

## **'MERGING IS SUCH SWEET SORROW'**

*Peter Freeman, Chairman of the Competition Commission, spoke at the British Institute of International and Comparative Law (BIICL) Mergers Conference on 13 November 2008. The full text of his speech follows.*

### **Summary**

1. In this speech, with the regime in the 'process of maturing', Mr Freeman takes the opportunity to assess the operation and effectiveness of UK merger control, in the light of 'a remarkable year'.
2. Assessing one such recent event, the decision not to refer the *LloydsTSB/HBOS* merger, he underlines that this should be seen as the 'exception rather than the rule', where 'speed and urgency overrode the need for full investigation'. A merger system must be able to deal with 'wider policy issues' and as such judgments on conflicting policies are 'in a democratic system, ... in the end best made by Ministers'. His belief remains that this shows the UK system to be 'in operation, not disarray'.
3. Admitting that the merger system causes 'some pain and some pleasure', Mr Freeman stresses that the criticism is not that it delivers 'wrong answers' but rather that it is 'too heavy, intrusive and burdensome'. He outlines how the CC has improved its approach to give greater focus and time discipline to its inquiries, provide more clarity and reduce the burden on parties.
4. Mr Freeman then tackles one of the major challenges that have emerged from the CC's recent experience—the 'substantial' problems that arise from inquiries into completed mergers. This has led the CC to take an increasingly firm line to ensure that 'our ability to achieve divestment ... should not be compromised'. Although for parties it may seem 'attractive' to be able to complete mergers without clearance, a subsequent referral means significant inconvenience and uncertainty during the inquiry itself and ultimately the possibility of incurring considerable costs, if the merger has to be 'unscrambled'.
5. As such, this issue warrants 'a serious discussion to assess the advantages and disadvantages of moving to a mandatory notification system'. Any change would rightly require a great deal of thought on matters such as notification thresholds but also whether there is actually evidence on a 'chilling' effect of pre-notification on the economy 'beyond the anecdotal'.
6. Mr Freeman concludes by examining the problems from balancing Phase I and Phase II. Clearly it is desirable that with 'problematic' mergers, most time should be spent on Phase II. However, there may also be some mergers that could benefit from a longer examination at Phase I, if they are suitable candidates for undertakings in lieu. 'Some skill is obviously needed to tell the two cases apart' and to filter out as early as possible cases that require in-depth examination—as well as to avoid the trap of the filtering process taking as long as the examination itself.
7. He stresses that this is not a problem that depends on the number of examining authorities. But given that two-stage investigations are the norm, then the 'existence of a separate, well established Phase II authority is a big advantage'. However, he concludes, regardless of the number of institutions involved, 'the question of how much work is done at which stage will not go away and needs to be addressed'.

## BIICL Mergers Conference, 13 November 2008

Peter Freeman<sup>1</sup>

### ‘Merging is such sweet sorrow’— the Competition Commission’s Perspective on UK merger control

#### Introduction

1. When Shakespeare’s Juliet exclaimed from her balcony that ‘parting is such sweet sorrow; that I shall say good night till it be morrow’ (Exit above),<sup>2</sup> she was referring to the contradictory pleasure and pain of separation. The theme of my talk today is that the same can be said of merging—and more particularly of the system of merger control in the UK: some pain and some pleasure.
2. I will try and guide you through this oxymoronic maze and give you an assessment of the operation and effectiveness of merger control in the UK at present and whether it is meeting the challenges it faces, and offer you some thoughts for future development.
3. This has, after all, been a remarkable year. Not only have we had the first CC examination of a case under the special media provisions<sup>3</sup> but one of the biggest UK mergers in asset value terms has been allowed to proceed, although found to be anti-competitive, on stringent regulatory terms,<sup>4</sup> and another major and arguably anti-competitive merger has been allowed to proceed on public interest grounds.<sup>5</sup>

#### The perception of the regime

4. Various survey ratings and rankings suggest that the UK competition regime in general and the merger control system in particular enjoy a very high international reputation.<sup>6</sup> However, not everyone shares this positive assessment and there is from time to time criticism that the whole process is altogether too heavy, intrusive and burdensome on businesses and takes too long.
5. Interestingly, there seems little suggestion that the system delivers wrong answers (although there are occasional concerns about remedies, to which I will return); more that we (that is the OFT and ourselves) take too long and that it costs too much to get to the right answer. These are important concerns that need to be addressed. They occasionally get confused with more institutional matters—like, how many authorities do we need to look at mergers? That is a different issue, to which I will also return. Let me first try and take stock of what has happened since 2003.

---

<sup>1</sup>Chairman, Competition Commission. All views expressed are personal.

<sup>2</sup>Romeo & Juliet Act II, Scene 2 184–5.

<sup>3</sup>Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc. Decision of the Secretary of State 29 January 2008. *British Sky Broadcasting Group plc v (1) The Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform; Virgin Media, Inc, v (1) The Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform*, Judgement of 29 September 2008, [2008] CAT 25.

<sup>4</sup>CC Report, *Macquarie UK Broadcasting Ventures Limited/National Grid Wireless Group, completed acquisition*, 11 March 2008.

<sup>5</sup>*Anticipated acquisition by Lloyds TSB plc of HBOS plc, OFT report to the Secretary of State for BERR, 24 October 2008; Decision by Lord Mandelson, the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds Group TSB plc and HBOS plc under Section 45 of the Enterprise Act dated 31 October 2008.*

<sup>6</sup>Global Competition Review’s Annual Survey of the World’s Leading Competition Authorities—Rating Enforcement, 11 June 2008; Department for Trade and Industry, *Peer review of Competition Policy*, 6 June 2007.

## Overview

6. Five years of merger control at the CC has involved 46 reports and a considerable amount of experience. OFT has obviously considered many more cases, and made some notable decisions such as Lovefilm<sup>7</sup> and Seaweed<sup>8</sup> and recently, Global Radio/GCap.<sup>9</sup> You will understand if I concentrate more on the CC's work.
7. Of the 46 merger cases, 24 were cleared and 22 resulted in an adverse finding. A further 21 cases were cancelled at an early stage of the CC's investigation. Of the remedies imposed in those 22 adverse cases, three were outright prohibitions, 13 involved structural remedies, four behavioural remedies and two required a mixed remedy.
8. It is to be hoped that, after five years of operation, the regime is in the process of maturing. It is not implausible, as is sometimes suggested and as it would be tempting to believe, that businesses and their advisers now feel that they have some experience in how the new law operates and may no longer notify merely to avoid any risk, as may have been more likely in the early years.
9. The number of references to the CC has decreased over the last year or so. This is probably due to several factors, and it is difficult to assign definite weight to any of them; merger activity is linked to the overall economic climate and does not stay constant over time; the OFT has developed its policy on undertakings (UILs) and it is plausible that the parties and their advisors are more confident in offering and dealing with UILs. The OFT has also repeatedly stated the desirability of dealing with cases at Phase I if this can be done without disproportionate effort.
10. Also, in November 2007, the OFT issued new 'de minimis' guidance.<sup>10</sup> Generally speaking, it is designed to screen out cases and avoid a reference to the CC where the OFT takes the view that the nature, size and probability of the competitive harm would not merit an in-depth assessment at Phase II. The OFT will now generally consider adverse mergers as insufficiently important in markets accounting for less than £10 million, unless other factors are present, such as very high market concentration and low entry prospects, evidence of coordination, important precedent value of that specific case, and/or a substantial detriment to vulnerable consumers. The policy underlying this more is eminently sensible.
11. From the CC's perspective it is much less likely that a merger could be referred 'by accident'. In general, the cases that are referred to us are not obviously unproblematic—that is they raise potentially significant competition issues which merit an in-depth assessment. That said, it is important to ensure that the balance of scrutiny between Phase I and Phase II be correctly struck, and I will return to that theme later on.

## Consideration of mergers by the CC

12. Let me now turn to how we at the CC consider mergers.

---

<sup>7</sup>Anticipated acquisition by LOVEFiLM International Limited of the online DVD rental subscription business of Amazon, Inc; OFT decision of 15 April 2008.

<sup>8</sup>Anticipated acquisition by FMC corporation of the alginates business of ISP Holdings (U.K.) Limited, OFT decision of 30 July 2008.

<sup>9</sup>Completed acquisition by Global Radio UK Ltd of GCap Media plc, OFT decision of 8 August 2008.

<sup>10</sup>OFT 516b, Revision to Mergers, Substantive assessment guidance, Exception to the duty to refer. Markets of insufficient importance.

### **More focus**

13. We are always seeking to improve our internal procedures and to make the best possible use of resources at the available time, through improved project management and by focussing on the key competition issues and evidence. One way to do this is by identifying 'theories of harm' early in the inquiry. Theories of harm are simply ways in which a merger could harm competition. The use of the term does not in any way imply that the CC has already formed a view that harm will arise which would pre-empt a proper and unbiased assessment; it is merely a tool to help provide the analytical framework. Testing these theories then becomes the basis of the analysis.

### **Better evidence**

14. Another technique to ensure better focus is the increased use of 'primary evidence'. This means material, including data, generated in the ordinary course of the parties' business, most likely before the investigation, as opposed to documents that have been specifically prepared for the purposes of submission to the OFT or CC in a particular case.
15. The obvious advantage of primary evidence from our point of view is that it is potentially less biased and more persuasive than evidence prepared specifically for the inquiry, which inevitably tend to emphasize those facts or arguments that support the parties' case. Primary evidence provides valuable insight into the parties' corporate strategy and how they view the nature, state and extent of competition in a market, and how markets naturally behave, outside the context of an inquiry.
16. This approach has already been used extensively in market investigation cases, but is also increasingly being used in merger inquiries (recently in the current BOC/Ineos merger inquiry<sup>11</sup>). Early meetings with the merging parties are meant to ensure that we have access to the relevant data from the start of the inquiry. This can reduce the initial length of our questionnaires and thus decrease the burden on the parties. We also seek to avoid situations where a lot of additional work is required to adapt data sets to the CC's requirements.

### **New guidelines**

17. A major development is the joint OFT/CC review of their respective merger guidelines with a view to issuing revised joint merger guidelines in 2009.<sup>12</sup>
18. The aim is to provide a comprehensive and updated set of substantive merger guidelines for both Phase I and Phase II in one single document. This will cover substantive merger assessment issues such as jurisdiction, market definition, the appropriate counterfactual, unilateral and coordinated effects, and vertical aspects. Separate OFT guidance on jurisdiction and procedure is likely to remain as will CC guidance on merger remedies. We have received a number of submissions from those involved or interested in merger control, including from external lawyers, economists and business representatives and have held round table discussions. We are now in the process of drafting the new guidelines, which will be put out for consultation in due course.

---

<sup>11</sup>BOC/Ineos packaged chlorine merger inquiry. Provisional findings report, published 18 September 2008.

<sup>12</sup>More information is available on [http://www.competition-commission.org.uk/about\\_us/our\\_organisation/workstreams/analysis/cc2\\_review.htm](http://www.competition-commission.org.uk/about_us/our_organisation/workstreams/analysis/cc2_review.htm).

## ***Sharper procedures***

19. The CC has recently carried out an internal review process which suggested that to speed up our processes, we should be more rigorous in enforcing deadlines for the provision of information. In a number of inquiries, the case has been delayed due to late submission of evidence by the parties. In turn, this means that the CC's analysis will be delayed as well, resulting in greater costs for all.
20. The CC has formal information gathering powers under section 109 of the Enterprise Act 2002 (Enterprise Act) to issue a Notice requiring the production of information or documents, or requiring specific individuals to give evidence to the CC. In the past, the CC has rarely used these powers but this has started to change. Ironically, recent instances of the use of Section 109 notices have been to delay an inquiry. Sending Notices to the parties to the Project Kangaroo joint venture<sup>13</sup> resulted in a suspension of the timetable until the required information was provided and similarly in the Patientline case,<sup>14</sup> referred recently and subsequently cancelled. The overall purpose of section 109 remains clear, however, to impose a time discipline on the inquiry as a whole.
21. These improvements to the CC's work are all important, but there are some more fundamental issues to address. One of them is the high incidence of completed mergers.

## ***The problem of completed mergers***

22. One of the challenges under the current merger regime is how to deal adequately and effectively with completed mergers. By international standards, the UK system is unusual in not requiring compulsory pre-notification to the competition authorities of qualifying mergers.<sup>15</sup> Five years into the application of the Enterprise Act, we have some experience with the problems associated with completed mergers and know that they can be substantial. Completed mergers account for more than half of all merger cases we have reported on. Of those completed mergers, nearly half<sup>16</sup> resulted in an adverse finding by the CC.
23. This means that parties are completing, or seeking to complete, a significant number of anti-competitive mergers and we have found that, notwithstanding the availability of certain tools such as interim measures (hold-separate undertakings), this poses a significant challenge to the effective operation of our merger control. The CC has sought to address this by taking an increasingly firm line on interim measures and now generally obtains them in all completed mergers. The CC may also require the appointment of a hold-separate manager and/or a monitoring trustee to ensure the effectiveness of the interim measures.<sup>17</sup> The aim of these measures is to ensure that in case of a final SLC finding, divestment remains possible in practice.
24. Of course, in the voluntary regime that we presently have the parties are perfectly entitled to complete the merger without awaiting approval by the OFT/CC. But it is equally clear that in doing so they are taking a risk. Our ability to achieve divestment—if the competition concerns in the relevant case warrant it—should not

---

<sup>13</sup>Anticipated Joint Venture between the BBC through BBC Worldwide Limited, Channel Four Television Corporation and ITV PLC relating to the Video on Demand sector.

<sup>14</sup>Anticipated acquisition by Hospedia Ltd of Premier Telesolutions Limited, OFT decision of 7 October 2008. Reference cancelled on 30 October 2008.

<sup>15</sup>Although there are several other countries operating a voluntary regime, including Australia, New Zealand, India, and Singapore.

<sup>16</sup>46 per cent.

<sup>17</sup>The CC's approach in this area has been upheld by the CAT in *Stericycle/CC*, CAT judgement of 19 September 2006.

be compromised. Otherwise, this would lead to the perverse situation of rewarding parties who chose to take the risk of completion prior to a formal clearance decision. Our Guidance makes it clear that we will generally not take into account the potential loss the merged company may incur when having to sell the acquired business, nor the costs involved in implementing the sale.

25. It should be noted that the OFT has also firmed up its practice and in its draft procedural and jurisdictional guidance also proposes to lower its threshold for obtaining hold-separate undertakings in Phase I.<sup>18</sup>
26. Another problem arising in completed mergers is the potential lack of incentives on the parties to achieve an efficient and timely divestment in case of an adverse finding in the CC's final report. This issue has arisen in several cases before the CC and it is in addition to the problems which usually arise from hold-separate issues. To date, the CC has required the appointment of divestiture trustees in three cases,<sup>19</sup> all of which were completed mergers.
27. Overall, our experience clearly suggests that the issues raised by completed mergers warrant a serious discussion to assess the advantages and disadvantages of moving towards a mandatory notification system and I will say a little more on that later on.

### **Public interest mergers**

28. Mergers involving public interest issues are much in the news, and rightly so. Perhaps they offer the best proof that we are experiencing pain and pleasure in equal measure in that there are two recent cases to consider, one of which came our way, the other, it is apparent, will not come before the CC.
29. These cases are BSKyB/ITV<sup>20</sup> and HBoS/Lloyds TSB.<sup>21</sup> Both are significant. Both are unusual in that they involve an intervention notice served under section 42 Enterprise Act, on the basis of a public interest consideration, thus bringing the decision back to the Minister. The difference between the two cases is that in BSKyB/ITV the Secretary of State, having considered competition and media plurality advice, referred the case to the CC and, on receipt of the report, decided against the merger; in HBoS/LloydsTSB the Secretary of State, having considered competition and financial stability advice, allowed the merger to proceed. This decision has aroused the opposition of the *Financial Times*, the *Economist*, other well known parts of the press and not a few influential voices in Scotland.
30. Both cases, I would submit, show how the UK system is established to cope with mergers where the issues extend beyond competition. I am particularly pleased to see that the CAT's judgements in BSKyB/ITV<sup>22</sup> suggest that our analysis of what is a merger, and what are its likely effects, was regarded as sound and reasonable, and that our approach to applying remedies similarly so. The CAT found that our

---

<sup>18</sup>OFT 526con, *Mergers, jurisdictional and procedural guidance. Draft guidance consultation document*, March 2008, at paragraph 6.31. In a completed merger, '[t]he OFT is likely to seek initial undertakings in respect of a completed merger where there are preliminary indications that the merger raises or is likely to raise competition concerns'. By contrast, the OFT's current *Procedural guidance* at paragraph 5.14 states that 'As a matter of practice [...] the OFT is unlikely to seek initial undertakings or orders in respect of a completed merger unless a reference is a real possibility'.

<sup>19</sup>CC report, *Somerfield plc/Wm Morrison Supermarkets plc: a report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc*, 2 September 2005; CC report, *Tesco plc and the Co-operative Group (CWS) Limited: a report on the acquisition of the Co-operative Group (CWS) Limited's store at Uxbridge Road, Slough, by Tesco plc*, 28 November 2007. CC report, *Clifford Kent Holdings Limited and Deans Food Group Limited: A report on the completed merger of Clifford Kent Holdings Limited, parent company of Stonegate Farmers Limited, and Deans Food Group Limited*, 20 April 2007.

<sup>20</sup>See reference earlier.

<sup>21</sup>See reference earlier.

<sup>22</sup>See reference earlier.

interpretation of the media plurality test<sup>23</sup> was incorrect on this occasion. I will say a little more on the approach to remedies later, but the case is still subject to the possibility of appeal, so I will not dwell further on the substance.

31. On HBoS/LloydsTSB, the issues are subtly different, despite similarity in the statutory basis. Let us first consider the context. Public interest intervention in mergers is not a new thing. It would be tempting to think that merger control must be based exclusively on competition. Indeed, in seeking to give greater emphasis to competition under the pre-2002 'public interest' test, the so-called 'Tebbit doctrine' of 1984 was pushing in that direction. But other factors must also count. Indirect re-nationalization (the so-called 'Lilley doctrine' of 1990) was not favoured by our predecessors. But national security has long been a potentially countervailing factor, and was specifically reserved in the 2002 Act, as was concern about consolidation in the media, again specifically protected in the Act and reinforced in the Communications Act the following year. The Enterprise Act makes it quite clear that the list of public interest considerations is not closed and can be added to even whilst a merger is in progress.
32. So I am not in the least surprised that, faced with evidence of risk to the banking system as a whole, and the existence of a significant merger proposal in the banking sector, the Secretary of State decided to serve an intervention notice in the HBoS/LloydsTSB case and to prepare and present to Parliament the necessary new public interest consideration.
33. Since then, of course, OFT has carried out its duty to investigate and report to the Secretary of State,<sup>24</sup> various parties, including the FSA, the Bank of England and HM Treasury have expressed views, to OFT and in some cases also to the Secretary of State (SoS), and the SoS took a decision on 31 October not to refer the proposed merger to the CC.
34. The OFT's Report of 24 October essentially advised that there was a relevant merger situation which may result in an SLC. That advice was binding on the SoS as to its terms. But the SoS went on to decide that the new financial stability public interest consideration was relevant and, taking that into account, the merger was not expected to operate against the public interest. This was because he considered that the benefits to the public interest from ensuring the stability of the UK financial system outweighed the potential harm to competition.
35. The Secretary of State placed some weight on the fact that the OFT's advice was couched in terms of 'a realistic prospect' rather than a probability of the merger restricting competition in personal current accounts, the market for banking services in Scotland, and to a lesser extent, the mortgage sector. This choice of words reflects the OFT's statutory duty. He also attached some significance to the OFT's counterfactual analysis, which envisaged that a two stage course of events was realistic, with the Government stepping in to stop HBoS failing, and with HBoS exerting some competitive pressure (albeit less than its pre-credit crunch self) for an initial period and providing greater pressure once stability had returned to the financial markets.
36. So what view should one take of these events? First, as I said, I regard this as the UK merger control system in operation, not in disarray. Second, it is of course true that had the CC been asked to consider this case in detail, it would have been difficult, even with the most streamlined inquiry, for us to give an authoritative view in

---

<sup>23</sup>Enterprise Act section 58a. A tortuous section on which the CAT has attempted to shed some light.

<sup>24</sup>Enterprise Act.

a short time. Third, it is also clear that the issues are not straightforward. Competition analysis is a 'broad church', and many of the matters bearing on financial stability could also be relevant to an analysis of the competitive effects of the merger against the likely counterfactual. And even if the case had been referred to the CC, the ultimate decision would have lain, as it did with BSKyB/ITV with the Secretary of State.

37. The case is therefore best seen as one where the need for speed and urgency overrode the need for full investigation. Such cases should be seen as the exception rather than the rule.
38. It does seem to me that it is essential for any merger control system to include processes to deal with the wider policy issues raised in particular merger situations. How the various policy considerations relate to each other cannot always be predicted. A defence merger, for example, might reduce competition, as most probably do but preserve a capability judged essential for national security. A media merger might conceivably not restrict competition, but nevertheless threaten plurality of media voices, particularly in the light of the CAT's recent clarification. And a financial services merger might, as we have seen, be judged necessary to avert systemic collapse. I remain of the view that such judgements, in a democratic system, are in the end best made by Ministers—better than attempting to place that burden on unelected agencies such as ourselves. Recent cases may serve as a reminder that the potentially controversial nature of merger decisions was one of the factors lying behind the removal of Ministers from most aspects of merger control in 2002. They also underline the need for transparency of process. Balancing the merits of differing policies may be necessary, but it should always be done in a way that is understandable and open.

## **Remedies**

39. Remedies are often the most difficult aspect of effective merger control. Let me briefly describe our thinking and then consider some specific issues.

## ***Revised guidance***

40. The CC consulted on its draft new merger remedies guidance between May and August this year with the aim of publishing the final version of the new remedies guidance soon.
41. Our original guidance on remedies was published five years ago in June 2003, as part of the general guidance on merger references. It coincided with the coming into force of the Enterprise Act, so at the time we had no experience of exercising our new powers in relation to remedies. Those initial guidelines were supplemented in December 2004 by a specific set of guidelines dealing with divestiture remedies, and we then published some guidance on the use of interim measures. One purpose of the new guidance is therefore to consolidate all that into one document.
42. While we have 'outgrown' the current guidance(s), we are not proposing any wholesale changes. Rather, the new guidelines are an evolution of what we already have, filling in gaps where necessary, so that it is comprehensive and up-to-date and incorporates our experience of operating the regime since 2003.
43. I do not have time today to go into too much detail on the new guidelines, but will instead highlight the main areas, particularly those aspects which are new and intended to fill existing 'gaps'.

44. The introductory section now gives an overview of the range of available remedies and the circumstances in which, typically, particular remedies will or will not be appropriate. It is made clear that in choosing an appropriate remedy, we will look first at effectiveness. Only then, we will separately look at proportionality and choose the least restrictive and costly remedy.
45. It will come as no great surprise that we prefer structural (divestiture) remedies to behavioural remedies, as the former generally constitute a direct measure to restore the rivalry that would be lost by the merger. There is less risk of market distortion and structural remedies avoid all the difficulties associated with monitoring and enforcing ongoing behavioural remedies. The CC will generally seek divestiture of the smallest, viable stand-alone business that can compete successfully. I will discuss the exceptions to this below.
46. A frequently contentious issue in the course of the divestiture process is the identity of the purchaser. We are now making it clear that the purchaser must have access to sufficient finance to develop the business and must be committed to competing in the relevant market.
47. There is now also a small section on Intellectual Property remedies. In most cases, we are likely to treat these as a form of asset divestiture. However, a key aspect in an actual inquiry will be whether IP alone is sufficient to enable the purchaser to compete effectively and it may only form part of a more comprehensive remedy.

### ***Structural vs behavioural remedies***

48. I mentioned our preference for structural remedies, as they directly address the competition problem and provide a one-off lasting solution, without the need for continuous monitoring. It would be unusual for the main remedy to be behavioural. They tend to be only appropriate where a structural remedy is not feasible, as in Dräger/Airshields,<sup>25</sup> or where the SLC can be expected to be of limited duration, as in First/Scotrail.<sup>26</sup>
49. We see behavioural remedies as falling into two categories. The first are enabling measures which are designed to overcome, for example, barriers to entry. The second category, very much a matter of last resort, are behavioural remedies which control the anti-competitive outcomes, for example, by imposing a price cap.
50. Having said that, there are always exceptions, and an example is the recent case of Macquarie/National Grid Wireless.<sup>27</sup> This merger brought together the two main providers of national managed transmission services and network access to UK broadcasters. On a cursory assessment, it seemed that structural remedies would be the best solution. However, for several reasons we took a different view.
  - We identified significant customer benefits which were likely to be lost as a result of the most feasible divestment option.

---

<sup>25</sup>CC report, *Dräger Medical AG & Co KGaA and Hillenbrand Industries, Inc: A report on the proposed acquisition of certain assets representing the Air-Shields business of Hill-Rom, Inc, a subsidiary of Hillenbrand Industries, Inc*, May 2004.

<sup>26</sup>CC report, *First Group plc and the Scottish passenger rail franchise, A report on the proposed acquisition of the Scottish passenger rail franchise currently operated by ScotRail Railways Limited*, June 2004.

<sup>27</sup>CC report, *Macquarie UK Broadcasting Ventures Limited/National Grid Wireless Group, completed acquisition*, 11 March 2008.

- There was also a very real risk of delay to the digital switchover which is underway and due to be completed by 2012. This would have resulted in significant cost and inconvenience to the broadcasters and the public.
  - The behavioural remedy was embedded in existing regulation as there was already regulatory control of the network access element. The remedy was supported by Ofcom, as well as by all significant customers, ie the broadcasters.
51. So for reasons of practicality, proportionality and potential loss of customer benefits we adopted a set of behavioural remedies. This case should not be interpreted as in any way indicating a trend towards the use of behavioural, or regulatory, measures in the CC's practice. Nor does it mean that we do not care about competition, as has been suggested by one distinguished commentator in the context of this case.<sup>28</sup>
  52. Let us also say a few words about the BSkyB case. Although this case may still be subject to appeal the CAT's recent judgements in the BSkyB<sup>29</sup> case contain interesting comments on the CC remedy powers. I will touch briefly on these.
  53. In its application to the CAT, BSkyB claimed that by, in the first place, considering the more stringent remedy of full divestment the CC had wrongly rejected its proposed alternative remedies. In referring to its judgement in Somerfield<sup>30</sup> the CAT noted that the CC and the Secretary of State have a margin of assessment in relation to appropriate action for remedying the SLC created by a merger. As set out in its guidance, the CC needs to achieve as comprehensive a solution as reasonable and practicable to remedy the adverse effect. As the CAT had already held in Somerfield it was not unreasonable, as a starting point, to consider 'restoring the status quo ante'.
  54. BSkyB further challenged the divestment down to a holding of 7.5 per cent as irrational and suggested that, on the basis of expected effective voting turnout, a divestiture to below 15 per cent would have been sufficient. At the other end of the spectrum, Virgin's challenge argued that the CC should have ordered a full divestment and that the CC's partial divestment was a departure from its own guidance. Pain and pleasure again, or perhaps double pain?
  55. The CAT found that in deciding on a remedy, the CC was entitled to a significant element of judgement and was permitted to take a cautious and conservative approach to likely future voting patterns. But equally, the removal of any 'realistic prospect' of material influence as a result of partial divestment rather than full divestment did not constitute a departure from its guidance. In any event, given that the reasons for choosing that particular remedy were fully explained in the report and had been subject to consultation, any departure was fully reasoned.
  56. In its second judgement on relief, the CAT found that the SLC remedy was the culmination of a logically distinct investigation and decision-making process. Given that the SLC finding was upheld by the CAT, the validity of the respective remedy was not in any way affected or undermined by the report's findings in relation to the

---

<sup>28</sup>Martin Cave, *Does the Competition Commission care enough about Competition?* 16 [2006/2007] 4 ULR; Diana Guy, *Does the Competition Commission care enough about Competition?—The CC's perspective*, 16 [2006/2007] 5 ULR.

<sup>29</sup>Judgment of 29 September 2008, [2008] CAT 25; Virgin Media, Inc and (1) The Competition Commission (2) the Secretary of State for Business, Enterprise and Regulatory Reform and British Sky Broadcasting Group PLC, Judgment of 30 October 2008, [2008] CAT 32. The former ('Main judgment') decided both Sky's application for review and Virgin's application. The latter dealt with the plurality issues.

<sup>30</sup>*Somerfield plc/Competition Commission*, CAT judgment of 13 February 2006, [2006] CAT 4.

plurality issues.<sup>31</sup> The CAT found that the competition remedy was sufficient to address any plurality issues. It is now for BERR to implement it.

## Looking ahead

57. Looking ahead I do not, first of all, believe that the analytical approach approved by OFT and CC needs any fundamental change—it is soundly based on sensible competition theory, buttressed by fair and rigorous evidence gathering and is at the apex of international best practice. I do see two areas of interest. First, possibly moving to a mandatory, rather than voluntary system. Second, how to ensure the right balance is struck between the Phase I and Phase II stages, assuming, as most people do, that a two-stage process is worthwhile.
58. Let me talk first about *pre-notification*.
59. The starting point is that the UK merger control system does not require mandatory pre-notification of mergers and an investigation by the OFT has no general suspensory effect. In practice, mergers can be and are agreed, completed and implemented even if subsequently OFT or CC find them to be anti-competitive. In such a case, the merger may have to be ‘unscrambled’ through divestiture, which raises a range of practical problems some of which I have described earlier.
60. I have referred to the possible weakening of the overall effectiveness of the merger regime and the need to expend considerable resources on establishing effective interim measures to stop further integration of the merged business for the duration of the investigation. These resources could be much better employed in the investigation of the merger itself.
61. Even from the parties’ point of view the non-notification system is not necessarily favourable. While it may seem attractive to be able to complete without awaiting competition clearance, it is by no means risk-free. Parties who choose to consummate the deal can find themselves in a situation where the OFT and/or CC will require them to commit to hold-separate undertakings at a stage where they may be half-way through the integration process. This can and does cause considerable inconvenience for the business, not to mention the legal uncertainty. And they may be required to divest themselves of the undertaking or assets they have required, possibly at considerable cost or loss.
62. Of course any change to the system may have consequences which would require careful consideration. If the UK moved to a compulsory pre-notification system, a great deal of thought would have to go into choosing the appropriate notification threshold. Would the share of supply test—which resulted in many reference cases in the recent past—need to be abolished, not least because it might not be considered compliant with international best practice in a notification system? And if we do go down that route, do we need or want some sort of ‘claw back’ to replace it to ensure ‘smaller’ anti-competitive mergers remain reviewable? Do we have robust evidence, beyond the anecdotal, of an actual chilling effect of pre-notification on the economy? Overall, how would we quantify the costs and benefits of moving to a notification system?
63. It seems that all these and, I am sure, many more questions need careful consideration and assessment. This would need to include meaningful comparative research on how other merger notification systems function and to what extent we

---

<sup>31</sup>See reference earlier, at paragraph 20.

can or (cannot) draw conclusions for the UK. But that debate is one that really needs to be had soon if we want to travel in the right direction in the medium term.

64. The second issue is *Phase I/Phase II*.
65. I mentioned earlier a decrease in the number of references to the CC recently. This it may be deduced reflects in part greater activity at Phase I. Generally since the IBA Healthcare<sup>32</sup> case, the OFT has sought to provide much detail and reasoning in its Phase I work, and to cover more ground. Equally, parties have tended to provide more material and data in pursuit of Phase I clearance. The OFT has become more sophisticated in obtaining undertakings in lieu and has been more explicit on de minimis clearances. All these factors have much in their favour.
66. The question of overall time taken by the system as a whole remains a concern. It is hard to assess this objectively as in the absence of mandatory pre-notification the start date for Phase I is not always clear. One issue is the time taken to examine a 'problematic' merger (ie one that will in all probability go to the CC). The time spent on Phase I should preferably be limited as the main focus should be Phase II. Can this be done? There would appear two possible ways. One would be to have statutory time limits at Phase I (the need to fix a start date inherently implies a move to mandatory notification).
67. Another, possibly complementary, move would be to provide for 'fast tracking' of clearly problematic mergers—identified as such either by the authorities or by the merging parties. OFT may already offer such a possibility in practice, it is understood. This may involve some asymmetry of treatment—in other words possibly a lower reference threshold for these types of merger. By contrast, mergers that clearly lend themselves to solution by means of undertakings in lieu, for example, could perhaps benefit from a longer period at Phase I. After all there is a good prospect that Phase II can be avoided altogether. Some skill is obviously needed to tell the two cases apart—and some mergers will not fall into either category.
68. But these problems are not insurmountable. Difficult mergers do need to be looked at in depth and a filtering system is needed to identify which mergers need in-depth examination, as it would be futile to look in-depth at all mergers. If the filter starts to take as long as the in-depth examination itself, the outcome is, as they say, 'sub-optimal'.
69. It is said from time to time that the solution to this is to have merger control, at both stages, conducted by a single authority presumably with an enhanced degree of judicial scrutiny. This is perhaps not the place to debate the merits and demerits of a single competition authority. But I do not believe this particular issue would be greatly different in a single authority environment. The problem merely becomes internal. For example, single authorities, such as DG Comp, typically operate a system based on mandatory pre-notification and a two-stage examination, subject to statutory time limits at each stage, albeit with 'stop the clock' conditions. The issues there are not very different from ours, although there is the added need to demonstrate that the examination at stage two is genuinely objective. Disputed cases tend now to go to appeal.
70. Perhaps the better way to look at this issue is positively. If an investigation is to be in two stages, as is the norm, the existence of a separate, well-established Phase II authority is a big advantage. Having two authorities overcomes many of the common

---

<sup>32</sup>IBA Health Limited v Office of Fair Trading, Court of Appeal judgement of 19 February 2004.

criticisms that the administrative procedure, normal in Europe, combines the role of investigator, prosecutor, judge and jury. A powerful independent body has its uses in the merger control context.

71. Leaving that question on one side, however, the issue of how much is done at which stage on which case will not go away and needs to be addressed, regardless of any debate on institutions. Simply increasing the amount of work at Phase I, although understandable, is not the appropriate way to deal with all kinds of cases, and in this context it is important to remember that the objective of merger control is not to clear all mergers, but to control, in an efficient and proportionate way, those mergers which harm competition. So the challenge of striking the appropriate balance between Phase I and Phase II remains.

Thank you

© November 2008