

UK MERGER CONTROL: RECENT DEVELOPMENTS

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This note analyses recent developments in UK merger control,¹ under the following headings: the *de minimis* exception; undertakings in lieu; the relationship between the OFT and the CC - retail mergers; substantial part of the UK; failing firms / counterfactual; and trends in OFT merger decisions.

1. The *de minimis* exception

The *de minimis* exception is the most dynamic area of UK merger control. It has operated in its current form for less than two years and the OFT has changed its approach significantly from the November 2007 guidance. The revised guidance which has been promised is likely to include significant changes.

To recap, the OFT has a statutory discretion not to make a reference if it believes that the market or markets concerned are "not of sufficient importance" to justify a reference. The May 2003 Mergers Substantive Assessment Guidance stated that the discretion would be exercised in some (but not all) cases when the costs of the reference - then assumed to be around £400,000 - were disproportionate to the size of the markets concerned. This text was replaced in November 2007, and the new Jurisdictional and Procedural Guidance and the draft Joint Substantive Merger Guidelines do not alter the approach, although the draft Joint Substantive Merger Guidelines refer to the OFT's plan to publish a new document, "Mergers - exceptions to the duty to refer and undertakings in lieu of reference".

The OFT's current practice can be split into a number of steps. First, the OFT will not exercise its discretion to approve the merger if the OFT considers that it is "in principle" clearly open to the parties to offer a clear-cut undertaking in lieu of a reference ("UIL") to resolve the competition concerns. This step was not mentioned in the November 2007 text, but has been developed in a line of cases starting with *Dunfermline Press / Trinity Mirror*. The rationale is that the recurring benefits of avoiding consumer harm by means of UIL in a given, and all future like cases, outweigh the one-off costs of a reference. UIL that would amount to a prohibition (i.e. the sale of the entire business of one of the parties) are disregarded for these purposes.² The open issue is whether the *de minimis* exception will be available when UIL could be offered that fall short of selling off the entire business of one of the parties but go beyond the sale of one of the parties' activities in the market or markets where competition problems have been identified. In two fairly recent cases, the OFT has not ruled out the *de minimis* exception at this first stage when there were links between the parties' activities in the markets giving rise to competition concerns and the parties' other activities, so that it was not possible to offer a clear cut divestment remedy that was precisely tailored to the competition problem.³ In each of the cases, the activities creating the competition concern *and* the connected activities taken together did not comprise the entirety of one of the merging parties' businesses, so clear cut undertakings were available to resolve the competition concerns that would *not* have amounted to a prohibition. Although not spelt out, it seems that the OFT is applying a proportionality test. If the putative undertakings would be proportionate to the competition concerns identified (e.g. because they are precisely or broadly tailored to the competition problem) then the *de minimis* exception is not available. However, the exception is still available if the undertakings would be disproportionate, e.g. amounting to a prohibition or involving the sale of extensive connected businesses. We would expect the revised guidance to clarify the OFT's approach on this issue.

¹ It reflects decisions up to 23 September 2009.

² See, e.g., *Stagecoach / Eastbourne Buses and Cavendish Motor Services*, para. 70.

³ In *Seniorlink Eldercare / Aid Call*, 21 July 2009, the competition concern involved one element of the parties' activities (the provision of pendant alarms) in Northern Ireland. The OFT found, at para. 95, that a structural remedy would not be effective because the parties' businesses in Northern Ireland were not stand alone and instead were connected with their British businesses. The merging parties' activities extended beyond the supply of pendant alarms. Similarly, in *Spectris plc / Lochard Ltd*, 29 January 2009, para. 116, the OFT found that there were links between the parties' activities in the area creating competition concerns and their other activities (although a divestment of the problematic and linked businesses would not have amounted to a prohibition). See also *Prince Minerals Ltd / Castle Colours Ltd*, 6 May 2009, para. 57.

The second step is to identify the total size of the markets in which there is a realistic prospect of an SLC and apply the market size threshold. There are two main open issues here. The first is that the statute refers to the "market ... or ... markets" not being of sufficient importance to justify a reference. However, on several occasions the OFT has focused not on the size of the market, but on valuing the part of the market that is adversely affected by the competition concern, excluding products⁴ or customers⁵ that will not suffer from an SLC. The OFT's approach is logical because it focuses on balancing the costs of the reference with the likely consumer harm, and is consistent with a move away from market definition. However, it is not straightforward to square with the statute, and it might be better to carry out a straightforward calculation of market size and draft revised guidance using a higher threshold, whilst making it clear that markets approaching this size would be candidates for the *de minimis* exception only if the potential consumer harm was very limited or was focused on limited parts of the market. The second open issue is the deceptively simple one of how the threshold operates. The November 2007 guidance states that "The OFT is generally likely to consider the affected market(s) to be of sufficient importance to justify a reference where their annual value in the UK, in aggregate, is more than £10 million." This implied that markets with a value exceeding £10 million might, exceptionally, be treated as falling within the *de minimis* exception and the OFT considered doing so in August 2008 in *Global / GCap*.⁶ However, more recently in *Stagecoach / Preston Bus*⁷ the OFT has treated the £10 million threshold as an absolute one, so that the *de minimis* exception was not available simply because the value of the market exceeded £10 million and the OFT did not consider exercising a discretion to apply the *de minimis* exception above that threshold. Moreover, in *Stagecoach / Eastbourne Buses and Cavendish Motors* the OFT said that it had not previously applied the exception in a market of £6 million and "it will be unlikely to do so unless its assessment of the other relevant factors strongly suggest it should do so."⁸ It is possible that the OFT's more conservative recent stance on the application of the threshold arises because of a change in personnel: Amelia Fletcher took over from Simon Pritchard as senior director of mergers in mid-December 2008.

In the third step, the OFT exercises its discretion whether to make a reference. The November 2007 guidance states that the OFT is "generally likely" not to refer cases below the market size threshold. However, this clearly does not represent current practice. In a consistent line of decisions, the OFT has treated the pivotal issue as being whether the impact of the merger is likely to be particularly significant (such that the *de minimis* exception should not be applied) or more limited (when the OFT may apply the exception).⁹ In making this assessment, the OFT considers:¹⁰

- (a) how bad the harm might be; this is a function of the market size, the magnitude of competition lost by the merger,¹¹ and the durability of the merger's impact;¹²

⁴ See *Govia Ltd / South Central Passenger Rail Franchise*, para. 66 (excluding revenue from regulated rail fares because the consumer detriment that may arise as a result of the merger involved unregulated rail fares or bus fares) and *National Express / East Coast* (exclusion of rail services).

⁵ See *FMC / ISP* (exclusion of a powerful buyer, Reckitt Benckiser) and *Orbital / Ocean Park* (exclusion of two powerful buyers; para. 77).

⁶ See *Global Radio UK Ltd / GCap Media plc*, para. 232. See also *Cineworld / Hollywood Green*, para. 62, stating that there was no reason to depart from the normal approach in the case of a market with a turnover exceeding £15 million.

⁷ 28 May 2009, para. 111. See also *Govia / South Central Passenger Rail Franchise*, 6 August 2009, para. 68, noting that the *de minimis* exception will not be available above £10 million (although the markets in question were valued at £3.7 million in that case).

⁸ Para. 76.

⁹ See, e.g., *Nufarm / Marks*, para. 93.

¹⁰ The November 2007 guidance also states that a reference may nevertheless be appropriate if it would have an important precedent value or it affects vulnerable consumers.

¹¹ In *Govia / South Central Passenger Rail Franchise*, paras 70 and 76, the OFT took account of the regulatory framework, and assessed the extent of the harm to consumers that had in practice arisen during the previous franchise period (during which the overlaps that gave rise to concerns had actually existed in practice). In *Seniorlink Eldercare / Aid Call*, para. 102, the OFT placed some weight on the fact that charities would be less likely to exploit any market power because of concerns for their reputation.

¹² For example, if entry is likely, this may limit the duration of the harm; see *Spectris plc / Lochard Ltd*, para. 129.

- (b) how likely the harm is to arise, i.e. the strength of the OFT's concerns and in particular whether its concerns arise on the balance of probabilities ("is ... the case")¹³ or the lower "realistic prospect" standard ("may be the case");¹⁴ and
- (c) transaction rationale and the value of deterrence; if the acquisition of market power forms a material part of the commercial rationale (as evidenced, e.g., by internal company documents,¹⁵ paying a price that seems to include a premium for market power,¹⁶ the fact that the merger relates solely to the affected market¹⁷ and/or the existence of customer concerns¹⁸) then this points towards referring the case; more generally, the OFT is concerned not to set a precedent that will compromise the deterrence of particularly problematic mergers going forward.¹⁹

The cases reflect a fairly consistent approach on this issue, and the promised guidance is likely to summarise existing practice.

On the procedural side, in *Govia / South Central*²⁰ the parties offered to forego an issues paper if the OFT would exercise its discretion not to refer on *de minimis* grounds and the OFT proceeded to clear the case without circulating an issues paper, despite finding a realistic prospect of an SLC.

2. Undertakings in lieu²¹

If UIL are not fulfilled, the OFT has the same powers to make orders as the CC does on a reference, but does *not* have the power to make a reference to the CC. For this reason, the OFT requires the parties to identify a purchaser and agree terms before it accepts the UIL (thereby losing the power to make a reference) when the risk profile of the remedy requires it, for example where the OFT has reasonable doubts as to the ongoing viability of the divestment package and/or there is only a small number of candidate purchasers.²²

In *Sports Direct / JJB Sports stores* the OFT found that UIL were capable of resolving the competition concerns but required the purchaser to find a buyer before finalising the UIL. Sports Direct was unable to find a buyer in the time allowed and the OFT's decision to refer the case provides insight into the current process of agreeing UIL.²³ The OFT proposed to allow Sports Direct just six weeks to agree sales for the stores in question, but eventually granted three months²⁴ because Sports Direct doubted the achievability of the OFT's target. Sports Direct breached its obligation to provide weekly updates and focused its initial negotiations on a sale back to JJB Sports despite OFT reservations about JJB

¹³ For example, in *BOC / Ineos* the OFT stated that its concerns were "significantly more likely than not" to arise, and referred the case; in *Spectris plc / Lochard Ltd, Seniorlink Eldercare / Aid Call* and *Govia Ltd / South Central Passenger Rail Franchise* the OFT cleared cases even though at least some of its concerns arose on the balance of probabilities.

¹⁴ For example, of the cases in which the OFT's concerns met the "may be the case" standard (but not the balance of probabilities), *NEG / ICEC, Arriva / Cross-Country, Stagecoach / East Midlands* and *Prince Minerals Ltd / Castle Colours Ltd* were cleared, but *Stagecoach / Eastbourne Buses and Cavendish Motor Services* was referred.

¹⁵ See *Stagecoach / Eastbourne Buses and Cavendish Motor Services*, para. 80 (noting, however, that the position was not wholly clear) and *Seniorlink Eldercare / Aid Call* (no suggestion on the internal documents that the merger was driven by wish to acquire market power, para. 104).

¹⁶ See, e.g., *Orbital / Ocean Park*, para. 85.

¹⁷ See *BOC / Ineos*, para. 125.

¹⁸ See *BOC / Ineos*, para. 125 (customers concerned) and *Spectris plc / Lochard Ltd*, para. 130 (customers not concerned).

¹⁹ See *Prince Minerals Ltd / Castle Colours Ltd*, para. 77.

²⁰ See para. 8.

²¹ See *Co-operative Group Ltd / Plymouth & South West Co-operative Society Ltd*, para. 36, for discussion of whether an existing divestment obligation could be sufficient to rule out concerns about an SLC which would otherwise arise in that market as a result of a subsequent transaction.

²² Such an arrangement may be required for some but not all of the divestments; see *Co-operative / Somerfield*, para. 194.

²³ For an earlier decision to refer following a failure to agree undertakings in lieu, see *Tesco / Slough*, 19 April 2007. The process in that case is not representative of current practice.

²⁴ The OFT stated that the three month period was not extendable reflecting the fact that Sports Direct had been granted a significantly longer period than the OFT originally considered reasonable.

Sports' suitability as a purchaser. It failed to agree sales within the three month period and sought an extension of time. The OFT refused and referred the case to the CC, as there was insufficient evidence that a sale would be achieved if an extension were granted and Sports Direct had not demonstrated a genuine commitment to the divestment process.

3. The relationship between the OFT and the CC - retail mergers

The publication of the draft Joint Substantive Merger Guidelines by the CC and OFT²⁵ reflects a significant effort to ensure that there is, whenever possible, a coherence to their decision making. Naturally, if the two bodies adopt a materially different approach, there is a risk of unnecessary references (if, applying the CC's methodology, the transaction does not raise even a realistic prospect of an SLC) or the OFT approving cases where the CC might have found an SLC on the balance of probabilities.

However, leaving supermarkets cases to one side, in retail mergers there seems to be a divergence in approach. Most recently, in *NBTY / Julian Graves*, a merger of health foods chains, the OFT applied its normal approach in assessing unilateral effects in differentiated products markets by not focusing on market definition and applying a rebuttable presumption that a realistic prospect of an SLC arises in a horizontal merger between firms with high margins and significant diversion ratios between them. The OFT relied heavily on a customer survey showing that the highest diversion ratio was between the parties and not between either or both of them and any *individual* supermarket. However, the CC focused on defining the relevant product market and placed significant weight on price correlations and margin correlations, a comparison of product ranges and an assessment of Holland & Barrett's reasons for recommending price changes. It did not apply the OFT's presumption based on margins and diversion ratios, and interpreted the survey evidence quite differently, focusing on diversions to supermarkets *as a whole*, and not to *individual* supermarkets separately. Now, of course, there is no logical difficulty in the OFT referring a case applying its "realistic prospect" test on the basis of an initial review, and the CC approving it applying a balance of probabilities test on the basis of a more extensive assessment. Indeed, as part of its in-depth review, the CC obtained data that seemingly was not available to the OFT. However, it is troubling that the same survey evidence was interpreted one way by the OFT and quite differently by the CC.²⁶ If the OFT had analysed the case applying the CC's methodology, so far as it was able to during a first phase review, it is plausible that the OFT would have approved the transaction.

Moreover, this is not the only recent case in which tensions have arisen between the OFT and the CC in retail mergers. In *Game Group / Games Station*, a merger between specialist providers of mint and pre-owned video games, the CC found that the relevant market was national and did *not* also find a local component to competition, even though there was evidence that the parties varied their prices depending on local conditions, local entry leads to a competitive response, and trade-in prices vary depending on local conditions. The CC instead found that because the internet had an effect across the country, the relevant geographic market was national. The reasoning on this issue is not straightforward, and it is difficult to imagine that the OFT would have reached such a conclusion.

4 Substantial part of the UK

The share of supply test is applied to the UK or a "substantial part" of the UK. The meaning of "substantial part" for these purposes was considered by the House of Lords in the well-known *South*

²⁵ This paper does not discuss the draft Joint Substantive Merger Guidelines in detail. Alistair Lindsay's comments on the draft have been published separately and are available at <http://www.monckton.com/doc/MergerGuidelinesAL.pdf>.

²⁶ For more general concerns about the dangers of posing SSNIP-type survey questions, see the CC's provisional findings in *Stagecoach / Eastbourne Buses and Cavendish Motors*, para. 5.21.

*Yorkshire*²⁷ case. To recap, the issue was whether the county of South Yorkshire and parts of Derby and Nottingham amounted to a "substantial part" of the UK in a merger between bus operators. The area covered 1,500 square miles with a population of around 1.8 million. Lord Mustill delivered the only substantive speech. He found that "substantial" in this statutory context was "further up the spectrum" than "more than de minimis" and found that the part must be "of such size, character and importance as to make it worth consideration for the purposes of the Act." In response to an argument that the key issue was the proportion of local bus services in the local area to total local bus services in the UK, Lord Mustill said: "I find this interpretation very hard to square with the words 'part of the United Kingdom' which are surely intended to relate to the area itself and not (at any rate primarily) to the market share of the area."

In a series of more recent cases, the OFT and CC have found areas much smaller than the one considered by the House of Lords to be a "substantial part" of the UK. In *Tesco / Slough*, the CC found²⁸ that Slough was a substantial part of the UK "having regard to such considerations as population and economic factors" and taking account of the fact that the parties compete in local markets. In *Stagecoach / Preston Bus*, a bus merger, the OFT found that Preston was a substantial part of the UK because its population was larger than Slough's and Lord Mustill in *South Yorkshire* had noted that the provision of local bus services was a matter of importance to the public as evidenced by Parliament making special provision for them in the Transport Act 1985.²⁹ Similarly, in *Stagecoach / Eastbourne Buses and Cavendish Motors* the OFT took account of Lord Mustill's comments, the population of Eastbourne and its vibrant tourist economy.³⁰

The open question is whether "substantial part of the UK" is determined solely with reference to the area's characteristics, or also taking account of the goods or services in question. Some goods or services are more significant than others; for example, grocery retailing accounts for a significant proportion of average household expenditure, raising the question of whether Slough would be a substantial part of the UK for the supply of less significant goods or services, such as paperclips. Equally, some areas are small geographically and as a proportion of total trade, but are very significant in the context of the supply of certain goods or services, e.g. Heathrow Airport might be very significant in the supply of aviation fuels but not of groceries. The House of Lords' decision in *South Yorkshire* clearly directs the primary focus to the area in question, but Lord Mustill's speech does refer to the importance to the public of local bus services implying that the nature of the goods or services in question may be a relevant secondary factor in the analysis.

²⁷ *R. v. Monopolies and Mergers Commission, ex p. South Yorkshire Transport Ltd* [1993] All ER 289. The case arose under the Fair Trading Act 1973.

²⁸ Para. 4.6.

²⁹ The CC's provisional findings state, at paras 3.13 and 3.14: "Preston City covers an area of 142 km² and has a population of around 134,000. The Greater Preston area, including the districts of South Ribble and Chorley covers an area of 458 km² and has a population of over 340,000. Preston was granted 'city' status in 2002 and is the commercial and administrative centre of Lancashire. With over 32,000 students, its university is one of the largest in the UK. We note that the CC has found in a number of cases that a local market, centred around a particular town or city, could be regarded as a substantial part of the UK. Having regard to the above factors, we consider that Preston City is of such size, character and importance as to make it worth of consideration for the purposes of the Act and hence 'a substantial part of the UK' for those purposes."

³⁰ The CC's provisional findings state, at paras 3.23 and 3.24: "Eastbourne is a substantial town, the largest in East Sussex excluding the Unitary Authority of Brighton & Hove. It attracts a substantial number of visitors in the summer months, and it has a higher-than-average proportion of the population who are retired. The CC has found in a number of cases that a local market, centred around a particular town or city, could be regarded as a substantial part of the UK. Although we recognize that Eastbourne is smaller than previous examples, we consider that it shares similar characteristics as a significant and distinct town."

5. Failing firms / counterfactual

The OFT expected the recession to lead to a series of failing firm / counterfactual arguments, and published a restatement of its position in December 2008.³¹ It has applied the principles (relatively uncontroversially) in *HMV / 15 Zavvi Stores* (where the OFT did not carry out an in-depth analysis of the overlap stores because of the strength of the failing firm evidence)³² and a series of decisions in which the criteria were not met.³³

In *Stagecoach / Preston Bus*, the CC's³⁴ provisional findings use a counterfactual which significantly pre-dates the merger, reasoning that "in assessing the counterfactual it is appropriate to disregard steps taken by the acquiring company in order to bring about the merger". In that case, Stagecoach inquired about purchasing Preston Bus in 2006 but was rebuffed. It then launched a series of services in Preston that led to a decline in Preston Bus's financial position and ultimately resulted in the merger in January 2009. The CC's provisional finding is that the counterfactual is the competitive conditions prior to the launch of Stagecoach's new services in 2007.

6. Trends in OFT merger decisions

Table 1 below summarises trends in OFT decisions. Rows 1 to 7 and Columns A to F comprise data from the OFT. The remainder of the table is obtained by manipulating the OFT's data. Note that Column G aggregates the data for 1 April 2008 to 31 August 2009 that is already included in Columns E and F, because Column F otherwise suffers from a small number of data points.

³¹ For criticism that the failing firm test sets too high a threshold and is inconsistent with a counterfactual analysis, see Alistair Lindsay's comments on the draft joint substantive guidance at <http://www.monckton.com/doc/MergerGuidelinesAL.pdf>.

³² For a recent case that was cleared on the basis of a counterfactual analysis, see *Smiths News Trading Ltd / Certain assets of Surridge Dawson Ltd*. See also *Co-operative Group Ltd / Plymouth & South West Co-operative Society Ltd*, in which the OFT found the supermarket would have closed in the absence of the merger, the target business would not have been able to sell on the supermarket to another grocery retailer in the absence of the merger, and the only realistic prospect of an SLC therefore arose if the merger reduced the possibility of the lease being surrendered and the landlord finding a new supermarket tenant. The parties addressed this concern by completing the surrender of the lease (without any restriction on the landlord's ability to choose its future tenant) the day before the OFT's decision. The OFT did not find a realistic prospect of an SLC in that market.

³³ See *Stagecoach / Preston Bus*, *Sports Direct / JJB Sports stores*, *NBTY / Julian Graves* and *Stagecoach / Eastbourne Buses and Cavendish Motors* (see also the CC's provisional findings, ruling out the failing firm analysis and adopting a counterfactual that there would have been at least some competition for some time between the merging firms, even if ultimately one of them were to exit from the market).

³⁴ Other recent CC cases in which the counterfactual has been important include *Nufarm / AH Marks* and *Long Clawson / Millway* (finding a loss of competition that was not substantial when compared with the counterfactual).

Table 1: Trends in OFT decisions

	A. 1.4.04 to 31.3.05	B. 1.4.05 to 31.3.06	C. 1.4.06 to 31.3.07	D. 1.4.07 to 31.3.08	E. 1.4.08 to 31.3.09	F. 1.4.09 to 31.8.09 (5 mths)	G. 1.4.08 to 31.8.09 (17 mths) ³⁵
1. Referred	18	17	13	10	8	6	14
2. UIL accepted	5	6	6	5	6	3	9
3. Unconditional clearance (not de minimis)	103	118	86	81	57	22	79
4. Unconditional clearance (de minimis)	0	0	0	3	4	2	6
5. Found not to qualify (FNQ)	45	69	22	15	9	4	13
6. Total decisions	171	210	127	114	84	37	121
7. To CRM	35	36	30	22	29	11	40
8. Total decisions on qualifying mergers ³⁶	126	141	105	99	75	33	108
9. Percentage of qualifying cases taken to CRM ³⁷	28%	26%	29%	22%	39%	33%	37%
10. Percentage of qualifying cases referred or UIL ³⁸	18%	16%	18%	15%	19%	27%	21%
11. Percentage of CRM cases referred or UIL ³⁹	66%	64%	63%	69%	48%	81%	58%
12. Percentage of qualifying cases where realistic prospect of SLC ⁴⁰	18%	16%	18%	18%	24%	33%	27%
13. Percentage of CRM cases where realistic prospect of SLC ⁴¹	66%	64%	63%	82%	62%	100%	73%

Source: http://www.offt.gov.uk/shared_offt/mergers_ea02/2009/stats.pdf and simple mathematical manipulation of the OFT's data.

The OFT has continued to publicise in its decisions those cases that led to a reference or undertakings and were identified through an own-initiative investigation by the Mergers Intelligence Unit. These include⁴² *Sports Direct / JJB Sports stores*, *Stagecoach / Preston Bus* and *NBTY / Julian Graves*. If the OFT is identifying and calling in cases that would previously have passed "under the radar" this may⁴³ explain why the OFT is now finding a realistic prospect of an SLC in greater proportions of cases. As shown in Row 12 of Table 1 above, in the 17 months from 1 April 2008 to 31 August 2009, 27 per cent. of qualifying mergers were found to have a realistic prospect of an SLC (and were therefore

³⁵ Columns E+F.

³⁶ Row 6 minus Row 5.

³⁷ (Row 7 divided by Row 8) x 100.

³⁸ ((Rows 1+2) divided by Row 8) x 100.

³⁹ ((Rows 1+2) divided by Row 7) x 100.

⁴⁰ ((Rows 1+2+4) divided by Row 8) x 100.

⁴¹ ((Rows 1+2+4) divided by Row 7) x 100.

⁴² *HMV / 15 Zavvi* stores was also called in by the OFT, but was cleared unconditionally.

⁴³ The other obvious potential explanations are data mix and the change in senior director of mergers (and, therefore, in the normal case, the decision maker) in mid-December 2008.

referred, cleared on *de minimis* grounds or cleared subject to UIL) compared with 16 to 18 per cent. in the previous four OFT years.⁴⁴

The other trends emerging from Table 1 are: the near disappearance of FNQ decisions; a continuing fall in the number of qualifying cases that are analysed (presumably partly due to a decline in M&A activity and partly because of the change of policy on calling in transactions); an increase in the percentage of qualifying cases taken to CRM (presumably arising from a change in the mix of cases with fewer straightforward cases being notified or called in); and finally a run of 11 straight CRMs from April to August 2009 in which a realistic prospect of an SLC has been found (see Row 13, Column F).

Dr Alistair Lindsay was listed as one of the top 40 antitrust lawyers in the world aged under 40 by Global Competition Review in February 2004 and again in May 2008. He is the author of "The EC Merger Regulation: Substantive Issues" (Sweet & Maxwell, 2003; 2nd ed, 2006; 3rd ed, forthcoming, jointly with Alison Berridge), which was described by a leading partner in a review as a "masterpiece". He was a partner in Allen & Overy LLP from 2001 to 2009 and, whilst a solicitor, was listed as a leading practitioner (in the first tier) of Competition/EU law by Chambers UK, which described him as a "star practitioner" (2008) and a "virtuoso" (2006) and referred to his "brilliantly accurate advice" (2007).

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

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⁴⁴ Source: http://www.offt.gov.uk/shared_offt/mergers_ea02/2009/stats.pdf.