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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- United Kingdom --

25 February 2014

This note is submitted by the United Kingdom to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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− United Kingdom −

Introduction

1. This paper is submitted jointly by the Office of Fair Trading ('**OFT**') and the Competition Commission ('**CC**') (together the '**Authorities**').

2. The UK's merger control regime is currently a two phase, two agency structure under which the OFT has a function to undertake the first stage review of mergers. It has a duty to refer to the CC for an in-depth investigation any merger 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 lessoning of competition ('**SLC**') in a UK market. The CC determines the outcome of those cases referred to it by the OFT and can impose remedial measures to remedy an SLC finding.

3. The UK system is being reformed from 1 April 2014 when the OFT and CC will merge into one new agency, the Competition and Markets Authority ('**CMA**'). The regime will, however, maintain a two phase review process.

4. Many of the reforms are aimed at increasing incentives for voluntary notification of mergers that may give rise to competition concerns. Importantly, in completed merger cases there will be changes to the powers for imposing interim measures to pause or unwind integration of businesses. Instead of accepting initial undertakings, the CMA will impose initial enforcement orders as a matter of course in completed mergers:

1. To prevent further pre-emptive action and un-wind integration that has already occurred in completed mergers;

2. To prohibit the completion of an anticipated merger in those relatively rare cases where pre-emptive action is difficult or costly to reverse); and

3. Which will remain in force throughout the duration of the investigation (without a further order required to be issued at phase 2).

5. Interim enforcement orders may be imposed in any merger where the CMA has jurisdiction and do not require the CMA to have performed a competitive assessment of the merger.

6. Also, the CMA will have the power to impose financial penalties should parties breach an interim order of up to five per cent of the aggregate turnover of the enterprises owned by the infringer.

7. This response aims to demonstrate that the Authorities believe that the voluntary regime, which the Government (after extensive consultation) opted to maintain, provides a proportionate and targeted approach to merger control by allowing problematic mergers to be remedied while avoiding unnecessary costs for both businesses and the Authorities. Although the Authorities acknowledge that investigating consummated mergers gives rise to challenges, practices have been developed to mitigate these and the ability to do so will be enhanced by the changes to the regime described above.

1. Pre-merger notification regime

Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)

8. Under the Enterprise Act 2002 (the '**Act**'), there is no mandatory notification requirement even where mergers meet the jurisdictional threshold tests. The regime is therefore a voluntary notification regime. There similarly is no bar to parties completing transactions before or even during the OFT's or CC's review.

9. However, parties to a merger are encouraged to consider notification in cases where there is a material overlap or that raise the possibility of competition concerns, since the OFT may become aware of the merger through its Mergers Intelligence function (see further below) and decide to launch an investigation (that is, the OFT has the power to initiate a merger investigation into transactions that qualify for review).

10. The UK Government considers that the voluntary, non-suspensory regime is both proportionate and effective. Where mergers are completed prior to review, the Authorities have tools at their disposal (i.e. interim measures) which are designed to safeguard effective remedial action by preventing or unwinding pre-emptive action should this be required.

11. As part of the recent reforms to the UK's competition regime, the Government considered, as part of a range of options, introducing mandatory notification thresholds. Having conducted an impact assessment, it considered that this would increase the costs to both business and the Authorities disproportionately. The Government therefore decided to augment the regime by strengthening the powers available to the new authority (the CMA) to gather information more effectively at an early stage and to order the suspension and un-winding of integration of parties to a completed merger under investigation (see further at 'new powers in UK merger control' below).

2. Review of mergers falling below notification thresholds

For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

12. While there are no mandatory notification thresholds under the UK regime, the OFT has the authority to initiate a review of any merger that it believes may fall within its jurisdictional thresholds, whether or not that merger was voluntarily notified to it by the parties. For completed mergers, there is a four month time limit in which the OFT is able to act from either the time of completion or when the material facts relating to the merger are made public.

13. One of the OFT's duties under the Act is to obtain, compile and keep under review information about matters relating, among other things, to the carrying out of its merger review functions (the Mergers Intelligence function). The OFT has dedicated resource to pro-actively monitor and review various information sources for details of merger activities that might warrant review. Generally those mergers that the OFT becomes aware of through this function are completed mergers.

14. The fact that a merger has been completed does not prevent the OFT from investigating and referring it to the CC for possible remedial action, or accepting undertakings in lieu of a reference. Completed mergers are not dealt with more leniently than anticipated mergers and there may also be costs involved for the parties to a completed merger (for example divestment cost or costs involved in appointing a monitoring trustee in regards to interim measures – see further at response to question 3 below).

15. There is also no difference in the remedies available between mergers notified to the OFT and those which are not. The UK regime gives the Authorities the ability to prohibit the merger (including unwind any completed merger). At phase 1, the OFT may accept undertakings in lieu and at phase 2, the CC may implement remedies by acceptance of undertakings or making an order. In both phases, the remedies can include divestments. The Authorities acknowledge that there are practical considerations when requesting or imposing remedies in completed mergers (as described in more detail in the response to question 3 below) but have developed practices to address these.

If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

16. The UK Authorities have extensive experience in dealing with consummated mergers. The UK experience of doing so highlights some key issues, especially regarding interim measures and remedies.

2.1 Interim measures

17. In order to deal with the commercial and legal problems associated with un-winding completed mergers and to safeguard the effectiveness of any decision that the CC may take, the Authorities may make use of interim measures. While the regime does not bar companies completing transactions before clearance, the OFT may accept initial undertakings from the parties that are appropriate to prevent pre-emptive action that could impede the CC's decision should the merger be referred. In essence, the measures are intended to prevent further integration of the businesses, including the sharing of confidential information. If the parties are unwilling to provide such undertakings the OFT may impose orders on the parties to achieve this objective.

18. In some cases, interim measures may implemented too late to prevent integration of the businesses. Dependent upon the circumstances, there is a risk that the competitiveness of the target may be diminished through its integration with the acquirer.

19. There also may be additional costs associated with putting in place interim measures: negotiating and preparing measures appropriate to the particular circumstances can take time and parties may be slow or unconstructive in their engagement.

2.2 Remedies

20. The OFT has a duty to refer to the CC for an in depth review and the imposition of possible remedies 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 lessoning of competition in a UK market, unless certain statutory exemptions apply. In particular, it may accept undertakings in lieu of a reference where it considers that such undertakings are sufficient to address the competition concern in a way which is clear cut (invariably divestment remedies).

21. If the completed merger is referred, the CC must decide whether on the balance of probabilities the merger has resulted, or may be expected to result in an SLC. If it decides this to be the case it has a duty to impose remedies as it considers necessary.

22. Other than the difference between prohibiting an anticipated merger from taking place as compared to un-winding a completed merger, the remedies available to the Authorities in completed mergers are no different than in anticipated mergers and may include divestment. However, the remedies package may necessarily be more complex in completed mergers where the parties have already commenced integration.[1] The steps taken towards integration by the acquirer before interim measures are put in place can affect the complexity.[2]

23. In completed mergers the possibility of being required to un-wind the merger creates a substantial risk for the parties and is one of the reasons why parties may decide to pre-emptively notify the OFT of the merger before completion. However, in 2012, over 50 per cent of mergers which were referred to the CC were completed mergers. This illustrates that some acquirers choose not to notify the OFT of the merger, notwithstanding that potential competition issues are present. However in the same year the OFT called in 32 mergers that were not pre-emptively notified to it, illustrating the importance of the Mergers Intelligence function.

24. When imposing divestment remedies the CC will not normally take into account costs or losses that the merging parties may suffer as a result of the divestment. This is because, in the Authorities' opinion, the cost of divestment is a risk that the parties have elected to take on by completing the merger. It is open to parties to make merger proposals conditional on competition approval or otherwise reflect the risk of an adverse CC finding in the purchase price.

25. Implementation of a divestment remedy may also be affected by the fact that the merger is consummated. The acquirer may have weaker incentives to pursue a timely divestiture, although the practice of setting an initial period for divestment, the use of a monitoring trustee, and the possibility of divestment by a divestment trustee and of increasing the divestiture package to attract buyers, provide some counterbalance.[3]

2.3 New powers in UK merger control

26. To date the Authorities have been able to develop practices designed to handle the challenges of remedying problematic completed mergers. In addition, the deterrence provided by the OFT's Mergers Intelligence function as well as the changes to the regime will further equip the CMA to deal with these challenges. In particular:

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1 This is particularly the case for mergers that are asset purchases. For example, in Stericycle Inc/Ecowaste Southwest Limited (2011) the CC had to consider in some detail which assets and which staff and contracts would transfer to the purchaser of the business. For more detail about the design of the divestiture package, see CC8 *Merger Remedies (part 3) http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/rules_and_guide/pdf/cc8.pdf.*

2 In a grocery retail merger, because the acquired store had been demolished, the remedy (the divestment of the site on which the store had been situated) had to make provision for the acquirer to seek planning permission but also had to make provision in the event that planning permission was not secured. Tesco plc/Co-operative Group, store at Uxbridge Road Slough merger Inquiry (2007) http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/tesco-co-op-store-acquisition-in-slough.

3 In Stericycle (see footnote 2) the CC was particularly concerned that the divestiture was achieved in good time to enable the purchaser to compete in forthcoming tenders for certain key contracts.

- The CMA will act to put interim measures in place at the earliest opportunity (if necessary enabling the party to seek derogation from the initial measures).

- The standard use of initial enforcement orders in completed mergers will speed up the process and more effectively avoid pre-emptive action.

- Information gathering powers at phase I have been strengthened to encourage the provision of evidence, including by third parties.

- Businesses are highly aware of the Mergers Intelligence function and understand the likelihood of their merger being called in on the CMA's own initiative. For example, based on experience to date and following a strengthening of the Mergers Intelligence function, OFT has seen internal documents evidencing that businesses consider it a high risk that a completed merger could be subject to an own initiative investigation by the OFT and recognise the likelihood of being required to hold the businesses separate in those circumstances.[4] In 2013, 40 per cent of mergers investigated by the OFT had not originally been notified to it. Approximately 10 per cent of SLC findings were in cases that were not notified.

- The CC (and going forward, the CMA) periodically reviews the effectiveness of merger remedies, identifying lessons learnt in relation to design and implementation.[5]

27. Overall, the Authorities consider the voluntary nature of the regime, coupled with the Mergers Intelligence function to be a proportionate and targeted approach to merger control and welcome the CMA-related reforms as a way to enhance these benefits, in particular by giving the Authorities further tools to overcome any challenges faced when investigating and remedying completed mergers.

28. As stated by Alex Chisholm, the CEO of the CMA, the voluntary UK merger control regime is aimed at being 'an effective filtering system which focuses correctly and efficiently on remedying or blocking anti-competitive mergers, without holding up harmless or beneficial ones.'[6]

2.4 Case example[7]

29. An example of a completed merger where the OFT accepted both initial undertakings and undertakings in lieu of a reference is the acquisition by Vue Entertainment International Limited of Apollo

4 For example, one internal document stated: '*We do not believe it would be appropriate to complete the acquisition without prior regulatory approval. The UK competition authorities frequently investigate completed acquisitions (e.g. the recent acquisition by Breedon of Aggregates Industries' Scotland quarries) and can impose remedy requirements. It is typical for the buyer to be required to "hold-separate" the acquisition business pending completion of the investigation.*'

5 The CC's report is available at: http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/governance/understanding_past_merger_remedies_september_2012.pdf.

6 Alex Chisholm 'Delivering choice and growth through the Competition and Markets Authority', 16 May 2013, Competition section Law Society annual conference.

7 Other examples of completed mergers where remedies were imposed are Ryanair/Air Lingus ME/4694/10, Edmundson Electrical/Electric Center ME/5161/11.

Cinemas Limited[8] which came to the OFT's attention through its Mergers Intelligence Unit. The merger involved two chains of cinemas in the UK and concerned local markets.

30. The OFT found that the parties overlapped in a number of local areas and found that the merger represented a three to two or two to one reduction in fascia in some areas. Consequently, the OFT found that the merger created a realistic prospect of an SLC in four local areas and so its duty to refer the merger to the CC was invoked.

31. However, the OFT has the discretion to accept undertakings from the acquirer in lieu of a reference. Vue indicated its willingness to give undertakings to divest its interest in the Apollo cinemas in all four areas where an SLC was found. The OFT was minded to accept these undertakings but required an upfront buyer before accepting the undertakings, given that it identified some uncertainty as to the viability of the remedies package and the likelihood of a suitable purchaser being found.

32. Undertakings that Vue would divest the relevant businesses to an approved purchaser were accepted by the OFT on 25 January 2013.

Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

33. Once the Mergers Intelligence Unit has identified a non-notified merger that:

1. Is likely to meet the OFT's jurisdictional thresholds and;

2. Gives rise to a reasonable prospect that the OFT's duty to refer might be met.

34. The OFT will consider whether or not to commence an investigation by sending the parties an enquiry letter. The OFT has found that responses to the enquiry letter vary but, in general, parties to a completed, non-notified merger tend to be less co-operative in providing information than those that have notified voluntarily. This often impacts the speed of the investigation since the OFT is not obliged to commence its 40 working day administrative timetable until it has sufficient information to proceed.

35. However, the OFT has a maximum of four months from the date of completion (or the date that the material facts are made public[9], whichever is later) to make a referral to the CC in completed mergers, although it is possible for the OFT to stop this statutory clock in certain circumstances including where a request for information from the parties has not been satisfactorily responded to. Under the new regime, both completed and anticipated mergers will be subject to a statutory 40 working day time limit (which runs alongside the four month period in the case of completed mergers).

36. The other key difference in procedure for the investigation of completed mergers is the use of interim measures as described in the response to question 3 above.

37. At phase 2, similarly there are few key differences in the processes adopted, although as described in response to question 3 above, there can be practical difficulties in obtaining evidence relating to the target (for example, its strategy, because the key management may have left). Typically there will only be one set of advisers (legal/economic) engaged and they may wish to attend hearings held by the CC

8 ME/5506/12 Completed acquisition by Vue Entertainment International Limited of Apollo Cinemas Limited 3 October 2012.

9 'Made public' is defined as 'so publicised as to be generally known or readily ascertainable'.

with the remaining target's management team. As noted in question 3, if a divestment is required, the acquirer may have incentives to delay this process.

3. Review of mergers that should have been notified but were not

If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

38. This question of penalties is not applicable to the UK's voluntary regime which is explained above.

39. However, the Authorities believe that the regime is aimed at encouraging notification and the upcoming amendments to the UK mergers regime have been designed around strengthening this. The powers afforded to the CMA, in particular initial enforcement orders and additional powers to un-wind completed mergers, are aimed at strengthening the deterrent for parties considering not notifying a merger to the CMA.

If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

40. Please see the response to question 3 above which sets out what remedies and measures are available in completed mergers.

4. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

41. It is not possible for the Authorities to re-open a merger investigation that has already been concluded. In addition, the Act prevents the OFT investigating and referring a completed merger to the CC if it has already cleared it as an anticipated merger.[10]

42. There are very limited circumstances when the OFT may consider re-examining a merger that it has cleared if it discovers that the parties have provided false or misleading information on which the OFT has relied.

43. Outside of the merger regime, the UK competition regime prohibits any conduct which amounts to the abuse of a dominant position if it might affect trade in the United Kingdom (referred to as the Chapter II prohibition under the Competition Act 1998 or Article 102 Treaty of the Functioning of the European Union).

[10] Section 22 (3)(c).