

Completed acquisition by Travis Perkins plc of a controlling interest in Toolstation Limited

ME/5365/12

The OFT's decision on reference under section 23 given on 29 March 2012. Full text of decision published 3 April 2012

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. Travis Perkins plc (**Travis Perkins**) is a large builders merchant and home improvement retailer, which owns businesses in a number of building materials sectors including general builders merchants (Travis Perkins), civil and heavyside specialists (Keyline), hardware stores (Wickes), plumbing and heating specialists (BSS, PTS and City Plumbing Supplies), ceramics specialists (Tile Giant), plaster drylining products and insulation specialists (CCF), and kitchens and joinery specialists (Benchmarkx).
2. Toolstation Limited (**Toolstation**) was founded in 2003. It is a generalist stockist of lightside building supplies with over 100 locations throughout the UK. It offers a broad range of lightside products for purchase in-store, on-line, by phone, fax and mail order.

TRANSACTION

3. Travis Perkins acquired 30 per cent of the voting shares of Toolstation in 2008, together with a number of additional control rights (the **2008 Acquisition**). Under the 2008 Acquisition, as amended in 2009, it was intended that Travis Perkins would subsequently acquire 100 per cent of the shares of Toolstation provided certain profit and growth targets were met.

4. On 3 January 2012, Travis Perkins acquired the remaining 70 per cent of shares that it did not already own, thus giving it 100 per cent of the voting rights in Toolstation (the **2012 Acquisition**).
5. The OFT asked for and received documentation from the parties showing the ownership position (in theory as well as in practice) since the 2008 Acquisition.
6. The parties' documentation shows that, from the completion of the 2008 Acquisition until the completion of the 2012 Acquisition, Travis Perkins held 30 per cent of the voting rights in Toolstation, as well as a number of other control rights including (but not limited to):
 - a. Toolstation would be operated in accordance with the Business Plan pre-agreed between Toolstation and Travis Perkins.
 - b. Travis Perkins funded the rapid expansion of Toolstation set out in the Business Plan (from 12 branches at the time of the 2008 Acquisition to over 100 branches by the time the 2012 Acquisition occurred). As part of this arrangement, Travis Perkins made available to Toolstation a £30m revolving loan agreement. In return, Toolstation would only be permitted to raise finance (whether debt or equity) through Travis Perkins. Without access to Travis Perkins funding, Toolstation was not able to carry out the Business Plan and branch openings to which it became contractually committed under the terms of the 2008 Acquisition. It therefore seems that Toolstation has been financially dependent on Travis Perkins since the 2008 Acquisition.
 - c. Travis Perkins' Chief Executive Officer sits on the Board of Toolstation. He participates fully in all board discussions and is provided with full access to information, management reports and information as regards strategy, growth and other commercial issues.
 - d. To manage the growth of the Toolstation business, Travis Perkins procured one of its experienced employees to take up a role as Operations Manager of Toolstation.
 - e. Regular and detailed reporting from Toolstation to Travis Perkins, including daily sales figures.

- f. Toolstation was prohibited from acquiring new property or entering into leases with a duration of longer than 10 years without the prior consent of Travis Perkins.
7. The OFT therefore believes that Travis Perkins had the ability to control the policy of Toolstation (also known as 'de facto control') from the completion of the 2008 Acquisition.¹ Since the completion of the 2012 Acquisition, Travis Perkins has held a controlling interest in Toolstation (also known as 'de jure control').² Accordingly, as a result of the 2012 Acquisition, Travis Perkins moved up a level of control.
8. The parties did not notify the transaction to the OFT. The OFT has undertaken its investigation at its own initiative through its Mergers Intelligence function.

JURISDICTION

9. For the year ended 31 December 2010, Toolstation's turnover was around £69.8 million. Its accounts for the year ended 31 December 2011 are not yet available. However, given Toolstation's rapid growth, and in particular its large number of store openings in 2010 and 2011, it is likely that its turnover for the year ended 31 December 2011 was over £70 million. The turnover test in section 23(1)(b) of the Enterprise Act 2002 (the **Act**) is therefore satisfied.
10. In order for the OFT to have jurisdiction to review this transaction, a relevant merger situation must have been created for the purposes of section 23 of the Act. Of particular relevance to this transaction is the requirement for two or more enterprises to have ceased to be distinct.
11. Section 26(4) of the Act provides as follows:

'For the purposes of [determining whether two enterprises have ceased to be distinct], in so far as it relates to bringing two or more enterprises under common control, a person or group of persons **may be treated** as bringing an enterprise under his or their control if:

¹ See Mergers: jurisdictional and procedural guidance (June 2009), paragraphs 3.29 to 3.31.

² See Mergers: jurisdictional and procedural guidance (June 2009), paragraph 3.32.

(a) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate, or

(b) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy.' (emphasis added)

12. Subparagraph (a) of section 26(4) applies in the present situation because, as discussed above, Travis Perkins moved up a level of control from de facto control to a controlling interest (de jure control) as a result of the 2012 Acquisition.³ Therefore, the OFT may treat the two parties as ceasing to be distinct and assert jurisdiction to investigate the transaction. The OFT has therefore considered whether to exercise this discretion.

13. The OFT has exercised this discretion in a number of previous cases. For example, in the Cavendish/Keepmoat/Apollo case, the OFT chose to exercise its discretion to review the transaction.⁴ In that case, the buyer previously had small stakes in two property/construction companies and was proposing to acquire a controlling interest in both. The OFT gave the following two main reasons for choosing to review the transaction(s):

- a. It had not previously had the opportunity to review the transactions and considered it important to review them at that stage.
- b. The proposed transactions changed the organisational structure of the two companies, consolidating them into a single group and resulting in a material change from the point of view of customers and competitors. The parties themselves said that the companies would compete differently post-merger.

³ For more discussion of this, see Mergers: jurisdictional and procedural guidance (June 2009), paragraphs 3.33 to 3.36.

⁴ Anticipated acquisition by Cavendish Square Partners (General Partner) Limited of a controlling interest in each of Lakeside 1 Limited (Keepmoat) and Apollo Group Holdings Limited (Apollo), OFT Decision of 24 November 2011.

14. Similarly, in the Guardian/Trader Media Group case, the OFT chose to review the increases in the level of control.⁵ In the OFT's view, the transaction had a clear competitive effect. Importantly, the transaction moved the target from a deadlock joint venture to a position where Guardian alone had a controlling interest. The joint venture partner was exiting, and Guardian and Trader Media Group were expected to stop being operated as separate entities.
15. In contrast, in the present case, it seems that there is no change to the competitive landscape for the OFT to review. For example, it is not clear to the OFT how its counterfactual would be different from the effect of the transaction.
16. A number of factors are relevant to this specific factual situation, including:
 - a. Some of Travis Perkins' other businesses have product ranges that overlap with Toolstation's to some extent. For example, Travis Perkins, Wickes, and Tile Giant do stock some similar products. However, none of Travis Perkins' other businesses overlap directly with Toolstation. The OFT understands that this perceived gap in Travis Perkins' operations was an important reason for its acquisition of an interest in Toolstation in 2008.
 - b. Travis Perkins has consistently described Toolstation as a group company (or similar) in documents such as its Annual Report.⁶
 - c. On average, since the 2008 Acquisition, Toolstation has opened a new branch every fortnight. The parties have provided information showing that this growth has only been possible as a result of Travis Perkins' intimate involvement and funding. This growth has been pro-competitive.
 - d. The transaction involves a single buyer and a single target who have already been working closely together to grow the business -- there is no new entity acquiring an interest, and the 'exiting' shareholders are members of a family that will continue to run the business.
 - e. From a customer's or competitor's point of view, it seems that the 2012 Acquisition makes no obvious practical difference.

⁵ Anticipated acquisition by Guardian Media Group of Trader Media Group, OFT Decision of 29 September 2003.

⁶ It seems that Toolstation's direct competitors are businesses such as Screwfix (owned by Kingfisher), DIY stores such as Homebase, hardware stores, and online DIY retailers (over 20 per cent of Toolstation's sales are online or mail order).

17. Despite issuing a public invitation to comment, the OFT has received no complaints about the transaction from third parties.
18. The OFT has taken the above factors, and all other relevant factors, into account. On balance, given the specific facts of the present case, the OFT chooses not to exercise its discretion under section 26(4) to review the effects of the transaction on competition under the merger control provisions of the Act.

DECISION

19. The OFT has chosen not to exercise its discretion under section 26(4) of the Act to review this transaction. Therefore, no relevant merger situation arises for the purposes of section 23 of the Act.