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Caveat emptor ... or, getting the deal stuck

Contemporary issues in UK merger control

Simon Pritchard
Senior Director, Mergers
Office of Fair Trading

Outline

- Mergers Group
- Managing the voluntary* regime
- Intervention thresholds 2006 -
- Clear-cut remedies
- *De minimis* merger control
- Headline points for the antitrust bar
- EC and U.S. highlights

Caveat: all views are personal and do not necessarily represent those of the OFT

Mergers Group

Structural reform

- Branch 'pyramid' replaced with Group 'diamond' → upgrade and career paths for Mergers staff
- Capacity building in management and leadership

Collegiate governance

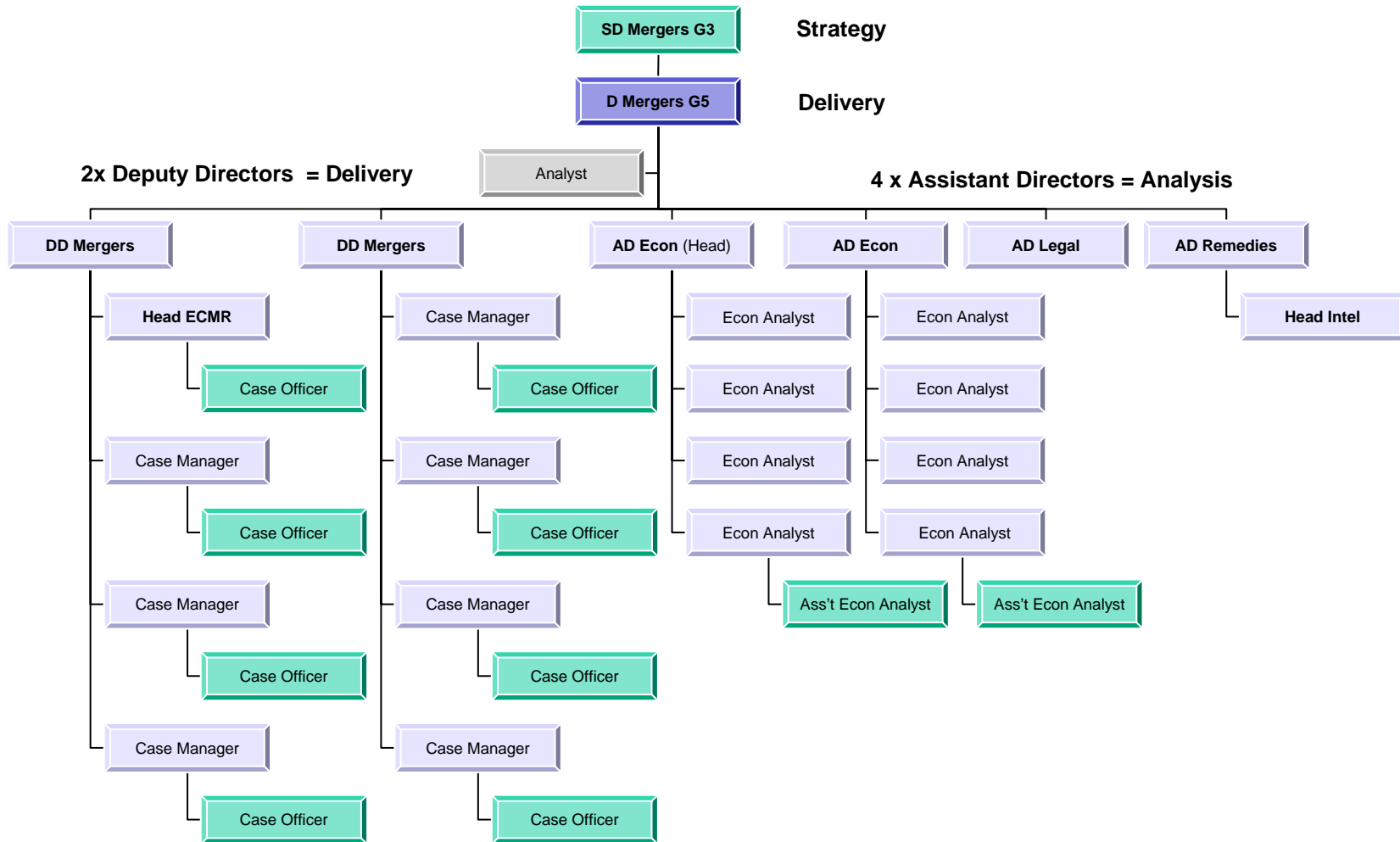
- CRM model → Open House for case lifecycle issues: earlier senior input, consistency
- Non-notifieds, IA requests, hold-separates, Art. 22, optimal handling of substantively complex cases

Cross-OFT integration

- CRM and Open House → integration with API, M&P sectoral, OCE, PIU
- Markets Leadership Team (MLT), Policy Committee

Mergers Structure

Sep 07



The voluntary* regime

* Compulsory OFT-led investigations

- Conscious elimination of inquiries into (and fewer voluntary filings of) benign deals
- Investing in (earlier) tracking down harmful 'below radar' deals e.g. *Stericycle/STG*, *Thermo/GVI*

* Compulsory hold-separate undertakings

- Statutory threshold: reasonable grounds to suspect jurisdiction
- Pre-EA02 Guidance: unlikely unless reference a real possibility
- 2007: prima facie risk analysis in weeks -1 to +1. Lower than CRM test, applied in weeks 5-6.
- Best to avoid costly surprise OFT 'cease and desist' and CC 'roll back' intervention

** But no compulsory information powers

- A statute-bound OFT must objectively justify merger decisions with relevant evidence
- OFT has no statutory power to gather evidence

The voluntary* regime

Unscrambling the eggs at the CC

- In around 50% of CC inquiries, the acquirer maximises antitrust exposure by integrating without waiting for the OFT and CC's verdict
 - **2 x litigation** – *Somerfield v CC* and *Stericycle v CC*
 - **3 x full unscrambling** – *Emap/ABI* (with positive IA), *Stonegate/Deans*, *Thermo/GVI*
 - **4 x substantial unscrambling** – *EWS/Marcroft*, *Stagecoach/Scottish Citylink*, *Somerfield/Morrisons*, *Stericycle/STG*
 - **3 x nearly unscrambled** – *Francisco/G Partners* (cleared by 3:2), *British Salt/New Cheshire* (provisional SLC) and *Greif/Blagden* (provisional SLC)

FTC intervention: 1996 - 2005

FTC Horizontal Merger Investigations
 Number of Significant Competitors
 All Markets
 FY 1996 through FY 2005

		<i>Outcome</i>		<i>TOTAL</i>
		Enforced	Closed	
<i>Significant Competitors</i>	2 to 1	192	5	197
	3 to 2	206	34	240
	4 to 3	114	44	158
	5 to 4	40	26	66
	6 to 5	15	24	39
	7 to 6	3	13	16
	8 to 7	6	7	13
	9 to 8	0	5	5
	10 to 9	2	1	3
	10 +	0	10	10
<i>TOTAL</i>		<i>578</i>	<i>169</i>	<i>747</i>

2nd Req. enforcement 'hit rate'

97% against 2 to 1
86% against 3 to 2
72% against 4 to 3
61% against 5 to 4
38% against 6 to 5
19% against 7 to 6
46% against 8 to 7
0% against 9 to 8
67% against 10 to 9
0% against 10+

OFT intervention: references 2006 -

2 to 1 ~ 'monopoly'	#1 and #2 ~ 'dominant firm'	3 to 2	4 to 3	Other theory of harm
<p>(Arqiva/NGW) (Sportech/Vernons) Greif/Blagden* Kemira Grow-H./Terra Thermo/GVI Svitzer/Adsteam Stagecoach/S. Citylink MDA/Quest Safenet/nCipher</p>	<p>(Game/Gamestation) Stonegate/Deans Hamsard/Live Nation Panfish/Marine Harvest* Stericycle/STG IPC/Horse Deals</p>	<p>Woolworths/Bertram CBS/Hampden Polypipe/Verplas G4S/Abbotshurst</p>	<p>(Tesco/Slough) Wienerb'r/Bagg'ridge .</p>	<p>(BSkyB/ITV) EWS/Marcroft</p>
9 of 23 refs = 39%	6 of 23 = 26%	4 of 23 = 17%	2 of 23 = 9%	2 of 23 = 9%

OFT intervention: conditional clearances 2006-

(each case allocated under highest concentration)

2 to 1 ~ 'monopoly'	#1 and #2 ~ 'dominant firm'	3 to 2	4 to 3	Other theory of harm
<i>CGL/United Co-op</i> <i>Inchcape/EMH</i> <i>Flybe/BA Connect</i> <i>Pendragon/Vardy</i> <i>Tetra Laval/Carlisle</i> <i>Gala/County</i> <i>Boots/Unichem</i>	<i>Johnston/Local Press</i>	<i>Lloyds Pharm/IPCC</i> <i>Agg Ind/Foster</i>		<i>CGL/Fairways</i>
7 of 11 UIL = 64%	1 of 11 UIL = 9%	2 of 11 UIL = 18%		1 of 11 = 9%

OFT intervention: conditional clearances 2006-

(each case allocated for all classes of SLC)

2 to 1 ~ 'monopoly'	#1 and #2 ~ 'dominant firm'	3 to 2	4 to 3	Other theory of harm
<i>CGL/United Co-op</i> <i>Inchcape/EMH</i> <i>Flybe/BA Connect</i> <i>Pendragon/Vardy</i> <i>Tetra Laval/Carlisle</i> <i>Gala/County</i> <i>Boots/Unichem</i>	<i>Johnston/Local Press</i>	<i>Lloyds Pharm/IPCC</i> <i>Agg Ind/Foster</i> <i>Pendragon/Vardy</i> <i>Tetra Laval/Carlisle</i> <i>Boots/Unichem</i>	<i>CGL/United</i> <i>Agg Ind/Foster</i> <i>Pendragon/Vardy</i>	<i>CGL/Fairways</i> <i>Agg Ind/Foster</i>
7 of 18 instances =39%	1 of 18 = 6%	5 of 18 = 28%	3 of 18 = 17%	2 of 18 = 11%

OFT non-intervention: clearances 2006 -

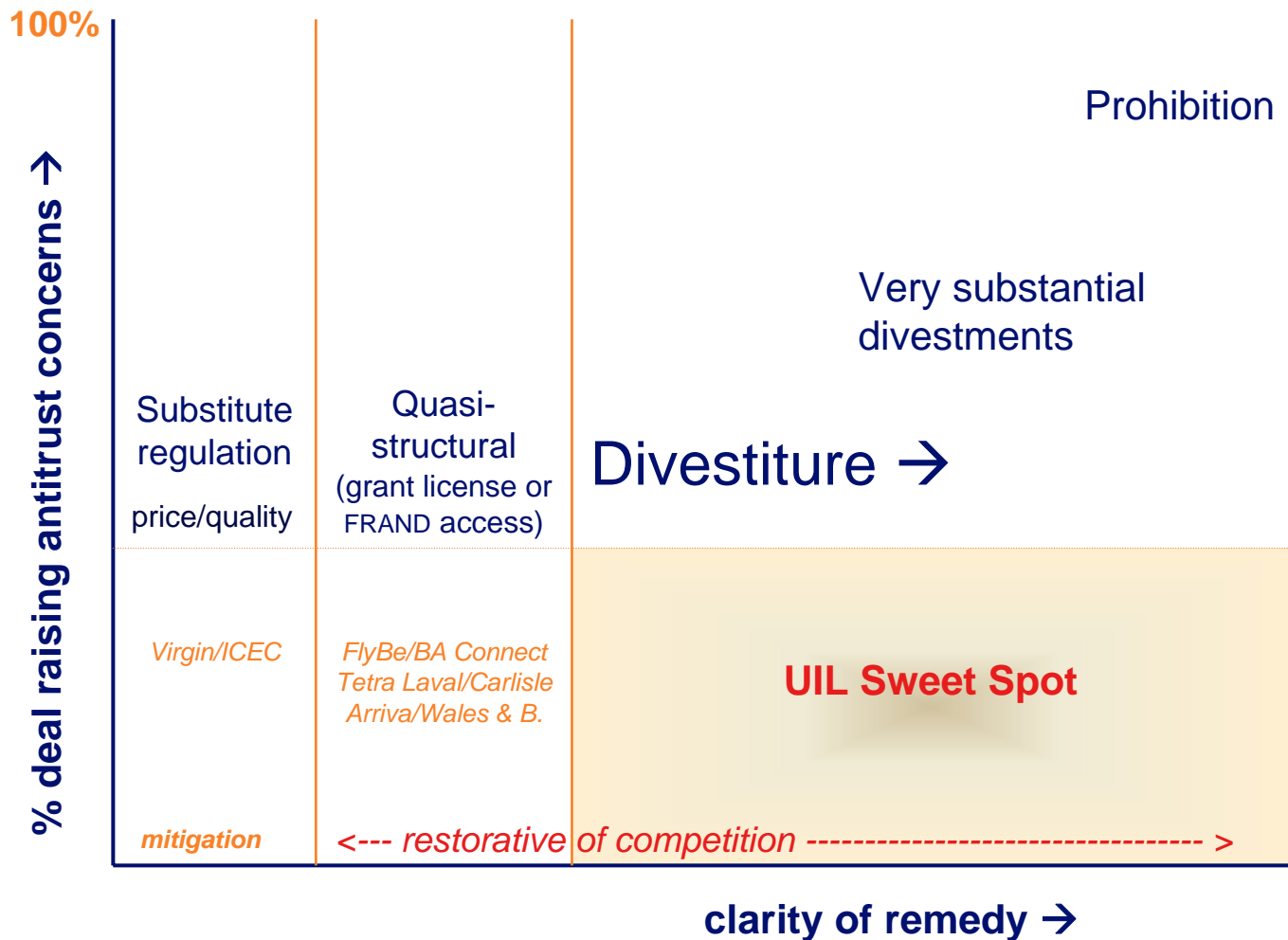
10 horizontal examples

- 2 to 1 but trivial merger effect due to buy-side – *Babcock/Devonport, Menzies/Grays*
- 3 to 2 but entry – *Arqiva/BT, Panavision/AFM*
- 4 to 3 but entry, expansion – *Celanese/APL* (and buyer power), *Getty/Digital/Photonica*
- Close competitors but rivals can expand, reposition – *Getinge/Huntl'gh, Premier/RHM, Altana/Wolst.*
- Cartel inquiries but merger would not create or reinforce coordination – *Dairy Crest/Arla*

5 non-horizontal examples (strong third party complaints)

- *Pearson/Harcourt*
- *Freightliner/DHL*
- *BUPA/Clinovia*
- *ICAP/EBS*
- *Montauban/Simon*

Clear-cut remedies



Clear-cut purchasers

Up-front buyers

- *Tetra Laval/Carlisle* – risks from IPR-only asset package successfully resolved via up-front buyer
- *Tesco/Slough* – prime candidate buyer drops out and OFT insists on up-front alternative due to obvious lack of credible and eligible one-stop purchasers

CGL v OFT

- OFT is reasonable in rejecting purchaser whose CEO sits on board of merged firm
- Structural links central also in *BSkyB/ITV* and *Aggregate Industries/Foster Yeoman* (Harlow JV)

Aggregate Industries v OFT (pending)

- OFT contends that in a quick-look purchaser approval context, it is reasonable for the OFT to reject a purchaser raising antitrust concerns ‘closely analogous’ to the original problematic deal

De minimis merger control

Consultation elements

- Explicit cost-benefit analysis with reference to consumer harm
- Raises figure to make *de minimis* arguments from £400k to £10m
- Clawback for clearly harmful mergers
- Clawback for cartelised markets
- Clawbacks for precedent value, vulnerable consumers
- Informal advice offered

Feedback

- Broadly supported as important step forward
- Clarifications required
- For some, does not go far enough – prefer safe harbour approach (~ carve out to jurisdiction)

Headlines for the antitrust bar

Is egg-scrambling in the best interests of the client?

- For deals with antitrust risk, consider impact on client in advising whether a 'below radar' strategy – and, in particular, scrambling the eggs post-closing – make business sense

The OFT has a strong interest to facilitate UIL outcomes in all candidate cases

- In cases with severable issues that do not destroy deal economics, pursue UIL discussions as early as the client feels comfortable
- In contrast, marginal 'binary' cases will be likely be decided on evidence, *not* UIL
- Tremendous upside potential for law firms to outshine their competitors by better use of pre-notification and timely provision of robust empirical evidence to support advocacy
 - *CGL/United* and *Stagecoach/SWT* – survey inputs stress-tested with OFT show low diversion ratios indicating absence of close competition → permits OFT to clear some/all markets
 - *Park/Home Farm* – consumer survey work underpins critical loss analysis tending to show that a candidate 'Christmas hamper/voucher' market is not worth monopolising

Phase II and enforcement action exist for good reason

EC and U.S. highlights

ECMR

- Non-horizontal guidelines consultation
- Remedies consultation
- Schneider damages judgment – breach of due process
- *Ryanair/Aer Lingus*

United States

- Now or never? Decline of merger enforcement in Bush II – see Baker/Shapiro critique
- FTC goes 0-4 in court – *Whole Foods/Wild Oats*