


BIICL- 7th Annual Merger Conference
13 November 2008

OFT merger remedies: The emergence of the up-front buyer

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(Views are personal and not binding on OFT)



Remedies overview

- **OFT has to get to SLC finding first**
 - No reverse engineering of SLC where parties have offered UILs
 - Decision maker not informed of existence of UILs until / if SLC finding made (but case team guidance throughout)
 - **Starting point: restoration of competition to pre-merger levels**
 - **OFT must be confident competition concerns can be resolved without need for further detailed investigation → UILs must be ‘clear cut’**
 - Competition concerns and proposed remedies must be clear cut, and remedies capable of ready implementation
 - Clear cut means precise identification of SLC, and effective and proportionate remedy
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UFB requirement

- **Acceptance of UIL contingent on purchaser identification and approval**
 - UFB must be contractually committed (subject to OFT approval)
 - OFT will consult on suitability of purchaser at the same time as remedy package itself
 - Contrast with EC where completion contingent on binding on-sale agreement to approved purchaser
- **Appropriate when concerns over:**
 - Purchaser risk: limited pool of suitable purchasers (ie limited interest, and/or limited number of those who do not raise their own competition issues)
 - Composition risk: concerns over viability or attractiveness of package
 - Asset risk: competitive capability of asset may deteriorate pending divestiture
- **Mitigates implementation risks:**
 - OFT can be confident that divestiture will actually occur to suitable buyer
 - Ability to refer is retained until UFB is approved and UIL accepted
 - Maintains incentive on parties to achieve remedy asap, and mitigates deterioration risk
 - Benefit to parties: potentially enables OFT to press pause on duty to refer more easily?

UILs 2008 to date – UFB in all cases

	Case	Risk	Outcome
1	Dunfermline Press/Berkshire Regional News	Composition/ purchaser	Sold to Bayliss
2	Homebase/Focus	Purchaser	Sold (back) to Focus
3	Air France/VLM	Purchaser	Eastern to take up slots
4	Global/GCap	Purchaser	Pending
5	CGL/Somerfield	Purchaser (some areas)	Pending