

Competition Section seminar 8 March 2016

Mergers: A year in review

An overview of the last year in UK merger control with emphasis on procedural and substantive highlights.

Speaker: Jonathan Parker, CMA

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Competition Section annual conference 2016

Thursday 19 May 2016

CPD hours: 6.5 hours

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UK Merger Control: A Year in Review

8 March 2016
Jonathan Parker
Director of Mergers, CMA

Overview

Financial year	04/05	05/06	06/07	07/08	8/09	09/10	10/11	11/12	12/13	13/14	14/15	15/16 March
Referred	18	17	13	10	8	7	8	9	14	8	6	10
UIL accepted	5	6	7	5	6	5	4	5	10	0	3	9
Unconditional clearances - 'de minimis' exception	103 0	118 0	86 0	78 3	53 4	43 7	43 4	62 3	49 4	42 3	56 7	34 3
Found not to qualify	45	69	22	15	9	10	14	21	23	12	10	2
Total decisions	171	210	128	111	80	72	73	100	100	65	83	57
Cases to CRM	35	36	30	22	29	22	21	30	32	19	24	21
IU – IEO	6	10	10	10	11	10	9	25	23	26	30	14

1. FY is 1 April to 31 March
2. FY14/15 includes data until 31 March 2015
3. Delays in accepting UILs mean these numbers are not strictly comparable
4. Please note that decisions up to and including 31 March 2014 were given by the Office of Fair Trading (OFT), and decisions on or after 1 April 2014 were given by the Competition and Markets Authority (CMA).

Source:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309111/Merger_stats.pdf

Mergers Intelligence

- MIC has reviewed >550 transactions since 1 April 2015
- **10** of 54 decisions in FY14/15 have resulted from MIC (19%)
 - **21** of 83 in FY14/15 (25%)
- Of these **10** cases:
 - **6** = CRM (**9** FY14/15)
 - **3** = SLC finding (**3** FY 14/15 – *Sonoco, Xchanging, Gorkana*)
 - 3x UILs (*Regus/Avanta, BCA/SMA, MRH/Esso*)
 - **1** = de minimis (*Sheffield Taxis*) (**4** FY14/15)
- Enhancements: (i) s.5 EA02 and (ii) submissions from parties
- More targeted approach and more effective allocation of resources
- Section 5: jurisdiction and de minimis
- Submissions: jurisdiction, substance & de minimis
- MIC FNTQ cases remain low: only **1** this year (**3** FY14/15)
- Enquiry Letter threshold remains unchanged

Interim measures

- CMA may now impose initial enforcement orders
- IEOs currently used in all completed mergers
- Limited exceptions: *Atos/Countrywide*
- Reduced number (**14** in 15/16), (**30** in 14/15)
- Prepared to use in anticipated cases – *Linergy/Ulster Farm*
- Derogations available and IEOs released following clearance at ISOP
- Power to require reversal of pre-emptive action – not yet used
- Power to require appointment of Monitoring Trustee: *iRI/Aztec*, *Noble Egg/Manton*

Pre-notification and Phase 1

- Pre-notification is now mandatory
- Average length of pre-notification currently 25WD
- Phase 1 40WD – 100% of cases w/in statutory deadline
- Average length of Phase 1 currently 35WD
- **25** cases cleared \leq 35WD: *Nikkei/FT* (10WD), *Heineken/Diageo* (20WD), *NSMP/Total* (21WD), *Aviator/Swissport* (22WD), *Netto/Co-op* (23WD)
- Once started, very limited ability to stop the clock
- P1 timetable suspended in only 3 cases (Art.4(4) referrals)
 - *Northern Rail Franchise*, *Celesio/Sainsbury's*, *Muller/Dairy Crest*

UILs & De Minimis

- New process/deadlines for undertakings in lieu
 - New Remedies Form
 - Upfront SLC decision and offers w/in 5WD
 - Parties able to discuss draft offers in first 5WD & receive input from case team
 - Input on proposed purchaser/s
 - 40WD w/ extension of up to 40WD
- Use of expertise from Phase 2 'remedies unit'
- **3** de minimis cases FY15/16
- De minimis at ISOP – **5** FY14/15, **2** FY15/16

Phase I

P1 referrals (10)	P1 UILs (9)
<i>Poundland/99p</i>	<i>InterCity/East Coast</i>
<i>Pennon/Bournemouth</i>	<i>GTCR/Gorkana</i>
<i>Joseph Ash/Corbett</i>	<i>Greene King/Spirit</i>
<i>BT/EE</i>	<i>TOBC/Bowlplex</i>
<i>Linery/Ulster Farm</i>	<i>Mueller/Dairy Crest</i>
<i>Pearson/Learndirect</i>	<i>Reed Elsevier/Jordan</i>
<i>Celesio/Sainsbury's</i>	<i>BCA/SMA</i>
<i>Fenland/Fishers</i>	<i>Regus/Avanta</i>
<i>Iron Mountain/Recall</i>	<i>MRH/Esso</i>
<i>Ladbrokes/Coral</i>	

Phase II

- *Xchanging/Agencyport (clearance) – 29/4/2015*
- *Pork Farms/Kerry (clearance) – 3/6/2015*
- *Reckitt Benckiser/KY (remedy) – 12/8/2015*
- *Sonoco/Weidenhammer (clearance) – 3/7/2015*
- *Joseph Ash/Corbett (abandoned) – 23/7/2015*
- *Ashford St Peters/Royal Surrey (clearance) – 16/9/2015*
- *Poundland/99p (clearance) – 18/9/2015*
- *Pennon/Bournemouth (clearance) – 5/11/2015*
- *BT/EE (clearance) – 15/1/2016*
- *Linergy/Ulster Farms (clearance) – 6/1/2016*
- *Pearson/Learndirect (abandoned) – 6/1/2016*
- *Celesio/Sainsbury's – ongoing*

Phase II, cont.

- *Fenland/Fisher's* (abandoned) – 7/1/2016
- *Ladbrokes/Coral* – ongoing
- *Iron Mountain/Recall* – ongoing
- *Clariant/Kilfrost* – ongoing

Poundland/99p

- Poundland proposed acquiring 99p's 246 stores in the UK
- Product market: supply of general merchandise by SPPs and VGMs (B&M, Home Bargains, Wilko, Poundstretcher, Bargain Buys)
- Geographic market: one mile catchment areas and on a national basis. Also assessed loss of potential competition
- 80 local areas 4:3 or worse all of which resulted in RP of an SLC
- CMA didn't conclude on national TOH as any local remedies should resolve the national TOH
- Potential competition: 12 4:3 areas where one of the parties present and another had plans to enter. Also considered both parties' expansion plans a la Pure Gym but did not consider any areas gave rise to SLC concern
- Parties did not offer UILs and case referred to P2
- TOH: price increases, reduction of non-price factors, store closures
- National v local: starting point local
- Survey: online, 60k responses

Lineryg/Ulster Farm

- Parties previously attempted to merge in 2011/12
- Lineryg operated a Cat 1 plant for processing animal waste and its Board had approved plans to construct a Cat 3 plant
- UF operated a Category 1 plant and a Category 3 plant
- OFT found SLC in processing of fallen stock, Cat 1 & Cat 3
- Lineryg & SAPI entered MOU & acquired Ulster Farm, June 2012
- October 2012, UF closed Cat 1 plant & Lineryg shelved Cat 3 plant
- May 2015, Lineryg acquired UF & called in by MIC
- Counterfactual: pre-merger or 2012?
- MOU provided an incentive & implausible not to influence decisions
- Counterfactual = UF not close Cat 1 & Lineryg build Cat 3
- P2 = UK close Cat 1 & Lineryg not build Cat 3

- Pearson serviced the DVSA contract for the provision of the driving theory test with the DfT and the DVSA since 2004
- LD won DVSA contract in 2012 Cabinet Office tender process
- Pearson proposed (re)acquiring LD's CBT business
- Counterfactual pre-merger or post-tender
- Parties each other's closest competitor, limited constraints
- Although LD had won tender from small base, entry from other providers unclear and unevidenced
- Referred to P2 but abandoned

- Market for cleanroom laundry services: laundry services for garments used in sterile environments, eg pharma and manufacturers of micro-electronics
- Three UK providers: Fenland, Berendsen and Fishers Cleanroom.
- JV agreement btn Fenland & Berendsen to use the Micronclean trademark
- Fenland = North, Berendsen = South
- Termination of JV agreement, Berendsen free to compete throughout GB
- Counterfactual = illegal agreement or pre-merger conditions?
- Fenland removed a material competitive constraint in the North & unclear whether Berendsen would have the ability/incentive to expand into the North
- Berendsen had ability to expand but query incentive
- Parties offered behavioural UILs - inform customers in the North, place adverts in trade press, and assign some customers
- Remedy would not comprehensively restore the competition to pre-merger conditions, doubts re: effectiveness, structural remedy available
- Referred to P2 and abandoned

- Acquisition of Sainsbury's pharmacy business
- Celesio 1,542 Lloyds pharmacies, Sainsbury's 277 pharmacies
- Overlaps: prescription-only medicines, pharmacy medicines, GSL medicines, non-pharma products (toiletries, health & beauty, etc)
- 1 mile radius around each Lloyds store and 10 min drive-time around each Sainsbury's store in urban areas and 15 mins in rural areas
- 763 overlapping stores (546 Lloyds stores, 217 Sainsbury's stores)
- CMA applied:
 - Share of supply filter based on GP prescription data – 40%+ combined share of supply with an increment of at least 10% (572 stores)
 - 4:3 filter for remaining Lloyds stores (139 stores)
 - Share of store filter for remaining Sainsbury's stores w/ 40%+ combined share of supply with an increment of at least 10% (52 stores)
- 78 stores failed these filters
- 43 problematic areas, unable to rule out concerns in remaining areas, insufficient evidence of countervailing constraints

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