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The UK OFT publishes new jurisdictional and procedural guidance for mergers

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UK Office of Fair Trading, 30 June 2009, Jurisdictional and procedural guidance

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On 30 June 2009, the UK antitrust authority, the Office of Fair Trading (OFT), published its 'Jurisdictional and procedural guidance' for mergers (Guidance). This consolidates, updates, and expands on previous OFT guidance and practice and is therefore essential reading for those involved in a transaction affecting the UK.

I. Consolidation and update

The Guidance consolidates, updates and supersedes these prior statements: Procedural guidance (May 2003); Jurisdictional guidance (previously in chapter 2 of the OFT's 'Substantive assessment guidance of May 2003); Guidance note on the calculation of turnover (July 2003); and Guidance on interim arrangements for informal advice and pre-notification contacts (April 2006 and October 2007).

II. Issues of interest

The Guidance is helpful in various respects, including the following (as further detailed below):

Material influence: The Guidance reflects recent case law, which confirms that the acquisition of a shareholding of less than 25% may give rise to material influence and therefore OFT jurisdiction to review a merger.

Informal advice: The Guidance formally reintroduces the possibility for parties to seek confidential and non-binding informal advice on the likelihood that the OFT will refer a merger for in-depth review to the UK's higher competition authority, the Competition Commission (CC).

Initial undertakings: The Guidance confirms that the OFT need only satisfy a low threshold when deciding whether to seek initial undertakings, which is consistent with its increasing reliance upon such undertakings to prevent further integration in completed merger situations.

Remedies and 'near-miss' offers: Merging parties typically only have one opportunity to offer undertakings in lieu of reference to the Competition Commission (and therefore to avoid an in-depth review), and cannot enter into negotiations with the OFT. However, the Guidance states that in exceptional 'near-miss' circumstances the OFT will allow the parties

an opportunity to revise their initial offer.

Fast-track references to the Competition Commission: The Guidance introduces a 10 working day fast-track Competition Commission reference procedure for mergers that clearly give rise to competition concerns and for which remedies are not suitable.

III. The Guidance

A. Material influence

In the UK, three levels of control may give rise to OFT jurisdiction to review a merger: 'controlling interest', 'de facto control', and 'material influence'. Material influence, or "the ability materially to influence the [commercial] policy of the target", is the lowest level of control. A 25% shareholding will give rise to a presumption of material influence, since 25% will usually suffice to block a special resolution. This assessment will be made on a case-by-case basis, and the Guidance confirms that the acquisition of a shareholding of less than 25% may also trigger material influence, as in BSkyB's failed attempt to acquire a 17.9% stake in ITV [1].

The Guidance does not change the law on material influence, but rather gives a more detailed explanation of the relevant factors to consider when making this assessment, including the level of shareholding, voting patterns, board representation and financial controls. It is important to bear in mind that even the acquisition a small minority shareholding may enable the OFT to carry out a merger inquiry.

B. Informal advice

Informal advice, by which the OFT indicates the likelihood of referring a merger to the CC for in-depth review, was a legacy of the pre-2003 merger regime. However, with the OFT's enhanced role under the new Enterprise Act regime, providing informal advice in the traditional manner was no longer considered appropriate. In particular, merging parties had a propensity to seek informal advice even for unproblematic mergers, and the OFT had difficulty in providing greater insight at the informal advice stage than could be provided by legal advisers with full knowledge of the facts. Therefore, in 2005 the OFT suspended the provision of informal advice except in exceptional circumstances.

The OFT nevertheless acknowledged the benefits of informal advice, and in 2006 and 2007 it issued interim guidance on when it may be appropriate. The Guidance formalises these principles, namely that merging parties may seek confidential and non-binding informal advice on the likelihood that the OFT will refer a merger to the CC when: there is a good faith intention to proceed with the merger; and the merger raises genuine competition concerns (which may include the question of whether the failing firm defence would apply).

The OFT may also address the question of jurisdiction through informal advice, but only where the merger also raises genuine competition concerns, and it may indicate the suitability of remedies. The informal advice process, which should take no longer than 10 working days, is therefore valuable where there are potential competition concerns, and where an

insight into the OFT's likely reaction will inform the parties' notification strategy.

C. Initial undertakings

The UK merger regime is voluntary, and therefore merging parties are not obliged to notify a merger to the OFT nor suspend completion pending receipt of an OFT clearance decision. Although merging parties may complete a transaction, the OFT has the power and duty to refer a merger to the Competition Commission that may substantially lessen competition, even if completion has already taken place. And the Commission has the ability to prohibit and unwind a merger, even after completion.

To safeguard against prejudicing a reference to the Commission and any potential remedial action by it, the OFT has the power to prevent post-completion integration of merging businesses. The OFT exercises this power by requesting initial undertakings from the merging parties to suspend integration, otherwise known as 'hold-separate undertakings', or by issuing an order to that effect, if the parties are unwilling to give an undertaking.

Recently, the OFT has shown a far greater tendency to request hold-separate undertakings in respect of completed mergers, and will do so almost as soon as it becomes aware of the merger. According to the Guidance, the OFT may request hold-separate undertakings where: it suspects that a completed merger may raise competition concerns; and undertakings are appropriate to prevent integration.

Significantly, the Guidance states that the threshold for satisfying these conditions is low, since the OFT is ill-placed to judge the severity of competition concerns at such an early stage of its investigation, and lengthy consideration would prevent a speedy resolution of the case. Therefore, if merging parties decide to complete a merger - before or without notifying the OFT - that may give rise to competition concerns, hold-separate undertakings are a distinct likelihood in any subsequent OFT inquiry.

D. Remedies and 'near-miss' offers

If the OFT concludes that a merger may substantially lessen competition, it is under a duty to refer the merger to the Competition Commission for in-depth review. Unlike the Commission, the OFT does not have the power to impose remedies on merging parties, however, it may accept binding undertakings as an alternative to making a Commission reference (so called 'undertakings in lieu'), if those undertakings are sufficient to remedy its competition concerns.

If the merging parties intend to offer undertakings in lieu, they must do so before the OFT's internal 'Case Review Meeting', and ideally at or immediately after the preceding 'Issues Meeting'. The parties only get one chance to offer appropriate and sufficient undertakings to avoid a Commission reference, since although the OFT will identify the areas of concern, for procedural reasons it will not enter into remedy negotiations.

However, in recognising the cost and efficiency benefits of the undertakings in lieu process, the OFT will be slow to reject undertakings in lieu that fall just short of remedying the OFT's concerns. According to the Guidance, in such 'near-miss'

cases, it will exceptionally afford the merging parties a narrow "second window of opportunity" (normally one working day) to consider revising their initial offer of undertakings, although only if the parties' initial offer was clearly in "good faith and credible". Behavioural remedies are unlikely to be suitable candidates, and the OFT is unlikely to give merging parties a second chance if it previously identified the competition concern and the parties simply declined to offer a suitable undertaking. Therefore, it is in the interests of merging parties to submit their best offer at or immediately after the Issues Meeting, because they may not get a second chance to avoid a reference decision.

E. Fast-track references to the Competition Commission

Upon receipt of a merger notification, the OFT typically has 40 working days to decide on whether to refer the merger to the Commission for in-depth review. In response to popular demand, the Guidance introduced a fast-track reference procedure whereby mergers that clearly satisfy the Commission reference test may be referred within 10 working days of notification.

This procedure will only be available to so-called 'binary cases', in which the potential competition concerns impact on the whole, or substantially all of the merger. Such cases are unsuited to undertakings in lieu, since any remedy considered sufficient by the OFT would likely eliminate the entire rationale for the merger. Therefore, in such cases the offer of undertakings in lieu is extremely unlikely. Similarly, the OFT can dispense with the Issues Meeting and the Case Review Meeting, since the parties will agree that the reference test is met. This enables the OFT to significantly reduce the amount of time required to reach a decision. Nevertheless, suitable pre-notification discussions and consultation by the OFT with third parties will still be required.

IV. Assessment

The above summary of parts of the Guidance illustrates its importance for parties and counsel involved in any merger transaction that may fall within the OFT's jurisdiction. Not only does the Guidance consolidate and update previous OFT positions, it also provides more detailed and practical insight to how the OFT will handle matters: essential reading for internal and external counsel.

[1] See Lisa Garber-Farmer, The UK Government refers a media merger to the Competition Commission because the proposed transaction could raise substantial issues concerning the plurality of news provision for both broadcast and newspaper readers (BSkyB/ITV), 24 May 2007, e-Competitions, n° 13979; Grant Saggers, The UK Secretary of State for Business, Enterprise & Regulatory Reform consistent with the recommendations of the UK Competition Commission required partial divestment of a shareholding and behavioural remedies with respect to an investment in the TV broadcasting sector (BSkyB/ITV), 29 January 2008, e-Competitions, n° 22135 and Ilan Sherr, The English Court of Appeal confirms divestment remedies in a TV merger (BSkyB/ITV), 21 January 2010, e-Competitions, n° 30786.

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