Under the radar, one-shot games and near-misses ........ OFT merger process

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Overview

- Caseload overview
- ‘Under the radar’ mergers
- Dealing with the OFT
- Top tips for remedies
- Key practical challenges

* Views are personal and not binding on the OFT
## Caseload overview

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<th>'04</th>
<th>'05</th>
<th>'06</th>
<th>'07</th>
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<tbody>
<tr>
<td>Total cases (FY)</td>
<td>190</td>
<td>211</td>
<td>131</td>
<td>112</td>
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<tr>
<td>Total CRM cases</td>
<td>28</td>
<td>35</td>
<td>29</td>
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<tr>
<td>Realistic prospect of SLC</td>
<td>23</td>
<td>23</td>
<td>19</td>
<td>19</td>
<td>18</td>
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<tr>
<td>‣ ‘clear-cut remedy’ (UIL)</td>
<td>(6)</td>
<td>(4)</td>
<td>(7)</td>
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<tr>
<td>‣ exempt (de minimis)</td>
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<td>(2)</td>
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<tr>
<td>‣ OFT refers to CC</td>
<td>17</td>
<td>19</td>
<td>12</td>
<td>12</td>
<td>7</td>
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<tr>
<td>‣ cancelled inquiries</td>
<td>(5)</td>
<td>(6)</td>
<td>(2)</td>
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<tr>
<td>‣ net CC inquiries</td>
<td>12</td>
<td>13</td>
<td>10</td>
<td>8</td>
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‘Under the radar’ OFT process

**Sources**
- Media
- Professional databases
- Complaints
- Internal intelligence
- Other government departments

**Daily filter**
- 1X PCO
- 4X ACO

**Detailed analysis**
- 1X PCO
- 1X Econ
- Plus ad-hoc support

**Weekly briefing**
- 1X G5
- 4X G6
- 1PCO
- 1 Econ

**Action**
- Inquiry letter
- Other actions

**Post mortem**

Intelligence feedback and monitoring
Dealing with the OFT

- Key objectives
  - Transparency and engagement
  - Efficient process

Transparency and engagement

- State of play meetings
  - Fill the gap between initial meeting and issues meeting
  - Provide market feedback
  - Articulate potential theories of harm
  - Mitigates possible surprises in issues letter

- More open to early debate on remedies (airlines, radio cases)
- Initial undertakings – waivers/consents published on website
- Decisional practice and Guidelines
Dealing with the OFT

Efficient process

- Good at scaling up (Global/GCap; Co-op/Somerfield), work still to do on scaling down
- Information requests more proportionate and better linked to ToH but can get better
- Earlier signals to parties
- Grading of concerns in ILs, and only issues of genuine concern
OFT merger review journey

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

Informal advice

Pre-notification

Regular case team contact

State of play

Issues letter

Issues meeting

Remedy discussions & near-miss

Guidance; decisional practice
First-phase remedies

- SLC finding first (no reverse engineering)
- Starting point: restoration of competition to pre-merger levels
- Clear-cut standard: precise identification of SLC, and effective and proportionate remedy
- Structural vs behavioural: in line with UK policy preference for competitive markets over regulated markets, and clear-cut standard (3 behavioural cases under EA02)
- One-shot game principle
  - No plans to give second UIL opportunity as of right - constructive engagement throughout process, undermines ‘last-shot game’ principle
  - Near-miss discretion applied in a few cases – good & credible attempts to resolve concerns, only “tweaking” required; not appropriate to seek to define further
First-phase remedies

**Risk management and error cost in OFT remedies cases**

- **Too hot** – remedies overbroad in scope (false conviction)
  - inherent in an asymmetric ‘liability test’ – but internal safeguards (*Dunfermline/BRN*)
  - private costs: give reasonable deference to parties’ calculus (*Celesio v OFT, Global/GCap, GCL/Somerfield*)

- **Too cold** – remedies unduly narrow (false acquittal)
  - cautious policy standard: clear-cut remedy to clear-cut concern → divestiture
  - in practice, remedy must meet every (marginal) ‘realistic prospect of harm’ concern (*Celesio v OFT re Boots/UniChem, William Hill/Stanley, Global/GCap, GCL/Somerfield*)
  - couple with procedural safeguards (see next slide)
First-phase remedies

**Procedural safeguards**

- **Up-front buyer**
  - Acceptance of UIL contingent on purchaser identification and approval
  - Purchaser, composition or asset risk
  - Mitigates implementation risks
    - Divestiture will actually occur to suitable buyer
    - Ability to refer is retained
    - 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?

- **No structural link between parties**
  - CEO of purchaser on seller board (*CGL v OFT re CGL/Fairways*)

- **No risk of new competition concerns**
  - Refusal to approve purchaser in same oligopoly; 4 to 3 cannot be a clear-cut ‘solution’ to a 4 to 3 ‘problem’ (*Al/Foster Yeoman*)
Key practical challenges

- **OFT reliance on evidence**
  - Significant part of evidence gathering / analysis falls to parties if they want Phase I outcome *(CGL/Somerfield)*
  - Recycling precedent is not enough – need to assess whether market has changed
  - Econ input from outset (not considered as sign of likely SLC)

- **Pre-notification can be enormously helpful (although note, not a substitute for market test)**

- **Advising clients on application of ‘de minimis’**
  - IA available but as much about magnitude and prospects of harm as size of market (£10m not a safe harbour)
  - Out-of-market deterrence multiplier

- **Impact of financial crisis (wait for discussion on last panel!)**
  - Ability to get away remedies
  - Failing firm defence