

Completed acquisition by JCDecaux UK Limited of rights in
Concourse Initiatives Limited and Media Initiatives Limited

ME/5303/11

The OFT's decision on reference under section 22(1) given on 19 March 2012.
Full text of decision published 23 March 2012.

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

PARTIES

1. **JCDecaux UK Limited ('JCD')**, a wholly owned subsidiary of JCDecaux Europe Holdings SAS, is active in the sale of outdoor advertising space. JCD acquires the right to advertise in various out-of-home environments and sells that space to media buyers and advertisers. JCD generated turnover in the United Kingdom ('UK') of approximately £250 million for the year ending 31 December 2010.
2. **Concourse Initiatives Limited and Media Initiatives Limited** (together '**Concourse**') is active in the sale of experiential advertising space to media buyers and advertisers. Concourse generated turnover in the UK of approximately £3 million for the year ending 31 March 2011.

TRANSACTION

3. On 11 November 2011, JCD entered into an [] Agreement with the owner of Concourse. The [] contained in the [] Agreement have not been exercised to date. However, the [] Agreement, which took effect from 11 November 2011, provided JCD with certain rights in Concourse. It is these rights that form the subject of the OFT's investigation in this case.
4. The OFT commenced its own investigation into this matter with the parties providing a satisfactory submission on 25 January 2012. The (extended)

statutory deadline is 30 March 2012 with an administrative deadline of 21 March 2012.

JURISDICTION

Enterprises ceasing to be distinct

5. The parties stated that the acquisition of Concourse has not yet completed as the [] contained in the [] Agreement cannot be exercised prior to mid-November 2012. Furthermore, the parties stated that, as JCD does not currently hold any shares or voting rights in Concourse, it has neither a controlling interest nor de facto control of Concourse. The parties also stated that there is no presumption of material influence arising in this case.
6. The [] Agreement contains a number of rights given to JCD as of 11 November 2011 over the running of Concourse, as well as restrictions on Concourse's autonomy to carry out its business activities. In particular, JCD has the right to appoint, and has appointed, two of the three directors to the board of Concourse. These directors are JCD's UK Finance Director and UK Management Director, and each director has one vote. The parties stated the JCD directors are primarily involved in ensuring compliance with JCD's internal policies and financial reporting. However, the parties also stated that JCD will take a more 'hands-on' approach to Concourse business practices once the OFT review is complete, and that the role of the JCD directors in relation to the commercial strategy of Concourse may be reviewed in the course of 2012 albeit not before the completion of the OFT's assessment.
7. The [] Agreement contains the following restrictive clauses:
 - Concourse will not enter into any contracts in excess of [] unless approved by the board and signed-off by at least one JCD director.
 - Concourse is to be managed in a manner consistent with JCD's policies on ethics and employment.

- Concourse needs the approval of JCD prior to expanding the remit of its business activities beyond those already agreed between the parties.
8. The [] Agreement notes that Concourse is to be maintained as a separate reporting unit within the JCD Group. In JCD's press release announcing the [] Agreement, the owner of Concourse is quoted as saying that Concourse will operate as a separate company under JCD's control.¹ JCD also informed the OFT that Concourse is managing its experiential advertising contract with [] on its behalf, where JCD remains the principal to the contract.
9. The OFT has therefore considered whether the rights provided to JCD in the [] Agreement, in the context of the arrangements entered into by the parties, has resulted in JCD acquiring material influence over Concourse. As set out in paragraph 3.15 of the OFT Jurisdictional and Procedural Guidance,² the ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation. The OFT will focus on the acquirer's ability materially to influence the management of the target business, and in particular, its competitive conduct, its strategic direction and its ability to define and achieve its commercial objectives. As such, the OFT must analyse each case on its own merits and all relevant factors must be taken into account.
10. The OFT's guidance is clear that 'it is possible that board representation alone (that is, without any shareholding) may, in certain circumstances, confer material influence'.³ In this situation, the OFT notes that:
- the presence of two senior JCD directors on the board of Concourse (each with a vote), where there are only three members of the board, is

¹ www.jcdecaux.co.uk/news/index.php?id=361, last accessed 01 March 2012.

² OFT527, June 2009.

³ *Ibid*, paragraph 3.23. The guidance also states that 'whilst the vast majority of board appointments, in particular non-executive appointments, will not raise substantive concerns of the type targeted by the Act, the OFT would be concerned to investigate under the Act cross-directorships between competing businesses where such representation raised the possibility that one party could in fact have material influence over a competitor and thereby raise the prospect that the duty to refer could be met' (paragraph 3.24).

a significant factor as it gives JCD the majority of voting rights on the board, and

- Concourse has specifically covenanted not to expand the remit of its business activities or enter into a commercial agreement for longer than [] without the consent of a JCD director.

11. Both of these factors indicate that JCD has already acquired, or at least may already have acquired, the ability materially to influence the commercial behaviour of Concourse.
12. The OFT is also mindful of the fact that JCD has acquired a [] over Concourse according to the [] Agreement. Section 27(3) of the Enterprise Act 2002 (the 'Act') states that, for the purposes of determining the time at which any two enterprises cease to be distinct enterprises, no account shall be taken of any option or other conditional right until such option is exercised or the condition satisfied. However, in line with the interpretation of the Monopolies and Mergers Commission in *Stora/Swedish Match/Gillette*,⁴ the OFT considers that section 27(3) – which is concerned with the **time** when enterprises cease to be distinct – does not mean that the existence of such option rights should be disregarded for the purposes of determining whether material influence or de facto control are present.⁵
13. The OFT considers that the existence of the [] in the [] Agreement, and other factors influencing the ongoing commercial relationship between the parties, should be taken into account in assessing whether JCD has obtained some degree of control over Concourse.
14. Taking all the factors discussed above into consideration, the OFT considers that it is or may be the case that JCD has already acquired

⁴ MMC Report March 1991. The MMC addressed the interpretation of sections 66(4) and 66(5) of the Fair Trading Act 1973 ('FTA') (which are similar to those of section 27(2) and 27(3) of the Act, respectively). The MMC considered that section 66(5) should be regarded as an interpretation aid to section 66(4), thus making it clear that conditional rights should not be treated as been exercised at the time they are entered into. The MMC stated that section 66(4) of the FTA was concerned as to the effect of that part of an arrangement that had not been completed and to the question whether, on effect being given to, or on completion of, that part of the arrangements, the result would be that the enterprises ceased to be distinct. It was not related to the question of what the effect is of the parts of the arrangement that have already taken effect.

⁵ *Ibid*, paragraph 7.57.

material influence over Concourse such that JCD and Concourse have ceased to be distinct for the purposes of section 26(3) of the Act.

Turnover/Share of Supply Test

15. Concourse's turnover was below £70 million for the year ending 31 March 2011 and therefore the turnover test as set out in section 23(1)(b) of the Act is not met.
16. In its previous decision, JCD/Titan Outdoor Advertising Limited, the OFT found that JCD had an estimated share of supply of between 30 and 40 per cent in the supply of outdoor advertising in the UK.⁶
17. The parties state that Concourse has a share of less than 0.5 per cent of the supply of outdoor advertising in the UK. On the basis of the above, the share of supply test as set out in section 23 of the Act is satisfied. Consequently, the OFT believes that is or may be the case that a relevant merger situation has been created.

FRAME OF REFERENCE

Background

18. Outdoor advertising is also known as out-of-home advertising. In the OFT's market study of the outdoor advertising market in the UK, it found that the outdoor advertising market consists broadly of three segments:⁷
 - Roadside, such as billboards, bus shelters and phone kiosks
 - Transport, which covers rail, airports, buses and taxis, and
 - Leisure, point of sale and retail environments, which includes supermarkets, shopping and leisure centres, bars and petrol stations.

⁶ ME/4470/10, Completed acquisition by JC Decaux UK Limited of Titan Outdoor Advertising Limited dated 5 May 2010.

⁷ OFT Market Study – Outdoor Advertising, paragraph. 2.10.

19. The OFT also found that outdoor advertising comes in a variety of formats, including: phone-box posters, four-sheet, six-sheet, 48-sheet and 96-sheet panels.⁸ According to this study, the choice of environment and format will depend on the audience targeted by the campaign.⁹
20. The study noted that outdoor advertising is provided via a long supply chain (see Figure 1 below). An advertiser typically uses a media agency to plan and buy its advertising campaign, and the media agency uses a specialist outdoor buyer for the outdoor advertising component of the campaign. The specialist outdoor buyer then purchases space from media owners who in turn have contracts with site owners to lease the sites on which to place posters.

Figure 1: Outdoor advertising supply chain



Source: OFT 1304¹⁰

21. The parties can be described as media owners who overlap in the sale of experiential advertising space (see below) to advertisers, media agencies and specialist outdoor buyers. JCD is active in the sale of outdoor advertising, including the sale of experiential advertising space, whilst Concourse is only active in the sale of experiential advertising space, which is a type of outdoor advertising activity.
22. Experiential advertising is focused on 'two-way' or 'face-to-face' communications with potential customers rather than traditional 'one-way'

⁸ *Ibid*, paragraph, 2.11.

⁹ *Ibid*, paragraph, 2.12.

¹⁰ *Ibid*, paragraph, 1.3.

images. Experiential advertising targets consumers outside the home in places such as transport hubs, shopping centres, and other locations that attract a large footfall of consumers (such as summer festivals, major shows or exhibitions and public venues).

23. Neither Concourse nor JCD provide experiential advertising themselves. Their activities relate only to the sale of space for such advertising to take place.

Product Scope

24. JCD stated that the sale of experiential advertising space could be considered as part of the wider market for the sale of outdoor advertising. However, JCD highlighted certain characteristics of the experiential segment, from both the demand and supply-side, which may make it more appropriate to be considered a distinct market.
25. From the demand side, JCD stated that the experiential segment offers an interactive means of attracting consumers. For example, if an advertiser concludes that its marketing objectives are best met by offering free samples of its new products or an opportunity to view or try out a physical product (for example, a car) or to discuss a service (for example, a mobile phone contract) then billboards or six-sheet advertising may complement, but do not represent a substitute for, the space needed for the experiential advertising.
26. From the supply side, JCD stated that providers of experiential advertising space are generally specialist companies that do not have significant activities in other types of outdoor advertising. JCD also stated that the resources required to sell experiential advertising space are different from other forms of outdoor advertising space. In particular, the supplier is not required to invest in semi-permanent hardware such as billboards, panels or screens, and all that is required are contracts with landlords to sell their space for experiential advertising use. JCD stated that the experiential advertisers provide the necessary infrastructure and staff that comprises the experiential advertising campaign.
27. According to JCD, the sales structures of the experiential advertising segment are also different from other forms of outdoor advertising in that only approximately 10 to 15 per cent of experiential advertising sales are

made to the traditional outdoor media buyers such as Posterscope and Kinetic. This is in contrast to outdoor advertising, where approximately 90 per cent of sales are made to the traditional outdoor media buyers.

28. JCD also stated that it does not provide any experiential advertising space to customers on a stand-alone basis and that all of its experiential advertising sales are in the context of broader contracts for other forms of outdoor advertising space. The exception to this is the operation by JCD of the [] experiential contract.¹¹
29. The OFT did not consider the experiential advertising segment within the context of its market study on outdoor advertising or in its previous decision concerning outdoor advertising in JCD/Titan.¹²
30. The majority of third parties identified different leading providers of experiential and outdoor advertising space. Third parties also identified Space and People, Brand Space, and Concourse as the leading suppliers of experiential advertising space in the UK, while JCD, Clear Channel, CBS Outdoor and Primesight were identified as the leading suppliers of all outdoor advertising space in the UK.
31. The OFT was informed by third parties that the sale of experiential advertising space is not a core offering for some outdoor advertising providers, and that this element, where required, is sub-contracted to specialist experiential advertising space providers.
32. Broadly, third party views supported the suggestion that experiential advertising is a separate market segment from all outdoor advertising.

Geographic Scope

33. JCD submitted that the market for the sale of experiential advertising space is at least national, and that a local presence is not required in order to secure contracts to lease experiential space. JCD also indicated that, although most companies active in the UK are primarily focused on experiential advertising space in the UK, it is possible for a UK provider to

¹¹ As noted above, this is currently being operated by Concourse on behalf of JCD.

¹² *Supra*, fn 6.

compete for rights to sell space for a company located in another European jurisdiction and some providers (notably Space and People, which is active in Germany) have material non-UK businesses.

34. There were some mixed views from third parties in relation to the precise geographic scope but broadly they supported the suggestion that the market would be national.
35. Aspects of the market that may favour a local approach would include the fact that small customers may involve local firms seeking to advertise their products within the local area. But given that the majority of advertising agents are national, and those noted to be the main customers of the parties operate on a national level, the OFT did not consider it appropriate or necessary in this case to narrow the geographic scope to the local level.

Conclusion on the relevant frame of reference

36. As the OFT has found that the merger will not raise any competition concerns in the narrowest relevant market segment, that being the sale of experiential advertising space, it believes there is no need to come to a conclusion on whether the sale of experiential advertising space is part of the overall outdoor advertising market or a distinct market in itself.
37. On a cautious basis, the OFT has assessed the competitive effects of the merger in the context of the sale of experiential advertising space at a national level.

HORIZONTAL ISSUES

Share of Supply

38. JCD submitted that there is very little specific information available on the experiential advertising segment that would allow for precise estimates of the parties' share of supply to be provided. JCD indicated that there are no independent figures or estimates published that could be used to approximate shares of supply. Also, there is very limited financial information available on the companies that are active in this segment, partly because these companies do not quote their turnover attributable to the sale of experiential advertising space.

39. However, JCD provided a conservative estimation for the purpose of this review as set out in Table 1 below. JCD estimated that the total value of the experiential advertising segment in the UK in 2011 was approximately £40 million.

Table 1: Shares of supply of experiential advertising space in the UK (2011)

	Turnover, £m	Share of supply (per cent)
JCD	[0-5]	[0-5]
Concourse	[0-5]	[5-10]
Combined	[0-5]	[10-15]
Brand Space	[15-20]	[40-45]
Space and People	[5-10]	[15-20]
Others	[10-15]	[25-30]
Total	40	100

Source: Based on the parties' estimates.

40. JCD indicated that Brand Space has a large presence in airports, shopping centres, and sport and leisure venues across the UK. Its overall turnover, according to figures on its website, is estimated at £23.5 million¹³ although it is noted that JCD estimated, on a conservative basis, its turnover to be approximately £[15-20] million.

41. Space and People was identified by JCD as the second largest supplier of experiential advertising space in the UK. It was considered to have operations in the UK and Germany, including a number of exclusive contracts for the provision of experiential advertising space in major shopping centres. JCD estimated its UK turnover to be £[five-10] million.

42. Other providers identified by JCD, and considered to be either around the same size, or perhaps slightly smaller than the post-merged entity, included:

¹³ See online media article at: http://menmedia.co.uk/manchestereveningnews/news/business/media/s/1426907_brandspace-group-appoints-paul-soanes-chief-executive last accessed 19 March 2012.

- Limited Space, which focuses on premium UK shopping centres.¹⁴ While JCD was unable to provide estimates of its UK turnover, it believed that it has a similar turnover to Concourse, and
 - Peel Advertising, which was identified as providing a wide range of media products at prestigious locations (such as The Trafford Centre in Manchester), as well as retail parks and other outdoor locations throughout the UK.¹⁵
43. JCD identified self-supply, that being, the sale of experiential advertising space by space owners directly to media buyers and advertisers, as a credible competitive constraint. Third party responses confirmed that self-supply is a possible alternative source of supply of experiential advertising space.
44. Although third parties did not provide quantitative estimates to corroborate JCD's share of supply figures, there was a general suggestion from third parties in the OFT's investigation that Concourse is small. For example, one customer indicated that Concourse is quite niche in that it just covers space in railway stations and that other suppliers, like Brand Space, offer a myriad of spaces in different locations.¹⁶
45. Another third party also indicated that it was difficult to estimate market shares for the experiential advertising segment, but pointed out that Brand Space and Space and People were the largest providers of experiential advertising space in the UK, with Concourse being smaller in comparison.
46. Information provided by third parties to the OFT also indicated that, prior to the acquisition, JCD was not significantly involved in the sale of experiential advertising space. This tended to confirm JCD's submission that it had a relatively small share of supply pre-merger.

¹⁴ For more on Limited Space, see: www.limited-space.com/index.html.

¹⁵ For more on Peel Advertising, see: www.peel.co.uk/advertising/default.aspx.

¹⁶ Brand Space has the exclusive experiential media rights for Covent Garden London and City Point - both high footfall, iconic London destinations.

Closeness of competition

47. The OFT received no strong evidence during its investigation suggesting that the parties were each other's closest rivals. JCD stated that it focuses on providing other forms of outdoor advertising space such as street advertising, billboard and digital advertising space and that it did not ordinarily compete for experiential advertising contracts on a stand-alone basis. The exception to this was when JCD acquired certain assets of Titan Outdoor Advertising Ltd in January 2010,¹⁷ which included the London Underground experiential advertising contract.
48. A summary of the information received from third parties is as follows:
- the experiential advertising space offered by JCD and Concourse would be considered complementary rather than substitutable as they offer spaces in different locations
 - there are other media owners and landlords active in the UK from whom experiential advertising space is purchased, and multiple suppliers are often used, and
 - there was no evidence of customers switching between the parties.
49. In light of the above, the OFT believes that there was no strong evidence of direct competition between JCD and Concourse prior to the transaction.
50. In light of the small increment in the shares of supply post-transaction, the fact that the evidence available to the OFT indicates that the parties were not close competitors, and third party information on alternative experiential advertising space providers active in the market, the OFT believes that the post-merged entity will continue to face sufficient competitive constraint.

¹⁷ *Supra*, fn 10.

Barriers to entry and expansion

Barriers to entry

51. JCD submitted that establishing a business in the experiential advertising segment does not require specialist staff or significant infrastructure, and that start-up costs are low. JCD indicated that in order to provide experiential advertising space, parties will generally only need a contract with a landlord and a relatively small number of staff to negotiate arrangements with customers (Concourse has eight full-time staff). JCD also submitted that, as the operating costs of providing experiential advertising space are low, a small number of contracts will provide sufficient revenue for a small business, and would make entry viable.
52. JCD indicated that while companies wishing to pitch for large contracts will be expected to demonstrate a certain level of financial stability, this could be addressed through partnership with a financial investor that would provide the necessary guarantees. JCD stated that this was the approach adopted by Concourse in its original (successful) pitch for the Network Rail contract in 1999.
53. JCD also indicated that there are a large number of smaller scale opportunities (for example, at local shopping malls) that would not impose these requirements and could provide an acceptable platform for a new entrant.
54. The majority of third party responses did not suggest that there were long-term contracting issues in the experiential advertising segment that may be considered problematic in terms of a customer's ability to switch.¹⁸

Expansion

55. Information provided to the OFT by third parties is suggestive of strong potential for expansion by existing outdoor advertising space providers into the sale of experiential advertising space. There are large players in the market with significant capacity and pre-existing relationships with landlords and customers that would support this. It appears reasonable to

¹⁸ JCD indicated that contracts are regularly tendered, most do not exceed a five year term and, in a growing market, hundreds of contracts are made available across the market annually.

consider that these large players can easily expand into the experiential advertising segment.

Conclusion on Barriers to Entry and Expansion

56. In light of the above, there is no evidence to suggest that barriers to entry and expansion are strong in the experiential advertising segment. However, in light of the OFT's views on the extent of pre-existing competition between the parties, the OFT has not had to conclude on the whether any entry or expansion into the sale of experiential advertising space would be timely, likely and sufficient.

VERTICAL ISSUES

57. As discussed above, the sale of experiential advertising space is not a core offering for all outdoor advertising providers. Where experiential advertising space is require as part of a larger outdoor advertising contract, specialist experiential advertising providers, such as Concourse, may be sub-contracted. During the OFT's investigation, a concern was raised that Concourse's role as a sub-contractor to other outdoor advertising providers may be limited or stopped thus foreclosing the supply of experiential advertising space to certain customers. However, this concern was not substantiated by any strong evidence.

58. In light of the small increment in JCD's share of supply post-merger in the sale of experiential advertising space, and the presence of credible alternative providers, the OFT did not consider that the merger would provide JCD with the ability or incentive to foreclose access to experiential advertising space.

THIRD PARTY VIEWS

59. Responses were received from 10 third parties comprising both customers and competitors of the parties. The vast majority of third parties had no concerns regarding the acquisition. Two concerns were raised, one in relation to the effect of the merger on the wider outdoor advertising market and the second, as described above, in relation to vertical foreclosure.

60. The issue regarding vertical foreclosure is addressed above. Regarding the third party concern in the outdoor advertising market, the OFT notes that

there is a minimal increment in the parties' share of supply post-merger. JCD's pre-merger share of supply of outdoor advertising in the UK, to include experiential advertising, is between 30 and 40 per cent. As stated previously, Concourse is only active in the supply of experiential advertising space, a type of outdoor advertising. As experiential advertising could be considered a segment within the overall outdoor advertising market, Concourse would have a share of supply of less than 0.5 per cent according to the parties.

ASSESSMENT

61. The [] Agreement contains a number of rights given to JCD over the running of Concourse, as well as restrictions on Concourse's autonomy to carry out its business activities. In particular, JCD has the right to appoint, and has appointed, two of the three directors to the board of Concourse.
62. The OFT considers that it is or may be the case that JCD has already acquired material influence over Concourse such that JCD and Concourse have ceased to be distinct for the purposes of section 26(3) of the Act.
63. The parties overlap in the sale of experiential advertising space in the UK. The sale of experiential advertising is estimated to be valued at about £40 million and could be considered a specialist segment of the overall outdoor advertising market valued at £880 million.¹⁹
64. The combined share of supply and increment in relation to the sale of experiential advertising space are small, estimated to be [10-15] per cent and [0-5] per cent respectively. There are several existing and potential rivals that are materially larger than the parties combined, and the evidence before the OFT suggests that the parties were not each other's closest rival prior to the merger. There was also no evidence of strong barriers to entry or expansion.
65. The vast majority of third parties did not raise any concerns and the two concerns raised are not supported by the evidence presently before the OFT.

¹⁹ OFT Market Study – Outdoor Advertising, paragraph 1.1. The Study noted that the outdoor advertising market was valued at £880 million in 2010.

66. In light of the above, 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

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