OFT merger remedies: The emergence of the up-front buyer

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(Views are personal and not binding on OFT)
Remedies overview

- **OFT has to get to SLC finding first**
  - No reverse engineering of SLC where parties have offered UILs
  - Decision maker not informed of existence of UILs until / if SLC finding made (but case team guidance throughout)

- **Starting point: restoration of competition to pre-merger levels**

- **OFT must be confident competition concerns can be resolved without need for further detailed investigation → UILs must be ‘clear cut’**
  - Competition concerns and proposed remedies must be clear cut, and remedies capable of ready implementation
  - Clear cut means precise identification of SLC, and effective and proportionate remedy
UFB requirement

- **Acceptance of UIL contingent on purchaser identification and approval**
  - UFB must be contractually committed (subject to OFT approval)
  - OFT will consult on suitability of purchaser at the same time as remedy package itself
  - Contrast with EC where completion contingent on binding on-sale agreement to approved purchaser

- **Appropriate when concerns over:**
  - **Purchaser risk:** limited pool of suitable purchasers (ie limited interest, and/or limited number of those who do not raise their own competition issues)
  - **Composition risk:** concerns over viability or attractiveness of package
  - **Asset risk:** competitive capability of asset may deteriorate pending divestiture

- **Mitigates implementation risks:**
  - OFT can be confident that divestiture will actually occur to suitable buyer
  - Ability to refer is retained until UFB is approved and UIL accepted
  - Maintains incentive on parties to achieve remedy asap, and mitigates deterioration risk
  - Benefit to parties: potentially enables OFT to press pause on duty to refer more easily?
UIIs 2008 to date – UFB in all cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Risk</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Dunfermline Press/Berkshire Regional News</td>
<td>Composition/purchaser</td>
<td>Sold to Bayliss</td>
</tr>
<tr>
<td>2 Homebase/Focus</td>
<td>Purchaser</td>
<td>Sold (back) to Focus</td>
</tr>
<tr>
<td>3 Air France/VLM</td>
<td>Purchaser</td>
<td>Eastern to take up slots</td>
</tr>
<tr>
<td>4 Global/GCap</td>
<td>Purchaser</td>
<td>Pending</td>
</tr>
<tr>
<td>5 CGL/Somerfield</td>
<td>Purchaser (some areas)</td>
<td>Pending</td>
</tr>
</tbody>
</table>