UK Merger Control: the regulator’s perspective

Sheldon Mills, Director, Mergers
IBC UK Competition Law Conference
23 February 2012
Outline

● Overview of recent merger activities
  - Phase I merger control statistics
  - Intervention rate
  - Increase in cases referred from DG COMP to UK

● Striking the right balance between Phase I and Phase II
  - The reference rate
  - System design
  - Some recent themes in UIL and referral cases

● First phase remedies: a platform for change

● Concluding remarks
# Phase I Merger control statistics

<table>
<thead>
<tr>
<th>Financial year*</th>
<th>06/07</th>
<th>07/08</th>
<th>08/09</th>
<th>09/10</th>
<th>10/11</th>
<th>11/12 (End Q3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referred</td>
<td>13</td>
<td>10</td>
<td>8</td>
<td>7**</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>UIL accepted</td>
<td>7</td>
<td>5</td>
<td>6</td>
<td>5***</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Unconditional clearances (of which 'de minimis')</td>
<td>86 (0)</td>
<td>81 (3)</td>
<td>57 (4)</td>
<td>50 (7)</td>
<td>43 (4)</td>
<td>43 (3)</td>
</tr>
<tr>
<td>Found not to qualify</td>
<td>22</td>
<td>15</td>
<td>9</td>
<td>10</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td>Total decisions</td>
<td>128</td>
<td>111</td>
<td>80</td>
<td>72</td>
<td>73</td>
<td>72</td>
</tr>
<tr>
<td>Cases to CRM</td>
<td>30</td>
<td>22</td>
<td>29</td>
<td>22</td>
<td>21</td>
<td>23</td>
</tr>
</tbody>
</table>

*Financial year runs from 1 April to 31 March
** NB These figures count Stagecoach/Eastbourne and Stagecoach/Cavendish as 2 reference decisions
*** Delays in accepting UILs mean these numbers are not strictly comparable.

Number of decisions stable...
OFT Intervention rate...

Recent notable cases:

• Integrated Dental Holdings / Associated Dental Practices (dental practices, UILs)

• Lightcatch (Betfred) / Tote (LBOs, negotiating UILs)

• SRCL / Ecowaste Southwest (reference, provisional prohibition)

• Kerry Foods / Headland Foods (reference)

Cases referred from the EC Under Article 4(4)

• Saint-Gobain / Build Center (negotiating UILs)

• Alpha Flight / LSG Sky Chefs (reference to CC, provisional clearance)

• Shell / Rontec (UILs)
Overall Regime Intervention rate

Number of Cases

Abandoned after reference
Phase II remedy/prohibition
Phase I remedy

04/05 05/06 06/07 07/08 08/09 09/10 10/11 11/12 (To Q3)
Cases referred from DG Comp to UK

- Significant increase in referrals from DG Comp to United Kingdom in 2011
- OFT made a referral request in relation to Orange / T-Mobile (2010). Retracted once appropriate remedies were agreed.
- *Thomas Cook / CGL / Midlands* (January 2011) was first case referred to UK from EC since Foster Yeoman in 2006.
- *Advent / Priory* (February 2011) was first Article 4(4) back to UK since April 2008
- A further six Article 4(4) referrals were made – most involved local markets.
- Contact with Mergers Group important where cases may be a referral candidate.
Cases referred from DGCOMP to UK

Article 4 (4) and Article 9 Cases

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cargill / ABF / Allied Grain JV</td>
<td>18/12/2004</td>
</tr>
<tr>
<td>Boots / Alliance Unichem</td>
<td>30/11/2005</td>
</tr>
<tr>
<td>London South Eastern Railway / The Integrated Kent Rail Franchise</td>
<td>30/01/2006</td>
</tr>
<tr>
<td>Dairy Crest / ARLA</td>
<td>03/04/2006</td>
</tr>
<tr>
<td>The Link / O2 UK</td>
<td>18/08/2006</td>
</tr>
<tr>
<td>Govia / The London Rail Concession</td>
<td>31/10/2006</td>
</tr>
<tr>
<td>Inchcape / European Motor Holdings</td>
<td>26/01/2007</td>
</tr>
<tr>
<td>Govia / West Midlands Passenger Rail Franchise</td>
<td>20/09/2007</td>
</tr>
<tr>
<td>G4S / Global Solutions Limited</td>
<td>07/03/2008</td>
</tr>
<tr>
<td>Odeon / Cineworld</td>
<td>23/04/2008</td>
</tr>
<tr>
<td>Advent / Priory</td>
<td>21/02/2011</td>
</tr>
<tr>
<td>Carlyle (CEP III) / Palamon Capital / Integrated Dental House (IDH) / ADP</td>
<td>22/03/2011</td>
</tr>
<tr>
<td>Mitsubishi Corporation / Premier Foods Group</td>
<td>05/04/2011</td>
</tr>
<tr>
<td>Anglo American plc / Lafarge S.A. / Tarmac</td>
<td>16/05/2011</td>
</tr>
<tr>
<td>Alpha Flight Group Limited / LSG Lufthansa Service Holding AG</td>
<td>19/07/2011</td>
</tr>
<tr>
<td>Shell / Rontec Investments</td>
<td>01/08/2011</td>
</tr>
<tr>
<td>Saint Gobain / Build Center</td>
<td>27/10/2011</td>
</tr>
</tbody>
</table>

Article 9

<table>
<thead>
<tr>
<th>Case Description</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Blackstone / NHP</td>
<td>01/02/2005</td>
</tr>
<tr>
<td>Mag / Ferrovial Aeropuertos / Exeter Airport</td>
<td>08/08/2005</td>
</tr>
<tr>
<td>Aggregate Industries / Foster Yeoman</td>
<td>06/09/2006</td>
</tr>
<tr>
<td>Thomas Cook / Co-op Group / Midlands Co-operative Society</td>
<td>06/01/2011</td>
</tr>
</tbody>
</table>
Cases referred from DGCOMP to UK - trends

- Art 9
- Art 4 (4)
Striking the right balance between Phase I and Phase II

- OFT open to working with parties through pre-notification and appropriate level of Phase I assessment in order to achieve a Phase I outcome

- Demonstrated by:
  - Most deals achieving Phase I outcome
  - No increase in average reference rate since EA02 coming into force
  - Use of exception to duty to refer powers including de minimis and UILs

- However, system designed so that certain cases are referred to Phase II for more detailed scrutiny

- OFT also has a duty to refer deals involving smaller markets and/or parties unless an exception to the duty to refer applies
Striking the right balance: system design

OFT
- OFT applies ‘realistic prospect’ threshold
- Shorter time to review
- Fewer information gathering powers

Gateways
- Realistic prospect test met then avoid referral if:
  - Undertaking in lieu of reference, markets of insufficient importance or relevant customer benefits

CC
- CC applies ‘on balance of probabilities’ threshold
- Information gathering powers and stronger remedy powers
- Longer review period (24 weeks)

Policy
- Achieves a second look or ‘fresh pair of eyes’ – favoured by business
- Consistent with unconditional clearances at Phase I
Rate of referrals consistent over time

References as % of total decisions

Average reference rate under EA02: 12%
But complexity increasing.....

Economic crisis =
Trade buyers, industry consolidation and defensive transactions

Economic crisis =
Less financial driven/investment transactions
Key themes in referrals

**Local Concerns**

- **UILs at first phase**
  - Asda/Netto (2010)
  - Travis Perkins/BSS (2010)
  - Jewson/Build Center (2012)*
  - Shell/Rontec (2012)*
  - *Being considered

- **Phase II – cleared**
  - Thomas Cook / CGL / Midlands (2011)

**Exiting firm**

- **Evidence compelling:**
  - Kingfisher / Focus (2011)

- **Phase II - cleared**
  - Stena / DFDS (2011)
  - Ratcliff Palfinger and Bonnyman (2011)
  - Kerry / Headlands (2011)

**Small deals**

- **Concentration in small or narrow markets/remedy would unwind**
  - Abandoned: MBL/Trigold (2011); KM/Northcliffe (2012)

- **Ph.II – cleared (no SLC or price rise short-lived)**
  - Sector Treasury / Butlers (2011)
  - Zipcar/Streetcar (2011)
  - Kerry / Headlands (2011)
Local concentration

- OFT and CC consider retail mergers require an assessment of local competition (see Local Retail Mergers Commentary)
- Number of retail mergers cleared at Phase I with conditions instead of a reference
- Referrals: Thomas Cook/CGL/Midlands (2011)
  - Referred to CC on fast track reference
  - Large number of local overlaps within catchment areas (472 Thomas Cook stores, 287 CGL stores and 80 Midlands stores out of 780, 360 and 100 stores respectively)
  - Significant econometric and quantitative analysis undertaken to establish that local competition between stores was muted
  - CC found that price rises could not be ruled out in certain local areas for certain customer groups but the JV would not be likely to result in an SLC since these would be ‘small, sporadic and eroded over time’
Exiting firm scenarios

- Economic crisis has led to a number of firms failing or struggling across the UK
- OFT and CC will both assess whether an alternative counterfactual is appropriate for assessment of a relevant merger:
  - OFT – prevailing conditions of competition are not realistic (see Guidelines, 4.3.5)
  - CC – establish ‘most likely scenario’ (Guidelines, 4.3.6)
- Economic context can be taken into account at Phase I
  - Kingfisher/Focus – exit inevitable and no less anti-competitive purchasers for stores
- Referrals raising exiting firm issues:
  - Stena/DFDS – exit on Heysham/Larne route overlapped with decision to merge
  - Kerry/Headlands – strong overlap in frozen ready meals but Headlands about to restructure/reorganise business prior to merger.
- Challenge: predict with confidence and certainty – requires compelling evidence
Smaller transactions

- Some cases involving smaller markets may raise a realistic prospect of an SLC at Phase I. OFT has a duty to refer these unless an exception is available.

- 21 *de minimis* decisions since exception introduced in 07/08

- A few recent referrals have involved smaller markets:
  - Sector Butler / Treasury (treasury management services to local authorities)
  - Ratcliff Palfinger / Ross & Bonnyman (tail lifts and spare parts)
  - Kent Messenger Group / Northcliffe (local newspapers)
  - MBL / Trigold (mortgage intermediary software)
  - Dorf Ketal / Johnson Mathey (chemicals)

- Some of these deals were abandoned, some were cleared unconditionally at Phase I

- Pre-notification essential in these deals. Legal and economic advice is also often appropriate.
UILs - Introduction

- First phase remedies are an important and critical part of UK merger control
- By and large, the UIL process has functioned well and continues to serve OFT, parties and ultimately consumers well
- Some changes of the process may be required to ensure robustness
UILs - Statistics

- Statistics show that remedies are a key feature of Phase I merger control
- 43 UIL’s accepted to end of Q3 11/12 from start of EA02

Notable Recent Divestments

- ASDA (part of the WAL-MART family) - 47 Stores
- NETTO - 47 Stores
- The co-operative - 133 Stores
- Somerfield - 133 Stores
UILs – Current process

- UIL PROCESS
- SLC – duty to refer
- Remedy offer placed before Decision Maker
- Duty to refer suspended with or without upfront buyer
- UILs negotiated and agreed between OFT and parties / Purchasers approved if UFB
- Public consultation launched
- UILS ACCEPTED PARTIES IMPLEMENT
UILs – Key features of UIL process

● Decision maker ‘blind’ as to remedy offer / no access to decision-maker

● Limited negotiation / ‘one-shot’ principle / some discussion with case team

● Limited information requirements prior to suspension to duty to refer

● Offer must be:
  - clear-cut – fully restore pre-competition levels (in line with EC’s ‘remove serious doubts’ policy)
  - capable of ready implementation (in line with EC ‘remove serious doubts’ policy)

● Voluntary –
  - parties free to complete the transaction at any time
  - In case of completed transactions, any hold separates in place may be removed as regards non-SLC businesses / assets
UILs – A platform for change

- UIL process offers benefits to parties and agencies.
- UIL process works well but there has been an increase in:
  - **Size** – scope of first phase remedies esp. local retail cases
  - **Complexity** – remedies can raise a range of implementation issues
  - **Time taken to agree UILs** – resource pressure / uncertainty
  - **Resources** – greater use of resource
  - **Risk** – above factors may lead to increased risk
- Proposed BIS reforms may change process
- Necessary to consider ways to improve the UIL process
## UILs – Ways to improve the process

<table>
<thead>
<tr>
<th>Process: Achieving the right balance between ease of use/administration for the agency and parties and agreeing viable UILs.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information requirements: Striking the appropriate balance between proportionality and ensuring a successful remedy outcome.</td>
</tr>
<tr>
<td>Monitoring divestment trustees: Consider use to improve remedy implementation and reduce resource requirements.</td>
</tr>
<tr>
<td>Timetables: Consider firmer time-limits for agreement of UIL and their implementation to increase efficiency of process.</td>
</tr>
<tr>
<td>Market testing: Consider ways to test remedy offers prior to suspension of duty to refer or sooner than public consultation in order to manage risk.</td>
</tr>
</tbody>
</table>
Concluding remarks

- Review of mergers in the UK remains a successful part of overall competition regime
- Stable level of decision but increase in complexity due to number of deals between direct rivals
- Most transactions cleared at Phase I and rate of referrals has not risen over time
- UILs continue to provide important benefits to parties and agency but process may require development
OFT merger control publications

Key OFT merger control publications include:

- OFT/CC A quick guide to UK merger assessment (March 2011)
- OFT/CC Merger Assessment Guidelines (Sept 2010)
- OFT Jurisdictional and Procedural Guidance (June 2009)
- OFT Exceptions to the Duty to Refer and Undertakings in lieu of reference guidance (Dec 2010)
- OFT/CC Commentary on retail mergers (April 2011)
- OFT/CC Good practice in the design and presentation of consumer survey evidence in merger inquiries (April 2011)

The OFT also publishes the reasons for its Phase I merger control decisions taken under the Enterprise Act 2002 on its website: www.of.t.gov.uk
UK Merger Control: the regulator’s perspective

Sheldon Mills, Director, Mergers
IBC UK Competition Law Conference
23 February 2012