

Completed acquisition by Sports Direct International plc of a minority shareholding in Blacks Leisure Group plc

ME/4540/10

The OFT's decision on reference under section 33(1) given on 3 June 2010. Full text of decision published 23 June 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. **Sports Direct International plc** (Sports Direct) the UK's leading sports retailer and owner of the outdoor apparel and equipment retailer, Field and Trek.
2. **Blacks Leisure Group plc** (Blacks) is one of the UK's leading retailers of outdoor apparel and equipment through its retailers Blacks and Millets.

BACKGROUND

3. Sports Direct originally acquired shares in Blacks in 2006, reaching a level of around 25–30 per cent.
4. In 2007 Sports Direct's subsidiary, Sportsdirect.com Retail Limited, entered into a repurchase agreement which formed a secured financing arrangement with the former bank, Kaupthing Singer & Friedlander Limited (KSF) pursuant to which legal title to the shares in Blacks owned by Sports Direct were transferred to a nominee company of KSF. When KSF entered into administration (8 October

2008) the beneficial ownership of Sports Direct's shares in Blacks fell into dispute.¹ Legal title to the shares remained with the KSF nominee company.

5. The Office of Fair Trading (OFT) understands that the relevant Blacks shares were not voted during the period in which beneficial ownership was in dispute. However, once Sports Direct entered into an agreement with KSF's administrators on 21 February 2010 it had the ability to exercise those shares' vote in Blacks.² [See end note 1.]
6. The agreement of 21 February 2010 therefore raised the possibility that, in practical terms, Sports Direct regained the ability to exert material influence over the policy of Field and Trek's competitor, Blacks, such that it might be subject to scrutiny under the merger provisions of the Enterprise Act 2002 (the Act). On this basis, the OFT began a merger investigation and subsequently issued an invitation to comment notice on 17 May 2010.
7. At the time of commencement of the OFT's investigation, the level of Sports Direct's shareholding in Blacks was slightly less than 30 per cent. However, since then, Sports Direct's shareholding has fallen to below 15 per cent as a result of it declining to acquire further shares from a Placing and Open Offer by Blacks.

¹ This dispute was settled by the High Court on 13 May 2010 which ruled that Sportsdirect.com Retail Limited has had beneficial ownership of the shares since 8 October 2008 – Joint Administrators of KSF v Sportsdirect.com Retail Ltd [2010] EWHC 1072.

² Sports Direct stated in a press release of 22 February 2010 that: 'Sportsdirect.com Retail Limited ("SWI"), a wholly-owned indirect subsidiary of Sports Direct International Plc, has been in dispute over the ownership of certain interests in Blacks Leisure Group plc ("Blacks") and JD Sports Fashion plc ("JD") with Kaupthing Singer & Friedlander Limited (in administration) ("KSF"). SWI proposes to acquire such right, title and interest as is held by KSF in 12,153,071 ordinary shares in Blacks and 5,775,255 ordinary shares in JD on the basis that the acquisition would be without prejudice to certain existing rights of the parties. If such rights in the shares are acquired, SWI currently intends to vote against the resolutions proposed by Blacks at its general meeting convened for 24 February however this remains subject to review and final determination by the board of directors of SWI prior to that general meeting being held'.

JURISDICTION

8. The merger provisions of the Act state that a relevant merger situation (that is, one which the OFT has jurisdiction to examine) is created if two or more enterprises are brought under common ownership or control as a result of the transaction and either the turnover test or share of supply test is met (section 26 of the Act). The lowest level of control is known as material influence.
9. In this case, given the level of Sports Direct's shareholding in Blacks (14.5 per cent) and its lack of directors on Blacks' board, the only level of control which Sports Direct could feasibly impart on Blacks is material influence.
10. The OFT's Jurisdictional and Procedural guidance states that the key factors to take into account when considering material influence are shareholdings (especially in relation to typical attendance levels of other shareholders), board representation and other factors such as production agreements or financing agreements.³ Further, the guidance states that: 'exceptionally, a shareholding of less than 15 per cent might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present. In practice, the OFT is likely to investigate such low levels of shareholding only where they concern one business taking a stake in a direct competitor'.⁴
11. The OFT does not believe that Sports Direct's 14.5 per cent shareholding in Blacks is sufficient to allow it as a practical matter to block any ordinary or special resolutions. Attendance at general meetings would need to be 58 per cent or less for Sports Direct to be able to block any special resolutions and for ordinary resolutions attendance would need to be below 29 per cent. Based on previous attendance figures at Blacks' general meetings since 2006, Sports Direct would not have this ability.
12. As Sports Direct (through Field and Trek) is a competitor to Blacks, the OFT considered whether Sports Direct's current shareholding

³ Mergers: jurisdictional and procedural guidance, OFT527, 2009, paragraphs 3.15–3.28.

⁴ Paragraph 3.20.

might be such as to allow it to influence policy at the formulation stage.⁵ However, the OFT notes that even with a shareholding significantly higher than 14.5 per cent Sports Direct was not in fact successful in opposing Blacks' Placing and Open Offer, which Blacks has stated will be used to allow the opening of new stores, to accelerate the refurbishment of existing stores and to cancel the Group's seasonal peak working capital facility of £7.5 million.⁶

13. Sports Direct does not have any board representation in Blacks nor is the OFT aware of any other additional factors (such as significant commercial loans) which may support a finding of material influence.
14. The OFT considers that the current shareholding Sports Direct has in Blacks does not confer on Sports Direct, directly or indirectly, control of Blacks, nor does it have the ability to materially influence the policy of Blacks.

DECISION

15. The OFT therefore considers that a relevant merger situation has not been created within the merger provisions of the Act since enterprises have not ceased to be distinct.

END NOTES

1. The 21 February agreement was not a result of Sports Direct conceding that it did not have the right to vote the shares (or direct such a vote) but rather was a mechanism to remove any doubt that Sports Direct had such a right at a time when the High Court case was ongoing.

⁵ Paragraph 3.22 of the OFT's jurisdictional and procedural guidance.

⁶ Blacks press statement of 30 April 2010, 'Proposed Placing and Open Offer'.