

# UK Merger Control Overview 2012

A number of patterns have emerged from the treatment of mergers by the Office of Fair Trading (OFT) over recent years. Deciding whether to notify has become increasingly complex, due to the prominence of hold-separate obligations and own-initiative cases. In 2012, the number of referrals to the Competition Commission (CC) continued to increase and the OFT's use of remedies also rose. Many OFT reviews have been longer than the "standard" 40 working day review period, involving increasingly demanding evidential requirements.

## To notify or not to notify?

**The main benefit of the UK's voluntary regime is that if a qualifying merger does not raise any competition concerns, then the parties can complete without the need to notify. It is, however, arguably getting harder to decide whether or not to notify due to:**

- Own-initiative cases: the OFT is increasingly calling in mergers for review on an own-initiative basis.
- "Hold-separates" risk: The OFT is increasingly insisting on parties holding their businesses separate

in completed cases while it conducts its review.

The risk of being called in by the OFT coupled with the cost and burden associated with hold-separate provisions is causing parties to re-consider their notification strategy.

### A more interventionist OFT?

**The OFT's "reference rate" has increased significantly.**

- References by the OFT to the CC have increased from three in 2010 to fourteen in 2012.
- This increase in references far outpaces the increase in OFT's case load (69 cases in 2010; 99 in 2012).

**Undertakings in lieu of reference (UILs) are also on the up.**

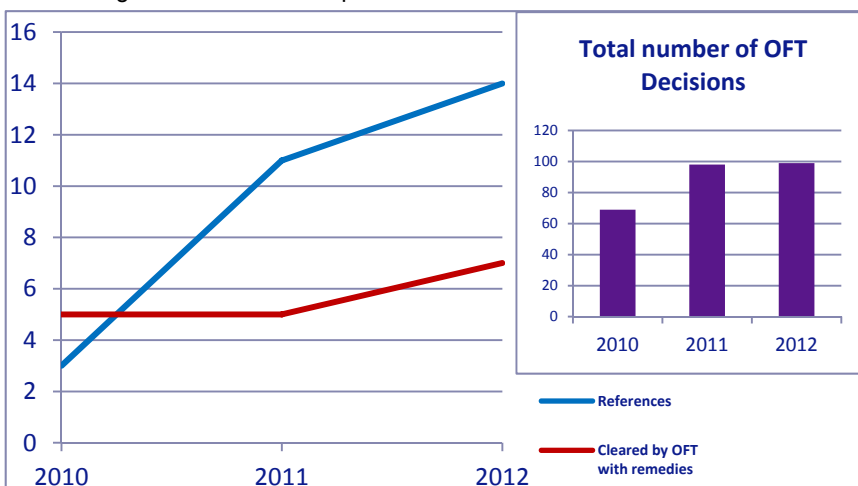
- There were more OFT remedies in 2012 (seven) than in 2011 (five).
- January 2013 has already seen three more UILs accepted.

**2012 has seen a consistently frequent use of the up-front buyer (UFB) requirement.**

- Five of the seven OFT remedies required an UFB.

**The high OFT referral rate has not been reflected in findings of concerns at the CC level.**

- In 2009 and 2010, the OFT referred a total of 10 cases, of which only one was found by the CC to give rise to a competition problem (later partially overturned), calling into question whether the OFT was over-referring during this period.
- In 2011 and 2012, a total of 25 cases were referred by the OFT:
  - 11 were cleared unconditionally by the CC;
  - competition problems were found in four cases. At 20% of cases referred (excluding those still outstanding), this is well up on 2009-2010, but still below long-term trends;



- five transactions were abandoned after they were referred; and
- decisions in five cases are outstanding.

### Sector focus?

During 2012, recurring sectors where competition concerns were identified are:

- Groceries;
- Transport (sea, bus x 2, air);
- Industrial/building materials;
- Oil and petrol; and
- Betting and gaming.

### Reviews can be lengthy and costly

In practice, OFT reviews are sometimes considerably longer than the "standard" 40 working day review period.

- Prevalent use of 'stopping the clock' has contributed to delays.
- Prior to the clock starting, the OFT is making more regular use of pre-notification discussions to engage with parties / require information – akin to the process at the EU level.
- In UIL cases, the period for agreeing the legal text of the remedies, particularly in those

cases requiring a UFB, can also be extremely long. For example, from completion of the Lightcatch (Betfred) / Tote acquisition to acceptance of undertakings took 11 months.

**The OFT review process involves increasingly demanding evidentiary requirements.**

- In addition to the customary provision of customer and competitor lists, internal documents and market data, the OFT is increasingly requiring substantial amounts of financial and other data from the merging parties.
- Consumer surveys are now the norm in retail cases, as is the provision of detailed margin information.
- The OFT now frequently uses, and places weight on the results of, simple price pressure tests (using the survey results and the parties' profit margin information) to assess competitive effects.

This can make it particularly hard for parties considering a possible transaction to assess the likelihood of concerns without undertaking

extensive work such as surveys.

### Merger fees increased in 2012

From October 2012, fees rose from £90,000 to £160,000 for acquisitions of enterprises with UK turnover of more than £120 million.

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