

Law Society European Group
15 September 2008

OFT Merger Control – 5 years on, and an evolving style of review

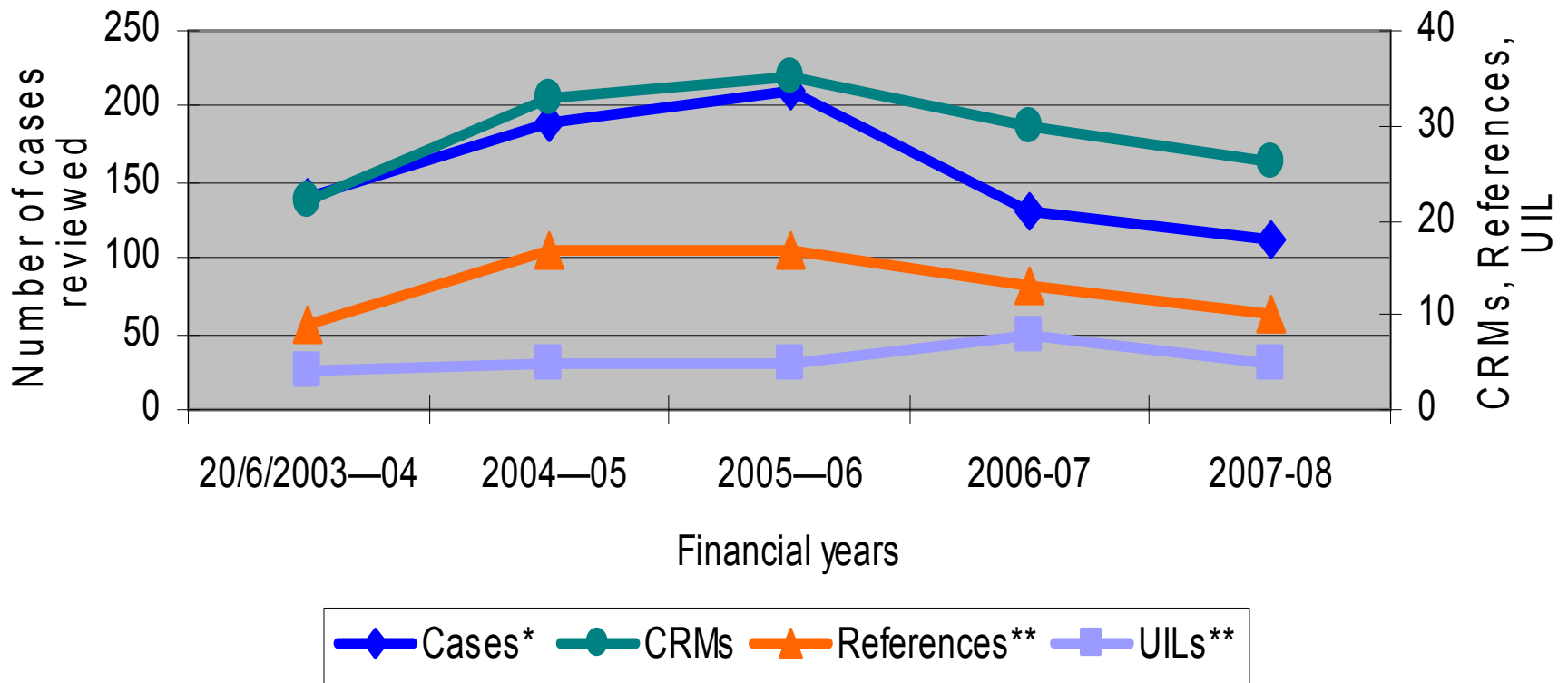
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Overview

- Casework overview
- Update on draft J&P Guidance
- Improving external procedures
- Remedies policy
- De minimis exception

*** Views are personal and not binding on the OFT**

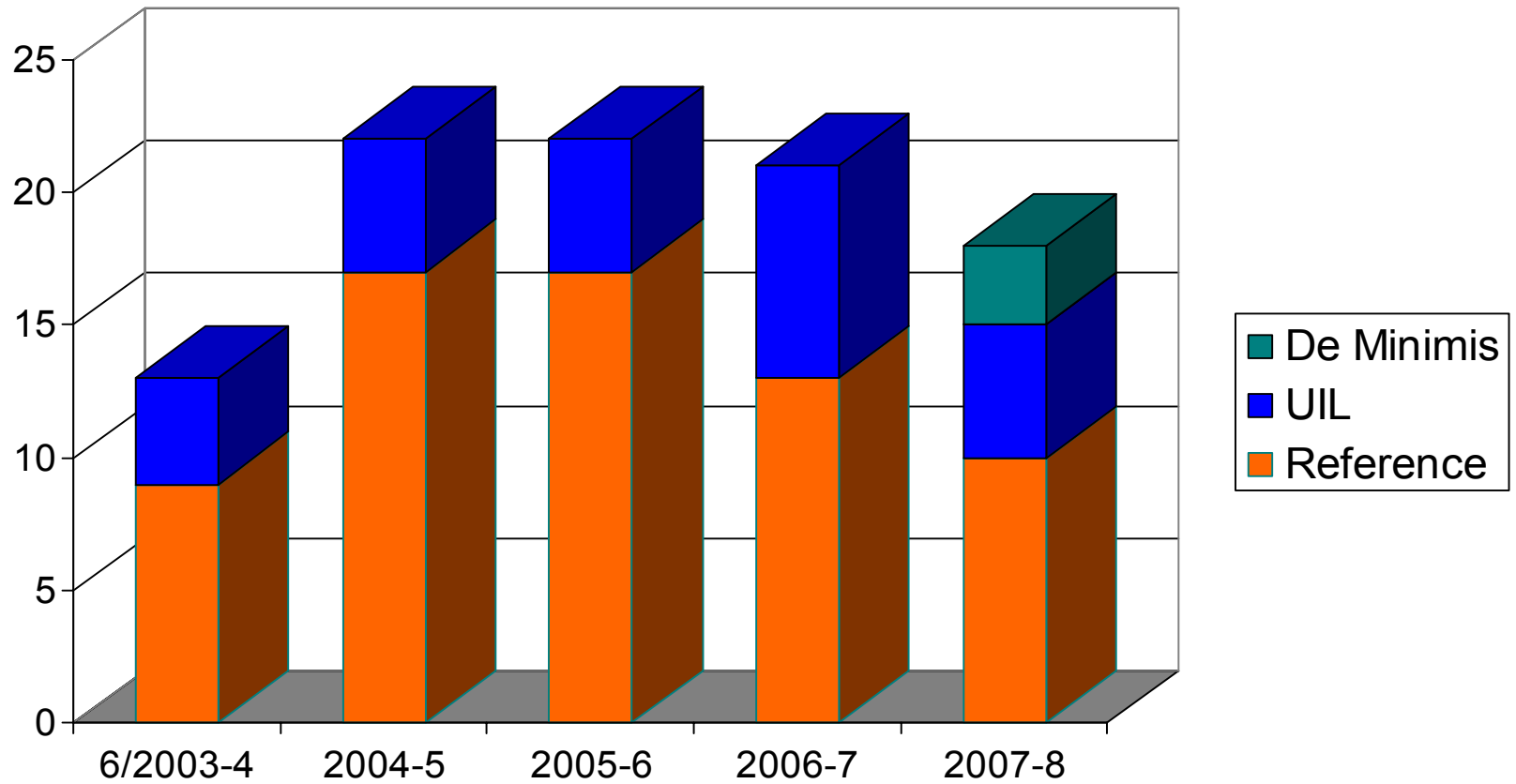
Casework outcomes under EA02



* Date of notification

** Date of s.22/33 decision

SLC findings 2003-present



Jurisdictional and Procedural Guidance

- Comments from 14 law firms, 4 professional bodies and trade associations
- Updating welcomed by stakeholders
- Summary of responses and emerging thinking to be published shortly
- Aiming for final guidance by end of year

Issues arising from responses

- Situations where MI found
- Unavailability of IA in water mergers
- Use of statutory merger notice
- Threshold for seeking IUs
- Period to respond between issues paper and issues meeting
- Procedures for facilitating UIL in “near miss” cases

J&P Guidance (cont'd)

Definition of a Relevant Merger Situation

- Focuses too heavily on exceptional factual situations suggesting MI might be found in more situations
- Inclusion of some additional factors (eg reference to likely voting of other s/h's) appears to risk extending MI unduly

Emerging Thinking

- Emphasise exceptional nature of certain factual situations in guidance
- Unlikely to give more rules of thumb - contrary to wording & intention behind test

J&P Guidance (cont'd)

Informal Advice

- Absence of jurisdictional IA in water mergers
 - Anomalous position given that credible candidate for reference
 - Alleged chilling effect on water M&A activity

Emerging Thinking

- Recognise commercial significance of mandatory reference regime in water mergers
- No plans to reinstate individual IA
 - Case teams no better placed than external advisors
 - Impractical given strain on resources
 - Better to focus on substantive assessment of public cases
- Ofwat / CC discussions on possibility of further generic published guidance

J&P Guidance (cont'd)

Statutory Merger Notice

- Suggested use too limited – tension with recognition that notification not always necessary

Emerging Thinking

- Emphasise that process available in all anticipated public cases
- Recognise importance of guaranteed decision within 20-30 WDs can be significant in certain cases (eg public bids)
- Notice risks not maximising phase 1 outcome in potential problem cases
- OFT will not encourage withdrawal of PN – doesn't follow OFT will restart clock, nor that decision will be made in additional 10 WDs
- More appropriate if used following greater pre-notification

J&P Guidance (cont'd)

Initial Undertakings and Orders

- New threshold (“preliminary indications ...raises competition concerns”) is too low

Emerging Thinking

- Appropriate to seek IUs ASAP following completion → threshold acceptable
- OFT not accepting IUs in all completed mergers
- Template & waivers/consents appropriate for reasons of procedural economy
- Waivers/consents to be published on website

J&P Guidance (cont'd)

Issues Papers

- Historic 'kitchen sink' approach
- Period between issues letter and issues meeting too short

Emerging Thinking

- Attempting to include only issues of genuine concern; ranking or grading
- 'State of play' discussion to be offered in all cases – market test feedback, potential ToHs, CRM?

J&P Guidance (cont'd)

Near miss UILs

- More guidance on when OFT would apply discretion
- Second opportunity to be given in all cases

Emerging Thinking

- No plans to give second UIL opportunity as of right
 - Constructive engagement on UILs throughout process
 - Undermines 'last-shot game' principle
- Near miss discretion applied in several cases – good & credible attempts to resolve concerns, only “tweaking” required
- Not appropriate to seek to define further “near miss” cases

Improving External Procedures

- Key features of dealings with OFT
 - Transparency and engagement
 - Efficient process
 - Openness

Transparency and engagement

➤ Criticism

- Parties in the dark: gap between initial meeting and issues meeting
- No third party feedback
- ToHs not properly articulated and/or developed too late
- Remedies discussed too late, and limited guidance from case team

➤ Solutions

- More regular contact (inc state of play) - market feedback and potential ToHs
- More debate/guidance on remedies
- 'Open House' branch weekly meeting

Improving External Procedures

Efficient process

➤ Criticism

- One size fits all
- Merger notice RIP
- 'Kitchen sink' approach to issues letter
- Info requests bearing no relation to ToH

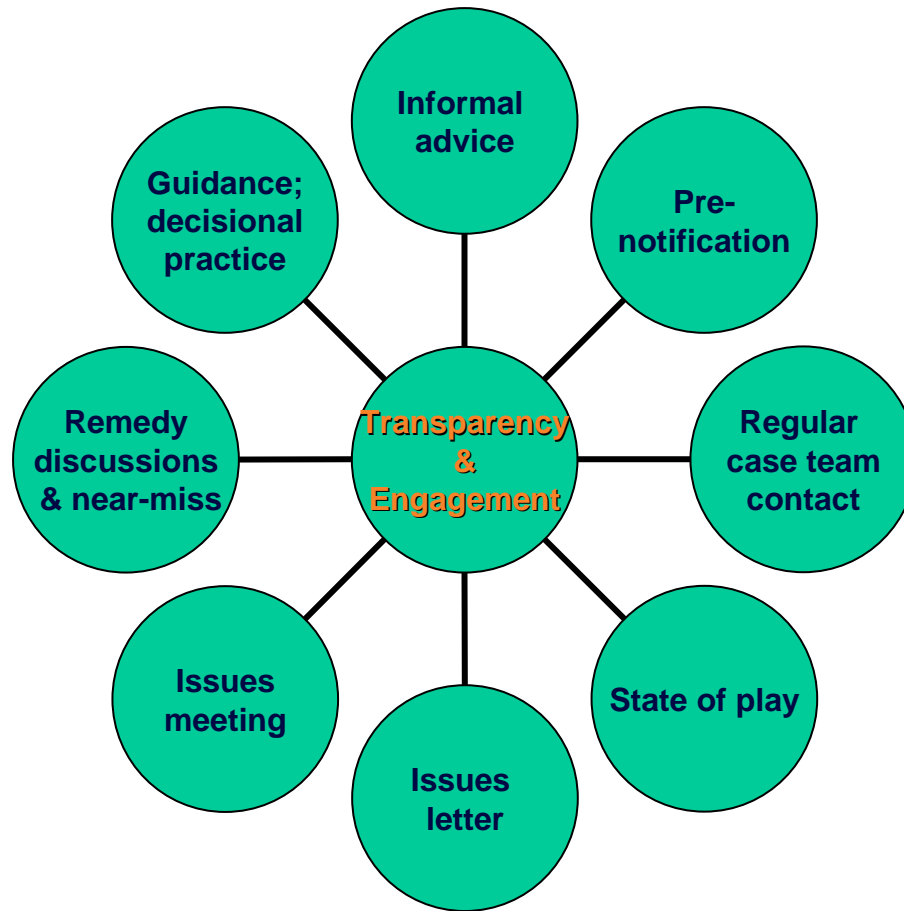
➤ Solutions

- Good at scaling up (Global/GCap; Boots/Unichem), work still to do on scaling down
- Information requests more proportionate and better linked to ToH
- Earlier signals to parties

Openness

- Guidelines, consultations, etc
- Today!

OFT Merger Review Journey



Remedies Policy

- Duty to refer must be triggered - no reverse engineering of SLC
 - DM unaware of UIL offer until SLC finding (but case team guidance)
- Starting point: restoration of competition to pre-merger levels **(Co-op/OFT)**
- Must be confident concerns resolved w/o further investigation → 'clear-cut' standard
- Strong preference for structural remedies - in line with UK policy preference for competitive markets over regulated markets, and clear-cut UIL standard
 - OFT has only accepted 'behavioural' remedies in 3 EA02 cases **(Arriva/Wales & Borders; Ivax/3M; Virgin/Stagecoach/ICEC)**

Remedies Policy

- UFB mitigates implementation risks – buyer or asset package risk
 - **Buyer risk - Global/GCap, AFKLM/VLM, Homebase/Focus, DPL/BRN**
 - **Asset risk - Tetra Laval/Carlisle, DPL/BRN**
- No structural link between parties
 - **CGL/Fairways** – CEO of purchaser on CGL board
- No risk of new competition concerns
 - **AI/Foster Yeoman** – refusal to approve purchaser in same oligopoly; 4 to 3 cannot be a clear-cut 'solution' to a 4 to 3 'problem'

De minimis

- Discretion not to refer where markets are of insufficient importance to justify a reference – same effect as a clearance
- Purpose is to avoid reference where costs are disproportionate to potential benefits
- Not available where UILs in principle available
 - Recurring benefits of avoiding consumer harm in given / future like cases outweighs one-off costs of reference
- Key consideration is whether impact of merger is likely to be particularly significant
 - Aggregate market size
 - Probability assessment: strength of OFT's concerns
 - Magnitude of harm: proxy for expected price/non-price effect
 - Durability of merger's impact: whether B2E substantial and durable

De minimis 'graphic equalizer'

Size of market	£0m -----	£5m -----	£10m
Probability assessment	0% -----	50% -----	100%
Magnitude	Low -----	Av -----	High
Durability	Short -----	Med -----	Long
Deterrence	Low -----	Av -----	High

- Other clawbacks: Vulnerable consumers, precedent value
- Applied in 4 cases
 - **3 rail franchises**: low probability, low deterrence
 - **FMC/ISP**: v. small market, prospect of medium-term entry
- Rejected in 3 cases
 - **DPL/BRN**: UIL in principle available
 - **BOC/Ineos & Nufarm/AHM**: high probability, potentially strong competition effects, insufficient evidence on how long effects would persist