
Anticipated acquisition by MBL Holdings Limited of TrigoldCrystal Group Limited

ME/4843/11

The OFT's decision on reference under section 33(1) given on 17 March 2011.
Full text of decision published 28 April 2011

PARTIES

1. **MBL Holdings Limited** is the parent company of Mortgage Brain Limited, The Mortgage Trading Exchange Limited, and MBL Financial Services Limited (together, MBL) which is active in the supply of mortgage sourcing software, an electronic mortgage trading platform and point of sale compliance solutions to financial services intermediaries. It is owned equally by six lenders: Santander; Barclays; Lloyds Banking Group; Nationwide; Northern Rock; and Royal Bank of Scotland. For the financial year ended 31 March 2010, MBL achieved a turnover of £5.9 million.
2. **TrigoldCrystal Group Limited** and its wholly-owned subsidiary TrigoldCrystal Limited (together, Trigold) supplies point of sale compliance software, mortgage sourcing software and an electronic trading platform to financial services intermediaries. Trigold's shareholders comprise private individuals (76 per cent), Prudential (13 per cent) and Santander (11 per cent). For the financial year ended 30 November 2009, Trigold's turnover was £5.8 million.

TRANSACTION

3. MBL proposes to acquire all the shares of Trigold. The proposed transaction will be effected by an offer document, for a consideration comprising a combination of cash, loan notes and shares totalling £[].

4. Post-completion, 86 per cent of the shares in MBL will be owned by its six current lender shareholders, and the remaining 14 per cent will be owned by private individuals, Prudential and others.

JURISDICTION

5. The proposed transaction will result in MBL and Trigold ceasing to be distinct enterprises for the purposes of section 26 of the Enterprise Act 2002 (the Act).
6. The UK turnover of the Trigold in its last financial year was £5.8 million and so the threshold under section 23(1)(b) of the Act is not met. However, the parties' combined shares of supply of each of mortgage sourcing software, point of sale compliance and electronic trading platforms in the UK exceed 25 per cent, so the proposed transaction qualifies for review under the Act.

BACKGROUND

The UK mortgage market

7. The UK mortgage market reached its peak in 2007 with gross lending of £364 billion, which fell to £144 billion in 2009. There are currently over 7,200 mortgage products available to customers. In 2009, approximately 960,000 mortgage sales were completed.¹
8. Mortgages can be sold directly by the lender or through an intermediary, such as a mortgage broker. Mortgage intermediaries account for around 60 per cent of mortgage transactions,² with direct lending to consumers accounting for the balance. There are currently 10,000 to 12,000 mortgage intermediaries in the UK which is down from a peak of between 30,000 to 32,000.³

¹ Parties' source, quoting the Council of Mortgage Lenders as the reference.

² Parties' source, quoting the Bank of England as the reference.

³ Parties' source, quoting the Association of Mortgage Intermediaries, from an article in Mortgage Strategy dated 27 September 2010.

Mortgage intermediaries

9. Mortgage intermediaries comprise:

- individual Independent Financial Advisers (IFAs) who sell pensions, investments, and from time-to-time mortgage products
- individual mortgage brokers who sell mortgages and associated products
- the financial services divisions of estate agents
- mortgage networks (umbrella organisations that are authorised by the Financial Services Authority (FSA) which act on behalf of their members, to, among other things, ensure compliance and avoid the need for individual mortgage intermediaries to be authorised by the FSA), and
- mortgage clubs ('affinity clubs' that offer attractive products and services to FSA-authorised mortgage intermediaries who benefit from collective buyer power vis-à-vis the lenders).

10. Mortgage intermediaries must comply with FSA rules, which means that when recommending mortgages to customers, they must complete five distinct pre-sales stages: (i) production of an Initial Disclosure Document (IDD); (ii) completion of a Factfind; (iii) needs analysis/mortgage sourcing; (iv) production of a Key Facts Illustration (KFI); and (iv) submission of an application to a lender.

MARKET DEFINITION

Product market

11. The parties submitted that the relevant product markets in which the parties' activities overlap are:

- i) the supply of point of sale compliance solutions
- ii) the supply of mortgage sourcing software, and

iii) the supply of electronic trading platforms.

12. The OFT considers that this delineation is a reasonable starting point for its competitive assessment, based on third party responses on demand-side aspects.⁴ However, as a result of customer preferences, the OFT additionally considers whether it would be appropriate to define a separate market for the supply of point of sale compliance, mortgage sourcing software and electronic trading platforms sold collectively (and/or a combination of two such products).⁵ These activities are considered further below.

Point of sale compliance

13. Documentation produced by a mortgage intermediary must, where required, be FSA compliant. Other than by purchasing point of sale compliance software from suppliers, the parties submitted that an intermediary can ensure compliance with FSA rules by:
- establishing its own internal procedures with reference to FSA rules and the FSA Handbook to ensure that its documentation is compliant
 - obtaining the required documentation directly from the financial institution offering the product
 - joining a network which would act as a principal on the intermediary's behalf thereby avoiding the need for the intermediary to be authorised independently, or
 - appointing an external company to arrange its compliance function.
14. The parties asserted that the above routes for becoming FSA compliant are demand-side substitutes for point of sale compliance software.

⁴ The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone (Merger Assessment Guidelines, paragraph 5.2.17).

⁵ The OFT also notes that the parties overlap with limited sales in the supply of web tools and the supply of advertising space to the financial sector. However, given its conclusion in this case, the OFT has not gone on to consider these activities further.

15. Independent intermediaries confirmed that one of the main benefits of being a member of a mortgage network is that they do not have to be concerned with being FSA-compliant. A number of mortgage networks informed the OFT that they have, or are in the process of developing, their own in-house point of sale compliance software for use by their members. However, the OFT did not receive any indication from third parties that the other sources listed above are regularly used. Indeed, individual brokers emphasised the importance of complying with FSA regulations such that setting up one's own internal procedures would not be considered due to cost, reputational and financial risks associated with failure to meet the requisite FSA standards.
16. There was mixed information supplied by the parties and third parties as to how different types of point of sale compliance products compete with one another. Whereas the parties asserted that there is one overall market for point of sale compliance software comprising mortgages, general insurance and protection, pensions and investments, third parties informed the OFT that point of sale compliance software that includes pensions and investments does not compete with standalone mortgage and general insurance compliance software. Third parties told the OFT that point of sale compliance software for broader types of products including pensions and investments are usually twice as expensive, and tend to target different customer groups. Whereas compliance software for mortgages and general insurance is mainly targeted at mortgage intermediaries (with some IFAs using such software in conjunction with their own systems), compliance software for the wider range of financial products are used by IFAs only. There was also some discrepancy in terms of where Trigold's point of sale product fitted into this scheme. Although Trigold's system includes pensions and investments capability, third parties stated that neither of the merging parties are real players in this wider point of sale supply.⁶
17. Given the OFT's conclusion on mortgage sourcing, it is not necessary for the OFT to conclude on the precise scope of the point of sale compliance software segment. Rather, the OFT considers it more appropriate to focus directly on the assessment of closeness of competition (see further paragraphs 38 to 41 below).

⁶ The OFT understands that the price of MBL's and Trigold's respective point of sale compliance systems are similar and reflect the 'cheaper' cost of mortgage-only compliance software.

Mortgage sourcing software

18. Mortgage sourcing software is used by intermediaries to conduct a 'whole of market' search to identify the mortgage products that best meet the client's needs. Sourcing software comprises three elements: the intermediary-facing search software; the underlying database that contains details of the product in question; and the production of the KFI to be presented to the customer. The mortgage product information necessary to populate the underlying database is obtained directly from the lender, or the software provider may search on the lender's website to obtain the relevant information. Sourcing software is predominantly delivered offline to intermediaries but can also be delivered online.
19. The parties submitted that there are a number of alternatives to using mortgage sourcing software, such as the intermediary using best buy tables, the FSA website, information provided by lenders, the trade press, various online sites, and a mortgage intermediary's own knowledge of lenders and products.
20. The parties' customers were of the view that, given the vast number of mortgage products available, having access to mortgage sourcing software is the only prudent way of determining the best product for the end-customer. They did not consider that alternatives, such as best buy tables or other online sites are adequate substitutes for mortgage sourcing software. Consistent with this evidence, survey data by BDRC for 2007 shows that only two per cent of intermediaries do not use a mortgage sourcing system.
21. The OFT notes that the supply of mortgage sourcing software is two-sided:⁷ intermediaries are paying customers for mortgage sourcing software; and mortgage lenders also derive a benefit from having their products listed on the mortgage sourcing system. Lenders can typically have their first 100 products displayed on the sourcing system for free but thereafter must pay a fee per additional product listed.

⁷ A two-sided market exists where: (i) the product in question is a 'platform' that allows or facilitates the interaction of two distinct groups of customers; and (ii) the benefit that customers in one group (lenders) derive from the interaction is larger where the number of customers on the other side of the platform (intermediaries) increases.

22. On balance, the information provided to the OFT during its investigation does not support the view that the alternatives put forward by the parties allow intermediaries to search easily and effectively the 'whole of market'. The OFT is therefore of the view that they cannot be regarded as demand-side substitutes. The OFT therefore considers that a separate market exists for the supply of mortgage sourcing software to intermediaries.

Electronic trading platforms

23. Once the intermediary has selected an appropriate mortgage for its client, the intermediary has the option to submit applications to the lender directly via the lender's website (if the lender's website has this functionality), or to use an electronic trading platform. Provided that the trading platform is interoperable with the intermediary's other software, an electronic trading platform allows the mortgage intermediary to communicate electronically with a lender for the purpose of submitting an application for a mortgage product, without needing to re-key the client's details.
24. MBL does not charge intermediaries a fee for downloading or using its mortgage trading platform but charges lenders a fee for transactions made through the same. Lenders are also charged for technical support and hosted server facilities. Lenders and intermediaries are therefore both customers for the parties' mortgage trading platforms.
25. The parties submitted that electronic trading platforms are a minority channel used by mortgage intermediaries, and that the primary channel through which mortgage applications are submitted is direct to the lender using the lender's website. They stated that since the lenders make the decision whether or not to accept applications through a trading platform and are the ones who pay the charges levied for its use (by intermediaries), the lenders are the real customers. The parties submitted that the use of a direct lender website is clearly substitutable with a mortgage trading platform from the lender's perspective.
26. Third parties agreed that intermediaries can either submit an application via an electronic trading platform or direct to the lender. However, intermediaries emphasised the ease in using a trading platform over submitting an application on a lender's website, which would mean re-keying certain information. One lender told the OFT that using an electronic trading platform would be particularly important for mortgage networks

that had a large number of members (and therefore significant volumes of completed mortgage applications). From the lender's perspective, one lender informed the OFT of the significant costs involved in using and supporting an electronic trading platform. Another lender and one broker noted that not all lenders have the ability to offer the online submission of documents and that in such a case (and where an electronic trading platform was not used), intermediaries would be required to send the application by post or by fax.

27. Given the OFT's conclusion on mortgage sourcing, it is not necessary for the OFT to conclude on whether electronic trading platforms form a distinct market. The OFT is minded, taking into account demand-side considerations, to consider that the supply of electronic trading platforms forms a distinct market. Lenders are required to pay significant fees to support an electronic trading platform which they would otherwise not have to do if merely supporting their own extranets. The OFT also notes that not all intermediaries consider submitting direct to lender as a direct substitute for the seamless alternative of submitting applications via an electronic trading platform. For the purposes of its competitive assessment, however, the OFT acknowledges that suppliers of electronic trading platforms are constrained by the intermediary's ability to submit applications directly to lenders via their websites where this functionality is available (see further paragraphs 82 to 87 below).

A combination of mortgage software products

28. The OFT received a significant number of responses from customers who emphasised the advantages of purchasing the three above products (or a combination of two of the three products) from a single supplier. This enables customers to obtain discounts, but more importantly, ensures that the products are interoperable. Integration of such software means that mortgage intermediaries do not need to re-key the client's information each time they move on to the next stage of the mortgage application process. In addition, it means that the intermediary's back office systems and client management systems can be linked to the mortgage software used.
29. Many customers informed the OFT that they would not consider purchasing mortgage sourcing software unless it could function with their point of sale compliance software and/or an electronic trading platforms.

Usually, this would mean customers purchasing the whole suite (or two of the three) from the same supplier.

30. The parties stated that it would not be meaningful for the OFT to consider a separate market for the supply of a combination of mortgage products to intermediaries since customers do not regularly purchase products as a bundle.
31. Although customers may not have purchased a combination of mortgage software products simultaneously, the OFT takes into account the customers' stated preferences and notes from third parties that the parties do cross-sell. The OFT has not needed to reach a conclusion on this point, for the purposes of its competitive assessment, but it nevertheless goes on to consider the ability of providers to supply the range (or a combination) of mortgage software products to intermediaries.

Geographic market

32. The parties submitted that the geographic market is no narrower than the UK. They stated that there are no significant barriers to an overseas provider of software designing, marketing and selling software solutions to UK mortgage intermediaries.
33. The OFT notes that the parties, their customers and competitors are all national players. The OFT also observes that the UK mortgage market is unique, with mortgages offered to end-customers on a national basis.
34. The OFT has received no evidence that the mortgage software market should be construed wider than the UK. It therefore considers that the relevant geographic market is national.

Conclusion on market definition

35. The OFT has left open the precise product scope for the supply of point of sale compliance software and the supply of electronic trading platforms. It finds that a separate market exists for the supply of mortgage sourcing software. In addition, the OFT adopts a cautious approach in assessing the supply of a combination of mortgage software products as part of its competitive assessment. The OFT considers that the geographic market is national in scope.

COMPETITIVE ASSESSMENT–HORIZONTAL UNILATERAL EFFECTS

Point of sale compliance

36. The information received by the OFT from parties and third parties during its investigation was mixed and not always consistent. []. They stated that Trigold is active in point of sale compliance for pensions and investments, yet third parties specifically stated that the merging parties do not compete with the likes of Swift, 1st Exchange and Intelliflo []. The parties mentioned Fairs, Plum, Bluecoat and Pivotal as being active in the point of sale compliance software for mortgages, but third parties did not mention these players at all.
37. The parties stated that they account for approximately [10-20] per cent of the point of sale compliance market for mortgages. However, third parties consistently estimated that the combined figure would be closer to [35-45] per cent or above.⁸ In light of these discrepancies, the OFT considers that limited weight can be placed on market shares in this instance, and that it is more probative to assess closeness of competition between the parties.

Closeness of competition

38. The parties asserted that they are not particularly close competitors since MBL's compliance software does not have capability in pensions and investments, so it cannot compete with Trigold for these wider contracts. The parties provided examples of tenders in which Trigold participated, of which MBL competed against it in [] out of 22 occasions.
39. MBL's internal documents identify a narrow effective competitor set:
- '[]'.
40. Further, Trigold's internal documents show that it considers MBL to be a strong competitor in point of sale compliance:

'[]'.

⁸ [].

41. Consistent with these statements in the parties' internal documents, most third parties were of the view that the parties are each other's closest competitors for point of sale compliance software for mortgages. Most mortgage networks ranked the merging parties first and second in this area, although a number of customers mentioned Mortgage Stream and Mortgage Keeper as credible alternatives. Third parties generally did not consider the likes of 1st Exchange, Intelliflo and Swift as competing with the parties for point of sale compliance software for mortgages.

Barriers to entry, expansion and self-supply

42. The parties consider that barriers to entry or expansion are low since most point of sale systems that manage life, pensions and investments products have been extended to cover mortgages. They were of the view that the players active in these wider areas could provide tailored software for mortgages only. In addition, the parties emphasised the extent of self-supply in this segment in that a number of networks have their own in-house point of sale compliance software. They argued that the merged firm will therefore be constrained by the threat of self-supply from these customers.
43. One point of sale compliance provider active across pensions, insurance and other investments told the OFT that it had exited the mortgage point of sale compliance software market because it was struggling to win customers. Another competitor considered that new entry would be easy, although very difficult to do it well and survive. It stated that the problem is getting the technology and business model right. That said, several networks confirmed that they have their own in-house point of sales software.

Conclusion on the supply of point of sale compliance

44. The OFT considers that the parties are each other's closest competitors in the supply of point of sale compliance software targeted at mortgage intermediaries, but notes the constraint that at least Mortgage Stream and Mortgage Keeper exert on the parties in this segment. The OFT also notes the number of networks who currently self-supply. It is not necessary for the OFT to conclude on whether the merger creates a realistic prospect of a substantial lessening of competition in the supply of point of sale

compliance software to intermediaries in the UK given its finding in the mortgage sourcing software market (see further below).

Mortgage sourcing software

Market shares and post-merger concentration

45. The parties submitted market share data for the supply of mortgage sourcing software to intermediaries in the UK. The parties have a combined market share of [90-100] per cent (increment of [30-40] per cent) by value or [80-90] per cent (increment of [30-40] per cent) by volume in the supply of mortgage sourcing software in the UK:

Table 1: Share of supply of mortgage sourcing software (2010)

Company	Product	User Licence Numbers	Per cent	Revenues 09/10 (£ million)	Per cent
MBL	ALL NEW Mortgage Brain	[]	[30-40]	[]	[30-40]
TrigoldCrystal	Trigold Prospector	[]	[50-60]	[]	[60-70]
Combined		[]	[80-90]	[]	[90-100]
Moneyfacts Group	eMoneyfacts	[]	[0-10]	-	-
Orbiter	Orbiter	[]	[0-10]	-	-
HBS	HBS	[]	[0-10]	[]	[0-10]
Webline		-	-	[]	[0-10]
Pivotal	Pivotal	[]	0-10]	-	-
CDS Mortgages	The Core	-	-	-	-
Total		[]	100	[]	100

Source: parties' estimates

46. The above table shows that the proposed transaction will lead to a near-monopoly in the supply of mortgage sourcing software to intermediaries in the UK.
47. Third parties broadly confirmed the market share estimates provided by the parties. Many lenders and intermediaries stated that the merged entity will dominate the market and that the remaining players are not credible

alternatives because their sourcing systems have less functionality than the parties' respective software, or are unproven.

48. The parties were of the view that the merger will not result in a substantial lessening of competition despite the high combined market share because:

- i) there is little competition between the parties pre-merger since the mortgage sourcing software market is saturated, and therefore competition is limited to providing a 'stalking horse' in customers' price negotiations
- ii) []
- iii) the merged firm will be constrained by the residual firms in the market especially since switching costs are low and competitors are not capacity constrained, and
- iv) large intermediaries are able to self-supply or sponsor a new entrant, and therefore the merged entity will be constrained by the threat of entry, expansion or self-supply post-merger.

49. The OFT considers each of these points in turn.

Pre-merger competitive dynamic

50. The parties submitted that because the market for mortgage sourcing software is saturated (and no growth is expected), there are no new customers who can take up a mortgage sourcing product for the first time. Their view was that existing customers have strong preferences towards a system with which they are familiar. Competition is therefore limited to providing a 'stalking horse' in customers' price negotiations with their incumbent supplier, as opposed to resulting in switching. Consequently, the parties stated that the only barrier to entry is the installed base of users who are resistant to switching. They argued that this barrier affects both new and existing firms in the same way and that Trigold therefore provides no greater constraint than any of the other players in the market since it is equally hard for it to gain customers from the incumbent. The parties submitted that this is supported by the fact that []. They concluded that this shows there is little pre-merger competition between the parties.

51. Whilst the OFT acknowledges that the mortgage sourcing market may well be saturated and that this affects all suppliers in the mortgage software market, the OFT does not consider that this necessarily leads to the conclusion that Trigold must exercise the same level of constraint on MBL as the other providers. In terms of size, Trigold is currently the market leader with over [50-60] per cent share of supply in the UK.
52. In terms of the relatively modest switching to ANMB, the OFT considers that there may be a number of reasons for this apart from inertia. The OFT notes that [].
53. The OFT does not consider that customer inertia is conclusive of a lack of competition pre-merger competition between MBL and Trigold. The fact that relatively few customers actually switch does not mean that there is no competition between suppliers to try to prevent switching from occurring. In any event, given the shares of supply of the parties in this market, the OFT believes it is even more important to protect whatever little competition exists in the sourcing software market. The OFT therefore goes on to assess closeness of competition between the parties.

Closeness of competition

54. The parties conceded that Trigold has historically been a competitor to MBL, but claim that [].
55. In support of the first proposition, the parties argued that Trigold [].
56. In support of the second proposition, the parties informed the OFT that in a recent survey of mortgage intermediaries, [].
57. In terms of the parties' existing competitive interaction, virtually all third parties told the OFT that they considered the merging parties to be each other's closest competitors in the supply of mortgage sourcing software. A few intermediaries noted that competition between the parties in mortgage sourcing software has kept prices down and has improved system functionality. One of the parties' competitors noted that MBL and Trigold have continued to try to undercut each other's negotiated pricing to levels that have proved difficult for other competitors to compete with. From the lenders' perspective, the OFT was informed that the parties are also viewed as each other's closest competitors.

58. Evidence of switching by customers (see further paragraphs 64 to 69 below), which primarily occurs between the merging parties, also emphasises the parties' closeness of competition. Generally, customers did not view all the residual competitors to be credible. This is because their sourcing systems were perceived to have less functionality, and some third parties noted that certain competitors had limited reputation with the lenders such that not all products were listed on their systems, or that some products had not been updated.
59. In terms of looking forward, neither the OFT's market investigation nor the parties' internal documents support the parties' assertions that Trigold is likely [], or that switching takes place (and would be expected to take place absent the merger) from []. With respect to MBL, a significant number of customers told the OFT that there has been no significant change to the mortgage sourcing software market through []. Indeed, the information supplied to the OFT from the parties shows that []. One mortgage network whose members have the choice between the parties' mortgage sourcing products informed the OFT that more of its members were switching away from MBL to Trigold, not the reverse. This evidence casts doubt on the proposition that ANMB is such that Trigold's product will no longer present any competitive constraint on it. In fact, many customers were also of the view that the launch of MBL's new product will motivate innovation in the market, particularly from Trigold.
60. Trigold provided the OFT with an internal strategy paper dated 15 December 2010. In this document, it appears that, absent the merger, Trigold intends to []. Trigold informed the OFT that, [].
61. Moreover, MBL's internal documents suggest that, absent the merger, competition between MBL and Trigold is expected to intensify. In particular, []. An increase [] of this proportion is unlikely to be consistent with a lack of competitive rivalry in the market. It is noteworthy that the only competitor identified in MBL's presentation for its national launch of ANMB was Trigold. Indeed Trigold is, and has been for some time, the market leader in mortgage sourcing software.
62. The OFT believes that there is evidence, as detailed above, that the parties exert a significant competitive constraint on each other which will be eliminated as a result of the proposed transaction. The OFT notes that both

intermediaries and lenders currently view the parties' sourcing software to be of similar strength and functionality. Although the OFT recognises that, absent the merger, Trigold [].

63. Finally, the OFT notes that, currently, MBL and Trigold refuse to allow interoperability between their respective mortgage sourcing and point of sale compliance software systems,⁹ but that they grant interoperability with their sourcing software to other point of sale compliance providers. The OFT considers that this highlights the existing level of competitive tension between the parties, which will be lost as a result of the merger.

Ease and evidence of switching outside the merging parties

64. The parties argued that customer switching costs are low for the following reasons:
- i) for small customers, the notice period is just one month, and for some larger customers the initial contract may be between one and three years followed by a one to three month notice to terminate
 - ii) the software systems are easy to use and switching supplier does not require any additional training
 - iii) there is no need for face-to-face training because user manuals and video presentations are available. Additionally mortgage systems are intuitive and easy to use
 - iv) mortgage sourcing products are inexpensive – on average, around £[] per user per month. This fee is not a material expense to the mortgage intermediary, and
 - v) mortgage sourcing systems are often interoperable with third parties' customer relationship management systems.
65. The parties stated that the costs and time involved to switch are modest and only apply to larger customers. They argued that the only real cost is training for users which is not significant, and provided examples of customers migrating to their systems within two to three months.

⁹ For example, in one of Trigold's internal documents it was recommended to Trigold's Board that they '[]'.

66. In terms of actual switching, the parties provided the OFT with a number of examples of which a significant proportion took place between the merging parties. However, the parties identified [] occasions where customers switched or threatened to switch to another supplier outside of the merging parties. These alternative competitors comprised Homebuyer Systems, Orbiter and Moneyfacts. They argued that the merged entity would therefore be constrained by these competitors in the future and that any loss of competition would be modest.
67. The parties also provided the OFT with value figures of the revenues lost by their major customers switching to competitors of mortgage sourcing software. Of Trigold's [] customers that switched during the last two years, [] switched to MBL and the [] switched to Orbiter. The annual revenue lost from the [] switching to MBL amounted to £[] whereas the figure for lost sales to Orbiter was around £[]. Similarly, MBL identified customers that have switched supplier since November 2008. Whereas the total value of the contracts lost to Trigold amounted to £[], the value of the contracts lost to Home Buyer Systems, was only £[].
68. Customers did not support the parties' assertions that switching costs are low. Many customers stated that costs of switching are very high because it typically involves significant technological change. One customer told the OFT that switching requires planning, implementation and training, all of which takes around three months. Aside from the time, effort, and cost associated with transitioning staff, several customers informed the OFT that existing software systems require integrating with the new supplier's sourcing software. A number of customers that have their IT systems integrated with MBL or Trigold's sourcing software told the OFT that there is a large cost associated with integrating any new supplier's system to their back office system or client relationship management system.
69. On the basis of the evidence available to it, the OFT considers that, although the remaining competitors in the mortgage sourcing software market may currently exert a limited constraint on the parties, this is not significant, and is therefore unlikely to be sufficient to constrain MBL post-transaction. As discussed above, the OFT notes that most customers only consider Trigold and MBL to be significant credible providers in the market. The OFT also observes that many of the examples given by the parties of switching outside the merging parties in fact involved customers threatening to switch, which resulted in obtaining discounts from the

parties, rather than actual switching. The OFT considers that this not only emphasises that the residual competitors' offerings are not perceived to be as strong by customers, but that switching costs are significant.

The likelihood of self-supply and/or sponsored entry

70. The parties submitted that it would be easy for mortgage intermediaries to self-supply by obtaining mortgage product data from lenders and developing a software solution in-house. They gave examples of Charcol, London & Country and Network Data developing their own sourcing systems. The parties suggested that an alternative would be for customers to sponsor entry or expansion. They stated that a rational response to the merger by mortgage networks and/or clubs would be to sponsor new entry or expansion by inviting these new or existing competitors to tender for contracts currently unavailable to them, which would then give them the enhanced credibility necessary to take their product offering to the wider market place. They argued that entry would be possible by firms currently supplying sourcing software pertaining to non-mortgage products and/or by firms not currently active in the supply of sourcing software for any financial products.
71. The OFT did not receive any evidence from customers that they would consider self-supply in this market. []. Neither was the OFT informed by any network or club that it would consider sponsoring entry. When asked by the OFT what these customers would do in the event of a five per cent price increase, they responded that they would not consider moving to an alternative supplier.
72. In terms of the likelihood that customers would self-supply in the future, the OFT has given consideration to the intermediary industry context presented by the parties, who emphasised the decline in the mortgage lending market in the past three years (see paragraphs 7 above). The OFT therefore believes that the intermediary market is precarious and is unlikely to be conducive to customers investing in developing their own mortgage sourcing software. In addition, the OFT notes that the reputation of mortgage sourcing providers is important, for example, in order to gain regular updates to the lenders' mortgage products, which may preclude successful entry more generally (see further paragraph 77 below).
73. The OFT notes that sponsored entry/self-supply may not be supported on the other side of the sourcing market, that is, from the lenders who provide

suppliers with the information on their products and pay fees for excess products displayed on mortgage sourcing systems. One lender told the OFT that it would be reluctant to support a new entrant's system since it would only make sense to consider mortgage sourcing software products that are used by the majority of intermediaries. It stated that it would be even more reluctant post-merger because the merged firm will have almost 100 per cent share of supply of the mortgage sourcing software market, such that there would be no incentive to pay money to encourage other players.

74. Overall, the OFT does not consider that the merged firm will be sufficiently constrained by the threat of self-supply or sponsored entry to avert the competition concerns resulting from the proposed transaction. Unlike the point of sale compliance software market, the OFT has not received independent confirmation of any examples from customers having their own in-house mortgage sourcing software. The OFT also notes the relative dependence suppliers have on the lenders, which makes the sustainability of entry or expansion more difficult. In any event, the OFT has not been informed of any timely, likely or sufficient entry or expansion plans in this regard.

Barriers to entry and expansion

75. The parties submitted that barriers to entry are low, giving examples of five new entrants since 2005. In total, the parties estimated that a new mortgage sourcing product would take less than a year to develop at a cost of between £[] (for a customer) and £[] (for a new entrant with no experience). That said, as set out in paragraph 55 above, Trigold noted that it would take it [].
76. One competitor told the OFT that it would take about one year for a new entrant to enter the mortgage sourcing market at a cost of up to £2 million.
77. Several competitors noted that barriers to entry are in fact very high. Some competitors told the OFT that they do not all have the same access to mortgage product information provided by the lenders as the merging parties. They stated that some lenders refuse to provide such data (which would be at no additional cost to them) and that therefore they have to source such information from the lenders' websites, which can be unduly time-consuming, resource-intensive, and may sometimes lead to the loss of credibility because they cannot update their systems immediately. Customers advised the OFT that they would not switch to an untested or

inexperienced new supplier since reputation of product and supplier is important.

78. Although the parties listed a number of new entrants in recent years, the OFT notes that a significant number of these mortgage sourcing software providers have since exited the market. These include Mortgage2000, Evaluate, The Edge, Lenders On Line, Mortgage Clearing Online, MForm among others. During the course of the OFT's market investigation, one competitor told the OFT that it is unable to sustain itself in the mortgage sourcing market and may have to exit in the near future. The OFT considers that the barriers to entry in this market are not necessarily technological in nature, but are more reputational, to the extent that the sustainability of suppliers in a volatile and declining mortgage market is difficult.
79. That said, the OFT is aware of one new entrant, CDS, that has recently entered the market. However, it does not currently have any customers and so its likely success (and therefore its effectiveness as a constraint on the merged firm) is unknown. The OFT therefore cannot conclude that CDS' entry would be sufficient to replace the lost competition brought about by the merger. The OFT has not been informed of any other entry or expansion plans that would be timely, likely, or sufficient to alleviate the competition concerns raised in the mortgage sourcing software market through proposed transaction.

Conclusion on the supply of mortgage sourcing software

80. The OFT considers that the proposed transaction creates a merger to near-monopoly in the supply of mortgage sourcing software to intermediaries in the UK. It believes that the parties are each other's closest competitors and that the merger will eliminate the strongest competitive force from the market. The evidence available to the OFT suggests that the majority of fringe competitors have not had much success against MBL and Trigold. Although there is some evidence of switching, the OFT observes that switching mainly takes place between the merging parties and that switching costs are significant. The OFT considers that barriers to entry and expansion are high and although there is one example of recent entry, the likely success of this new entrant is questionable (as is the degree of competition that it will bring against the merged entity). The OFT does not know of any other plans of providers to enter or expand into this market in

any timely, likely or sufficient manner to countervail the competition concerns raised. Neither has the OFT been informed by customers that they would be willing to self-supply or sponsor entry in the event that the merged firm raised prices.

81. The OFT therefore considers that there is a realistic prospect that the merger will give rise to a substantial lessening of competition, and that post-transaction, the merged firm may have the ability and incentive to raise prices or reduce them less than would have been necessary without the merger, or to reduce quality, innovation and investment, as a result of the loss of competition between MBL and Trigold.

Electronic trading platforms

82. The merging parties are the only players that are active in this market in terms of external providers (that is, other than the option of using a lender's extranet to submit a mortgage application).
83. The parties stated that Trigold's platform, ETC, []. The parties stated that in the 12 months to June 2009, [] full mortgage applications were made through their trading platforms combined, of which ETC []. The parties estimated the total number of these transactions (including via lenders' websites) account for around [10-20] per cent of full mortgage applications made by mortgage intermediaries during the period (increment of [] per cent created by the merger). For these reasons, the parties submitted that the OFT should not be concerned about the monopoly created by the proposed transaction in the supply of electronic mortgage trading platforms in the UK.
84. Some third parties confirmed that ETC has gained limited market share despite being free to intermediaries since []. Lenders and intermediaries confirmed that []. They also noted that the real constraint on MBL comes from the lenders who allow intermediaries to submit application directly via their websites.
85. However, one lender stated that not all of the lenders listed on the parties' trading platforms have transactional websites capable of processing mortgage applications. In such a case, the only alternative option to using the merged firm's electronic trading platforms would be to submit a paper version of the application by post to the lender. The parties disputed that this was the case, stating that virtually all lenders have extranets capable

of accepting applications online. Third parties also told the OFT that barriers to entry are high in this market because of the need to have a good reputation with the lenders. One lender told the OFT that it would be unwilling to support a new entrant and incur significant monthly fees and integration costs, particularly given that MTE already does the job well.

86. The OFT notes that MBL and Trigold are the only suppliers of electronic trading platforms in the UK. However, it considers that MBL is constrained by the ability of intermediaries to submit applications directly via lenders' websites, which is the avenue most used by intermediaries. Further, the OFT notes that []. It also notes that there is nothing in Trigold's internal documents that [].

Conclusion on the supply of electronic trading platforms

87. The OFT considers that MBL is not materially constrained by Trigold pre-merger as []. Rather, competition comes from the lenders' websites, which MBL will continue to face post-merger. However, the OFT does not consider it necessary to conclude on whether the merger gives rise to a realistic prospect of a substantial lessening of competition in electronic trading platforms, given its finding in relation to the mortgage sourcing software market.

A combined mortgage software market

88. The parties are the only suppliers of all three mortgage software products: mortgage point of sale compliance software; mortgage sourcing software; and electronic trading platforms. If a mortgage intermediary sources all three from the same supplier, it can complete a mortgage transaction from the initial collection of client data through to submitting a mortgage application on the customer's behalf. In such a case, the OFT may be concerned that the merged firm might increase the selling price of one of its products when sold on a standalone basis, but might not do so if customers buy both (or all three of) the merged firm's products. This is because it would give customers an incentive to buy the whole suite of products (or some combination of the products) from the merged firm as well, which puts rivals in the second product market at a disadvantage.¹⁰ In such a case, the OFT looks at the ability, incentive and effect of this strategy. In addition, the OFT notes the potential foreclosure effects that

¹⁰ Merger Assessment Guidelines, paragraph 5.6.13, third bullet.

may arise by the merged firm refusing to allow interoperability with its systems vis-à-vis its competitors' systems. The OFT considers both theories of harm below.

89. The OFT notes that there is significant demand for all three mortgage software products and that these products are complementary. Customers told the OFT that their strong preference would be to purchase the whole suite of products from the same supplier because it is cheaper and it enables effective integration of systems. One customer told the OFT that there are three reasons for choosing to purchase from a single supplier, namely, reduced IT support costs; no IT integration costs; and quicker resolution of IT support problems. One lender stated that intermediaries 'depend on' the integration of their electronic trading platform with point of sale compliance and their own fact-find system to ensure the whole mortgage application process is seamless.
90. One competitor told the OFT that some customers [].
91. None of the parties' competitors told the OFT that they are currently able to supply all three products. Even in the event that a competitor were to develop such a suite, given the limited switching that occurs on an annual basis, the OFT does not consider it likely that they would be able to expand to a sufficient scale in a timely manner to compete effectively with the merged firm, particularly given that post-transaction, the parties will have nearly 100 per cent share of supply (by value) in mortgage sourcing software and 100 per cent share of supply in electronic trading platforms, such that intermediaries and lenders would be unlikely to use alternative products.
92. In relation to foreclosure concerns arising through interoperability, the OFT notes that the parties currently do not allow interoperability vis-à-vis each other's point of sale compliance and mortgage sourcing systems, but do allow their sourcing systems to be interoperable with other suppliers' point of sale compliance software (see paragraph 63 above). The OFT considers that post-transaction, the merged firm may have an incentive to foreclose these suppliers who have existing interoperability with the parties' systems as the parties currently do to each other, in order to drive out the remaining competition.
93. However, given its findings in the supply of mortgage sourcing software to intermediaries, it has not been necessary for the OFT to conclude on

whether the merger gives rise to a realistic prospect of a substantial lessening of competition in the supply of a combination of mortgage software products to intermediaries in the UK through either of the concerns outlined above.

Conclusion on unilateral effects

94. The OFT considers that the test for reference is met in relation to the supply of mortgage sourcing software to intermediaries in the UK. The OFT leaves open whether the test for reference is met in relation to the supply of point of sale compliance software, the supply of electronic trading platforms and the supply of a combination of mortgage software products.¹¹

VERTICAL EFFECTS

95. The parties put forward arguments as to why the merger will not give rise to input or customer foreclosure. The OFT has not received any evidence to suggest that the merger will result in customer foreclosure. The OFT therefore only considers below whether input foreclosure could arise as a result of the proposed transaction.¹²

Input foreclosure

96. The OFT considered whether the parties' lender shareholders would have the ability and incentive to withhold their own mortgage product information from rival sourcing software providers, or to deny access to their systems for mortgage applications to be made by intermediaries electronically.
97. The parties argued that no such input foreclosure concerns arise. With respect to providing information on lenders' own mortgage products, the parties stated that their shareholders already currently provide information direct to intermediaries and there would be no incentive to cease doing so post-merger since distribution of mortgage products is the overriding

¹¹ The OFT has not had to conclude on these areas given its conclusions in relation to the markets of insufficient importance exception to the duty to refer and the availability of undertakings in lieu of reference with regard to mortgage sourcing alone (see paragraphs 119 to 127 below).

¹² Merger Assessment Guidelines, paragraphs 5.6.9 to 5.6.12.

concern of lenders and the profit realised through the sale of a mortgage far exceeds the profit that the merged entity will be able to achieve through software charges to mortgage intermediaries. They stated that in any event, companies such as Defaqto make whole of market information available to any company willing to pay for such services, at a cost of approximately £[].

98. As regards granting access to submit applications electronically, the parties stated that lenders already provide access to consumers (and intermediaries on behalf of consumers) to apply for mortgages electronically and that there would be no incentive to deny access going forward since this would risk losing mortgage business to rivals.
99. The OFT received some complaints from competitors, who stated that some of the parties' lender shareholders do not currently provide access to the updates to their mortgage products, which are often sent to the parties at no cost. Third parties raised concerns about lenders having the incentive to withhold such data in order to promote the dominant mortgage sourcing firm used by nearly 100 per cent of the intermediaries, that is, the merged firm. One competitor provided documentary evidence showing that, since the announcement of the merger, a lender (who is a shareholder of one of the parties) had discontinued supplying it with mortgage rate updates.
100. With respect to the electronic trading platform market, a few competitors active in other mortgage software markets informed the OFT that integration with lenders' systems is difficult, making expansion into this area impossible. They complained that whilst the merging parties are permitted to integrate their software with their shareholders' systems, smaller companies are not given the same access. The OFT notes from lenders themselves that they have an incentive to support just one electronic trading platform because of the significant transaction fees and support costs that they otherwise have to incur.
101. Given the findings in the mortgage sourcing software market with respect to unilateral effects, the OFT does not consider it necessary to conclude on whether the proposed transaction gives rise to vertical foreclosure effects.

BUYER POWER

102. The parties submitted that many customers have buyer power, particularly the main mortgage networks.
103. Mortgage networks told the OFT that they currently enjoy a degree of market power to obtain better discounts and rates, particularly where the parties' products are purchased as a bundle. However, much of this buyer power appeared to be predicated on the ability of the customer to play the parties off against one another to obtain better rates, even if the customer did not ultimately switch supplier. Several networks told the OFT that they believe that the merger will diminish their buyer power. Individual brokers and IFAs stated that they had no ability to obtain discounts, unless they purchase a range of products from the parties.
104. The OFT considers that some pre-merger buyer power exists but only with respect to the large mortgage networks. In any event, this buyer power will diminish as a result of the merger given the concentration that occurs, at least in mortgage sourcing. As a result, none of the mortgage networks told the OFT that their position was such as to mean that they would not be negatively impacted by the merger. The OFT is therefore not confident that buyer power will be sufficient in this case to countervail the potential anticompetitive effects arising from the merger, primarily because of the lack of credible alternative suppliers to whom customers can threaten to switch.

THIRD PARTY VIEWS

105. Third party comments have been discussed above where relevant.
106. The OFT received 28 submissions from third parties, a number of which were unsolicited. With the exception of some of the lenders who are the parties' shareholders, all third parties viewed the merger as reducing competition in the market. The vast majority of third parties were very concerned about the merger, particularly in the mortgage sourcing software market. In particular, customers raised concerns that the merger would likely lead to increased prices, reduced innovation and development, and reduced choice in the markets.

107. Third parties viewed the merging parties to be strong competitors in the mortgage sourcing software market, typically winning customers from each other.

108. A number of the parties' competitors and customers noted that MBL and Trigold have a history of buying up existing competition in the mortgage sourcing markets and that the merger goes one step further in virtually eliminating all effective competition in these markets.

109. [].

ASSESSMENT

110. The parties overlap in the supply of point of sale compliance software, mortgage sourcing software and electronic trading platforms to intermediaries. The OFT has left open the precise product scope for the supply of point of sale compliance software and the supply of electronic trading platforms. It finds that a separate market exists for the supply of mortgage sourcing software to intermediaries. The OFT has also assessed the parties' ability to supply the whole range (or a combination) of these products to intermediaries. The OFT considers that the relevant geographic scope is national.

111. The OFT did not consider it necessary to reach a conclusion whether the merger would lead to a realistic prospect of a substantial lessening of competition in the supply of point of sale compliance software, in the supply of electronic trading platforms, or in the supply of a combination of mortgage software, given its findings in the supply of mortgage sourcing software (see below). Nor did the OFT conclude whether the merger is likely to give rise to vertical input foreclosure effects, for the same reason.

112. With respect to the supply of mortgage sourcing software, the OFT considers that the proposed transaction leads to a merger to near-monopoly in the UK. The parties are each other's closest competitors and the remaining competitors are not considered by third parties to have software systems that have the same level of functionality as the parties'. Based on the evidence available to it, the OFT considers that barriers to entry are high and switching costs are significant. Although switching is not commonplace in this market, the OFT notes that it typically takes place

between the merging parties. The OFT has been informed of new entry from CDS, but given that this player currently has no customers, the OFT is unable to assess its ability to constrain the merged firm. In addition, a large number of third parties were very concerned about the effects of the merger in the mortgage sourcing software market.

113. As a result of the above, the OFT considers that it is the case that the merger may be expected to result in a substantial lessening of competition in the supply of mortgage sourcing software to intermediaries in the UK such that the merger should be referred to the Competition Commission for further investigation.

EXCEPTIONS TO THE DUTY TO REFER

114. The OFT's duty to refer under section 33(1) of the Act is subject to the application of certain discretionary exceptions, including the markets of insufficient importance or 'de minimis' exception under section 33(2)(a). The effect of not making a reference to the Competition Commission on this basis is the same as a decision that clears the merger unconditionally.¹³

115. The OFT has found a realistic prospect of a substantial lessening of competition in relation to the supply of mortgage sourcing software to intermediaries in the UK. The OFT believes that the annual cumulative size of the market concerned in the UK is less than £10 million. The OFT has therefore considered whether it should apply the 'de minimis' exception to the duty to refer.

Availability of undertakings in lieu

116. As stated in the Exceptions Guidance,¹⁴ the OFT believes that it would be proportionate to refer a problematic merger (that is, not to apply the 'de minimis' exception) where it is 'in principle' clearly open to the parties to offer clear-cut undertakings in lieu of reference (UIL). This is because the recurring benefits of avoiding consumer harm by means of UIL in a given case, and all future like cases, outweigh the one-off costs of a reference.

¹³ Exceptions to the duty to refer and undertakings in lieu of reference guidance, OFT 1122 (the Exceptions Guidance), paragraph 2.5.

¹⁴ Paragraph 2.22.

117. The OFT's judgment as to whether UIL are 'in principle' available for the purposes of considering whether the 'de minimis' exception can be applied, does not depend on an actual offer of UIL being made by the parties. The existence of any such offer is unknown to the decision maker at the time of his or her decision as to whether undertakings are 'in principle' available.

118. In this case, the OFT considers that the only structural remedy open to MBL to address the competition concerns raised would involve not proceeding with the transaction. This is because the obvious structural remedy to the concerns in mortgage sourcing would involve divestment of either ANMB or Prospector, the combination of which forms the essential rationale of the transaction. The OFT does not consider that undertakings in lieu are 'in principle' available where the OFT's competition concerns relate to such an integral part of a transaction that to remedy them via a structural divestment would be tantamount to prohibiting the merger altogether.¹⁵ On the basis that the OFT believes there is no clear-cut and proportionate divestiture package in principle available, the OFT has proceeded to examine whether to exercise its 'de minimis' exception in this case.

Application of the markets of insufficient importance exception to this case

119. The factors that the OFT looks at in determining whether it should apply its 'de minimis' discretion are set out in its Exceptions Guidance. Such factors are:

- the market size
- the strength of the OFT's concern (that is, its judgment as to the probability of the substantial lessening of competition occurring)
- the magnitude of competition lost by the merger
- the durability of the merger's impact and
- any precedential implications of the merger which could be replicated across the sector in future cases.

¹⁵ Exceptions Guidance, paragraph 2.26.

120. The OFT has considered each of the above factors in determining whether to exercise its discretion in this case.

121. **Market size** – the OFT uses the parties' estimate of £[5-6] million for the year to 31 March 2010 as a starting point for determining the total market size of the supply of mortgage sourcing software to intermediaries in the UK. The parties argued that there were two reasons why the OFT should treat the market concerned as being smaller than this, neither of which were accepted by the OFT:

- First, the parties submitted that the size of the market is likely to fall to £5 million in 2011 and is unlikely to grow significantly in 2012-2013. One competitor supported this, being of the view that the market may not have bottomed-out yet. However, the OFT also observes that MBL's business plan forecasts an increase in sales for mortgage sourcing in 2012-2013 to £6.5 million. Given this uncertainty, the OFT believes the parties' estimate of the current figure, £[5-6] million, is the most appropriate market size to adopt.¹⁶
- Second, the parties argued that the OFT should exclude £[1-2] million from the total market value on the basis that the parties' largest customers (specifically, [] customers spending in excess of £[] per annum) could individually sponsor expansion/entry or could self-supply.¹⁷ However the OFT does not consider that the [] different customers identified by the parties exert a level of countervailing buyer power to justify exclusion from the total market size (and indeed none of the customers identified themselves as having such buyer power so as not to be concerned about the effect of the merger).

122. **Strength of the OFT's concerns** – the OFT believes that the proposed transaction may be expected to result in a substantial lessening of competition in mortgage sourcing (that is, its belief is over 50 per cent

¹⁶ Given the other factors in this case, the OFT's conclusion as to whether to apply the 'de minimis' exception would not have been affected by a reduction in the size of the market to £5 million.

¹⁷ The parties compared this to the OFT's analysis in ME/3688/08 Anticipated acquisition by FMC Corporation of the Alginates business of ISP Holdings (UK) Limited. However, the OFT considers that the facts in the present case are significantly different to those in FMC/ISP. In that case, the OFT noted the exceptional circumstances represented by one customer, Reckitt Benckiser, who accounted for the vast majority of total sales such that the substantial countervailing buyer power it exerted was of a wholly different nature and magnitude to that of the small remaining customers in the market (paragraph 71).

likelihood, or at the 'is the case' standard in the working of section 33 of the Act). As a result, the strength of the OFT's belief that harm will result from the merger, although not in itself conclusive, tends to point away from the exercise of the 'de minimis' exception in this case.

123. Magnitude of competition lost – the proposed transaction creates a reduction in the number of major suppliers in the UK of mortgage sourcing software from two to one. Such increased concentration would normally be expected to give rise to the prospect of price rises and/or a deterioration of innovation and development. The parties submitted that given the low barriers to entry/expansion, the current market context and the lack of switching, the degree of competition between the parties is limited. As discussed in paragraphs 54 to 63 above, however, the OFT notes the significant evidence of closeness of competition between the parties and that, although switching may not be commonplace, it usually occurs between the merging parties. Overall, these factors suggest that the magnitude of competition lost as a result of the proposed transaction is what would be expected to result from a two to one merger, and therefore more likely to be in the upper-range. This would tend to weigh against the exercise of the 'de minimis' discretion.

124. Durability – although the OFT has not reached a level of confidence that new entry would be timely, likely and sufficient to avert the competition concerns raised by the merger, it did receive some evidence that CDS is currently trying to enter the market (although it does not yet have any customers). That said, most competitors informed the OFT that barriers to entry/expansion in the UK are very high in terms of sustainability, particularly in light of the current financial climate. Although the parties provided several examples of new entry into the market over the past years, the OFT observes that the majority have since exited or have been acquired (see paragraph 78 above). Overall, the OFT considers the duration of harm arising from the transaction points against the exercise of the 'de minimis' discretion.

125. Wider implications – the OFT does not believe that there are wider implications in this case that serve as an aggravating feature in exercising its 'de minimis' discretion. It does not consider that the merger is one of a potentially large number of similar mergers that could be replicated across the mortgage software sector.

Conclusion on exceptions to the duty to refer

126. The OFT considers that the total impact of the merger in terms of customer harm is likely to be significant in this case, and that the costs associated with a Competition Commission inquiry would be proportionate in comparison. For the reasons given above, the OFT therefore does not consider it appropriate to exercise its 'de minimis' discretion in this case.

127. The parties put forward several representations on efficiencies, none of which the OFT considers to be rivalry-enhancing.¹⁸ In addition, the parties asserted that one customer benefit arising from the merger is that the merged firm would offer integration of MBL's electronic trading platform with Trigold's mortgage sourcing software. However, for the reasons already addressed above, and in light of the significant number of customer concerns, the OFT does not consider that this perceived benefit outweighs the likely customer harm. The OFT therefore considers it appropriate to refer the proposed transaction to the Competition Commission.

UNDERTAKINGS IN LIEU OF REFERENCE

128. Where the duty to make a reference under section 33(1) of the Act applies, pursuant to section 73(2) of the Act, the OFT may, instead of making such a reference, and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may be expected to result from it, accept from such of the parties concerned undertakings as it considers appropriate.

129. The OFT's Exceptions Guidance states that UIL are appropriate only where the remedies proposed to address the competition concerns are clear-cut and are capable of ready implementation.¹⁹ Consequently, in those cases in which there is doubt over the effectiveness of the undertakings, the OFT is likely to consider that accepting UIL is not appropriate.

130. To deal with any substantial lessening of competition concerns in the mortgage sourcing software market, MBL offered to divest the intellectual property rights in the source code of the Edgev2. The Edgev2 is a mortgage sourcing software package which MBL acquired through the

¹⁸ Merger Assessment Guidelines, paragraph 5.7.

¹⁹ Exceptions Guidance, paragraph 5.7.

acquisition of the Edge in December 2009. Although the Edgev2 does not currently have any active users, MBL offered to divest the customer list of the Edge which contains details of all [] brokers who registered to use the software in the period to December 2009. Further, it stated that it would be willing to continue to offer interoperability on standard terms to point of sale providers in relation to Prospector and Mortgage Brain, as well as interoperability with MTE to all mortgage sourcing and point of sale compliance providers who requested such interoperability.

131. The OFT does not consider that the UIL offered are clear-cut. Nor does the OFT consider that the UIL will restore competition to the level that would have prevailed absent the merger.²⁰ As identified in paragraphs 78 above, the OFT believes that the barriers to entry/expansion are not technological, but concern the ability of providers to sustain themselves to win customers who are inert. As such, the OFT considers that the barrier to entry involves obtaining the necessary reputation and customer base. The parties have offered a customer list from 2009. As the parties have identified, there are no new intermediaries currently looking for mortgage sourcing software. Rather, there is significant surplus of intermediaries in the mortgage market. The OFT believes that the customer list offered by MBL represents a list of historic contact details and that since all the customers identified will either have transferred to MBL or will currently be using a different sourcing provider, a purchaser of the remedy package would in effect be buying the software without any customers. The OFT does not therefore believe it credible that any such purchaser would be in a position to re-create the level of competition currently provided by either ANMB or Prospector in mortgage sourcing.

132. For the reasons above, the OFT does not consider that the UIL offered are acceptable to justify not making a referral to the Competition Commission in this case.

DECISION

133. The proposed transaction will be referred to the Competition Commission pursuant to section 33(1) of the Act.

²⁰ Exceptions Guidance, paragraph 5.11.

ENDNOTES

1. With respect to paragraph 11, the OFT clarifies that the parties provided information on the basis of their overlapping activities without specifying whether these segments amounted to relevant product markets.
2. In relation to paragraphs 51 and 61, the OFT clarifies that the term market leader is used in terms of the Trigold having the largest number of user licences.
3. In relation to paragraphs 63 and 92, the OFT clarifies that Trigold's mortgage sourcing software, Prospector, is interoperable with MBL's point of sale compliance software and that MBL has always offered interoperability between its point of sale compliance software and other mortgage sourcing systems.
4. In relation to paragraph 70, MBL clarified that London & Country has not developed its own mortgage sourcing system for use by its advisors but uses MBL's software.