Caveat emptor ... or, getting the deal stuck

Contemporary issues in UK merger control

Simon Pritchard
Senior Director, Mergers
Office of Fair Trading
Outline

- Mergers Group
- Managing the voluntary* regime
- Intervention thresholds 2006 -
- Clear-cut remedies
- *De minimis* merger control
- Headline points for the antitrust bar
- EC and U.S. highlights

Caveat: all views are personal and do not necessarily represent those of the OFT
Mergers Group

Structural reform
- Branch ‘pyramid’ replaced with Group ‘diamond’ → upgrade and career paths for Mergers staff
- Capacity building in management and leadership

Collegiate governance
- CRM model → Open House for case lifecycle issues: earlier senior input, consistency
- Non-notifieds, IA requests, hold-separates, Art. 22, optimal handling of substantively complex cases

Cross-OFT integration
- CRM and Open House → integration with API, M&P sectoral, OCE, PIU
- Markets Leadership Team (MLT), Policy Committee
The voluntary* regime

* Compulsory OFT-led investigations

- Conscious elimination of inquiries into (and fewer voluntary filings of) benign deals
- Investing in (earlier) tracking down harmful ‘below radar’ deals e.g. Stericycle/STG, Thermo/GVI

* Compulsory hold-separate undertakings

- Statutory threshold: reasonable grounds to suspect jurisdiction
- Pre-EA02 Guidance: unlikely unless reference a real possibility
- 2007: prima facie risk analysis in weeks -1 to +1. Lower than CRM test, applied in weeks 5-6.
- Best to avoid costly surprise OFT ‘cease and desist’ and CC ‘roll back’ intervention

** But no compulsory information powers

- A statute-bound OFT must objectively justify merger decisions with relevant evidence
- OFT has no statutory power to gather evidence
The voluntary* regime

Unscrambling the eggs at the CC

- In around 50% of CC inquiries, the acquirer maximises antitrust exposure by integrating without waiting for the OFT and CC’s verdict

  - **2 x litigation** – Somerfield v CC and Stericycle v CC
  
  - **3 x full unscrambling** – Emap/ABI (with positive IA), Stonegate/Deans, Thermo/GVI
  
  - **4 x substantial unscrambling** – EWS/Marcroft, Stagecoach/Scottish Citylink, Somerfield/Morrisons, Stericycle/STG
  
  - **3 x nearly unscrambled** – Francisco/G Partners (cleared by 3:2), British Salt/New Cheshire (provisional SLC) and Greif/Blagden (provisional SLC)
## FTC intervention: 1996 - 2005

### FTC Horizontal Merger Investigations

**Number of Significant Competitors**

**All Markets**

FY 1996 through FY 2005

<table>
<thead>
<tr>
<th>Significant Competitors</th>
<th>Outcome</th>
<th>Enforced</th>
<th>Closed</th>
<th>TOTAL</th>
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</thead>
<tbody>
<tr>
<td>2 to 1</td>
<td></td>
<td>192</td>
<td>5</td>
<td>197</td>
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<tr>
<td>3 to 2</td>
<td></td>
<td>206</td>
<td>34</td>
<td>240</td>
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<tr>
<td>4 to 3</td>
<td></td>
<td>114</td>
<td>44</td>
<td>158</td>
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<tr>
<td>5 to 4</td>
<td></td>
<td>40</td>
<td>26</td>
<td>66</td>
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<td>6 to 5</td>
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<td>24</td>
<td>39</td>
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<td>7 to 6</td>
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<td>3</td>
<td>13</td>
<td>16</td>
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<td>8 to 7</td>
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<td>13</td>
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<tr>
<td>9 to 8</td>
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<td>0</td>
<td>5</td>
<td>5</td>
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<tr>
<td>10 to 9</td>
<td></td>
<td>2</td>
<td>1</td>
<td>3</td>
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<td>10+</td>
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<td>0</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td>378</td>
<td>169</td>
<td>747</td>
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</table>

2nd Req. enforcement ‘hit rate’

- 97% against 2 to 1
- 86% against 3 to 2
- 72% against 4 to 3
- 61% against 5 to 4
- 38% against 6 to 5
- 19% against 7 to 6
- 46% against 8 to 7
- 0% against 9 to 8
- 67% against 10 to 9
- 0% against 10+
### OFT intervention: references 2006 -

<table>
<thead>
<tr>
<th>2 to 1 ~ ‘monopoly’</th>
<th>#1 and #2 ~ ‘dominant firm’</th>
<th>3 to 2</th>
<th>4 to 3</th>
<th>Other theory of harm</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Arqiva/NGW)</td>
<td>(Game/Gamestation)</td>
<td>Woolworths/Bertram</td>
<td>(Tesco/Slough)</td>
<td>(BSkyB/ITV)</td>
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<tr>
<td>(Sportech/Vernons)</td>
<td>Stonegate/Deans</td>
<td>CBS/Hampden</td>
<td>Wienerb’r/Bagg’ridge</td>
<td>EWS/Marcroft</td>
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<tr>
<td>Greif/Blagden*</td>
<td>Hamsard/Live Nation</td>
<td>Panfish/Marine Harvest*</td>
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<tr>
<td>Kemira Grow-H./Terra Thermo/GVI</td>
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<td>Stericycle/STG</td>
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<td>Svitzer/Adsteam</td>
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<td>IPC/Horse Deals</td>
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<td>Stagecoach/S. Citylink</td>
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<td>MDA/Quest</td>
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<td>Safenet/nCipher</td>
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</table>

9 of 23 refs = 39%
6 of 23 = 26%
4 of 23 = 17%
2 of 23 = 9%
2 of 23 = 9%
### OFT intervention: conditional clearances 2006-

*(each case allocated under highest concentration)*

<table>
<thead>
<tr>
<th></th>
<th>2 to 1 ~ ‘monopoly’</th>
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<td>CGL/United Co-op</td>
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<td>CGL/Fairways</td>
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<td></td>
<td>7 of 11 UIL = 64%</td>
<td>1 of 11 UIL = 9%</td>
<td>2 of 11 UIL = 18%</td>
<td></td>
<td>1 of 11 = 9%</td>
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**OFT intervention:** conditional clearances 2006-
(each case allocated for all classes of SLC)

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7 of 18 instances = 39%
1 of 18 = 6%
5 of 18 = 28%
3 of 18 = 17%
2 of 18 = 11%
OFT non-intervention: clearances 2006 -

10 horizontal examples
- 2 to 1 but trivial merger effect due to buy-side – Babcock/Devonport, Menzies/Grays
- 3 to 2 but entry – Arqiva/BT, Panavision/AFM
- 4 to 3 but entry, expansion – Celanese/APL (and buyer power), Getty/Digital/Photonica
- Close competitors but rivals can expand, reposition – Getinge/Hunt’gh, Premier/RHM, Altana/Wolst.
- Cartel inquiries but merger would not create or reinforce coordination – Dairy Crest/Arla

5 non-horizontal examples (strong third party complaints)
- Pearson/Harcourt
- Freightliner/DHL
- BUPA/Clinovia
- ICAP/EBS
- Montauban/Simon
Clear-cut remedies

100%

% deal raising antitrust concerns ↑

Substitute regulation price/quality

Quasi-structural (grant license or FRAND access)

Divestiture →

UIL Sweet Spot

Virgin/ICEC

FlyBe/BA Connect Tetra Laval/Carlisle Arriva/Wales & B.

Prohibition

Very substantial divestments

clarity of remedy →

mitigation

<--- restorative of competition ---------------------- >
Clear-cut purchasers

Up-front buyers

- *Tetra Laval/Carlisle* – risks from IPR-only asset package successfully resolved via up-front buyer
- *Tesco/Slough* – prime candidate buyer drops out and OFT insists on up-front alternative due to obvious lack of credible and eligible one-stop purchasers

CGL v OFT

- OFT is reasonable in rejecting purchaser whose CEO sits on board of merged firm
- Structural links central also in *BSkyB/ITV* and *Aggregate Industries/Foster Yeoman* (Harlow JV)

Aggregate Industries v OFT (pending)

- OFT contends that in a quick-look purchaser approval context, it is reasonable for the OFT to reject a purchaser raising antitrust concerns ‘closely analogous’ to the original problematic deal
De minimis merger control

Consultation elements

- Explicit cost-benefit analysis with reference to consumer harm
- Raises figure to make *de minimis* arguments from £400k to £10m
- Clawback for clearly harmful mergers
- Clawback for cartelised markets
- Clawbacks for precedent value, vulnerable consumers
- Informal advice offered

Feedback

- Broadly supported as important step forward
- Clarifications required
- For some, does not go far enough – prefer safe harbour approach (~ carve out to jurisdiction)
Headlines for the antitrust bar

Is egg-scrambling in the best interests of the client?

- For deals with antitrust risk, consider impact on client in advising whether a ‘below radar’ strategy – and, in particular, scrambling the eggs post-closing – make business sense

The OFT has a strong interest to facilitate UIL outcomes in all candidate cases

- In cases with severable issues that do not destroy deal economics, pursue UIL discussions as early as the client feels comfortable

- In contrast, marginal ‘binary’ cases will be likely be decided on evidence, not UIL

- Tremendous upside potential for law firms to outshine their competitors by better use of pre-notification and timely provision of robust empirical evidence to support advocacy

  - CGL/United and Stagecoach/SWT – survey inputs stress-tested with OFT show low diversion ratios indicating absence of close competition → permits OFT to clear some/all markets

  - Park/Home Farm – consumer survey work underpins critical loss analysis tending to show that a candidate ‘Christmas hamper/voucher’ market is not worth monopolising

Phase II and enforcement action exist for good reason
EC and U.S. highlights

ECMR

- Non-horizontal guidelines consultation
- Remedies consultation
- Schneider damages judgment – breach of due process
- Ryanair/Aer Lingus

United States

- Now or never? Decline of merger enforcement in Bush II – see Baker/Shapiro critique
- FTC goes 0-4 in court – Whole Foods/Wild Oats