# Anticipated acquisition by GUS plc of part of the Index Business of Littlewoods Ltd

The OFT's decision on reference under section 33(1) given on 20 June 2005. Full text of decision published 28 June 2005.

**Please note square brackets indicate information replaced by a range or excised at the request of the parties for reasons of commercial confidentiality.**

## PARTIES

1. **GUS plc (GUS)** is a public limited company whose shares are listed on the London Stock Exchange. GUS has four main divisions, one of which is the general merchandise retailer, Argos Retail Group (ARG). ARG includes the multi-channel retail chain, Argos.

2. **Littlewoods Limited (Littlewoods)** is a privately-owned business comprising a number of activities including Littlewoods Home Shopping, Littlewoods high street stores and a catalogue retail business carried on under the Index brand. In 2004, the total UK turnover of the business being acquired was £76.5 million.

## TRANSACTION

3. GUS intends to acquire part of the Index business from Littlewoods, namely 33 Index standalone stores and the catalogue retail business of Index as carried out through the Index website and order line, as well as, *inter alia*, the Index brand (Index).

4. The remaining standalone stores will not be acquired by GUS, and it is intended that the space dedicated to the Index business within the Littlewoods high street stores will in future be used for the Littlewoods high street retail business. It is intended that the Index business as a whole will cease to trade in the near future.

5. The administrative deadline for announcement of the OFT's decision in this case expires on 21 June 2005.

## JURISDICTION

6. As a result of this transaction GUS and Index will cease to be distinct. The UK turnover of Index exceeds £70 million, so the turnover test in section 23(1)(b) of

the Enterprise Act 2002 (the Act) is satisfied. 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.

## RELEVANT MARKET

### Product market

7. The parties are both active in catalogue retailing. In its report on the merger situation between March UK Ltd and the home shopping and home delivery businesses of GUS of January 2004, Cm 6102 (the March/GUS Report), the Competition Commission (CC) described catalogue retailing as a hybrid of home shopping and the high street. The CC identified a widely drawn, non-food retail market, which includes all forms of home shopping, catalogue stores and high street shops.[1] The parties and third parties contacted by us in respect of this case agree that the high street places a constraint on catalogue shopping.

8. Argos and Index overlap in the retail supply of the following product categories:

   (i) housewares;
   (ii) furniture;
   (iii) electrical;
   (iv) toys;
   (v) jewellery and gifts;
   (vi) sports and leisure; and
   (vii) RMI (repair, maintenance and improvement, i.e. DIY products).

   We have examined the competitive effect of the transaction in each of these categories.

9. For the purpose of analysis the toys sector has been further subdivided, since this is the segment in which the most significant share of supply arises. In the OFT decision of 21 November 2003 that agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games infringed the Chapter I prohibition of the Competition Act 1998 (the OFT Chapter I Decision), the toys sector was divided into the following categories: (i) infant and pre-school; (ii) boys' toys; (iii) girls' toys; (iv) games and puzzles; (v) creative toys; (vi) construction; (vii) plush (soft toys); (viii) ride-ons; (ix) electronic learning aids; and (x) hand-held electronic games.[2] As GUS does not have information on shares of supply for these particular segments, NPD Consumer Panel data categories have been used as the closest available proxy.

### Geographic market

10. The parties submit that the relevant geographic market is the UK. The CC noted in the March/GUS Report that the geographic market in respect of agency mail order is national and the parties believe this also applies to catalogue retailing. GUS submits that Argos, Index and their competitors all operate national pricing

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[1] See paragraphs 2.45, 2.57-2.64 and 2.79-2.95 of the March/GUS Report.
[2] See paragraphs 23-36 of the OFT Chapter I Decision.

policies. [ ]. Similarly, Argos and its competitors operate national product ranging policies within space constraints. The OFT Chapter I Decision also referred to a national market for toys.

11. The geographic frame of reference for the purpose of this decision is therefore taken to be the UK. However, given that there may be more local elements to competition, in particular choice, the toys segment has been looked at from both a national and local point of view.

## HORIZONTAL ISSUES

### Market shares

12. Table 1 below sets out the estimated shares of supply of the merged entity in each of the categories in which the parties are both active. The share of supply of Index as a whole has been apportioned between the part of the business being acquired (the 33 standalone stores) and the part of the business that has been retained by Littlewoods (which is expected to cease trading in July 2005).

**Table 1: UK shares of supply**

| | Toys | Housewares | Furniture | Electrical | Jewellery & Gifts | Sports & Leisure | RMI |
|---|---|---|---|---|---|---|---|
| GUS | **[20-30]** | **[0-10]** | **[10-20]** | **[0-10]** | **[10-20]** | **[0-10]** | **[0-10]** |
| Index (33 standalone stores) | **[<1]** | **[<1]** | **[<1]** | **[<1]** | **[<1]** | **[<1]** | **[<1]** |
| ***GUS post-merger*** | **[20-30]** | **[0-10]** | **[10-20]** | **[0-10]** | **[10-20]** | **[0-10]** | **[0-10]** |
| Index (not purchased) | **[<5]** | **[<5]** | **[<5]** | **[<5]** | **[<5]** | **[<5]** | **[<5]** |

Source: GUS estimates based on Verdict, Mintel or other reputable sources. For toys, the share has been sourced from NPD Consumer Panel data.

13. Shares of supply and increments are not high in any category. Third parties did not raise concerns about any category other than toys. Although Argos and Index may be considered close competitors, there are numerous other existing competitors (including relatively close competitors) in each sector. Given the low shares, small increments and the lack of concerns, these categories are not considered further. The toys sector is considered in greater detail below.

Toys

14. The local analysis of the toy sector carried out by GUS indicates that there is an overlap with an Argos store in each locality.[3] At least four of the parties' main competitors[4] are present in each locality. In respect of 32 out of 33 Index

[3] The local analysis was based on a 5-mile radius around each of the 33 Index standalone stores to be acquired.
[4] Woolworths, Early Learning Centre, Games Workshop, The Entertainer, Hamleys/Bear Factory, Mothercare,Gamleys, The Disney Store, Toys 'R' Us.

standalone stores that GUS is acquiring, there is a Woolworths store within the five mile radius.[5]

15. GUS also submitted details of a similar analysis using the following catchment areas: local high street (4km), town centre (4.8km), out-of-town retail park (6.4km), city centre or London suburb (7.2km) and regional shopping centre (16km). At least four competitors remain in each catchment area after the merger. No third parties expressed concerns in relation to local competition.

16. Shares of supply by NPD Consumer Panel categories for toys are shown in Table 2 below.

**Table 2: Shares of supply within the toys sector**

| | Infant/ Pre-school | Boys | Girls | Games & Puzzles | Creative toys | Building sets | Soft toys |
|---|---|---|---|---|---|---|---|
| GUS | **[10-20]** | **[20-30]** | **[20-30]** | **[10-20]** | **[10-20]** | **[10-20]** | **[10-20]** |
| Index (33 standalone stores) | **[<1]** | **[<1]** | **[<1]** | **[<1]** | **[<1]** | **[<1]** | **[<1]** |
| ***GUS post-merger*** | **[10-20]** | **[20-30]** | **[20-30]** | **[10-20]** | **[10-20]** | **[10-20]** | **[10-20]** |
| Woolworths | **[10-20]** | **[10-20]** | **[20-30]** | **[20-30]** | **[10-20]** | **[20-30]** | **[10-20]** |
| Toys R Us | **[0-10]** | **[10-20]** | **[10-20]** | **[0-10]** | **[0-10]** | **[10-20]** | **[0-10]** |
| ELC | **[20-30]** | **[0-10]** | **[0-10]** | **[0-10]** | **[10-20]** | **[0-10]** | **[0-10]** |
| Tesco | **[0-10]** | **[0-10]** | **[0-10]** | **[0-10]** | **[0-10]** | **[0-10]** | **[0-10]** |
| *Index (total)* | **[0-10]** | **[0-10]** | **[0-10]** | **[0-10]** | **[0-10]** | **[0-10]** | **[0-10]** |
| Market size (£m) | [ ] | [ ] | [ ] | [ ] | [ ] | [ ] | [ ] |

Source: NPD Consumer Panel data as provided by GUS

17. Shares of supply are not high in any segment and the increments are very small. This suggests that the transaction will not lead to a substantial lessening of competition. Given that Argos is not acquiring all of the Index business, it is likely that it will win some further share from the remaining Index stores and concessions that will not continue trading, but this does not affect the conclusion.

18. The OFT has considered whether the conclusion could be affected by the findings in the OFT Chapter I Decision, as subsequently upheld by the Competition Appeal Tribunal,[6] as to conditions of competition in the toys sector (see Note 1). The Decision notes that, at the time of the cartel (1998-2001), Argos was generally accepted as the price setter and leader in the market. However, Hasbro considered that Argos would have been very unlikely to make a commitment to follow Hasbro's RRPs unless is was reassured that doing so would not result in its catalogue prices being undercut by those in the Index catalogue. It was therefore deemed necessary to reassure Argos that

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[5] In the one locality where there is no Woolworths store, there is an Early Learning Centre, Mothercare and Toymaster, as well as a Boots and WHSmith.

[6] Argos Limited and Littlewoods Limited v OFT [2004] CAT 24.

Littlewoods would also be committed to RRPs.[7] This suggests that the constraint Index placed on GUS/Argos was, at the time of the cartel, much stronger than Index's share of supply may have indicated.

19. In light of this finding it is appropriate to examine whether this merger signifies the loss of a major constraint on GUS and whether post-merger, despite its relatively low share of supply and the presence of several other market participants with similar shares of supply, GUS would be in a position to raise prices unilaterally. In particular, we have considered whether the market conditions which prevailed at the time of the cartel have changed in the intervening period.

20. According to GUS, Woolworths is currently (see Note 2) the closest competitor to Argos since it is present in each area in which Argos is present and it has a very strong value reputation, similar to Argos. Woolworths' share of supply has increased from [ ] per cent to [ ] per cent in the last 4-5 years. This is supported by findings in the Mintel Report of September 2004 'Toy Retailing, Retail intelligence' (the Mintel Report), which states that Argos and Woolworths vie for toy market leadership in the UK.

21. The Mintel Report also supports the argument put forward by GUS that all toy retailers are facing growing competition from the supermarkets who can offer considerably lower prices as compared to traditional high street retailers. Sales through grocers, particularly Asda and Tesco, grew by over 40 per cent between 2002 and 2003 to account for an estimated 7.5 per cent of the toys sector; 18 per cent of consumers mention purchasing toys from Asda and 16 per cent mention Tesco. The Mintel Report also notes that significant incursions made by the grocery sector had a major impact upon average prices, with Tesco and Asda emerging as very significant accounts for toy producers.

22. There has also been growth in online retailing, with one in ten consumers mentioning online purchasing, according to the Mintel Report. Over the three years to 2003, the rise of the internet and grocery sector has been at the expense of almost all other alternative avenues. GUS has submitted that the Internet gives consumers transparent pricing information and allows them to purchase products in stores or over the web and allows retailers to change their prices on a daily basis.

23. Growth in online retailing is one reason why Argos (and its competitors) has become much more promotion-driven, with the consequence that the published catalogue prices have become less relevant, both for consumers when making purchasing decisions, and for competitors when determining prices. In 2004, [ ] per cent of Argos' toy sales were through these promotional leaflets. This was up from [ ] per cent in 2001. On average [ ] per cent of the products promoted though Argos' promotional leaflets offer a price discount to that in the catalogue. The Mintel Report notes that there was a high degree of price-promotional activity undertaken by Woolworths, Argos and major grocery chains.

24. The Mintel Report also backs the view put forward by GUS that pricing has become more competitive in recent years. There has been very little in the way

7 See paragraph 47 of the OFT Chapter I Decision.

of inflation in the toys and games sector, and suppliers have struggled to generate value-driven growth. There has been a general downward trend in pricing, both in real and nominal terms.

25. In summary, there have recently been a number of changes in the competitive landscape which have reduced the importance of the Index catalogue as a competitive constraint on GUS/Argos, namely the increasing importance of supermarkets in toy retailing; the impact of the internet (in terms of facilitating price comparisons and as a retail channel which lends itself to rapid price variations); and the consumer trend to buy on promotion which has reduced the benchmark status of catalogue prices.

26. Although Index may still place a greater constraint on Argos than its small share of supply in the toys sector suggests, the trends identified above, is well as the fact that GUS is buying only part of the Index business, indicate that this transaction will not result in a substantial lessening of competition in this sector.

27. The proposition that Index could exercise a greater constraint on Argos than its share of supply suggests, does not translate from the toys sector to other sectors in which Argos and Index are active. This is because Argos is unlikely to be a price leader in these other sectors. Its share is smaller and it faces strong competitors: it does not appear to be the leading supplier in these other segments. Furthermore, unlike in toys, Argos and Index are not necessarily selling the same product (by brand) as their competitors, thus making price comparison for consumers more difficult.

**Barriers to entry**

28. Although GUS was unable to estimate the costs of entering the toys sector, it was noted that Tesco has recently entered the market and gained around a 4 per cent share within a relatively short period of time. Advertising costs are low and the toys sector is expanding, having grown at over 3 per cent per annum each year between 1999 and 2004. It appears that barriers to entry to the toy sector are not insurmountable, particularly given the recent emergence of supermarkets selling children's toys and, over the last decade, the development of toy superstores.

**Buyer power**

29. The main customers are consumers, who do not have any individual countervailing buyer power.

**Vertical issues**

30. This merger does not give rise to vertical competition issues.

**THE COUNTERFACTUAL**

31. Absent this transaction, it is likely that Littlewoods would have closed down the Index business in any event. Index has been loss-making for a number of years and Littlewoods has now confirmed the closure of the remainder of the Index business. The possibility of establishing a failing firm defence was explored.

However, in view of the OFT's high evidential threshold in respect of each aspect of the defence,[8] it was considered that it would be unlikely to succeed in the circumstances of this case.

**THIRD PARTY VIEWS**

32. Few third parties responded to our enquiries; outside of toys, no third party expressed any concerns. The concerns expressed in relation to toys have not been substantiated by our competition analysis. All third parties that responded were of the opinion that the high street competes with catalogue retailing.

**ASSESSMENT**

33. The parties are both active in catalogue retailing in the following product categories: housewares, furniture, electrical, toys, jewellery and gifts, sports and leisure and RMI. Consistent with the conclusion reached by the CC in the 2004 March/GUS Report, and with views expressed by third parties in this case, we consider that the high street constrains catalogue retailers. In the wider retail market the combined shares of supply and increments in each category of overlap do not raise competition concerns, and a significant number of competitors remain post merger. Similarly, the local analysis of the toys sector indicates that this transaction does not give rise to competition concerns.

34. Despite this, we have considered whether competition concerns could have arisen in the toys sector, since the operation of the cartel from 1998-2001 identified in the OFT Chapter I Decision depended on participation of the two catalogue retailers, Argos and Index; this suggests that the constraint Index placed on GUS/Argos was, at the time of the cartel, much stronger than Index's share of supply may have indicated. In this respect it is relevant to note that GUS is currently only acquiring part of the Index business; the remainder of the Index business is expected to close in the near future. Furthermore, our analysis indicates that changes in the toys sector since the time of the cartel, including the increased share of supply of supermarkets and the growing importance of the internet, as well as the consumer trend to buy on promotion rather than at full price, have diminished the competitive constraint exercised by the Index catalogue on GUS/Argos.

35. Consequently, the OFT does not believe that it is or may be 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.

**DECISION**

36. This merger will therefore not be referred to the Competition Commission under section 33(1) of the Act.

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[8] See paragraphs 4.36-4.39 of the OFT's Mergers substantive assessment guidance, May 2003.

Note 1 GUS notes that Argos intends to appeal against the Competition Appeal Tribunal judgement upholding the OFT Chapter I decision and is currently awaiting permission from the Court of Appeal to bring this appeal. Argos therefore disputes the references in this decision to the existence of a cartel.

Note 2 According to GUS, Woolworths has always been the closest competitor to Argos, including between 1998 and 2001.