
Anticipated award to Odeon Cinema Holdings Limited of a contract in relation to the BFI IMAX Cinema

ME/5483-12

The OFT's decision on reference under section 26 given on 16 July 2012. Full text of decision published 25 July 2012.

PARTIES

1. **Odeon Cinema Holdings Limited** (Odeon) is a wholly owned UK subsidiary of Odeon & UCI Cinemas Group Limited. Odeon principally provides cinema film exhibition services. Odeon currently operates 108 cinemas in the UK, and the Odeon & UCI group operates a total of 231 cinemas across Austria, Germany, Ireland, Italy, Portugal, Spain and the UK. The Odeon & UCI group is also a joint venture partner, together with Cineworld plc, in Digital Cinema Media, which provides cinema screen advertising services to cinemas and sells advertising space to advertising agencies. Odeon's turnover in the financial year ended 31 December 2011 was £725.1 million, of which £315.5 million was attributable to the UK.
2. **The British Film Institute** (BFI) is a charitable organisation established in the 1930s and incorporated under Royal Charter in 1983. The BFI's activities range from investing in creative work to promoting British films and talents and preserving and restoring a film collection and archive. Commercial turnover of the BFI for the financial year ending March 2012 was £17.8 million. The BFI operates certain premises including the BFI IMAX cinema (the BFI IMAX), a single screen cinema with 498 seats located in Waterloo, London. Turnover of the BFI IMAX was £6.9 million for the financial year ending March 2011.¹

¹ Of which £1.2 million was generated from an advertising 'wrap', which is not part of this transaction.

TRANSACTION

3. The BFI conducted an open tender process to select a contractor to operate the BFI IMAX. Odeon was selected as the preferred contractor. Odeon and the BFI (the parties) signed a concession agreement on 27 April 2012 (the Concession Agreement) and service level agreement (the SLA).²
4. The Concession Agreement was conditional on the OFT indicating that the proposed arrangements either did not result in the creation of a relevant merger situation for the purposes of the Enterprise Act 2002 (the Act) or would not be referred to the Competition Commission.
5. Under the proposed arrangements, Odeon will become the manager and operator of both the cinema business at the BFI IMAX site and a supporting retail presence for the duration of the relevant arrangements.

JURISDICTION

6. A relevant merger situation arises where as a result of arrangements or transactions, two or more enterprises cease to be distinct enterprises and either the UK turnover test or share of supply test set out in section 23 of the Act is met.

Enterprises ceasing to be distinct

7. The parties submitted that the proposed arrangements are more akin to a management arrangement than a merger transaction.
8. The OFT has assessed whether the particular arrangements under consideration are more akin to a management or outsourcing arrangement in nature and scope, and has concluded that this is the case. The OFT's guidance sets out the general considerations the OFT will take into account when assessing this issue: 'outsourcing arrangements involving ongoing supply arrangements will not generally result in enterprises ceasing to be distinct, but may do so

² The Concession Agreement was entered into between Odeon Cinemas Limited, British Film Institute (Big Screen) Limited and the BFI. In the context of the Concession Agreement or its related obligations, references in this decision to the BFI relate to both of the latter two parties.

where they involve the permanent (or long-term) transfer of assets, rights and/or employees to the outsourcing service supplier and where those may be used to supply services other than to the original owner/employer'.³ The reason being that merger control rules are generally intended to apply to permanent and long-term transfers of a business as opposed to arrangements which fall short of such transfers.⁴

9. The OFT has therefore assessed by reference to the following factors whether the arrangements point to a situation which will be sufficiently long-lasting such that two enterprises have ceased to be distinct for the purposes of the Act, or whether the arrangements are more akin to the award of a management agreement or of an outsourcing agreement: transfer of employees; operation and management of the site; acquisition of, or control of, property rights; control, direction and approval rights; and duration. The OFT has concluded, on the balance of evidence available to it, that the proposed arrangements do not lead to a situation which will be sufficiently long-lasting such that two enterprises have ceased to be distinct.

Transfer of Employees

10. Staff will not transfer on a permanent basis to Odeon under the terms of the Concession Agreement. Although the staff previously employed at the BFI IMAX will transfer to Odeon under the terms of the Concession Agreement in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations), the staff will revert back to the BFI at the end of the

³ OFT *Mergers - jurisdictional and procedural guidance* (OFT527), paragraph 3.13.

⁴ It is also relevant to note paragraph 18, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01): 'Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). Only such contracts can result in a structural change in the market.'

Concession Agreement.⁵ The terms of the Concession Agreement do not provide for the transfer by Odeon of these staff to other parts of Odeon's business.

Operation and management of the site

11. Odeon will be responsible for the operation and management of the site for the duration of the Concession Agreement. The operation and management of the BFI IMAX site will revert back to the BFI at the end of the Concession Agreement.

Acquisition of, or control of, property rights

12. Odeon will not obtain any property rights over the BFI IMAX site as a result of the Concession Agreement and all fixtures, fitting and equipment will remain the property of the BFI IMAX. This remains the case even where Odeon has committed to capital expenditure during the course of the Concession Agreement. All relevant assets at the BFI IMAX site will remain the property of the BFI and will be used by Odeon under licence only for the purpose of fulfilling Odeon's obligations under the proposed arrangements.

Control, direction and approval rights

13. The Concession Agreement provides a number of areas in which the BFI will retain the ability to exercise a substantial degree of control over the operations and management of the BFI IMAX. These include agreement on aspects, such as, the film exhibition programme and guidelines. In particular, the proposed arrangements include an enhanced level of performance monitoring against agreed key performance indicators and consent rights over business plans. Failure to comply with these various obligations under the Concession Agreement and the SLA will lead to the ability of the BFI to terminate the Concession Agreement.

⁵ The application of the TUPE Regulations would generally be regarded by the OFT as a strong factor in finding that the business transferred constitutes an enterprise, and implicitly, that a business was transferred at all. See OFT *Mergers - jurisdictional and procedural guidance* (OFT527), paragraph 3.10.

Duration of the Concession Agreement

14. The OFT notes that the Act does not define the period of time that a merger situation should last in order for it to qualify as a relevant merger situation under the Act.⁶
15. The parties submitted that the Concession Agreement will last for an initial term of three years and that at that stage the parties may extend the Concession Agreement to five years and/or seek to amend its terms. Any such extension, amendment or renewal may, depending on the arrangements, therefore qualify as relevant merger situation under the Act.
16. The OFT notes the parties' submissions that the Concession Agreement has an effective initial term of three years. The OFT does not consider that such a potentially short period of time is sufficient, taken in the context of the other circumstances of this case, to determine that two or more enterprises will cease to be distinct as a result of the proposed arrangements.

Conclusion

17. The OFT considers that the balance of the above evidence points to the arrangements being more akin in substance to the award of a management contract⁷ than to the transfer on a permanent or sufficiently long-term basis of a business or enterprise. As such, the OFT does not consider there has been a structural change in the marketplace brought about by this particular set of arrangements.
18. This conclusion is without prejudice to other transactions in which the circumstances and context are such that it may be the case that arrangements of this kind could comprise a structural change in the marketplace. This conclusion is also without prejudice to the possibility that significant amendments to this particular set of arrangements could lead to merger control scrutiny in the future.

⁶ OFT *Mergers - jurisdictional and procedural guidance* (OFT527), paragraph 3.37.

⁷ The OFT notes the conclusion in a previous case, based in part on certain similar facts, that the substance of the relevant transaction was more akin to the award of a management contract. Anticipated contract award to Nuclear Management Partners Limited as the Parent Body Organisation for Sellafield Limited, OFT decision of 22 October 2008, Case ME/3858-08.

DECISION

19. Therefore, the Office of Fair Trading has decided that the proposed arrangements do not qualify for investigation under the mergers provisions of the Act because under the arrangements in progress or in contemplation two or more enterprises will not cease to be distinct for the purposes of section 26 of the Act. A relevant merger situation, therefore, will not be created.