

Completed supplier agreement between Guestlogix Inc and Panasonic Avionics in respect of a commercial arrangement to provide services in the development of onboard point of sale payment facility integrated into in-flight entertainment systems

ME/5685/12

The OFT's decision on reference given on 21 December 2012. Full text of decision published 8 January 2013.

PARTIES

1. **GuestLogix Inc** (GuestLogix) is a global provider of onboard retail payment technology solutions to airline and rail passenger travel industry and incorporated in Canada. GuestLogix's global headquarters is located in Toronto, Canada with regional head offices around the globe including GuestLogix USA, serving the Americas, located in Dallas, Texas; GuestLogix Europe, located in Bracknell, UK and GuestLogix Technologies located in Bristol (new name for its completed acquisition of BOM Merchant Technologies), serving Europe, Middle East and Africa; GuestLogix Asia Pacific, located in Hong Kong.
2. **Panasonic Avionics Corporation** (Panasonic) is a global provider of in-flight entertainment and communications. Panasonic is headquartered in Lake Forest, California, with offices in Bothell, Washington; regional centres in Dallas, Singapore, London, Toulouse, Tokyo, Sydney and Dubai. Panasonic is a subsidiary of Panasonic Corporation of North America. Panasonic Corporation of North America based in New Jersey.

TRANSACTION

3. The Parties signed a non-exclusive supplier agreement on 20 April 2012 (Master Services Agreement) providing that GuestLogix will configure its standard payment service offering in order for it to be integrated with

Panasonic's in-flight entertainment systems (onboard entertainment screens typically located on the back of aircraft seats). The agreement was first made public on 18 September 2012.

4. This transaction was identified by the OFT's Mergers Intelligence Committee. The four-month statutory limit within which to consider this transaction therefore expires on **18 January 2013**.

JURISDICTION

5. The jurisdictional test in the Enterprise Act 2002 (the Act) is met if the OFT believes that it is or it may be the case that a relevant merger situation is created.¹ Given that the Parties concluded the Master Services Agreement in April 2012, the OFT has therefore considered the key question as to whether this transaction will lead to the creation of a 'relevant merger situation'.
6. A 'relevant merger situation' arises where two or more enterprises² cease to be distinct and brought under common ownership or control and either the turnover or the share of supply test is met.³ It can cover different kinds of transaction and arrangements, including the transfer or pooling of assets or the creation of a joint venture.
7. The OFT's Jurisdictional and procedural guidance discusses the concept of an enterprise and explains the factors the OFT will consider when determining whether two or more enterprises have ceased to be distinct.⁴ The main factors that have been considered by the OFT as key

¹ Section 22(1) of the Act.

² The term 'enterprise' is defined in section 129 of the Act as 'the activities, or part of the activities, of a business.' In turn, a 'business' is stated to include 'a professional practice and ... any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge'.

³ The turnover test is met if the UK turnover of the enterprise being taken over exceeds £70 million. The share of supply test is met if the merging parties together supply or obtain 25 per cent or more of goods or services of any (reasonable) description in the UK or a substantial part of the UK (and where the merger enhances that share of supply).

⁴ OFT 527 Mergers- Jurisdictional and Procedural Guidance Enterprise Act 2002, June 2009 , paragraphs 3.8-3.10.

considerations in the analysis of this particular transaction are whether the intangible and tangible assets under the agreement are being transferred on a permanent basis and, if so, whether they are sufficient to constitute an enterprise.

8. The OFT has not taken a single factor to be determinative in reaching its conclusion but rather, the OFT has taken the totality of all the relevant considerations.

Transfer of intangible assets

9. The Parties agreed that GuestLogix will use its expertise in the onboard point of sale retail transaction management to configure its onboard retail payment system in order to integrate it with Panasonic's in-flight entertainment systems allowing passengers the option to carry out onboard retail purchases from within Panasonic's in-flight entertainment system.
10. The Master Agreement allows Panasonic to deploy GuestLogix's payment and settlement solution on to its in-flight systems, thus allowing GuestLogix to be remunerated on a per transaction basis. However, GuestLogix's onboard system normally relies on hand held devices rather than on screen devices and some further software development is therefore required by GuestLogix. Panasonic will therefore be relying on the GuestLogix software and IPR to integrate the payment system onto its in-flight entertainment screens. GuestLogix has confirmed that the transfer of such IPR will not enable Panasonic to create a revenue stream for in-flight entertainment in its own right because the software would require further development by GuestLogix before it can be commercially used on Panasonic's in-flight screen system.⁵
11. Moreover, GuestLogix has confirmed that any revenue stream from the point of sale retail transactions on Panasonic's in-flight entertainment system, once fully developed by GuestLogix, would belong to GuestLogix and not Panasonic.

⁵ This is similar to the reasoning in *Anticipated joint venture between The British Broadcasting Corporation, ITV Broadcasting Limited, Channel Four Television Corporation, Channel 5 Broadcasting Limited, British Telecommunications plc, Talk Talk Telecom Limited and Arqiva Limited – Project Canvas*, 19 May 2010.

12. The OFT further notes that the transfer of IPR to Panasonic is on a 'non-exclusive' basis meaning that GuestLogix could enter a similar agreement with other in-flight entertainment providers and likewise Panasonic could retain suppliers other than GuestLogix. This would suggest that the transfer of the IPR is not a permanent transfer to Panasonic but rather is more akin to a conventional supplier agreement than a transfer of assets that could be deemed to be an 'enterprise' for the purposes of the Act. GuestLogix has confirmed that Panasonic is its customer under the Master Services Agreement with the service being provided to Panasonic being an information technology solution, customised for Panasonic's in-flight entertainment system.
13. The Master Service Agreement does not provide for the transfer of any other intangible assets nor does the agreement provide for payment of goodwill to GuestLogix.

Transfer of tangible assets

14. The Master Services Agreement provides for GuestLogix employees to work at the business premises of Panasonic from time to time in the development of the software required for its in-flight entertainment system. The OFT has considered whether this represents a transfer of employees. GuestLogix has confirmed that such staff contributions will be received by Panasonic on an 'arms-length' basis as part of the agreement. GuestLogix has further confirmed that such employees will remain employees of GuestLogix. The Master Services Agreement does not provide for any application of the *Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006*.

DECISION

15. On the basis of the information available to it, the OFT has decided that The Master Services Agreement between GuestLogix and Panasonic, as it has been presented to the OFT, does not qualify for investigation under the mergers provisions of the Act, because the transaction does not lead to two enterprises ceasing to be distinct as defined in section 26 of the Act.