Anticipated acquisition by Cineworld Group plc, through its subsidiary Cine-UK Limited, of the cinema business operating at the Hollywood Green Leisure Park, Wood Green

ME/3390/07

The OFT's decision on reference under section 22(1) given on 17 March 2008. Full text of decision published 24 April 2008.

Please note that square brackets indicate figures or text which have been deleted or replaced at the request of the parties for reasons of commercial confidentiality.

PARTIES

1. **CineWorld Group plc (CineWorld)** is a listed cinema group with a circuit of 73 sites with a total of 758 screens. CineWorld operates a 12 screen cinema in Wood Green.

2. **Standard Life Property Income Trust (Standard Life)** is part of Standard Life plc,[1] one of the UK's largest financial services providers. The premises at the Hollywood Green Leisure Park, Wood Green (the Premises) are owned by Standard Life and held within an income trust, the property having been acquired for its income stream.

3. **Samenic Limited - formally known as Hoyts Cinemas Ltd (Hoyts),** an Australian cinema operator, is the holder of the current lease from Standard Life for the Premises at Hollywood Green Leisure Park. Hoyts having sold all of its cinema operations, except those operated from the Premises, to National Amusements, trading as Showcase, in 2001, this is Hoyts' sole remaining cinema business in the UK. The Premises are currently operated as a Showcase cinema by National Amusements on behalf of Hoyts under a management agreement (originally for two years but now under a 'rolling' contract).

[1] The OFT has since been told that Standard Life Property Income Trust (SLIPIT) is not part of Standard Life plc. It is a listed Investment Trust, with different shareholders and an independent board.

TRANSACTION

4. An agreement for lease in respect of the Premises has been entered into by CineWorld and Standard Life. Completion of the agreement for lease is subject to Standard Life obtaining vacant procession of the premises and is also subject to OFT clearance. Separately, the current lessor, Hoyts, will surrender its lease to Standard Life [ ]. CineWorld notified the transaction on 5 November 2007 and the administrative deadline for a decision was 12 February 2008.

JURISDICTION

5. A relevant merger situation arises when two or more enterprises cease to be distinct enterprises and either the UK turnover test or share of supply test set out in section 23 of the Enterprise Act 2002 (the Act) is met. The requisite test for the OFT is that it has to reach a belief that it is or may be the case that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation (section 33(1)).

Enterprises ceasing to be distinct

6. Considering the overall substance of this transaction, rather than just its legal form, the OFT has reached a belief that it is or may be the case that the agreement for lease by Standard Life to CineWorld, when taken together with the acquisition of additional assets from Hoyts, via Standard Life, and the transfer of certain staff from Hoyts/National Amusements to CineWorld, will result in two or more enterprises ceasing to be distinct.

7. CineWorld has argued that no enterprises have ceased to be distinct since:

   - The contractual arrangement is that of a new lease being granted by Standard Life to CineWorld. The relationship between CineWorld and Standard Life is limited to that between a (prospective) tenant and landlord. Separate from the transaction, Standard Life has entered into an agreement with Hoyts, under which Hoyts will surrender its existing lease of the premises [ ]. There is, however, no contractual relationship between CineWorld and Showcase (or Hoyts) (the tenant and operator of the current cinema business on the Premises). Given that the only party with whom CineWorld is contracting, Standard Life, is neither the tenant nor the cinema operator, therefore, no relevant merger situation can exist.

   - No direct premium has been paid by CineWorld to Hoyts or National Amusements/Showcase, indicating that no goodwill is being paid for the cinema business.

- Other than fixtures and fittings, no equipment will pass from Hoyts to CineWorld. [ ].

- There is no direct or indirect agreement or understanding between CineWorld and National Amusements/Showcase (or Hoyts) under which CineWorld will acquire and carry on the Showcase business. In particular, CineWorld is not bound by its lease with Standard Life to operate a cinema from the Premises. There is therefore no genuine continuity between the existing Showcase cinema business and the new CineWorld business.

- And finally, because of the different business model operated by CineWorld cinemas, customers will perceive a distinct change when CineWorld takes on the lease of the premises. This fact is accentuated by the fact that CineWorld might choose to close the cinema for several weeks for refurbishment of the Premises. Therefore it is not reasonable to presume that customer perception will be one of the operation of a continuous business.

8. The OFT has carefully considered all the points put forward by CineWorld as to why this transaction does not give rise to two or more enterprises ceasing to be distinct, but is not persuaded by them (on the basis of the 'is or may be the case' standard) for the following reasons:

- As mentioned above, the OFT considers the substance of a transaction over its form, i.e. the legal form of the arrangements is not determinative. In this case, the lease of the Premises to CineWorld by Standard Life has the same competitive effect as would a direct assignment of the existing lease (with the transfer of assets, staff and goodwill) from Hoyts to CineWorld.

- Currently the Premises are operated as a cinema by National Amusements, trading as Showcase, notwithstanding that National Amusements or Hoyts has no direct contractual relationship with Standard Life.

- [ ].

- Fixtures and fittings at the Premises owned by Hoyts will pass to CineWorld, via Standard Life. [ ].

- The OFT's view is that, even if there were to be a temporary interruption for refurbishment, customers' overall perception will be that the operation of the Premises as a cinema will in essence be continuous, despite any changes in signage.

- CineWorld has said that the Transfer of Undertakings (Protection of Employment) Regulations may apply to the employees of Hoyts and Showcase which are transferring to CineWorld, which again tends to indicate that an on-going business activity may be transferring.

9. The test for the OFT under the Act is whether it is or may be the case that enterprises will cease to be distinct and the OFT believes that the test is met in this case. In the event of doubts as to whether the transaction does in fact constitute a relevant merger situation, then it is appropriate that these should be determined by the Competition Commission (CC) at second phase – should the OFT reach a view that the relevant merger situation is or may be expected to result in a substantial lessening of competition.

Share of supply in a substantial part of the UK

10. The parties overlap in the supply of film exhibition services. The share of supply test in section 23 of the Act is met in the London Borough of Haringey, which is considered by the OFT to be a substantial part of the UK.

11. The use of the Borough of Haringey as a substantial part of the UK for the purposes of the jurisdictional test would be consistent with the CC's recent finding in its Tesco/Co-op Slough Report[2] that the Borough of Slough is a substantial part of the UK. CineWorld has disputed this contention, arguing that the CC's findings in Tesco/Co-op Slough were specific to the market in that case which was 'local in nature'. CineWorld contended that cinemas and supermarkets were very different and that the OFT should apply the same test in this context as had previously been applied in other cinema merger cases.

12. However, the OFT does not consider it appropriate for the CC to characterise Slough as a substantial part of the UK on the one hand, and the OFT to characterise Haringey an insubstantial part of the UK on the other: Haringey's population is around 80 per cent greater than that of Slough; the boroughs are of similar size, and, in light of the CC's reference to the local nature of grocery retailing, there is also no basis to distinguish cinemas from grocery stores, as cinemas also compete locally for local consumers. In the circumstances, therefore, the OFT believes that the Borough of Haringey is a substantial part of the UK.

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[2] Paragraph 4.6, Tesco plc and the Co-operative Group (CWS) Limited - A report on the acquisition of the Co-operative Group (CWS) Limited's store at Uxbridge Road, Slough, by Tesco plc – 28/11/2007 (Tesco/Co-op Slough).
http://www.competition-commission.gov.uk/rep_pub/reports/2007/fulltext/534.pdf
Borough of Slough – population 119,500, area 12.6 sq miles.
Borough of Haringey – population 225,700, area 11.5 sq miles.

13. Therefore, the OFT believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

MARKET DEFINITIONS

14. The parties overlap in the supply of film exhibition services.

Product Scope

15. In previous OFT and CC decisions,[3] it has been found that film exhibition was in a separate market from film distribution. It was also noted that film exhibition was not found to be part of a wider market for the supply of leisure activity services (such as bowling or television viewing) and that visiting a cinema is not part of a wider market including viewing films on television screens, either from a video cassette or DVD or from free to view or pay television.

16. CineWorld has indicated that it agrees with this product frame of reference concluded from past OFT and CC decisions. No clear evidence was provided by third parties to suggest departing from this conclusion. Therefore for the purposes of this case the product scope is taken as the supply of film exhibition services.

Geographic scope

17. Previous cinema merger decisions, primarily Blackstone/UCG and Terra Firma/UCI, have considered competition in both national and local markets. This is because although competition takes place predominantly at the local level through price, content and facilities varying to meet local conditions. However, certain parameters of competition for national chains (for example, negotiation with distributors for access to film content and for screen advertising fees and branding) are determined at the national level. The OFT has therefore analysed competition both nationally and locally.

18. In these previous cinema merger decisions, the OFT considered that when analysing local markets it was appropriate to use a 20 minute isochrone, with a 30 minute isochrone as a sensitivity check, based on drive time around the parties' cinemas or population centres in areas of overlap.

19. In the Vue/A3 decision, the CC agreed with the OFT that the size of the market should be based on a 20 minute drive time isochrone around the

[3] The acquisition by Terra Firma Investments (GP) 2 Ltd of United Cinemas International (UK) Limited and Cinema International Corporation (UK) Limited, 2005 (Terra Firma/UCI). The completed acquisition by the Blackstone Group of UGC Holdings Limited, 2005 (Blackstone/UGC). The Competition Commissions report on The completed acquisition by Vue Entertainment Holdings (UK) Ltd of A3 Cinema Limited, 2006 (View/A3).

acquired cinema, bearing in mind that the closer a competitor is, the greater the constraint it is likely to offer.[4] This was because if there is a second cinema very close to a population's nearest cinema then the cinemas will share most of their actual and potential customers. This means that the two cinemas will have a higher incentive to compete with each other for those customers. The CC used this market definition as guidance for its subsequent substantive analysis, rather than as a rigid rule.

20. CineWorld appears to agree, in general, with this approach for application in most cinema cases and submitted that a 20 minute drive time is broadly consistent with the approach taken by CineWorld and the industry more generally. However, CineWorld has pointed to the fact that the OFT has also previously[5] found that cinemas in the West End (i.e. Central London) are likely to exert some competitive constraint on cinemas in Chelsea, Fulham and Hammersmith (3.5, 3.6 and 5.7 miles from Leicester Square respectively) and that although proximity to the cinema is a key factor that customers take into account, their choice will be based on a range of factors including the facilities on offer. In the Terra Firma/UCI decision, the OFT noted that the prevalence of other modes of transport and the more diverse nature of 'West End' audiences make isochrone analysis a less reliable proxy in relation to Central London. CineWorld has said that it considers that this applies to both Central London and other Greater London cinemas.

21. CineWorld has submitted that in Greater London (as well as Central London) a 20 minute drive time is generally not appropriate because of a number of factors, and suggests that two key issues need to be considered. Firstly, the nature of competition in London and secondly, the size of cinemas competing with CineWorld, Wood Green and Showcase, Wood Green. To help evidence the consideration of the relevant geographic market, CineWorld carried out a consumer survey over three days, Friday 25 to Sunday 27 January 2008, of cinema-goers at the CineWorld Wood Green cinema (the CineWorld survey). The outcome of that survey and the arguments put by CineWorld to the OFT are discussed below.

22. Whilst the OFT considered this argument carefully, the evidence set out below suggests that isochrone analysis remains a viable proxy for cinemas outside Central London.

23. CineWorld submits that the levels of infrastructure, population density and patterns of consumer behaviour differ in London from the conditions applicable in smaller urban centres or in rural areas. CineWorld considers that drive times cannot be applied in the same way in London as in other areas of the UK due to the availability and use of public transport systems,

[4] Ibid, paragraph 5.34
[5] Blackstone/ UGC

consumer habits, typical distances for travel to work and for leisure activities in London and structural matters, such as traffic conditions.

24. CineWorld notes that cinema-goers in London are less likely to drive to a cinema than in other regions and therefore exhibitors must assess the local infrastructure to determine the ease of travel to a particular cinema. The CineWorld survey found that [ ] per cent of people surveyed had taken public transport or walked to the CineWorld Wood Green cinema. Also CineWorld commented that the typically longer travel times between home and place of work within London mean that the population is more likely to visit a cinema located near their workplace. However, we have received no evidence to support this view.

25. Furthermore, CineWorld argues that London has a number of entertainment areas whose catchment area is larger than its local population, such as the West End, Islington, Fulham and Docklands.

26. The CineWorld survey found that the average journey time of those surveyed was [ ] minutes. However, as the majority of those surveyed used methods of travel, either walking or travelling by bus, that are slower than driving a car, it would not be inappropriate to consider a shorter equivalent drive time, we therefore do not consider that the entertainment areas listed in paragraph 25 are considered an effective alternative by CineWorld Wood Green customers.

27. The survey evidence on average travel times and the frequency with which different modes of transport are used for this journey indicates that the 20 minute drive time isochrone with a 30 minute drive time isochrone as a sensitivity check, as used in previous OFT and CC cases, would not be inappropriate in this case.

28. CineWorld contended that cinemas in Central London compete with the Showcase business such that the 20 minute drive time isochrone is inadequate to capture competitive constraints from Central London cinemas. Wood Green is on the Piccadilly line of the London Underground and as such has a direct route to Leicester Square. According to Transport for London (TfL) the average journey time from Wood Green underground station to Leicester Square underground station is 21 minutes.[6] However, this takes no account of other factors which might be part of the 'generalised cost' of travel such as distance/time to the tube station and waiting periods. In addition, the results of the customer survey indicated that about [ ] per cent of people surveyed by CineWorld travelled there by tube. The highest proportion ([ ] per cent) travelled by bus, and according to Transport for London, a bus journey from Wood Green to Leicester Square would take over an hour. Furthermore, the survey results indicated

[6] www.tfl.gov.uk

that few customers - only [ ] out of [ ] - considered a West End cinema as their next best alternative to the CineWorld Wood Green.

29. One third party local competitor commented that while there would always be a degree of competition with West End cinemas, they believed that if they increased their prices, customers would not switch to a cinema in Central London because the Central London cinemas would always be more expensive.

30. Another third party told us that the closer a cinema was to the West End, the greater the extent to which it would compete with West End cinemas. However, it noted that the cinemas in the 20 and 30 minute primary isochrones drawn around the Wood Green cinemas mainly serve their immediate catchment areas. It did go on to say that people working in the West End may sometimes prefer to stay in the West End for the evening. However, we received no evidence as to how significant this factor may be (since the survey was carried out over a weekend it might not have caught this effect).

31. Two other third party competitors agreed that the cinemas within the primary isochrones do not compete with cinemas in Central London. One noted that cinemas in the West End and Leicester Square provide a significantly different offering, as they usually have larger screens and host film premieres. The other commented that prices in Central London would be higher and the time taken to travel and the cost of travel would mean that the cinemas within the primary isochrones do not compete with Central London cinemas.

32. The OFT also considered whether the relevant geographic scope should be construed more narrowly than a 20 minute drive time isochrone, i.e. the Wood Green area only, as the CineWorld survey results indicated a high diversion ratio, [ ] per cent, between the CineWorld and Showcase cinemas in Wood Green. However a critical loss analysis indicates that given CineWorld's gross margins the critical loss for a 10 per cent price increase is [ ] per cent. Since the survey showed that 33 per cent of customers would have gone to cinemas outside the narrow area of Wood Green, this suggests that the relevant geographic scope could be wider than Wood Green.

Conclusion

33. Overall, on the basis of the survey and third party evidence, it is considered appropriate to assess the transaction on a national and local basis. At the local level, having carefully considered CineWorld's arguments, it is considered that the geographic market, whilst wider than Wood Green, is not as wide as to include Central London cinemas as CineWorld has suggested. The survey evidence suggests that, as with previous cinema

merger cases, a 20 minute drive time isochrone with a 30 minute drive time sensitivity check is not an unreasonable proxy to apply.

HORIZONTAL ISSUES

National Issues

34. Nationally, the addition of the Showcase Wood Green cinema to the CineWorld stable would increase CineWorld's market share by [0-5] per cent to [15-20] per cent (based on number of screens) or by [0-5] per cent to [20-25] per cent (based on number of seats). Given the small increments and the presence of the other national cinema operators there are no concerns at the national level.

Local Issues

35. In the 20 minute drive time isochrone around the Showcase Wood Green there are currently seven cinemas belonging to five companies – CineWorld (two cinemas), Showcase, Odeon (two cinemas), Vue and The Phoenix. Previously, to calculate the reduction in fascia, the OFT has considered the size of cinema that would provide effective competition to a multiplex cinema, such as the CineWorld and Showcase cinemas in Wood Green. The OFT has concluded in previous cases that a small cinema would provide only a limited competitive constraint on a multiplex given the limited number of films able to be shown at the smaller cinema. Past decisions have considered cinemas with at least three screens and about 700 seats as effective competitors. However, as this case involves the acquisition of only one cinema, the OFT has been able to consider the competitiveness of the other cinemas in the 20 minute drive time on a case by case basis without having to eliminate all smaller cinemas through the application of this rule of thumb.

36. Bearing this in mind, the OFT carefully considered whether The Phoenix Cinema in East Finchley can be considered an effective competitor. Given its size, 1 screen and 308 seats, and the nature of its film offering, which is mainly Art house, independent and foreign language films, it was concluded that The Phoenix does not provide an effective constraint on the parties. On this basis, there is a reduction in fascia from four to three in the 20 minute isochrone.

37. Even if the isochrone is flexed to 30 minutes, which brings in a further four independent cinemas, there would still be a reduction from four to three because, for similar reasons, The Rio at Dalston, Screen on the Green at Islington, Screen on the Hill at Belsize Park and the Everyman at

Hampstead are not considered to be effective competitors to the CineWorld and Showcase cinemas.[7]

38. Within the 20 minute isochrone, CineWorld (including its cinema in Enfield) and Showcase Wood Green combined would have an estimated market share of [60-65] per cent (increment [10-15] per cent) when measured using number of screens and [60-65] per cent (increment [15-20] per cent) when measured by number of seats. There are two other fascia present within the isochrone, Odeon and Vue. Odeon have two cinemas, while Vue has one. After the merging parties, the next largest competitor in the 20 minute isochrone is Odeon with a market share of [20-25] per cent when measured by both the number of screens and the number of seats, while Vue has a market share of [15-20] per cent when measured by number of screens and [15-20] per cent when measured by number of seats.

39. CineWorld submitted that the CineWorld Cinema in Enfield in the primary 20 minute isochrone does not compete with the CineWorld cinema in Wood Green and should therefore be omitted. This is because, according to CineWorld, London cinema-goers do not typically travel by car and so are reliant on public transport and the transport links between Enfield and Wood Green are poor. While the survey results did show that the majority of customers surveyed travelled by public transport, a significant percentage, [ ] per cent, travelled by car. If the Enfield CineWorld were to be excluded the parties would still have a combined market share of [45-50] per cent (increment [15-20] per cent) when measured by screens and some [40-45] per cent (increment [20-25] per cent) by seats. In effect, removing CineWorld Enfield from the isochrone increases the relative size and significance of the Showcase in Wood Green from [10-15] per cent to [15-20] per cent by screens and [15-20] per cent to [20-25] per cent by seats.

40. CineWorld have submitted that the competitive constraint exercised by the two cinemas in Wood Green on each other is limited, despite the high market shares and their proximity, within about 200 metres, of each other. CineWorld has said that the two cinemas attract a different audience profile due to the differing films on offer at the cinemas. CineWorld Wood Green specialises in Bollywood, Turkish and Tamil film products. In 2006 over [ ] per cent of CineWorld Wood Green box office receipts were attributable to films made by and for Asian audiences (Bollywood films). In addition, a further [ ] per cent of the gross box office receipts in that period were attributable to Turkish films. By contrast, Showcase exhibits purely mainstream/blockbuster films.

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[7] These cinemas were not considered to be effective competitors because of their size (The Rio, Screen on the Hill and Screen on the Green have 1 screen and the Everyman has 2). Further, in the survey results neither The Screen on the Green nor The Everyman were mentioned as an alternative cinema to CineWorld while The Rio was only mentioned by 2 customers.

41. However, the CineWorld survey results show that, over the three day period, 25 to 27 January, while the film with the most admissions was a Turkish language film, overall admission by film genre shows that approximately [ ] per cent of those surveyed (i.e. those attending CineWorld Wood Green) watched a mainstream Hollywood film.

42. Further, the survey results show that, had the CineWorld in Wood Green been closed, [ ] per cent ([ ]) of those surveyed would have visited an alternative cinema, and of those [ ] customers, [ ] said they would visit a Showcase cinema[8] resulting in a high diversion ratio of [ ] per cent. This result shows that the Wood Green Showcase is the Wood Green CineWorld's closest competitor.

43. Overall, given that the merger would result in CineWorld having a market share of [60-65] per cent (or [45-50] per cent if CineWorld Enfield were excluded) in the 20 minute primary isochrone, a reduction in the number of fascias within the 20 minute isochrone from four to three, and the fact that the diversion ratio from CineWorld Wood Green to Wood Green Showcase is very high, the OFT considers that, absent other factors, the merger would raise significant unilateral effects concerns, such as higher prices, a reduced incentive to maintain the quality of the offer at the Wood Green cinemas, and a reduction in choice for consumers in Wood Green and the surrounding area.

44. The main concern of third party customers was the likely increase in price of cinema tickets should the transaction go ahead. The OFT carried out a profitability analysis using gross margins data, attendance figures and revenue data provided by CineWorld and the diversion ratio between CineWorld and Showcase Wood Green as indicated by the CineWorld survey. Given the high diversion ration between the parties and CineWorld's gross margins which are high, the analysis shows that the increase in revenue from raising prices by 10 per cent would be greater than the revenue lost by customers' switching to an alternative cinema. Therefore, from the evidence available, it is clear that a 10 per cent price increase would be profitable.

Barriers to entry and expansion

45. In previous OFT and CC decisions[9], the OFT has noted that although there have been significant numbers of new cinemas built and several new

[8] Given that the next closest Showcase cinema is in Newham Essex (some13 miles from the Showcase in Wood Green), it is reasonable to assume that a very large proportion of these respondents were referring to Showcase Wood Green.

[9] Terra Firma/UCI, Blackstone/UGC and Vue/A3. Note, in Vue/A3, the CC concluded that it did not expect new entry (or the threat of it) to constrain the Basingstoke market.

groups have entered the exhibition sector in the last decade, barriers to entry tend to vary by locality.

46. CineWorld has submitted that a new entrant could enter the market in two ways. Firstly, by entering into a deal with a property developer to build a new cinema and secondly, by acquiring a lease of a property. It is estimated by CineWorld that the first option would cost approximately [ ] and it would take 4 to 5 years to recover with a 20 per cent occupancy level. The second option would cost at least [ ], with the operator benefiting from economies of scale as the circuit grows. CineWorld considers that this start up cost is the key barrier to entry.

47. However, one third party competitor believed that it would be extremely difficult for a new entrant to enter this market since start up costs would vary significantly between £3-20 million, with no guarantee of recovering these costs. Another third party stated that it would cost approximately £5 million to build a typical10 screen cinema. However, it added that a high proportion of new cinemas are built by developers and are then leased to cinema operators. This limits the capital investment needed from the exhibitor to the additional internal fitting out of the cinema. The time frame for opening a new cinema, therefore, could be 2-3 years for a typical cinema forming part of a larger development. This timeframe excludes the time taken to obtain planning permission.

48. Third parties confirmed that there has been no new entry in the primary 20 or 30 minute isochrones in the last five years. However, CineWorld has submitted that a developer is intending to build an exhibition, leisure and entertainment complex at the Alexandra Palace site in Wood Green. It is believed by CineWorld that the cinema would be over 50,000 square feet and contain 12 to 14 screens. However, while the OFT has been able to confirm that a developer has drawn up initial draft plans for the site that include a cinema, it cannot be guaranteed that the complex will eventually be built or built in this form. Further, even if the final plans include a cinema, completion has been estimated to take at least three years.

49. We also understand from a third party that another new cinema is being planned for the Westfield Stratford City development. This would appear to be within the 30 minute isochrone (approximately 26 minutes from Wood Green). However, we do not have any firm evidence of when this cinema is likely to open or who the likely operator will be, although some third parties have told the OFT that the operator will be CineWorld.

50. Finally, the OFT received no evidence to suggest that expansion or repositioning by other fascia within the isochrone would resolve any concerns.

51. In light of the above, the OFT does not consider that entry (or expansion) within the 20 or 30 minute isochrones will be timely, likely and sufficient to offset any unilateral effects concerns arising from the merger.

THIRD PARTY VIEWS

52. The OFT received a number of unsolicited complaints about the transaction from Wood Green cinema-goers. Their main concerns were the potential loss of an alternative cinema venue and concerns about potential price increases that might occur post merger. Third parties pointed to the fact that the basic cost of a ticket for adults at the CineWorld Wood Green is £7.00, CineWorld's cheapest London ticket price, with the Showcase price being about the same, which they ascribed to the fact that there is competition between the two Wood Green cinemas which act to constrain each other.

ASSESSMENT

53. On careful analysis, the OFT believes that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

54. The parties overlap in the supply of film exhibition services.

55. The OFT's approach to geographic market definition follows previous cinema merger cases considered by the OFT and the CC. At local level, while CineWorld argued that cinemas in Central London should be included in the market analysis, on the basis of the CineWorld survey and third party evidence, the OFT considered that the geographic market, while wider than Wood Green, is not as wide as to include Central London cinemas. The survey evidence suggests that, as with previous cinema merger cases, the area of North London covered by a 20 minute drive time isochrone centred on the target cinema, with a 30 minute drive time sensitivity check, is the best-available proxy in the circumstances.

56. In the twenty-minute primary isochrone, the transaction would reduce the number of cinema fascia from four to three; the other fascias are Vue and Odeon. In this area, the parties would have an estimated market share of [60-65] per cent (increment [10-15] per cent) by number of screens and [60-65] per cent (increment [15-20] per cent) by number of seats (including the CineWorld at Enfield; the combined share ([40-50] per cent) and increment ([15-25] per cent) is still significant if excluded. These concentration data raise prima facie unilateral effects concerns, consistent with previous cases.

57. Consistent with these results, the OFT received a number of unsolicited third party complaints from local cinema-goers. The main concern of third

party customers was the likely increase in price of cinema tickets should the transaction go ahead. These concerns were validated by economic evidence. The CineWorld survey results indicated a high diversion ratio from the Wood Green CineWorld to the Wood Green Showcase ([ ] per cent). This result shows that the Wood Green Showcase is the Wood Green CineWorld's closest competitor by some margin. Given the high diversion ration between the parties and the high gross margins achieved, economic analysis carried out by the OFT shows that the increase in revenue from raising prices by 10 per cent would be greater than the revenue lost by customers' switching to an alternative cinema. Therefore, from the evidence available, it is clear that a 10 per cent post-merger price increase on ticket sales would be profitable. Non-price pressure on each merging party would also be reduced by the merger.

58. For the reasons given in more detail above, neither entry nor expansion will be timely, likely or sufficient to resolve these concerns.

59. Consequently, the OFT believes that it is the case that the merger may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

EXCEPTIONS TO THE DUTY TO REFER

60. The OFT's duty to refer under section 33(1) is subject to the application of certain discretionary exceptions in section 33, of which two might potentially have been relevant here.

61. The first is the 'markets of insufficient importance' or *de minimis* discretion: section 33(2) provides that 'the OFT may decide not to make a reference under this section if it believes that (a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission ...'.

62. CineWorld did not argue that the de minimis exception should be applied. However, as the use of this exception is at the discretion of the OFT, it is not necessary for a party to plead the exception in order to benefit from it in an appropriate case. The OFT's revised Guidance on the use of the markets of insufficient importance states that '[b]efore using this discretion the OFT will exercise its judgment in considering each case on its individual facts.' The revised Guidance notes that '[t]he OFT is generally likely to consider the affected market(s) to be of sufficient importance to justify a reference where their annual value in the UK, in aggregate, is more than £10 million.' In the current case, the estimated total revenue for the seven cinemas within the 20 minute isochrone in 2007 is over £15 million and therefore presumptively outside the scope of the *de minimis* provision. The OFT considers there is no reason arising from the facts of this case why

the scope of the *de minimis* exception should be extended to apply in the circumstances of this case.

63. The second exception to the duty to refer is the undertakings in lieu discretion, but the parties did not offer any such undertakings.

DECISION

64. This merger will therefore be referred to the Competition Commission under section 33(1) of the Act.