Final decisions on reviews of two Enterprise Act 2002 merger remedies

Introduction

1. The Competition and Markets Authority's (CMA) annual plan for 2015/16[1] noted the start of a systematic review of existing merger, market and monopoly remedies, which may lead to the removal of measures that are no longer necessary and/or may be restricting or distorting competition.

2. The CMA announced on 26 March 2015 that it had launched a review of structural merger remedies put in place before 1 January 2005 and to which the merger provisions of either the Fair Trading Act 1973 or the Enterprise Act 2002 apply.

3. This notice concerns the final two structural merger remedies under consideration in the CMA's systematic review, and completes the reviews of all 76 merger remedies outlined in March 2015.

Jurisdiction

4. The CMA has a statutory duty to keep under review undertakings and orders. From time to time, the CMA must consider whether, by reason of a change in circumstances:

   (a) undertakings are no longer appropriate and need to be varied, superseded or released; or

   (b) an order is no longer appropriate and needs to be varied or revoked.

5. Responsibility for deciding on variation or termination of the undertakings lies with the CMA.

[1] See CMA annual plan 2015/16, paragraphs 4.12 & 4.17.

Final decisions

6. The CMA's final decisions in relation to both merger remedies are set out in Annex 1 and Annex 2 below. In both cases, the CMA's final decision is to retain the undertakings.

Annex 1 – Hanson plc / Pioneer International

Undertakings given by

1. Hanson plc.

Jurisdiction

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2006/0354).

Details of the transaction

3. Hanson proposed to acquire Pioneer International Limited (Pioneer)

Competition Commission (CC) report published

4. Undertakings in lieu of a reference to the CC were given in May 2000.

The market(s) concerned

5. The supply of aggregates, asphalt, and ready-mixed concrete.

Theory of harm

6. Reduction of competition in local markets for the supply of aggregates, asphalt, and ready-mixed concrete.

Description of the undertakings in lieu of reference

7. The undertakings (given on 4 May 2000) required Hanson to sell the 'Nominated Assets' (listed below) by 2 November 2000 and not to reacquire any interest in them.

   (a) Aggregates plants at Durnford and Grove.

   (b) Asphalt plants at Durnford, Forest Wood and Burley Hill.

   (c) Ready-mixed concrete plants listed below:

   Andover (Pioneer)
   Ashford (Pioneer)
   Banbury (Pioneer)
   Barford (Hanson)
   Bedford (Pioneer)
   Bristol (Pioneer)
   Chichester (Pioneer)
   Corby (Hanson)
   Dawley (Pioneer)

Eastbourne (Hanson)
Exeter (Hanson)
Fairford (Pioneer)
Filey (Hanson)
Gloucester (Pioneer)
Great Billing (Hanson)
Havant (Pioneer)
Heathfield (Pioneer)
Newhaven (Hanson
Newport (Pioneer)
Plymouth (Pioneer)
Portsmouth (Pioneer)
Risca (Hanson)
Rushden (Pioneer)
Swansea (Hanson)
Shoreham (Pioneer)

8. The undertakings in effect required Hanson to divest such assets, sites and quarries as would reduce their market share:

(a) in respect of aggregates and asphalt to 33% or less in all production areas within a 30-mile radius of a Hanson or Pioneer quarry; and

(b) in respect of ready-mixed concrete to 40% or less in all production areas within a 10-mile radius of a Hanson or Pioneer ready-mixed concrete plant (50% or less in those areas where there are at least four other competitors present, at least one of whom is not a national player).[2]

History of the companies since the undertakings were given[3]

9. Hanson (company number 00488067) was renamed Hanson Building Materials Limited on 14 October 2003. It is still active.

10. There is no reference to a UK company with the name Pioneer International that was in business at the time of the signing of the undertakings. We have assumed that the Pioneer International concerned was an Australian company of that name.[4] It is not clear whether this company is still active.

Change of circumstances

11. The CMA has not received or otherwise obtained sufficient information relevant to the extent of competition around each of these sites to enable it to identify any relevant changes of circumstances in relation to these sites.

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[2] See Department of Trade & Industry's press release.
[3] All information in this section is sourced from Companies House unless otherwise stated.
[4] See www.delisted.com.au.

Final decision

12. Based on the limited information available, the CMA's final decision is to retain the undertakings.

Annex 2 – Severn Trent Water Ltd / South West Water plc

Undertakings given by

1. Severn Trent plc (ST).

Jurisdiction

2. Enterprise Act 2002 (transferred from Fair Trading Act 1973 jurisdiction by SI 2006/355).

Details of the transaction

3. On 21 March 1996 ST announced its intention to make a bid for South West Water plc (SWW). ST and SWW owned regulated water and sewerage businesses, respectively Severn Trent Water Limited (STW) and South West Water Services Ltd (SWWS).

Monopolies and Mergers Commission (MMC) report published

4. 25 October 1996.

The market concerned

5. STW was, and is still, one of the largest of the ten water and sewerage companies (WaSCs) in terms both of turnover and area covered. It provides water and sewerage services in an extensive region of central England and Wales. At the time of the merger, 8.3 million customers obtained their sewerage services from STW, while water services were provided to 7.2 million customers, a water-only company supplied the remaining 1.1 million. SWWS supplies water and sewerage services to around 1.5 million customers, principally in Devon and Cornwall.

Special legal considerations which applied to water mergers

6. A merger of two or more water enterprises was required by section 32 of the Water Industry Act 1991 (WIA) to be the subject of a reference to the MMC.

7. Sections 32 to 35 of the WIA made special provisions for references to the MMC of such mergers. Section 34(3)(a) provided that in determining whether such a merger operates against the public interest the MMC 'shall have regard to the desirability of giving effect to the principle that the Director General of Water Services' (DGWS') ability, in carrying out his functions ... to make comparisons between different water enterprises should not be prejudiced'. The system of comparative competition by which the water

industry was regulated depended upon the DGWS' ability to make effective comparisons.

8. The availability of a wide range of comparative information about companies' costs and levels of service was regarded as important to the DGWS in enabling him both to set prices at each Periodic Review and, between Reviews, to secure higher standards of performance and customer service. The uses which the DGWS made of comparisons between companies had been developing as the industry has evolved since privatisation.

Theory of harm

9. The MMC considered that this proposed merger, involving as it would for the first time the loss of one of the ten WaSCs, was of a different order to any that had previously taken place in the industry. The MMC considered that SWWS was of substantial value to the DGWS for comparative purposes. This was particularly the case on the sewerage side, where the DGWS already had difficulties in making robust comparisons of operating efficiency with only ten comparators. The loss of SWWS as a comparator would have weakened the comparative system across the range of uses to which comparisons were put.

10. The MMC's conclusion under section 34(3)(a) of the WIA was that the loss of SWWS as a comparator would seriously prejudice the DGWS' ability to make comparisons between different water enterprises.

Description of the undertakings

11. The undertakings (given on 19 December 1997) required ST 'not to be party, or give effect, to any arrangements with respect to South West Water plc which would give rise to a compulsory reference to the MMC under sections 32-35 of the Water Industry Act 1991, or any successor statute to similar effect, unless the prior written consent of the Secretary of State (now the CMA)[5] has been obtained.'

12. The effect of the undertakings is therefore to require prior notification of a merger to the CMA. Consequently, while the undertakings remain in place, were a future transaction between ST and SWW to be contemplated, ST may request the consent of the CMA under the undertakings. Any application for

[5] Such consent under the undertakings is now granted by the CMA. The undertakings were amended by Article 4 and paragraph 5 of Schedule 1 to the Enterprise Act 2002 (Enforcement Undertakings and Orders) Order 2006, SI 2006/355, such that actions requiring the consent of the Secretary of State are to be granted by the Office of Fair Trading; this instrument itself was in turn amended by Article 2 and paragraph 19 of Schedule 1 to the Enterprise and Regulatory Reform Act 2013 (Competition) (Consequential, Transitional and Saving Provisions) (No 2) Order 2014, SI 2014/549, such that the consent of the 'Office of Fair Trading' is substituted with the 'Competition and Markets Authority'.

consent under the undertakings could be incorporated into the UK merger control process alongside the substantive assessment of the transaction.

History of the companies since the undertakings were given[6]

13. ST (company number 02366619) and STW (company number 02366686) are both still active.

14. SWW (company number 02366640) was renamed Pennon Group plc on 1 August 1998. It is still active and still owns South West Water Services Limited (company number 02366665) – which was renamed South West Water Limited on 1 August 1998 and is still active.

ST's views on the undertakings

15. ST submitted that the undertakings could now be removed because:

(a) the legislation for water mergers had changed with the introduction of the Water Act 2014;

(b) the process for assessing mergers under the special merger regime had changed;

(c) the regulatory framework for assessing the impact on Ofwat's ability to make comparison had changed;

(d) Ofwat's approach towards water mergers had changed in relation to issues to do with innovation; and

(e) the structural shape of SWW had changed. It highlighted two changes, first, it now operated 59% more sewage facilities in terms of length, having adopted private drains and sewers. Second, it had merged with Bournemouth Water in 2015, meaning that the structural analysis of a new merger situation today would inevitably be different.

Ofwat's views[7]

16. Ofwat confirmed that the special merger regime that applies to the water and sewage areas was revised by the Enterprise Act 2002 and Water Act 2014. Ofwat's view was that the changes brought about by the Enterprise Act 2002

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[6] Source: Companies House data.
[7] As part of this review, the CMA has liaised with Ofwat, the sector regulator, as envisioned in paragraph 3.16 of CMA11 Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders.

balanced prejudice and benefits in a different way to the way the issues were considered when the merger was considered by the MMC.

Change of circumstances

17. The CMA acknowledges that there have been changes to the legislation concerning the specific merger regime for the consideration of water mergers. The CMA notes that this new legislative regime came into force on 18 December 2015, after publication of the CMA's provisional decision in this review. The CMA highlights that the changes in legislation and guidance relate to the process and methodology for reviewing water mergers, in particular in relation to innovation and relevant customer benefits. It also highlights that the substantive test applied, that is whether a merger will prejudice Ofwat's ability to make comparisons between water enterprises, has not changed. Given this, the CMA has concluded that these changes in methodology for reviewing water mergers are not sufficient to constitute a change of circumstances relevant to these undertakings.

18. There have also been a number of changes, both to SWW and the character of the water industry since the time of the original transaction. In this context, the CMA acknowledges the two structural changes highlighted by ST. However, without prejudice to the result of any future investigation, and on the basis of the evidence available in this review, the CMA has not found that the changes identified are sufficiently material that the CMA can conclude that the substantive analysis would now be significantly different as a result of those changes, in the event that the transaction were repeated. The CMA has therefore not found these changes constitute a change of circumstances relevant to the undertakings.

19. The CMA considers that, in practice, these undertakings, which effectively require notification to the CMA of a repeated merger proposal, need not act as a substantial additional burden on ST in the event another merger involving SWW were under consideration. The CMA would be able to consider a request for permission under these undertakings as part of the substantive assessment of the merger proposal under the Water Industry Act 1991.

Final decision

20. The CMA's final decision is to retain the undertakings.