OFT Merger Control – 5 years on, and an evolving style of review
Overview

- Casework overview
- Update on draft J&P Guidance
- Improving external procedures
- Remedies policy
- De minimis exception

* Views are personal and not binding on the OFT
Casework outcomes under EA02

Financial years

Number of cases reviewed

Cases*  CRMs  References**  UILs**

* Date of notification
** Date of s.22/33 decision
SLC findings 2003-present

[Bar chart showing SLC findings from 2003-2008, with categories for De Minimis, UIL, and Reference.]
Jurisdictional and Procedural Guidance

- Comments from 14 law firms, 4 professional bodies and trade associations
- Updating welcomed by stakeholders
- Summary of responses and emerging thinking to be published shortly
- Aiming for final guidance by end of year

Issues arising from responses

- Situations where MI found
- Unavailability of IA in water mergers
- Use of statutory merger notice
- Threshold for seeking IUs
- Period to respond between issues paper and issues meeting
- Procedures for facilitating UIL in “near miss” cases
J&P Guidance (cont’d)

Definition of a Relevant Merger Situation

- Focuses too heavily on exceptional factual situations suggesting MI might be found in more situations
- Inclusion of some additional factors (e.g., reference to likely voting of other s/h’s) appears to risk extending MI unduly

Emerging Thinking

- Emphasise exceptional nature of certain factual situations in guidance
- Unlikely to give more rules of thumb - contrary to wording & intention behind test
Informal Advice
- Absence of jurisdictional IA in water mergers
  - Anomalous position given that credible candidate for reference
  - Alleged chilling effect on water M&A activity

Emerging Thinking
- Recognise commercial significance of mandatory reference regime in water mergers
- No plans to reinstate individual IA
  - Case teams no better placed than external advisors
  - Impractical given strain on resources
  - Better to focus on substantive assessment of public cases
- Ofwat / CC discussions on possibility of further generic published guidance
J&P Guidance (cont’d)

Statutory Merger Notice
- Suggested use too limited – tension with recognition that notification not always necessary

Emerging Thinking
- Emphasise that process available in all anticipated public cases
- Recognise importance of guaranteed decision within 20-30 WDs can be significant in certain cases (eg public bids)
- Notice risks not maximising phase 1 outcome in potential problem cases
- OFT will not encourage withdrawal of PN – doesn’t follow OFT will restart clock, nor that decision will be made in additional 10 WDs
- More appropriate if used following greater pre-notification
J&P Guidance (cont’d)

Initial Undertakings and Orders

- New threshold ("preliminary indications …raises competition concerns") is too low

Emerging Thinking

- Appropriate to seek IUs ASAP following completion → threshold acceptable
- OFT not accepting IUs in all completed mergers
- Template & waivers/consents appropriate for reasons of procedural economy
- Waivers/consents to be published on website
J&P Guidance (cont’d)

Issues Papers

- Historic ‘kitchen sink’ approach
- Period between issues letter and issues meeting too short

Emerging Thinking

- Attempting to include only issues of genuine concern; ranking or grading
- ‘State of play’ discussion to be offered in all cases – market test feedback, potential ToHs, CRM?
J&P Guidance (cont’d)

Near miss UILs
- More guidance on when OFT would apply discretion
- Second opportunity to be given in all cases

Emerging Thinking
- No plans to give second UIL opportunity as of right
  - Constructive engagement on UILs throughout process
  - Undermines ‘last-shot game’ principle
- Near miss discretion applied in several cases – good & credible attempts to resolve concerns, only “tweaking” required
- Not appropriate to seek to define further “near miss” cases
Improving External Procedures

- Key features of dealings with OFT
  - Transparency and engagement
  - Efficient process
  - Openness

Transparency and engagement

- Criticism
  - Parties in the dark: gap between initial meeting and issues meeting
  - No third party feedback
  - ToHs not properly articulated and/or developed too late
  - Remedies discussed too late, and limited guidance from case team

- Solutions
  - More regular contact (inc state of play) - market feedback and potential ToHs
  - More debate/guidance on remedies
  - ‘Open House’ branch weekly meeting
Improving External Procedures

Efficient process

- **Criticism**
  - One size fits all
  - Merger notice RIP
  - ‘Kitchen sink’ approach to issues letter
  - Info requests bearing no relation to ToH

- **Solutions**
  - Good at scaling up (Global/GCap; Boots/Unichem), work still to do on scaling down
  - Information requests more proportionate and better linked to ToH
  - Earlier signals to parties

Openness

- Guidelines, consultations, etc
- Today!
OFT Merger Review Journey

- Informal advice
- Pre-notification
- Transparency & Engagement
- Regular case team contact
- State of play
- Issues letter
- Remedy discussions & near-miss
- Issues meeting
- Guidance; decisional practice
Remedies Policy

- Duty to refer must be triggered - no reverse engineering of SLC
  - DM unaware of UIL offer until SLC finding (but case team guidance)
- Starting point: restoration of competition to pre-merger levels (Co-op/OFT)
- Must be confident concerns resolved w/o further investigation → ‘clear-cut’ standard
- Strong preference for structural remedies - in line with UK policy preference for competitive markets over regulated markets, and clear-cut UIL standard
  - OFT has only accepted ‘behavioural’ remedies in 3 EA02 cases (Arriva/Wales & Borders; Ivax/3M; Virgin/Stagecoach/ICEC)
Remedies Policy

- UFB mitigates implementation risks – buyer or asset package risk
  - **Buyer risk** - Global/GCap, AFKLM/VLM, Homebase/Focus, DPL/BRN
  - **Asset risk** - Tetra Laval/Carlisle, DPL/BRN

- No structural link between parties
  - **CGL/Fairways** – CEO of purchaser on CGL board

- No risk of new competition concerns
  - **AI/Foster Yeoman** – refusal to approve purchaser in same oligopoly; 4 to 3 cannot be a clear-cut ‘solution’ to a 4 to 3 ‘problem’
De minimis

- Discretion not to refer where markets are of insufficient importance to justify a reference – same effect as a clearance
- Purpose is to avoid reference where costs are disproportionate to potential benefits
- Not available where UILs in principle available
  - Recurring benefits of avoiding consumer harm in given / future like cases outweighs one-off costs of reference
- Key consideration is whether impact of merger is likely to be particularly significant
  - Aggregate market size
  - Probability assessment: strength of OFT’s concerns
  - Magnitude of harm: proxy for expected price/non-price effect
  - Durability of merger’s impact: whether B2E substantial and durable
De minimis ‘graphic equalizer’

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- Other clawbacks: Vulnerable consumers, precedent value
- Applied in 4 cases
  - 3 rail franchises: low probability, low deterrence
  - FMC/ISP: v. small market, prospect of medium-term entry
- Rejected in 3 cases
  - DPL/BRN: UIL in principle available
  - BOC/Ineos & Nufarm/AHM: high probability, potentially strong competition effects, insufficient evidence on how long effects would persist