

9 The views of the Environment Agency

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Introduction

9.1. This chapter summarizes the views of the EA which were provided, mainly by the EA's Southern Region, in written submissions to the MMC and at two hearings. The EA and OFWAT also provided a joint background submission on water resources in East Sussex and Kent.

9.2. The MMC sought evidence from the EA on any existing merger and on the proposed arrangements. The MMC were concerned to establish whether GU's and SAUR's proposals or the possible existing merger might have any effect on the EA's ability to administer the abstraction licensing system; whether the EA considered that the proposals were desirable to secure better water resource use in the region; and whether the aims of the proposals were capable of achievement other than through the proposed mergers. The EA's views were also sought on any remedies the EA thought appropriate if the MMC concluded that any of the mergers might be expected to operate against the public interest and on any other issues which the EA considered relevant. Some of the EA's views, especially on resource issues, are shown in greater detail in Chapter 5.

The role of the EA

General

9.3. The EA's regulatory functions are set out in Appendices 4.1 and 4.2. In its evidence the EA explained that when the industry was privatized in 1989, responsibilities for water resources planning were passed to the NRA. The NRA had developed national and regional policies between 1989 and 1996, which reflected international and national policies on sustainable development. The NRA advocated demand management and transfers between companies before major new resource developments. All those policies had been adopted by the EA, as the successor organization to the NRA from 1 April 1996. The EA had a general duty to manage water resources with powers to conserve, redistribute, augment and secure their proper use. This duty was mainly achieved through determining abstraction licence applications and through national and regional water resource development strategies, for example as set out in *Sustaining Our Resources-The Way Forward* published by the NRA's Southern Region in November 1994, now in the process of being updated. The EA's general duties on managing resources had attracted criticism from the water industry on the grounds that the EA's activity did not adequately reflect the commercial realities of the water industry post-privatization. In the EA's view this was largely because the relevant legislation (the Water Resources Act 1991) was in essence a continuation of pre-privatization legislation, notably the Water Resources Act 1963. The legislation was therefore specifically related to the proper management of water resources and was not designed to cope with commercial competition.

Protecting and enhancing the environment

9.4. The EA also had a duty to protect and enhance the environment. Where river flows had been reduced by over-abstraction the EA sought to remedy matters with the companies concerned. The Darent in north Kent was a local example. EA environment policy emphasized the principles of:

- sustainable development;
- the precautionary principle (for example, to refuse applications, where there was a risk of adverse impact on the environment); and
- demand management.

These principles had important implications for the merger proposals.

Demand forecasts and joint working with OFWAT

9.5. In addition, the EA had a duty to publish demand forecasts, and on this worked closely with OFWAT which used forecasts from the water companies as a basis for the economic regulatory regime. One of the key components of demand forecasting was leakage. Both OFWAT and the EA took a keen interest in company leakage levels. OFWAT published annual comparisons of performance, while the EA Southern Region water resources strategy provided indicative leakage level targets of 6 l/prop/h or 120 l/prop/d. These were taken as starting points in considering 'reasonable need' (see paragraph 9.11) in determining abstraction licence applications.

9.6. A further area of joint working with OFWAT was on BSTs between companies. There were good water resource reasons for using such transfers. In using its powers to order BST agreements, OFWAT was statutorily required to consult the EA.

The EA's licensing function

Licensing criteria

9.7. In determining abstraction licence applications, the EA said that it must balance the reasonable need of the abstractor against the impact on other abstractors and the environment. In assessing a water company application the following issues were paramount:

- was total leakage (from water company distribution and customer supply pipes) down to an acceptable and economic level, taking into account both operating costs and capital costs of new sources;

- had the company promoted to its customers water conservation and demand management, particularly through meter installations and appropriate tariffs; and
- were there surplus water resources available from neighbouring companies which could be transferred for up to 10 or 15 years?

9.8. The EA was asked about the full extent of its powers. It said that it had a duty under section 19 of the Water Resources Act 1991 to take action in accordance with the directions of the Secretary of State for the Environment, where necessary to conserve, redistribute or otherwise augment water resources in England and Wales; and to secure the proper use of such water resources. Although apparently wide-ranging, it was advised that the duty did not itself confer powers to take any action but applied only in relation to functions conferred by other sections of the Act.

9.9. It was implicit in the issue of licences in perpetuity and of right that a water abstraction licence should become a valuable property right or asset. Licences were routinely transferred by agreement and negotiation when property with abstraction rights changed hands. However, the EA did have powers, dating back to the Water Resources Act 1963, to revoke licences, for which compensation might be payable following a valuation by the Lands Tribunal. The powers had hardly ever been used and certainly not 'aggressively' to revoke a water company licence for transfer to another company. The EA did not consider that its powers to revoke licences extended to circumstances where the main purpose of such an action would be to reallocate water resources between two water companies in order to redress historic imbalances in available supplies and commercial competitiveness.

9.10. If major public water supply licences were to be revoked, the compensation claimed might be the cost of replacement resources, perhaps £1 million to £2 million per Ml/d of source yield. Compensation payment of, say, £50 million for the loss of a 25 Ml/d source would obviously present major problems to the EA which had a regional annual water resources income of about £7 million. (The national annual income for the EA was about £85 million.) The EA believed its powers were available to redress the balance between abstraction and the aquatic environment. In 1992 the NRA Board had resolved to use these powers unilaterally to reduce abstraction licences held by Thames Water which were drying up flows in the River Darent, in north Kent. In the event, Thames Water had agreed to a voluntary reduction of 30 per cent of licensed abstractions, but it had suggested it might claim about £50 million compensation for loss of 23 Ml/d abstraction yield.

9.11. The EA said that in 1994 SAUR and GU had proposed to the NRA and OFWAT that SWS's Darwell licences should be revoked and transferred to SEW. This the NRA considered inappropriate and impractical. Although the Secretary of State for the Environment had powers under section 52 of the Water Resources Act 1991 to direct the EA to formulate proposals for revoking licences, he did not do so. This proposal had not featured in SEW's 1994 strategic business plan. The EA would, however, have no difficulty in facilitating a redistribution of licences where this could be mutually agreed between the parties concerned.

9.12. It had been argued that the EA had a statutory duty to make water available for a water undertaker who had not got sufficient water, and where a BST arrangement could not be imposed because it would put at risk the potential supplier's ability to meet its statutory obligations. The EA said, however, that this argument was based on a misunderstanding. Section 19(1) of the Water Resources Act 1991 was a wide-ranging duty on the EA but section 19(2) of the same Act put the responsibility for resource development squarely with the undertaker. 'Nothing in this section shall be construed as relieving any water undertaker of the obligation to develop water resources for the purpose of performing any duty imposed on it by virtue of section 37 of the Water Industry Act 1991.' Certainly the EA would expect to assist an undertaker, in accordance with section 19(1), but the concept of the EA being obliged to make water available was erroneous. Furthermore, EA policy nationally was not to become involved in resource development schemes, and only in exceptional circumstances would it promote a scheme. This could occur if, for example, there were a number of beneficiaries, or if the scheme had a large environmental benefit.

Situation in the EA Southern Region

9.13. At present the EA saw plenty of scope in its Southern Region for:

- leakage reduction;
- demand management; and
- BSTs.

If water resources were managed making use of these techniques, in line with the low demand assumptions (which the EA considered the more likely) made in the NRA's national strategy paper 'Water: Nature's Precious Resource' (NRA, 1994), there should be sufficient resources for the Southern Region as a whole up to around 2021.

9.14. This judgment took account of information supplied by the companies themselves and by the EA's own consultants. The view was also robust when set against long-term predictions, for example those in the recent DoE *Review of the Potential Effects of Climate Change in the United Kingdom* (HMSO, 1996). The long-term reductions in rainfall in the south-east of England which were forecast made it important to manage demand properly and to deter unessential use through a policy of metering coupled with differential tariffs.

Water resources in Kent and East Sussex

Resource availability

9.15. A detailed analysis of resource issues, including information from the EA, is incorporated in Chapter 5. In essence, however, the EA believed that, although there were areas of deficit within East Sussex and Kent, there was an overall surplus in the region. On the basis of the EA's low demand scenario (which was considered by the EA to be the more likely scenario) no major new resources should be needed for 30 years or more.

9.16. In contending that the imbalance of water resources within the East Sussex-Kent area could be resolved through the integration of the distribution systems and water resources of the three companies, GU and SAUR had, in the EA's assessment, also assumed that there was groundwater available for development in the MKW area. However, there was no guarantee of this.

9.17. However, the EA considered that transfers of water from the west of its Southern Region (see paragraph 3.7) coupled with effective demand management would delay the need for a major new resource development. If this did not happen there was likely to be increased stress on the local groundwater in Kent, whether or not the merger proposals proceeded.

9.18. Another possible option to increase resource availability for the two companies FDWS and SEW was the transfer of resources between companies through abstraction licence revocation and re-issue. The EA said that, in principle, transfer of resources through licence transfer could be either:

- (a) by mutual agreement between donor and recipient; or
- (b) by 'aggressive' revocation by the EA and subsequent re-issue.

The EA referred to the recent DoE and Welsh Office report *Water Resources and Supply: Agenda for Action* which pointed out that the existing legislative and administrative procedure enabled water companies to reach agreement among themselves for the redistribution of abstraction licences. As indicated in paragraph 9.11, the EA considered that it would have no difficulty in facilitating such a redistribution; and there had been a recent case in the Southern Region of a water company 'purchasing' a licence from another organization, albeit not another water company. However, the indications so far from SWS were that it would not be willing to transfer licences by agreement, although it had offered BSTs on a number of occasions. The DoE report did not deal with case (b) but the EA's current view was that the legislation did not in practice envisage such a course of action by the EA (see paragraph 9.9) in circumstances such as these.

Resource management

Joint Resources Company

9.19. In the EA's view, the short-term implications for water resource use of the proposed JRC were as yet unclear. Should effective demand management be achieved, however, the need for major scheme development, which would be the JRC's most significant planning function, would be delayed for the foreseeable future. Consequently the role of the JRC might be less important than issues such as demand management.

9.20. In assessing the proposed functions of the JRC, the EA commented on its principal features as follows:

- (a) *Planning* new major developments in the two enlarged areas and minor developments in the former MKW area. In the EA's view a separate corporate identity was not needed for planning purposes.
- (b) *Promoting* new major resources (for example, Broad Oak) including negotiation with third parties (for example, SWS). The EA saw some small practical advantages arising from a JRC. The main benefit might be to have two more equally matched entities (JRC and SWS) entering into joint promotion.
- (c) The *ownership* and control of major new assets would remain with FDWS and SEW, not with the JRC. In the EA's view this seemed seriously to undermine the case for a JRC. If the JRC did not own the assets it would merely be a planning device, which did not need a corporate status to be effective.
- (d) *Minor sources* would be owned and developed by the separate companies, yet the licences would be held by the JRC. The EA could only receive licence applications from *occupiers* of land on which abstraction takes place and it appeared that the JRC might not be the legal occupier. Enforcement of licence conditions should be against the operator of the source, not a third party. The EA doubted that the JRC could be classified as a water undertaker and so might not be eligible to apply for drought orders for licences it held.

9.21. The EA maintained that co-operation between companies and the use of BSTs would ensure that companies arrived together at the point when a major new resource was to be planned without the need for a JRC. Whilst the proposals to pool SEW/MKW/FDWS resources in the short term could introduce a partial convergence of need, it would be at the expense of extra pressure on groundwater and did not address the more important imbalance between the GU and SAUR companies and SWS. The EA would be bound to view any new proposals to build Broad Oak reservoir in the light of the overall availability of resources in the Kent catchment.

GU's and SAUR's infrastructure proposals (the 'mini-grid')

9.22. The EA had also been shown an outline of the proposals by GU and SAUR for new infrastructure development in the MKW area to facilitate and optimize resource use across the area of the three present WoCs. In general, the EA considered that the connection of demand centres to strategic sources and the infilling of gaps in existing trunk mains improved the resilience of any resource system and was in line with EA policy. The proposals provided benefit to FDWS by effectively reallocating the Barham source, and improved supplies to Ashford in Mid Kent through the intended connection from Maidstone. The connections from Bewl Water, via Kippings Cross towards Tunbridge Wells, would improve the most vulnerable part of SEW's area. There was therefore a potential benefit to all three company areas (see Map 4).

9.23. In more detail (on which see also paragraphs 5.58, 6.12 and 6.13), the proposed pipelines from Canterbury to Barham and from Godmersham to Canterbury would enable the Barham source to be reallocated to FDWS, provided that the shortfall in Ashford could in turn adequately be made up from the west. Reallocation of Barham in this way had long been a feature of NRA/EA strategy and the proposal was therefore entirely consistent with this. However, the EA was seeking to reduce abstractions at Barham because of its impact on the Little Stour. This source would therefore be of limited value to Folkestone. This would have implications for the capacity of the pipeline required into Ashford from the west.

9.24. The proposed connection from the Medway Scheme at Bewl Water into Tunbridge Wells was also consistent with the NRA resources strategy. The supply would come from Mid Kent's existing entitlement at the reservoir. However, the extent to which further groundwater developments in the MKW area could contribute to supplies for Canterbury and for Folkestone and Dover would be dependent on the results of further investigation work to quantify likely outputs, and on the extent to which the EA would license them. As far as the EA was aware, most of this investigation work remained to be done.

Medway proposal

9.25. A key feature of the merger proposals was to be the generation of additional resources from the existing Medway system of some 25 Ml/d. On the face of it, however, the field trials carried out by the EA were unlikely to give any support to the GU and SAUR proposal submitted to the EA in the summer of 1996. This proposal could reduce notional fresh water residual flows below levels considered safe.

9.26. The NRA had carried out detailed investigations over two or three years to identify the most appropriate abstraction regime for the tidal Medway Estuary. In addition to hydrological modelling of the type carried out by the Institute of Hydrology for GU and SAUR, the EA had undertaken extensive water quality modelling of, and detailed monitoring of conditions in, the estuary (including trials of a 'bubbler barge'). This had allowed the EA to identify possible reductions in fresh water residual flows as a result of improved water quality following tighter discharge consents and multi-million pound investment in treatment by dischargers (mainly paper mills and SWS sewage works). The public water supply licences for the Medway Scheme were varied accordingly and over 100 other abstraction licences were varied to reduce the minimum residual flow conditions. However, the existing flow to the estuary still fell significantly short of that required to meet the estuary water quality objective. As a result the EA would be extremely unlikely to support proposals which reduced the notional fresh water residual flows any further.

9.27. The EA had at a late stage in the MMC inquiry met GU and SAUR, at their request, to explain these conclusions and findings to them. The EA was always willing to work with water companies to develop sensible proposals. It had made it clear to GU and SAUR that the water quality objectives for the Medway Estuary took into account recent effluent improvements. The EA was always prepared to consider proposals that would further treat effluent discharges so that the water quality objective could be met by lower fresh water flows, or by a scheme which provided additional fresh water low flow to the estuary. The EA could say with certainty, however, that the GU and SAUR proposals, as originally submitted (and allowing for the minimal supporting technical detail), were unlikely to be licensable. Any new proposals which the companies might put forward would, in the EA's view, face challenging, difficult and uncertain circumstances. It was doubtful that they could be cost-effective. They might be achievable, though at a high cost, but would in any case need very thorough investigation.

9.28. However, if additional storage were created at Bewl Water, the output from the Medway might be increased. The proposed strengthening of the mains around Maidstone envisaged as part of GU's and SAUR's 'mini-grid' would then be appropriate. Any scheme to enlarge the reservoir at Bewl would, however, have to be with the agreement of the owner, SWS.

Leakage

9.29. According to the EA, in England and Wales the smaller WoCs had a consistently better leakage record than the larger WaSCs. In Kent and East Sussex, however, the WaSC, SWS, had consistently outperformed the WoCs. And for 1997/98, while SWS was setting a target of 103 l/prop/d (a reduction of 33 l/prop/d), MKW's target was 120 l/prop/d and those of SEW and FDWS were some 20 l/prop/d higher (see Table 5.4). In its submission the EA said that exemplary performance in demand management (leakage and metering) was unlikely to be achieved by the merging companies without the stimulus of an enforceable recommendation from the MMC.

Metering

9.30. Metering targets for the three companies were also dissimilar. Although the EA considered that MKW had a better track record in achievement of targets, its aim by 2005 was a less challenging 23 per cent of households on meters, compared with 51 per cent and 53 per cent for SEW and FDWS respectively.

Bulk supply transfers

9.31. The EA said that it was well aware that SEW and FDWS argued that there were commercial and operational reasons why BSTs between themselves and SWS or MKW were unacceptable. The NRA previously, and now the EA, had, however, consistently taken the view that there were good water resource reasons for using transfers as the key option for securing proper use of water resources. Together with the DGWS, the EA had encouraged SEW and FDWS to take advantage of the opportunities available for BSTs on a number of recent occasions. This policy was also reflected in the EA's licensing policy and determinations. Neither company had yet had the opportunity to appeal against NRA/EA decisions and put their case to a public inquiry, although two small SEW abstraction applications were to be the subject of an inquiry in June 1997.

9.32. At the publication of the NRA Southern Region strategy document *Sustaining Our Resources-The Way Forward* in November 1994, companies had issued statements giving their position on transfers. SWS had said that it was willing to make supplies available; SEW and FDWS had said that it was not their company policy to take new bulk supplies. MKW had recently offered BSTs to both SEW and FDWS. The EA continued to promote such transfers as a means of meeting deficits and OFWAT had the necessary power to determine a fair price and conditions where there were disagreements.

9.33. In the EA's view, as SWS in particular had spare resources, they should be taken up as bulk supplies by SEW and FDWS. However, on the basis of information put to the EA by the two companies, there appeared to be a possibility that SEW and FDWS might seek to rescind the existing MKW/SWS agreements for BSTs if the mergers proceeded. If this were to happen it would have a very serious effect. It would put the companies in the position of needing to develop new resources much sooner than was necessary or anticipated.

9.34. In essence, the EA's view was that additional water resources and optimizing resource use could be achieved by the two companies without a merger, if they accepted BSTs. This was the preferred route from a water resource management point of view. It reduced the need to exploit groundwater in MKW's area, and postponed the need for further resource developments longer than would otherwise be the case.

Detriments, benefits and remedies

Detriments

9.35. The EA considered that the proposed arrangements could or would affect the duties of the EA in the following functional areas:

- managing and distributing water resources;
- securing proper use of water resources;
- protecting and enhancing the environment; and
- balancing the needs of the water customer, shareholder, other legitimate uses and the environment.

9.36. The EA considered that the loss of a comparator and information about water resources, resulting from the loss of MKW through the proposals, would affect the EA's ability to undertake the above functions. While, in its view, the use of comparators was not a precise science, it provided a critical frame of reference for identifying strategic and operational management issues. For example, where one company introduced a free meter option for sprinkler users, other companies in the area were likely to develop similar initiatives. The loss of a comparator was viewed by the EA as the loss of a source of ideas, solutions and incentives to improve the effectiveness and efficiency of water resource management.

9.37. For the EA, the proposals also clearly entailed the development of further groundwater in Kent. It would seem likely that potential development might be needed sooner than proposed by MKW if the companies, as the EA feared, did not accept further BSTs.

Benefits

9.38. The EA considered that most of the prospective benefits claimed by GU and SAUR for the proposals, such as improved infrastructure, resource optimization and better demand management, were achievable without the proposed acquisition. However, the proposed acquisition probably offered the only means of achieving better conjunctive use of sources (resulting from infrastructure improvements). There would be benefits to the environment, such as reductions in licensed abstractions from low-flow rivers such as the Darent. The EA doubted whether the proposed improvements could be relied on to take place without the proposed acquisition and a commitment by the companies to achieve quantifiable targets, enforceable as a result of MMC recommendations.

Remedies

9.39. The EA considered that, on balance, the proposed arrangements were likely to operate against the public interest. Most of the claimed water resource benefits could be achieved without a merger. However, the achievement of 'exemplary' comparator status by the bidding companies, as a result of an enforceable set of remedies covering demand management and other matters, could be regarded as a purpose of substantially greater significance in relation to the public interest. This purpose was probably not achievable without the proposed mergers.

9.40. The EA believed that carefully expressed and enforceable remedies could provide new industry-best water resources comparators for this most stressed part of south-east England; and that these would in time serve as industry bench-marks in England and Wales and thus assist as a partial remedy to the detriment of the comparative regime. The EA proposed that each of the companies controlled by FDWS and SEW, as a condition of the merger, be required to:

- (a) prepare an Action Plan for balancing supply and demand over the next 25 years; this plan to be to industry-best standard;
- (b) agree to specific short-term interim actions; and
- (c) give commitment to implementing and maintaining the Action Plan.

9.41. The Action Plans should be prepared to a content, format and methodology agreed by the EA and OFWAT. All stages of the development of the Action Plans should be subject to independent certification by the company reporters. A full draft of the Action Plans including reports from the reporters should be submitted to both regulators within 12 months of the merger. Following discussion with the regulators the Action Plan, including reports from the reporters, would be finalized to address all the regulators' concerns within 15 months of the merger. If necessary the contents of the plans, once approved, could be incorporated into the companies' terms of appointment and thereby enforced by OFWAT. The Action Plans would be kept under review and regularly updated in the light of changing circumstances. They would be key documents in any EA abstraction licence determinations. They would also form part of the companies' submissions of OFWAT in the event of a Periodic Review of price limits occurring in 1999.

9.42. The EA submitted that the Action Plan should demonstrate exemplary approaches to:

- customer and company leakage reduction;
- installation of domestic and non-domestic meters;
- promoting efficient use of water to customers;
- customer tariffs;

- continued use of existing BSTs;
- economic appraisal of costs and terms for additional medium-term BSTs (with reference to OFWAT, if necessary);
- alleviation of low flows by voluntary reduction of abstraction licences in the Darent, Little Stour and Dour catchments; and
- providing current and historic data at sub-company level on leakage, per capita consumption, metered domestic/non-domestic consumption, transfer volumes and operational costs.

9.43. As specific interim actions, the EA would like to see both companies achieve:

- total leakage levels better than 120 l/prop/d by 31 March 1998, for reporting in the 1998 July returns;
- a free meter option in the two enlarged company supply areas, within 12 months of the merger; and
- compulsory metering of garden sprinkler users in the two enlarged company supply areas, within 12 months of the merger.

9.44. Clearly it would be necessary for each company to be committed to implementing and maintaining the agreed Action Plans. Details of their performance standards for customer service, targets for leakage, planned activity levels and investment proposals should be published. The companies should be required to provide to the Secretary of State enforceable undertakings with respect to the Action Plans and interim measures as a partial remedy to the harm to the regulatory regime that would arise from the merger, failing which orders under the FTA or amendments to appointments should be made.

9.45. The EA also put forward a number of specific longer-term demand management and other proposals. These are set out at Appendix 9.1. The EA said that these proposals should be subject to detailed cost-benefit analysis and compared with alternative supply management and development options, such as transfers, enhanced supply grids and new source development. The EA would expect each company to carry out this work for its own enlarged supply area, and to provide an additional joint report covering matters pertaining to the proposed JRC.

9.46. The EA considered that, in the event of a finding by the MMC that a merger was already in being, the disbenefits perceived under the proposed arrangements would still result once Stages 1 and 2 of the proposals had been implemented. The EA would therefore continue to recommend the above remedies.

Possible merger in being

9.47. The EA said that, based on its dealings with the companies on water resources issues, it had no evidence or perception that a merger was in being. The GU and SAUR submission to the EA in February 1996 set out a number of proposals for the management of water resources after the proposed merger, and it was the EA's understanding that none of these had yet been implemented. Whilst it might be argued that the recent BST agreed between MKW and FDWS at Barham constituted a step towards the wider scheme of resource management envisaged in the submission, the EA understood that this BST was subject to full commercial negotiations and not therefore the type of transfer expected in a unified supply area.

9.48. Both SEW and MKW were progressing individual abstraction licence applications which did not seem to the EA to be part of a larger strategy. All three companies had shown the EA different water efficiency plans. The EA did not therefore consider that a merger was in being.

Interpretation of section 34(3)(b) of the Water Industry Act 1991

9.49. The EA considered that the primary public interest consideration for the MMC was the desirability of giving effect to the principle that the DGWS's ability to make comparisons between different water

companies should not be prejudiced. The desirability of achieving any other purpose was subject to that primary consideration. Section 34(3)(b)(i) enabled the MMC to have regard to any other purpose that could be achieved in a manner that did not conflict with the principle but in so far only as the MMC were satisfied that such other purpose could be so achieved. This proviso could not sensibly be read so as to include all situations where the other purpose could, in theory, be achieved in a manner that did not conflict with the principle.

9.50. It had been suggested that any other purpose not falling within section 34(3)(b)(i) necessarily fell within section 34(3)(b)(ii), subject only to the requirement that achievement of that other purpose was of substantially greater significance. However, the EA considered that section 34(3)(b)(ii) applied to situations where the other purpose could only be brought about in a manner which conflicted with the principle and not merely to situations where purposes could be achieved in a manner which conflicted with the principle but not exclusively so. The MMC were not entitled to have regard to a purpose of substantially greater significance unless the second condition (that the achievement of that purpose could be brought about only in a manner conflicting with the comparator principle) is found. So, where the purpose was capable of being achieved in a manner which did not conflict with the principle (for example, by co-operation), the MMC may not have regard to that purpose under section 34(3)(b)(ii), even if it was of substantially greater significance. Whether the MMC were entitled to have regard to that purpose under section 34(3)(b)(i) will depend upon the extent to which it can be achieved under the merger proposals, without any such conflict.