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UK Merger Control: Riding the Winds of Change

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Still in the shadow of the financial crisis, 2010 to 2011[1] has seen a slight increase in merger activity compared with the previous year. During this period, the Office of Fair Trading (OFT) issued a total number of 73 merger decisions, including 47 unconditional clearances (four of which were de minimis), eight references for an in-depth investigation, four cases in which undertakings in lieu (UIL) were accepted and 14 cases that did not qualify for a review.[2] The Competition Commission is also becoming busier, with four pending merger inquiries at the time of writing (see 'Competition Commission investigations', below). In addition to seeing an increase in deal activity, 2011 has also brought with it the UK government's long-awaited Consultation on Options for Reform (the Consultation).[3] In particular, the Consultation proposes a merger of the functions of the OFT and CC, as well as modifications to the voluntary merger regime and jurisdictional thresholds, more (and tighter) deadlines in the merger review process and an exemption for deals involving small businesses (see 'UK merger regime reform', below).

Jurisdiction and procedure

The Enterprise Act 2002 (the EA02) provides the OFT with powers to investigate relevant merger situations and assess whether they have resulted in, or may be expected to result in, a substantial lessening of competition in any market or markets in the UK (the SLC test). Despite ongoing debate on the relative merits of the voluntary regime, UK merger control rules still currently contain no requirement to seek or obtain merger clearance before completing a transaction. This may change however, if the recent proposals to consider implementing a mandatory or hybrid notification system become law.[4]

In any event, the UK competition authorities still have the power to investigate non-notified qualifying mergers[5] and may prohibit transactions or impose remedies similar to the many mandatory filing regimes around the world. This introduces an additional dimension into UK merger control advice for clients, ie, whether to notify reviewable transactions for clearance prior to completion or take the risk that the competition authorities may later investigate and, possibly, unwind the deal or impose substantial remedies.

Relevant merger situations

For the time being, there has been no change to the UK jurisdictional thresholds.[6] Thus a relevant merger situation will still arise when the following conditions are met:

- two enterprises (broadly speaking, business activities of any kind) cease to be distinct;
- either the merger has not yet taken place or the merger has taken place not more than four months before the reference is made, unless the merger took place without having been made public and without the OFT being informed of it; and
- either the turnover of the acquired enterprise in the UK exceeds £70 million (the turnover test), or the transaction creates or enhances a share of supply of goods or services of a particular description in the UK of 25 per cent or more (the share of supply test).

In determining whether two or more enterprises will cease to be distinct, the OFT looks not only at acquisitions of legal control, but also at acquisitions of de facto control over company policy and acquisitions of a lesser 'material influence' over company policy. The OFT will generally be prepared to consider an acquisition of a shareholding of 15 per cent or more to ascertain whether it may confer material influence. So, for example, the Court of Appeal upheld the approach taken by the CC in relation to BSkyB's acquisition of a 17.9 per cent stake in ITV,[7] the approach of which drew upon, inter alia, evidence of BSkyB's attendance and voting at recent ITV shareholders' meetings. Conversely, the OFT did not consider Sports Direct's 14.5 per cent holding in Blacks to give it the ability to materially influence policy due to, inter alia, the lack of Sports Direct board representation and other forms of influence (such as significant material loans).[8]

In spite of the difficulties the share of supply test presents for merging parties – on account of the great discretion it affords to the OFT to define the reference products and services – it is still one of the two alternative jurisdictional size thresholds, subject to the outcome of the Consultation (see 'UK merger regime reform', below). The share of supply test is satisfied when the merger itself creates or enhances a 25 per cent share of supply or purchases of any goods or services in the UK (or in a substantial part of it). The share of supply test also gives the OFT a wide discretion regarding the geographic frame of reference. For example, the OFT has found a substantial part of the UK to be as narrow as parts of cities, such as the London Borough of Haringey.[9]

The EA02 will not generally apply to any transaction falling under the European Commission Merger Regulation (ECMR) in the absence of a referral back to the OFT (see 'Referrals to and from the EC', below) or public interest considerations (see 'Political intervention', below).

Merger filings

Once they have decided to make a notification, merging parties can use either the statutory voluntary pre-notification procedure or make an informal submission in accordance with the OFT's administrative procedure. Merging parties can typically expect a decision within 20 and 40 working days, depending on the notification procedure adopted. Where the OFT believes that an SLC may be expected to arise or may have arisen, it has a duty under the EA02, with limited exceptions, to refer the transaction to the CC for an in-depth investigation.

The OFT also has the power to refer to the CC any completed qualifying mergers that risk a possible SLC. Such referrals can result in a CC order for the merged entity to unscramble the deal or to divest parts of the merged entity where necessary to avoid an SLC. The OFT must generally make any referral within four months from the deal completion or from the point at which the material details concerning it became public. However, there are potential exceptions to this general rule, as seen in the recent *Ryanair/Aer Lingus* case, now under appeal in the Competition Appeal Tribunal (CAT) (see 'CAT appeals', below).[10]

The statutory procedure, used in straightforward public offers, requires the OFT to issue a decision within 20 working days, subject to a possible extension of 10 working days. Many practitioners still prefer to use the OFT's administrative procedure, particularly in more complex cases, as it allows the OFT more time to conduct its assessment, thereby reducing the chances of a referral to the CC. Under the OFT's administrative procedure, the parties can generally expect a decision within 40 working days. Merging parties must also pay a fee for their merger to be reviewed. Since 1 October 2009, the fees payable are:

- £30,000 where target's UK turnover is less than £20 million;
- £60,000 for a UK turnover of between £20 million and £70 million; and
- £90,000 for a UK turnover of over £70 million.

Please note that the Consultation also contains suggested proposals to change the fee structure as well as streamline the investigation timescales (see 'UK merger regime reform', below).[11]

OFT reviews: duty to refer, new guidance and 'de minimis' exception

Under EA02, the OFT has a duty to refer a qualifying merger to the CC where the OFT believes that it has resulted in or may be expected to result in a substantial lessening of competition (an SLC) in a market or markets in the UK. The OFT must make a reference to the CC when it believes that the merger is more likely than not to result in an SLC. The EA02 also contemplates reference at lower ranges of probability. Specifically, if the OFT believes that the relevant likelihood is greater than fanciful, but below 50 per cent, it has a wide margin of discretion. In such cases, the OFT has the duty to refer when it believes there is a realistic prospect that the merger will result in an SLC.

Having said this, the duty does not apply where:

- the competition concerns can be resolved by agreeing binding undertakings in lieu (UIL) with the merging parties;
- the merger is insufficiently advanced to warrant a reference;
- the affected markets are not of significant importance to warrant a reference (de minimis); or
- the customer benefits resulting from the merger outweigh its adverse effects.

UIL need to be clear-cut solutions to the competition concerns. The UK authorities generally prefer structural to behavioural remedies, although the UK is perceived to be more amenable to behavioural undertakings than the European Commission (EC), particularly as regards pricing remedies. So far between 2010 and 2011,[12] the OFT has accepted UIL in five cases, all of which were structural undertakings. For example, on 1 July 2011, the OFT published its decision to seek UIL of referring the completed joint venture between the Carlyle Group and Palamon Capital Partners LP for the acquisition of Integrated Dental Holdings Group and Associated Dental Practices.[13] The OFT was concerned that the merged entity could reduce dentistry and orthodontic services competition in certain areas within the UK based on non-price factors. As a result, the parties agreed to divest the entire merger overlap in the affected areas to an upfront buyer. In *Asda/Netto*,[14] the OFT accepted, on 9 March 2011, Asda's UIL to divest 47 food stores in areas where the OFT identified competition concerns. The OFT also required the identification of an up-front purchaser for 25 of these stores. Further, the OFT accepted, on 16 June 2011, undertakings from Unilever in lieu of referring its completed acquisition of Alberto Culver to the CC.[15] The OFT was looking for undertakings that would help to assuage concerns in the market for bar soaps. As a result, Unilever offered to divest Alberto Culver's bar soap business – including the 'Cidal', 'Wright's' and 'Simple' brands – to an upfront purchaser. Further, the OFT accepted UIL in the two acquisitions by GB Oils Limited of Brogan Holdings Limited and Pace Fuel Care Limited, respectively. GB Oils has offered to divest oil production facilities on the Isle of Stornoway (in Brogan)[16] and the oil distribution business in the Isle of Wight as well as Pace's terminal in Cowes (in Pace fuel Care Limited)[17] to an upfront buyer.

In December 2010, the OFT published new guidance on exceptions to the duty to refer mergers (the Guidance).[18] This explains the OFT's approach to de minimis mergers; mergers where arrangements are insufficiently advanced and where there are relevant customer benefits. It also covers the OFT's approach to the acceptance of UIL of reference.

The primary purpose of the de minimis exception is to avoid references being made where the costs involved would be disproportionate to the size of the markets concerned. The OFT considers that the market or markets concerned will generally be of sufficient importance to justify a reference – in which case de minimis will not be applied – where their annual value in the UK, in aggregate, is more than £10 million. By contrast, where the annual value in the UK of the market or markets concerned is, in aggregate, less than £3 million, the OFT will generally not consider a reference justified provided that there is in principle not a clear-cut UIL of reference available. Where the annual value in the UK, in aggregate, of the market or markets concerned is between £3 million and £10 million, the OFT will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a CC reference (currently around £400,000). For example, on 14 July 2011, the OFT decided to approve, under the de minimis rules, the acquisition of Connaught PLC (Santia branded business) by Rentokil Initial PLC.[19] Although its duty to refer might be triggered, the OFT would exercise its discretion not to refer given that the markets concerned were, in OFT's view, of insufficient importance because they represented less than £10 million in value.

The OFT will base its assessment of expected customer harm on the size of the market concerned, its view of the likelihood that an SLC will occur, its assessment of the magnitude of any competition that would be lost and its expectation of the duration of that SLC. The OFT will also take account of the wider implications of its decisions in this area and will be less likely to exercise its discretion, and therefore more likely to refer, where the merger is potentially replicable across a number of similar markets in a particular sector.

Finally, the OFT's general policy is not to apply the de minimis exception where clear-cut UIL could be offered by the parties to resolve the competition concerns identified. The OFT believes that even where the markets concerned are small in size, parties should remain incentivised to offer clear-cut UIL to remedy concerns or to design their transactions so as to avoid anti-competitive effects.

Competition Commission investigations

The CC has a period of 24 weeks, subject to a possible eight-week extension, to report on whether the referred transaction constitutes a relevant merger situation and, if so, whether that merger situation has resulted in, or may be expected to result in, an SLC within any market or markets in the UK. Pending the conclusion of its inquiry, the CC has a broad range of powers to prevent the parties from integrating the businesses (interim orders). Where the CC concludes that there is an SLC, it may either accept undertakings from the parties or

otherwise impose remedies, including prohibiting the merger.

Proposed transactions that are made conditional on clearance from the OFT may lapse following a reference to the CC where the purchase agreement is conditional on the OFT not deciding to refer the transaction to the CC. Even where the transaction is not conditional on clearance, the parties may agree to back out of it where faced with the prospect of a lengthy and expensive inquiry by the CC, as occurred recently in *Getty Images*.[20]

In 2010, the CC issued its final report on three mergers referred to it by the OFT in 2009. It approved unconditionally the acquisition by Sports Direct of 31 JJB stores[21] and the acquisition of Friends Reunited Holdings Limited by Brightsolid Group Limited.[22] The CC also confirmed its decision to clear unconditionally the *Ticketmaster/Live Nation* merger,[23] following an appeal to the CAT. In relation to the three mergers referred to the CC during 2010, two of these were cancelled following reference (*Getty Images*, and *Dorf Ketal/Johnson Matthey*). The CC unconditionally approved the *Zipcar/Streetcar* merger in December 2010.[24] In the 2010 to 2011 fiscal year, only 8 mergers were referred to the CC.[25] In any event, the majority of referred mergers continue to be cleared by the CC. This number represents a notable reduction of referrals from previous years.

So far, in 2011 alone, three merger references to the CC have been decided, namely *Stena AB/DFDS Irish Sea ferry services*, *Ratcliff Palfinger/Ross & Bonnyman* and *MBL/TrigoldCrystal* (cancelled), all without remedies.[26] At the time of writing, the CC has four pending inquiries: *Kerry Foods/Headland Foods*,[27] *BATS Trading/Chi-X Europe*,[28] *Sector Treasury Services Limited/Butlers*[29] and *Thomas Cook/Co-op travel agency* joint venture.[30] One of the most awaited decisions concerns *BATS/Chi-X Europe*, which was referred to the CC on 20 June 2011.[31] The OFT believes that BATS Trading Limited and Chi-X Europe Limited operate the two largest (currently) competing Multilateral Trading Facilities (MTFs) for the trading of UK-listed equities. Another interesting case with the CC decision expected in 2011 is *Thomas Cook/Co-op travel agency* joint venture. The joint venture will bring together two of the three largest travel agents on the UK high street. The OFT is concerned that the joint venture could significantly affect competition in the supply of travel services via retail travel agency outlets in the UK.

Political intervention

Under the EA02, the Secretary of State for Business, Innovation and Skills (SoS) can intervene in cases that raise specified public interest considerations. There are currently three public interest grounds pursuant to which the SoS may intervene: national security, media mergers and, more recently, stability of the UK financial system, following the UK government's newspaper decision to intervene to save HBOS via an acquisition by Lloyds.[32]

The seminal media plurality case under EA02 resulted from the SoS's intervention in News Corp's proposed acquisition of the outstanding shares in BSkyB. In light of News Corp's EC merger notification on 3 November 2010,[33] the Department for Business, Innovation & Skills (BIS) announced on 4 November 2010 that the SoS had issued a European intervention notice.[34]

Following a two-month media plurality review by Ofcom that assessed, inter alia, the proposed acquisition's likely impact on the plurality of persons with control of media enterprises in the UK, the SoS decided on 3 March 2011 that the plurality concerns could be addressed by News Corp undertaking to spin-off the Sky News business. Having accepted material amendments to the UIL, the SoS began a second public consultation on 30 June 2011. Nevertheless, as the phone-hacking and bribery allegations against News Corp entities increased, and as the police investigations and public and political concerns about News Corp's proposed outright acquisition of BSkyB intensified, News Corp felt obliged to withdraw its UIL and bid.

Referrals to and from the EC

Pursuant to the ECMR, the OFT has the power to request that mergers notified to the EC be referred back for investigation by the OFT[35] and to refer UK-qualifying mergers to the European Commission.[36] The ECMR also enables the merging parties themselves to request that cases which would otherwise be notified to the EC be notified to the OFT, or to apply for the referral of mergers qualifying for investigation in three or more EU Member States to the EC (thereby enabling merging parties to benefit from the EC's 'one stop shop').[37] In 2011, at the time of writing, the EC has made one article 9 reference to the OFT.[38]

UK merger regime reform

The Consultation issued by BIS on 16 March 2011 (which closed on the 13 June 2011) sought views on a potential merger between OFT and the CC creating the Competition and Markets Authority (CMA), introducing mandatory or 'hybrid' merger filing requirements, increasing filing fees to as much as £220,000 for large transactions, streamlining investigation processes and granting the CMA a stronger supervisory role in regulated sectors.

Three reform options are currently on the table in respect of a new merger control regime. Option one would retain the voluntary regime as well as the current notification thresholds (possibly with a new statutory exclusion where target's UK turnover and buyer's global turnover are de minimis) and no standstill obligation (but with stronger 'hold separate' interim measures). Option two contemplates mandatory notification where target's UK turnover exceeds £5 million and buyer's worldwide turnover exceeds £10 million with a likely standstill obligation. Option three introduces the so-called hybrid mandatory regime requiring notification if target's UK turnover exceeds £70 million, and voluntary notification if the merger creates or increases a UK share supply of at least 25 per cent.

Joint OFT and CC Merger Assessment Guidelines

Following a consultation in April 2010, in September 2010 the OFT and CC published the final version of their Joint Merger Assessment Guidelines (the Guidelines).[39] These Guidelines set out the common principles that both authorities apply in assessing the unilateral and co-ordinated effects of horizontal or non-horizontal mergers. The Guidelines include, inter alia, further explanation regarding the SLC test and the meaning of a significant effect on rivalry over time. The Guidelines also take a more economics-based approach to merger assessment, particularly in unilateral effects cases. For example, whilst the concept of market definition is still relevant to frame the competitive assessment, it is now considered more of a useful tool and not necessarily an end in itself. This is particularly the case in the unilateral effects context where going forward use of diversion ratios,[40] profit margins and other quantitative evidence will be more important. This new approach may bring challenges in certain cases, however, where the requisite data is not available (particularly in a Phase I review, where there is less time to produce and analyse survey evidence).

CAT appeals

During the fiscal year between 2010 and 2011, the CAT handed down a number of interesting decisions. For example, on 21 May

2010, the CAT handed down its judgment on the appeal by Stagecoach against the CC's final report on the *Stagecoach/ Preston Bus* merger.[41] However, a noteworthy recent CAT appeal relates to Ryanair's stake in Aer Lingus. In 2007, Ryanair made a public bid for the remaining shares of Aer Lingus and requested clearance under the ECMR. The EC prohibited the takeover on 27 June 2007[42] and the General Court confirmed such decision on appeal on 6 July 2010,[43] also confirming the ECMR limits in investigating the current shareholding of Ryanair in Aer Lingus. Whilst Ryanair's 29.82 per cent shareholding in Aer Lingus was insufficient to trigger the acquisition of 'control' under the ECMR, the OFT sought to take jurisdiction on the grounds that this non-controlling shareholding enabled Ryanair to exercise material influence over the behaviour and policy of Aer Lingus. On 7 January 2011, Ryanair appealed the OFT's decision to open an investigation to the CAT on the ground that the OFT was time-barred from reviewing the shareholding.[44] On 28 July 2011, the CAT decided that the OFT had the duty to avoid 'potential conflicts' and 'cooperate' with the EC, and therefore could not have taken action earlier (while the EC proceeding was running).[45] The CAT therefore concluded that the OFT could proceed with its merger review of Ryanair's minority shareholding in Aer Lingus.

Note

1 These figures refer to the Fiscal Year 2010-2011 running from 1 April 2010 to 31 March 2011.

2 See OFT Merger Statistics at http://oft.gov.uk/shared_oft/mergers_ea02/2011/Web_stats.pdf.

3 A Competition Regime for Growth: A Consultation on Options for Reform (16 March 2011 – 13 June 2011), UK Government Business Innovation and Skills consultation.

4 See 8, below.

5 For example, between 2010 and 2011 the OFT investigated 15 non-notified mergers on its own-initiative.

6 The Consultation proposes possible changes to the UK merger notification thresholds (see 8, below).

7 *British Sky Broadcasting Group PLC v Competition Commission and The Secretary of State*; and *Virgin Media, Inc v Competition Commission and The Secretary of State for Business, Enterprise and Regulatory Reform* [2010] EWCA Civ 2.

8 According to the OFT's Jurisdictional and Procedural Guidance (section 3.20), the OFT is likely to investigate shareholdings of less than 15 per cent only where target is a direct competitor.

9 OFT decision ME/3390/07 – *CineWorld Group PLC/Hollywood Green Leisure Park*.

10 *Ryanair Holdings PLC v Office of Fair Trading* [2011] 1174/4/1/11 (CAT).

11 Thus, the fees payable under a voluntary notification regime could reach £220,000 depending on the target turnover. Under a possible mandatory regime, a flat fee of around £7,500 could be applied or variable fees at around 30 per cent of current levels.

12 These figures cover the fiscal year of 2010 to 2011 (running from 1 April 2010 to 31 March 2011), up to the time of drafting.

13 OFT decision ME/4560/10 *Integrated Dental Holdings Group/Associated Dental Practices*.

14 OFT decision ME/4551/10 *Asda/Netto Foodstores*.

15 OFT decision ME/4805/10 *Unilever/Alberto Culver*.

16 OFT decision ME/4406/10 *GB Oils Limited/Brogan Holdings Limited*.

17 OFT decision ME/4924/11 *GB Oils Limited/Pace Fuel Care Limited*.

18 OFT guidance on exceptions to the duty to refer and undertakings in lieu of reference (December 2010, OFT 1122).

19 OFT decision ME/4911/11, *Rentokil Initial PLC/Connaugh PLC*.

20 Anticipated acquisition by Getty Images, Inc of Rex Features Limited (ME/4522/10).

21 CC Report on the acquisition by Sports Direct International PLC of 31 stores from JJB Sports PLC (16 March 2010).

22 CC Report on the anticipated acquisition by Brightsolid Group Limited of Friends Reunited Holdings Limited (18 March 2010).

23 CC Report on the completed merger between Ticketmaster Entertainment, Inc and Live Nation, Inc (7 May 2010).

24 CC Report on the completed merger between Zipcar and Streetcar (22 December 2010).

25 See Competition Commission Annual Report 2010-2011.

26 CC Reports on the completed mergers between *Stena AB/DFDS Seaways Irish Sea Ferries Ltd* (25 June 2011), *Ratcliff Palfinger/Ross & Bonnyman* (Commercial Vehicle Tail Lifts Spare Parts Business, 10 June 2011) and *MBL/TrigolCrystal* (31 March 2011).

27 CC Investigation on the completed merger between *Kerry Foods/Headland Foods* (from 12 July 2011 to 26 December 2011).

28 CC Investigation on the completed merger between *BATS Trading Limited/Chi-X Europe Ltd* (from 20 June 2011 to 2 December 2011).

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Bingham's market-leading practices are focused on global financial services firms and Fortune 100 companies. The firm has 1,100 lawyers in 13 locations in the US, Europe and Asia, including New York, London, Frankfurt, Tokyo and Hong Kong. Bingham also has a significant East Coast/West Coast presence in the United States. Our EU/UK competition law practice advises multinationals, corporates, hedge fund managers, investment banks and other financial institutions across Europe on the full range of competition law services, including mergers, acquisitions and joint ventures, technology transfer/IP licensing, cartels, investigations by government agencies and regulators, and state aid/restructuring. Our team advises clients before the European Commission and other EU institutions, the Office of Fair Trading, the Competition Commission and the Competition Appeal Tribunal, as well as litigating before the European and UK courts. We provide strategic, regulatory advice across a wide number of industries, including financial services, energy, technology and environmental. Our UK practice expands our market-leading antitrust and trade regulation practice group in the United States to a broader base of EU clients. It also demonstrates Bingham's commitment to advancing our competition and antitrust capabilities to the EU and to servicing our broader financial institutions client base.

29 CC Investigation on the completed merger between *STS/Butlers* (31 March 2011 to 14 September 2011).
30 CC Investigation on the completed merger between *Thomas Cook/Co-operative Group/Midlands Co-operative* (2 March 2011 to 16 August 2011).
31 OFT Decision ME/4904/11 and CC referral of *BATS Trading Limited/Chi-X Europe Ltd* (expected decision 2 December 2011).
32 OFT Decision ME/3862/08.
33 EC Case COMP/M.5932.
34 Pursuant to Section 67 EA02.
35 Article 9 ECMR.
36 Article 22 ECMR.
37 Article 4 ECMR.
38 EC Case COMP/M.5996 *Thomas Cook/Travel Business of Co-Operative Group and Midlands Co-Operative Society*. OFT Decision ME/4880/11.
39 The Joint Merger Assessment Guidelines (OFT1254), 16 September 2010.
40 As in the US, the OFT/CC are increasingly using quantitative indicators such as UPP (Upward Pricing Pressure) or IPR (Illustrative Price Rises) to assess unilateral effects. These seek to combine diversion ratios and profit margins to provide an indication of pricing pressure or price increases post-merger. The authorities have already used them in a number of cases – see, eg, CC Report on the completed merger between Zipcar and Streetcar.
41 CAT appeal 1145/4/8/09.
42 Case COMP/M.4439 *Ryanair/Aer Lingus* (27 June 2007).
43 *Ryanair v Commission*, Case T-342/07 (2010).
44 The grounds of appeal are mainly based on the fact that the OFT's decision to investigate was time-barred by sections 22 and 24 EA02 (read together with section 122).
45 See CAT Case 1174/4/1/11 *Ryanair Holdings PLC v Office of Fair Trading*.

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