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**UK Merger Control: In
Need of Reform?**



1. Introduction

The Chancellor's Pre-Budget Report on 9 October 2007 acknowledged that the UK's world class competition regime could be improved, and announced:-

“By the end of the year the Government intends to consult on measures to further enhance the speed and simplicity of the UK merger regime...”

But are these the only reforms which are required and what is meant by “simplicity”?



2. How are the OFT/CoCo regarded?

KPMG peer review of competition policy for DTI (June 2007) – mergers

Good Points

- UK improved its ranking – 2nd only to US
- Improved its effectiveness ahead of Germany
- Continued use of robust economic analysis – has “truly excellent analytical capability”

Problems

- Slow
- Scores relatively low on ability to set and adhere to “strict and limited timeframes”



How are the OFT/CoCo regarded? (2)

■ Areas for Improvement

- Improve speed of decision making
- Make the regime less complex to users
- Improve the use of resources



How are the OFT/CoCo regarded? (3)

■ Areas for Improvement (cont.)

- Allow 3Ps too long to respond to information requests
- OFT should prioritise cases according to business need
- Parties should make best use of pre-notification throughout process
- Inability to enter into UIL negotiations
- CoCo uses a “one size fits all approach” for all references



How are the OFT/CoCo regarded? (4)

■ Suggestions for Reform

- Mandatory notifications
- Additional resources – particularly more economists for OFT
- More discretion for OFT not to refer and accept UILs



How are the OFT/CoCo regarded? (5)

- Global Competition Review (June 2007)
 - CoCo ranked in the Elite with DG Comp and FTC
 - OFT ranked Very Good with DoJ, ACCC, France's Competition Council and FCO
- CoCo
 - Standard of merger review was high
 - Not afraid to clear deals unconditionally
- *Problems/Quibbles*
 - Keeping teams together is difficult
 - the economic analysis is sometimes questionable
 - need to find ways to present confidential information fairly
 - Quicker investigation where possible



How are the OFT/CoCo regarded? (6)

■ OFT

- Commentary recognises that it is a time of change

■ *Problems*

- Lack of focus
- Merger resources stretched
- High staff turnover (15%), variable quality
- *“does some of its work well, at times its output is distinctly mediocre”*
- No information about third party comment and details about progress are *“often vague”*



3. Benefits and Deterrence

■ Benefits

- The OFT estimated the benefits of preventing or remedying anti-competitive mergers at £640m from April 2000 to March 2005
- The OFT estimated that the average consumer savings from the UK merger regime at £92m pa (2004 - 2007)
- CoCo estimated the extra costs consumers would have paid at £53m pa over April 2004 to March 2007 but for its merger enforcement



Benefits and Deterrence (2)

■ Deterrence

● Deloitte concludes:-

- that for every merger blocked or modified by UK authorities 5 more were abandoned or modified on competition grounds before the OFT became aware of them
- 12% of all mergers considered by companies were abandoned or modified on competition grounds increasing to 30% if there had been a CoCo inquiry in the sector since 2000



4. Potential areas for Reform

- Legislative changes
 1. Time
 2. Mandatory notifications
 3. Thresholds for notifications
 4. Thresholds for a reference
 5. Focused references
 6. Simplified procedure for “no brainers”
 7. Powers for OFT to obtain information
 8. Material Influence, Associated Persons
 9. Duty to refer



Potential areas for Reform (2)

- Managerial/Process changes
 1. More resources
 2. Process changes at OFT
 - revise requirements for a complete notification
 - seek third party comments early
 - internal deadlines for information requests
 - address less central issues earlier
 - earlier issues letter
 - Informal Advice/Confidential Guidance
 3. UIL
 4. Process changes at CoCo
- Changes not discussed
 - Marriage of OFT and CoCo



Merger Workload – UK/Germany 2006

| Cases | Bundeskartellamt | OFT | CoCo |
|---------------------------------------|------------------|-----|------|
| Notifications | 1829 | 141 | - |
| Decisions | 1684 | 114 | - |
| Clearances | 1679 | 112 | |
| Phase 1 Clearances | 1649 | 101 | - |
| Phase 2 Clearances | 24 | - | 3 |
| Phase 2 Clearances with Conditions | 6 | - | 8 |
| Prohibitions | 5 | - | - |
| Withdrawals/ Abandonments | 44 | - | 2 |
| No Jurisdiction | 91 | 27 | - |



5. Legislative Reform

1. Time (present position)

■ OFT

| | |
|-------------------|----------------------------|
| – Prenotification | 2 weeks |
| – Phase 1 | 8 weeks (often longer) |
| – Phase 2 | 24 weeks |
| – Remedies say | <u>6 weeks</u> |
| Total | 40 weeks / 8 months |

■ ECMR Extended

| | |
|--------------|------------------|
| – Phase 1 | 7 weeks |
| – Phase 2 | <u>5 months</u> |
| Total | 6½ months |

■ EU Norm

| | |
|--------------|-----------------|
| – Phase 1 | 1 month |
| – Phase 2 | <u>4 months</u> |
| Total | 5 months |



Legislative Reform (2)

- Only Slovakia has a longer Phase 1; only Sweden has a longer Phase 2
- General Consensus - process takes too long – increased number of abandonments following EA
- Reforms - OFT
 - simplified decisions
 - shorter deadline, say 30 working days
 - fast references for obvious cases, not merely water mergers
- Reforms - CoCo
 - deal with remedies within process
 - shorten period to say 4/5 months
 - continue developing more streamlined procedures for more straightforward cases



Legislative Reform (3)

2. Mandatory Notifications

■ Present Position

- Many mergers not notified
- Survey evidence that number of unnotified mergers which would have been unlikely to be cleared unconditionally similar to those where SLC found or UIL obtained
- OFT devotes relatively little effort to identifying such cases relying largely on 3P complaints

■ Reforms

- OFT
 - Fairly widespread view of GCR, KPMG respondents
 - CoCo view that this would avoid the problems they face in dealing with completed mergers
- If mandatory and suspensory system:
 - business probably not in favour – undue burden
 - impact on auctions – the common method of transacting mergers
 - significantly increased resources required for OFT



Legislative Reform (4)

3. Thresholds for Notifications

■ Present Position

- Share of supply test potentially catches a wide range of transactions
- OFT's proposed "de minimis" approach but still 3 significant clawbacks

■ Reforms

- Dispense with share of supply test
 - suggested by CoCo
 - not inevitable
 - e.g. Portugal, Spain
- Turnover threshold
 - crucial
- Retain residual power to intervene as in US?

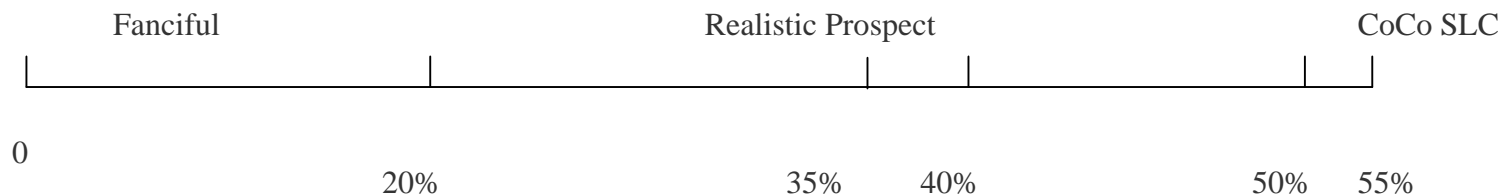


Legislative Reform (5)

4. Thresholds for a Reference

■ Present Position

- Following *IBA Health*



- A realistic prospect of SLC probably starts at 35% +
- Increased number of references post CA decision
- In practice OFT probably raising the threshold
- A lot depends on the industry and number of 3P complaints
- Reforms
 - Replace realistic prospect with say a strong prospect



Legislative Reform (6)

5. Focused References

■ Present Position

- CoCo starts anew albeit with benefit of OFT Decision, papers, briefing, etc.

■ Reforms

- OFT makes a focused reference identifying the relevant markets, theory of harm and evidence where it has found possible SLC and clears the rest



Legislative Reform (7)

6. Simplified procedure for “No Brainers”

■ Present Position

- Although Merger Notice will be used OFT often takes extension
- Takes resources off more difficult cases

■ Reforms

- More resources for OFT
- Stick to 20 working days
- Simplified decision
 - either ECMR type decision or
 - template decision with basic information
- Possible market share limit



Legislative Reform (8)

7. Legal powers for OFT to obtain information

■ Present Position

- No such power – although Parties will do so
- 3Ps often delay in providing information

■ Reforms

- Equip OFT with such powers



Legislative Reform (9)

8. Material Influence/Associated Persons

■ Material Influence

- Lack of clarity
- OFT does not intervene in many cases, even with listed targets
 - e.g. *Aegis/Havas*
- If it does intervene, it tends to be due to 3P complaints
 - e.g. *First Milk/Robert Wiseman*
or it is very high profile
 - e.g. *BSkyB/ITV*



Legislative Reform (10)

8. *Material Influence/Associated Persons (cont.)*

■ Reforms

- Bright line thresholds but see *Gillette/Wilkinson Sword* and Germany where 25% shareholding has exceptions for competitive significant influence at lower levels
- Should it apply if say decisive influence would fall under ECMR?

■ Associated Persons

- Lack of clarity
- Wide possibilities if combined with material influence
- However, concerns tend to be more theoretical than actual



Legislative Reform (11)

9. Duty to Refer

■ Present Position

- OFT under a duty to refer if a realistic prospect of SLC

■ Reform

- Some commentators suggest that the duty to refer is replaced by a discretion
- *Problem?*
 - if OFT successfully reviewed by CAT it is not obvious that a fresh look will lead to a change
 - it will raise new issues for review by CAT as to the exercise of its discretion
- If other reforms are made, this would not be necessary



6. Managerial / Process Changes

1. More Resources

- OFT budget being reduced by 5% pa in real terms over 2008/11 spending review period
- CoCo reducing corporate services costs and maintaining level of cost per inquiry
- OFT increasing resources in Mergers Division with 36 posts including Legal and Remedies
- Reforms
 - Better use of resources
 - Increase productivity



Managerial / Process Changes (2)

2. Process changes at OFT

- 1) Revise requirements for complete notification
 - e.g. internal documents
- 2) Internal deadlines for Information Requests of Parties
- 3) Early despatch of information requests to 3Ps – follow up with calls
- 4) Early meeting with Parties to identify central issues
- 5) Earlier issues letter
 - try and resolve peripheral issues earlier
- 6) Informal Advice, Confidential Guidance



Managerial / Process Changes (3)

3. UIL and Local Markets

■ Work well enough for local markets

- e.g. pubs, betting shops, pharmacies, RMC plants, etc

But

- depends on established precedent

■ Difficulties for UIL

- Lack of precedent
- Ability of OFT to scope nature and extent of SLC



Managerial / Process Changes (4)

3. *UIL and Local Markets (cont.)*

■ Difficulties for Parties

- If the OFT's analysis is understood earlier, Parties in better position to offer earlier and debate acceptability
- No opportunity to debate with decision makers

■ Latest Cases

- Upfront IPR license remedy in *Tetra Laval/Carlisle*

■ Reforms

- Preparedness to debate/negotiate remedies earlier
- Ability to negotiate with decision maker
- Insert a stage after CRM to negotiate UIL



Managerial / Process Changes (5)

4. Process changes at CoCo

- 1) Further develop streamlined procedures for more straightforward mergers
- 2) Review breadth and depth of various questionnaires
- 3) Increased focus on project management
- 4) More staff meetings including some with 1 or more group members



7. Conclusions

- UK merger control is relatively slow, deluxe and expensive
 - What business is looking for is for
 - a faster
 - more focused
 - and thus less expensive

merger control regime which retains as far as possible the strengths of the current regime but fixes the weaknesses
- It requires a combination of legislative and management change
- The issue is not whether some change is required but what changes are appropriate. It would be a pity if the Chancellor/BERR's consultation is confined to speed



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