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
The Competition Section is a Law Society subscription based membership group which provides the support you need to be prepared for market change in competition law and practice, helping you to understand the implications for both you, your business and consumers.

We deliver expert analysis and practical guidance through our face-to-face networking events, topical webinars and archived podcasts, providing practical guidance with insight from competition law experts, both solicitors and representatives of related institutions.

For more information about the Competition Section or to join - [www.lawsociety.org.uk/competition](http://www.lawsociety.org.uk/competition)
Competition Section calendar

- **December 2015:** (Webinar) Competition law update 2015
  - Speakers - Alastair Mordaunt & Greg Olsen, partners, Clifford Chance

- **15 March:** (Webinar) Economics of horizontal mergers for competition law in practice
  - Speaker - Stephen Lewis, principal, RBB Economics

- **Wednesday 20 April:** (Seminar) The role of regulators in dealing with disruptive innovation
  - Speaker - John Fingleton

- **Tuesday 19 May:** Competition Section annual conference
  - Speaker - Stephen Lewis, principal, RBB Economics

- **Feedback/Suggestions** - [Competition Section LinkedIn group](https://www.linkedin.com) or email [competitionsection@lawsociety.org.uk](mailto:competitionsection@lawsociety.org.uk)

[www.lawsociety.org.uk/competition](http://www.lawsociety.org.uk/competition)
Competition Section annual conference 2016

Thursday 19 May 2016
CPD hours: 6.5 hours

We are delighted to announce that Richard Whish QC (Hon), emeritus professor of law, King’s College London will chair a session on anti-trust enforcement/commitments.

Keynote address: advocate general Juliane Kokott, Court of Justice of the EU

Panellists include:
- Daniel Beard QC, Monckton Chambers
- Birgit Krueger, Bundeskartellamt
- James Kavanagh, partner, Oxera
- Thomas Kramler, head of Digital Single Market Task Force, European Commission
- Sarah Cardell, general counsel, CMA
- David Parker, director, Frontier Economics.

The conference is structured with a mix of engaging panel sessions including:
- State aid
- Merger control
- E-commerce and digital markets
- Anti-trust enforcement and commitments
- Competition litigation.

www.lawsociety.org.uk/competitionconf2016
UK Merger Control: A Year in Review

8 March 2016
Jonathan Parker
Director of Mergers, CMA
### Overview

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:

<table>
<thead>
<tr>
<th>Financial year</th>
<th>04/05</th>
<th>05/06</th>
<th>06/07</th>
<th>07/08</th>
<th>08/09</th>
<th>09/10</th>
<th>10/11</th>
<th>11/12</th>
<th>12/13</th>
<th>13/14</th>
<th>14/15</th>
<th>15/4 March</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referred</td>
<td>18</td>
<td>17</td>
<td>13</td>
<td>10</td>
<td>8</td>
<td>7</td>
<td>8</td>
<td>9</td>
<td>14</td>
<td>8</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>UIL accepted</td>
<td>5</td>
<td>6</td>
<td>7</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>4</td>
<td>5</td>
<td>10</td>
<td>0</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Unconditional clearances - 'de minimis' exception</td>
<td>103</td>
<td>118</td>
<td>86</td>
<td>78</td>
<td>53</td>
<td>43</td>
<td>43</td>
<td>62</td>
<td>49</td>
<td>42</td>
<td>56</td>
<td>34</td>
</tr>
<tr>
<td>Found not to qualify</td>
<td>45</td>
<td>69</td>
<td>22</td>
<td>15</td>
<td>9</td>
<td>10</td>
<td>14</td>
<td>21</td>
<td>23</td>
<td>12</td>
<td>10</td>
<td>2</td>
</tr>
<tr>
<td>Total decisions</td>
<td>171</td>
<td>210</td>
<td>128</td>
<td>111</td>
<td>80</td>
<td>72</td>
<td>73</td>
<td>100</td>
<td>100</td>
<td>65</td>
<td>83</td>
<td>57</td>
</tr>
</tbody>
</table>

| 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 |
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 ≤ 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

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

- Parties previously attempted to merge in 2011/12
- Linergy 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
- Linergy & SAPI entered MOU & acquired Ulster Farm, June 2012
- October 2012, UF closed Cat 1 plant & Linergy shelved Cat 3 plant
- May 2015, Linergy 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 & Linergy build Cat 3
- P2 = UK close Cat 1 & Linergy 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
Celesio/Sainsbury’s

- 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
Competition Section calendar

- **December 2015:** (Webinar) Competition law update 2015
  - Speakers - Alastair Mordaunt & Greg Olsen, partners, Clifford Chance
- **15 March:** (Webinar) Economics of horizontal mergers for competition law in practice
  - Speaker - Stephen Lewis, principal, RBB Economics
- **Wednesday 20 April:** (Seminar) The role of regulators in dealing with disruptive innovation
  - Speaker - John Fingleton
- **Tuesday 19 May:** Competition Section annual conference
  - Speaker - Stephen Lewis, principal, RBB Economics

- **Feedback/Suggestions** - Competition Section LinkedIn group or email competitionsection@lawsociety.org.uk

www.lawsociety.org.uk/competition
Competition Section annual conference 2016
Thursday 19 May 2016
CPD hours: 6.5 hours

We are delighted to announce that Richard Whish QC (Hon), emeritus professor of law, King’s College London will chair a session on anti-trust enforcement/commitments.

Keynote address: advocate general Juliane Kokott, Court of Justice of the EU
Panellists include:
• Daniel Beard QC, Monckton Chambers
• Birgit Krueger, Bundeskartellamt
• James Kavanagh, partner, Oxera
• Thomas Kramler, head of Digital Single Market Task Force, European Commission
• Sarah Cardell, general counsel, CMA
• David Parker, director, Frontier Economics.

The conference is structured with a mix of engaging panel sessions including:
• State aid
• Merger control
• E-commerce and digital markets
• Anti-trust enforcement and commitments
• Competition litigation.

www.lawsociety.org.uk/competitionconf2016