relevant parties as appropriate.

Open and joint hearings

- 3.36 Early in the inquiry, the CC will consider whether one or more public hearings, generally known as open hearings, or joint hearings should be held.⁵⁴ Given the time-scales in a merger inquiry, it is very unusual to hold an open hearing. It is, however, more common to hold a private, multi-party hearing (for example, involving industry commentators or a group of industry participants). These hearings are inquisitorial and the aim is to allow the CC to put questions to the parties, probe responses and test the strength of the submissions and evidence of the parties. Multi-party hearings provide each party with an opportunity to hear and respond directly to evidence put forward by others.

Surveys and consultants

- 3.37 In many cases—for example, in an inquiry involving a significant number of third party suppliers or customers, or where the market is one directly affecting consumers—a survey will be a useful part of the information-gathering process. If the CC decides to conduct a survey the main party or parties will be consulted on the draft survey design and survey questions.

⁵⁴CC1, [Rule 7.1](#).

- 3.38 Before any contract is awarded and as far as practicable, the main party or parties will be informed which market research organizations have been invited to tender. Where possible, the parties will be asked if they have any objections to the proposed market research organizations (for example, due to possible conflicts) and any objections will be considered by the CC prior to any appointment being made.
- 3.39 In some cases where a survey is conducted, main and/or some third parties may be required to provide contact details for a sample of their customers or suppliers so that the survey company can seek the views of relevant persons.
- 3.40 For some merger inquiries, the CC may wish to employ a consultant to provide specialist advice on the sector concerned. Where possible, before any contract is awarded, the main party or parties will be informed and allowed a short time to inform the CC of any objections to the proposed consultants and any such objections will be considered prior to any appointment being made.

Site visit

- 3.41 During the early weeks of the inquiry the inquiry team will usually arrange a site visit.⁵⁵ This is a chance for the CC to gain a greater understanding of the merged parties' businesses by visiting key facilities and meeting key operational staff. Parties are encouraged to organize a short presentation on their businesses in order to explain the nature of the business and the context in which the merger transaction takes place, followed by a tour of the relevant business areas and an opportunity for questions. They may also wish to present their initial views on the relevant competition issues as they see them.

⁵⁵Where this is appropriate given the nature of the businesses involved.

The issues statement

- 3.42 At an early stage the CC publishes an issues statement with an accompanying news release. The issues statement sets out the competitive theory or theories of harm which will form the framework for the analysis and outlines the issues which the inquiry will be exploring. It may also address the question of whether there are any potentially relevant customer benefits⁵⁶ resulting from the merger (see paragraph 5.9). The issues statement will invite comments from parties, setting a deadline for their receipt. The issues statement and the accompanying news release—embargoed until the publication date—will be sent to the main party or parties on the working day before publication. Exact timings will depend on whether the CC considers the issues statement to be market sensitive.⁵⁷
- 3.43 Later in the inquiry, the issues statement may be annotated and used as an agenda for the main party hearing (see paragraph 4.6). The annotated issues statement will not generally be published.

Part 4: Assessment

Working papers

- 4.1 Internal CC papers dealing with the substance of an inquiry are termed ‘working papers’. Working papers will be prepared covering the factual background, evidence and analysis relevant to the statutory questions and the theories of harm that have been identified. They may cover various topics including, for example, market definition, the counterfactual (what would have been expected to happen in the absence of the merger), competitive effects, and entry or expansion. They will include reference to the key evidence and/or analysis which the CC is taking into account when considering the statutory questions it must answer (see [Part 2](#)). For

⁵⁶Relevant customer benefits are defined in section 30 of the Act. See also CC8, paragraphs 1.14–1.20.

⁵⁷Where statements are market sensitive, embargoed documents will generally be provided after markets have closed, with publication at 07.00 the following morning, just before markets open. See also paragraph 5.15.

information on the CC's analytical approach see the joint CC/OFT merger assessment guidelines.⁵⁸

- 4.2 Working papers contain the CC's approach and developing thinking to the statutory questions at a point in time. They are not definitive, nor do they represent the CC's final views, either in relation to the scope of the inquiry or the merits of any particular argument. Some working papers may be published as self-standing papers on the CC's website; more commonly they may form the basis of sections of, or appendices to, the CC's provisional findings.
- 4.3 The CC may update certain working papers as its thinking develops. The CC will consider all comments from parties on its working papers, but will not necessarily respond separately to each comment. The CC will address key issues arising in its provisional findings.

Transparency

- 4.4 The CC does not offer access to the file, but instead ensures that parties are able to comment and make representations on the arguments and evidence that underpin the CC's provisional findings and final decision.⁵⁹ The way the CC ensures this is done will vary for each of its references. Set out below are steps that the CC generally takes to facilitate parties' understanding of the CC's developing thinking and ability to comment on the evidence and analysis.

⁵⁸CC2 (Revised).

⁵⁹CC7.

- 4.5 The CC may send to parties some of the working papers, or extracts from some of the working papers, which have been prepared, and invite comments and further evidence in response.⁶⁰
- 4.6 Further, in advance of the main party hearing, the CC will generally provide the parties with an annotated issues statement or hearing agenda, giving an overview of its analysis to date. Parties will also generally have an opportunity to comment on further working papers produced after that hearing either in writing, or where appropriate at a staff meeting (a record of such meetings would be made and provided to the group).
- 4.7 The CC may invite parties to comment on specific pieces of technical analysis. If this raises issues as to the confidentiality of the data underlying a particular piece of analysis, but the CC nevertheless considers that disclosure is necessary (subject to additional protections being put in place—see [Annex D](#)), the CC may restrict the disclosure of that data to the main parties' external advisers only in order to preserve as far as possible the confidentiality of the data concerned. In such cases, strict rules relating to access and non-disclosure will be applied and recipients will be required to acknowledge that they understand the basis on which such disclosure is made and that they will comply with these restrictions. If advisers fail to comply with these requirements, they will be subject to sanctions including, at a minimum, revoking their access to the data. Where the CC decides that it is appropriate to disclose information in order to facilitate its function, but the information in question is not made public, it is an offence for the recipient to disclose that information without the CC's prior consent.⁶¹

⁶⁰Some working papers are prepared for the purpose of facilitating internal debate and are not disclosed to parties. In this guidance, the reference to working papers refers to those documents that are disclosed to parties.

⁶¹Section 241(2) of the Act.

Put-back

- 4.8 The CC may send some working papers (or relevant extracts) to parties for the purposes of enabling them to:
- (a) verify the factual correctness of certain content (usually information supplied by them); and
 - (b) identify confidential material, prior to disclosure of the material. Parties should give reasons for any requests they make for material to be excised from CC documents that are to be published by reference to section 244 of the Act (see also paragraph 3.29 and [Annex D](#) on confidentiality and disclosure).
- 4.9 This process is referred to as put-back. The purpose of the put-back process is not to enable a restatement of case by parties.
- 4.10 As far as practicable, the source of all material in working papers will be identified which will assist the parties in checking such papers.
- 4.11 This put-back process will also take place for other material published by the CC including provisional findings and the final report.

The main party hearing

- 4.12 Towards the close of the assessment phase the CC will normally hold a hearing with the main party or parties.⁶² The CC is likely to wish to speak to senior management in the businesses affected by the merger. In the case of a completed merger, the CC may want a separate hearing with the sellers/former management of the acquired company (see paragraph 9.16). For an anticipated merger, the CC is likely to want to hear from the acquirer and the target company separately.

⁶²The CC may compel specified persons to attend to give evidence and may also take evidence under oath using its powers under section 109 of the Act.

- 4.13 The main party hearing is an inquisitorial process. The primary purpose of this hearing is to enable the CC to test the evidence and explore key issues with the parties. It also provides an opportunity for the parties to explain their position orally, directly to the decision-makers. It should not be seen as an opportunity for parties to put questions about the substantive analysis to the CC.
- 4.14 As noted in paragraph 4.6, in advance of the hearing the CC will provide the main party or parties with an overview of the CC's analysis at that stage.
- 4.15 The main party hearing is a formal occasion at which the main party is usually given the opportunity to make brief opening and/or closing statements.⁶³ Parties should expect to provide a concise explanation of their case and to respond to the CC's questions.⁶⁴ A transcript of the hearing will be taken, and will be sent to the main parties after the hearing for checking. As set out in paragraph 4.7, intentional or reckless provision of false or misleading information is a criminal offence (this includes where the information is provided during a hearing).⁶⁵ Whilst a party may be accompanied by its legal or other professional advisers, the CC will expect to hear primarily from the representatives of the business themselves. The CC may direct its questioning at specific individuals.
- 4.16 Summaries of main party hearings are not normally prepared during merger inquiries, although points arising from these hearings may be put to third parties for comment where appropriate.
- 4.17 The CC staff (and, on occasion, members of the group with specialist skills in the relevant area) will sometimes also participate in face-to-face meetings with parties

⁶³Parties must inform the inquiry staff team in advance if they wish to make an opening or closing statement and where relevant provide copies of any presentation materials they wish to use when making those statements.

⁶⁴Parties have the opportunity to comment more fully in writing on the approach and views of the CC disclosed to them in working papers disclosed to them for comment (see paragraphs 4.5 and 4.6) and in its provisional findings.

⁶⁵Section 117 of the Act.

with the aim of facilitating understanding of detailed technical or analytical matters arising during the inquiry or to clarify evidence. Such meetings will be led by CC staff, and a transcript or note will be taken, depending on the circumstances.

Publication of provisional findings

- 4.18 The CC reaches provisional conclusions on the first two statutory questions (see paragraph 2.4). These are recorded in the Notice of provisional findings. The provisional findings represent a provisional decision on the two statutory questions, including the CC's competition assessment, which will most commonly be changed only in response to new arguments or evidence. They will set out the core background details necessary for an understanding of the inquiry (for example, details of the main party or parties, the principal features of the industry where relevant and a description of the relevant merger situation) and a full explanation of the CC's reasoning in reaching its provisional findings.
- 4.19 Prior to publication the staff team will normally put back to parties excerpts from the provisional findings not already put back in working papers to check that all confidential material has been identified. As well as identifying any confidential material, parties should, at the same time, explain why they consider that the material in question should be excised by reference to section 244 of the Act (see paragraph 3.29 and [Annex D](#) on confidentiality and disclosure). Given the constraints of the inquiry timetable, the deadline for parties to respond to such further put-back may be short (generally no more than 24 hours).
- 4.20 When the group has made its decision on excisions from its provisional findings, each party is informed of any of its requests the group has rejected. The party has

the right to make further representations to the CC's Chief Executive (see paragraph 3.31).⁶⁶

- 4.21 In many cases, the Notice of provisional findings and a summary of the provisional findings will be published at the same time as the more detailed draft decision is provided to the parties under embargo, giving the parties a final opportunity to check that the necessary redactions have been made. However, if the CC is fully satisfied that all confidential material (except any it has decided to publish) has been removed from the provisional findings, it may publish the full decision the morning after it has been sent to the main parties. If an SLC has been identified a Notice of Possible Remedies is published, usually at the same time as the summary of the provisional findings.
- 4.22 It may be appropriate, though unusual, to include proposals for possible remedies in the provisional findings report, depending on the CC's proposed decision on the competition questions and the stage that its thinking has reached.⁶⁷ Usually where there is a provisional SLC finding, the CC publishes a Notice of Possible Remedies.
- 4.23 The Notice of Possible Remedies acts as a formal starting point for discussion of remedies. It will set out one or more options to remedy the SLC that the CC provisionally expects to arise as a result of the merger, and may set out the CC's initial thoughts on the relative merits of these options. If parties wish to propose potential remedies in advance of publication of provisional findings, details of the proposals should be provided in writing and may be discussed with staff without prejudice to the CC's provisional findings. Where relevant, the Notice of Possible Remedies will include any options put forward by the parties. The Notice of Possible

⁶⁶CC4, *General Advice and Information*, March 2006, [paragraph 6.30](#), and CC7, [paragraph 4.6](#).

⁶⁷CC1, [Rule 11.2](#).

Remedies will invite comments by a given date from all interested parties on the remedies set out in the Notice, and will also invite parties to suggest alternatives.

- 4.24 The CC will issue a news release announcing the publication of its provisional findings and, if relevant, the Notice of Possible Remedies.

Part 5: After provisional findings

Public consultation on provisional findings and Notice of Possible Remedies

- 5.1 The Notice of provisional findings identifies a period (of at least 21 days⁶⁸) in which the parties can comment on the provisional findings. Where the CC has provisionally found an SLC arising from the merger, consideration of possible remedies to the SLC proceeds in parallel with consultation on the provisional findings. Responses to the Notice of Possible Remedies are typically requested within 14 days (and in any event, no less than 7 days) so that they can be considered before response hearings. In the interests of keeping the inquiry to schedule, response hearings may be held before the 21-day consultation period on the provisional findings has expired.
- 5.2 Responses from parties to the provisional findings and the Notice of Possible Remedies are generally disclosed through publication on the CC website. Parties should, at the same time as they submit their responses to the CC, identify any confidential material contained in those responses and explain why such material should be excised by reference to section 244 of the Act (see also [Annex D](#)).
- 5.3 The CC will consider all responses it receives, and whether the provisional findings should be altered in the light of these (see paragraph 5.14). In most cases, views on provisional findings and on remedies will be explored at a single hearing. Where the

⁶⁸CC1, Rule 10.5(a).

merger is subject to investigation in other jurisdictions, it would be usual for the CC to discuss issues relating to remedies with the relevant competition authorities.

Response hearings

- 5.4 Where the CC's provisional finding is that the merger gives, or may be expected to give rise to an SLC, response hearings will take place. Response hearings will generally be held with the main parties and potentially with key third parties likely to provide evidence or views useful for reaching a final decision on the competition question or on remedies. This could include potential buyers, customers or relevant economic regulators.
- 5.5 Response hearings may take place where the provisional finding is that no SLC arises as a result of the merger, although main parties often choose not to take advantage of this.
- 5.6 The CC will consult the OFT on possible remedies, because the OFT may have responsibilities for monitoring and enforcing remedies in certain circumstances and its views on practicability and costs of enforcement are therefore likely to be relevant. The OFT may be invited to a hearing to discuss remedies. The OFT's views are not usually disclosed but relevant issues raised by the OFT will be included in the remedies working paper and disclosed to the main parties (see paragraph 5.9).
- 5.7 The response hearing with the main parties will be held in the presence of the group. The hearings with third parties may often be taken by CC staff, and may be held face-to-face or by teleconference. Parties will be given the opportunity to comment orally on the provisional findings and the CC may seek clarification of particular points made in written submissions or at the hearing. However, the hearing is likely to focus on possible remedies. Transcripts of the hearings will be taken and processed

in a similar way as the transcripts of the hearings held earlier in the inquiry process (see paragraph 3.33). However, summaries of third party response hearings will not necessarily be published—the publication of such summaries will depend on the circumstances of the case and will take into account confidentiality considerations. Where relevant and subject to confidentiality considerations, comments from third parties will be incorporated into the remedies working paper that is disclosed to the main parties (see paragraph 5.9).

- 5.8 Following this hearing, the main party or parties may submit further, or amended, proposals for remedies. Non-confidential versions of these proposals will be published on the CC's website. There may also be further meetings with the main parties at staff level. These meetings will be working meetings led by CC staff at which the details of specific remedies proposals can be explored. A transcript or note of such meetings will be taken, depending on the circumstances. Comment on remedies proposals may be invited within a given period, typically no less than 5 working days, for the responses to be considered within the administrative timetable.

Remedies working paper

- 5.9 A remedies working paper, containing a detailed assessment of the different remedies options and setting out a provisional decision on remedies, will be sent to the main parties for comment following the response hearings.⁶⁹ This paper will also set out the CC's views on whether the merger gives rise to relevant customer benefits,⁷⁰ and if so, whether the proposed remedy should be modified in order to preserve those benefits. A period typically no less than 5 working days would normally be allowed for the main parties to submit their comments. Third parties may also be consulted about the proposed scope of remedies and their views on any

⁶⁹CC8 explains how the CC conducts its substantive assessment of remedies options, and how it takes 'relevant customer benefits' into account in this assessment (see CC8, paragraphs 1.14–1.20).

⁷⁰As defined in section 30 of the Act.

relevant customer benefits, and the remedies working paper may in some cases be published on the CC's website if the CC deems a wider consultation to be necessary. The remedies working paper is not, however, usually published.

- 5.10 Following consultation with parties on the remedies working paper and any further discussions and meetings with the parties that the CC considers necessary, the CC develops the remedies section of the CC's final report.

Publication of the final report

- 5.11 The CC is required to publish its conclusions on the statutory questions (see paragraph 2.4) in a report which must contain the reasons for the decisions and such information as the CC considers appropriate for a proper understanding of the decision.⁷¹
- 5.12 The report must normally be published⁷² within 24 weeks of the date of the reference.⁷³ The inquiry can be extended, once only, by up to eight weeks if the CC considers there are special reasons why a report cannot be prepared and published within the statutory deadline.⁷⁴ In addition to an extension for special reasons, the inquiry period can be extended if one of the main parties fails to provide information in response to a formal notice to produce within the time stated in the notice⁷⁵ (see paragraphs 3.17 to 3.20 on section 109 notices). In this case the inquiry timetable is extended until the information is provided to the satisfaction of the CC or the CC decides to cancel the extension. If the inquiry timetable is extended for any reason a

⁷¹Section 38 of the Act.

⁷²The CC is responsible for publishing all its reports of merger inquiries that are not public interest cases (see [Part 8](#)).

⁷³Section 39(1) of the Act. The statutory deadline for publication will normally, for convenience, be stated in the OFT's reference and will also be shown in the administrative timetable and on the inquiry page for the relevant inquiry on the CC's website.

⁷⁴Section 39(3) of the Act.

⁷⁵Section 39(4) of the Act.

notice of extension will be published⁷⁶ and the administrative timetable will be revised and re-published.

- 5.13 The final report contains the CC's final decisions on the statutory questions it must decide (see paragraph 2.4), including remedies if there is an SLC finding. The final report will also contain the reasons for those decisions and such information as is necessary to facilitate a proper understanding of the decisions and the reasons.⁷⁷
- 5.14 If the final report contains significant additions to, or amendments of, the text in the provisional findings, this text will be put back to the relevant parties prior to publication of the final report (see paragraphs 4.8 to 4.11). Where the CC changes its provisional decisions on the statutory questions as a result of evidence received following publication of its provisional findings, it may be appropriate for the CC to publish, or otherwise disclose to the main parties and relevant third parties, a description of its reasons for changing its provisional decision in order to provide parties with an opportunity to comment prior to publication of the final report. In such cases, the requirement for a minimum 21-day period for consultation on provisional findings set out in the CC's rules of procedure does not apply. In deciding whether it is necessary to publish or otherwise disclose such an update of its provisional findings, the CC will in particular have regard to its statutory duties to consult where it proposes to make a relevant decision that is likely to be adverse to the interests of the merging parties.⁷⁸
- 5.15 The CC will send the final report, including a summary, to the main parties in the form in which it will be published, ie with excisions. The final report and summary are embargoed until publication. At this stage, the main parties are not generally invited

⁷⁶Section 107(2)(c) of the Act.

⁷⁷Section 38 of the Act.

⁷⁸Section 104 of the Act.

to make a final check of the text because most excision requests will have been resolved ahead of publication of provisional findings (see paragraphs 4.19 to 4.21). In cases where the main party is a UK-listed company,⁷⁹ a copy of the final report, as well as the news release, is made available to the main parties on an embargoed basis after the Stock Exchange has closed on the day before publication. By 7.00 am the following day, the final report is published on the CC website.

5.16 If there is no SLC finding in the CC's final report, this is the final stage in the merger inquiry process.

5.17 Where the report contains an SLC finding (provided that finding is the decision of at least two-thirds of the members of the group⁸⁰), and the CC has decided to implement remedies to address that SLC, the OFT is sent an unexcised version of the final report as well as the published excised version. In other cases, the OFT is sent the report as published.⁸¹

Part 6: Implementation of remedies

6.1 Following publication of the final report, if the CC has concluded that a merger would give rise to an SLC and that remedial action should be taken by it to remedy that SLC, the CC will take steps to implement such remedies. This may be achieved either by the CC accepting undertakings from appropriate persons⁸² that have been negotiated with the parties concerned or by the CC exercising its power to make an order.⁸³ The main focus at this stage in the process is on implementing the detail of

⁷⁹Where the main parties are listed companies in other jurisdictions, the CC will, where possible, seek to avoid publication during stock exchange hours in those jurisdictions.

⁸⁰Competition Act 1998, Schedule 7, paragraph 20, requires that a group must reach a decision that there is an anticompetitive outcome by a two-thirds majority if it is to go on to consider remedial action. However, only a simple majority is required for decisions on the questions relating to remedies. The Chairman of a group has a casting vote on any question to be decided by the group (Competition Act 1998, Schedule 7, paragraph 21).

⁸¹See section 118(5) of the Act, and CC12, *Disclosure of information by the Competition Commission to other public authorities*, April 2006, [paragraph 2](#).

⁸²Section 82 of the Act. This includes but is not limited to the main parties.

⁸³The CC's order-making powers are set out in sections 84, 86, 87, 88 of, and Schedule 8 to, the Act.

the chosen remedy option, not on points of principle. Action by the CC must be consistent with the decision on remedies set out in the final report unless there has been a material change of circumstances or there are special reasons for acting differently.⁸⁴

6.2 The group remains in existence throughout this phase until final undertakings are accepted by the CC or an order made.⁸⁵ Existing interim measures remain in force for the same period. The CC will also consider whether interim measures should be put in place (where none are already in place) or existing interim measures varied (for example, allowing for the appointment of a monitoring trustee), pending the implementation of final remedies. The administrative staff team at the CC may change at this point of the inquiry. The main parties will be informed of any new points of contact.

6.3 The CC will draw up a timetable for the drafting and implementation of undertakings or an order, and share key milestones with the main parties to help them plan their input to the process.

6.4 The process of agreeing undertakings or making an order will involve informal consultation between the CC (with meetings usually being held at staff level), the main parties and the OFT. Third parties may also be consulted where relevant. Parties will be asked to comment both on the substance of the draft undertakings or order, and on any material which they consider to be confidential and which they would want to be excised from the published version by reference to section 244 of the Act.

⁸⁴Section 41(3).

⁸⁵Although the group may be reappointed to oversee any action required to be taken by the parties to give effect to the undertakings/order rather than this oversight role being carried out by the Remedies Standing Group (see paragraph 6.7).

- 6.5 When a version of the undertakings has been provisionally agreed on which the CC is willing to consult publicly, the CC will then publish a 'notice of intention to accept final undertakings' or a 'notice of intention to make an order' on its website, to which the draft undertakings or order are annexed. A minimum consultation period (15 days for undertakings and 30 days for an order)⁸⁶ is allowed for parties to comment on the notice.
- 6.6 The CC will decide whether any changes need to be made to the draft undertakings or order in light of responses to the consultation. If any material changes are required, a further minimum 7-day consultation period is required.⁸⁷ Minor changes do not require further consultation.
- 6.7 The CC then publishes a 'notice of acceptance of undertakings' or a 'notice of making an order'. At this point, the inquiry is finally determined. Responsibility within the CC for any further implementation (eg overseeing the divestiture process) will either pass to the Remedies Standing Group⁸⁸ or to an inquiry group appointed to oversee this part of the process (possibly the original inquiry group). Responsibility for monitoring and enforcement of behavioural remedies passes to the OFT.
- 6.8 If a party fails to comply with any undertakings it has given or any order imposed on it by the CC, compliance may be enforced by means of civil proceedings brought by the OFT or CC for an injunction or for interdict or for any other appropriate relief or remedy in one of the UK courts. In addition to enforcement by the OFT or the CC, any person affected by the contravention of undertakings or an order who has

⁸⁶Schedule 10, paragraph 2(f), to the Act.

⁸⁷Schedule 10, paragraph 5(c), to the Act.

⁸⁸www.competition-commission.org.uk/about_us/our_organisation/workstreams/remedies.htm.

sustained loss or damage as a result of such contravention may also bring an action against the party bound by the undertakings or order.⁸⁹

6.9 The OFT has a statutory duty⁹⁰ to keep undertakings and orders under the Act under review. From time to time, the OFT must consider whether, by reason of a change in circumstances, the set of undertakings or the order is no longer appropriate and should be varied or terminated⁹¹ and give the CC such advice as it considers appropriate.⁹² Responsibility for deciding on variation or termination of undertakings or orders lies with the CC in all but a very limited number of undertakings and orders.⁹³

Part 7: The cancellation process

7.1 In some cases when an anticipated merger is referred to the CC, the main parties decide not to proceed with the transaction. In such cases, the CC can cancel the reference and stop the inquiry. The CC has no power to cancel the reference of a completed merger.⁹⁴

7.2 Section 37(1) of the Act requires the CC to cancel a reference if it considers that the proposal to make arrangements of the kind mentioned in the reference has been abandoned. Where it is claimed that the arrangements have been abandoned and new arrangements are proposed or contemplated, the CC must be satisfied that the

⁸⁹Section 94 of the Act.

⁹⁰Under sections 92(2) and 162(2) of the Act. There is a similar legacy duty under sections 88(4) and (5) of the Fair Trading Act 1973 (as preserved in Schedule 24 to the Act).

⁹¹The statutory language refers to the variation, release or superseding of undertakings and the variation, superseding or revocation of orders.

⁹²The OFT and CC have entered into a memorandum of understanding (MOU) regarding the variation or release of undertakings. The current version of this can be found on the CC's website:

www.competition-commission.org.uk/our_role/ms_and_fm/pdf/mou_between_of_t_and_cc.pdf.

⁹³Certain undertakings and orders originally given to the Secretary of State under the Fair Trading Act 1973 remain the responsibility of the Secretary of State.

⁹⁴There may be circumstances where only part of the arrangements under consideration have been abandoned, it may be appropriate in such cases for the CC to continue its investigation. This will depend upon the terms of reference. For example in its report on the merger situation: *NTL Communications Corp and Newcastle United PLC* (July 1999), the terms of reference included a completed merger situation and an anticipated merger situation. During the course of the inquiry, the anticipated merger situation was abandoned. However, the then Monopolies and Mergers Commission continued its inquiry into the completed merger situation that had been referred to it and published its report accordingly.

arrangements that are described in the terms of reference have, in fact, been abandoned and that the new arrangements are not merely an amended form of the arrangements that were referred.⁹⁵

- 7.3 In order to be satisfied that the parties have abandoned the merger, the CC will require written assurance from the parties to the transaction to that effect. Written assurances are normally sought from the proposed acquirer (signed by persons of suitable seniority and with authority to bind the acquirer), though there may be cases where the CC will require additional assurances from the seller.
- 7.4 If parties decide not to proceed with the merger, this decision will often be taken soon after the merger has been referred to the CC and before a group has been appointed. If a group has not been constituted, or a group has not held its first meeting, the CC Chairman is able to cancel a reference where he is satisfied that arrangements have been abandoned.⁹⁶ If a group has been appointed and has held its first meeting, it falls to the group to cancel the reference.
- 7.5 Parties may seek cancellation at any time prior to final determination of the reference. Final determination occurs upon the acceptance of final undertakings or the making of a final order.⁹⁷

Part 8: Special types of merger inquiry: public interest references, media mergers and water mergers

Public interest and special public interest cases

- 8.1 The Act provides for certain mergers which raise closely defined public interest issues to be referred on public interest or special public interest grounds as well as,

⁹⁵R v MMC and SoS for Trade and Industry ex parte Argyll Group [1986] 2 All ER 257.

⁹⁶Competition Act 1998, Schedule 7, paragraph 15(8).

⁹⁷Section 79(1) of the Act.

or instead of, competition grounds. The public interest issues currently identified in the Act are:

- (a) national security;
- (b) accurate presentation of news and free expression of opinion in newspapers;
- (c) plurality of views in newspapers;
- (d) media considerations (the need for plurality of persons controlling media enterprises; availability of high-quality and varied broadcasting and need for those controlling media enterprises to have commitment to broadcasting standards); and
- (e) maintaining the stability of the UK financial system.

8.2 Where one or more of the specified public interest considerations appears to be relevant to a merger the Secretary of State can issue an intervention notice, effectively asserting jurisdiction over the merger.⁹⁸ Where such a notice has been issued the OFT reports to the Secretary of State as to whether a relevant merger situation has been or will be created and whether it may be expected to give rise to an SLC, and gives recommendations on the public interest consideration or (in the case of media public interest considerations) a summary of any representations received about the case.⁹⁹ Ofcom has the role of giving advice to the Secretary of State in media mergers where a public interest consideration has been identified.

8.3 The Secretary of State may refer the case to the CC¹⁰⁰ if he believes that:

- (a) there is a relevant merger situation;
- (b) a public interest consideration mentioned in the intervention notice is relevant to the merger; and

⁹⁸Section 42 of the Act.

⁹⁹Sections 44. and section 44A of the Act.

¹⁰⁰The Secretary of State also has the ability to seek undertakings in lieu of a reference in these circumstances, see Schedule 7 to the Act.

(c) taking account of that consideration and of any effect on competition that the OFT has found to exist, the merger operates or may be expected to operate against the public interest.¹⁰¹

- 8.4 A reference may be made on public interest grounds alone. If the OFT has advised that the merger may be expected to give rise to an SLC the reference will also require the CC to consider whether the merger gives rise to a SLC.
- 8.5 In public interest cases the CC reports to the Secretary of State and, if the CC considers that the merger operates or may be expected to operate against the public interest, makes recommendations as to the action the Secretary of State or others should take to remedy any adverse effects. The Secretary of State will make the final decision on the public interest test and take whatever remedial steps he considers necessary.
- 8.6 The CC's procedures for public interest inquiries are similar to those for normal merger references. The principal differences are that the CC provides its report to the Secretary of State and the final decision on public interest matters lies with the Secretary of State. The CC has to prepare a report and give it to the Secretary of State within 24 weeks (subject to the usual eight-week extension) from the date of the reference (see paragraph 5.12). The Act does not require the CC to consult the Secretary of State in the event that it proposes to extend the inquiry.
- 8.7 Some key procedural differences in public interest cases include:
- (a) The CC sends the excised version of the provisional findings to the relevant Secretary of State, Ofcom (if appropriate) and the OFT at the same time as copies go to main parties in advance of publication.

¹⁰¹Section 45 of the Act.

- (b) The CC conducts an excisions process as set out in paragraph 4.19, even though the CC does not make the final decision on excisions to be made in the published version of the report¹⁰² (see paragraph 8.9). The CC will consider requests for excisions, and decide whether it would be minded to accept or reject such request. Its views will be made available to the Secretary of State to facilitate the Secretary of State's task of preparing an excised version of the report for publication. The parties will not have seen the CC's views on excisions at the time the report goes to the Secretary of State and there will consequently be no provision to make representations to the CC Chief Executive about any rejected excision requests, as in the case of the standard merger inquiries (see paragraph 4.20).
- (c) The CC will inform the main parties at least 24 hours before the final report is sent to the Secretary of State that the report is to be despatched imminently.
- (d) The CC will issue a news release announcing only that the CC has delivered the final report to the Secretary of State; no part of the report or summary of it is disclosed at this time.

8.8 Once the Secretary of State has received the CC's report, he has 30 days in which to make and publish his decision.^{103,104} The Secretary of State is bound by the CC's decision on whether there is a merger situation and its findings on the competition question. But he must decide whether there is a problem in relation to the specified public interest issue. Whilst he must have regard to the findings in the CC's report regarding remedies, he can also decide on remedies other than those the CC has recommended. However, if the Secretary of State decides that the public interest issue is not relevant, he will send the case back to the CC to decide how to remedy

¹⁰²Section 118 of the Act.

¹⁰³Section 54(5) of the Act.

¹⁰⁴Guidance from BIS on the operation of the public interest provisions for media mergers can be found at: www.bis.gov.uk/files/file14331.pdf.

any competition issue identified. The Secretary of State's decision is published on the relevant government website and later posted on the CC website.

- 8.9 The Secretary of State must publish a non-confidential version of the CC's final report in public interest cases no later than the publication of his decision on the case¹⁰⁵ (ie within 30 days). The final decision on the material to be excised from the published report is made by the Secretary of State. Shortly after the Secretary of State has published the CC's final report, it is also posted on the CC's website.

European mergers: intervention to protect legitimate interests under Article 21(4) of the ECMR

- 8.10 The Act¹⁰⁶ provides for the Secretary of State to serve a European intervention notice in cases where the competition issues have a 'Community dimension' thus falling to be determined by the European Commission under the EU Merger Regulation,¹⁰⁷ and the Secretary of State is considering whether to take appropriate measures to protect legitimate interests under Article 21(4) of the EU Merger Regulation.¹⁰⁸ These include public security and plurality of the media. The Secretary of State may take action when he believes that a public interest consideration (other than the financial stability public interest consideration) is relevant to the case. The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003¹⁰⁹ makes provision: to require the OFT to produce a report where such a notice has been given;¹¹⁰ to enable the Secretary of State to refer the matter to the CC for a report within 24 weeks on whether, taking account only of the public interest consideration, the creation of the European relevant merger situation would operate against the public interest; and to

¹⁰⁵Section 107(9)(b) of the Act.

¹⁰⁶Section 67 of the Act.

¹⁰⁷Council Regulation 139/2004/EC on the control of concentrations between undertakings.

¹⁰⁸Legitimate interests specified in Article 21(4) of the EU Merger Regulation are: public security, plurality of the media and prudential rules. Member states may take appropriate measures to protect other legitimate interests with the prior consent of the European Commission. The European Commission has recognized the water merger regime described in paragraphs 8.16–8.19 as protecting a legitimate interest for the purposes of Article 21(4).

¹⁰⁹Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 SI 2003/1592.

¹¹⁰Ofcom has the role of giving advice to the Secretary of State in media mergers where a public interest consideration has been identified (see paragraph 8.2).

enable the Secretary of State to provide for the taking of action to remedy, mitigate or prevent any effects that arise which are adverse to the public interest. This procedure is similar to the procedure applying to merger public interest cases.

Newspaper mergers and other media mergers

8.11 Newspaper mergers and other media mergers may be referred to the CC as normal mergers under section 22 or 33 of the Act. They can also be referred as public interest mergers under section 45 (see paragraphs 8.1 to 8.9).¹¹¹ In such circumstances, it is likely that the CC would apply the procedures outlined for normal mergers, subject to the procedural differences set out in paragraphs 8.7 to 8.9 relating to public interest mergers.

Special merger situations

8.12 The Act also provides that in certain cases where a specified public interest applies, the Secretary of State may intervene on public interest grounds despite the fact that the standard jurisdictional thresholds are not satisfied (called a special merger situation). In such cases, the intervention is limited to public interest grounds and no competition assessment is carried out.¹¹²

8.13 Such an intervention may be made when neither the turnover test nor the share of supply test in section 23(1) of the Act—which requires the creation or enhancement of a 25 per cent share of supply—is met but at least 25 per cent of the supply of newspapers, or of the provision of broadcasting, in the UK or in a substantial part of the UK is provided by the person who carries on one of the enterprises involved in the merger.

¹¹¹The Communications Act 2003 integrated newspaper mergers into the general merger regime. It also specified media public interest considerations in section 58 of the Enterprise Act which can be applied to mergers involving newspaper enterprises and broadcasting enterprises.

¹¹²Section 59 of the Act.

- 8.14 In addition, a merger involving a government contractor (past or present) which holds confidential material related to defence—so triggering the consideration of national security—but which does not meet the normal qualifying jurisdictional thresholds relating to turnover or the share of supply, may lead to intervention under the special public interest regime.
- 8.15 In such cases, the CC would apply similar procedures to those outlined for normal mergers subject to the procedural differences set out in paragraphs 8.7 to 8.9 above relating to public interest mergers, although its assessment would be confined to the public interest issues specified in the intervention notice.

Water mergers

- 8.16 The OFT has a duty to refer mergers between two or more water enterprises where the value of the turnover of the water enterprise being taken over and the value of the water enterprise belonging to the person making the takeover each exceeds £10 million.¹¹³
- 8.17 The questions to be decided by the CC are:¹¹⁴
- (a) whether arrangements are in progress which will result in a water merger or whether a water merger has taken place;
 - (b) if so, whether the merger may be expected to prejudice or has prejudiced the ability of the Water Services Regulation Authority (Ofwat) in carrying out its functions by virtue of the Water Industry Act 1991, to make comparisons between water enterprises; and
 - (c) if there is or will be such a water merger and there is or will be such prejudice, whether to take action to remedy, mitigate or prevent the prejudice or any adverse effect resulting from it and if so what action should be taken.

¹¹³Sections 32 and 33 of the Water Industry Act 1991.

¹¹⁴Schedule 4ZA of the Water Industry Act 1991.

Questions (a) and (b) require at least a two-thirds majority of the group if remedies are to be considered.

8.18 In deciding on remedies, the CC will be able to have regard to their effect on customer benefits, but only where taking account of those benefits would not prevent a solution to the prejudice concerned or where the benefits are expected to be substantially more important than the prejudice.

8.19 Guidance on the CC's substantive assessment of water mergers is set out in CC9, *Water Merger References: Competition Commission Guidelines*, December 2004.¹¹⁵ The CC will follow its normal merger procedures for water mergers as set out in Parts 1 to 7 of this document.

Part 9: Procedural issues in completed mergers

9.1 Completed mergers give rise to a number of particular procedural issues of which parties should be aware. Whilst the UK merger regime is based on voluntary notification, where parties choose to complete their merger prior to seeking competition approval, they must expect to bear the costs and associated risks of having done so (this reflects the fact that these are avoidable risks given that parties have the ability to seek prior approval of their merger).

Impact of interim measures

9.2 As noted in paragraphs 3.7 to 3.8, once a merger has been referred to the CC, the CC has the power to take any action it considers necessary to prevent pre-emptive action. This is of particular concern in relation to completed mergers. 'Pre-emptive action' means action which might prejudice the reference or impede the taking of

¹¹⁵www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc9.pdf.

action following the reference.¹¹⁶ The CC will seek to ensure that it has the ability to take effective and appropriate remedial action if it reaches an SLC decision. Pre-emptive action may include an acquirer running down or neglecting the assets of the acquired business, integrating businesses in a way that might make future separation more difficult to achieve, discontinuing business activities (of the acquirer or the acquired business), departure of senior management or staff redundancy or extracting commercially sensitive information from the acquired business (if it would not be considered appropriate for active competitors to share such information, interim measures are likely to be necessary to prevent it being shared within the merged entity). For further detail on the use of interim measures by the CC, see [CC8](#), Part 5 (paragraphs 5.1 to 5.4) and Appendix A.¹¹⁷

9.3 These powers are extensive and the threshold at which they may be imposed has been confirmed by the CAT as being low.¹¹⁸

9.4 When completed mergers are referred to the CC, the CC will generally, as a holding measure, adopt any initial undertakings that have been accepted by the OFT or initial order made by the OFT. Adoption by the CC of such undertakings/order must take place within 7 days of the reference¹¹⁹ and will often be done by the Chairman or a designated Deputy Chairman of the CC, as the group may not have been appointed, or if it has, may not yet have met.

9.5 Following the reference, the CC's first day letter will refer to the likely need for the parties to agree interim undertakings with the CC (replacing the OFT initial undertakings/order), having regard to the scope of any integration that has taken place or changes made to the merging businesses. As noted above (see paragraph 9.2), it

¹¹⁶Section 80 (10) of the Act.

¹¹⁷*CC8, Merger Remedies: Competition Commission Guidelines*, November 2008.
www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc8.pdf.

¹¹⁸*Stericycle International LLC and Stericycle International Limited v Competition Commission* [2006] CAT 21.

¹¹⁹Sections 80 and 81 of the Act, read together with sections 71 and 72 of the Act.

will ask for extensive information about the extent of integration and interim arrangements for operating the merged enterprise.

- 9.6 The CC will review any existing interim measures and any consents that have been given by the OFT pursuant to those initial undertakings/order to establish whether the measures appear adequate or need to be supplemented. If additional measures are considered necessary, the CC will seek interim undertakings for the parties,¹²⁰ and if these are not forthcoming on a timely basis, the CC will impose an interim order.
- 9.7 In order to assess what further measures, if any, are required, in addition to the first day letter information request and the initial meeting with staff, parties to completed mergers can expect to attend additional meetings to discuss issues relevant to interim measures. Representatives of the parties attending such meetings should be in senior management roles and will be expected to be able to explain the structure of the merging enterprises, before and after the merger, provide details of relevant reporting lines on business and financial data and describe steps that have been taken to integrate the businesses or to keep them separate.
- 9.8 CC interim measures may include additional measures such as the appointment of a monitoring trustee to monitor and report to the CC on compliance with the interim undertakings and/or a hold separate manager. These are individuals appointed by the parties to the merger and at their expense but acting under the direction of the CC. Where the CC considers that the appointment of a monitoring trustee and/or hold separate manager is necessary, it will issue directions requiring the appointment to be made.

¹²⁰The CC's standard template undertakings form a starting point for developing appropriate interim measures and will be amended or supplemented as appropriate to the particular merger.

- 9.9 Monitoring trustee and hold separate manager candidates must be independent of the parties, have appropriate qualifications and capacity for the task and must not be subject to conflicts of interest. Whilst candidates may be proposed by the merger parties, they can be appointed only with the consent of the CC.
- 9.10 The responsibilities of the monitoring trustee/hold separate manager will be set out in a mandate or letter of engagement, the terms of which (including remuneration¹²¹) must be approved in advance by the CC. The monitoring trustee/hold separate manager is required to perform the directions of the CC in accordance with this mandate and will not be permitted to accept instructions from the parties. Where the parties wish the monitoring trustee/hold separate manager to depart from the terms of the mandate, this will be possible only with the prior consent of the CC.
- 9.11 Typically only the CC will have the right to terminate the appointment of the monitoring trustee/hold separate manager. However, parties may make representations to the CC to replace the monitoring trustee/hold separate manager if they have good cause to do so.
- 9.12 Given the importance of having interim measures in place early in the inquiry, the CC would normally expect a monitoring trustee/hold separate manager to be nominated and approved before interim undertakings are accepted.
- 9.13 Parties should be aware that the effect of these obligations may mean that they are required to fund the acquired business without having the level of oversight of that business that they would ordinarily expect.

¹²¹Remuneration of the monitoring trustee/hold separate manager must not compromise the independence of the monitoring trustee/hold separate manager and must provide sufficient incentive to perform the required function to an appropriate standard.

Seeking consent under interim measures

9.14 Where parties seek consent to action that would otherwise be prohibited by the interim measures, they will be expected to provide detailed reasons why the consent is sought, the precise steps that will be taken if the consent is granted and expected impact of those steps and to explain why such steps are required to be taken in advance of the CC's decision on the merger. If a monitoring trustee/hold separate manager has been appointed, the CC may seek their views as to the need for and the appropriateness of the intended actions. Parties should be aware that requests for consent, and any derogation granted from the interim measures, may be published on the CC's website (subject to excision of confidential information in accordance with the CC's statutory duties in Part 9 of the Act).

Information gathering and hearings

9.15 Although it is usual in the case of a completed merger for submissions to be made by the acquirer alone, the CC may wish to seek views on the merger from those associated with the acquired business, separately from any submissions from or hearings with the acquirer. For example, senior management of the acquired business who have transferred to the acquirer, may be asked to attend hearings separately from the acquirers.

9.16 The mere fact that a merger has completed does not mean that the seller has no role in the CC's inquiry. The seller, including any senior management of the acquired business that have left the organization, may be asked to provide information to the CC during the course of its inquiry and may be required to attend hearings with the CC.

9.17 Advisers to the seller may also be asked to provide information during the inquiry.

This may be necessary in order for the CC to establish whether there were credible alternative purchasers for the business.

Annex A: The initial factual information request

1. This annex sets out the types of information that the CC typically seeks at the outset of a merger inquiry. The CC aims to tailor requests; specific questions will depend on the information received from the OFT and the circumstances of the case.
Accordingly, the following lists are indicative only, designed to illustrate the range of topics and level of detail that may be covered.

Initial factual information request

2. This comprises information that the CC thinks should be relatively accessible to parties and does not require particular analysis. It is sometimes referred to as 'off the shelf' material. The request may be lengthy, but the CC will indicate which information parties should provide as a priority.

The merger

3. The legal agreements governing the merger.
4. A copy of all documents (including presentations) prepared by the parties or their advisers relating to the merger. This may include any financial due diligence reports, internal or external investment appraisals or strategy documents and prospectus, valuation reports and any additional papers relating to the merger.
5. A copy of calculation/valuation models, supporting the merger terms and the agreed price, including any analysis of the projected revenues.
6. Extracts from the minutes of board, management or executive team meetings concerning the merger, and any relevant presentations made to meetings of those bodies.

7. Press notices issued or announcements made about the merger.
8. Any circular issued to shareholders concerning the merger.

The parties to the merger

9. An organization chart showing the names, job titles and areas of responsibility of the senior executives of the parties.
10. A corporate diagram of the parties' group and detailed description of corporate structure.
11. Details of all shareholders in the parties with a holding of 3 per cent or more, and any other significant shareholdings that may be relevant to the merger.
12. Details of which of the reference products the parties supply over which geographic areas.
13. An outline of the main characteristics of the service the parties offer.
14. Strategy plans, business plans and other documents relevant to strategy, both historic and future.
15. Any marketing or advertising strategy documents covering the reference product.
16. Current selling aids and promotional materials.
17. External assessments or commentaries and any broker/analyst reports concerning the parties or the merger.

Accounting information

18. The most recent annual report of the parties or their parents.
19. The most recent statutory accounts for each of the parties.
20. The management accounts for the parties (reconciled to the statutory accounts).
21. The latest monthly management accounts (ie for the current financial year) for all relevant companies.

Competitors, suppliers and customers

22. Names and contact points of actual and potential competitors in the provision of the reference products indicating their total size and size in the reference area.
23. Names of suppliers including annual value and volume of purchases and contact details.
24. Names of customers including annual value and volume of sales and contact details.

The industry

25. Any market research reports or consumer surveys on the appropriate industry sector.
26. The name and contact details for any relevant regulatory authorities covering the industry.
27. Details of any trade associations which cover the industry.

Annex B: The market and financial information requests

1. This annex describes the types of information that the CC typically seeks in its main market and financial questionnaires and data requests. The CC aims to tailor requests by reference to the theories of harm it proposes to investigate and having regard to the information received from the OFT and the circumstances of the case. Accordingly, the following is an indicative description only, designed to illustrate the range of topics and level of detail that may be covered.

Market information request

2. Strategy—parties may be asked to provide details of the business strategy including challenges and opportunities in the future. This should also include an outline of any trends or events that may affect competition in the near future and an assessment of the scope for technical developments.
3. Previous competition inquiries—parties may be asked to provide details of any previous inquiry by a competition authority to which the parties have been subject.

The market(s)

Product market

4. Parties may be expected to provide a broad range of data on the products/services they supply over a period of several years (the duration will depend on the nature of the product/service and whether the relevant markets have cyclical trends). This may include: pricing data; information on customer purchasing behaviour; the core skills, attributes or facilities necessary to manufacture/supply the relevant products or services; and details of other companies active in the market or that may be able to enter the market with relative ease.

Geographic market

5. Parties may be asked to provide data regarding the location of their customers, which may include evidence regarding the distances travelled by customers and whether customers switch purchases to other areas.

Market shares

6. Parties may be asked to provide data to enable an assessment of their market strength, and that of their competitors.

Suppliers

7. Parties may be asked for details of their supply chain and their relationship with their suppliers, including identifying potential alternative suppliers. This may include information about the scale of their suppliers. In particular, parties should expect to provide information on the anticipated effect of the merger on their supply chain or relationship with suppliers.
8. Parties may also be asked to provide any known information about suppliers to their competitors.

Customers

9. Parties may be asked to provide details of their customers and the factors that customers take into account in deciding where to source their requirements (eg price, quality, service support). This may include changes in customer relationships over time. In particular, parties should provide details of the anticipated impact on customer relationships resulting from the merger.

Competition, pricing and marketing

10. Parties may be asked to provide data to assess competition in the relevant markets relating to the ways in which they compete with one another and with other market participants. This may include costs information, pricing strategy, range of products/services supplied, nature of their advertising and marketing.

Barriers to entry, expansion and exit

11. Parties may be asked to identify and provide details of barriers to entry or expansion and the costs associated with overcoming those barriers. This may include information regarding potential entrants to the market.

Financial information request

The transaction

12. Parties may be asked to provide details of the sales process including consideration of alternative transactions.

The rationale for the merger

13. Parties may be asked to provide an explanation of the rationale for the merger. Parties may also be asked to provide financial information about the merger, for example:
 - pro-forma financial statements for the merged entity;
 - any cost benefits or other synergies expected as a result of the merger; and
 - valuation methodology adopted.

The counterfactual

14. Parties may be asked to provide information about what they would have done absent the merger, including details of any interactions with other potential purchasers.

Financial performance and projections

15. Parties may be asked to provide information about their historical and projected financial performance. This may include:

- management accounting information at a divisional or product level;
- information about financing activities;
- details of any recent acquisitions and disposals.

Annex C: Format for responses and submissions

1. Parties should send correspondence to the CC electronically or on disc wherever practicable, in a format compatible with Microsoft Office programs, or as tagged PDF files. Spreadsheets, charts and all other digital source data files should be submitted, as far as possible, in Microsoft Excel or their equivalent original format, to facilitate CC analysis. Spreadsheets should include underlying formulae.
2. When sending material electronically or making up discs, parties should ensure that each file is given a fully explanatory title and that the files are sent without being grouped into folders and sub-folders. 10MB is the limit for acceptance by the CC system of emailed material in any one message.
3. In the case of urgent material, parties should check in advance that the recipient is available to receive it.
4. The CC will send some documents to parties as tagged PDF files and some as Microsoft Word files.

Annex D: Confidentiality and disclosure

1. The Act imposes a general restriction on the disclosure of specified information¹²² that the CC has obtained in connection with the exercise of its functions. However, the Act also sets out the circumstances in which the CC may disclose such information, including when disclosure is made with the consent of the person or undertaking to whom it relates¹²³ or is made for the purpose of facilitating the CC's functions¹²⁴ or is made to a public authority for the purpose of exercising that authority's functions.¹²⁵

2. Depending upon the circumstances of any disclosure by the CC, restrictions may apply to any further use or disclosure of the information. If information is disclosed for the purpose of facilitating the CC's functions but is not made available to the public, the person to whom the disclosure is made may not further disclose the information other than with the CC's agreement and for the purpose of facilitating the functions of the CC.¹²⁶ For more information, see [CC7](#).¹²⁷ For more information about disclosure to public authorities, see [CC12](#).¹²⁸

3. During the course of the inquiry, the CC will publish a number of documents on its website. These will include a statement of issues, the CC's provisional findings, a Notice of Possible Remedies and the CC's report. Additionally, and as explained in this guidance, the CC may also publish other information on its website in accordance with its objective of being open and transparent. For further information about the CC's disclosure policy see [CC7](#) and [CC12](#).

¹²²See Part 9 of the Act. Specified information means information which relates to the affairs of an individual or to any business of an undertaking and which comes to the CC in connection with the performance of its functions (section 237 and section 238 of the Act).

¹²³Section 239 of the Act.

¹²⁴Section 241(1) of the Act.

¹²⁵Section 241(3) of the Act.

¹²⁶Section 241(2) of the Act.

¹²⁷www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc7.pdf.

¹²⁸www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc12.pdf.

4. Whenever the CC considers whether or not to disclose specified information, it must have regard to three considerations set out in section 244 of the Act:
 - (a) the need to exclude from disclosure (so far as practicable) any information whose disclosure the CC thinks is contrary to the public interest;
 - (b) the need to exclude from disclosure (so far as practicable):
 - (i) commercial information whose disclosure the CC thinks might significantly harm the legitimate business interests of the undertaking to which it relates;
or
 - (ii) information relating to the private affairs of an individual whose disclosure the CC thinks might significantly harm the individual's interests; and
 - (c) the extent to which the disclosure of the information mentioned in (i) or (ii) above is necessary for the purpose for which the CC is permitted to make disclosure.

5. The CC may decide to excise sensitive information from its published reports. However, in cases where the CC decides to impose remedies in relation to a merger referred to it, the CC will provide the OFT with an unexcised (and unpublished) version of the final report to enable the OFT to comply with its monitoring functions under the Act. The OFT is bound by restrictions under the Act in relation to any further disclosure of the information the CC makes available to it (for further information see [CC12](#)).