

Completed acquisition by AP Møller-Maersk A/S of a 31 per cent interest in DFDS A/S

**ME/4563/10**

The OFT's decision on reference under section 22 given on 19 July 2010. Full text of the decision published on 26 July 2010.

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**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. **AP Møller-Maersk A/S** (APMM) is one of the world's largest shipping companies. It is active in a wide range of activities including intercontinental container shipping, tanker shipping (product tankers, crude oil carriers and gas carriers), shipping terminal services, freight forwarding and the provision of general logistics services.
2. **DFDS A/S** (DFDS) is a Danish company active in short sea shipping services within Northern Europe. Its activities include container shipping, passenger shipping, terminal services and freight forwarding.

## **TRANSACTION**

3. On 17 June 2010 the European Commission (the Commission) announced its approval, subject to commitments, of DFDS' acquisition of Norfolk Holdings BV (Norfolk), a wholly owned subsidiary of APMM.<sup>1</sup> As part of the consideration for Norfolk, APMM received shares in DFDS equivalent to around 31 per cent of DFDS' share capital. The transfer of shares took place within the context of a rights issue of new shares by DFDS which completed on 12 July 2010. Apart from APMM receiving shares directly

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<sup>1</sup> COMP/M.5756 DFDS/Norfolk.

from DFDS Tor Line Holding AB (a subsidiary of DFDS), which account for less than one per cent of DFDS' issued shares, the transfer of shares was between Vesterhavet Holding A/S (Vesterhavet, a subsidiary of the shipping company Lauritzen Fonden) and APMM (the Transaction).

4. After the Transaction, Vesterhavet (which participated in the rights issue) owns around 36 per cent of DFDS (down from around 56 per cent) and APMM around 31 per cent.

## **JURISDICTION**

5. In its decision, the Commission determined that it did not have jurisdiction over APMM's 31 per cent stake in DFDS given that this constituted a minority stake that did not give APMM decisive influence over DFDS. However, APMM notified this stake to the Office of Fair Trading (OFT) under the Enterprise Act 2002 (the Act).<sup>2</sup>
6. UK merger control provisions set out in the Act recognises three levels of control which an acquiring company may acquire over the target company. These are full control, de facto control and material influence.<sup>3</sup> Material influence is a lower test of control than the Commission's decisive influence test. Therefore, there could be instances in which a minority shareholding will not constitute a concentration under the EC Merger Regulation<sup>4</sup> but may constitute material influence<sup>4</sup> under the Act. In the current case material influence is the only feasible level of control which APMM could exercise over DFDS post-Transaction.
7. The OFT's Jurisdictional and Procedural guidance states that the key factors to take into account when considering material influence are the size of the acquired voting shareholding (both itself and also in relation to typical attendance/voting of other shareholders at shareholder meetings), board representation and other factors such as production agreements or financing agreements.<sup>5</sup> The OFT makes its assessment on substance and not on legal form.
8. In the current case APMM received:

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<sup>2</sup> See paragraphs 5 and 6 of the Commission's decision.

<sup>3</sup> Section 26 of the Act.

<sup>4</sup> Council Regulation (EC) No 139/2004.

<sup>5</sup> 'Mergers: jurisdictional and procedural guidance', OFT527, June 2009, paragraphs 3.15–3.28.

- approximately 31 per cent of the share capital of DFDS
  - a right of veto on a number of DFDS decisions, including [ ]
  - a right of veto over [ ], and
  - the right to appoint one director to the board of DFDS.
9. APMM submitted to the OFT that a shareholding of around 31 per cent does not confer material influence in this case. That is because DFDS' Articles of Association stipulate that Annual General Meeting proposals only require a simple majority to be passed while other matters – such as the dissolution of the company or a merger with another company – require a two-thirds majority in order to be passed. Therefore, with a shareholding of less than a third APMM will not be able to block any matters of strategic importance to DFDS.<sup>6</sup>
10. APMM further submitted that APMM will be able to appoint only one board director, whereas Vesterhavet will have five or six, and the DFDS employees will have three directors. Therefore, APMM will not be in a position to out-vote other directors in matters of the day-to-day running of DFDS.
11. In terms of the veto powers that are expressly accorded to APMM under the shareholder agreement agreed between it and Vesterhavet, APMM argued that these constitute no more than minority shareholder protection rights. The Commission supported this conclusion in its decision.<sup>7</sup> Moreover, the Danish Financial Services Authority in its capacity of enforcing Danish stock exchange rules found that Vesterhavet would retain control over DFDS after the Transaction.<sup>8</sup>

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<sup>6</sup> By contrast, UK company law generally requires 75 per cent of the votes cast to approve a special resolution. Therefore, a shareholding of more than 25 per cent will presumptively confer the ability materially to influence the policy of the target company.

<sup>7</sup> Paragraph 5.

<sup>8</sup> The relevant stock exchange rule says 'if a shareholding is directly or indirectly assigned in a company which has one or more share classes admitted to trading on a regulated market or an alternative market place, the purchaser must give all the shareholders of the company the opportunity to sell their shares on identical terms, if a consequence of the assignment is that the purchaser gets to exercise a deciding influence over the company and gets to own more than a third of the voting rights'. It is therefore a different test to that of material influence under UK merger laws.

12. The OFT queried whether APMM could be said to have the ability to exercise material influence over DFDS by being able [ ]. This might impact upon any expansion possibilities by DFDS, for example into intercontinental deep sea shipping. APMM submitted in this respect that:
- [ ]
  - [ ], and
  - [ ].
13. Moreover, DFDS' annual report (2009) discusses its key strategies for the future, only one of which includes expansion. But DFDS envisages that this expansion will be confined to expanding its shipping networks to include more regions in Northern Europe. This would not be an example of DFDS participating in any business outside the scope of its current activities [ ].

#### **OFT views on jurisdiction**

14. The OFT has considered all of the above points made by the parties carefully and has had due regard to its relevant previous decisions and published guidance in relation to this matter. The facts of this particular case lead the OFT to consider that it is or may be the case that after the Transaction APMM will be able to materially to influence the policy of DFDS for the following reasons.
15. First, the veto rights allow APMM to prevent DFDS entering into a new business activity [ ].<sup>9</sup> There is some evidence that DFDS does have expansion plans within Northern Europe and the OFT cannot rule out the possibility that [ ].
16. In Centrica / Lake Acquisitions, the OFT found that veto powers relating to the target company including making acquisitions above a certain monetary

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<sup>9</sup> In BSKyB/ITV, BKyB's ability to limit ITV's strategic options was a key factor in the Competition Commission's finding of material influence (together with BSKyB being ITV's largest shareholder and an established industry player). See 'Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc', Report sent to Secretary of State (BERR), 14 December 2007, paragraph 3.66.

value and the incurring of debt did contribute to a finding of material influence in that case (together with board representation).<sup>10</sup>

17. Second, APMM is entitled to appoint one director to the board of DFDS. While not able to out vote other directors, APMM is DFDS' second largest shareholder with considerable expertise in shipping and therefore its influence on the board may be relatively strong.<sup>11</sup>
18. While a finding of material influence does not rest on any single one of these factors, combined they do lead the OFT to conclude that it is or may be the case that the Transaction confers to APMM the ability to materially influence the policy of DFDS. Therefore, the OFT concludes that the enterprises APMM and DFDS have or will be expected to be distinct within the meaning of section 26 of the Act.
19. DFDS has a UK turnover of more than £70 million. Therefore, the OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

## **MARKET DEFINITION**

20. The parties overlap in the provision of unitised freight shipping, freight forwarding services and general contract logistics.
21. Given that the areas of activity are included in the Commission's investigation of DFDS/Norfolk and the parties in this case were involved in the Commission's case the OFT has taken the product and geographic scopes from the Commission's decision.<sup>12</sup>
22. The Commission's market definitions relevant for this case were:
  - Unitised freight shipping included both 'roll-on, roll-off' and 'roll-on, roll-off including passenger vehicles' vessels but the question of

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<sup>10</sup> Anticipated acquisition by Centrica of 20 per cent of Lake Acquisitions, case ME/4133/09, OFT decision of 7 August 2009, paragraph 10.

<sup>11</sup> That a shareholder (with board representation) has considerable industry expertise has been a factor in establishing jurisdiction in Completed acquisition by First Milk Limited of a 15 per cent stake in Robert Wiseman Dairies plc, Case ME/1459/04, OFT decision of 7 April 2005.

<sup>12</sup> The definition for unitised freight shipping is broadly the same as that used by the Competition Commission in its report Stena AB and The Peninsular and Oriental Steam Navigation Company, February 2004.

whether freight transported on cruise vessels was included was left open. The geographic market was also left open but the merger was analysed on the basis of various short sea corridors (for example, UK-Scandinavia, UK-Denmark, UK-Sweden, UK-Norway).<sup>13</sup>

- Freight forwarding (the organisation of the transportation of items on behalf of customers according to their needs) was also left open. The Commission left open the geographic definition but remarked that they have been analysed nationally in the past but may have a tendency towards an EEA wide market. Further, it may be that freight forwarding can be analysed on the basis of trade lanes.<sup>14</sup>
- General contract logistics describes the planning, implementation and control of the transport and storage of goods from their point of origin to the point of their consumption. While the geographic market was left open the Commission examined this service on the basis of a national market.<sup>15</sup>

23. Given the outcome of the competition assessment the OFT has not found it necessary in this case to further define the above markets/activities, nor has it found it necessary to define the non-overlap activities in which APMM is active (for example, world wide deep sea shipping).

## **HORIZONTAL ISSUES**

24. APMM and DFDS overlap in the activities:

- unitised freight services
- freight forwarding
- general contract logistics.

25. Overlaps in all of these areas of activity are small (discussed below). Indeed, the Commission examined APMM's position in all of these activities in the context of DFDS/Norfolk and found no significant overlaps between

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<sup>13</sup> Paragraphs 11 to 20.

<sup>14</sup> Paragraphs 30 to 32.

<sup>15</sup> Paragraphs 33 to 35.

APMM (without Norfolk) and DFDS occurred in any of the areas of activity.<sup>16</sup> Nevertheless, the overlap activities are discussed below.

26. In unitised freight services APMM submitted that it does not compete with DFDS since its focus is on world wide deep sea shipping whereas DFDS concentrates on short sea intra-Europe shipping. However, APMM has undertaken a small amount of short sea intra-Europe shipping in shipping corridors which have overlapped with DFDS' activities via two wholly owned subsidiaries, Maersk Line and Safmarine. The relevant corridors are between the UK and Scandinavia (Denmark, Sweden and Norway) and Western Europe (Benelux countries and northern France). On whichever measure (shipping corridors or segmentations to individual countries) APMM's share has been [0–five] per cent.
27. In freight forwarding, APMM's subsidiary company, Damco, is active. However, Damco's share is negligible ([0–five per cent]) in all trade corridors affecting the UK in which DFDS is also active ([ ]).
28. In general contract logistics APMM is active via Damco. However, Damco's share is [0–five] per cent in the UK.
29. Given the minimal overlaps between APMM and DFDS the OFT does not consider that there is a realistic prospect of a substantial lessening of competition arising through unilateral effects as a result of the Transaction.

## **NON-HORIZONTAL ISSUES**

30. One third party expressed concern to the OFT that APMM would be able to use its strong position in world wide deep sea shipping to foreclose rivals to DFDS in intra-European short sea shipping in order to maximise the dividends that it will receive following the Transaction. An example given by the third party is that APMM would ship goods into Europe, say to Rotterdam, where they will be distributed to their final destination, sometimes by ship. Whereas before the Transaction APMM did not have the incentive to influence who the customer used for the intra-Europe shipping, after the Transaction APMM does have the incentive to ensure that it will be DFDS. This, the third party argued, would foreclose short sea shipping rivals and substantially lessen competition.

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<sup>16</sup> Footnote 26.

31. The OFT has investigated these concerns. In doing so it has been mindful that the Transaction does not afford APMM day-to-day control of DFDS including its pricing decisions. Therefore, APMM would not be in a strong position to encourage customers to use DFDS (through offering lower prices for DFDS' services, for example) or to otherwise enforce or monitor the foreclosure strategy. As such the OFT does not consider that APMM could credibly commit to a successful strategy of foreclosure.
32. The OFT therefore considers that it is unlikely that the Transaction would confer on APMM the ability to undertake a foreclosure strategy. Other points that the OFT considers relevant are that:
  - APMM is unlikely to have the ability to force customers to use DFDS for intra-Europe shipping since it has [10–20] per cent share of supply of intercontinental shipping for most shipping corridors. For those corridors in which it has around [20–40] per cent share ([ ]) the shares were calculated by including shipping to/from the Mediterranean where DFDS is not active.
  - Through its freight forwarding activities APMM is in a position to determine who ships the freight within Europe for some customers. However, APMM's involvement in this area is negligible (paragraph 27 above).
  - APMM has undertaken some short sea intra-Europe shipping via its subsidiaries Maersk Line and Safmarine (paragraph 26 above). Therefore, if foreclosing rivals in short sea intra-Europe shipping was profitable for APMM one may expect such a strategy to already be embarked upon using Maersk Line and Safmarine.
33. For these reasons the OFT does not consider that the Transaction raises a realistic prospect of foreclosure of rivals via portfolio effects.
34. Finally, the OFT has examined whether vertical effects concerns arise in this case. It may be the case that the Transaction has a vertical dimension via the link between freight forwarding and unitised freight shipping services and between general contract logistics and unitised freight

shipping and/or freight forwarding.<sup>17</sup> However, given the small involvement of APMM in the areas of freight forwarding and general contract logistics vertical effects concerns do not arise in this case.

### **THIRD PARTY VIEWS**

35. None of the customers who responded to the OFT's enquiries in this case expressed concern about the Transaction.
36. Competitors were largely unconcerned about the Transaction since they did not view APMM and DFDS as being close competitors. Only one competitor objected to the Transaction. This competitor was concerned that APMM would be able to use its strong position in world wide deep sea shipping to foreclose rivals to DFDS in intra-European short sea shipping in order to maximise the dividends that it will receive following the Transaction. This concern has been examined in this decision above.

### **ASSESSMENT**

37. This case involves the acquisition of a minority shareholding by APMM in DFDS. While no one factor on its own leads the OFT to conclude that it is or may be the case that APMM will acquire the ability materially to influence the policy of DFDS as a result of the Transaction, a combination of factors – comprising APMM's veto rights, its board representation, that APMM is DFDS' second largest shareholder and its industry expertise – does lead the OFT to this conclusion. DFDS has a UK turnover of more than £70 million and the OFT therefore believes that it is or may be the case that a relevant merger situation has been created.
38. APMM's core shipping activity is in world wide deep sea shipping whereas DFDS' core shipping activity is in short sea intra-Europe shipping. Nonetheless, there is some overlap between the parties, However, in no overlap activity (unitised freight services, freight forwarding, or general contract logistics) does a realistic prospect of a substantial lessening of competition arise as a result of the Transaction through unilateral effects.
39. In its investigation the OFT also examined the possibility of rival foreclosure in short sea intra-Europe shipping. The evidence available in this case

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<sup>17</sup> See the Commission's decision in DFDS/Norfolk, paragraphs 70 to 72.

indicates that APMM would not have the ability to embark on such a strategy as a result of the Transaction.

40. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

41. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act.