

After conducting its assessment regarding the allegations made within the scope of art.6, the Board then evaluated whether there was a violation of art.4 through an anti-competitive agreement made between Petrofis and Triple Star and through the conduct of Petrofis preventing the complainant from purchasing from other undertakings at market price. The Board evaluated that Petrofis did not have a significant supply source that could enable it to put pressure on undertakings to not supply to the complainant and there was no indication that Petrofis, Triple Star and THY OPET were party to an anti-competitive agreement.

In line with all these assessments, the Board concluded that the investigated undertakings did not violate arts. 4 and 6 of the Law No. 4054 and did not impose any administrative monetary fine on these undertakings.

The Board's decision is of importance as it provides a detailed insight into the conditions for refusal to deal and discriminatory practices as well as assessment on dominant position.

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MERGERS

*Merger control—decision—
acquisition—supply of packed
sugar—three to two merger—
counterfactual—test for proof of
market exit by target—
acquisition approved*

🔗 Acquisitions; Counterfactual analysis; Failing firm defence; Merger control; Sugar

CMA clears acquisition of sugar business

In September 2024, the UK's Competition and Markets Authority (the "CMA") cleared the proposed acquisition by T&L Sugars Limited ("T&L") of certain assets of Tereos United Kingdom and Ireland Limited (the "Tereos Business").¹ Whilst the CMA's view was that this would reduce the number of competitors in the relevant market from three to two,² it was satisfied that, absent the acquisition, the Tereos Business would have exited the market entirely.

Background

T&L refines and distributes sugar and related products in the UK,³ and the Tereos Business packs and distributes sugar to customers including retailers, restaurants and hotels (so-called 'business-to-consumer' or 'B2C' customers).⁴ The CMA judged that the parties competed in the supply of various types of packed sugar to B2C customers in the UK.⁵

Review framework

When reviewing a merger, the CMA is required to assess whether there is a realistic prospect of a substantial lessening of competition ("SLC") at Phase 1,⁶ and whether there will be an SLC on the balance of probabilities at Phase

¹ CMA press release, *Sugar deal cleared by CMA*, 3 September 2023, available at: <https://www.gov.uk/government/news/sugar-deal-cleared-by-cma>.

² CMA Phase 1 decision ("Phase 1 Decision"), 17 July 2024, available at: <https://www.gov.uk/cma-cases/t-and-l-sugars-slash-tereos-merger-inquiry>.

³ CMA Final Report ("Final Report"), 3 September 2024, para.3, available at: https://assets.publishing.service.gov.uk/media/66d5bb09701781e1b341db09/Final_report.pdf.

⁴ Final Report at para.4.

⁵ Final Report at para.5.

⁶ CMA, Merger Assessment Guidelines ("CMA129"), 18 March 2021, paras 2.33–2.34, available at: https://assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs_for_publication_2021_-__.pdf.

2.⁷ As part of this assessment, the CMA is required to compare the expected circumstances in the relevant market post-transaction to the competitive situation which would have prevailed absent the transaction, known as the ‘counterfactual’.⁸ Whilst the counterfactual will usually be that the competitive conditions as they existed prior to the merger continue to prevail, it is open to parties to argue that they would have been different, for example because one of the transaction parties would have exited the market altogether.⁹

The CMA’s Phase 1 decision

In March 2024, the CMA decided following a Phase 1 inquiry that there was a realistic prospect that the proposed transaction may have been expected to result in an SLC in the UK.¹⁰ In its reasoning, the CMA found that prior to the transaction, T&L and the Tereos Business faced competition only from one other competitor, British Sugar.¹¹ Further, it found that the appropriate counterfactual was that the Tereos Business continued to compete in the relevant market as an independent competitor.¹²

The CMA’s Phase 2 decision

However, following an in-depth Phase 2 investigation, the CMA found that the appropriate counterfactual was one where the Tereos Business exited the market. This required the parties satisfying both of the following limbs:¹³

1. The Tereos Business would have exited the market, absent the transaction (“Limb 1”); and
2. There would not have been an alternative, less anti-competitive purchaser for the firm or its assets to the acquirer in question (“Limb 2”).

With regards to Limb 1, the CMA found that the Tereos Business had had a “prolonged period of poor financial performance”, as per its internal documents and the CMA’s own analysis.¹⁴ Together with other factors, including the Tereos Business’s redundancies and attempts to restructure, this allowed the CMA to conclude that the business would have exited the market altogether were it not for the transaction.¹⁵

Limb 2 is important, since even if a firm would not stay in a market independently absent acquisition, the CMA must satisfy itself that there is no buyer which could have produced a *more competitive* scenario. With regards to Limb 2 in this case, the CMA found that although T&L was not the only party that showed interest in the Tereos Business,¹⁶ there was no evidence to suggest that there would have been an alternative, less anti-competitive purchaser for the business, including because the pool of alternative purchasers was “likely to be limited”.¹⁷ This meant that the parties needed simply to prove that the market would be no less competitive than in a world where the Tereos Business exited altogether; given that, in such a scenario, T&L and the Tereos Business would not have competed at all, the CMA found that the acquisition would not substantially lessen competition as compared to the counterfactual.¹⁸

⁷ CMA 129 at para.2.36.

⁸ CMA 129 s.3.

⁹ CMA 129 at para.3.21ff.

¹⁰ Phase 1 Decision at para.119.

¹¹ Phase 1 Decision at para.43.

¹² Phase 1 Decision at para.40.

¹³ CMA 129 at para.3.21.

¹⁴ Final Report at para.4.34.

¹⁵ Final Report at paras 4.35–4.36.

¹⁶ Final Report at para.4.57.

¹⁷ Final Report at para.4.58.

¹⁸ Final Report at paras 4.59–4.60.

Other use cases of the exiting firm counterfactual

This is not the CMA's only acceptance of the exiting firm counterfactual in recent months. In August 2024, the CMA cleared the acquisition by Eurofins of Cellmark at Phase 1. It found that "...absent the Merger, it is inevitable that Cellmark would have exited the markets in which it is active and there would not have been a less anti-competitive purchaser for Cellmark or its assets than Eurofins."¹⁹

It is important to note, however, that whilst this counterfactual is commonly deployed in cases where an acquired or to-be-acquired firm is in financial difficulties, this is not the only application. The CMA notes that "...exit may be for other reasons, for example because the target firm's corporate strategy has changed."²⁰

Conclusion

Whilst the exiting firm scenario has been used with success by transaction parties in recent months before the CMA, it remains difficult to prove that it is the most likely counterfactual. For example, the CMA's guidance notes that even if a firm has entered administration, this "may not be sufficient to demonstrate that exit is inevitable or likely."²¹

It is likely that the CMA, which has placed increasing emphasis on the importance of the parties' internal documents when assessing mergers, will be looking for clear documentation prepared outside of the context of a merger that exit from the market is the most likely counterfactual.²²

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¹⁹ CMA Phase 1 decision, 19 August 2024, para.58, available at: https://assets.publishing.service.gov.uk/media/66c2f82867dbaeb97a13e344/Full_text_decision_-_Eurofins_Cellmark.pdf.

²⁰ CMA 129 at para.3.22.

²¹ CMA 129 at para.3.27.

²² CMA 129 at paras 3.23–3.24.