

Anticipated acquisition by Getty Images Inc of Rex Features Limited

ME/4522/10

The OFT's decision on reference under section 33(1) given on 8 July 2010. Full text of decision published 28 July 2010.

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. **Getty Images, Inc. (Getty Images)** is an American company, wholly owned by Hellman and Freidman LLC, a private equity investor. Getty Images is primarily engaged in the licensing of editorial images to media companies and stock images to creative companies and corporate marketing departments. In addition, Getty Images also licenses stock illustrations, moving picture clips and digitised music.
2. **Rex Features Limited (Rex)** is a family owned company based in London with offices in London, New York and Los Angeles. Rex specialises in the licensing of editorial images and, in particular, celebrity and entertainment images. Rex is also engaged in the licensing of stock images. In the year ended 31 December 2009, Rex's UK turnover was around [] million.

TRANSACTION

3. On 24 April 2010, Getty Images and Rex agreed a share purchase agreement whereby Getty Images has agreed to pay [] million cash for all of Rex's issued and outstanding shares. The OFT's administrative deadline for deciding whether to refer the merger to the Competition Commission (CC) is 8 July 2010.

JURISDICTION

4. As a result of this transaction Getty Images and Rex will cease to be distinct. The UK turnover of Rex is not sufficient to meet the turnover test contained in section 23(1)(b) of the Enterprise Act 2002 (the Act). However, the OFT believes that it is or may be the case that the share of supply test set out in section 23 of the Act is satisfied, as there is evidence indicating that the parties have a combined share in the UK of more than 25 per cent in the supply of archive images. The OFT therefore 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 DEFINITION

Product scope

5. The area of overlap between the parties relates to the supply of stock and editorial images in the UK.

Stock and Editorial images

6. Stock images refer to creative images that are held in an inventory and have not been created for a particular need. They have a substantially long commercial life and require model/property releases, if they depict something in which there is a cognizable privacy or property interest, before they can be used. Stock images may be 'rights free', in which case the user has unlimited use of the image, or 'rights managed' in which case the user obtains restricted use.
7. Editorial images consist of photographs of newsworthy events and personalities produced by photographers who may be employed (by an 'images' agency such as Getty Images and Rex or a publisher) or self employed and be accredited to cover specific events and personalities/celebrities. Editorial images are typically categorised by the industry as being either: news, sport or entertainment. They are usually supplied on a time-sensitive basis - while they have current news value - and can be used in many cases without a model or property release.

8. The parties stated that stock images, as defined above, are likely to be a separate market from editorial images (see below) because newspaper and magazine publishers are unlikely to want to use an image not directly related to the story that they are writing about. In addition, in a previous case,¹ the OFT found substantial agreement among market participants that stock and editorial images constituted separate frames of reference.
9. Based on the evidence from its investigation, the OFT believes that in the market for the supply of stock images in the UK, the parties' combined market share would be no more than [20-30] per cent and the increment would be negligible. Therefore, the OFT does not consider it necessary to cover stock images in any further detail in its competitive assessment.

Editorial images – distinction between Live and Archive

10. Getty Images stated that it generally categorised (for administrative reasons) only editorial images that were created before 2000 to be 'archive' images. Getty Images explained that it had set the pre-2000 cut off when, in 2003, it was digitising and organising its images and placed those more than three years old into an 'archive'. However, given that the pre-2000 cut off had not changed since then, in effect the definition of 'live' imagery expands every year by one year (so it is now images up to 10 years old).
11. However, Rex stated that it considered images that were over six weeks old to be 'archive' images, as this captured the cycle for next-issue publications and fitted with Rex's billing cycle. One newspaper publisher argued that editorial images were only 'live' for around 48 hours and that 'archive' included all images that were older than 48 hours. A number of third parties agreed that this was a sensible time distinction.
12. The OFT does not believe it is possible, or particularly meaningful, to conclude on a single cut-off time at which point live images become archived images as there is such wide disagreement over this amongst parties in the industry. The OFT received data on estimated market shares for archive data based on Getty Images' 10-year delineation used in Getty Images' internal assessments. However, the OFT acknowledges that this

¹ OFT decision on the completed acquisition by Getty Images Inc of Digital Vision Ltd, 10 March 2006, ME/1807/05.

arbitrary cut-off will eliminate the archives of firms that are less than 10 years old. In relation to the other propositions, of 48 hours and six weeks, the OFT understands that the appropriate cut-off time depends on each customer's preferences and needs (ie reflecting each customer's publication frequency).

13. Regarding the demand side substitutability of live and archive images, the parties submitted some pricing data as evidence for the view that archive and more current pictures belong in the same relevant market. In particular the parties submitted base prices for Getty Images' sales of archive images and all other types of imagery for editorial use in the UK. However, the OFT was not able to rely heavily on this information because it was mostly based on base, rather than actual, prices and where actual prices were listed these contained wide variation in prices that hampered interpretation of the data.
14. One publisher stated that it would not consider archive images to be substitutes for contemporary (live) images of celebrities because consumers of celebrity magazines wish to see the more recent images. In addition, the same third party stated that to the extent that magazines purchase archive images, they are complementary to the 'live' images. Furthermore, another publisher stated that 'live' and 'archive' images are used for different purposes: live images are used in the editorial section, whilst archive images are more often used in the lifestyle and features section of a newspaper.
15. Notwithstanding the comments above, the OFT accepts that there will in some cases be some potential for demand side substitution for archive and live images. In particular, there may be substitution between older and more recent images of a particular celebrity depending on each customer's preferences and needs. A publisher may, for example, consider an image of the particular celebrity that is five years old to be substitutable for an image that was shot recently. However, in general, the OFT believes that archive and live images will not generally be demand substitutes.
16. Regarding supply side substitution, images of past events cannot be recreated by a photographer. In addition, the parties advised that analogue archive images must be held in a climate controlled environment and archivists are often employed to manage the archives. Therefore, the

equipment used for taking live images – cameras, lenses - is not the same as the equipment required for creating an archive.

17. Based on the evidence available to it, the OFT believes that although there is scope for some limited demand side substitution between live and archive images, there is likely to be a point in time when an image of a particular event or personality is no longer substitutable for a new image. Therefore, the OFT considered live and archive editorial images constituting separate frames of reference and consequently it has considered them separately in its competitive assessment. Furthermore, the OFT does not consider it appropriate to conclude on a specific cut off time for archive images. However it notes that this will be more likely in the region of days or weeks, depending on the requirements of the customer in question and reflecting the publication frequency of most publications.

Categorization of live editorial images based on content

18. As stated above, based on information from the parties about their own internal classification and comments from third parties, live editorial images can be further segmented based on their content, most usually into entertainment, sports and news. Agencies may produce their own images or syndicate images from smaller agencies. Rex's staff photographers have a particular specialty in entertainment related photographs. Rex also syndicates entertainment and other types of photographs.
19. From the demand side, the parties argue that substitutability is clearly limited, because customers will typically require pictures that illustrate a particular story. In addition, substitution is also limited even within a particular category (such as entertainment), because customers typically require images of a particular event or personality.
20. The parties argue that editorial images as a whole constitute the most appropriate frame of reference, given the supply-side flexibility that exists across all editorial image production and distribution generally. In particular, the parties argue that a photographer can as readily shoot a sports event as shoot a celebrity. Third parties disputed this assertion. Competitors noted that the photographic skills required for entertainment and sports are not the same. Third parties further noted that agencies active in sports, but not entertainment, would find it difficult to obtain credentials for a red carpet entertainment event. Agencies may therefore find it difficult to switch

between supplying different types of editorial images following a small but significant increase in price.

21. That said, the OFT cannot rule out that there might be some limited supply side substitution between different types of editorial images, especially for images where obtaining credentials for an event (whether it be entertainment, news or sports) is not needed and therefore any photographer can shoot at the event. However, the OFT understands that the majority of the venues at which entertainment images are taken (exclusive access events, portraiture, red carpet, royal family) require some form of press credentials.
22. Based on the evidence available to it, the OFT believes that there may be separate relevant frames for each category of live editorial images, namely entertainment, sports and news. Based on the evidence from its investigation, the OFT believes that in the market for the supply of news and sports-related editorial images in the UK, Rex's market share is negligible (below [0-10] per cent). Therefore, the OFT does not consider it necessary to cover news and sports images in any further detail in its competitive assessment.

No need to distinguish archive editorial images based on content

23. In relation to archive editorial images, the OFT understands that the considerations about whether it is appropriate to differentiate between entertainment, news and sports related archive images are more balanced.² However, given the OFT's conclusion (see paragraphs 33-38) that there is a realistic prospect of a substantial lessening of competition in the supply of archive editorial images in general, it has not been necessary to delineate between different categories of archive images.

Conclusion on product scope

24. Based on the evidence currently available, the OFT is of the view that:
 - editorial and stock images are in separate markets

² Evidence available to the OFT indicates that the parties do not categorise archive images based on their content. However, suppliers with strength in relation to a particular category of live editorial images would naturally be expected to have stronger position in the corresponding category of archive images.

- within editorial images, live and archive images constitute separate frames of reference, and
- based on the particular content, live editorial images can be further divided into entertainment-related, sports-related and/or news-related editorial images.

The OFT noted that these categories are consistent with Getty Images' internal documents in which it assesses competitors.

Geographic Scope

25. The parties' view is that the market for editorial images (live and archive) is increasingly global given the prevalence of internet distribution and the fact that there is a widespread multi-national demand for images relating to the same news, entertainment celebrities and sporting events. Nevertheless, the parties accept that there is a category of UK-centric content for which non-UK content is not a direct substitute, and may be less attractive to international audiences. In addition, the parties argued that international providers of editorial images find themselves competing, in any particular country, not only among themselves but also with a unique group of local and regional providers. Accordingly, the parties accepted the UK as a reasonable geographic frame of reference for editorial (live and archive) images.
26. No third parties raised objections to this geographic definition, although publishers were keen to note that the substitutability of one picture for another (irrespective of origin) depends on the subject and context of the image.
27. On the basis of the evidence available at that stage, the OFT cannot rule out that the geographic scope for editorial images (live and archive) is no wider than the UK.

COMPETITIVE ASSESSMENT

Archive images

Market shares

28. Getty Images argued that the most reliable measure of shares in archive images is annual sales of all editorial imagery, supporting the view that a 48-hour cut-off between live and archive images was reasonable and accordingly that every company that creates or acquires live images is also engaged in the supply of archive images. On that basis, the parties estimated their combined share for archive images as [10-20] per cent with an increment of [0-10] per cent. However, as stated above, based on the evidence available to it, the OFT did not consider it meaningful to conclude on a specific cut off time for archive images. The OFT notes that the [10-20] per cent figure quoted by the parties is for all editorial images, and that this ignores the distinction between archive and live images.
29. Furthermore, the parties provided estimated market shares for archive images measured by the size of individual agencies' digital collections (capacity). Based on their capacities, the parties have shares of [10-20] per cent with an increment of [0-10] per cent. However, the OFT did not consider this estimate to be the best working proxy, considering that capacity based market shares are not a good measure for the scarcity or similarity of images in a collection.
30. The OFT also received estimated market shares for archive images from Getty Images based on the pre-2000 delineation used in Getty Images' internal assessments. In particular, according to Getty Images' Board document,³ Getty Images' market share for the supply of archive editorial images in the UK is [30-40] per cent by value. In addition, based on Getty Images' estimate of the relevant market size ([] million)⁴ other major UK players in this market include Corbis ([20-30] per cent), Associated Press (AP) ([0-10] per cent) and Reuters ([0-10] per cent). The 'Others' category,

³ Getty Images NSEA revenue composition and core market sizing, January 2010 (p10)

⁴ Getty Images NSEA revenue composition and core market sizing, January 2010 (p10).

which would be expected to include Rex, was estimated to account for [30-40] per cent of the 'market'.⁵

31. Although the parties did not submit separate market shares for Rex in the supply of archive images, the OFT's market investigation showed that Rex is a significant player in the supply of archive images in the UK and that the parties' combined market share post merger would be high enough to raise competition concerns. In particular, Getty Images' internal documents refer to []. Moreover, customers refer to them as being vigorous competitors in the 'archive' sector.
32. Getty Images expressed caution about placing any weight on its market share estimates. It pointed out the various caveats that were attached to these figures in the Board document,⁶ in particular, that they were produced at short notice, over the year end holiday period and on the basis of interviews within the company. The OFT has considered these representations but notes that these figures were considered sufficiently valid to be put before Getty Images' Board, they reflect the input from key sales staff and known data in respect of any recent business development activity. Further, Getty Images did not provide any other comparable internal document that provided an alternative indication of its own view of its market shares in the supply of archive images. The OFT acknowledges the caveats applicable to an internal estimate of market shares, but given Getty Images' position within the industry, the OFT believes it is appropriate to give some weight to market share estimates based upon its considerable knowledge of the UK market and how it operates. In addition, the OFT had no other indication as to whether Getty Images would have a market share higher or lower than the one estimated in its internal document, if archive images were defined more similarly to the definition given by Rex or other publishers (six weeks or 48 hours). However, in the absence of any further data on market share estimates, the OFT considered the evidence from Getty Images' internal document as the best working proxy.

⁵ The fact that Rex is not split out individually may be explained by the fact that the document in question identifies the suppliers against whom Getty Images competed internationally, across a number of geographic markets.

⁶ Getty Images NSEA revenue composition and core market sizing, January 2010

Closeness of competition

33. Based on the evidence available to it, the OFT is of the view that the parties are likely to be close competitors in the supply of archive editorial images in the UK. In particular, one third party noted that, although Rex is smaller than Getty Images overall, it has a considerable catalogue of celebrity pictures. Another publisher stated that the merging parties have very similar archives of images and that post-merger there would be no substitute for the merged parties' offering. Another publisher stated that there is substantial cross-over in the parties' historical images, and features-based material such as travel and environment. In addition, one third party mentioned that the parties have always compared themselves with each other in negotiations. Furthermore, third parties stated that Rex has successfully competed against Getty Images because it could offer an extensive archive service.
34. Even in the event that the parties' archives do not substantially overlap (in terms of specific content), third parties suggested that Rex is able to compete effectively against Getty Images because it can offer a large archive of images. Getty Images' internal documents note that [].⁷
35. Overall, the OFT therefore believes there is evidence indicating that Getty Images and Rex can currently be considered close competitors in the supply of archive editorial images.

Constraint from other suppliers

36. The parties argued that a substantial volume of historic and other archive images is available from numerous agencies. In particular, the parties stated that the Press Association (PA), the Associated Press (AP) and Reuters each have impressive archives from their decades of operation as reporting services to newspapers and other mass media. In addition, the parties argued that they do not have uniquely overlapping archives. The content on most of Rex's overlap collections is offered, according to the parties, by at least four other agencies and there is no identifiable collection in the Rex digital archive where the parties are unique content suppliers. Furthermore, the parties provided evidence of competition from other agencies, where the parties lost business or were forced to adjust their

⁷ [].

pricing. Finally the parties stated that, even if Getty Images is known for having a large archive, images created before 2000 accounted for only [] per cent of its sales in 2009.⁸

37. The OFT accepts the evidence provided from the parties that other agencies offer similar archive images to publishers as the parties do. However, such evidence does not suggest that the parties are not each other's closest competitors. In addition, although the OFT acknowledges that there were clearly instances where the parties competed with other agencies for customers, such specific examples do not detract from the more generalised feedback that the OFT received from its market investigation. In particular, the response to the OFT's market investigation indicated that these agencies are not Getty Images' closest competitors nor have they significant market shares to constrain the merging parties. AP and Reuters are very small in this market according to Getty Images' own figures. Furthermore, although Getty Images identified Corbis as having a market share of [20-30] per cent in the supply of archive images in the UK, one third party noted that Corbis has a large archive, but that this archive is US centric.

Conclusion

38. On the basis of all the evidence available to it and the number of concerns raised by third parties, the OFT concludes that there is a realistic prospect of a substantial lessening of competition in the supply of archive editorial images in the UK resulting from the merger, due to the loss of an independent constraint, Rex, which - based on the evidence available - competes closely against Getty Images in the supply of such archive images in the UK.

⁸ However, Getty Images' Board document (Getty Images NSEA revenue composition and core market sizing, January 2010) estimated its UK sales for archive images to be [] million (out of total UK revenue of [] million) – or [] per cent. In any event, the precise proportion of Getty Images' sales accounted for by archives is not directly informative of its competitive strength within archives.

Entertainment-Related Editorial Images

Market shares

39. The parties submitted that their combined market share for live entertainment related editorial images is about [20-30] per cent (with an increment of [0-10] per cent). The estimates of the parties' market shares provided by third parties were significantly higher than this. Getty Images' internal documents note that its main competitors in entertainment images in the UK are []. According to the parties' informal submission, these competitors have shares of less than [0-10] per cent each.
40. Getty Images' internal documents put the size of the entertainment-related (live) editorial images market (excluding archive) at [] million.⁹ In addition, the parties' informal submission stated that their combined UK sales of entertainment images were [] million. Using this estimate of the total market size gives the parties a combined share of [40-50] per cent (with an increment of [20-30] per cent) for live entertainment-related editorial images,¹⁰ which the OFT considers to be, absent any further market share data, the best working proxy. This estimate is closer to the market share estimates provided by third parties. Getty Images' internal documents note that [].¹¹
41. The OFT accepts that there are difficulties in obtaining precise market share data in this area (as was the case in archive). However, based on the calculation above, and the results of the OFT's market investigation, there is evidence indicating that the combined market share in entertainment editorial images is likely to be around [40-50] per cent or above.

Closeness of competition

42. Competition between the parties for entertainment related editorial images is described by third parties as being as intense as it is in archives. Getty Images' internal documents describe Rex as [].¹²

⁹ Getty Images NSEA revenue composition and core market sizing, January 2010. [].

¹⁰ According to internal documents and the parties' informal submission Getty Images' turnover is [] million. Rex's turnover is [] million based on the parties' informal submission.

¹¹ Global editorial strategy project, 2008 (p22).

¹² Business development update, July 2009 (p4).

43. One third party stated that the parties are two of the biggest suppliers of entertainment images in the UK and that there is a long tail of considerably smaller players. One third party stated that the quality of entertainment pictures supplied by the parties' smaller competitors is significantly lower than the merging parties although some of the smaller firms can compete for certain aspects of entertainment images, such as paparazzi.
44. In addition, a number of third parties stated that the merging parties are the closest competitors with regards to exclusive access and coverage of 'after event parties' and 'celebrity' events and that no other agencies have access comparable to the merging parties. Publishers stated that it is only occasionally that other photographers and competing agencies obtain the type of access that the parties regularly receive for exclusive celebrity events.
45. Regarding the exclusive access to events, the parties argued that coverage of such events is rarely exclusive, as it only provides for a vantage point within an event venue, but does not prevent competing photographers from taking and distributing other (very often similar) pictures of the event. In addition, the parties argued that, even where exclusive access is granted, such access did not play any significant role in the parties' creation or licensing of entertainment imagery, as the number of events under some kind of exclusive accreditation that the parties attended was small.¹³ The OFT accepts that there are instances, where competing photographers can gain some degree of access to 'exclusive' events and take very similar images to the parties. However, such evidence does not detract from the responses to the OFT's market investigation showing that the parties are the closest competitors with regards to exclusive access and coverage of 'after event parties' and 'celebrity' events.
46. Furthermore, in support of the argument that the parties are close competitors, the OFT noted that Getty Images' documents assessing the deal indicate that it expects that the merger will result in [].

¹³ The parties submitted that in 2010 Getty Images attended only [] out of roughly [] events under some kind of exclusive accreditation and that Rex has obtained exclusive access to only [] events in the last twelve months. Over a period of three years, the parties submitted that Getty Images (all brands) obtained exclusive access to only [] out of [] events in the UK.

47. Overall, however, based on the evidence available to it, the OFT concludes that the merging parties are likely to be each other's closest competitors in relation to the supply of entertainment-related editorial images.

Constraint from other suppliers

48. The parties stated that there is strong competition in entertainment related images and that this is evidenced by the fact that entertainment images are the cheapest editorial images, on average. In particular, the parties argued that there were a large number of photographers and agencies who typically covered a notable event or celebrity appearance. In addition, they stated that there were over 100 suppliers of entertainment editorial images to which customers in the UK have access online.
49. The parties provided some evidence of customers attempting to negotiate lower prices by threatening to switch to alternative suppliers and gave an example of a customer ultimately switching. It was not clear, however, that these examples pertained to editorial images and although the OFT accepts that there will be some instances of switching to other suppliers, such behaviour is not in line with the wider views from the market investigation.
50. The parties stated that they do not have exclusive rights to sell photographers' pictures taken at an exclusive event unless those photographers obtain credentials through their agency or their agency has agreed a right of first refusal with those photographers. Also, photographers readily switch agency if they believe that other agencies can offer more favourable terms. In addition, the parties noted that the most prominent photographers make their images from exclusive events available through their own websites and galleries. Furthermore, the parties stated that when exclusive access is granted, it does not account for a significant part of their business as the sales generated from images taken in these exclusive events produces a relatively small amount of income.
51. No third parties which the OFT spoke with could identify an event for which they had contracted directly with the photographers identified by the parties to obtain exclusive celebrity images. In addition, as mentioned above (paragraph 44), publishers noted that it is only occasionally that other photographers and competing agencies obtain the type of access that the parties regularly receive for exclusive 'celebrity' events. Furthermore,

parties' internal documents recognise the value of exclusive access and coverage of events. In particular, Getty Images' internal documents note that [].¹⁴

52. Based on the evidence available to it, the OFT accepts that there are a number of alternative suppliers of entertainment related images. In addition, the OFT accepts that photographers can switch agencies and possibly distribute their images from their own websites. However, such evidence does not in itself indicate that the parties are not each other's closest competitors and nor does it allow the OFT to conclude that other photographers and agencies will be in a position to effectively constrain the parties post-merger.
53. Finally, several publishers stated that the merger will lead to a substantial lessening of competition 'in most types of imagery' and that competitors' combined products would not match the images supplied by the merging parties in terms of variety and quality. In particular, it was stated that post merger the parties would be uniquely placed to offer 'one-stop-shop' service for editorial images.¹⁵ Third parties argued that the parties were competing closely to supply a 'one-stop shop' service and whilst a proportion of the images sold by the parties are available from smaller competitors, purchasing from these competitors would involve a higher search cost and a higher price per image.

Conclusion

54. In relation to live entertainment related editorial images, the OFT believes that the merging parties' combined share would be significant, particularly relative to their nearest competitors and therefore the merger raises prima facie competition concerns. Further, based on the evidence provided to the OFT, it believes that pre-merger the parties are each other's closest competitors in particular in their exclusive access and coverage of after parties/events. The OFT cannot rule out the possibility that the merger would allow the merged entity to raise price or reduce quality post-merger, unless constrained by entry, expansion or buyer power (see below).

¹⁴ Global editorial strategy project, 2008 (p40).

¹⁵ By 'one-stop shop' service, the OFT refers to the ability of an agency to supply entertainment, sports and news images to customers.

Barriers to entry and expansion

Archive images

55. In relation to archive images, Getty Images' internal documents note that archive images are 'non-replicable' and are frequently in limited supply or subject to outright exclusivity. Entry to the supply of archive images therefore appears to be particularly difficult.

Entertainment-related editorial images

56. In relation to entertainment related editorial images, the parties stated that barriers to entry are low, with minimal capital investment required. In particular, the parties stated that there was evidence of recent entry as well as of expansion by incumbent suppliers of editorial images from their traditional areas of focus.
57. However, Getty Images' internal documents note the failure of an entrant – active in the supply of stock images in the UK – to gain any traction in editorial images.¹⁶ The same document attributes the entrant's failure to its limited success in producing a sufficiently high number of wide ranging entertainment images.
58. In addition, the OFT understands that one important barrier to entry and expansion for smaller agencies is the development of a distribution network in order to be able to offer images to a variety of customers. The parties noted that posting images on Image Data Systems (IDS) – an aggregating service providing access to live feeds and archives from picture agencies/libraries to media owners via a single searchable website - was one way to overcome the issue. Furthermore, the parties argued that partnering among photo agencies provided a common means for image producers to broaden the distribution of their images. However, the OFT, based on its market investigation, understands that such partnerships and image aggregators could facilitate entry and expansion of small agencies, but that such entry could not be considered sufficient, considering that an important factor for an entrant to be able to constrain the parties is the volume of images that this entrant can supply.

¹⁶ Getty Images NSEA growth potential 2010-2012 (p9-10).

59. Furthermore, competitors noted that whilst the costs involved in setting up a new agency are relatively low, the main barrier to entry is the ability to secure regular credentials for access to events.
60. Overall the OFT's market investigation showed that the barriers to entry and expansion in the supply of entertainment related editorial images were high, considering the difficulty to secure regular access to exclusive events and to develop a distribution network and relationships with publishers.

Buyer power

61. Publishers were concerned that the merger will result in Getty Images holding a significant 'share of purse' and that they would have no alternative to the merged parties for the types of archive and entertainment images described above. Publishers were therefore concerned that the merger would confer on Getty Images an ability to raise prices which could not be constrained by any countervailing power of buyers.
62. The parties stated that all the customers to whom the parties sell editorial images buy pictures from numerous sources and therefore are well positioned to switch suppliers or to reduce the volume of images purchased from a given supplier. In support of this claim, the parties provided some evidence of certain newspaper publishers having sought to reduce prices in the past. However, the evidence provided by the parties did not demonstrate whether the price reductions proposed by the publishers ultimately had any effect on the parties' prices. It was not clear whether the initial demands to reduce prices ultimately led to a sustained reduction in price, or whether there were simply the opening rounds of a further period of negotiation. Furthermore, in relation to in-house photographers, the parties' argument was not supported by any further evidence showing the constraint that publishers could impose on the merged entity. Therefore, the OFT could not rule out the fact that the merger would confer on Getty Images an ability to raise prices which could not be constrained by any countervailing power of buyers.

CONGLOMERATE EFFECTS

63. The OFT also considered in its investigation whether, after the merger, the merged entity would be able to leverage its strong position in certain categories of images to bundle the supply of other images, where the

merged entity might be performing less well. However, the OFT did not consider it necessary to conclude on this issue given its findings that there is a realistic prospect of a substantial lessening of competition arising from unilateral effects in the supply of archive and entertainment related editorial images.

ASSESSMENT

64. The parties overlap in the supply of stock and editorial images in the UK. The OFT had no concerns in relation to stock images given that the parties' combined position (and the minimal increment) did not give rise to any preliminary concerns. In relation to editorial imagery, the parties overlap principally in the supply of archive images and the supply of entertainment related editorial images.
65. The OFT examined market shares for archive images based on the 10 year delineation used in Getty Images' internal assessments. On this basis, Getty Images' market share for the supply of archive editorial images in the UK is [30-40] per cent by value. The parties did not seek to estimate Rex's market shares in the supply of archive images on this same basis. However, the OFT's market investigation (parties' internal documents and third party comments) showed, that Rex is a significant player in the supply of archive images in the UK and that the parties' combined share of supply post merger would be high enough to raise competition concerns. Furthermore, the OFT received a significant number of third party concerns that the parties are close competitors in the supply of archive editorial images in the UK, with very similar extensive archives of images and that post-merger there would be no substitute for the merged parties' offering. Finally, the OFT noted that, because archive images cannot be replicated, it may be the case that firms cannot easily enter the supply of archive images nor can they expand their supply of archive images.
66. The OFT also examined unilateral effects in the supply of entertainment related editorial images. The OFT's market investigation (based on Getty Images' estimate of the total market size and third party views) indicates that the parties had a combined share of [40-50] per cent (with an increment of [20-30] per cent) for entertainment-related editorial images. This is sufficient to raise prima facie competition concerns. In addition, the OFT received a large number of third party concerns stating that competition between the parties for entertainment related editorial images

is intense, that the parties were two of the biggest suppliers of entertainment images in the UK and that the long tail is made up of considerably smaller players. In addition, a number of third parties stated that the merging parties are the closest competitors with regards to exclusive access and coverage of 'after event parties' and 'celebrity' events and that the parties were competing closely to the supply of a 'one-stop shop' service.

67. Finally, the OFT's market investigation showed that barriers to entry and expansion in the supply of both archive and entertainment related editorial images were high, for different reasons. In addition, the evidence presented to the OFT on buyer power was insufficient for the OFT to be confident that buyers would be able to constrain the parties' ability post merger to raise prices.
68. Consequently, the OFT believes that it is or may be the case that the merger may be expected to result in a substantial lessening of competition for the supply of archive editorial images and live entertainment editorial images in the United Kingdom.

UNDERTAKINGS IN LIEU

69. 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.
70. The parties offered a behavioural undertaking according to which post merger they would continue to offer all imagery in the parties' celebrity archives to customers in the UK individually, on an à la carte basis, at prices and on other terms that are consistent with, and no less favourable to the customer than, the prices and other terms on which Getty Images sells its other rights-managed editorial imagery.
71. While the OFT welcomes the willingness of the parties to put forward remedies, it does not consider that the remedy proposed in this case is capable of sufficiently removing the competition concerns arising from the merger. The OFT notes that, at first phase, undertakings in lieu of a

reference are appropriate only where the remedy proposed to address the concerns identified is clear cut.¹⁷ As a general point, the OFT notes that it is unlikely to consider that behavioural undertakings have sufficiently clear effects to address the competition concerns identified in the merger.¹⁸

72. Having examined the undertaking offered in this case, the OFT believes that the remedy proposed is not clear cut. Specifically, the operation of the proposed undertaking would not address the underlying competition problem. It would require constant and detailed monitoring, and would potentially risk distorting prices for other images. For these reasons, it is not suitable as an undertaking in lieu.¹⁹
73. Therefore, the OFT does not believe that the remedy proposed by the parties meet the clear cut standard and therefore the duty to refer remains.

DECISION

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

¹⁷ OFT *Mergers – Substantive assessment guidance*, para 8.3.

¹⁸ OFT *Mergers – Substantive assessment guidance*, para 8.10.

¹⁹ The OFT notes that it is unclear whether the remedy as offered by the parties would address the competition concerns identified in the merger in relation to the supply of *live* entertainment related editorial images. However, the OFT did not consider it necessary to revert to the parties to clarify this point given that the undertaking as offered was, in any event, unsuitable for the reasons given above.