

Anticipated acquisition by DS Smith plc of OTOR S.A.

ME/4604/10

The OFT's decision on reference under section 33(1) given on 12 August 2010. Full text of decision published on 25 August 2010.

Please note that the square brackets indicate figures or text which have been deleted or replaced in ranges at the request of the parties or third parties for reasons of commercial confidentiality.

PARTIES

1. **DS Smith Plc (DS Smith)** is an international firm involved in the manufacture of paper and corrugated packaging, plastic packaging, and office products wholesaling, headquartered in England and listed on the London Stock Exchange. DS Smith has operating locations across the UK, Europe, the USA and Australasia. In the year ended April 30 2010, DS Smith had a UK turnover of £[] billion.
2. **Otor S.A (Otor)** is a French based manufacturer of corrugated packaging, recycled container board and packaging machines. Otor's UK turnover in the year ended 31 December 2009 was £[].

TRANSACTION

3. DS Smith proposes to acquire the entire share capital of Otor Finance¹ which includes a 94.75 per cent interest in Otor.

¹ Otor Finance is a holding company within the Carlyle Group, who is the main shareholder of Otor with 94.75 per cent of the share capital. Otor controls all of the operative subsidiaries of the Otor Group.

4. The parties notified the transaction to the Office of Fair Trading (OFT) on 7 July 2010. The administrative deadline for the OFT to decide whether to refer the merger to the Competition Commission (CC) is 2 September 2010.

JURISDICTION

5. As a result of this transaction DS Smith and Otor will cease to be distinct. The UK turnover of Otor is not sufficient to meet the turnover test contained in section 23(1)(b) of the Enterprise Act 2002 (the Act). However, the OFT believes that it is or may be the case that the share of supply test set out in section 23 of the Act is satisfied, as there is evidence indicating that the parties have a combined share in the UK of more than 25 per cent in the supply of corrugated cases. The OFT therefore believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

MARKET DEFINITION

Product scope

Corrugated cases

6. The parties overlap in the supply of corrugated cases in the UK. The key input to the manufacture of corrugated cases is containerboard (also known as corrugated case material (CCM)), which is then converted into corrugated sheet, which in turn is used as inputs into corrugated cases.
7. The CC has previously decided that the manufacture and supply of corrugated cases constituted its own relevant product market as did each of the other key stages of the production process – the manufacture and supply of CCM and sheets.²

² Competition Commission, a report on the completed acquisition of Linpac Containers Ltd by DS Smith Plc, October 2004, paragraphs 4.8, 4.18 and 4.23.

8. In a more recent case³ the OFT considered the merger on the basis of all corrugated cases excluding packaging made from other materials. It was not necessary to conclude on the precise scope of the relevant product market in that case since the test for reference did not depend on it.
9. In the current case, the OFT did not receive any evidence suggesting a departure from this approach and therefore considered the impact of the merger in the supply of corrugated cases excluding packaging made from other materials.

Packaging machines

10. Otor is active in the production and supply of packaging machines to end customers (such as food manufacturers) and DS Smith is involved in the sale of the packaging machines as an advisor to customers or as a distributor and installer of the machines at customer sites.
11. The parties considered the relevant product market to be the machines used specifically for the erection of packaging at a customer site, that is, those directly equivalent to Otor's machines.
12. Therefore, the OFT considered the impact of the merger on the narrowest plausible frame of reference, namely the supply of packaging machines. However, given that the merger does not cause competition concerns even on this narrow basis, it is not necessary to conclude on the precise scope of the relevant product market.

Geographic scope

Corrugated Cases

13. Regarding the supply of corrugated cases, the CC has previously concluded that the relevant geographic market for the supply of

³ OFT decision on the anticipated acquisition by Sociedad Anonima Industrias Celulosa Aragonesa of the conventional corrugated board business of SCA Packaging Ltd, 28 August 2008.

corrugated cases was Great Britain.⁴ In addition, the European Commission in *Jefferson Smurfit/Kappa* suggested that the market may be defined by a radius of 200 to 300km from the production site.⁵

14. The parties stated that there was no need to conclude on the precise scope of the relevant geographic market since there were no competition concerns on any basis.
15. The OFT did not receive any evidence suggesting departure from the above approach and therefore considered the impact of the merger in Great Britain and on the basis of a radius of 200 to 300km from the production site. However, given that the merger does not raise any competition concerns on either basis, it is not necessary to conclude on the precise scope of the geographic market for the supply of corrugated cases.

Packaging machines

16. Regarding the sale of packaging machines the parties considered the impact of the merger on a UK and European frame of reference.
17. Since the merger does not raise any competition concerns on either geographic frame of reference, the OFT did not consider it necessary to conclude on the precise scope of the relevant geographic market.

HORIZONTAL ISSUES

Market shares

18. The parties' market share estimates for the supply of corrugated cases in Great Britain is approximately [20-30] per cent with a minimal increment of [0-five] per cent.
19. On a 200 to 300km radius from Otor's production sites in France, the parties provided data showing that in some cases a strict 300km radius included some of the southern parts of the UK. However, the

⁴Competition Commission, a report on the completed acquisition of Linpac Containers Ltd by DS Smith Plc, October 2004, paragraph 4.24.

⁵ See Case No. COMP/M.3935 - *Jefferson Smurfit/Kappa*, 10 November 2005.

parties argued that the 200 to 300km distance is a proxy for travel time and cost, and the channel crossing adds so significantly to both that it is not realistic to include UK locations in these target plant-centred markets.

Competitive effects

20. Otor has previously sold only very small quantities of cases into the UK. The OFT received no evidence to suggest that Otor provides a significant competitive constraint in the UK market which would be removed by the merger.
21. No third party raised any competition concerns about this aspect of the proposed merger.
22. Therefore, the OFT does not consider that there is a realistic prospect of a substantial lessening of competition as a result of the merger in the supply of corrugated cases in Great Britain.

VERTICAL ISSUES

23. The merger does have a vertical dimension. Otor is active in the production and supply of packaging machines to end customers (such as food manufacturers) and DS Smith is involved in the sale of the packaging machines as an advisor to customers or as a distributor and installer of the machines at customer sites.
24. The OFT considered first whether the merged entity will have the ability to foreclose competitors.
25. The parties argued that Otor has a minor presence in the market of packaging machines with an estimated market share of [0-five] per cent in the UK. In addition, the parties' combined market share in the supply of corrugated cases is approximately [20-30] per cent (with the increment being very small).
26. No third party raised any concerns regarding this aspect of the merger contending that there were a number of suppliers of packaging machines other than the parties.

27. Given the market positions of the parties, the small increment, and the lack of third party concerns, the OFT concludes that the merger will not confer on DS Smith the ability to foreclose competitors (in the supply of packaging machines) and therefore there is no realistic prospect of a substantial lessening of competition in the supply of packaging machines in the UK.

THIRD PARTY VIEWS

28. No third parties, whether customers or competitors, expressed concerns about the proposed merger to the OFT.

ASSESSMENT

29. The parties overlap in the supply of corrugated cases in Great Britain. Their combined market share is approximately [20-30] per cent with an increment of [0-five] per cent. On a 200 to 300km radius from Otor's production sites in France, the parties do not have any substantive overlaps in the UK, considering that the channel crossing adds significantly to travel time and cost. Furthermore no third parties raised any competition concerns regarding the merger. Therefore, the OFT does not consider that there is a realistic prospect of a substantial lessening of competition in the supply of corrugated cases in Great Britain as a result of the merger.
30. The merger has a vertical dimension. Otor is active in the production and supply of packaging machines to end customers and DS Smith is involved in the sale of packaging machines as an advisor to customers or as a distributor and installer of the machines at customer sites. Given Otor's market share of [0-five] per cent in the supply of packaging machines in the UK and the parties' combined market share of approximately [20-30] per cent in the supply of corrugated cases in the UK, the OFT does not believe that there is a realistic prospect of a substantial lessening of competition through the foreclosure of competitors.

31. Consequently, the OFT does not believe that it is or may be the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

32. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act.

ENDNOTES

1. In respect of paragraph 3, DS Smith clarified that it would acquire 94.99 per cent of Otor both directly and, indirectly, through the purchase of Otor Finance.