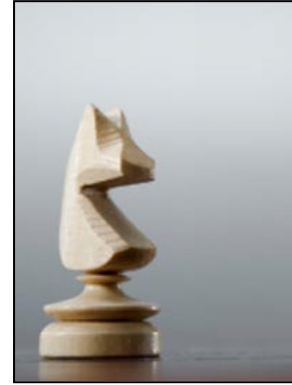


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UK Merger Control: Recent Developments (Issue 2)

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UK merger control remains relatively quiet. There are currently no merger references from the OFT before the Competition Commission (**the CC**): the only ongoing merger investigation at the CC – *Live Nation / Ticketmaster* – arose as a result of a remittal from the Competition Appeal Tribunal (**the CAT**). Nevertheless, the last six months has resulted in three merger appeals to the CAT (*Sports Direct, Eventim* and *Stagecoach*), the Court of Appeal's decision in *British Sky Broadcasting*, and some very controversial CC decisions including: the reversals of the Provisional Findings in *Stagecoach / Cavendish* and *Live Nation / Ticketmaster*; the novel counterfactual analysis in *Stagecoach / Preston Bus*; and the unconditional clearance of *Sports Direct / JJB Sports*, which created local monopolies.

This note analyses these developments, along with others over the last six months,¹ under the following headings: when is a lessening of competition not *substantial*?; merger to monopoly; the *de minimis* exception; the counterfactual; CAT appeals; and other issues.

1. When is a lessening of competition not *substantial*?

In two recent cases, the CC has identified a lessening of competition arising from a merger, but has nevertheless not found an SLC on the grounds that the lessening of competition is not "substantial".

First, in *Stagecoach / Cavendish*, Stagecoach acquired the two main bus operators in the Eastbourne area, EBL and Cavendish. Cavendish's management accounts indicated that its operations were profitable in March 2008.² In its Provisional Findings, the CC stated:

"It seems likely to us that competition between two operators in Eastbourne would persist in the absence of the merger situation for a period of time, which we would expect to cover at least the short to medium term (eg two years). While differences in costs and any tendencies to aggressive competition may mean this could be shortlived, it is also possible to anticipate outcomes where two operators continue to compete in the longer term. Even if they retrench to services which do not overlap, there could be competitive pressure from potential"

¹ It reflects decisions from 24 September 2009 to 6 April 2010. For Issue 1, covering decisions in the six months to 23 September 2009, see <http://www.monckton.com/docs/library/MergerControl24Sept09AL.pdf>.

² Report, para. 6.18.

*competition, as each would be well placed to enter or expand on flows in head-to-head competition if the other's service standards slipped or fares were raised."*³

This analysis led the CC provisionally to conclude that there would be an SLC but, in its final report, the CC reversed its provisional conclusion and found that there would *not* be an SLC. The main new evidence received after publication of the Provisional Findings seems to have been the explanation from Cavendish's former owner that the management accounts were not accurate as they excluded certain categories of costs and the business was not profitable.⁴ The CC found that in March 2008 Cavendish was making losses relative to total costs whilst covering its direct costs.⁵ It concluded:

*"On balance, given the likely increase in competition from a rejuvenated EBL, we think it is unlikely that Cavendish would have chosen to keep operating its loss-making routes in the medium to long term. A retrenchment of services, to levels substantially below those in March 2008, is more likely ... It is not possible to anticipate the precise commercial strategies of particular operators in the hypothetical situation of competition in the absence of the mergers, and a number of outcomes are possible. However ... it seems likely to us that at least a significant retrenchment of services would have occurred within the near future. It may have taken some time to determine its optimal strategy, while it waited to see what EBL would do and it considered its options ..., but we expect that it would have taken its actions within, at most, 12 months, and possibly more quickly."*⁶

The CC therefore found that there was no *substantial* lessening of competition arising from a merger between the two principal suppliers of bus services in the Eastbourne area *even though* the merger:

- (a) eliminated the intense level of pre-merger competition that was likely to have continued for up to 12 months following the merger; and
- (b) resulted in the *loss of a chance* of continuing competition going beyond the competition described in (a) above, whether through ongoing competition from a "retrenched" Cavendish or otherwise (in circumstances where the CC, understandably, was not able to anticipate the precise commercial strategies).

The implication is that loss of competition of this magnitude is not "substantial", although the CC's contrary analysis⁷ in its Provisional Findings implies that the case is near to the borderline. The decision is important because one would have expected the CC to oppose a merger to near monopoly in a case where the failing firm defence was not available and it was uncertain how competition in the market would play out, as consumers would benefit from competition unless and until one of the suppliers exited.⁸

Secondly, in Sports Direct / JJB Sports, the principal issue – which is discussed in section 2 below – was whether the acquisition by Sports Direct of 31 JJB stores led to an SLC at a local level. However, the CC also analysed whether the reduction in *local* competition would affect Sports Direct's *national* pricing decisions. The CC analysed the actual effects of the acquisitions as follows:

"We found that Sports Direct's national prices had increased since the store transfers began and estimated that a price rise between approximately 0.4 and 1.2 per cent was

³ Provisional Findings, para. 6.18. See also para. 7.48 ("*While it is possible that as a result of this competition, one or other of the bus operators may have exited, we were not persuaded that this would necessarily occur within a short period, if at all, and the process of competition is itself valuable*").

⁴ Report, para. 6.18.

⁵ Report, para. 6.22. However, there was "*some uncertainty relating to the true costs faced by Cavendish*".

⁶ Report, paras. 6.26 to 6.27. This analysis led the CC to conclude, in para. 7.35: "*We found that, absent the merger, Cavendish was unlikely to continue operating at previous levels and that it was likely to choose to retrench or end its operations. Consequently, we concluded that the loss of head-to-head competition arising from the mergers is likely to be limited at most.*"

⁷ On the basis of quite a similar analysis of the relevant facts.

⁸ See the Provisional Findings, para. 7.48, which is quoted in fn 3 above.

*attributable to the store transfers (though we interpreted this result with caution, aware of the limitations of our modelling approach). We also found that, due to the store transfers, Sports Direct appeared to face less pressure on its national prices which could lead to its prices increasing by less than one per cent ... (though we also interpreted this result with caution) ... Given the small size of the possible (or actual) price increase due to the store transfers, and the uncertainty surrounding these estimates, we concluded that it was unlikely that the store transfers had resulted, or would result in, a significant deterioration in Sports Direct's pricing at the national level."*⁹

Putting to one side the CC's cautions about the reliability of the two analyses, and taking the lowest estimate of the analysis of *actual* price rises attributable to the merger (0.4 per cent.), the increased prices payable by Sports Direct customers each year is around £5.5 million based on its UK revenues of £1.367 billion.¹⁰ Over three years, this amounts to around £16.5 million. Additional harm to consumers would arise if JJB and/or other suppliers increase their prices as a result (the "umbrella effect"). In other words, whilst the *percentage* increases identified by the CC are relatively small, the *actual* harm to consumers of the national effects is material.

Taken together, *Cavendish* and *Sports Direct* suggest that, at the CC stage, there is scope for a merger to lessen competition quite materially without that lessening being regarded as "substantial".

2. Merger to monopoly

Sports Direct / JJB Sports involved the transfer of 31 JJB stores to Sports Direct. The CC found that there was no SLC arising out of mergers to monopoly in a series of local markets for retailing sporting and leisure clothing, equipment and footwear.

The CC found that: the merging parties were the only parties in the market, in the light, in particular, of very high diversion ratios from Sports Direct to JJB¹¹; the geographic market was local¹²; and Sports Direct was able to, and did, vary a number of aspects of its non-price offering (QRS)¹³ on a local basis.¹⁴ Moreover, Sports Direct itself did not argue that there was *no* local competition, but instead said that local competition was "weak"¹⁵ (implying that there was some local competition that would be lost as a result of a merger to monopoly in a particular area). Ordinarily, an SLC finding would be expected in the case of a merger to monopoly in a properly defined local market with: high diversion ratios between the merging parties; at least some element of local competition; and evidence of local variations in offering.

However, the CC did not find any evidence that Sports Direct varied any aspect of PQRS *in response to local competition*¹⁶ and it therefore "assumed that the benefits before the store transfers were outweighed by the costs".¹⁷ The CC explained its assumption as follows:

"The main costs we identified in moving to a system that flexed local non-price variables in response to local competition were the costs of designing [text redacted from the CC's report] for allocating stores to particular grades and, more generally, the cost of implementing a different business model. Whilst we were unable to quantify these costs,

⁹ Report, para. 8.40.

¹⁰ Report, para. 2.4. Note that some of Sports Direct's revenues arise in markets outside the CC's inquiry.

¹¹ Report, paras 6.28, 6.32 and 6.46.

¹² The CC found that it was likely to be between a two and five mile radius around each store: see the Report, para. 6.73.

¹³ Quality, range and service.

¹⁴ E.g. range, availability of stock, delivery frequency, staffing levels, advertising, maintenance and refurbishment expenditure and opening hours: see the Report, paras 8.16 and 8.17.

¹⁵ Report, para. 6.60.

¹⁶ Report, para. 8.17. Appendix F para. 12 noted that "*deliveries are more frequent, stores open for longer periods and staff work more hours in Sports Direct stores that face competition from a JJB within 2 miles*" but paras 13 to 21 explain that it was not possible to link the variations to differences in local competitive conditions.

¹⁷ Report, para. 8.19.

we recognized that, because Sports Direct did not flex these variables pre-transfer, despite having a relatively large number of stores in 'monopoly' areas, the costs were likely to have outweighed the potential benefits, at least prior to the transfers."¹⁸

The assumption is a significant one because:

- (a) Sports Direct was flexing its local offering extensively, implying that it had the *ability* to do so and the costs of setting up a system to facilitate local flexing had been incurred.
- (b) The CC was not able to quantify the costs of altering the existing system for local flexing to *allow for flexing on the basis of an additional variable* (namely the extent of local competition).
- (c) Sports Direct's ability to add a new variable to its local flexing system to reflect the extent of local competition was presumably helped by the work done by the CC and Sports Direct itself on the way that local competition works.
- (d) It turns on the fact that the observed differences in Sports Direct's local competitive behaviour when it faced a JJB store within two miles could not be shown to be caused by variations in local competitive conditions.¹⁹ The absence of statistical evidence pointing to a linkage is arguably less significant than (say) a normal course of business assessment of whether it would be practicable to introduce local flexing in response to conditions of local competition. However, apparently the CC's assumption was not corroborated by any other evidence.

This *assumption* was pivotal to the CC's conclusion:

"Given the relatively small change in the number of Sports Direct's 'monopoly' areas as a result of the store transfers, we did not think it likely that the transfers would have increased significantly Sports Direct's incentives to flex its PQRS in response to changes in local competition and, therefore, the costs of doing so were likely to continue to outweigh the benefits."²⁰

In turn, this led the CC to find that the store transfers were unlikely to result in a significant change to any aspect of Sports Direct's PQRS in any local area.

Further, the CC found that Sports Direct had closed five stores as a result of the merger. The analysis summarised above implied that the store closures did not lead to any harm to consumers through a reduction in QRS in those five locations. However, the CC found that there was a reduction in convenience for consumers of the stores which had closed as they had to travel further to the nearest alternative store but, since the average distance was small (0.22 miles), the CC concluded that *"the Sports Direct store closures have not had a significant effect on consumers"*.²¹

There are some similarities²² between this decision and *Sportech / Vernons*, October 2007, in which the CC cleared a merger between two suppliers together accounting for 99 per cent. of the supply of football pools on the grounds that the parties' products were not close substitutes, and the merger would therefore not remove a substantial competitive constraint (either because the parties were active in separate markets or, if in the same market, they did not exercise substantial competitive constraint on one another).

¹⁸ Report, Appendix F, para. 24.

¹⁹ Report, Appendix F, paras 12 to 21.

²⁰ Report, para. 8.21.

²¹ Report, para. 8.27. See also para. 8.41.

²² In *Sports Direct* the high diversion ratios suggest that the parties' outlets *are* close substitutes.

3. The *de minimis* exception

The *de minimis* exception remains probably the most dynamic area of UK merger control.

In *Koppers / Cindu Chemicals*,²³ the OFT found that the merger was "2 to 1" in two, or possibly three, markets.²⁴ The OFT nevertheless exercised its discretion in favour of approving the merger applying the *de minimis* exception, stating at the start of its "Conclusion": "*the OFT is particularly conscious in this case that the products in respect of which concerns have been found are by-products arising from the distillation process to produce coal tar pitch (over which the OFT has no concerns)*..."²⁵ The transaction was therefore essentially benign or pro-competitive and the draft Guidance states that such transactions "*should not be deterred by merger control*".²⁶

In *Stagecoach / Islwyn* the OFT also exercised its discretion to clear the merger. It found an SLC on four overlap flows²⁷ but, curiously,²⁸ in applying the "magnitude of competition lost" criterion, emphasised that *outside the four overlap flows* Islwyn "*has not been a particularly active competitor in terms of expansion*".²⁹ This reasoning implies that the "magnitude of competition lost" extends beyond the competition lost in the markets where an SLC has been found into some form of broader competition assessment.

The consultation period for the OFT's draft *Exceptions to the duty to refer and undertakings in lieu guidance* expired on 15 January 2010³⁰ and the OFT has published the responses it has received.³¹

4. The counterfactual

The counterfactual is the way in which competition in the market would operate in the absence of the merger.³² It is a convenient term for one "half" of the assessment of causation: in order to understand the effects of the merger, it is necessary to identify the counterfactual, predict the effects of the merger on competition in the market, and compare the two "halves". The difference is *caused* by the merger and needs to be assessed to determine whether there is an SLC.

Sometimes, the assessment of the counterfactual is difficult, and several scenarios may be identified. In *British Sky Broadcasting v. Competition Commission*, the CAT stated:³³

"In our view the Commission was entitled to compare the competitive effects of the Acquisition with those of what it regarded as the most likely counterfactual of an independent ITV, but at the same time to take into account in its assessment of SLC plausible situations or strategies which might result in the postulated independent ITV ceasing to be so. Similarly, in considering the ways in which Sky's ability materially to

²³ See also *Arriva / Go Ahead North East Transactions* which were cleared applying the *de minimis* exception on 11 February 2010 but the decisions have not been published at the time of writing (almost two months later).

²⁴ Paras 94 ("2 to 1" amongst actual suppliers, but "3 to 2" if a potential supplier is included), 95 ("2 to 1") and 98 ("2 to 1")

²⁵ Para. 108.

²⁶ Para. 2.49. This is consistent with the principle that the *de minimis* exception should not undermine the *deterrent effect* of the merger control regime (see generally para. 2.47 of the draft Guidance).

²⁷ Paras 79 to 83.

²⁸ The case is also curious in finding that potential fare rises on a jointly operated route following the merger would not arise as a result of the loss of competition and/or would reflect an improvement in bus quality; see paras 42 and 47.

²⁹ Para. 89.

³⁰ For Alistair Lindsay's comments, see <http://www.monckton.com/docs/library/ExceptionstotheDutyAL.pdf>.

³¹ See http://www.of.gov.uk/advice_and_resources/resource_base/consultations/closed-awaiting/exceptions.

³² Or, as the Court of Appeal described it in *British Sky Broadcasting v. Competition Commission*, at para. 43: "*A counterfactual is the hypothesis as regards the facts by reference to which an alleged effect on competition is to be tested.*"

³³ [2008] CAT 25, para. 92.

influence ITV's policy may be expected to give rise to an SLC, the Commission was correct to consider the effect such influence could have on potential ITV acquisitions or on ITV being acquired. We consider that the Commission would have been vulnerable to criticism had the possible occurrence of these situations or transactions been left out of account."

The Court of Appeal found that this paragraph was correct.³⁴ The rulings imply that the authorities can identify a single counterfactual as "the most likely" whilst considering others as credible possibilities or, presumably, can consider two or more different scenarios as part of the counterfactual assessment without finding that any single scenario is the "most likely". For example, in *Stagecoach / Cavendish*, the CC stated: "*It is not possible to anticipate the precise commercial strategies of particular operators in the hypothetical situation of competition in the absence of the mergers, and a number of outcomes are possible.*"³⁵ Similarly, in *Orange PCS / T-Mobile UK*, Article 9(2) request, the OFT³⁶ found that there was considerable uncertainty about the counterfactual because the spectrum auction process had not been finalised. The OFT therefore considered two counterfactuals and found that "*under a number of circumstances, prior to the merger there would be more than one full-speed national LTE network launched in the UK in the short to medium term.*"³⁷

Counterfactual issues also arose in *Stagecoach / Preston Bus* (see section 5 below) and are currently before the CC in the *Live Nation / Ticketmaster* remittal.³⁸

5. The CAT appeals

There have been three appeals to the CAT involving mergers in the last six months: *Sports Direct, Eventim* and *Stagecoach*. The first two cases and the application to strike out in *Stagecoach* are discussed in a separate note.³⁹

Stagecoach was an appeal against the SLC finding and remedies in *Stagecoach / Preston Bus*. The transaction was signed in December 2008 and involved a merger to monopoly in bus services in Preston. However, following the rejection of an earlier approach by *Stagecoach* to *Preston Bus (PBL)* in July 2006, *Stagecoach* launched new bus services in Preston from June 2007.⁴⁰ Its stated objective in doing so was to obtain a significant minority share of the Preston market,⁴¹ but the CC found that *Stagecoach's* conduct was not consistent with this objective.⁴² The CC stated:

"6.4 We ... consider that in assessing the counterfactual it is appropriate to disregard steps taken by the acquiring company which had the effect of bringing about the merger ... Stagecoach's conduct in the 18 months that preceded the merger was pursued with little regard for profit and normal commercial considerations. This abnormal competition from Stagecoach in our view had the effect (and must have been expected to have the effect) of removing PBL from the market or marginalizing it as a competitive threat to Stagecoach (including by rendering it an unattractive acquisition to third parties). Given the nature of Stagecoach's behaviour and the significant losses incurred by both companies, we do not consider that the competition that took place during this period reflects the rivalry that could be expected to occur in the absence of the merger. Nor, for the same reason, do we accept that we should assess the counterfactual on the basis that PBL was a 'failing firm' at the time of the merger and that Stagecoach would inevitably have ended up with its current high share of the market for bus services in Preston irrespective of the merger."

³⁴ Para. 55.

³⁵ Report, para. 6.27.

³⁶ The OFT obviously does not apply the balance of probabilities test.

³⁷ Paras 92 to 101.

³⁸ See sections 2 and 3 of *Eventim's* Response to the Further Provisional Findings at http://www.competition-commission.org.uk/inquiries/ref2009/ticketmaster/pdf/eventim_response_to_further_provisional_findings.pdf.

³⁹ See <http://www.monckton.com/docs/library/ALCATJR.pdf>.

⁴⁰ Report, paras 5.4 and 5.6.

⁴¹ Report, para. 5.10.

⁴² Report, paras 5.53 and 5.63.

The CC therefore used as the counterfactual the competitive situation that prevailed before the launch of the new intra-urban services by Stagecoach in 2007.⁴³ Using this counterfactual, and having rejected Stagecoach's failing firm argument, the CC found an SLC as the merger was "2 to 1". The CC stated that its normal expectation was that a divestiture of PBL would restore competition "that existed prior to the launch of Preston intra-urban services by Stagecoach in summer 2007"⁴⁴ but rejected this because the developments in 2008 and 2009 meant that PBL's service offering was less extensive than it had been under "normal" competitive conditions and because PBL was currently not commercially viable.⁴⁵ The CC therefore required Stagecoach to divest a *re-configured* PBL, noting:

*"We did not consider that it was necessary, for our remedy to be effective, to restore precisely the same conditions of competition that prevailed in Preston before the period of abnormal competition. The aim of this remedy is to reinstate rivalry between two operators each with extensive and coherent neighbouring networks of commercial services within and around Preston from their own large depots."*⁴⁶

Stagecoach challenged the CC's decision at the CAT. The case was heard on 9 and 10 March 2010, but, at the time of writing, has not been yet listed for judgment. The principal issues before the CAT include the following:

- (a) Stagecoach argued that the CC had wrongly defined the counterfactual by assessing the effects of the acquisition against the situation prevailing in late 2006 and early 2007⁴⁷ and that this amounted to an *error of law*. In the hearing, one member of the Tribunal doubted whether this challenge could be presented as an error of law⁴⁸ (as opposed to a challenge to the CC's analysis of the evidence / decision on the facts).
- (b) The CC's finding that Stagecoach was incurring losses from 2007 and therefore its activities over this period were not intended to obtain a minority market share was questioned by one member of the Tribunal who focused on whether the losses would be recouped by profits in subsequent years *if PBL retrenched*.⁴⁹ The CC accepted that it had not analysed whether Stagecoach would have had a commercial rationale for its conduct if PBL retrenched.⁵⁰ There was also discussion at the hearing about whether the absence of internal documentary evidence undermined Stagecoach's claim.⁵¹ The CC's response was that the inferences it drew were reasonable and therefore withstand challenge on judicial review principles, even if there may have been other ways of looking at matters.⁵²
- (c) Stagecoach argued that the CC's remedy focused on restoring the position before June 2007, rather than on remedying the effects of the merger.⁵³ The Tribunal asked questions about the fact that Stagecoach had gained market share as a result of competition from June 2007 that was not illegal, whilst the use of a counterfactual from before June 2007 implied that the remedy deprived Stagecoach of those lawful gains in market share.⁵⁴ The CC's response was that the remedy was designed to introduce a second competitor, not to reinstate competition in its 2007 form⁵⁵ and, in any event, if Stagecoach's other grounds of

⁴³ Report, para. 6.13 (see also para. 6.5).

⁴⁴ Report, para. 10.8.

⁴⁵ Report, para. 10.9.

⁴⁶ Report, para. 10.48.

⁴⁷ This was ground 1 of Stagecoach's application; see http://www.catribunal.org.uk/files/1145_Stagecoach_Summary_application_11.12.09.pdf. See also

Transcript of Day Two, p. 65.

⁴⁸ Transcript of Day One, p. 31. See also p. 35. The CC argued that the counterfactual is not a statutory test (see Transcript of Day Two, p. 5).

⁴⁹ Transcript of Day One, p. 53 and Transcript of Day Two, p. 27.

⁵⁰ Transcript of Day Two, p. 27.

⁵¹ Transcript of Day Two, p. 28.

⁵² Transcript of Day Two, p. 29.

⁵³ Transcript of Day One, p. 65.

⁵⁴ Transcript of Day One, pp. 75 and 76. See also Transcript of Day Two, pp. 10 to 12, 14, 51 and 52.

⁵⁵ Transcript of Day Two, p. 13.

challenge failed, then it was hard to see how a remedy that was crafted around the CC's general analysis could be found to be disproportionate.⁵⁶

6. Other issues

This section rounds up a number of other interesting points from recent decisions.

First, in terms of evidence, the OFT is showing a willingness to be robust in the face of adverse third party comments if the evidence taken as a whole points towards clearance. In particular, the OFT has placed greater weight on actual behaviour / revealed preferences than on third party comments.⁵⁷

Similarly, in *Nynas / UK Bitumen*, seven out of ten customers consulted expressed concerns about a merger that involved high shares,⁵⁸ but the OFT cleared the transaction in particular in the light of evidence about spare capacity in a declining market. More generally, the OFT has treated sceptically complaints from third parties that were not supported by evidence⁵⁹ and has taken account of the proportion of potential complainants who have actually complained.⁶⁰ Conversely, in markets where customers have expertise, the OFT continues to be willing to clear apparently problematic transactions if customers do not object.⁶¹ Finally, whilst internal documents are important, the UK authorities have recognised the need to review them in context and apparently harmful internal documents were explained away successfully by merging parties in *The Ambassador Theatre Group / Live Nation*⁶² and *Brightsolid / Friends Reunited*.⁶³

Secondly, in *Sainsbury / Co-operative* the OFT confirmed the distinction between jurisdiction and substance, noting that if a transaction satisfies the share of supply test, then the OFT can examine the competitive effects of the merger in all affected geographic areas regardless of whether the share of supply test is satisfied in those other areas.⁶⁴

Thirdly, in *Durrants / Cision*, the OFT considered an "efficiency offence" complaint, namely that the merged group will enjoy economies of scale, enabling it to undercut rivals and force them to exit. Interestingly, the OFT rejected this argument on the facts,⁶⁵ and did not comment on whether it would be willing to find a realistic prospect of an SLC as a result of efficiencies generated by the merger.⁶⁶

Fourthly, interesting points also arose in: *Orange PCS / T-Mobile UK*, Article 9(2) request (the effect of the merger on the operation of an existing agreement between one of the merging parties and a third party⁶⁷); *Brightsolid / Friends Reunited* (the OFT relied in part on the Information Memorandum in support of its decision to refer the case⁶⁸); *Nynas / UK Bitumen* (enterprises ceasing to be distinct without a transfer of any ongoing contractual supply agreements; scope to

⁵⁶ Transcript of Day Two, p. 55.

⁵⁷ See *The Ambassador Theatre Group / Live Nation*, paras 36 and 56.

⁵⁸ Paras 35 and 39.

⁵⁹ See *The Ambassador Theatre Group / Live Nation*, para. 76 and *Essilor / Horizon*, para. 25.

⁶⁰ See *Orange PCS / T-Mobile UK*, Article 9(2) request, para. 55.

⁶¹ See *London Stock Exchange / Turquoise*. The merged group had a share of 69 per cent. (increment of 6 per cent.) and the merger involved the acquisition by LSE of a supplier that was set up specifically in order to challenge LSE (see para. 79), but the market test was broadly positive (see paras 82 and 86) which contributed to the clearance decision.

⁶² See paras 88 to 91.

⁶³ CC Report, paras 6.17 to 6.22.

⁶⁴ Paras 10 and 11.

⁶⁵ See paras 52 to 56.

⁶⁶ Compare *Orange PCS / T-Mobile UK*, Article 9(2) request, para. 119 (rejecting an argument from the parties that the OFT was effectively operating an "efficiency offence").

⁶⁷ Paras 60 to 80.

⁶⁸ OFT, para. 76.

price discriminate defeating a "chains of substitution" argument; and the test for including self-supply in the market⁶⁹); *Buzz Asia / Club Asia* (intangible assets such as a broadcast licence do not amount to an enterprise unless it is possible to identify turnover directly related to the transferred assets that will also transfer to the buyer); *C&C / Tennent's* (allocation of market shares in the case of exclusive distribution rights⁷⁰); *Teacrate / Nationwide Crate Hire* (mergers in cases of durable goods⁷¹); *Infinis Energy / Noveral Energy* (analysis started from the area of overlap even though there were numerous precedents pointing towards a wider market definition⁷²); and *Lodge Brothers Funerals* (Uxbridge, Hillingdon and Hayes together found to be a substantial part of the UK; share of supply above 25 per cent. treated as indicating "*prima facie competition concerns*"⁷³).

Finally, the OFT has published its merger statistics for the 12 months to 31 March 2010.⁷⁴ These show that the number of cases in which the OFT found an SLC has remained almost constant over each of the last four years, with falling numbers of references being offset by growth in the use of the *de minimis* exception. More specifically, the number of references per year has fallen from 13 (2006/07) to seven (2009/10) but the number of cases cleared on the basis of the *de minimis* exception has risen from none (2006/07, before the exception was introduced) to six (2009/10). Over this period, the number of cases where UILs were accepted has remained fairly constant at five or six per year.⁷⁵

Alistair Lindsay represented Eventim (with Paul Lasok QC) in *Eventim v. Competition Commission* and is assisting Eventim on the ongoing remittal to the Competition Commission of the Live Nation / Ticketmaster merger.

The views expressed in this note do not necessarily reflect those of Monckton Chambers, its tenants or clients.

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⁶⁹ See paras 10, 11, 24, 25 and 43.

⁷⁰ Para. 19.

⁷¹ See fn. 6 of the decision.

⁷² Para. 13.

⁷³ See paras 5 and 30. (On the market shares, contrast the very tentative treatment of their significance in the draft Joint Merger Assessment Guidelines, paras 4.88 and 4.89.)

⁷⁴ http://www.offt.gov.uk/shared_offt/mergers_ea02/678502/Mergerstats.pdf.

⁷⁵ The OFT's data records UILs at the date when they are finally accepted not when the OFT decides in principle that UILs are capable of resolving the SLC.