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I. INTRODUCTION

In March 2008, the U.K. Office of Fair Trading (the "OFT") published for consultation draft Mergers Jurisdictional and Procedural Guidance (the "Draft Procedural Guidance").[1] The Draft Procedural Guidance is part of a comprehensive series of revisions to merger guidance by the U.K. merger control authorities. In April 2008, the OFT and the U.K. Competition Commission (the "CC") launched a joint review of their respective substantive merger guidance and they are aiming to issue joint draft guidance for consultation by the end of 2008.[2] In May 2008, the CC published for consultation draft revised guidance on merger remedies.[3]

The Draft Procedural Guidance will replace the current Procedural Guidance which the OFT published in May 2003 (the 2003 Guidance), prior to the entry into force

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[1] OFFICE OF FAIR TRADING, MERGERS - JURISDICTIONAL AND PROCEDURAL GUIDANCE, DRAFT GUIDANCE CONSULTATION DOCUMENT (Mar. 2008) [hereinafter "Draft Procedural Guidance"], *available at* http://www.oft.gov.uk/shared_oft/consultations/oft526con.pdf.

[2] Press Release, Office of Fair Trading, OFT and Competition Commission launch review to issue joint merger guidelines (Apr. 22, 2008), *available at* http://www.oft.gov.uk/news/press/2008/53-08.

[3] Competition Commission – Current Consultations, Consultation on new merger remedy guidelines, at http://www.competition-commission.org.uk/rep_pub/consultations/current/merger_remedy_guidelines.htm (last visited Jun. 18, 2008).

of the new merger control regime under the Enterprise Act 2002 (EA02). It takes into account developments in decisional practice as well as case law and legislation over the inaugural five years of the EA02 regime.

The Draft Procedural Guidance also reflects the OFT's increased concern with the difficulties it faces in reviewing completed mergers. Because notification under the U.K.'s merger control regime is voluntary, parties may complete and implement mergers without notifying the OFT or, where a notification has been made, before the OFT has issued a decision. While the "light touch" nature of the voluntary regime is considered desirable by many, it means that OFT and the CC face the challenging task of reviewing completed mergers where integration between the businesses has already taken place.[4] The OFT's desire to pre-empt this situation by encouraging notification of all mergers which are likely to give rise to competition concerns and, where this is not the case, by detecting and imposing "hold separate" undertakings on such transactions at an early stage, is a strong theme throughout the Draft Procedural Guidance. A further theme is the OFT's increased use of Undertakings in Lieu (UILs) to clear transactions at first phase rather than refer them to the CC.

This article highlights the key amendments to the OFT's guidance in the context of these developments.

II. JURISDICTION: WHAT IS A RELEVANT MERGER SITUATION?

The most significant amendment to the OFT's guidance on jurisdiction (Chapter 3 of the Draft Procedural Guidance) relates to the acquisition of material influence in a

[4] The OFT's concern with the voluntary nature of the regime is echoed by the CC. *See* COMPETITION COMMISSION, ANNUAL REPORT AND ACCOUNTS 2006/2007 5-6 (2007).

target company.[5] This section incorporates much of the CC's reasoning in the *BSkyB/ITV* case in which the CC found that BSkyB's acquisition of a 17.9 percent stake in rival broadcaster ITV constituted an acquisition of material influence for the purposes of the EA02.[6] In making its assessment, the CC looked at whether in acquiring the 17.9 percent stake, BSkyB had acquired the ability materially to influence the policy of ITV, in particular the management of its business and its ability to define and achieve its objectives. The CC noted that 17.9 percent was at the low end of the levels of holding which have, in the past, been found to confer material influence. However, the CC found that although a holding of less than 25 percent did not give BSkyB an automatic right to block special resolutions, BSkyB would be able to do so given past voting patterns at ITV general meetings. This would limit some of ITV's strategic options, such as the ability to raise funds. The CC also took into account BSkyB's stature as an industry player and its position as the largest shareholder in ITV by some margin. BSkyB has appealed the CC's findings on material influence among other findings and so the OFT's guidance on this point is stated as applying for an interim period pending the outcome of the appeal. The hearing took place before the U.K. Competition Appeal Tribunal (the "CAT") in early June 2008.[7] Judgments in such cases are usually handed down several months after the hearing.

[5] Draft Procedural Guidance, *supra* note 1, at paras. 3.13-3.16.

[6] COMPETITION COMMISSION, ACQUISITION BY BRITISH SKY BROADCASTING GROUP PLC OF 17.9 PER CENT OF THE SHARES IN ITV PLC, REPORT SENT TO THE SECRETARY OF STATE (BERR) 14 DECEMBER 2007 (2007).

[7] CAT Hearings Jun. 3-5, 2008, Case Nos. 1095/4/8/08 & 1096/4/8/08, British Sky Broadcasting Group Plc v. CC & Virgin Media, Inc. v. CC.

Chapter 3 also includes a new section on temporary merger situations, in which the OFT notes that it will have regard to the principles set out by the European Commission in its Consolidated Jurisdictional Notice.

III. NOTIFYING MERGERS TO THE OFT

The OFT's desire to encourage parties to notify mergers potentially giving rise to competition concerns is particularly evident in Chapter 4 of the Draft Procedural Guidance, "Notifying mergers to the OFT." The OFT points out that many of the cases in which it ultimately found that the reference test was met were not notified but rather were cases which the OFT decided to investigate following a complaint or on its own initiative. Further, the OFT explains that as of March 2008 it has appointed a dedicated Mergers Intelligence Officer responsible for detecting non-notified merger activity.[8]

In addition, the OFT sets out in detail the risks of not notifying mergers pre-completion, pointing out that it will not treat completed mergers more favorably than anticipated mergers and the fact that a merger has been completed does not have any bearing on its assessment of whether the test for reference is met. Further, the OFT states that it is likely to seek, or where necessary order, hold separate undertakings in completed merger cases likely to give rise to competition concerns and that completed transactions may be ordered to be undone following a reference to and an adverse finding by the CC. The OFT also notes that in not notifying a transaction to the OFT, the parties reduce the time available to the OFT for review of the transaction and therefore the OFT's ability to conclude within the available time that the test for a reference to the CC is not met

[8] Draft Procedural Guidance, *supra* note 1, at paras. 4.7-4.9.

(although it is difficult to see that this is borne out in practice given the current low levels of references to the CC).[9]

A. Informal Advice

In November 2005, the OFT withdrew confidential guidance and announced that it would only provide informal advice in exceptional circumstances. In April 2006, it reintroduced informal advice, but not confidential guidance, and at the same time it published Interim Guidance setting out screening principles which it would apply in relation to requests for informal guidance. In brief, the OFT will only provide informal guidance in relation to good faith, confidential transactions which present a genuine issue. The Draft Procedural Guidance incorporates the OFT's Interim Guidance of April 2006 with only minor changes.[10]

B. Pre-Notification Discussions

The guidance on pre-notification discussions reflects a change in stance since the 2003 Procedural Guidance.[11] Whereas in the 2003 Procedural Guidance the OFT stated that it was "willing to hold pre-notification discussions," the Draft Procedural Guidance "strongly encourages" parties to engage in pre-notification discussions. The benefits to the parties and to the OFT of pre-notification discussions as set out in the OFT's April 2006 Interim Guidance on Informal Advice are incorporated. Pre-notification discussions have now become the norm in complex cases and allow the parties to cover some of the issues arising in the case prior to the commencement of the official review period.

[9] *Id.* at paras. 4.18-4.21.

[10] *Id.* at paras. 4.26-4.41.

[11] *Id.* at paras. 4.42-4.48.

C. Statutory Pre-Notification

In relation to statutory pre-notification it is of note that the OFT states that going forward it will not encourage parties to withdraw a merger notice at a late stage of the OFT's review in order to provide additional time for consideration of evidence. Although it remains open to the parties to withdraw the merger notice and to re-notify as an informal submission, the parties should have no expectation that their case will be decided within 40 working days from the date of submission of the original merger notice.[12] As such parties in any doubt of the suitability of the statutory pre-notification procedure for their transaction may wish to consider using the informal submission procedure in the first instance in order to avoid the risk of unnecessary delay to the review of their transaction.

D. Informal Submissions

The OFT notes that in the post-*IBA Health*[13] environment, parties have often requested that the OFT ignore its administrative deadline in order to clear the case at first phase. Reflecting the increasing tendency for the OFT to clear cases with remedies at first phase, the OFT states that there is an overriding interest in avoiding unnecessary references where the case lends itself to first phase resolution, and that it considers it appropriate to treat such requests as equating to an extension of the 40-working-day deadline. Where granted, the OFT states that it would regard meeting the extended deadline as having complied with its administrative timetable.[14]

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[12] *Id.* at paras. 4.61-4.62.

[13] OFT v. IBA Health, 2004 E.W.C.A. Civ. 42.

[14] Draft Procedural Guidance, *supra* note 1, at para. 4.67.

E. Fast-Track Reference Cases

Chapter 4 also includes a new section on fast-track reference cases, where, at the request of the parties, the OFT will accelerate the handling of referrals to the CC.[15]

IV. THE ASSESSMENT PROCESS

Chapter 6, "The assessment process," has been amended to reflect legislative developments and CAT jurisprudence. For example, in relation to the need to consult with third parties further to the CAT's judgment in *UniChem*,[16] the OFT states that it will seek to test any issue material to the outcome of a case directly with the market participant best placed to supply evidence on that issue. Further, the OFT notes the impact on its functions of the Freedom of Information Act (FOIA) which came into full effect in January 2005. In addition, the OFT notes judicial guidance in the *Celesio* case, in which the CAT held that it is important that the OFT sets out the reasoning on which it has come to its conclusion.[17]

However, the main revision to the OFT's guidance on its assessment process relates to initial (or hold separate) undertakings and orders.[18] While the OFT has no power to prevent parties to an anticipated merger from completing it, it may accept an offer of, or impose, undertakings to suspend the integration of the merging parties. As these powers were newly introduced under the EA02 regime, the Draft Procedural Guidance reflects the OFT's initial experience in exercising them.

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[15] *Id.* at paras. 4.72-4.76.

[16] UniChem v. OFT, 2005 C.A.T. 8.

[17] Celesio v. OFT, 2006 C.A.T. 9.

[18] Draft Procedural Guidance, *supra* note 1, at paras. 6.22-6.43.

This is particularly true in light of the *Stericycle* case.[19] Stericycle acquired STG on February 27, 2006 without notifying the transaction to the OFT. Both companies supply clinical waste management services. On February 28, 2006 the OFT began its investigation and on May 24, 2006 the OFT requested initial undertakings from Stericycle. The OFT subsequently referred the merger to the CC for review. Stericycle appealed the CC's direction that the parties should appoint a Hold Separate Monitor to the CAT. In its judgment, the CAT noted the OFT only suggested initial undertakings some two and a half months into its investigation. This was more than two months after completion and by this stage the parties were well into the process of integrating their businesses. Further, the CAT found that the undertakings given to the OFT lacked clarity and excepted integration which had been initiated at the date of the undertakings.[20] As a result, the undertakings accepted by the OFT were ineffectual.

Since the CAT's judgment in *Stericycle* in September 2006 there has been a marked increase in the OFT's use of hold separate undertakings in relation to completed mergers. Further, in the Draft Procedural Guidance, the OFT states that for initial undertakings to be effective, the OFT must consider their appropriateness as soon as it has reasonable grounds to suspect that it may have jurisdiction to review the merger. In respect of completed mergers, the OFT is likely to seek initial undertakings when there are preliminary indications that the merger is likely to raise competition concerns. The OFT notes that the threshold for considering whether to seek undertakings is a low one. Further, the OFT states that the short-run cost and disruption to the parties subject to

[19] Stericycle v. CC, 2006 C.A.T. 21.

[20] *Id.* at paras. 132-33.

initial undertakings will be given little weight when weighed against the long-run risk of consumer harm. The OFT has recently issued draft model undertakings which may be found on the OFT website.[21] The fact that parties may be prevented from implementing their mergers prior to regulatory clearance undermines the "voluntary" nature of the regime.

V. REMEDIES

Chapter 8 of the Draft Procedural Guidance, "Remedies," is also considerably expanded, reflecting the OFT's increased likelihood of clearing cases at first phase using UILs. This Chapter includes a new section on the offering of scaled remedies. The OFT explains that it is open to the parties to offer a scale of remedy options in the form of sealed, sequentially numbered envelopes. Only offers which correspond to the final decision on the existence and scope of any competition concerns will be opened.[22] There is also a new section on "near miss" UIL cases, that is those where the UILs offered fall just short of a package which the OFT considers would otherwise be sufficient to remedy the concerns identified, the OFT may give the parties an opportunity to reconsider and clarify their original UIL offer.[23] The OFT emphasizes that this will be available only in exceptional circumstances and where the original offer was clearly credible and in good faith. Nevertheless, it offers merging parties a "second bite of the cherry" to get their transaction cleared at first phase, making the possibility of a reference to the CC even more unlikely.

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[21] The Office of Fair Trading: Mergers, *at* http://www.oft.gov.uk/advice_and_resources/resource_base/Mergers_home/ (last visited Jun. 18, 2008).

[22] Draft Procedural Guidance, *supra* note 1, at paras. 8.16-8.17.

[23] *Id.* at paras. 8.18-8.23.

VI. THE EC MERGER REGULATION

Chapter 10 of the Draft Procedural Guidance has been amended to take into account the revision of the EC merger regulation (the "ECMR"). The revised ECMR, Regulation 139/2004, entered into force on May 1, 2004 and, under Articles 4(4) and 4(5), introduced new mechanisms under which parties can request pre-notification referral of a merger from the European Commission to a Member State competition authority or vice versa. The OFT points out that there are advantages for parties in using the Article 4(4) mechanism to refer a case to the OFT rather than waiting for the OFT to make a referral request under Article 9, including the fact that parties are guaranteed a decision whether the case will be referred back under Article 4(4) within 25 working days of submission of the Form RS, whereas a reference under Article 9 may be made any point up to 65 working days after notification of the Form CO.[24] The OFT notes that in view of the availability of the Article 4(4) referral mechanism, it envisages that the need for the use of Article 9 ECMR will remain limited.

VII. CONCLUSION

Practitioners dealing frequently with the OFT's mergers group will observe that, in the main, the Draft Procedural Guidance reflects what the OFT has already been doing in practice for some time. Further, as has been discussed, several broad themes can be identified from the Draft Procedural Guidance including an increased concern on the OFT's part with the difficulties presented by the review of completed mergers and, as a

[24] *See, e.g.*, OFT Decision of 6 February 2006, Anticipated acquisition by Boots plc of Alliance UniChem plc ("*Boots/Alliance UniChem*") (Feb. 22, 2006), which involved local markets. Had the parties not made an Article 4(4) request, it is likely that the case would have been referred to the OFT under Article 9 ECMR anyway.

result, greater emphasis on encouraging notification of mergers and on detecting non-notified mergers. In addition, there is greater emphasis on the more effective use of hold separate undertakings and UILs. In light of these developments, merging parties would be wise to consider the risks of implementing a merger prior to competition clearance carefully, but can be encouraged by the OFT's increasingly innovative use of UILs to clear problematic cases at first phase.

The consultation period closed on June 20, 2008. The finalized Jurisdictional and Procedural Guidance promises to be a useful aid to merging parties in navigating the merger control process and is expected to be issued in the autumn of 2008.