BIICL merger conference  
– Materiality (de minimis)

Nick Scola  
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17 March 2011

OFT De minimis exception: here to stay*  

* Or not ? – see BIS consultation
Recap – de minimis – cost / benefit evaluation

- Replicability across the sector

- Size of market (£m) × Magnitude of harm (%) × Probability of SLC (%) × Duration of harm (yrs) = Expected harm (£m)

- Public costs of a reference (~ £400k)

De minimis – the key three points (without having to read the guidance)

- No de minimis if parties can offer a clear-cut remedy (cf GMG/4 x Abbey hospitals)

- Market size thresholds:
  - Reference ‘generally not justified’; only refer ‘exceptionally’
  - Consideration of whether the expected customer harm resulting from the merger is materially greater than the average public cost of a CC reference (currently around £400,000)
  - Markets will ‘generally justify a reference’

- OFT will consider de minimis upfront in suitable cases (see Govia, but cf: Towers Watson / EMB)
De minimis – three recent cases

- **Towers Watson / EMB**
  - Market size: £1.4m
  - SLC: 2 to 1 in actuarial risk pricing software
  - Swing factors: none

- **OS / LGID**
  - Market size: £3.5m
  - SLC: 2 to 1 in accurate georeferenced addressing datasets in GB for supply to private sector customers
  - Swing factors: existence of benefits; customers supportive of merger; transaction rationale (to remove inefficiencies)

- **Dorf Ketal / JM**
  - Market size: £3.5m
  - SLC: 90% + shares in titanates and zirconates (catalysts in industrial processes)
  - Swing factors: high degree of concentration; significant customer concerns

Recap – de minimis – cost / benefit evaluation

- **Replicability across the sector**

- **Net harm, after consideration of RCBs – ‘best of both’?**

- **Public costs of a reference (~ £400k)**
BIICL merger conference – Counterfactual (failing firm)

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Merger Assessment Guidelines – exiting firm scenario at phase 1

- Recast as ‘exiting firm’ (includes ‘failing’)
- Three limbs apply
  - Inevitable exit
  - No substantially less anti-competitive alternative purchaser for the firm or its assets (cf: Dorf Ketal)
  - Exit would not itself be substantially less anti-competitive
- OFT: compelling evidence on all three limbs, or revert to pre-merger conditions of competition
- Applies to divisions as well as firms
### Exiting firms – recent phase 1 ‘misses’

<table>
<thead>
<tr>
<th>Case and exiting firm argument</th>
<th>Reasons for counterfactual rejection</th>
<th>SLC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dorf Ketal / titanate and zirconate business of Johnson Matthey – exit of JM target business</td>
<td>Financial analysis suggested plant positive EBITDA; documentary evidence contemporaneous with sale discussions</td>
<td>UK share of 95% in titanates and zirconates (catalysts in industrial processes)</td>
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<tr>
<td>Stena / DFDS - closure of Stena’s Fleetwood – Lame route</td>
<td>Evidence not compelling to dismiss concerns that closure of Stena’s Fleetwood-Larne route may have been influenced by merger</td>
<td>Ferry services for freight from NW England to NI</td>
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<tr>
<td>Ratcliff Palfinger / spare parts of Ross &amp; Bonnyman – exit of R&amp;B from supply of tail-lifts</td>
<td>Evidence that tail lifts business was loss making, but had been since 2007; also recent increase in orders Strategic decision to exit tail lifts potentially influenced by sale of spare parts business to Ratcliff? R&amp;B still active in supply of tail lifts</td>
<td>3 to 2 in the supply of column tail lifts (with parties close competitors)</td>
</tr>
</tbody>
</table>

### Exiting firms – the five phase 1 ‘hits’

<table>
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<tr>
<th>Case</th>
<th>Counterfactual argument</th>
<th>Reasons why counterfactual argument successful</th>
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<tbody>
<tr>
<td>First West Yorkshire / Black Prince Buses</td>
<td>Failing firm defence met in respect of a bus business as a whole</td>
<td>Owner retiring, with no successor; extensive marketing exercise undertaken but First only bidder</td>
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<td>Tesco / 5 former Kwik Save stores</td>
<td>Failing firm defence met in respect of individual local grocery stores</td>
<td>Kwiksave had collapsed; auction to other grocers; Tesco was sole bidder</td>
</tr>
<tr>
<td>CdMG group / Ferryways and Searoad Stevedores</td>
<td>Failing firm defence met in respect of target business</td>
<td>Target business collapsed (alleged fraud), leading to loss of customers</td>
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<tr>
<td>Home Retail Group / 27 Focus leasehold properties</td>
<td>Failing firm defence met in respect of the St Albans store</td>
<td>Clear instructions to property agent to ‘sell or shut’; open marketing exercise</td>
</tr>
<tr>
<td>HMV / Zavvi</td>
<td>Failed Zavvi chain; HMV was sole buyer for a number of stores</td>
<td>Public collapse of Zavvi ensured other potential buyers aware of stores; landlords unwilling to accept other buyers</td>
</tr>
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</table>
What are the magic ingredients for phase 1 exiting firm scenario success?

Clear financial data
Evidence pre-dating sale talks

Open auction evidence re no other buyers (identifiable purchaser group)
Exit will not lead to entry (retail)

SUCCESSFUL PHASE 1 EXITING FIRM

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