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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from the United Kingdom

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- United Kingdom --

1. General points

1.1 Introduction: Summary of UK merger regime

1.1.1 Outline of UK merger regime

1. The UK established a merger control regime in 1965. Since then the regime has been updated, most recently in 2002 by the Enterprise Act which established a competition based test and made the UK Competition Authorities (i.e. the Office of Fair Trading (OFT) and the Competition Commission (CC)) determinative.

2. Both anticipated and completed mergers are capable of review by the UK Authorities. UK merger control law does not require that a qualifying merger (see (b) below)) be notified to the OFT. However, a voluntary notification system exists which enables firms to obtain legal certainty by informing the OFT about a prospective merger in advance, a fee being payable for this procedure. The OFT may also hold discussions with a party prior to the notification being made. In practice the notification system is seldom used. The OFT also provides a number of opportunities through which the parties may obtain informal advice.[1] However, the regime contemplates the OFT initiating review of mergers where it believes that it may have jurisdiction. This is the case whether or not parties have informed the OFT of the merger and may occur following a complaint from a third party. The OFT is responsible for obtaining and keeping under review information relating to its functions, including its merger functions. The OFT has a dedicated Mergers Intelligence Officer responsible for monitoring non-notified merger activity and liaising with other competition authorities.

3. Mergers that have a 'Community dimension' under the EC Merger Regulation (ECMR) (ie mergers above certain thresholds) fall outside the scope of the Enterprise Act. Instead they must be notified in advance to the European Commission in Brussels.

4. Subject to some limited exceptions, any qualifying merger (see (b)) that is investigated by the OFT is subject to a fee irrespective of whether a reference is made to the CC (see (d)). The fees are based on UK turnover of the value of the enterprise acquired.

5. The remainder of the paragraphs in this section explain which mergers may be reviewed by the authorities, the statutory test that the Authorities consider and the institutional arrangements. In addition to the present fee structure being based on the UK turnover (of the value of enterprise acquired), it is notable that the two jurisdictional tests (see (b)) are also focused on the UK as is the SLC test.

[1] The notification requirements and the OFT's practice regarding informal advice are described in the OFT's published guidance *Mergers: Jurisdictional and Procedural Guidance* 2009 OFT 527, available on OFT website.

1.1.2 Qualifying mergers

6. The UK Authorities are able to review qualifying mergers. A qualifying merger is one in which two or more enterprises[2] cease to be distinct and which satisfies either the turnover test or the share of supply test or both. The legislation stipulates that 'ceasing to be distinct' can be brought about through the acquiring company gaining: (i) legal control of the target company; (ii) 'de facto' control; or (iii) material influence over the behaviour of the target company despite having a minority shareholding.[3] In addition, the merger must not yet have taken place or (subject to certain exceptions) the merger must have taken place not more than four months before the reference to the CC is made.

7. **Turnover test**: the value of UK turnover of the enterprise which is being acquired exceeds £70 million

8. **Share of Supply test**: the enterprises which cease to be distinct supply or acquire goods or services of any description and after the merger together supply or acquire at least 25 per cent of all those particular goods or services supplied in the UK or in a substantial part of it.

9. The merger must result in an increment to the share of supply or consumption. In practice, therefore, the share of supply test can only be met where the enterprises concerned supply or acquire goods or services of a similar kind.

10. There are no exemptions or special provisions for cross border mergers.

1.1.3 Merger assessment

11. In assessing a merger, the UK Authorities must consider whether:

- a relevant merger situation has been created (or, for anticipated mergers, will be created); and if so,
- whether or not this situation will lead to a substantial lessening of competition within any market or markets in the United Kingdom for goods or services (SLC).

12. Further explanation of the approach the UK Authorities take when assessing mergers is available in published guidelines.[4]

1.1.4 Institutional arrangements

13. The assessment of mergers in the UK is conducted as a two-phase process, giving distinct but interrelated roles to the OFT, the CC and, exceptionally in the case of public interest cases, the Secretary of State for Business, Innovation and Skills.

14. At Phase 1, the OFT obtains and reviews information relating to merger situations. The OFT has a duty to refer to the CC for further investigation any relevant merger situation where it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition (SLC). A decision by the OFT not to refer may be made unconditionally or be made subject to the provision of undertakings in lieu of reference.

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2 The meaning of "enterprise" is defined as the activities, or part of the activities, of a business (section 129 Enterprise Act).

3 Further explanation can be found in *Mergers: jurisdictional and procedural guidance* 2009 OFT527, Chapter 3.

4 *Merger Assessment Guidelines* 2010, CC2 (Revised) OFT 1254, available on CC and OFT websites.

15. At Phase 2, the CC investigates mergers that are referred to it by the OFT, the CC having no ability to investigate any merger unless it has been asked to do so. The CC determines the outcome of merger cases referred to it by the OFT. In the event that it finds that the merger will lead to an SLC, the CC decides upon remedies and has powers to implement them.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

2.1.1 Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?

16. There have been no conflicts.

2.1.2 Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?

17. There are no bilateral agreements of the sort described.

18. However, recently (10th January 2011) the OFT entered into a non binding Memorandum of Understanding on Cooperation with the National Development and Reform Commission of the People's Republic of China which aims to establish and develop co-operation in the enforcement of competition policy and related matters between the participants.[5]

2.1.3 If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?

19. UK merger control law stipulates that the UK Authorities examine whether a merger is likely to lead to a substantial lessening of competition within the UK. Mergers capable of review by the UK Authorities therefore include those where one or more of the merger parties is foreign if the firm that is the subject of the merger operates in the UK (and either the turnover or share of supply thresholds are satisfied) whether or not that firm is a UK registered company. It is relatively common for the UK authorities to investigate mergers where one or more of the parties is foreign.

2.1.4 Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organisations?

20. Yes, the UK authorities are very active in international organizations such as the OECD, ICN and EU working groups. We do implement the principles of these where we can. In particular we have regard to the OECD Recommendation of the Council on Merger Review and materials published by the ICN Merger Working Group. The UK Authorities have contributed to many of the ICN materials also (including the Recommended Practices for Merger Notification and Review Procedures, the Merger Remedies Report and Model Confidentiality Waiver).

5 http://www.oft.gov.uk/shared_oft/about_oft/international/China.pdf.

2.1.5 Does your regime belong to a regional organisation in the field of competition law? Does this organisation have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?

21. The UK is a member of the European Union and the EU has a mergers working group of which the UK competition authorities are members. The EU mergers working group cannot set rules. However it affords the opportunity for discussion of issues of best practice in international cooperation in merger investigations which result in recommendations for member states.

22. Various provisions of the EC Merger Regulation enable mergers, in some circumstances, to be transferred to/from the European Commission from/to the Member States at the request of either the merger firms or the Member States (which in the case of the UK is the OFT).

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

2.2.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

23. Yes, as explained in Section A, the UK has a voluntary notification regime and mergers capable of review by the Authorities meet either a turnover threshold or share of supply threshold (or both). The appropriateness of these thresholds is periodically reviewed, as is the appropriateness of a voluntary regime.

2.2.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

24. Yes, we quite often seek information from parties involved in cross border mergers. In the large majority of instances parties are cooperative. We have also sought and received information from foreign competition authorities via use of a waiver from the merger parties.

2.2.3 To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

25. We always undertake our own assessment based on the evidence available to us. Previous decision by foreign authorities can be helpful for some aspects of our cases. For example, when developing theories of harm we would consider the issues that the other authority considered, the body of evidence available to the authority and the authority's understanding of the relevant industry sector. This information may be helpful not only to the theories of harm but also to informing the case teams at an early stage of review and so helping to quickly reach a view on the approach that should be taken when carrying out the review. However, as informative as these decisions may be, the case team is alert to the possibility that the UK market and the issues raised by the merger may be different. Even so, the consideration by the European Commission of such factors as market definition and barriers to entry are often helpful to us, particularly in Phase 1 and the early stage of the Phase 2 investigation.

26. In addition to conducting desk top research, the Authorities will also talk to case teams in foreign authorities if we are investigating the same merger in our respective jurisdictions either in parallel or sequentially or we are believe that it may be useful to discuss with another agency a previous merger review by that other agency.

27. The issues covered in such conversations will vary according the stage of investigation by the UK Authorities and also the overseas authority. For example, if the UK Authorities are at an early stage, they might wish to explore the functioning of the market. There may be occasions when the Authorities might wish to discuss their analyses and, if remedies are being considered in Phase 2, the teams will typically explore the thinking on remedies in the other jurisdictions (particularly if the reviews are proceeding in parallel or the other jurisdiction is ahead of the CC's investigation).

28. Such discussions are often helpful and are taken into account in forming our own thinking. They may also influence the design of remedies. Although the possibility of either of the UK Authorities not taking remedial action is not ruled out, the likelihood of no action being taken when either considers that the merger results in an SLC is remote. This is because the UK Authorities' analysis is focused on the competitive effects of the merger in the UK The UK Authorities would need to be satisfied both that the remedy advanced by another jurisdiction did remedy the SLC found by the UK Authorities and that it would need to be able to enforce compliance of the remedial action itself. However, UK Authorities would take into account the remedy implemented by the foreign authority when devising its remedy.

29. The UK Authorities are prevented by the Enterprise Act from disclosing sensitive information (including confidential information about the merging parties) unless one of a limited number of gateways apply. Disclosure is permitted, for example, if necessary for the exercise of either of the UK Authorities' functions. Disclosure is also permitted with the consent of the person to whom the information relates. The UK Authorities have sought consent from the parties on several occasions, and when doing so, the consent often being based on the ICN waiver.

2.2.4 Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

30. The scope for political (or public interest) intervention in qualifying mergers is set out in the legislation. It is confined to areas of media plurality, national security and the stability of the UK financial system. While Ministers may intervene and ultimately decide the outcome of the case taking into account the competition and the public interest issues, Ministers must accept the conclusions of the UK Authorities as to the competitive effects of the merger. If a Minister decides that the merger is against the public interest, the Minister may determine the remedial action to be taken. He may also allow the merger to proceed (i.e. without any remedies being implemented) on public interest grounds notwithstanding the UK Competition Authorities' decision that the merger will result in an SLC.

2.2.5 Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

31. There are no specific provisions relating to cross-border mergers. There is limited scope for scope for non-competition issues to be considered are in the public interest intervention cases (see *II* Q4 above).

2.2.6 Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

32. The issues the UK Authorities face are common across jurisdictions.

2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

33. The Authorities have implemented remedies following review of such mergers. Recent examples include:

- Transocean/GlobalSantaFe (offshore drilling rigs)[6]
- Air France / VLM Airlines (airport slots)[7]
- Nufarm / AH Marks (herbicide products)[8]
- Dräger/AirShields (neonatal warming therapy products)[9]

34. In Nufarm/AH Marks the CC decided that the merger did result in an SLC and considered whether to require divestment of a factory that was situated in the UK. However, the CC decided to accept a package of behavior remedies. While the CC did not think that divestiture would have been disproportionate, it did take into account the effects of the merger and the expected duration of these, and the fact that, in comparison to the divestiture remedy, the behavioural package of remedies would be more closely targeted at the SLC (ie the fact that the UK based factory manufactured goods for export).

35. In Dräger the location of the manufacturing assets (i.e outside the UK) limited the CC in its choice of remedies. Undertakings which included a commitment to supply and put in place price controls for 4 years were accepted from both the German parent and the UK subsidiary. Additionally the CC made to buyers to address the harmful effects on competition in the longer term.

2.3.2 If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.

36. Both the UK Authorities have a strong preference for structural remedies.[10] The OFT is able to implement remedies through undertakings. If it anticipated that implementing a structural remedy might be difficult (this is a possibility for some completed merger cases) it would be likely to refer the merger to the Competition Commission for Phase 2 investigation rather than to implement a behavioural remedy.

37. The CC guidance on merger remedies sets out three circumstances in which CC may select behavioural remedies rather than structural remedies.[11] The first of these circumstances is that "divestiture and/or prohibition is not feasible ..." Dräger/Airshields (see III Q1) is an example where divestiture was not feasible.

2.3.3 Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

38. Enforceabilty is a relevant consideration when determining the effectiveness of a particular remedy. An additional issue to consider, when accepting undertakings from a company registered in

6 http://www.oft.gov.uk/OFTwork/mergers/Mergers_Cases/2007/516034

7 http://www.oft.gov.uk/OFTwork/mergers/decisions/2008/airfrance

8 http://www.competition-commission.org.uk/inquiries/ref2008/nufarm/index.htm

9 http://www.competition-commission.org.uk/inquiries/completed/2004/dragair/index.htm

10 CC guidance of remedies in mergers.

11 *Merger Remedies* 2008 CC 8, para 2.16

another jurisdiction, is whether the proposed execution of the undertakings (usually by a director or another official of the company) is sufficient for the UK Authorities to be satisfied that undertakings are entered into with full authority.

2.3.4 What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

39. The UK Authorities have not relied on other countries to assist in the monitoring of remedies. This is most likely the case because care is taken that the remedy addresses the adverse effects of the merger on competition in the UK and also because when designing a remedy, the ability for the UK Authorities to monitor compliance is a relevant factor (whether that involves a formal compliance programme actively monitored by the Authorities or reliance upon third parties bringing potential issues to their attention).

40. An advantage of structural remedies is that they seldom require long term monitoring. If the CC requires a divestment, it will monitor compliance with the undertakings or Order put in place until such point as the divestiture has been completed and the undertakings discharged or Order complied with. It does this usually by receiving reports from the party subject to the Order or who gave the undertakings (the obligation to provide reports and information is one of the standard obligations of the remedy). In many situations, compliance is also monitored by a Monitoring Trustee who reports regularly to the CC on the progress with the divestiture as well as ensuring hold separate arrangements remain in place. In unusual circumstances where parties have not been able to divest the business/assets with sufficient speed, a Divestiture Trustee may also be appointed.

41. The OFT has the statutory responsibility for monitoring compliance with remedies and does so via third party comments. Additionally, if the CC puts in place remedies that require ongoing monitoring, it may consider it necessary to require the merger parties to appoint and remunerate a third-party monitor who reports to the OFT. Remedies (i.e. behavioural) may be varied or revoked if there is a material change of circumstance so that they are no longer appropriate. Parties will draw to the OFT's attention the possibility that the remedy should be varied (in turn this will be referred to the CC if the remedy at issues followed a Phase 2 review).

2.3.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

42. Both Authorities recognize that coordination may be helpful when considering they are considering remedies to be put in place. In practice it is more likely that that such coordination would occur in Phase 2. As explained, (see *III* Q 4) such co-ordination would likely be for the purpose of appreciating the overseas' authorities proposed remedy. An example of coordination by the CC.

43. In Nufarm / AH Marks the merger (see *III* Q 1) several agencies, including the CC, were reviewing the merger. The CC held discussions with the Federal Trade Commission, the Competition Bureau, Canada and the ACCC at a number of points during its investigation. This included discussion while the CC was considering the type of remedy to impose.

44. The CC has developed its practice in respect of remedy design and implementation having regard to the experiences of other jurisdictions, drawing on lessons learnt from the reviews of US agencies, DG Comp and its own work on the effectiveness of past remedies. The CC has published its review of past remedies, *Understanding past merger remedies*.[12]

[12] http://www.competition-commission.org.uk/our_role/analysis/understanding_past_merger_remedies.pdf.