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Anticipated acquisition by Travis Perkins plc of the BSS Group plc

ME/4609/10

The OFT's decision on reference under section 33(1) given on 26 October 2010. Full text of the decision published on 11 November 2010.

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

## **PARTIES**

1. **Travis Perkins plc (TP)** primarily distributes building materials through over 600 branches across the UK. Its businesses also include **City Plumbing Supplies (CPS)** a national chain of 194 outlets which specialises in the supply of plumbing and heating (P&H) products; and **Wickes**, a national do-it-yourself (DIY) retailer with 196 stores.<sup>1</sup>
2. **The BSS Group plc (BSS)** primarily retails and wholesales P&H products in the UK and the Republic of Ireland. It has three business divisions: Domestic, Industrial and Specialist. Its Domestic and Industrial divisions supply P&H products to different customer groups through different branded businesses.<sup>2</sup> Its subsidiary, Plumbing Trade Supplies Limited (PTS), operates 325 branches retailing P&H products mainly to 'domestic' customers (mainly sole traders, plumbers and house builders) in the UK. PTS generated a turnover in 2009 in excess of £[ ] million. Other subsidiaries supplying P&H products mainly to

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<sup>1</sup> In addition, TP operates: i) other retail outlets specialising in heavy side building materials such as drainage, concrete, bricks and blocks (Keyline); a kitchen and joinery trade-only retail chain (Benchmark); a chain of ceramics stores (Tile Giant) open to the general public; and; ii) at wholesale and retail levels, Commercial Ceiling Factors (CCF), which specialises in suspended ceilings, partitions and insulation systems.

<sup>2</sup> Its Specialist division distributes power and hand tools, accessories, consumables, clothing and maintenance equipment to domestic and industrial retail and wholesale customers.

'domestic' customers include: F&P Wholesale (a wholesale supplier to general and specialist builders' merchants), Spendlove C. Jebb (a plumbers' merchant in Northern Ireland and the Republic of Ireland); and, Direct Heating Spares (a distributor of domestic heating spare parts). The Industrial division includes: BSS Industrial,<sup>3</sup> UGS and Warren businesses.

## **THE TRANSACTION**

3. TP proposes to acquire BSS by way of a scheme of arrangement. The transaction is subject to the UK Takeover Code and is conditional on Office of Fair Trading (OFT) satisfactory non-referral.
4. TP notified this transaction to the OFT on 19 July 2010. The OFT's administrative deadline in this case is 26 October (twice extended [ ] while additional information was supplied and assessed).

## **JURISDICTION**

5. As a result of the proposed merger TP and BSS will cease to be distinct.
6. For the year ending on 31 March 2010, BSS had a UK turnover in excess of £1.3 billion. Therefore, the turnover test in section 23(1)(b) of the Enterprise Act 2002 (the Act) is met. This transaction does not have a Community dimension for the purposes of the EC Merger Regulation, Council Regulation (EC) No 139/2004 because both parties earn more than two-thirds of their Community turnover within the UK.

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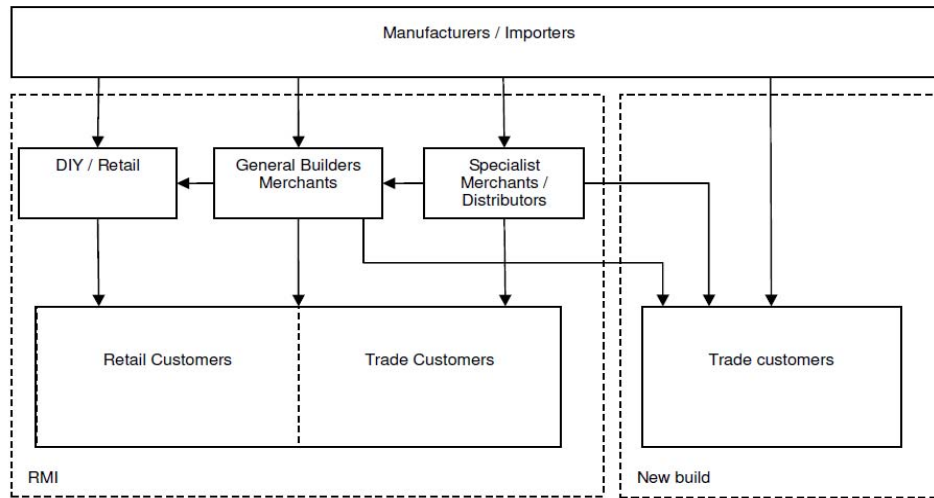
<sup>3</sup> BSS Industrial forms the industrial division of BSS with 58 branches across the UK and the Republic of Ireland. It supplies specialist brands for specific technical product ranges such as pumps, plastics and controls. It also markets and distributes heating and plumbing, process, pipeline and mechanical services equipment primarily for industrial applications. It stocks some products which can be used in domestic installations. Since the material overlap resulting from this merger relates to domestic products, this assessment has focused on BSS Domestic Division which in the UK consists of PTS at the retail level and F&P at the wholesale level.

7. Consequently, the OFT considers that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation.

## **BACKGROUND**

8. The parties are both active in the supply of building materials. In particular, they overlap in the supply of P&H products for 'domestic' use.
9. TP submits that P&H products include: baths and sanitary ware, accessories, brassware, rainwater and soil goods, showers and fittings, tubes and fittings, water mains and waste pipes, boilers, electrics storage heating, room heaters, fires, radiators, fireplaces, water heaters, air conditioning units and heating controls and pumps.
10. Building materials (including plumbing and heating products) are supplied to a greater or lesser extent through different types of retailers. The product portfolio, stock depth and levels vary substantially depending on the type of retailer (or distribution channel).
11. The parties submit that the following diagram illustrates the various channels of supply of building materials in the UK.

**Figure 1 – Building materials supply chain**

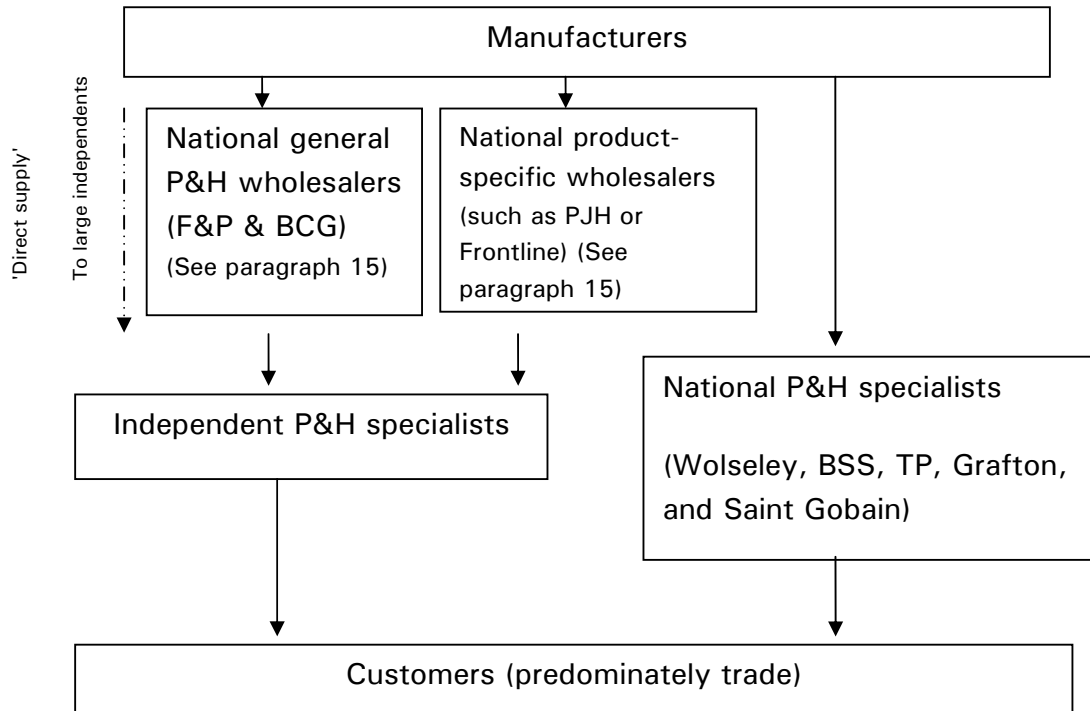


Source: the parties.

12. The non-P&H specialist merchants/distributors in the above diagram include: national DIY/Retail (B&Q, Focus, Wickes and Homebase), national builders' merchants (Travis Perkins, Jewson, Build Center, Buildbase and Jacksons), sub-national DIY and builders' merchants retailers, specialist merchant distributors (including P&H and other retailers: such as bathroom, tile and kitchen specialists) which can operate at national, regional or local level. General builders' merchants typically supply the full range of building materials while specialist distributors/retailers focus on either heavyside or lightside products or a single segment. DIY chains have an increasing tendency to provide products (albeit with a relatively narrow range) which were traditionally supplied to the builders' trade, but will also naturally focus on their core retail customer base.
13. The customer base for these products is varied: from very large national building or service companies to small traders (such as plumbers and heating system installers) or individuals performing home repairs. Their 'shopping missions' also vary from procurement for new constructions/large projects ('new build') to repair, maintenance and improvement (RMI).
14. Although it is possible to buy P&H products through various channels, the vast majority of P&H sales are in fact made through P&H specialists. Third parties' responses have led the OFT to consider that

the following diagram represents the supply chain for P&H products through P&H specialists.

**Figure 2 – Supply chain for P&H products**



Source: OFT based on third parties' representations.

15. BSS controls F&P Wholesale (F&P) and Wolseley owns BCG. Independent P&H specialist retailers and product manufacturers named F&P and BCG as the two largest national wholesalers of P&H products. Other general P&H wholesalers (such as AMS Plumbing Supplies) operate at regional level. There are also national wholesalers which specialise in specific product ranges (such as bathroom suites or kitchens).<sup>4</sup> Independent retailers and suppliers told the OFT that wholesalers facilitate the distribution to individual stores which are unable to have their own depots or logistical facilities to stock large quantities. The product manufacturers benefit from a limited number of delivery points and easier credit control risk management of a large number of independent retailers.

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<sup>4</sup> For example, PJH Group or Frontline –which is part of the Grafton Group.

16. Other national P&H specialist retailers are controlled by large international conglomerate groups: Wolseley plc owns Plumb Center, Saint Gobain SA controls Graham and Grafton Group plc, a large retailer and specialist wholesaler with operations in the Republic of Ireland and the UK, controls Plumbase. Their retail networks also supply some P&H products through other distribution channels/types of retailer such as builders' merchants or specialist outlets, which often sell particular product lines, including spare parts, under different brands.
17. Kingfisher, B&Q's parent company, owns 150 Screwfix stores across the country and has been rolling out specialist P&H Plumbfix outlets, to adjoin each of these Screwfix stores. Plumbfix started trading in 2008 with a catalogue offering [confidential to third party].

## **MARKET DEFINITION**

18. As stated in the Merger Assessment Guidelines, 'market definition is a useful tool, but not an end in itself, and identifying the relevant market involves an element of judgment. The boundaries of the market do not determine the outcome of the Authorities' analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to a substantial lessening of competition the Authorities may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.'<sup>5</sup>

## **Product market**

19. The parties supply building materials and primarily overlap in the retail supply of P&H products through their national P&H specialist chains (CPS and PTS). As stated above,<sup>6</sup> BSS also owns a national supplier at the wholesale level. The transaction does not create any overlaps at the wholesale level and hence, supply at such level is only considered when assessing non-horizontal issues, below.

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<sup>5</sup> OFT / CC Merger Assessment Guidelines, paragraph 5.2.2 (OFT1254).

<sup>6</sup> See paragraph 15 above.

20. The OFT has not previously reviewed a merger between specialist P&H suppliers of this magnitude. In *Wolseley/William Wilson Holdings Limited*<sup>7</sup> which concerned the acquisition of a regional plumber's merchant and raised no substantive competition concerns, the OFT's investigation suggested that the relevant product frame of reference could be 'the distribution of plumbing and heating products by builders' merchants, specialists distributors and DIY stores'. The OFT notes, however, that the decision stressed that different types of suppliers pose different degrees of constraint on each other.
21. The European Commission has also looked at the supply of building materials. In 2003, it cleared a concentration between a builders' and a specialist merchants, *Wolseley/Pinnault, Boix & Matériaux*,<sup>8</sup> which created a network of over 600 outlets in France. The European Commission did not conclude on the relevant market definition but acknowledged that P&H products could represent a separate market given that these goods are often bought by the same customers (for example plumbers), sold in the same areas of the outlets or in similar specialist stores.
22. In this case, the OFT has considered whether the appropriate product scope is that of building materials as a whole or whether P&H products should be considered as a distinct segment of building materials.

**All building materials or P&H products only**

23. TP submits that TP and BSS operate in the building materials market, which includes the marketing and distribution of P&H products for both RMI and for 'new build'. Consequently, TP submits that a frame of reference incorporating all building materials is appropriate but that given the nature of BSS' businesses, the weight of the overlap resides in the supply of P&H products.
24. It is clear that there is unlikely to be significant substitutability on the demand side between P&H products and wider building materials,

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<sup>7</sup> OFT decision of 12 January 2006 on the completed acquisition by Wolseley plc of William Wilson, paragraphs 14, 15 and 17.

<sup>8</sup> Case No COMP/M.3184, decision of 3 July 2003, paragraph 16.

given their very different uses. However, where products are typically supplied together by a particular type of retailer, reflecting customer preferences to buy them in one place, then it may be appropriate to define a retail market more widely than might be implied by the demand-side substitutability of the specific products being supplied.

25. In this case, though, and consistent with the OFT's previous investigations in this area, the evidence available suggests that the supply of P&H products forms a separate market to the supply of building materials in general. In particular:
- most national P&H specialists, builders' merchants and DIY retailers, told the OFT that P&H professionals expect to source from expert P&H retailers rather than general builders' merchants
  - Wolseley, TP, Grafton, Saint Gobain and Kingfisher all have chains of specialist branded P&H outlets, even though they also operate general builders' merchants outlets
  - the range of P&H products offered by large specialist P&H retailers is fairly similar - and typically wider than that offered by general builders' merchants. This indicates that specialist P&H retailers are targeting trade customers who specialise in this area.
26. The OFT therefore considers that the appropriate product market should comprise 'the supply of P&H products' and should not be extended to building materials. The OFT considers below whether the market should be further segmented by product, customer type or distribution channel.

**Further segmentation by product, customer type or distribution channel is not appropriate**

27. As stated in the Merger Assessment Guidelines,<sup>9</sup> the relevant market may not be the narrowest market that meets the hypothetical monopolist test. In this case, given the variety of products on offer,

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<sup>9</sup> OFT/CC Merger Assessment Guidelines, paragraph 5.2.3.



customer types and route to market (that is, distribution channels), the OFT considered whether segmentation of the market by product, customer or distribution channel is appropriate.

28. On possible narrowing by individual P&H product type, the OFT notes that:
- although third party responses suggested that, on the demand side, customers cannot generally switch between P&H product types (which the parties also confirmed), third parties explained how customers often seek a 'bundle' of related products (such as boilers, radiators, flues, cylinders, thermostats to build an entire heating system) in a single transaction
  - on the supply-side, TP submitted and competitors confirmed that supply side substitution is easy, with the only constraint being the size of the premises as some core products which must always be available
  - the product range and depth supplied by the national and some large regional P&H specialists are similar and incorporate a wide range of P&H products, and
  - the majority of third parties agreed that the appropriate frame of reference for the OFT to examine the merger was all P&H products, although some urged the OFT to examine the supply of boilers separately (which is discussed further below).
29. The OFT therefore considered that it was not appropriate to narrow the market by individual P&H product type.
30. On possible narrowing by customer type, the OFT notes that:
- although the OFT's third party enquiries did suggest that—on the demand side—there could be separate markets by customer type (for example, 'jobbing' plumbers, P&H installers, national P&H contractors), the parties provided evidence (from the CPS customer survey<sup>10</sup>) that customer divisions are becoming

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<sup>10</sup> City Plumbing Supplies – 2007 Customer satisfaction survey, presented in February 2008 (CPS customer survey). See further paragraph 56 below.

increasingly blurred and that multi-sourcing by customers among P&H specialists and other suppliers is common,<sup>11</sup> and

- similarly, in the detailed information supplied by the parties on individual (largely volume related) discounts given on price,<sup>12</sup> there was no consistent evidence that some defined customer groups got better terms for the same requirements than others with negotiations taking place on a case by case basis. There was therefore no evidence that the effects of the merger on competition to supply a targeted group of customers would differ from its effects on other customers so as to require a separate analysis.<sup>13</sup>

31. In light of the above, the OFT therefore considered that it was not appropriate to narrow the market by customer type.

32. Regarding possible narrowing by distribution channel, the OFT notes that:

- the evidence was mixed on the degree of constraint faced by the parties from the various distribution channels
- for example, a DIY store selling a few P&H product stock-keeping units (SKU) was unlikely to impose a significant constraint on a national P&H specialist chain, especially for a trade customer who valued range, service and expertise. However, there is some evidence (discussed below in the unilateral effects section) that even a DIY store can provide a weak constraint, especially in respect of small unbundled purchases of P&H products (for example, tools and accessories)
- similarly, an independent specialist P&H supplier may not provide a significant constraint due to their differential scale and range. However, there is also evidence that independents,

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<sup>11</sup> Notwithstanding this, the parties submitted that differences in the customer bases served by CPS and PTS indicated that they were not close competitors. This is discussed in the unilateral effects section below.

<sup>12</sup> See further paragraph 61 below.

<sup>13</sup> OFT / CC Merger Assessment Guidelines, paragraph 5.2.28.

especially large regional ones, can provide a degree of competition to national specialist P&H chains

- this is a merger between two national specialist P&H suppliers. Therefore, the narrowest product scope could be the supply of P&H products through national specialist P&H suppliers. The evidence available to the OFT indicated that such an approach would be unduly narrow given that there are a range of suppliers of P&H products, all of whom impose varying degrees of constraint on such national specialist P&H suppliers.

33. Overall, therefore, the OFT did not consider it necessary or appropriate to narrow the product scope by distribution channel but has reflected the relative degree of constraint posed by any channel of supply of P&H products or an individual supplier (where the evidence is available) in the unilateral effects assessment below.

#### **Conclusion on product scope**

34. For the reasons outlined above, the OFT considers that the relevant product scope for the assessment of this merger is the retail supply of P&H products. The OFT did not consider that it was necessary for the purpose of reviewing this merger to narrow the product scope by customer type, product type or retail channel.<sup>14</sup>

#### **Geographic market**

35. The parties submitted that there are both national and local aspects to competition. They noted that, with only limited exceptions (such as nationwide projects), 'all customers typically consider their alternative suppliers by reference to their ability to provide products in their local area'.<sup>15</sup> National elements of competition include national procurement and contracts with national customers as well as branding. Local

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<sup>14</sup> As stated above (see paragraph 18 above) market definition is only a tool which can inform the competitive assessment. In this case, the market definition informs the level of constraints that different distribution channels confer on each other when supplying P&H products. The OFT notes that this market, which incorporates a wide variety of competitive constraints, may not be the narrowest possible market satisfying the 'hypothetical monopolist' test.

<sup>15</sup> Footnote 31 of the response to the Issues paper of 8 October.

elements of competition include price discounting and other non-price factors (such as quality of service).

36. The importance of having local outlets in this market is demonstrated by the experience [confidential to third party] P&H trade customers are inclined to visit the premises to check the goods and (when possible) to collect the items before travelling to a job. The importance of local presence is also consistent with data from the CPS consumer survey which indicate that around [75-85] per cent of CPS customers visit CPS branches.
37. In cases involving multiple local areas, catchment areas provide a pragmatic approximation for a candidate market to which a hypothetical monopolist test can be applied. A catchment area is typically defined so as to include the area in which the great majority (for example 80 per cent) of a store's custom is located.
38. The use of catchment areas to approximate sensible candidate local geographic markets is likely to be most appropriate in situations where customers travel to a supplier's location to purchase products. However, the OFT notes that in the present case, P&H products are either collected at the supplier's outlets or delivered to an alternative location.
39. TP first submitted that 10 miles radials (three miles within the M25) is an appropriate catchment area. It argued that these distances are consistent with the approach the OFT has taken in relevant precedents<sup>16</sup> and a good proxy for the 15-minute drive time adopted in another relevant case.<sup>17</sup>
40. During the assessment, TP submitted evidence of where 80 per cent of CPS' sales (by value) were delivered in 18 local areas. In all areas, the radius encompassing 80 per cent of the sales was above 10 miles, although the precise figure varied substantially from area to area. In TP's view, the data showed that, contrary to its preliminary estimates

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<sup>16</sup> OFT decision of 4 February 2005 on the anticipated acquisition by Travis Perkins plc of Wickes plc.

<sup>17</sup> OFT decision of 1 August 2007 on the anticipated acquisition by Speedy Hire of Hewden Stuart.

(which had been based on the above OFT precedents), a 10-mile catchment area was in fact extremely conservative and unlikely to catch all competitors.

41. In support of this argument to expand the catchment area to beyond 10 miles, TP argued that one-off deliveries beyond that distance showed suppliers' willingness (in particular independent P&H specialists) to go beyond that narrow catchment area. It also argued that P&H customers often travel further to get a good price on a specific product.
42. Most of the data that the parties have submitted to support these arguments referred to the catchment area for delivery business. In contrast, the OFT noted that in the only two areas where TP had also submitted the proportion of its collected sales (against the address given by the customer), the radius in which that proportion of sales (by value) was achieved was smaller.
43. One competing national P&H specialist considered an appropriate catchment area (on a conservative basis) to be four miles. However, responses from other national P&H specialists did not tally with this, indicating that a range of between 15 and 20 minutes drive time would capture around 80 per cent of their sales. The OFT has checked that the comparable distance to this drive time is around 10 miles in all seven local areas from where TP has submitted comparable drive time in addition to radial distance.
44. The OFT also looked at the impact of competitor entry at various distances (see paragraph 58 below): if no competitive impact of the entry of a competitor can be found beyond a certain distance, then that distance may be a sensible place to draw the boundaries of a candidate local geographic market. The OFT's competitor opening impact analysis showed that:
  - the closer the entry, the bigger the impact on CPS's revenue and profits, and
  - entry beyond ten miles had no impact at all on CPS's revenue and profits.

## Conclusion on geographic scope

45. In light of the above, the OFT considered that a 10-mile radial was reasonable as a preliminary filter. The OFT does not believe that this is overly conservative, but rather considers it appropriately cautious. Further, on the basis of the evidence received on this point, the OFT believes that proximity matters for competition among P&H suppliers. For this reason, in its unilateral effects analysis below, the OFT has taken into account the proximity between the merging parties' stores as well as between them and other third parties' stores in assessing the competitive impact of the merger in each local catchment area.

## INTRODUCTION TO THEORIES OF HARM

46. As stated in the Merger Assessment Guidelines, '[t]heories of harm are drawn by the Authorities to provide the framework for assessing the effects of a merger and whether it would lead to a substantial lessening of competition. They describe possible changes arising from the merger, any impact on rivalry and expected harm to customers as compared with the situation likely to arise without the merger'.<sup>18</sup>
47. This case raised four theories of harm that were investigated by the OFT:
- unilateral effects in the retail market for P&H products at the national and/or local level
  - vertical effects and in particular whether TP may have the ability and incentive through the wholesale chain, F&P, to raise the price of, or refuse to supply, P&H products (specifically, boilers) to independent P&H specialists ('input foreclosure') with the effect of reducing competition at the retail level
  - anti-competitive buyer power and in particular whether, as a result of its increased P&H retail market share:
    - i. whether TP may be able to secure lower prices than its competitors for P&H products (specifically boilers) from its

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<sup>18</sup> OFT / CC Mergers Assessment Guidelines, paragraph 4.2.

suppliers; and in turn, whether these suppliers may recoup the lower prices obtained by TP with higher prices to other national P&H specialists (a 'waterbed effect'), with the effect of reducing competition at the retail level; and/or

ii. the merged firm has an incentive to lower the amount it purchases so as to reduce the purchase price it pays, recouping lost retail sales, through higher retail prices (known as 'demand withholding').

- coordinated effects at the retail level between PTS/CPS and Wolseley's Plumb Centre.

48. Each of these concerns is addressed in turn below.

## **UNILATERAL EFFECTS AT A NATIONAL LEVEL**

49. As stated in the geographic market discussion (see paragraph 35 above), there are both national and local elements of competition in the retail supply of P&H products. The OFT begins by examining whether competition concerns arise in relation to unilateral effects at a national level.

### **Market shares in the supply of P&H products**

50. The parties submit that, in relation to the supply of P&H products, they have a combined share of supply of [20-30] per cent, with an increment of [10-20]<sup>19</sup> per cent. The parties' estimated shares of supply in relation to the supply of P&H products through all distribution channels, that is, including sales through independent P&H specialists, builders' merchants and DIY stores are shown in Table 1 below.

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<sup>19</sup> See end note 1.

**Table 1 Estimated shares of supply of P&H products by value, 2009**

<b>Supplier</b>	<b>Sales - £m</b>	<b>Share (per cent)</b>
Wolseley	[ ]	[15-25]
Travis Perkins	[ ]	[10-20]
BSS	[ ]	[10-20]
<b>BSS / Travis Perkins</b>	[ ]	[20-30]
Saint Gobain	[ ]	[ 0-10]
Grafton	[ ]	[0-10]
Kingfisher	[ ]	[0-10]
Homebase (Home Retail Group)	[ ]	[ 0-5]
Others	[ ]	[ 30-40]
<b>Total</b>	[ ]	100

Source: Travis Perkins internal estimates

51. In order to assess whether unilateral effects arise at the national level, the OFT has considered evidence provided by the parties (and third parties) on the relative closeness of competition between them and the constraint they face from other suppliers or supply channels of P&H products.
  
52. In support of their contention that, in addition to national P&H specialist chains, the merged entity would face significant constraint from all supply channels, or at the very least, from independent specialist P&H suppliers, the parties put forward a range of evidence that the OFT has considered in its unilateral effects assessment.
  
53. This section, on unilateral effects assessment at the national level, is therefore structured as follows:
  - evaluation of the evidence supplied by the parties on closeness of competition and constraints



- constraints from other national P&H specialists and the closeness of competition between the parties themselves (relative to other national P&H specialists)
- the constraint on national P&H specialists from general builders' merchants, DIY stores and other specialist stores
- the constraint on national P&H specialists from independent P&H specialists, and
- conclusion on unilateral effects at the national level.

#### **Evaluation of the evidence supplied by the parties on closeness of competition in the supply of P&H products**

54. The parties argued that national P&H specialist retailers (including the parties) are constrained by all other suppliers of P&H products, including builders' merchants, independent P&H specialists, others (such as bathroom specialists) and increasingly, P&H trade counters at national DIY stores. They provided the OFT with data from a variety of sources in order to inform the analysis of the constraint from different distribution channels of P&H products and to enable the OFT to assess the constraint they face from those different channels.
55. The parties did not undertake a consumer survey in this case<sup>20</sup> and the OFT therefore assessed the following evidence supplied by them on the closeness of competition.
56. **A 2008 CPS customer survey (the CPS customer survey).** This survey which CPS conducted prior to the proposed merger, showed which supplier CPS customers identified as their next best alternative supplier. The OFT considered this a potentially important source of evidence. However, the OFT notes that:
- the evidentiary weight that the OFT could attach to the CPS customer survey was limited, because the text of the survey

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<sup>20</sup> In many retail cases, the parties commission local area surveys to facilitate assessment of the merger at a local level. This data can also be useful in assessing closeness of competition more generally.

asked respondents about their 'second most frequently used' supplier

- the parties interpreted this as 'next best alternative' (that is the second most frequently used instead of CPS). However, given the prevalence of CPS customer multi-sourcing that was also evident from the survey the OFT considered that this was as likely to mean the second most frequently used in addition to CPS, and
- as such, this ambiguity meant that survey respondents may not have been referring to the kind of switching behaviour that would have been informative about substitution but may in fact have been referring to suppliers that were, potentially, complementary to CPS.

57. **Competitor opening impact analysis.** The parties carried out an analysis of the impact of the opening of [over 250] local independent P&H specialists and other P&H suppliers (for example DIY stores, builders' merchants) on CPS's sales and profits in the UK from 2003-2009. In relation to this evidence, the OFT notes that:

- the parties' analysis did not attempt to control for factors other than entry that may have affected CPS's sales and profits, such as how far away the competitor entered or its date of entry
- potentially as a result of this absence of control, the parties' analysis gave some counter-intuitive results taken at face value, for example that in some cases, new entry led to CPS revenue and profits increasing. The parties suggested that this may be because, when a new merchant enters an area, the incumbent branches may react through short term special offers designed to attract customer loyalty and avoid switching to the new entrant. However, they produced no significant evidence to corroborate this argument.

58. **OFT econometric analysis of the competitor opening impact analysis.** In an attempt to isolate the impact of entry, the OFT carried out an econometric analysis of the impact of competitor openings in a subset of five of the [over 250] local areas analysed by the parties in their

opening impact analysis. In terms of the potential limitations of the OFT's econometric analysis:

- the parties maintained that the OFT's results should not be extrapolated beyond these five specific local areas, in particular given the small size of the sample set. However, these five areas were among those that appeared most problematic to the OFT on the basis of the reduction in the number of national P&H specialist fascias in the local area (that is from 3-to-2 or 2-to-1 – see paragraph 127 below)
- the parties submitted that in each of these areas 'P&H specialists are not the only stores which exert a competitive constraint on the parties' P&H businesses'. The parties also submitted that PTS branch managers in two of those areas ([ ]) commented that competitor entry had impacted on the incumbent store. However, the OFT noted that if entry by builders' merchants, DIY stores and others had had any effect at all, then it should have showed up in these areas since the level of concentration was high<sup>21</sup>
- the parties also disputed the OFT's results, suggesting that the OFT's analysis may have conflated the effect on CPS of entry by PTS with the effect of entry close-by, as the PTS entry events in the OFT's data were much closer (on average) than the entry of other competitors. The parties suggested that, as a result, the OFT should only infer from its analysis that entry by some competitors had some effect on average. The OFT accepts the parties' arguments on this point
- set against the above concerns expressed by the parties, the OFT considers that the competitor opening impact analysis provides some evidence that some independent P&H specialists (and, arguably, some other P&H suppliers, for example DIY stores and builders' merchants) may impose some constraint in some areas. However, the analysis is not sufficient to show that these channels or types of suppliers were a strong

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<sup>21</sup> An important exception was noted: the entry of MKM Building Supplies, a builders' merchant, had a notable impact on CPS revenues and profits in [one area].

constraint on national specialist P&H suppliers, such as the parties.

59. **Margin-concentration analysis.** At the OFT's request, the parties submitted an analysis of the gross profit margin of each CPS store (relative to CPS's national average) correlated against the relative number and type (that is national P&H specialist, independent P&H specialist and other P&H supplier)<sup>22</sup> of competitors in the relevant radius (a 'margin-concentration analysis'). In relation to this evidence:

- relative gross margins were used to control for extraneous factors other than the degree of local competition that could affect profitability but that were (more or less) constant nationwide (for example seasonal weather, the recession) and
- the parties submitted that 'there is no discernible 'rule' as to the likely relative performance of a CPS store according to the number of competitor stores that exist within the relevant radius' and that the poor fit of the statistical relationship in their analysis 'demonstrated statistically the lack of a consistent relationship between the factors being measured'.

60. **'Good news/not so good news' emails.** The parties submitted an analysis of 'good news/not so good news' emails sent between May and September 2010 from PTS branches to central management on a weekly basis. These emails highlighted a few local items of 'good news' (for example winning an order) or 'not so good news' (for example competitive prices offered by rivals). In terms of the value of this evidence:

- this data set, the parties said, were representative of the views of smaller customers who negotiate discounts at the branch level and not centrally<sup>23</sup>

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<sup>22</sup> See end note 2.

<sup>23</sup> The OFT notes that these emails did not predate its consideration of the merger. The OFT generally attaches more evidentiary weight to documents prepared independently of its merger investigations than to those prepared in contemplation of them. In this case, the parties stated that, although 'good news/not so good news' emails were sent from PTS

- from its inspection of the emails underpinning the parties' analysis, the OFT believes that many instances of both the 'good news' and the 'not so good news' were best characterised as being competitor benchmarking. Evidence on benchmarking does not carry the same weight in assessing competition as does evidence on monitoring and reacting to competitor activities, and
- Out of a sample of [over 100] instances that TP [and BSS]<sup>24</sup> presented to the OFT in its first submission<sup>25</sup> to show that CPS [and PTS]<sup>26</sup> had reacted to commercial initiatives of a large set of competitors, the OFT counted only [30-40] references to named competitors, with only [fewer than five] events indicating some reactive action. The rest involved monitoring or a brief reference to a third party. With this quality of evidence, the OFT could not draw any overall conclusion. More instances submitted by the parties in response to the OFT Issues paper of 4 October 2010 did not differentiate whether the parties had reacted to a numerous list of competitors initiatives. For this reason, the OFT did not consider this evidence sufficient to support the parties' contention that all distribution channels constrained national P&H specialist suppliers to an equal extent.

61. **PTS and CPS price matching data.** At the OFT's request, the parties provided two sources of comparative pricing information: CPS data on instances of store staff giving the highest levels of shop floor discount (known as M4 data) and comparable PTS data on instances of store staff requesting central support for discounted pricing (known as 'internal contract support' or ICS data). In both sets of data, many (but not all) discounts are used in order to price match other competitors.<sup>27</sup> The OFT considered that this evidence provided a valuable source of information on the extent to which each of the parties were constrained – at least in terms of price – by different

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branches to management prior to May 2010, they had not collected them until requested to do so by the OFT.

<sup>24</sup> See end note 3.

<sup>25</sup> Annexes 9 and 10 of TP's submission of 16 July 2010.

<sup>26</sup> See end note 3.

<sup>27</sup> Other stated reasons include discounting damaged or obsolete stock.

suppliers, for example, as discussed below, it indicated that other national P&H specialist chains and some large independent specialists may constrain the parties post-merger. It should however be emphasised that M4 discounts are only given by CPS on [zero-10] per cent of its sales and therefore represent only a subset of its 'pricing decisions'.

62. **PTS's experience of its customer views.** The parties submitted the results of an interview conducted by CRA<sup>28</sup> with PTS's central sales team eliciting their views of the preferences of a sample of [over 50] of their customers spending £100,000-£500,000 a year (PTS had [over 350] customers in 2009 spending this amount). The analysis gave the unprompted views of PTS's central sales team on which other competitors PTS's customers would mention, if asked. The OFT considered that this analysis was directionally helpful but it was inherently too subjective for the OFT to attach substantial quantitative weight to it.

**Constraints from other national P&H specialists and closeness of competition between the parties themselves (relative to other national P&H specialists).**

63. As can be seen from Table 1, above, this is a merger between the number two and number three P&H suppliers on a national basis. In addition, the other three suppliers (Wolseley, Grafton and Saint Gobain) in the top five competitors all supply through national branded P&H specialist chains. As such, the OFT considers it appropriate first to examine the competitive effect of the merger with specific reference to national P&H specialists – and then to consider whether the merging parties could be considered to be particularly close competitors within this distribution channel segment of the P&H supply market.

**Reduction in the number of national P&H specialists and shares of supply**

64. This merger leads to a reduction in the number of national P&H specialist fascias from five to four: Wolseley's Plumb Center, Saint Gobain's Graham, Grafton's Plumbase and the merged company. As the OFT/CC Merger Assessment Guidelines make clear, a fascia

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<sup>28</sup> Charles River Associates, TP's instructed economic advisers.

reduction of '5 to 4' has not usually given the OFT cause for concern over unilateral effects.<sup>29</sup>

65. Shares of supply of P&H products by national P&H specialists are shown below. The merger of CPS and PTS will bring the merged company to around [30-40] per cent of national P&H specialist supply, [ ] to Wolseley, with two other significant national competitors (Grafton and Saint Gobain) remaining in the market.

**Table 2 – Share of supply of P&H products by national P&H specialists**

Supplier	Turnover, £m	Market share, per cent
Plumb Center (Wolseley)	[ ]	[ ]
PTS	[ ]	[20-30]
Graham (Saint Gobain)	[ ]	[ ]
CPS	[ ]	[5-15]
Plumbase (Grafton)	[ ]	[ ]
Total	[ ]	100

Source: information compiled by the OFT and the parties

66. The merging parties argue that:
- even if national P&H specialists are considered separately, their combined share of supply is below the level that would usually give the OFT cause for concern over unilateral effects, and
  - pre-merger rivalry between the merging parties has not been significantly different to rivalry between them and other national competitors, nor is there any evidence to suggest that PTS has been a more aggressive competitor to CPS than has any other national competitor. As such the merger does not give rise to concerns beyond those implied by the shares of supply above.

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<sup>29</sup> See OFT / CC Merger Assessment Guidelines, paragraph 5.3.5: 'previous OFT decisions in mergers involving retailers suggest that the OFT has not usually been concerned about mergers that reduce the number of firms in the market from five to four (or above)'.

67. The OFT considers below the closeness of competition between the parties themselves, in particular in relation to other national P&H specialists.

**Closeness of competition between the parties themselves**

68. The parties submitted that they are not close competitors because:

- they have substantially different customer bases
- they offer different retail propositions
- they do not price match/discount much against each other
- PTS has not targeted its store opening/expansion program at CPS
- PTS's rapid growth has come at Plumb Center's expense, not CPS's, and
- in addition to the specific points above, the range of data provided by the parties demonstrates that the parties should not be regarded as close competitors.

69. Each of these points is considered below.

Differentiated customer bases

70. The parties submitted that 'assessing the degree of head-to-head competition between the parties rests on an understanding of the segmented nature of the customer base (in terms of size and type) for P&H supplies'. The parties said that customers can be distinguished between large-scale and small scale purchasers, although they also submitted that customer divisions are becoming increasingly blurred (see paragraph 30).

- Large-scale projects include, for example, public buildings and housing developments where price and consistency of product will be the key drivers of decisions over P&H suppliers. For these projects (including 'new build'), P&H requirements are typically specified by the project manager, often after discussion with the P&H equipment manufacturer. The manufacturer may offer financial incentives to the project manager to specify its particular



brand-based technical specification regardless of which P&H supplier eventually supplies the P&H products.<sup>30</sup> Contracts for large scale commercial projects are often negotiated centrally between the P&H supplier and customer, with particular attention being paid to cost and the efficiency of the distribution system.

- Smaller-scale projects include, for example, renovation, updating of domestic properties or fitting out of smaller industrial developments where range, stock availability and design considerations may play a stronger role than price. At the branch level, most day-to-day customers are smaller scale and P&H products are not bought in bulk. The opportunity to negotiate switching to an alternative brand is greater than in large-scale specified contracts; and value is placed on advice and product range as well as price.

71. On the basis of this distinction between large-scale and small-scale, the parties submit that this transaction has limited impact on any existing rivalry between them because:

- the merging parties are not close competitors for large scale commercial projects, with other competitors such as Wolseley's Plumb Center or Saint Gobain's Graham competing with PTS more heavily for this customer group than does CPS, and
- at the branch level, competition for most day-to-day customers' smaller-scale transactions includes suppliers from other distribution channels: independent P&H specialists, general builders' merchants and DIY stores.

72. The latter of these points is examined further below. In support of the former, the parties submitted evidence showing that PTS has a significantly larger number of high revenue customers than CPS. For example, in 2009 the median PTS customer spent [over £1,500] whereas the median CPS customer spent [under £750]. The OFT noted, however, that these differences were largely accounted for by

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<sup>30</sup> These agreements between the manufacturers and the project managers (or customers) are often called 'Contract Support Agreements'. They may offer better pricing or other non-price advantageous (such as extended warranties).

a few dozen PTS customers (out of over [30,000-40,000]) who spent millions of pounds. The OFT further noted that the great majority of both parties' customers spent less than [£5,000-£15,000] in 2009 ([85-95] per cent of CPS customers and [75-85] per cent of PTS customers). However, the parties pointed out that this comparison ignored the relevance of these customers in terms of the value of sales to them.<sup>31</sup>

73. The parties further submitted that PTS obtains [over 60] per cent of its revenue from commercial/industrial sales whereas CPS obtains [zero-five] per cent and that, unlike PTS, CPS does not have a management team targeting these customers. Consistent with this, some large industrial customers contacted by the OFT said that CPS is not a viable alternative for them.

#### Product range and retail proposition

74. The parties submitted that their retail propositions are also different. PTS stores, the parties said, are aimed at trade customers whilst CPS stores, by contrast, usually include showrooms and are aimed at the general public.<sup>32</sup>
75. Third parties' responses did not entirely confirm this distinction. On the one hand, some third parties (suppliers) considered that the parties had slightly different offerings and the way they buy their stocks would confirm this. PTS, for example, acquires larger bulks of similar items for single larger projects. On the other hand, other third parties (primarily small customers) identified the parties as 'close competitors' but not necessarily 'uniquely close' competitors. In all cases, at least one other third national competitor (or large independent) was listed as a viable alternative from which those customers could procure their P&H supplies.
76. In summary, while any differences in product range and the retail proposition are not sufficient in themselves to lead to firm conclusions on the merging parties' closeness of competition, third parties'

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<sup>31</sup> The parties submitted that sales to customers spending under [£5,000-£15,000] accounted for [over 20] per cent of CPS sales but only [under 10] per cent of PTS sales.

<sup>32</sup> See end note 3.

responses indicated that other national competitors (in particular Plumb Center) was at least equally close to either party.

Price matching data and 'good news /not so good news' emails

77. The OFT's analysis of the price match data revealed that:
- the CPS M4 data showed that, of price matches against the four other national P&H specialists, PTS appears more often than other competitors ([40-50] per cent of the time—Plumb Center appears [40-50] per cent of the time)
  - but conversely the PTS ICS data showed that most of these requests were in response to prices offered by Wolseley's Plumb Center ([55-65] per cent) and Saint Gobain's Graham ([10-20] per cent). CPS was mentioned in [zero-10] per cent of the instances. (Consistent with this, to the extent that PTS's 'good news/not so good news' emails reflect price matching—which is not clear—CPS accounts for only [five-15] per cent of weekly mentions, far less than Wolseley and Saint Gobain).
78. The parties interpreted this as showing that, because PTS targets more high-volume/low-margin business than does CPS, it is unsurprising that PTS often appears in CPS's M4 data. They also pointed out that sales below M4 account for only [zero-10] per cent of CPS's sales and only [0-10] per cent are price matching competitors. The parties note that CPS does not appear so regularly in the instances where PTS has to offer special conditions (or make an ICS request). However, in both cases, they said, Wolseley and/or Saint Gobain appear with the same (if not greater) frequency. This might suggest that Wolseley and/or Saint Gobain are competing with PTS more often, at least, at branch level.

PTS store opening

79. The parties submitted that physical proximity has limited relevance in a sector where trade customers would seek the most competitive price and a large proportion of business is delivered (rather than collected).

80. However, the OFT noted that [70-80] per cent of the customers interviewed in the CPS survey said that they visited the branch. The OFT also noted during its investigation the significant number of competing premises that are located close to each other and both the parties and third parties stated that the location of the premises was very important in catching a substantial amount of 'passing trade'.
81. Notwithstanding this, the parties submitted that there is nothing unique about the rate at which PTS has entered within 10 miles of CPS since 2004 by comparison to the rate of entry of other national P&H specialists.
82. However, the OFT's analysis of the information submitted by the parties was not entirely consistent with this. It suggested that [30-40] per cent of entry was by PTS, [20-30] per cent was by Grafton, [20-30] per cent was by Wolseley and [10-20] per cent was by Saint Gobain. This would suggest a higher rate of entry by PTS close to CPS than PTS's national market share would imply.<sup>33</sup> However, the rate of entry within 10 miles of CPS by Kingfisher (Plumbfix/Screwfix) and single- and multi-store independent P&H specialists dwarfed that of the national P&H specialists.<sup>34</sup>

#### PTS growth

83. The parties argued that PTS's growth strategy has been based on increasing sales at the expense of Plumb Center (the largest national P&H specialist) against whom PTS has competed for the largest national contracts.
84. In support, the parties presented data suggesting that PTS's revenue growth in the last five years has come from a loss of revenues by Wolseley, rather than by CPS; indeed, CPS has also enjoyed some growth, albeit less than PTS. The parties argued that Plumb Center's revenues had declined from just over £1.2 billion to under £900

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<sup>33</sup> See paragraph 65 above: CPS's national market share is [10-20] per cent and PTS's is [20-30] per cent. This means that PTS accounts for [20-30] per cent of the residual market not accounted for by CPS ( $[20-30] / 100 - [10-20]$ ). All else equal, therefore, one might expect PTS to have [20-30] per cent of store openings not accounted for by CPS.

<sup>34</sup> The parties identified [80-90] openings within 10 miles of CPS by the other national P&H specialists and 185 by Kingfisher and single- and multi-store independent P&H specialists.

million and argued that there was a clear causal relationship between that revenue drop and PTS's revenue increase over the same period, which was of a comparable amount.

**Table 3 – Parties' revenues 2005-2009**

Financial year	2005	2006	2007	2008	2009
CPS	£[ ]m	£[ ]m	£[ ]m	£[ ]m	£[ ]m
PTS	£[ ]m	£[ ]m	£[ ]m	£[ ]m	£[ ]m

Source: the parties

### Conclusion

85. On the basis of the evidence discussed above, the OFT accepts the parties' argument that they are no closer as competitors to each other than they are with the wider set of national P&H specialists.
86. The evidence does, however, point towards the existence of close competition between national P&H specialist chains in view of their scale, product range and geographic scope. The evidence provided by the parties, such as price matching data, customer survey evidence, also clearly indicates the closeness of competition between national P&H specialists.
87. The OFT considers below the degree of constraint national P&H specialists, including the parties, would face from other distribution channels or types of supplier.

### **The constraint on national P&H specialists from general builders' merchants, DIY stores and other specialist stores**

#### Builders' merchants

88. The parties submitted that builders' merchants with a stated P&H offering constrain them.
89. The parties also submitted that, notwithstanding their submission on the general constraint they provided, the constraint from builders' merchants could be assessed on a case-by-case basis. In this regard, the parties submitted information on numerous individual builders'

merchants who they considered to have P&H offers comparable to P&H specialists on the basis of price, service and delivery.

90. TP further submitted that the 2008 CPS customer survey showed that [50-60] per cent of CPS customers identified a supplier other than a national P&H specialist as their next best alternative; with builders' merchants, national DIY retailers and independent P&H specialists featuring heavily in the list of suppliers other than CPS used in the previous three months. Specifically, the parties noted that there was evidence of builders' merchants constraining the parties in so far as:
- over [40-50] per cent of respondents in the CPS customer survey had used Screwfix<sup>35</sup> in 2008 for some of their P&H purchases and [10-20] per cent mentioned it as their second most frequently used, and
  - B&Q and Screwfix account for [zero-five] per cent of mentions in the 'not so good news' emails and [zero-five] per cent of mentions in the 'good news' emails.
91. Third parties' views (customers of different sizes and locations; and some of the merging parties' competitors) on the relative constraint provided by builders' merchants were mixed. However, there are significant differences in the number of P&H SKUs held by builders' merchants and P&H specialists. For example CPS specialist stores stock [over 2,000] P&H SKUs whereas 'Travis Perkins' branded builders' merchant outlets stock [over 500] and Wickes [over 1,100].

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<sup>35</sup> See paragraph 17 above. [ ].

92. In respect of this last point, TP submitted that, since 'Travis Perkins' branded builders' merchants and the specialist CPS outlets have access to the same P&H products, they can both offer delivery of any P&H product on file within four days'. However, the parties also submitted that 'a substantial portion of P&H supplies are picked up by customers and not delivered'. For these customers, the OFT believes that other distribution channels are not likely to be substitutable for P&H specialists, because P&H specialists have a wider range of products 'in stock'.
93. Overall, it was reasonably clear that customers indicated that they have a preference for 'in-stock' range and specialist advice and felt that they obtained this from specialist P&H suppliers rather than general builders' merchants. In light of the evidence received during its investigation, the OFT does not consider it appropriate to consider that national and sub-national builders' merchants can be generally considered as close competitors to national P&H specialists.
94. That said, the OFT noted that in some local areas independent builders' merchants were listed by customers as a primary source of their P&H supplies. Therefore, consistent with an analysis of closeness of competition, the OFT considered whether there were exceptions to this general conclusion. That is, whether there were any builders' merchants who imposed a strong constraint on national P&H specialist chains.
95. The OFT did, in respect of one builders' merchant, MKM Building Supplies, receive sufficient and consistent evidence that it provided a strong competitive constraint on the parties because of the size and strength of its P&H offering. This was on the basis that:
- it brands itself as a 'one-stop' shop for building materials and plumbing and heating, mainly for trade customers
  - it has a strong regional presence with 36 stores in the North-East of England and Southport
  - it was identified as a competitor in the merging parties' internal documents including a significant number of price-matching instances, and

- it was identified by local P&H customers as a significant competitor.

96. On the basis of the above, the OFT considered that the constraint provided by MKM Building Supplies was strong and could be seen as broadly commensurate with that provided by national P&H specialists.

DIY retailers

97. The parties also submitted that they are constrained by DIY retailers on the basis that:

- in the CPS customer survey, over a third of respondents had recently purchased P&H products from B&Q, and B&Q was mentioned as their second most frequently used supplier by [5-15] per cent of CPS customers
- a Trade Point scheme has been introduced to B&Q stores to encourage trade customers, offering trade discounts and account facilities, and
- DIY retailers have longer and more convenient opening hours than P&H specialists.

98. Set against this, third party customers were unanimously of the view that, although they may procure P&H products from DIY stores in an emergency due to the DIY stores' longer opening hours, these cannot be considered a substitute to a P&H specialist. The level of 'trade' services offered (for example, specialist advice and after sales support, ability to service large contracts, credit and account facilities, free delivery) are not generally available from DIY retailers.

99. On this basis, the OFT does not consider that DIY retailers should be regarded as close competitors to national P&H specialists, and consider that any constraint is relatively weak.

Other specialist stores (such as bathroom specialists)

100. The parties submitted that specialist stores (such as bathroom specialists) constrain the merging parties, at least with respect to certain product lines.



101. Set against this, no third parties have named any specialist stores as a competitor to the merging parties or other national P&H specialists. Furthermore there are [fewer than five] references of specialist bathroom retailers in the parties' internal price matching data.
102. For some customer types (such as bathroom installers), a specialist outlet may offer a viable alternative to the merging parties for some supplies (such as bathroom suites). However, it is significant that the parties did not provide any evidence which could corroborate or quantify the constraint these specialist stores confer on the merging parties.
103. The limited range, as well as the lack of any other convincing evidence supplied by the merging parties on this issue, together with the lack of any support from third parties' views, mean that the OFT considers that other national and sub-national specialists stores provide a weak constraint on national P&H specialists.

#### **The constraint on national P&H specialists from independent P&H specialists**

104. The parties submitted that independent P&H specialists provide a constraint on national P&H specialists when taken together. However, they accepted that the competitive strength of each independent varies from case to case.
105. Consistent with this, a third party competitor told the OFT that it considered there to be around 900 independent P&H specialist outlets (some belonging to multi-store chains) that could be described as effective competitors to national P&H specialists in those local areas where they are present. Other competitors also told the OFT that independents play a significant role in this market.
106. The parties argued that the competitor opening impact analysis suggested that there was no significant difference in the impact of new entry by these suppliers and the entry of independent or multi-store regional P&H specialists.
107. In support of the proposition that independent P&H specialists did provide a significant constraint, TP submitted the CPS customer survey showing that [30-40] per cent of TP customers had also bought P&H products from a range of independent P&H specialists. According to the parties, the survey illustrated that, of all the suppliers listed,

independents received the most positive customer feedback on many parameters (opening hours, technical expertise, product range, value for money and delivery service).

108. In addition, the parties noted that:

- the 'good news/not so good news' emails<sup>36</sup> and other internal documents<sup>37</sup> show that they monitor independent P&H specialists, and
- TP's senior management has referred to the competitive threat posed by the independents in internal and external presentations.<sup>38</sup>

109. The parties further submitted that they both undertake local analyses when deciding whether to open new branches, which often refer to local independents. They also submitted that independents often financially outperform CPS and have generally weathered the recession better than CPS.

110. Conversely, most independent P&H specialists who responded to the OFT's inquiry, and four large customers, informed the OFT that independent P&H specialists did not provide a constraint on the merging parties and other national P&H specialists. This was because independents are of varying scales, with varying sizes of range, and potentially without access to sales features (for example finance offers) that could be provided by national suppliers.

111. A number of independent specialists also commented to the OFT that their competitive constraint on the merging parties was limited given that they were unable to procure well-known brands of boilers (primarily Bosch-Worcester, Vaillant and Baxi) at competitive prices. One large independent told the OFT that this difficulty in accessing boilers at competitive prices had hindered its expansion in heating products and

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<sup>36</sup> This evidence shows that around [25-35] per cent of 'not so good news' and [10-20] per cent of 'good news' for PTS relates to other competitors, principally independents.

<sup>37</sup> These include: competitors' logs, identification of local competitors when assessing the suitability of new branches, price matching schemes, and emails to senior management stating independents' availability to access top brand boilers at a cheaper price.

<sup>38</sup> Geoff Cooper, TP's Chief Executive, has referred to the strength of independents on several occasions. [ ].

had forced it to confine itself to offering plumbing goods. While this was an exceptional response, many others raised the same concern about the functioning of the boiler supply channel. Respondents to the OFT's market investigation noted that the commercial importance of supplying boilers arose from new energy saving regulations, which are driving up boiler sales and sales of complementary products (such as cylinders, flues and radiators).

112. In relation to this specific concern about access to boilers at competitive prices, and the risk that this could undermine the competitive strength posed by independents, TP argued that:

- contrary to third parties' submissions, CPS does not buy boilers more cheaply than independents do (though PTS does, as a result of its volume-based business model), and
- in any event, boiler manufacturers provide 'channel support' to P&H independents in the form of ex post rebates which help keep this route to market open.

113. The evidence available to the OFT has not demonstrated that P&H independents provide, as a distribution channel, a significant constraint to national P&H specialists (including the parties). This is because independents vary significantly in terms of their scale and their size, and it is clear that the constraint from independent P&H specialists will be variable in strength depending on the independent involved.

114. That said, implicit in this assessment, is the fact that some independents do offer a competitive proposition that may be similar to that of national P&H specialists. In particular, the OFT's investigation has suggested that the constraint provided by large regional independent P&H specialists may be comparatively strong and broadly equivalent to that provided by the national P&H specialists.

115. At a national level, on the basis of the available evidence, the OFT identified Crosslings Ltd (Crosslings) as being in a differentiated position from most other independents on the basis that:

- it is a plumbers' merchant operating in the North of England with 14 branches and a turnover of £[ ] million in 2008

- it has an average turnover per branch of just over £[ ] million, which is at the top end of the merging parties' branch turnovers
- it appears listed in PTS' ICS data more often than CPS, which indicates that its constraint in those areas where it is present is at least as significant as that of CPS
- the parties stated that CPS branch managers had offered significant discounts on sales in response to entry by Crosslings in [one area] (although no corroborating evidence was provided on this).

116. In summary, therefore, the OFT considers that:

- P&H independents exert some competitive constraint on the parties, but are not for the most part as strong and consistent a constraint as the other national P&H specialists
- there is, however, evidence to support the inclusion of Crosslings, a large regional independent, as equivalent in terms of competitive constraint in its particular region as a national specialist P&H chain
- in the local analysis that follows, where the OFT has been supplied with or has obtained during its investigation supporting evidence of sufficient weight, it has considered the constraint from identified individual independent P&H specialists in the relevant local areas where they compete and where this has been relevant for its analysis.

#### **Conclusion on unilateral effects at the national level**

117. On the basis of the above, the OFT does not consider that the merger gives rise to cause for concern over unilateral effects on price or non-price factors at the national level given in particular that:

- even focusing on national P&H specialists, there will still be at least four national P&H specialists (the merged entity, Wolseley, Grafton and Saint Gobain), as well as at least one builders' merchant identified as having a very strong P&H offering (MKM Building

Supplies)<sup>39</sup> and – where it is present – at least one large regional independent P&H specialist identified as exerting a strong competitive constraint (Crosslings)

- the parties' combined share of supply in the supply of P&H products through national specialist P&H suppliers (that is a narrow segment of the market) is below 40 per cent, and
- the evidence available to the OFT does not suggest that the parties are closer competitors than their combined share of supply would imply.

## **UNILATERAL EFFECTS AT A LOCAL LEVEL**

118. As discussed above (see paragraph 35 above), the available evidence suggests that there is a significant local component to competition in the supply of P&H products. The parties also submit that competition in this market takes place at a local level. Therefore, it is appropriate to consider the impact of the merger at a local level as well as a national one.

119. The OFT examined the impact of the merger on competition within 10-mile radial catchment areas, centred on the target store. On this basis, the merger gives rise to 164 overlaps. In these areas, the merger has the potential to give rise to unilateral effects concerns by removing the competitive constraint that each party currently places on the other. This could in turn enable the merged firm to raise prices at the target outlets or worsen some non-price factor of competition (for example quality of service, range of goods).

## **METHODOLOGY**

### **Drivers of competition informing the methodology**

120. To assess these local concerns, the OFT adopted a two-stage methodology. This methodology reflects two important dynamics of competition in this sector: i) type and identity of the retailer; and ii) location.

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<sup>39</sup> See further paragraph 120 below.

- i) On identity, as discussed above, the available evidence suggests that **national P&H specialists are more significantly constrained by other national P&H specialists than they are by other P&H suppliers**. Therefore, the OFT has taken a cautious view and looked in the first instance only at the national specialist suppliers of P&H products, plus a couple of others that have been identified as imposing a particularly strong competitive constraint on the parties on a local basis. These are:
- Crosslings: a plumbers' merchant operating in the North of England with 14 branches and a turnover of £ [ ] million in 2008. Its average turnover per branch of just over £[ ]million is at the top end of the merging parties' branch turnovers (see paragraph 115 above).
  - MKM Building Supplies (MKM): a builders' merchant with operations in the North East, East Anglia, and Scotland with a turnover of £[ ] million, mainly from heavy-side building supplies (such as concrete, bricks, etc) but also branding itself as a 'one-stop' shop for plumbing and heating, mainly for trade customers. It was identified as a competitor in the merging parties internal documents including price-matching instances and also by local P&H customers (see paragraph 94 above).
- ii) On location, the available evidence suggests that **physical location is an important parameter of local competition between retailers**. Therefore, in the absence of conclusive evidence to the contrary, it is to be expected that competition between particularly close P&H specialist outlets would be significantly higher than between them and more distant P&H specialist outlets, all else equal.

121. Therefore, on a cautious basis, the methodology set out below also gives weight to the analysis of competition within a five mile catchment area of the target outlet. Where competitor outlets lie within a five mile catchment area of the target, they are viewed as likely to be particularly strong competitors.

## Description of methodology

### Stage 1: Desktop fascia counting exercise

122. Local areas were defined on the basis of 10-mile radials around each target store. In those areas in which an overlap between the merger parties arose, the number of national P&H specialists with outlets within each of these areas was examined.
123. The analysis adopts the cautious approach that a reduction in the number of national P&H specialist fascias within a 10-mile catchment area from '3-to-2' or from '2-to-1' gives rise to a realistic prospect of a substantial lessening of competition. The concerns from the loss of competition between national P&H specialists in such areas are considered sufficiently strong that any evidence on the presence of P&H independents in the area would be insufficient to dispel them.<sup>40</sup>
124. In a number of other local areas, the merger would lead to fascia reductions of '4-to-3' between national P&H specialists. The OFT considered that these areas raised preliminary competition concerns that merited further assessment, but its concerns were relatively muted.<sup>41</sup> In such areas, therefore, the methodology does take into account the available evidence on the existence of local independent P&H specialists, and their likely strength as competitive constraints on the merging parties.

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<sup>40</sup> Given that local surveys were not carried out, the OFT did not calculate illustrative price rises (IPRs) in this case. However, it is relevant to note that in a local area where there are currently three national P&H specialists, it would not be unreasonable to expect that the diversion ratios between them were at least 35 per cent, assuming symmetry and assuming that around 30 per cent of sales divert away from these players altogether. Assuming an isoelastic demand function (as is usual in our IPR calculations), and using the estimated [10-20] per cent gross margin for the parties, a merger between any two of these players would give rise to an IPR of over [five-15] per cent. This supports the approach of treating '3-to-2' and '2-to-1' mergers as raising significant concerns.

<sup>41</sup> Based on the same approach as taken in the previous footnote, the diversion ratios in a local area with four national P&S specialists would be [20-30] per cent. This implies an IPR of [zero-10] per cent, based on same assumptions as above. This is only slightly above a five per cent intervention threshold that the OFT has used in other retail cases (see Anticipated acquisition by Asda Stores Limited of Netto Foodstores Limited, 23 September 2010, paragraph 36), and therefore leads to relatively muted concerns.

125. The analysis also examined whether there were any additional areas in which the merger would create a '2-to-1' reduction in national P&H specialists within a five-mile radius of the target, even where four national P&H specialist outlets would be left post-merger within the 10-mile radius. The concern in such areas is that the parties are likely to be each other's closest competitors, due to their proximity, with other national P&H fascia less strong as competitive constraints, due to their greater distance from the parties.

Stage 2: Further assessment of 4-to-3 areas <sup>42</sup>

126. Stage 2 of the methodology involved a further assessment of the '4-to-3' areas identified at Stage 1. A series of three filters was employed at this stage in order to exclude those areas where the OFT did not in fact consider a substantial lessening of competition to be realistic:

- in a number of the areas, the PTS and CPS outlets were found to be relatively far away from each other (at least five miles apart). The OFT considers that the merger does not give rise to a realistic prospect of a substantial lessening of competition in these areas
- in a number of areas, the two other national P&H specialists in the 10-mile catchment area were in fact found to be located very close to the parties (that is within five miles of the target outlet). In one area, the second competing national P&H specialist was 5.1 miles away from the target, and the rule was also flexed to exclude this area. Again, the OFT considers that the merger does not give rise to a realistic prospect of a substantial lessening of competition in these areas
- in a number of the remaining areas, the merger parties would continue to face competition from one national P&H specialist that is 'close' to the merging parties (within five miles from the target store) **and** the OFT was persuaded, based on compelling evidence available to it, that they also faced strong competition from a non-national (independent) P&H specialist, also within five miles of the target store. The OFT considered that there is no realistic prospect of a substantial lessening of competition in these areas.

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<sup>42</sup> And any additional areas where the merger creates a '2-to-1' on a five mile radius.



## Application of the methodology

### Stage 1, 3-to-2 and 2-to-1 areas

127. Stage 1 identified 13 areas where the merger leads to fascia reductions of '3-to-2' or '2-to-1' among national P&H specialists in 10-mile radial catchment areas. All these areas give rise to a realistic prospect of a substantial lessening of competition. The 13 areas are:

<b>2-to-1 fascia reduction</b>		
Telford		
<b>3-to-2 fascia reduction</b>		
Bridgend	Woolwich	Hitchin
Luton	Haverfordwest	Newport
Port Talbot	Merthyr Tydfill	Swansea
Tamworth	Weston-Super-Mare	Witney

### Stage 2, 4-to-3 areas

128. Stage 2 of the methodology involved further assessment of the catchment areas where the merger leads to a fascia reduction of '4-to-3', and one additional area (Newhaven) in which the merger constituted a '2-to-1' on a five miles radius, but a '5-to-4' on a 10-mile catchment area. This identified 38 local areas for further assessment.

129. However, following the methodology explained above (see paragraph 126 above), the OFT concluded that the loss of rivalry was not substantial where the PTS and CPS stores are more than five miles apart. The following four areas met this criterion:

<b>4-to-3 fascia reduction where the CPS store is further than five miles from the PTS store</b>		
Stafford	Tipton	Wadebridge
Wigan		

130. The OFT also concluded that the loss of rivalry was not substantial where there are two other national P&H specialists within five miles of the PTS store (see paragraph 120 above). The following 24 areas met this criterion:

<b>4-to-3 fascia reduction where two other P&amp;H national specialists are within 5 miles of the PTS store</b>		
Aberdeen	Aberystwyth	Barnstaple
Basingstoke	Bridgwater	Cannock
Carmarthen	Crayford	Dyce
Falkirk	Harlow	Hereford
Inverness	Kidderminster	Kings Lynn
Mansfield	Milton Keynes	Orpington
Salisbury	Scarborough	Torquay
Truro	Weymouth	Wolverhampton

131. After exclusion of the '4 to 3' areas detailed above, there remained ten local areas for further stage two consideration. In these 10 areas, having regard to the more limited nature of the prima facie loss of competition (see paragraph 124 above), the OFT considered whether the loss of rivalry could be said not to be substantial because, in addition to one other national P&H specialist being close to the PTS outlet, there is at least one effective independent P&H specialist also within five miles of the PTS outlet (see paragraph 126 above).

132. The OFT's investigation provided it with some information about independents operating in these ten areas. The OFT assessed the constraint provided by independents in these areas by reference to:

- the location of the independent(s) in question
- the estimated turnover of the independent(s) in question - and whether it was broadly equivalent to the branch turnover of one of the party's stores
- the range of products supplied by the independent(s) in question

- whether the independent(s) in question featured in the price-match data submitted by the parties, and
- whether the independent(s) in question had been identified as a competitive constraint by third parties.

133. On this basis, the OFT was able to satisfy itself that independent competitors provided a sufficient constraint in Brierley Hill (where Plumbwares Ltd and Plumbequip were present), Pontypridd (where Dougfield Plumbing Supplies Ltd was present) and Southport (where AMS Plumbing Supplies was present) such that it could dismiss there being a realistic prospect of a substantial lessening of competition in those areas.<sup>43</sup> In each of these areas, the OFT obtained independent confirmation of the presence and competitive strength of the identified competitors.

134. In the remaining seven areas (Aldridge, Basildon, Dorchester, Hemel Hempstead, Macmerry, Newhaven<sup>44</sup> and Walsall) the OFT did not have sufficient information available to it to conclude that any independents located in those areas provided a sufficient constraint in the supply of P&H products such that the OFT could dismiss concerns. The OFT does not exclude the possibility that there are such independents in those areas; however, it was not able within the confines of its investigation to identify them with the degree of confidence required.

### **Conclusion on unilateral effects at a local level**

135. In total, the OFT has identified a realistic prospect of a substantial lessening of competition based on unilateral effects at a local level in 20 local areas.

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<sup>43</sup> For completeness, the OFT notes the existence of other independent competitors in these areas. However, the OFT was not able to ascertain the extent to which these other competitors exert sufficient competitive constraint on the parties.

<sup>44</sup> The one area identified as being a '5-to-4' on a 10-mile radius but a '2-to-1' in a five-mile radius such that it warranted further analysis by the OFT consistent with a 4-to-3.

## **VERTICAL EFFECTS, ANTICOMPETITIVE BUYER POWER AND COORDINATED EFFECTS**

136. Four competitors have raised concerns about the effect that the merger might have on customers as a result of TP acquiring BSS's national P&H wholesaler F&P in addition to BSS's P&H retailing businesses CPS. F&P supplies CPS and independent third parties.

137. As detailed above,<sup>45</sup> these concerns may be characterised as input foreclosure, anticompetitive buyer power (a waterbed effect and demand withholding) and coordinated effects.

138. In assessing the concerns over input foreclosure and anticompetitive buyer power (though not coordinated effects), the OFT notes that they pre-suppose to varying extents the existence of separate markets for the wholesaling and retailing of boilers. However, all but one competitor suggested that the narrowest candidate market in this case is the supply of P&H products (without further segmentation). Nonetheless, taking a cautious approach, the OFT has assessed these concerns by considering boilers separately, noting, where appropriate, where the wider market identified for P&H products affects its analysis.

139. In respect of the concerns over input foreclosure, the OFT also notes that non-horizontal mergers do not involve a direct loss of competition between firms in the same market and it is a well-established principle that most are benign and do not raise competition concerns.<sup>46</sup>

### **VERTICAL EFFECTS: INPUT FORECLOSURE**

140. Mergers which are principally horizontal in character may have vertical effects if one or more of the merger firms also operate at a different level of the supply chain for the good or service. The merged firm will generally need to have a significant position in the market for an SLC to arise from vertical effects. In assessing the vertical effects of a

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<sup>45</sup> See paragraph 47.

<sup>46</sup> OFT / CC Merger Assessment Guidelines, paragraph 5.6.1.

horizontal merger, the Authorities will use the same approach as on assessing a purely vertical merger.<sup>47</sup>

141. Four competitors told the OFT that post merger TP (having acquired F&P) will be able to increase the cost of boilers to independent P&H retailers (partial input foreclosure). Others told the OFT that TP (via F&P) will be able to stop supplying boilers to them (total input foreclosure). In general, the OFT is more concerned with total foreclosure as a theory of harm than with partial foreclosure, given its more obvious potential impact on competition.

142. Both sets of complainants argue that, because there are only two main national wholesalers (Wolseley's BCG and BSS's F&P), the market share increment in P&H retailing resulting from this merger incentivizes TP to partially or totally foreclose the supply of boilers to rival retailers.

143. The OFT has framed its analysis of input foreclosure around three questions:

- **Ability:** would the merged firm have the ability to harm rivals, for example through raising prices or refusing to supply them?
- **Incentive:** would it be profitable to do so?
- **Effect:** would the effect of any action by the merged firm be sufficient to reduce competition in the affected market to the extent that, in the context of the market in question, it gives rise to an SLC?

In practice, the analysis of these questions may overlap and many of the factors examined below may affect more than one question.

#### **Ability to foreclose**

144. Ability in this case depends on four factors.

145. First, the ability to foreclose depends on the degree to which it is possible for retailers to switch away from BSS's F&P to BCG or other sources of supply (for example, to regional distributors or to direct

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<sup>47</sup> OFT / CC Merger Assessment Guidelines, paragraphs 5.4.22 and 5.4.23.

supply from manufacturers). This in turn depends on F&P's market share in P&H wholesaling (specifically of boilers) and/or on whether F&P is a 'must use' wholesaler.

146. As stated above,<sup>48</sup> the merger does not add any market share in the wholesale level supply of boilers in the UK. In this regard, two third parties estimated F&P's market share to be 45 per cent and 65 per cent. This level of market share is above the threshold that may give the OFT cause for concern over input foreclosure (30 per cent).<sup>49</sup> The parties estimated F&P's market share in boiler wholesaling to be [30-40] per cent, only just above that threshold.
147. The majority of customers contacted by the OFT had dealings with both F&P and BCG. Set against this, the OFT understands that independent P&H specialists often purchase boilers through buying groups. Further, one buying group told the OFT that it could 'break' bulk purchases from boiler manufacturers and act as a wholesaler to independents who were not members of the group (although two others did not).
148. Second, the ability to totally foreclose (but not partially) depends on the extent to which F&P can credibly commit not to re-supply boilers to independent P&H specialists, for example by adopting supply-chain practices which mean that it physically cannot supply independents in future.
149. No complainants identified any such plausible practices, nor did any third parties suggest anything that the OFT could use to identify what these might be.
150. Third, the ability to foreclose (partially and totally) depends on the cost of boilers relative to the total cost of the bundle of the P&H products that independent P&H suppliers are buying from F&P and selling to their customers. The smaller the proportion of total cost accounted for by the boiler, the less ability F&P have to foreclose independent P&H suppliers.
151. In this regard, the information available to the OFT was insufficient to ascertain with any precision the exact proportion of the cost of the

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<sup>48</sup> See paragraph 19.

<sup>49</sup> OFT / CC Merger Assessment Guidelines, paragraph 5.3.5.

bundle accounted for by the boiler. One competitor estimated that boilers represent 20 per cent of the heating market. Notwithstanding this, almost all third parties contacted by the OFT said that boilers were 'important' and some commented that boiler sales 'drive' other purchases. Both comments suggest that the share of boilers in the bundle is significant.

152. Lastly, the ability to foreclose depends on the pass-through of any increase in F&P's wholesale price of boilers to independents to their end customers (for example plumbers). If independents are able to pass the increased cost of boilers through into higher prices without losing much business, then they are not likely to lose sales to any putative foreclose strategy.
153. In this regard, boiler manufacturers told the OFT that while they do not influence the final price, they are conscious of sales volumes and any reduction in those would lead to immediate action. They also told the OFT that they use different marketing tools other than price to promote their boilers against other brands including 'customer support' (for example rebates). Both these statements are consistent with independents not losing many sales and would therefore lead the OFT to believe that foreclosure is less likely. The manufacturers of two of the top boiler brands told the OFT that any attempts to foreclose the merging parties rival retailers, for example by raising F&P's wholesale prices, would lead them to react so as to protect their sales against other boiler manufacturers. They also explain that they could follow the practice in other European countries where boiler manufacturers might have wholesale distribution activities themselves. While this is not the current practice, it is not unreasonable to consider that it might happen if a large international boiler manufacturer starts losing out sales to other competitors due to any pressure or action by the merged entity.
154. On balance, the OFT does not believe that TP would have the ability to totally foreclose independent boiler supplies. With regard to partial input foreclosure, the evidence on ability is mixed and it is unclear to the OFT on the basis of the foregoing whether TP (through F&P) would have the ability to partially foreclose. On a cautious basis, the OFT has proceeded to examine any incentive that the parties may have to partially foreclose.

### **Incentive to partially foreclose**

155. The incentive of the merging parties to partially foreclose boilers to independents depends on three factors.
156. First, the incentive to foreclose depends on the loss of profits in F&P's wholesale supply of boilers. The higher this is, the lower is the incentive to foreclose. This in turn depends, amongst other things, on the degree of competition in the wholesale supply of boilers.
157. In this regard, one complainant submitted that the wholesaling of boilers is virtually a duopoly, with F&B and BCG having some 81 per cent of the market. Though other third parties did not submit market share data, the consensus of opinion was that the market is concentrated. Indeed, this was also reflected in BSS's internal documents. Consistent with this, one complainant submitted that profit margins on boilers at the wholesale level are higher than at the retail level,<sup>50</sup> and that profit margins at the retail level had eroded as the wholesale level had become more concentrated. This was further supported by other third parties, albeit qualitatively rather than quantitatively with regard to boilers from certain brands.
158. Second, the incentive to foreclose depends on the gain in profits in sales of boilers at the retail level. The lower this is, the lower the incentive to foreclose. This in turn depends on the elasticity of customers' demand for boilers and the diversion ratio from independents to PTS and/or CPS. If the elasticity of customers' demand for boilers and the diversion ratio from independents to PTS/CPS are both low, then this gain is likely to be low. This is because the foreclosed firm does not lose much business and little of that diverts to the downstream arm of the merged firm.
159. In this regard, one complainant—citing BSS's Preliminary Results presentation for the year ended 31 March 2010—told the OFT that the elasticity of demand for boilers is low. This is consistent with third parties' comments referred to above on the importance of boilers.

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<sup>50</sup> Strictly speaking, the complainant submitted comparisons between its retail price and the parties' which suggested that, for the parties to make any money at all on boiler sales [ ] than the complainant earned at the retail level.



Moreover, this complainant also submitted that 'there is a core of customer demand that will continue to prefer [two brands], even though there are incentives to try other brands.'

160. In respect of the diversion ratio from independents to PTS/CPS, the discussion of independents in the national unilateral effects section above may suggest that the diversion from them to PTS/CPS is likely to vary on a case-by-case basis and would not be expected to be uniformly high.

161. On balance, then, the evidence above does not suggest that the merger gives TP sufficient incentive to engage in input foreclosure.

### **Effect of foreclosure**

162. For completeness, the evidence available to the OFT does not suggest that any such partial foreclosure would in any event have an anticompetitive effect. In particular, boiler manufacturers told the OFT that, through contract support agreements, large customers can benefit from similar pricing, and other terms and conditions (such as extended warranties) regardless of the distribution channel used for final delivery. Lastly, the main boiler manufacturers told the OFT that if the merger led to a reduction in their revenues, they would consider establishing alternative distribution channels; including setting up their own wholesale arms [ ] or finding alternative routes direct to end customers.<sup>51</sup> In support of this commercial freedom to protect their commercial interests, two of the major boiler manufacturers told the OFT that they are not contractually obliged to exclusivity or volume levels with any wholesale or retail customer (including F&P and BCG).

### **Conclusion on input foreclosure**

163. On the basis of the above, the OFT does not consider that the merger gives rise to a realistic prospect of anticompetitive partial or total input foreclosure of independent P&H specialists.

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<sup>51</sup> The Merger Assessment Guidelines also note that the OFT may also need to take account of any stimulus to rivalry in the downstream market that may arise as a result of efficiencies from the merger. Given the OFT's findings on ability, incentive and effect not including efficiencies, it is not necessary for the OFT to conclude on this.

## **ANTICOMPETITIVE BUYER POWER: WATERBED EFFECT AND THE DEMAND WITHHOLDING**

164. One complainant told the OFT that the merger would increase the combined group's bargaining power. In support, it noted that TP has said that it expects to garner £19m of purchasing synergies from the merger. It also noted that TP's CEO had confirmed to City analysts the improved buying terms that the merged business would enjoy. On this basis, the complainant said that the merger would harm its ability to compete as well as that of other smaller competitors.

165. As with the discussion of partial input foreclosure, this argument principally relates to boilers. In contrast to complaints of input foreclosure, which related to the supply of boilers indirectly through BSS's wholesaler F&P, the complaint about anticompetitive buyer power related to the direct supply of boilers from manufacturers to PTS/CPS. As characterised by the OFT, the complaint about anticompetitive buyer power has two limbs: a 'waterbed effect'<sup>52</sup> argument and a 'demand withholding' argument.

166. In many cases, an increase in buyer power is not likely to give rise to anticompetitive effects; and some of the benefits to the firm of its greater market power may be passed on to the merged firm's customers.<sup>53</sup> Nonetheless, on a cautious basis, each theory of harm is considered below.

### **Waterbed effect**

167. Under the waterbed effect argument, any additional discount generated by the enhanced buying power of the merged firm allows it to reduce prices and attract additional business. Some of that increased business comes at the expense of the merged firm's competitors (some may come from growing the market, however—for example see paragraph 1978). Their scale of activity is therefore reduced.

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<sup>52</sup> The term waterbed effect has also been used to describe a theory of harm whereby the prices of two or more related products sold by separate firms pre-merger are rebalanced by a single firm post-merger in a way that may harm competition (for example, in this case, boilers and cylinders, radiators and flues). This was not the concern of the complainant in this case.

<sup>53</sup> OFT / CC Merger Assessment Guidelines, paragraph 5.4.19.

168. This may reduce the discount that they obtain from their suppliers and/or make them less able to enjoy economies of scale. If so, then this 'waterbed effect' may give rise to competition concerns if the merged firm's retail competitors are already sufficiently 'squeezed' that they exit the market or otherwise cut back their operations. This reduces the competitive pressure on the merged firm, potentially more than offsetting any pro-competitive effects of its buyer power.
169. The waterbed effect in this case therefore depends on four factors. First, the extent to which discounts depend on scale. Second, whether any scale-dependent discounts apply 'at the margin' to prices, so that discounts affect retailers' incremental costs, which in turn affect the prices they charge. Third, whether there are economies of scale in retailing and fourth, whether the merged firm's rivals are much smaller and/or operating under much lower margins (that is they are squeezed). Even if so, any waterbed effect must still be weighed against any pro-competitive effects of buyer power.
170. Two major boiler manufacturers told the OFT that discounts do not depend only on volume but also on a wide set of criteria, including supply logistics and credit-worthiness. Indeed, one of these manufacturers said that [ ]. Further, these boiler manufacturers told the OFT that the volume-related discounts offered did not apply at the margin to price but took the form of retrospective rebates (at between 30 and 45 days). Other third parties also told the OFT that boiler manufacturers undertake promotional and other activities in lieu of price discounts. Consequently, it is not clear to the OFT that any reduced scale of the merged firm's retail competitors would necessarily result in them obtaining reduced discounts, nor that any reduction in discounts would much affect the prices that they charge.
171. Neither did the OFT uncover any evidence that economies of scale in P&H retailing are such that a small reduction in the scale of the activities of the merged firm's competitors would substantially increase their costs of operation.
172. Moreover, on the basis of the discussion of national unilateral effects (and in particular, the market shares in paragraph 65) the parties' competitors all appear to have significant market shares.

173. Lastly, although competitors complained to the OFT that the margins earned on sales of boilers were low, these appeared comparable to those earned by the parties. For example, one competitor submitted that the average gross margin it achieved on boilers purchased from the big three manufacturers in 2010 was [zero-10] per cent. In comparison, the parties submitted that CPS's average gross margin on 2009 boiler sales was [zero-10] per cent (lower for the 'big three') and PTS's was [five-15] per cent.

174. In addition, this competitor submitted that boilers accounted for [15-25] per cent of its sales and it made 'significantly higher' margins (averaging [20-30] per cent) on the other [75-85] per cent. In comparison, the parties submitted that boilers accounted for [20-30] per cent of CPS's sales in 2009 (and that its gross margin on the other [70-80] per cent averaged [20-30] per cent) and [30-40] per cent of PTS's (and that its gross margin on the other [60-70] per cent averaged [10-20] per cent).

175. The OFT's investigation did not indicate that competitors are more squeezed than the parties, or sufficiently squeezed that they would exit the market or cut back their operations as a consequence of the exercise of any buyer power that the merger might give the parties.

#### **Conclusion on waterbed effect**

176. On the basis of the above, the OFT does not consider that any increase in buyer power attributable to the merger gives rise to a realistic prospect of an SLC through a waterbed effect.

#### **Demand withholding**

177. Under the demand withholding argument, the increased buyer power of PTS and CPS could harm competition by resulting in higher prices to customers if:

- boiler manufacturers are producing boilers under decreasing return to scale and PTS and CPS are their major customers. If so, then PTS and CPS face an upward sloping supply curve for boilers from

manufacturers.<sup>54</sup> This means that—as they reduce the quantity of boilers that they purchase—boiler manufacturers reduce the price that they charge PTS and CPS for boilers, and

- PTS and CPS have sufficient market power in the retail supply of boilers so that they are able to compensate for the revenue they lose from selling fewer boilers (and complementary P&H products such as radiators, flues and cylinders) by increasing the price of the boilers that they sell.

178.No boiler manufacturers told the OFT that they were unwilling to sell more boilers unless prices rose (for example see paragraph161), as one would expect if they faced diseconomies of scale.

179.In relation to whether PTS and CPS are the major customers for boiler manufactures, the OFT was unable to ascertain the proportion of boiler sales by the major manufacturers that were accounted for by purchases by PTS and CPS. One complainant told the OFT that it had been unable to access boilers from key manufacturers, which appears consistent with PTS and CPS accounting for the bulk of boiler manufacturers' sales.

180.Set against this, two major boiler manufacturers told the OFT that the parties jointly accounted for [ ] and [ ] per cent of their sales but that the majority of this went through BSS' wholesaler F&P with a proportion of those ending in the independent sector. Further, one complainant told the OFT that, in its experience, the two leading boiler brands (Worcester Bosch and Vaillant) marketed effectively to end consumers and the installation trade to increase demand of their brands. This marketing policy supports the argument that boiler manufacturers are concerned about competing with each other to gain end customers. No boiler manufacturer told the OFT that channelling the great majority of their sales through PTS and CPS would facilitate such a policy. Boiler manufacturers also told the OFT that they can switch any sales that

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<sup>54</sup> Put differently, this says that the conditions of supply (the cost function) faced by manufacturers should be such that the incremental cost of each extra boiler that they make should be increasing, not constant or decreasing. If so, then it is only worth manufacturers making the extra boilers if they can sell them for more. That is, if the supply function that their customers face is upward sloping.

PTS and CPS make to other direct customers (for example, the other national P&H specialists) or to indirect customers (for example independents buying through wholesalers). This is also not consistent with PTS and CPS accounting for the great bulk of boiler manufacturers' sales.

181. On the second point, as discussed in the national unilateral effects section above, the parties' combined share in the market for national P&H specialists is not high enough to give the OFT cause for concern over unilateral effects. The estimate submitted by a third party is slightly higher than those combined market shares but the OFT also notes representations made by all third parties that boilers are often bought in a bundle of complementary P&H products. This suggests the existence of an indirect constraint on the retail pricing of boilers from the fear of losing sales of these additional products were boiler prices to rise.

#### **Conclusion on demand withholding**

182. On the basis of the above, the OFT does not consider that the any increase in buyer power attributable to the merger gives rise to a realistic prospect of an SLC through demand withholding.

183. In respect of both waterbed effect and demand withholding theories of harm, as noted above, the OFT may also need to take account of any stimulus to rivalry in the downstream market that may arise as a result of any increased buyer power from the merger. However, given the OFT's findings on the waterbed effect, it is not necessary for the OFT to conclude on this.

184. Nonetheless, one complainant submitted that the increased buyer power of the merged firm will not lead to lower prices to consumers because the merger will increase the risk of anticompetitive coordinated effects between the two leading competitors (Wolseley's Plumb Centre and the merging parties) at the retail level. This is assessed below.

## **COORDINATED EFFECTS**

185. According to the Merger Assessment Guidelines<sup>55</sup>, in assessing coordination the Authorities will ask:

- Is the market capable of sustaining coordinated behaviour?
- Does the merger increase the risk of coordinated behaviour?

186. On the first bullet, all three of the following conditions must be satisfied for coordination to be possible:

- firms need to be able to reach and monitor the terms of coordination
- coordination needs to be internally stable, and
- coordination needs to be externally stable.

187. It was put to the OFT by a third party that, following this merger, the market will be a virtual duopoly in which the two leading firms will be highly symmetric, will have incentives to follow a tacitly coordinated pricing strategy, will be able to monitor each other's pricing behaviour closely, and will face no external constraints on their ability to sustain high prices.

188. The OFT has no evidence of pre-existing coordination at the national or local levels.

### **Reach and monitor the terms of coordination**

189. It was submitted to the OFT that TP/BSS and Wolseley will be able to reach and monitor the terms of coordination because:

- the market will be highly concentrated
- the two firms will be very similar in size and cost structure, and
- the two firms will have similar commercial strategies.

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<sup>55</sup> Section 5.5. and paragraph 5.6.15.

190. Although, as stated above (see Table 2 above) the market shares of TP and Wolseley are similar and exceed [65-75] per cent on a combined basis, the OFT notes that some [25-35] per cent of the market including only close competitors remains in the hands of those competitors and, in any event, this does not take into account any external constraints from other retailers (such as those who feature on a case-by-case basis in the local analysis).
191. Reaching and monitoring the terms of price coordination also depends on the degree of complexity in the competitive environment in which firms interact.<sup>56</sup> Here, price is only one parameter of competition, with customers citing quality of service and stock availability as other important parameters of competition. Quality of service is a parameter that will vary across branches within the same organisation and, in the OFT view, may be extremely difficult to monitor. Further, the degree of complexity will depend on the number and type of products sold—in this regard, the national P&H specialists sell thousands of SKUs.
192. Further, as explained above, although price lists are set nationally (and may be transparent) transaction prices are set locally in individual negotiations. As pricing is opaque, monitoring price collusion does not appear easy to the OFT.
193. As the degree of complexity in the competitive environment increases, the more firms differ in their capabilities and the more different are their customer mixes and strategies. In this regard, the OFT notes that the customer mixes of PTS and CPS are quite different (see paragraphs 70 to 73). Further, [confidential to third party]. This customer mix appeared to the OFT more similar to PTS pre-merger than to the merged firm post-merger.
194. Nor did the OFT receive evidence of any significant structural links between the parties and Wolseley that might assist in reaching and monitoring the terms of coordination.<sup>57</sup>

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<sup>56</sup> OFT / CC Merger Assessment Guidelines, paragraph 5.5.11.

<sup>57</sup> OFT / CC Merger Assessment Guidelines, paragraph 5.5.14.



## **Internal stability**

195. In the OFT's view, coordination will be sustainable only where the additional profit from coordination is sufficiently high, and there is an effective mechanism to punish deviation. If not, the short term gain that a firm makes from deviating may outweigh the cost to it of future punishment.

196. It was submitted to the OFT that coordination would be internally stable because:

- coordination need involve only two firms
- these two firms will be able to closely monitor each other's behaviour in the market
- the market is relatively stable in size and is unlikely to face significant growth in demand in future, and
- with only two competitors, the benefits of deviations from the coordinated outcome will be limited.

197. On the first point, see paragraph 190. On the second point, see paragraphs 190 to 191. In addition, on the basis of the OFT's inspection of the M4 and ICS price-matching evidence and of the 'good news/not so good news' emails, it was not clear how any price matching (or monitoring) behaviour at the local level could feed into a national strategy of price coordination. Wolseley is not present in every local area where PTS and CPS are present, and its constraint varied within the areas where it was present. It was not therefore clear to the OFT how PTS/CPS could observe the discounts and net prices offered by Wolseley with sufficient granularity to implement a national price coordination strategy.

198. On the third point, contrary to this view, other competitors told the OFT that new energy efficiency regulations are driving sales of boilers up and this trend is expected to continue.

199. Lastly, the profits from deviation would be likely to be limited when only two firms are coordinating. However, the profits from coordination in this instance would be shared not only between the merged entity and

Wolseley but also between Graham and Plumbase. When the profits from coordination are shared between more firms, the cost to the deviating firm of being punished (in terms of foregone profit from coordination) is also lower, making punishment less credible and coordination less likely. The OFT had no evidence on which effect is the stronger in this case.

### **External stability**

200. The complainant submitted that coordination would be externally sustainable because:

- the two market leaders will not face effective competition from other existing competitors
- they will not face any effective constraints from new entrants, and
- demand for key P&H products (in particular, boilers) is inelastic, meaning that customers will not easily be able to switch away from buying boilers if prices rise.

201. On the first point, the OFT notes that—consistent with the concern expressed—it is not necessary for all firms in the market to be involved in coordination but those firms which coordinate need to be able collectively to exercise a degree of market power.<sup>58</sup> With a combined market share around [65-75] per cent, the parties and Wolseley would appear collectively to exercise market power.

202. On barriers to entry and expansion, as discussed below, the OFT accepts that entry and expansion are not timely, likely or sufficient enough to avert any competition problem.

203. In respect of the demand for boilers being inelastic, this has two countervailing effects on the likelihood of coordination. Inelastic demand makes deviation less likely because demand will not change much if price is lowered—this increases the likelihood of coordination. However, by the same token it means that punishment is less effective—this increases the likelihood of deviation, decreasing the likelihood of

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<sup>58</sup> OFT / CC Merger Assessment Guidelines, paragraph 5.5.17.

coordination. The OFT had no evidence on which effect is stronger in this case.

204. Lastly, boiler manufacturers have told the OFT that, if they experienced a reduction in sales volumes (as may be expected if the parties and Wolseley are coordinating to keep prices high) then they would be able to open/increase other distribution channels if necessary.

#### **Effect of the merger**

205. Turning to the second bullet of paragraph 184, it was submitted to the OFT that PTS is a maverick competitor that has pursued an aggressive pricing strategy but that –citing TP's Annual Report for 2009– that TP is 'looking to maintain gross margins wherever possible'.

206. In this regard, the parties submitted that PTS has had a clear strategy of competing head to head with Wolseley's Plumb Centre (see paragraphs 83 and 84), consistent with the complainant's argument.

207. However, it is not clear that the existence of PTS as an aggressive independent competitor had been preventing coordination from emerging, given the OFT's findings above on the three necessary conditions for this.

#### **Conclusion on coordinated effects**

208. On the basis of the above, the OFT does not consider that all three of the conditions are met in order for co-ordination to be possible in the supply of P&H products. Nor is the effect of the merger to create the necessary conditions for co-ordination. As such, the OFT does not believe this merger gives rise to a realistic prospect of a substantial lessening of competition through coordinated effects.

### **BARRIERS TO ENTRY AND EXPANSION**

209. The merging parties submitted that although entering the UK market and achieving a national market share in the building material market of five per cent would require significant capital investment, there are low barriers to entry to enter or expand in the retail supply of P&H products. The merging parties pointed to existing builder's merchants or DIY operators as the natural candidates to undertake such entry or

expansion in a timely, efficient and effective manner. TP named at least two large regional chains which entering in the last 10 years have now achieved a sizeable business (at least at regional level).

210. At local level, the merging parties stressed that barriers to entry were low and that there was no significant difference in the impact of new entry between individual independent P&H specialists and multi-store regional independents.

211. The threshold for the OFT to consider that entry or expansion can remove its competition concerns in a given area is that entry must be timely, likely and sufficient.<sup>59</sup> The lack of significant evidence submitted by the merging parties on any effect arising as a result of any entry has obliged the OFT to be particularly cautious about accepting entry and expansion as countervailing factors to its preliminary competition concerns in several local areas.

212. In this case, the OFT has been able to verify that some national P&H specialists and DIY outlets have expansion plans to extend their P&H specialist branch networks. However, the OFT has not been able to verify that entry would be sufficiently timely to constrain the merging parties in those local areas raising competition concerns.

### **THIRD PARTY VIEWS**

213. The OFT contacted over 150 third parties, almost two-thirds of those being customers with a level of response over the average of other merger cases. Many of them, in particular competitors raised competition concerns which have been addressed above.

### **ASSESSMENT**

214. TP and BSS are both active in the supply of building materials, in particular they overlap in the retail supply of P&H products for 'domestic' use through their subsidiaries CPS and PTS respectively.

215. The OFT considers that the relevant product scope is the retail supply of P&H products, and that it is not appropriate for the purpose of

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<sup>59</sup> OFT/CC Merger Assessment Guidelines, paragraph 5.8.

reviewing this merger to narrow the market by customer type, product type or retail channel. That said, evidence indicated that competition between national P&H specialists is more intense than competition with other distribution channels of P&H products or between those distribution channels. The OFT has taken into account these differences in its assessment of competitive constraints.

216. On geographic scope, the OFT considered that a 10-mile radial was reasonable as a preliminary filter. The OFT believed that this catchment area (and three miles within the M25) was not overly conservative but an appropriately cautious geographic scope for a preliminary filter.

217. Further, based on the evidence before the OFT, including representations from third parties, the OFT's investigation indicated that proximity matters for competition among P&H suppliers. For this reason, in the unilateral effects analysis, the OFT has taken into account the proximity between the merging parties' stores and between them and other third parties' stores in assessing the competitive impact of the merger in each local catchment area.

218. The OFT considered whether the merger gave rise to unilateral effects at both the national and/or the level local. At national level, the OFT concluded that competition concerns did not arise, in particular given that there will remain sufficient constraint from three other national P&H specialists, as well as MKM Building Supplies and Crosslings.

219. By contrast, the OFT considers that competition concerns were substantiated in relation to unilateral effects at the local level in 20 local areas.

- The OFT found competition concerns in 13 catchment areas where the merger would lead to a fascia reduction in the number of national P&H specialists of '3-to-2' and '2-to-1'.
- In relation to areas where the merger would lead to a fascia reduction in the number of national P&H specialists of '4-to-3' the OFT considered that these areas raised preliminary competition concerns that merited further assessment, but which were relatively muted. After further consideration, the OFT could not dismiss its preliminary competition concerns in six local areas. Concerns could also not be dismissed in an additional area in

which the merger would create a '2-to-1' reduction in national P&H specialist outlets within five miles' radius of the target, even where four national P&H specialist outlets would be left post-merger within a 10-mile catchment area.

220. The OFT considered carefully three further theories of harm put to it during its investigation. These were: input foreclosure of boilers to independent P&H specialists; anti-competitive buyer power in relation to boilers (in the form of a 'waterbed effect' and/or 'demand withholding'); and coordinated effects at the retail level between TP and Wolseley's Plumb Center. For the reasons given in the decision, the OFT did not consider that a realistic prospect of a substantial lessening of competition arose in relation to any of these theories of harm.

221. 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 within a market or markets in the United Kingdom as a result of local unilateral effects arising in 20 local areas.

## **UNDERTAKINGS IN LIEU OF A REFERENCE**

222. 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.

223. The OFT has therefore considered whether there might be undertakings in lieu of reference (UILs) which would address the competition concerns outlined above. The OFT's guidance states that undertakings in lieu of reference are appropriate only where the competition concerns raised by the merger and the remedies proposed to address them are clear cut, and those remedies are capable of ready implementation.<sup>60</sup>

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<sup>60</sup> Mergers – substantive assessment guidance, OFT526, June 2003, paragraph 9.3 and Mergers: jurisdictional and procedural guidance, OFT527, June 2009, paragraph 8.5.

224. TP offered UILs to divest a store or stores in the 20 local areas where the OFT identified competition concerns meeting its test for reference to the CC.

225. As a structural remedy that will, in each local area, remove the overlap between the parties, the OFT considers that TP's proposed UILs are sufficient in principle to act as a clear-cut and comprehensive remedy to the competition concerns identified by the OFT.

### **Up-front buyers**

226. The OFT considered whether it is appropriate in the circumstances of this case to require that the relevant divestments be made in whole or in part to an up-front buyer or buyers.

227. An up-front buyer requirement means that the proposed divestment purchasers will have committed contractually, subject to formal OFT approval of the undertakings in lieu, to acquiring the relevant divestment store(s) before the OFT accepts undertakings in lieu. This means that the OFT will accept undertakings in lieu only where a provisional sale in the upfront buyer areas has been agreed, thereby demonstrating that a sale to a suitable purchaser is achievable. It also means that the OFT may consult publicly on the suitability of the proposed divestment purchasers, as well as any other aspects of the draft undertakings, during the public consultation period.

228. The OFT will seek an up-front buyer where the risk profile of the remedy requires it, for example where the OFT has reasonable doubts with regard to the ongoing viability of the divestment package and/or there exists only a small number of candidate suitable purchasers.<sup>61</sup>

229. In this case, the question for the OFT was whether TP, or a divestment trustee, should one need to be appointed, would be able to sell the store or stores in each of the divestment areas to a suitable purchaser approved by the OFT that was not already present as an effective

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<sup>61</sup> Mergers: jurisdictional and procedural guidance', OFT527, June 2009, paragraph 8.32. See in particular Anticipated acquisition by Co-operative Group Limited of Somerfield Limited 20 October 2008; and Completed acquisition by Home Retail Group plc of 27 leasehold properties from Focus (DIY) Ltd 15 April 2008 and Completed acquisition by Global Radio UK Limited of GCap Media plc 8 August 2008.

competitor in the local area such that the divestment remedied, mitigated or prevented the substantial lessening of competition in that area.

230. The parties argued that an up-front buyer provision was not required in this case given that they believe there are a large number of potential purchasers for divestment stores, including other national P&H specialists, regional independent P&H specialists and stand alone independent P&H specialists. Indeed, TP noted that it had already received expressions of interest from specialist P&H competitors anticipating some divestment stores.

231. In previous cases,<sup>62</sup> in deciding whether to require that divestments be made up-front, the OFT has had regard to the number of buyers for each divestment store that it would be reasonable to consider would be able and potentially willing to acquire the store. In this case, having regard to the existence of the other three national P&H specialists, as well as MKM Building Supplies, Crosslings and other regional independent P&H specialists, the OFT considers that there could reasonably be expected to be at least three P&H specialists that would be eligible and potentially willing purchasers for each of the areas in which a divestment is required.

232. The OFT has therefore decided that, given the facts of this case, there is no need to include an up-front buyer provision in respect of the 20 local areas where the OFT's duty to refer to the CC has been triggered.

#### **Identity and choice of stores to be divested**

233. TP's UIL offer was clear that it extended, to the extent necessary, to cover sale of all the CPS or PTS stores in a local area where the test for reference was met. However, TP argued that such an approach would be disproportionate and inconsistent on the basis that:

- the OFT's substantial lessening of competition analysis focuses on a reduction in the number of competing fascias, not the number of

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<sup>62</sup> See Co-operative/Somerfield paragraphs 186 and 190 and Anticipated acquisition by Asda Stores Limited of Netto Foodstores Limited 23 September 2010, paragraph 144.



stores – the OFT's approach to remedies should therefore follow a similar approach by requiring divestment of a single store, and

- in *Co-operative Group/Somerfield*, the OFT required divestment of either the Somerfield store (in respect of the area around which competition concerns had been identified) or the Co-operative Group store or stores in the isochrone; divestment of multiple Somerfield stores in an individual area was not required – by analogy, the requirement to divestment multiple stores should apply only to the CPS stores, not to PTS stores.

234. The OFT rejects TP's argument that the remedy should only ever, as a matter of principle, require sale of a single store, not the total number of stores of that fascia within a local area. To this extent, there is a relevant difference between the OFT's substantial lessening of competition analysis (which as a practical matter treats different fascia as competing equally regardless of how many stores each fascia has) and its approach to remedies. When considering structural remedies – at first phase – the OFT's starting point is to require the divestment of the entire overlap causing concerns.

235. By way of practical explanation for this approach in this case, the OFT does not know in a given area around a PTS store with multiple CPS overlaps whether competition is provided exclusively by one CPS store, or by multiple stores, and in what proportion. An approach whereby TP was permitted to divest only one of its CPS stores within the local area risks permitting divestment of a store that accounts for only a subset of diversion from the PTS store, and potentially less diversion than that to the other(s) CPS store(s).

236. By contrast, the OFT accepts TP's argument set out in the second bullet. In this case, as in *Co-operative Group/Somerfield*, the OFT's analysis was centred around the target stores (PTS outlets) and each of the target stores was the subject of its own independent analysis.<sup>63</sup> To the extent that there are other PTS stores within an area around a PTS

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<sup>63</sup> In *Co-operative Group/Somerfield* some isochrone analysis was carried out centred on certain of the acquirer's (CGL) stores, due to relevant differences in store size between acquirer and target stores in some areas. However, the main review focussed its isochrones analysis on the Somerfield stores.

store that has given rise to concerns, these do not necessarily need to be divested since they will have been the subject of their own individual analysis.

237. In summary, the OFT considers that TP is required to divest either the PTS store, or all the overlapping CPS stores, in order to remedy competition concerns in the identified 20 local areas.

238. TP submitted that the choice of PTS store or CPS store(s) should be left to it. In line with its approach in previous cases, the OFT considers this to be appropriate on the basis that the undertakings in lieu should provide for either the PTS store or the CPS store(s) to be sold, and therefore a divestment trustee (should one need to be appointed) would also benefit from this choice in seeking to achieve a satisfactory remedy.

## **DECISION**

239. The OFT's duty to refer the anticipated acquisition by Travis Perkins plc of BSS Ltd to the Competition Commission pursuant to section 33 of the Act is suspended because the OFT is considering whether to accept undertakings in lieu of reference from TP pursuant to section 73 of the Act.

## END NOTES

1. Following the review of the decision TP rightly indicated to the OFT that the appropriate increment was [10-20] per cent, and not [10-20] per cent as wrongly stated in the original text of this decision. This minor change does not impact on the substance or outcome of this decision.
2. Following the review of this decision, TP indicated that the 'margin-concentration' analysis referred to 'national P&H specialists' and/or 'independent P&H specialists'. This decision incorporates a third category, 'other P&H suppliers', as in the OFT's view some of the companies TP describes as 'independent P&H specialists' can be grouped as 'other P&H suppliers'. These would include for example, builders' merchants and DIY outlets. This clarification does not impact on the substance or outcome of this decision.
3. The OFT understands that in a very limited number of PTS branches, basic showrooms are set up for tradesmen to bring their customers to (in order that they can show them a specific product). CPS branches by contrast have more extensive showrooms; similar to those in retail outlets. This reflects the parties' different strategies with PTS focusing on larger customers whilst CPS focuses on smaller customers (such as jobbing plumbers). Paragraph 74 should be read in context with this which informed the outcome of this decision.
4. Following the review of this decision, TP rightly noticed that the instances referred to in paragraph 60 (third bullet point) relate to both BSS and TP and the respective subsidiaries, PTS and CPS. This has now been amended and the change does not impact on the substance or outcome of this decision.