UK Merger Control Under the Enterprise Act 2002

SLAUGHTER AND MAY
November 2009
## CONTENTS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Interrelationship with ECMR</td>
<td>3</td>
</tr>
<tr>
<td>Merger Situations</td>
<td>4</td>
</tr>
<tr>
<td>Jurisdictional Thresholds</td>
<td>7</td>
</tr>
<tr>
<td>Time Limits for Reference</td>
<td>9</td>
</tr>
<tr>
<td>OFT Procedure</td>
<td>10</td>
</tr>
<tr>
<td>CC Procedure</td>
<td>17</td>
</tr>
<tr>
<td>Substantive Appraisal of Mergers</td>
<td>22</td>
</tr>
<tr>
<td>Public Interest Cases</td>
<td>34</td>
</tr>
<tr>
<td>Judicial Review</td>
<td>38</td>
</tr>
</tbody>
</table>
1. INTRODUCTION

The merger control rules of the United Kingdom are contained in the Enterprise Act 2002 (the Act). The rules do not generally apply to mergers in relation to which the European Commission has exclusive jurisdiction under the EC Merger Regulation (the ECMR)\(^1\)

Mergers qualify for review under the UK rules if they meet either a test relating to the turnover of the business to be acquired or a “share of supply” test. Where the UK turnover of the business to be acquired exceeds £70 million, the turnover test will be satisfied. The share of supply test will be satisfied where the merger creates an enlarged business supplying 25 per cent. or more of goods or services of any description or enhances a pre-existing share of supply of 25 per cent. or more.

In contrast to the position under the ECMR, there is no system of mandatory notification of mergers. In practice, however, many mergers are notified in the UK on a voluntary basis, usually prior to completion.

Transactions that qualify for review may be investigated initially by the Office of Fair Trading (the OFT). The OFT has a general duty to refer mergers to the Competition Commission (the CC) for detailed investigation on the basis of a statutorily-defined competition test – the substantial lessening of competition (SLC) test\(^2\). Undertakings in lieu of reference to the CC may be accepted by the OFT. The CC’s in-depth investigation may lead to a prohibition decision, a decision that the transaction should be allowed to proceed subject to commitments, or clearance. The CC also applies the SLC standard in its decision-making.

In certain limited circumstances (namely where the merger raises a defined “public interest consideration”) the UK system allows the Secretary of State for Business, Enterprise and Regulatory Reform (the ‘Secretary of State’) to intervene in relation to mergers. Currently, public interest considerations are limited to considerations of national security, considerations relating to quality and plurality in the case of media mergers, considerations relating to accurate presentation of news and free expression in newspaper mergers and considerations relating to the maintenance of the stability of the UK financial system.

Decisions of the OFT, the Secretary of State and the CC in relation to mergers may be appealed to the Competition Appeal Tribunal.

---

\(^1\) Council Regulation (EC) No 139/2004. See separate Slaughter and May publication on The EC Merger Regulation.

\(^2\) There is, however, a different test for mergers between two or more water enterprises where either the target or the acquiree’s enterprises each has an annual turnover exceeding £10 million. Such mergers between water enterprises are subject to a mandatory reference to the CC under s. 32 Water Industry Act 1991. The CC must then determine whether the merger may prejudice the ability of the Water Services Regulation Authority (Ofwat) to make comparisons between water enterprises in the performance of its functions under the Water Industry Act 1991 (in particular, in relation to the setting of price controls). In the event of an adverse finding, the CC determines what remedial action needs to be taken.
Both the OFT\(^3\) and the CC\(^4\) (the Authorities) have published detailed non-binding guidelines on the procedures they will adopt for the review of mergers. In April 2009, the Authorities published jointly, in draft form, non-binding substantive merger guidelines on how they will apply the SLC test (the draft Joint Substantive Guidelines)\(^5\).

This publication considers transactions to which merger control provisions apply, jurisdictional thresholds for review, procedures followed by the institutions responsible for application of the rules and appraisal of mergers that qualify for review.

---

\(^3\) The OFT has now completed its consultation on a new set of jurisdictional and procedural merger guidelines, the final version of which was published in June 2009 (OFT527). All OFT guidance booklets can be accessed from the OFT’s website: http://www.oft.gov.uk/advice_and_resources/publications/guidance/enterprise_act.


The draft Joint Substantive Guidelines replace the following OFT publications: Mergers—substantive assessment guidance, May 2003 (OFT516); Guidance note revising Mergers—substantive assessment guidance, October 2004 (OFT516a); and Revision to Mergers—substantive assessment guidance—exceptions to the duty to refer markets of insufficient importance, November 2007 (OFT516b). The draft Joint Substantive Guidelines also replace the CC publication, Merger References: Competition Commission Guidelines, CC2, April 2003.

It should be noted, however, that Chapters 7 (exceptions to the duty to refer) and 8 (undertakings in lieu of reference) of the OFT publication Mergers—substantive assessment guidance (OFT516) and Revision to Mergers—substantive assessment guidance—Exception to the duty to refer: markets of insufficient importance (OFT516b) continue to apply prior to publication of the forthcoming OFT publication Mergers—exceptions to the duty to refer and undertakings in lieu of reference (see paragraph 1.1 of draft Joint Substantive Guidelines, footnote 1).
2. INTERRELATIONSHIP WITH ECMR

The European Commission’s jurisdiction under the ECMR extends only to mergers which have a ‘Community dimension’. The ECMR sets out two circumstances in which a concentration is regarded as having a ‘Community dimension’:

> Where (i) the combined aggregate worldwide turnover of all the parties is more than EUR5,000 million and (ii) the aggregate Community-wide turnover of each of at least two of the parties is more than EUR250 million. The merger will not, however, fall under the ECMR where each of the parties concerned achieves more than two-thirds of its total Community-wide turnover in the same member state.\(^6\)

> Alternatively, where (i) the parties to the transaction have a global turnover at least EUR2,500 million (ii) at least two of the parties have a total EU turnover of more than EUR100 million, and (iii) there are at least 3 member states in which the parties’ combined turnover is EUR100 million and at least two of the parties each have a turnover of more than EUR25 million. Again, the merger will not fall under the ECMR where each of the companies concerned achieves more than two-thirds of its total Community-wide turnover in the same member state.\(^7\)

Transactions with a ‘Community dimension’ must be notified to the Commission for investigation and approval before they may be put into effect. Procedures also exist which allow jurisdiction to be transferred between the Commission and the national competition authorities (in either direction) in certain circumstances:

> Under Article 4(4) of the ECMR, the parties to a merger may request that the merger, though falling under the Commission’s jurisdiction, be examined in whole or in part by a particular member state if it may significantly affect competition within that member state. Likewise under Article 4(5), there is provision for the parties to inform the Commission by reasoned submission that a merger, not having a Community dimension, is nonetheless capable of being reviewed under the national competition laws of at least three member states and should therefore be examined by the Commission.

> Under Article 9, the ECMR allows the Commission to refer a merger that affects or threatens to affect competition within a market in a particular member state to the competent authorities of that member state. Likewise, Article 22 allows one or member states to refer to the Commission a merger that will affect trade between member states and significantly affect competition within the territory of the member state concerned.

Where such a transaction does not have a Community dimension, it may instead be subject to scrutiny under national merger control rules.

---

\(^6\) Art 1(3), Council Regulation (EC) No 139/2004  
\(^7\) Art 1(4), Council Regulation (EC) No 139/2004
3. MERGER SITUATIONS

The Act provides that its merger control provisions may apply where “two or more enterprises have ceased to be distinct enterprises” or where “arrangements are in progress or in contemplation” which, if carried into effect, will lead to the enterprises ceasing to be distinct\(^8\).

It is clear from that definition that it is open to the OFT to refer *proposed*, as well as completed, mergers and in practice the number of references is fairly evenly split between proposed and completed mergers.

**Enterprise**

An “enterprise” for the purpose of the merger control rules is defined as “the activities, or part of the activities, of a business”\(^9\).

OFT guidance suggests that even the transfer of physical assets alone may constitute an enterprise, for example where facilities or premises transferred allow for a particular business activity to be carried on. Intangible assets alone such as intellectual property rights are unlikely to constitute an enterprise. There are certain factors that will be persuasive in the OFT’s assessment of whether an enterprise is being transferred: whether ‘customer records’ are transferred; whether the TUPE regulations apply to the transfer\(^10\); the existence of a direct contractual relationship between seller and purchaser; and the existence of a premium over the value of the land and assets would also be indicative of goodwill being transferred\(^11\).

**Ceasing to be Distinct**

The Act states that any two enterprises cease to be distinct if they are brought under “common ownership or common control”\(^12\).

The concept of enterprises coming under common ownership is simple: A owns enterprise X and then acquires from B enterprise Y; A then owns both enterprises (X and Y), which have accordingly come under common ownership and thus ceased to be distinct.

As regards common control, the Act recognises three degrees of control\(^13\), acquisition of each of which can give rise to a qualifying merger.

---

\(^8\) Sections 23 (completed mergers) and 33 (proposed mergers).
\(^9\) Section 129.
\(^10\) The Transfer of Undertakings (Protection of Employment) Regulations 2006.
\(^11\) Paragraph 3.10, Mergers – jurisdictional and procedural guidance (OF527).
\(^12\) Section 26(1).
\(^13\) Section 26(2) to (4).
The three degrees of control are normally referred to as:

> _de jure_ or legal control (that is, a controlling interest);

> _de facto_ control (that is, control of commercial policy); and

> material influence (that is, ability materially to influence commercial policy).

Note that it is the _ability_ to control, rather than the actual exercise (or intended exercise) of control which is relevant.

It should be noted that the concept of "joint control" does not exist under the Act (in contrast to the position under the ECMR). The concepts of _de jure_ or _de facto_ control only apply if one shareholder holds those rights on its own. Thus in a ECMR joint control situation, neither party may have _de jure_ control for the purposes of the Act, although each of the parties individually may have the ability to exercise at least material influence.

For the purposes of a reference to the CC, where a level of control is acquired through a series of transactions occurring within a two-year period, the OFT may treat those transactions as having occurred simultaneously on the date on which the latest of them occurred\(^{14}\) (or in the case of anticipated mergers, on the date on which the latest of the transactions will occur\(^{15}\)).

**De Jure Control**

A controlling interest normally means anything over 50 per cent. of the voting rights in a general meeting.

**De Facto Control**

The ability to control commercial policy is not defined in the Act and there are no precise criteria for determining at what point a shareholding gives its holder _de facto_ control. The determination of whether that point has been reached will depend upon a close examination of the particular facts in a given case. It is generally considered that _de facto_ control arises on the acquisition of a shareholding of around 30 per cent. if other shareholdings are widely dispersed\(^{16}\).

In practice, if the existing influence of one enterprise over the commercial policy of another is "material" (see below), then any increase in that position short of attaining outright control has the potential to involve the acquisition of _de facto_ control.

---

\(^{14}\) Section 29(1).

\(^{15}\) A reference can be made to the CC of a series of transactions some of which are completed and some of which are contemplated or in progress. The Enterprise Act 2002 (Anticipated Mergers) Order 2003 makes provision for mergers which are referred as proposed mergers to be treated as completed mergers.

\(^{16}\) See West Midlands Travel Limited/Laing Infrastructure Holdings Limited/Ansaldo Transporti Sistemi Ferroviari SpA/Altram LRT Limited (2006).
Material Influence

The lowest degree of relationship that can cause the enterprise affected to cease to be distinct is acquisition by another of the ability materially to influence the policy of that enterprise. The Act is silent as to what constitutes material influence and there are no precise criteria for determining the point at which a person acquires the ability materially to influence policy. As with de facto control it is a matter that has to be decided on a case by case basis by reference to the detailed facts. This will involve consideration of a number of factors that will normally – but need not – include an equity shareholding. Other relevant matters are board representation, contractual relationships and financial links.

As a rule of thumb, material influence will be regarded as being conferred by a shareholding of over 25 per cent. in a UK company since a shareholding of that size enables the holder to block a special resolution\(^\text{17}\) and so to exert negative influence. However, the OFT has indicated that it may examine any case in which the value of the shareholding is 15 per cent. or more in order to ascertain whether the holder may be able to influence the company’s policy\(^\text{18}\). Occasionally, a holding of less than 15 per cent. may be subject to scrutiny where indications of the ability to exercise influence exist\(^\text{19}\).

In deciding whether a minority equity shareholding is capable of conferring material influence, the OFT will consider several factors, including the size of the relevant shareholding, the identity of the shareholder, the way in which the other shares are dispersed, the existence of special rights attaching to the holding and restrictions on voting rights. The OFT will also consider all surrounding factors such as whether the acquirer has board representation, the status and experience of the acquirer, the level of influence they have over shareholders and the existence of any consultancy agreement between the acquirer and the company\(^\text{20}\).

Acquiring control by stages

The degree of control may pass through each level in turn: moving from ability materially to influence, to ability to control commercial policy, through to a controlling interest. Each transition from one level to the next may give rise to a separate relevant merger situation.

\(^{17}\) A special resolution requires 75 per cent. of the votes passed in a general meeting and is required for important matters such as change in the company’s objectives.

\(^{18}\) First Milk/Robert Wiseman Dairies (2005), HBOS/Lex Vehicle Leasing (2006), BSkyB/ITV (2007). In the latter case, the Secretary of State, acting on the recommendation of the CC, ordered BSkyB to reduce their 17.9 per cent. shareholding in ITV to below 7.5 per cent.

\(^{19}\) In deciding on material influence in Creative Broadcast Services/BBC Broadcast. (2005), the OFT took into account not only a direct shareholding of 4.3 per cent. but also an indirect interest of around 20 per cent., a management services agreement as well as an ability to jointly appoint a director to the board.

\(^{20}\) In First Milk/Robert Wiseman Dairies (op. cit.), the OFT considered not only First Milk’s 15 per cent. stake in the latter but also their right to nominate a member to the Wiseman board and the continuing milk supply agreement between the parties. In BSkyB/ITV op. cit. BSkyB was also ordered to give undertakings not to seek representation on the board of ITV.
4. JURISDICTIONAL THRESHOLDS

Where enterprises have ceased to be distinct in the sense described above, the transaction will qualify for review if it meets either of two alternative jurisdictional tests. A merger situation will qualify for review if either:

> The turnover in the UK of the enterprise to be acquired exceeds £70 million (the turnover test); or

> As a result of the merger, a 25 per cent. share of supply of goods or services of any description is created or enhanced in the UK as a whole or in some “substantial part” of the UK (the share of supply test).

Turnover test

Where the annual value of the UK turnover of the enterprise being acquired exceeds £70 million, the turnover test will be satisfied. For these purposes one looks to turnover generated by customers located in the UK at the time of completion of the merger or, for mergers “in contemplation”, at the time of the reference decision. Whilst the turnover figures from an enterprise’s latest statutory accounts will normally suffice for the purposes of applying the test, adjustments may be required if, for example, significant acquisitions or disposals have been made since the closing of the accounts. Variations to these rules apply to transactions involving credit institutions, financial institutions and insurance undertakings.

In 'pure mergers', i.e. where no enterprise stays under the same ownership (because two businesses are merged into one, and the owners become common to both), the normal ‘target’s turnover’ rule cannot apply. In such a case, the turnovers of all the enterprises involved are added together and the turnover of the highest value deducted from the total.

Share of supply test

The share of supply test is satisfied if the merged enterprises:

> Both supply goods or services of a particular description; and

> As a result of the merger, a 25 per cent. share of supply of goods or services is created or enhanced in the UK as a whole or in a substantial part of it.

Whilst sometimes referred to as the “market share” test, that is a misnomer. The test is framed not in terms of a share of a “market” in an economic sense, but rather in terms of a share of

---

21 In cases where a qualifying merger situation arises but no enterprise continues to be carried on under the same ownership or control (which may be the case, inter alia, on the formation of a joint venture), Section 28(1)(b) provides that for the purpose of the turnover test the turnover is to be calculated by aggregating the UK turnover of all the enterprises involved and deducting the highest.


23 Section 28(1)(b).
supply of goods or services “of any description”\textsuperscript{24}. Once within the ambit of the Act, the issues of market definition and market power in an economic sense will assume greater importance in determining whether or not the merger will result in a SLC such as to warrant reference to the CC.

Nonetheless, the OFT (and the CC) enjoy a wide discretion in describing the relevant goods or services and in selecting the criterion (value, volume, capacity, number of workers, etc.) for determining whether the 25 per cent. threshold is satisfied, both for the purposes of establishing jurisdiction and in applying the test. In applying the share of supply test, the OFT will have regard to “any reasonable description of a set of goods of services”\textsuperscript{25}.

The share of supply test may be satisfied in relation to the UK as a whole or in relation to a “substantial part” of the UK. Whilst not a defined term under the Act, a House of Lords ruling\textsuperscript{26} indicates that to constitute a substantial part of the UK, an area must be of such size, character and importance as to make it worthy of consideration for the purposes of the merger control rules. In addition to absolute and relative size, the OFT will take into account the social, political, economic, financial and geographic significance of the relevant area\textsuperscript{27}.

\textsuperscript{24} Section 23(3) and (4).
\textsuperscript{25} Paragraph 3.55, Mergers – jurisdictional and procedural guidance (OFT527).
\textsuperscript{26} R v MMC ex parte South Yorkshire Transport Authority [1993] All ER 289.
\textsuperscript{27} In Tesco/Co-operative store acquisition in Slough (2007), the CC applied the House of Lords ruling in its finding that the Borough of Slough represented a substantial part of the UK. In reaching this decision, the CC took into account population and economic factors as well as the fact that the markets in which the merging parties competed were local in nature.
5. **TIME LIMITS FOR REFERENCE**

The general rule is that a merger will no longer qualify for reference to the CC following the expiry of four months after the date of implementation of the merger. For the purpose of this rule, time will not begin until the 'material facts' of the merger (i.e. names of the parties, nature of the transaction and completion date) have been made public or are given to the OFT. Facts are deemed to have been made public when they are ‘so publicised as to be generally known or readily ascertainable’ at national level or in the relevant trade press or by means of a press release on the acquirer’s website.

There are a number of important exceptions to this general rule. In particular, the OFT may extend the four-month period where undertakings in lieu of reference are under negotiation; where the parties have yet fully to comply with an information request from the OFT; or where a request has been made by the UK for review of the transaction by the European Commission in accordance with Article 22(3) of the ECMR. The four-month period may also be extended by agreement between the OFT and the merging enterprises, but for no more than 20 days.

The four-month rule will not apply where a merger has been formally pre-notified to the OFT using the formal Merger Notice procedure (see further below). In such a case, the time limit for reference is 20 working days from the day after receipt of the Notice, a period which may be extended by the OFT for a further 10 working days.

The four-month rule is adjusted where there has been a “creeping merger” by which a person has obtained control of an enterprise through a series of transactions over a period of two years. In such cases, the OFT may treat them as a single event taking place on the date of the last transaction in the series. Thus, a reference may be made despite the fact that it may be unclear at the date of reference when the “trigger” degree of control was obtained.

---

28 Section 24(1)(a).
29 Paragraph 3.37, Mergers – jurisdictional and procedural guidance (OFT527).
30 Section 24(2)(b).
31 Section 24(3).
32 Paragraph 3.45, Mergers – jurisdictional and procedural guidance (OFT527).
33 See further Section 25.
34 Section 29(1). See also the Enterprise Act (Anticipated Mergers) Order 2003.
6. OFT PROCEDURE

Notification under the UK system of merger control is “voluntary” in the sense that there is no obligation under the merger control rules to apply for clearance before implementation of a transaction. In practice, however, there may be compelling reasons to apply for clearance prior to completion of the transaction. In particular:

> If the OFT suspects that a completed merger may raise competition concerns, it is likely to seek initial ‘hold separate’ undertakings (or orders in the case of non-compliance) not to integrate the businesses further until the merger has been cleared.

> There is the risk of ultimately being ordered to divest in the event that a CC reference is made which results in an adverse outcome. To manage this risk, merger clearance is commonly a contractual pre-condition to completion of a transaction that, when implemented, would constitute a qualifying merger. In this way, the parties, as a matter of private contract, mandate a prior application for clearance.

> Where a merger situation qualifying for review falls within the City Code on Takeovers and Mergers, the merger control rules in effect are mandatory. Rule 12 of the City Code requires it to be a term of the offer that it will lapse should reference to the CC be made before the first closing date of the offer (21 days after posting of the offer) or the date the offer goes unconditional as to acceptances, whichever is the later. Mergers falling within the jurisdiction of the UK competition authorities often require notification to other competition authorities, both within and outside the EEA.

> The fact that a merger has not been notified does not mean that it will not be reviewed. The OFT has a dedicated Mergers Intelligence Officer responsible for monitoring merger activity that has not been notified and liaising with other competition authorities. Third parties are invited to contact the Mergers Intelligence Officer about any mergers they may consider anti-competitive.

The question whether in a particular case prior clearance should be actively sought from the OFT is one for the parties – and, in particular, the acquirer – to consider with their advisers. Normally it will be wise to do so where a material competition issue is involved. There are two methods by which clearance may be sought; the suitability of each to a particular case will vary:

---

Note, however, that the CC has said that where the parties have not sought clearance prior to completion, in considering the reasonableness or otherwise of a remedy proposed to address a SLC, it will not take into account the costs of divestment to the parties. Its basis for this policy is that in these circumstances the cost could have been avoided by an application for prior clearance (paragraph 4.10, CC Substantive Guidelines).

Paragraph 6.24, Mergers – jurisdictional and procedural guidance (OFT527).

The City Code applies as a rule to all takeovers of, or mergers with, listed and unlisted UK companies and to certain limited categories of acquisitions of private companies. Although it does not have the force of law and so is not legally enforceable, the City Code – which operates mainly to secure fair and equal treatment of shareholders in relation to takeovers and mergers to which it applies – forms the basis for the structure and conduct of takeover and merger activity in the UK.

Paragraph 4.6, Mergers – jurisdictional and procedural guidance (OFT527).
The informal (and more common) method of seeking clearance is by means of a written submission describing the merger, the parties to it and their activities, and addressing any competition issues raised.

Alternatively, where a proposed merger has been publicly announced but not yet completed, the formal Merger Notice procedure may be used.

A flowchart indicating the typical shape of an OFT merger inquiry is attached as Annex A.

If a prior approach to the OFT is to be made, the best method for seeking clearance is something that requires proper consideration in conjunction with the company’s legal advisers.

**Applying for clearance**

**Pre-notification discussions**

The OFT encourages parties to make contact in advance of notification and seek advice on the submission (whether formal or informal). This process may assist both the OFT in learning about complex and unfamiliar markets and the parties in ensuring the notification is complete at the time of submission. It may thus avoid the need for burdensome information requests post notification. This process can also be used to determine whether a merger is suitable for the Merger Notice procedure or an informal submission. In order to make use of this process, parties must satisfy the OFT that there is a good faith intention to proceed with the transaction.

**Notification by way of informal submissions**

An informal application for clearance – which does not involve any prescribed form or process – is still the preferred method of dealing in many cases.

Under this procedure, the acquirer (or, if it is an agreed deal, the parties jointly) will prepare the submissions for the OFT’s Mergers Group. Submissions should include a summary description stating the names of the acquirer and target, the nature of the transaction, why it is a qualifying merger, a brief description of the businesses being acquired, the areas of overlap between acquirer and target, the reasons for the acquisition and any timing considerations that need to be taken into account. Supporting documentation should include copies of all studies, surveys, analyses and reports prepared for or by any officers or directors of the company for the purposes of evaluating or analysing the merger, each party’s most recent business plan, annual report and accounts. The submission should also detail whether the merger has been notified in any other jurisdictions and highlight any issues arising on jurisdiction. Contact details of each party’s top five customers and competitors must also be provided.

---

40 Paragraph 4.44, Mergers – jurisdictional and procedural guidance (OFT527).
41 Paragraph 5.5, Mergers – jurisdictional and procedural guidance (OFT527).
A case officer, responsible for day to day management of the case, will be appointed. Normally, further questions will be put – maybe several series of further questions if the case is complicated or third party complaints are received. The OFT will typically want a further meeting with the parties and, in more complex cases, supplementary submissions may be made. It is a flexible procedure that takes on its own momentum to a large extent.

As indicated above, the OFT will require the merger parties to supply details of their main customers, suppliers and competitors and will contact these third parties directly to seek their views on the merger. The OFT will also solicit the views of other third parties likely to have an interest by means of an ‘invitation to comment’ notice published through the Regulatory News Service and on its website.

In difficult cases, the OFT will summon the parties to attend an issues meeting. This will be preceded by an issues letter sent to the parties at least a couple of days ahead of the hearing, setting out all the possible arguments in favour of a reference to the CC. A written response to the issues letter may be submitted to the OFT to support the points made at the issues hearing.

Cases giving rise to significant issues will be considered at a case review meeting (a CRM) attended by senior members of the OFT, including an individual charged with acting as a ‘devil’s advocate’. In cases involving regulated industries, a representative of the relevant sectoral regulator will also be present. The CRM, which will follow the issues meeting with the parties, will consider a draft decision. CRMs are seen by the OFT as part of its internal checks and balances, therefore the parties will not be party to a CRM’s deliberations or conclusions. A final decision will be taken at a separate internal OFT meeting, which will include the chair of the CRM, the ‘devil’s advocate’ and usually the other attendees of the CRM.

The OFT is required by the Act to publish all its decisions. It announces its decisions through a short press release posted on the Regulatory News Service and placed on its website. The full text of the decision, with redactions to take account of information confidential to the merging parties, is published at a relatively short interval thereafter on its website.

The OFT has indicated that it will aim to process informal applications for clearance within 40 working days from receipt of a complete submission. In practice, however, this period is frequently exceeded. Further details on OFT procedure can be found in the draft OFT jurisdictional and procedural merger guidelines.

42 Paragraph 6.9, Mergers – jurisdictional and procedural guidance (OFT527).
43 Paragraph 6.53-4, Mergers – jurisdictional and procedural guidance (OFT527).
44 Paragraph 6.57-8, Mergers – jurisdictional and procedural guidance (OFT527).
45 Section 107(1).
Formal Merger Notice Procedure

For merger proposals that have been made public and have not yet been completed, the formal Merger Notice procedure (sometimes called the statutory procedure) is an alternative means of applying for clearance. Service of the Notice (a prescribed form) sets running a timetable within which the OFT’s decision on reference must be made. Save for certain exceptions, a merger notified under this procedure will be deemed cleared if it has not been referred within the maximum period allowed to the OFT for its consideration (the consideration period). The initial consideration period is 20 working days from receipt of a Notice and the relevant fee, which period may be extended once for a further 10 working days.\textsuperscript{46}

Although the timing benefits of the Merger Notice procedure are theoretically available for all proposed mergers that are in the public domain, the OFT has indicated that it is intended primarily as a fast-track procedure for transactions that are caught by the turnover test alone and do not raise any substantive competition concerns.\textsuperscript{47} An attempt to use the formal Merger Notice procedure in a complex case is likely to be met with an invitation from the OFT to withdraw the Merger Notice so as to allow the transaction to be assessed through an informal application for clearance instead, with no guarantee that the case will be handled within 40 working days from the date of the original Merger Notice. This is so as not to prejudice parties who filed an informal submission and did not receive priority for the first 20-30 working days.\textsuperscript{48}

The OFT may reject a Merger Notice on certain, specified grounds.\textsuperscript{49} In particular, the OFT can reject the Merger Notice if it suspects that any information is false or misleading or if it suspects that it is not proposed to carry the notified arrangements into effect.\textsuperscript{50} Rejection of a Merger Notice means that the transaction will no longer be deemed cleared at the expiry of the consideration period. That consequence may also flow from, amongst others, a failure to supply the OFT with all material information, implementation of the merger during the consideration period, or the merger of one of the enterprises with a third party during that period.\textsuperscript{51}

Receipt of a Merger Notice will be published in the same form as receipt of a standard application for clearance. Once the Merger Notice period begins, the procedure followed by the OFT is broadly the same as the procedure followed on an informal application for clearance (but see below in relation to information-gathering powers).

\textsuperscript{46} Section 97(1), (8). The merger notice timetable may be further extended for reasons specified in Section 97(3) to (13), which include failure by the parties to provide information requested by the OFT, seeking of undertakings by the OFT and consideration by the European Commission of a request made by the UK (alone or with others) to deal with the case under Article 22(3) of the ECMR.
\textsuperscript{47} Paragraph 4.71, Mergers – jurisdictional and procedural guidance (OFT527).
\textsuperscript{48} Paragraph 4.61, Mergers – jurisdictional and procedural guidance (OFT527).
\textsuperscript{49} Section 99(5).
\textsuperscript{50} Annex A.9, Mergers – jurisdictional and procedural guidance (OFT527).
\textsuperscript{51} Section 100(1).
Informal advice

The OFT is willing to give informal advice (whereby the OFT would consider evidence and argument put to it by the parties and formulate advice as to whether it would be likely or unlikely to refer the merger to the CC) in some limited circumstances. Essentially, the OFT will do so in the case of good faith confidential transactions where the OFT is satisfied that the transaction raises a genuine issue as to referral to the CC, i.e. it raises genuine competition concerns. Informal advice will also be available in relation to the ‘failing firms’ defence (for further information on this defence, see section 8 below). The service is only available for transactions which are not in the public domain. Any resulting advice is likely to be modest and qualified and is largely intended to supplement the assessment of the parties’ legal advisers. It is not binding on the OFT. The quality of the advice will depend to a large extent on the quality of the information provided. It follows that in preparing an application for informal advice, accuracy should not be sacrificed to brevity. Although there is no administrative timetable for the giving of informal advice, the OFT will endeavour to indicate whether a request for advice has been accepted within 5 working days. Where the advice is to be given immediately following a meeting, the OFT will endeavour to schedule the meeting within 10 – 15 working days of receipt of the original application, however, urgent cases may be handled more quickly.

Fast track reference cases

Where both parties seek a reference to the CC, and the OFT holds an objectively justifiable belief that the test for a reference is met, the referral process may be accelerated. The usual steps such as the issues meeting and CRM may be dispensed with, and the time taken to investigate (such as in conducting third party enquiries) will be shortened where possible. The OFT has indicated that fast track references will be most suitable for cases where competition concerns impact on the whole or substantially all of the transaction, rather than on just one part of the transaction which is capable of being resolved by structural undertakings in lieu of a reference. It is open to the parties to inform the OFT that they seek a fast track reference to the CC either at the time of notification or at any point during the course of the OFT’s investigation.

Information gathering powers

The powers of the OFT to gather information are relatively limited. A formal Merger Notice that is not complete is not effective to set the statutory timetable running and the OFT’s administrative target for processing an informal application for clearance will not start to run until such time as a complete application form has been submitted. In most cases, the commercial imperatives to complete the deal will operate to ensure that the parties provide the OFT with extensive information from the outset of the process.

---

52 Mergers – jurisdictional and procedural guidance (OFT527).
54 Paragraph 4.39, Mergers – jurisdictional and procedural guidance (OFT527).
55 Paragraphs 4.71-4, Mergers – jurisdictional and procedural guidance (OFT527).
56 Paragraph 4.75, Mergers – jurisdictional and procedural guidance (OFT527).
If requests for information arise in the context of the informal procedure, these will normally take the form of informal questions. Under the formal Merger Notice procedure, requests for further information will take the form of statutory notices. Failure to respond to a statutory notice by the deadline stipulated in that notice may lead to an extension to the statutory timetable for consideration of the Merger Notice for as long as the response to the information request is overdue or, in extreme cases, rejection of the Merger Notice.

Statutory notices may be used in the context of completed mergers if the OFT wants the option of extending the four month deadline in the event that the parties fail to comply with a request for information.

It is a criminal offence knowingly or recklessly to supply false or materially misleading information to the OFT, the CC or any sectoral regulator in any context.

**Pre-emptive orders and undertakings**

Whilst deliberating whether or not to refer a merger that has been completed, the OFT may order or accept undertakings from the parties not to take action that might prejudice any remedies that might be recommended by the CC were a reference to be made. These orders and ‘hold-separate’ undertakings may prevent the parties integrating the businesses, transferring assets or closing down operations. The OFT will only make an order after giving the parties a reasonable time to offer undertakings. An order to this effect by the OFT can only be made if it has a reasonable suspicion that pre-emptive action is in progress or contemplation. The threshold is a low one and the OFT has indicated that unwillingness to provide initial undertakings may in itself be evidence that pre-emptive action is in progress or contemplation. The OFT will afford parties an opportunity to make representations as to why an order would not be appropriate in the circumstances of the case.

Whilst the OFT has not found it necessary to resort to its order-making powers, it often seeks interim undertakings in the context of completed mergers. In any completed merger raising at least some substantive issues, it is likely that the OFT will seek interim undertakings to prevent further integration and to require the acquired business to be maintained as a going concern at an early stage in its review. The stronger the case for reference, the more likely the OFT will be to seek initial undertakings. The OFT uses a standard form template set of interim undertakings for the purposes of the negotiations with the parties on this subject. However, the OFT will take

---

57 Sections 31 and 99.
58 Paragraph 6.3, Mergers – jurisdictional and procedural guidance (OFT527).
59 Section 31 and paragraph 4.17, Mergers – jurisdictional and procedural guidance (OFT527).
60 Section 117.
61 Sections 71 and 72.
63 Paragraph 6.44, Mergers – jurisdictional and procedural guidance (OFT527).
64 Paragraph 6.31, Mergers – jurisdictional and procedural guidance (OFT527).
proportionality into account in deciding on the scope of the undertakings so that the competition risks will be balanced against the commercial context of the transaction and potential harm to the businesses. Although the OFT will give the parties a short time in which to consider the suitability of the proposed undertakings, it will generally avoid conducting lengthy negotiations upfront. Instead, the OFT will consider subsequent waiver requests that will exempt certain elements of the hold-separate obligation where justified.

**Merger Fees**

Fees have to be paid in respect of a merger that qualifies for reference to the CC, irrespective of whether a reference is actually made. However, no fees are payable where the merger relates to the acquisition of anything less than a de jure controlling interest, unless a Merger Notice is used.

Where the Merger Notice procedure is used, the fee must accompany the Notice. Until receipt of the fee, the statutory timetable for consideration of the Notice does not begin to run.

For other mergers, the fee is payable by the acquirer on the publication of the OFT’s decision to refer or not to refer. An invoice is issued and payment must be made within 30 days of the date of the invoice.

There are three bands of merger fees which apply according to the value of the turnover in the United Kingdom of the enterprise which is to be acquired.

The current scale is as follows:

<table>
<thead>
<tr>
<th>Turnover</th>
<th>Merger Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>£20 million or less</td>
<td>£30,000</td>
</tr>
<tr>
<td>over £20 million, but not over £70 million</td>
<td>£60,000</td>
</tr>
<tr>
<td>over £70 million</td>
<td>£90,000</td>
</tr>
</tbody>
</table>

No fee will be payable if either the exemption for acquisitions by small/medium sized enterprises applies.

---

65 Paragraph 6.37, Mergers – jurisdictional and procedural guidance (OFT527).
68 Section 7 Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003.
7. **CC Procedure**

Merger references (and indeed merger clearances) are announced on the Regulatory News Service and the announcement is placed on the OFT website at 11.00 a.m. or 3.00 p.m.. The parties to a referred merger are contacted one hour before the public announcement and are advised of the timing and nature of the decision (though the time delay may be shortened to as little as five minutes where any difficulty in the handling of price-sensitive information is envisaged). Where the OFT is to issue a press release the parties will normally receive a copy of this at the same time as the announcement. The full text of the OFT decision will then be posted on the OFT website, after a short interval to agree redactions to protect confidential information provided by the parties.

**Interim Measures following a CC reference**

Upon the making of a CC reference, there are a number of consequences for the transaction – some arising automatically, some relevant only if invoked by the authorities.

**Temporary Restriction on Share Dealings**

When a merger reference is made in relation to a merger that has not yet been completed, the Act automatically prohibits (in broad terms) the parties from acquiring interests in each other’s shares until such time as the CC inquiry is finally determined. This restriction can be lifted only with the consent of the CC.

**Restrictions on Further Integration**

In relation to completed mergers, the Act prohibits from the point of reference any further integration of the businesses or any transfer of ownership or control of businesses to which the reference relates. The purpose of the prohibition is to prevent the parties from taking any steps which might prejudice or make it difficult for the CC to implement any remedies which might ultimately prove necessary. Again, this prohibition, which lasts until the reference has been finally determined, may be relaxed only with the consent of the CC.

**Interim Undertakings and Orders**

The CC also has available a wide range of interim order-making powers including powers to impose obligations to safeguard assets and to continue to carry on certain businesses, supplemented if necessary by the appointment of a trustee. Any such order may continue in force after the report is made until final remedies have been determined. As an alternative to the exercise of its interim-order making powers, the CC can accept legally binding undertakings.

---

69 Paragraph 6.64, Mergers – jurisdictional and procedural guidance (OFTS27).
70 Ibid.
71 Section 78.
72 Section 77.
73 Sections 80 and 81.
from one or more parties to a completed or anticipated merger that they will not take any action that might prejudice the outcome of the merger reference.

Orders and undertakings made by the OFT in the course of its investigation of a completed merger under Sections 71 or 72 may be adopted by the CC for this purpose. In practice, the CC has tended to proceed first by adopting any interim undertakings by the OFT in the period immediately following a reference decision and then seeking to agree a new set of interim undertakings with the parties in the weeks following reference.

**Lapse of Public Takeover Bid**

Under Rule 12 of the City Code on Takeovers, a bid subject to the Code must be subject to a condition that the bid will lapse if a CC reference is made before the later of the first closing date and the date the bid goes unconditional as to acceptances. In these circumstances, Rule 35 of the Code provides, in broad terms, that the bidder may not bid again for the target for a period of 12 months following the date the bid lapses. However, if the bid is cleared by the CC following an inquiry, the Takeover Panel will normally permit a fresh bid to be made, provided it is made within 21 days of the CC’s clearance being announced.

**CC Investigations**

The CC rules of procedure on merger cases are governed by the Act, Schedule 7 of the Competition Act 1998 and the CC’s Rules of Procedure. Subject to those provisions (and to generally applicable principles of English administrative law, including the principles set out in the European Convention on Human Rights, directly enforceable in the UK under the Human Rights Act 1998) the CC has a broad discretion in determining how inquiries ought to be conducted.

Decisions in merger cases are made by a group of CC members, appointed by the CC Chairman. For mergers, the groups generally consist of a chairman and at least two other members. In making group appointments, the CC’s internal procedures require the Chairman to avoid situations which might give rise to a conflict of interest, or otherwise undermine or call into question, the independence and impartiality of the CC.\(^{74}\)

Each group is supported by a team of CC staff (economists, accountants, lawyers, clerical staff and so on) and may, on occasion, use external advisers and consultants.

Decisions are taken by a two-thirds majority vote of the group, although the Act allows a dissenting member to include in the report a statement of, and reasons for, his disagreement.\(^{75}\)

\(^{74}\) Paragraph 4.4, CC Rules of Procedure 2006; see also CC Code of Practice for Reporting Panel Members and CC Guidance on Conflicts of Interest.

\(^{75}\) Section 119.
The CC is obliged to publish a report, setting out its reasoned decisions, within a statutory maximum period of 24 weeks (extendable in special cases for a period of up to eight weeks) from the date of reference. Whilst the CC states in its published guidance that in most cases it expects to complete its reports in a lesser period of time than the statutory maximum, to date most CC decisions under the Act have taken the full 24 week period. A period shorter than 24 weeks may apply when a merger has been referred back to the UK under Article 9(6) of the ECMR.

A CC investigation typically has four main phases:

(i) inquiry into the facts (typically on the basis of information contained in the pre-existing OFT file, responses to factual questionnaires to the parties and third parties, market surveys and site visits);

(ii) inquiry into the substantive issues (on the basis of an issues letter produced by the CC, followed by hearings with the parties and others);

(iii) discussion of the CC's provisional findings (on the basis of a notice of its provisional finding published by the CC, which will take into account the parties' responses to the CC's issues letter); and

(iv) consideration of possible remedies on the basis of a remedies notice (taking into account the parties' responses to the CC's provisional findings and any remedies hearing).

The group is obliged under the Rules of Procedure to arrange for an administrative timetable to be drawn up, setting out the timing of the major stages of the reference. The relatively short period for investigation means that these phases, in particular the provisional finding and remedies stages, may be telescoped in many inquiries. The period of reference is generally a hectic one for the parties, between preparation of submissions for the CC, preparation for CC hearings and dealing with inquiries raised on an ad hoc basis by the CC or its supporting staff.

A flowchart indicating the typical shape of a CC merger inquiry is attached as Annex B.

---

76 These special cases are not defined in the Act, but it is anticipated that they would include matters such as the illness or incapacity of members of a reporting group that has seriously impeded its work, and unexpected events such as a merger of competitors.

77 Paragraph 6.7, CC General Advice and Information, March 2006.

78 Section 170(5) provides that the CC must have regard to this information in the performance of its functions.

79 The practice of producing a notice of provisional findings reflects Section 104, which requires the CC (and the OFT) to consult parties to the merger before taking an adverse decision. The notice will generally allow the parties 21 days to file a response (Paragraph 6.20 CC General Advice and Information).

80 Paragraph 6.4 of the CC’s Rules of Procedure states that in drawing up this timetable, the CC will have regard to views expressed by the parties.

81 The CC has indicated that its notice of provisional findings may also include proposals for remedies and that it may consult the parties on both matters at the same time (CC General Advice and Information, paragraphs 3.6, 6.20 and 6.21). In practice, this is what generally occurs.
**Information gathering powers**

The CC has wide statutory powers to require the parties and third parties to produce information and documents for the purposes of a merger investigation\(^83\). Legally privileged documents do not, however, have to be disclosed to the CC. Derogations from supplying certain items of information may be negotiated with the CC depending on whether the information in question is regarded by the panel as absolutely necessary for an understanding of the issues. The CC can also compel witnesses to attend in person before the CC.

There are a number of means by which these powers may be enforced:

(i) Financial penalties can be imposed by the CC as a means of enforcing these powers, in the form of a fixed monetary penalty of a maximum of £30,000, or a penalty of £15,000 per day, or a combination of the two\(^84\). The CC’s Statement of Policy on Penalties indicates the circumstances in which penalties may be imposed and what will be considered aggravating or mitigating factors.

(ii) The CC’s Rules of Procedure provide that the CC can ignore information provided where it has not been produced within a reasonable time and without reasonable explanation in response to a request from the CC\(^85\).

(iii) Where information has not been produced in accordance with a CC notice, the CC has a broad discretion to extend the period within which a report is to be prepared and published. The power to extend the reporting period applies whether or not there was a reasonable excuse for the failure to comply\(^86\).

(iv) Finally, fines or terms of imprisonment may be imposed following conviction for the criminal offences of intentional provision of false information or intentional alteration, suppression or destruction of documents whose production has been required by the CC\(^87\).

In practice, information-gathering has tended to be achieved by firm requests and voluntary compliance, although the CC has indicated that it will be using its statutory powers more extensively in the future.

Hearings will be held with the parties prior to the group reaching its provisional findings. The issues letter can be expected to form the agenda for these hearings. There will often be a

---

\(^83\) Section 109.
\(^84\) Section 110(1), (3) and Section 111(7).
\(^86\) Sections 39(4) and 51(4).
\(^87\) Section 110(5) and Section 117.
separate hearing to discuss remedies. CC hearings are generally held in private. Transcripts of hearings are made available to attendees, to allow them to check for accuracy and to make additional substantive points in writing.

The CC invites evidence from a wide range of third parties and routinely invites third parties to appear before it in person. Third party comment is more generally solicited by means of advertisements in the trade press and by notices on the CC’s website. The administrative timetable for the reference, the notice of provisional findings and the remedies letter are posted on the website. The CC has also indicated that it may also publish information supplied to it in the course of its inquiry on its website. In practice, the main submissions of the parties during the reference, together with a summary of third party comment, is generally published on the website. The CC also publishes its reports, both in hard copy and on its website. Prior to publication, the CC may “put-back” chapters of its draft report (other than those that deal with its conclusions) to the parties for their comments, both on accuracy and on disclosure.

The Act provides that information should be excluded from the published report where the CC considers that publication would harm the public interest, the legitimate interests of a business or, where the information relates to the private affairs of an individual, the interests of that individual. However, the CC must balance against these restrictions its statutory obligation to include within its report the information necessary to understand its decision and the reasoning for its decision.

---

88 Paragraph 6.17, CC General Advice and Information. There is provision in the CC Rules of Procedure for hearings to be held in public, as was the case in relation to proposed offer to acquire Safeways supermarket chain in 2003, however, no public hearings have been held since in the context of mergers and the CC has indicated that it is unlikely that it will make use of this process again in the future.

89 Paragraph 6.27, CC General Advice and Information. The CC’s practice is to publish at an early stage in the inquiry a summary of the case put forward by the main parties on its website.


91 Section 244.

92 Section 38(2)(c).
8. SUBSTANTIVE APPRAISAL OF MERGERS

The OFT has a statutory duty to refer a relevant merger situation to the CC where it has a reasonably held belief that there is a significant prospect that the merger may result in a substantial lessening of competition (SLC). The CC’s powers to prohibit mergers or require remedies from the merging parties arise where it is satisfied that a SLC may be expected to result from the merger.

In Office of Fair Trading and others v. IBA Health Limited (IBA Health) 93, the Court of Appeal (CA) considered the extent of the discretion afforded the OFT by the statutory duty. It concluded that the OFT’s duty to refer merger cases to the CC arises where it forms a reasonable belief that there is a possibility that the merger will result in a SLC.

Possibility, for these purposes, means something more than fanciful, but is a lower prospect than “significant prospect” 94. The OFT has a discretion whether to make a reference in cases where the degree of likelihood is somewhere between the purely fanciful and a significant prospect, but is obliged to do so where there is a significant prospect of a SLC. A prospect of a SLC that is significant certainly arises where the possibility is greater than 50% and may arise at a materially lower level of possibility.

Where the relevant likelihood is greater than fanciful but below 50%, the draft non-binding guidelines issued jointly by the OFT and the CC (the draft Joint Substantive Guidelines – see below) indicate that the two key factors for the OFT will be (i) the evidence available and (ii) the potential adverse effect on consumer welfare of an incorrect decision not to refer 95.

In passing, the CA noted that in order to prohibit a merger or to impose remedies, the CC had to form a conclusion that it was not merely likely, but could be expected that a merger would result in a SLC. The CA suggested that this involved a more than 50% chance of such an effect on competition.

There are a number of exceptions to the OFT’s duty to refer mergers likely to result in a SLC, as discussed further below.

Appraisal by the OFT and CC (the Authorities)

In April 2009, the Authorities published draft Joint Substantive Guidelines with a view to setting out (and in some cases aligning) their respective approaches to the statutory SLC test. The draft Joint Substantive Guidelines replace, among others, the pre-existing non-binding guidelines by the OFT from May 2003 and by the CC from April 2003 96. In making the SLC assessment the Authorities have stated that they will both start with a comparison of the prospects for competition if the merger proceeds (the “factual”) and if it does not proceed (the “counter-

---

94 Prior to the CA decision, the OFT had applied the “significant prospect” test to mergers.
95 Paragraph 2.5, draft Joint Substantive Guidelines.
96 See footnote 5 above.
factual”). From this comparison the Authorities will identify one or more categories of possible anti-competitive effects of the proposed merger (“theories of harm”) that they will use as a framework for substantive merger analysis97. The draft Joint Substantive Guidelines identify three forms of merger that may lead to a SLC: horizontal mergers, vertical mergers and conglomerate mergers98.

**Horizontal mergers**

In relation to horizontal mergers, various measures of post-merger concentration levels may be used by the Authorities to identify competitive pressures in a market (and therefore whether the merger may lead to a SLC in that market)99. The tools used by the Authorities for these purposes may include market shares, concentration ratios (the aggregate market share of the leading firms in the market) or the Herfindahl-Hirschman Index (HHI) (a calculation based on the sum of the squares of all the market participants). The Authorities have indicated that they do not intend to employ a mechanistic approach to the use of HHIs, however, a merger meeting particular concentration levels will provide an indication of whether a merger is likely to raise competition concerns100. Having examined the post-merger concentration levels in the relevant market, the Authorities will review whether a horizontal merger will give rise to “unilateral” or “co-ordinated” anti-competitive effects. Unilateral effects will be deemed to arise where the merged firm would find it profitable to raise prices or reduce output or quality following the merger. Co-ordinated effects will be deemed to arise where the post merger market structure is such that firms in the market are likely tacitly or expressly to co-ordinate their behaviour to raise prices, reduce quality or curtail output.

**Unilateral effects**

The following factors, amongst others, will be taken into account in assessing whether unilateral effects may arise from a merger101:

> Post merger concentration levels.

> The size of the increment to the pre-existing market share.

> Buyer power and the practical ability of customers to switch to alternative suppliers.

> The ease of new entry or expansion of existing capacity levels.

---

97 Paragraphs 4.8 and 4.9, draft Joint Substantive Guidelines.
98 Paragraph 4.2, draft Joint Substantive Guidelines.
99 Paragraphs 4.84 and 4.85, draft Joint Substantive Guidelines.
100 Paragraph 4.93 of the draft Joint Substantive Guidelines states: “…any market with a post-merger HHI exceeding 1,000 may be regarded by the Authorities as concentrated and any market with a post-merger HHI exceeding 2,000 as highly concentrated. In a concentrated market, a horizontal merger generating a delta exceeding 250 may give cause for concern over anti-competitive effects, as may a horizontal merger in a highly concentrated market generating a delta exceeding 150 (non-horizontal mergers do not generate an increase in market share or a delta).”
101 Paragraphs 4.100 to 4.114, draft Joint Substantive Guidelines.
The Authorities have stated that unilateral effects may arise not only in circumstances where the merging firms alone are considered likely to benefit from supra-competitive profits post-merger, but also in circumstances where rival firms benefit from reductions in competitive pressures as a result of the merger. In this instance, whilst the Authorities will be primarily concerned with unilateral effects on the customers of the merging firms, they may also take account of effects on the customers of other firms in the market.  

**Co-ordinated effects**

Co-ordinated anti-competitive effects will arise where the merger situation increases the likelihood that competitors will collude, or increases the prospects that collusion will be successful. For these purposes, the collusion may be express or tacit. Three conditions must be satisfied before such a conclusion can be reached:

(i) Market participants must be able to reach and monitor the terms of co-ordination;

(ii) Co-ordination needs to be *internally* sustainable among the co-ordinating group – market participants have to find it in their individual interests to adhere to the co-ordinated outcome; and

(iii) Co-ordination needs to be *externally* sustainable – other competitive constraints in the market must not be such as to undermine the sustainability of the collusion.

The draft Joint Substantive Guidelines highlight two factors that are especially valuable in identifying the likelihood of a merger having co-ordinated anti-competitive effects:

> A concentrated market structure with a limited number of players with broadly symmetrical market shares; and

> A history of collusion.

**New entry**

The prospect of new market entry is an important part of the analysis in both the non-coordinated and unilateral effects contexts. The Authorities have stated that new entry will only be considered to be a sufficient constraint on the parties or their competitors’ attempts to profit from the removal of a competitor where the following three conditions are satisfied:

(i) Barriers to entry to the market (e.g. licensing constraints, first mover advantages, high levels of sunk costs, economies of scale, etc.) are not such as to render new entry unfeasible;

---

102 Paragraph 4.95, draft Joint Substantive Guidelines.
104 Paragraph 4.119, draft Joint Substantive Guidelines.
(ii) The scope of any potential new entry will be sufficient to constrain any post-merger market power; and

(iii) Entry will be sufficiently timely (generally within less than two years) and sustainable to provide lasting and effective post-merger competition.

**Failing firms**

Where one of the parties to a merger is in serious financial difficulties, the failing firm defence may be used to rebut any suggestion of a SLC arising from a merger. The conditions to be satisfied before such a defence can be relied upon are strict. The Authorities will consider:

(i) Evidence that without the merger the firm and its assets will exit the market in the near future. These criteria will generally be met by firms in liquidation, but firms contemplating entering into administration will not generally satisfy them;

(ii) The likelihood of acquisition of the firm or assets by an alternative buyer producing a substantially better outcome for competition than the proposed merger; and

(iii) Whether the failure of the firm and the resulting competition for that firm’s market share by the remaining players in the market would be a substantially less anti-competitive outcome than the proposed merger.

**Vertical mergers**

A vertical merger, that is, a merger between companies that operate at different but complementary levels of the production chain, may lead to a SLC where the merger is likely to foreclose market access for the merged firm’s rivals or, occasionally, where the merged firm gains access to commercially sensitive information about its rivals.

In considering whether a merger will deny competitors access to either inputs or customers, it will generally be necessary to assess the market power of the merged firm at either the upstream (inputs) or downstream (customers) levels of the market. Absent market power, any attempts by the merged firm to withhold inputs from competitors or to supply them only on anti-competitive terms, or to undermine competitors’ continuing viability by denying them access to a significant proportion of the customer base are unlikely to prove effective. As a rule of thumb, a market share of less than 30% in the downstream market (customer foreclosure) or the upstream market (input foreclosure) will be unlikely to raise anti-competitive concerns.
The Authorities will also take into account the incentive of the merged firm to foreclose an important input or customer. The presence of an incentive will depend on whether foreclosure is profit enhancing; in other words, whether the profit gained by the merged firm in the relevant upstream or downstream market (depending on whether customer or input foreclosure is at issue) exceeds the profit lost by the merged firm in the corresponding downstream or upstream market\(^{109}\).

### Conglomerate mergers

Conglomerate mergers, that is, mergers between companies operating in different product markets, may be deemed to give rise to a SLC, in particular where they afford the merged firm the possibility of exercising portfolio power. Portfolio power may arise where customers have a strong preference for sourcing from a single supplier, so that a company with a broad portfolio of brands will have an unassailable advantage over suppliers with a less extensive product range. Alternatively, conglomerate mergers may also give rise to anti-competitive effects where the merged company uses tying or bundling to link products from the separate markets\(^{110}\).

The Authorities recognise, however, that conglomerate mergers are less likely than horizontal mergers to have anti-competitive effects\(^{111}\).

### Exceptions to the duty to refer

There are four exceptions to the OFT’s statutory duty to refer a merger considered likely to result in a SLC. Such a merger need not be referred where:

(i) The SLC can be addressed by undertakings in lieu (see further below)\(^{112}\);

(ii) The proposals for a merger are not sufficiently advanced to warrant reference. Where a public statement of an intention to merge or to acquire has been made, this exception is unlikely to apply\(^{113}\);

(iii) The market is not of sufficient importance to warrant reference. In other words, where the costs of a CC reference would be disproportionate to the value of the relevant market, the OFT may clear the deal, notwithstanding a SLC (see paragraph below on ‘New de minimis exception’)\(^{114}\); or

\(^{109}\) Paragraphs 4.134 to 4.150, draft Joint Substantive Guidelines.

\(^{110}\) Paragraphs 4.154 and 4.155, draft Joint Substantive Guidelines.

\(^{111}\) Paragraph 4.153, draft Joint Substantive Guidelines.

\(^{112}\) Section 74(1).

\(^{113}\) Section 33(2)(b).

\(^{114}\) Sections 23(2)(a) and 33(2)(a).
(iv) The merger is likely to lead to customer benefits\textsuperscript{115}.

Although efficiency and other benefits are often claimed for mergers, the customer benefits exception to the duty to refer is likely to be available only in very rare cases\textsuperscript{116}. Unfettered competition is normally considered the best way to ensure that benefits arise and are passed on to customers, so there is an informal presumption that customer benefits will neither arise nor be passed on in a merger characterised by a SLC.

The types of benefits that may be relevant to the customer benefits exception to the duty to refer include lower prices, greater innovation and improved choice or quality. Benefits to the merging parties in terms of increased economies of scale or otherwise are not necessarily relevant. The benefits claimed for the merger must be quantifiable and must clearly derive from the merger. Benefits that may arise at some remote or uncertain time in the future will not be relevant for these purposes\textsuperscript{117}.

"Customers" for the purposes of the exception include the customers of the parties to the merger, so that it is not necessary to demonstrate that the benefits will necessarily flow through to final consumers. Moreover, the benefits may arise in a market other than the market in which the SLC is considered to arise\textsuperscript{118}.

In practice, the customer benefits exception is likely to be of primary relevance to markets characterised by network effects, that is, markets in which customers attach increasing value to the network in proportion to the number of customers that are connected to the network. This could apply, for example, to mergers involving telecommunications companies or companies offering passenger transport services. Where the customer benefits exception may be relevant, arguments as to why it should apply must be raised with the OFT at an early stage in the process\textsuperscript{119}.

\textit{New de minimis exception}

In November 2007 the OFT published revised guidance on markets not sufficiently important to warrant a reference\textsuperscript{120}. The new guidance increased the market size threshold from £400,000 to £10 million. This considerably broadened the scope of its application. The guidance also stated that where there is a high market concentration and low entry prospects, evidence of co-ordination, the case has precedent value, or the detriment to competition is likely to affect vulnerable customers, the exception is not likely to be applied. The OFT further clarified that it

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{115} Sections 22(2)(b) and 33(2)(c).
\item\textsuperscript{116} Paragraph 7.10, Mergers—substantive assessment guidance (OFT516). The OFT relied on the efficiencies argument to conclude that there would not be an SLC in a particular market for the first time in Global Radio UK Limited/GCap Media plc [ME/3638/08].
\item\textsuperscript{117} Paragraphs 7.7 and 7.8, Mergers—substantive assessment guidance (OFT516).
\item\textsuperscript{118} Paragraph 7.9, Mergers—substantive assessment guidance (OFT516).
\item\textsuperscript{119} See Global Media UK Ltd / GCap Media plc (2008)
\item\textsuperscript{120} Revision to Mergers – substantive assessment guidance, OFT516b, November 2007.
\end{itemize}
\end{footnotesize}
may still be applied regardless of market concentration and low entry prospects or evidence of co-ordination where the total impact on consumer welfare would be limited. Since the revised guidance was published, the OFT has applied the exception to clear four rail franchise mergers\textsuperscript{121}, a merger affecting the alginates market (a product used in pharmaceuticals)\textsuperscript{122} and a merger of bulk distributors of tour operator travel brochures\textsuperscript{123}. In its decision on the merger between Dunfermline Press and Trinity Mirror\textsuperscript{124}, the OFT stated that, on policy grounds, it would not apply the exception where the detriment to competition can clearly be remedied by undertakings in lieu.

Undertakings in lieu of reference to the CC

A reference of a transaction to the CC by the OFT may be averted by the giving of undertakings in lieu of reference\textsuperscript{125}. Undertakings in lieu are likely to be acceptable to the OFT only where both the competition issue and the remedy are reasonably clear-cut.

These undertakings may be structural (e.g. divestment of one of the overlapping businesses) or behavioural (e.g. a commitment to observe a price cap for a period of time). Structural undertakings which do not require on-going monitoring and which address the structural changes giving rise to the competition issue are preferred by the OFT\textsuperscript{126}. This reflects in part the provisions of the Act which require the OFT, in exercise of its powers to accept undertakings in lieu, “to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable”\textsuperscript{127}. Behavioural undertakings in lieu will be considered by the OFT in practice only where divestment would be impractical or disproportionate to the nature of the concerns identified\textsuperscript{128}.

In its most recent guidance\textsuperscript{129}, the OFT has indicated that where it considers the risks associated with a proposed package of divestments to be high (for example, where it has concerns for the long-term sustainability of the divestment package or there is only a limited pool of suitable candidate buyers), it will require the parties to find an up-front buyer. In these cases, the OFT now requires a conditional sale agreement first to be agreed with a suitable buyer before the undertakings can be accepted (the OFT will consult on the identity of the buyer at the same time as the undertakings more generally). Accordingly, the parties will usually be given a short time period (the OFT’s guidance states that this may a matter of weeks, not months) in which

\textsuperscript{121} National Express Group plc / Inter City East Coast rail franchise, (2007); Arriva plc / Arriva Trains Cross Country Limited / Cross Country passenger rail franchise (2007); Stagecoach Group plc / East Midlands Franchise (2008).
\textsuperscript{122} FMC Corporation / ISP Holdings (U.K.) Limited (2008).
\textsuperscript{123} Orbital Marketing Services Group Limited / Ocean Park Limited (2008).
\textsuperscript{124} Dunfermline Press Limited / Trinity Mirror plc (2008).
\textsuperscript{125} Section 73.
\textsuperscript{126} Paragraph 8.6, Mergers—substantive assessment guidance (OFT516).
\textsuperscript{127} Section 73(3).
\textsuperscript{128} Paragraph 8.10, Mergers—substantive assessment guidance (OFT516).
\textsuperscript{129} Paragraphs 8.31-5, Mergers—jurisdictional and procedural guidance (OFT527).
to identify a proposed up-front buyer, obtain (provisional) confirmation from the OFT that the identified buyer is likely to be acceptable, and enter into a binding sale agreement. During this period, the OFT will ‘suspend’ its duty to refer the transaction to the CC. Where the OFT does not believe that there are good reasons to consider that a suitable up-front buyer will be found within a reasonable timeframe, it may decide that its duty to refer the transaction to the CC should no longer be suspended, in which case a reference will follow.

Undertakings in lieu may be proffered to the OFT, either in the initial application for clearance or at a later stage in the OFT’s procedure. In circumstances where the OFT considers that undertakings in lieu would be appropriate, it will issue a press notice stating that it is minded to refer the transaction to the CC, absent appropriate undertakings. It will also publish the full text of its decision on its website followed by the text of the proposed undertakings. The OFT will then allow not less than 15 working days for third party comment. If the undertakings are modified significantly as a result of third party consultation or otherwise, there must be a further seven day period for third party comment on the revised undertakings before they are finalised. The OFT will ask the parties to sign the final version of the undertakings before it announces its formal acceptance of them. The final version will then be published on the OFT’s website.

Following the announcement that the duty to refer has been suspended, the OFT may by notice extend the four-month statutory timetable for considering a merger notice, or the statutory deadline.

Should undertakings in lieu be accepted, the merger in question will be immune from CC reference unless it emerges that any material fact relating to the merger was neither disclosed to the OFT nor made public before the acceptance of the undertakings. The final text of the undertakings will be published on the OFT’s website along with a press release announcing their acceptance. Should undertakings in lieu be breached, the OFT has the power to make a wide variety of orders (including interim orders) to address the adverse effects on competition deemed to arise from the merger.

Undertakings in lieu of reference may be later varied, superseded or released. The Authorities recently entered into a Memorandum of Understanding to promote greater clarity in their process for reviewing merger undertakings and orders.

130 Paragraph 8.33, Mergers – jurisdictional and procedural guidance (OFT527).
131 This approach was most recently adopted by the OFT in its decision to refer the completed acquisition by Sports Direct plc of a number of retail stores from JJB Sports plc.
132 Paragraph 8.28, Mergers – jurisdictional and procedural guidance (OFT527).
133 Paragraph 8.29, Mergers – jurisdictional and procedural guidance (OFT527).
134 Section 97(7), (8).
135 Section 25(4), (5).
136 Section 74(2).
137 Section 75.
138 See OFT Press Release 15/09 which includes a link to the Memorandum of Understanding.
Appraisal by the CC after OFT referral

Having first satisfied itself that a merger situation for the purposes of the Act exists, the CC then considers whether or not a SLC has resulted, or is likely to result, from that situation. This assessment will be conducted in accordance with the analytical framework described above (i.e. in line with the draft Joint Substantive Guidelines). If it concludes that a SLC can be expected to result from a merger, its extensive remedial powers, including its powers of prohibition, then become operative.

Remedies

Subject to rare exceptions, where the CC concludes that a SLC may be expected to arise from a merger, it must recommend remedies.

In November 2008 the CC published a set of guidelines\(^{139}\) to explain its approach and requirements in exercising its wide-ranging and flexible powers in relation to remedies\(^{140}\). The remedies that the CC may require from the parties may be either structural (e.g. prohibition, or complete or partial divestment) or behavioural (e.g. licensing of intellectual property rights or price caps). It may also recommend that steps be taken by others, for example, that regulators should change the terms of operating licences or take steps to increase market transparency\(^{141}\).

In choosing between the panoply of remedies available to it, the CC will take into account the likely effectiveness of the remedy, the costs to the parties and to the OFT of compliance with the remedy and the proportionality of the remedy to the SLC identified\(^{142}\). However, in relation to completed mergers, the CC has indicated that the costs to the parties of compliance with the remedy will not normally be relevant on the basis that these could have been avoided by a prior application for clearance\(^{143}\).

The Act requires the CC to have particular regard to the need to achieve “as comprehensive a solution as is reasonable and practicable” to remedy the SLC\(^{144}\). A preference for structural rather than behavioural remedies has evolved. The costs associated with on-going monitoring of behavioural remedies by the OFT, and the susceptibility of such remedies to be made inappropriate or irrelevant by changes in market conditions, mean that behavioural remedies are more likely to be a supplement to structural remedies rather than a substitute for such remedies\(^{145}\).

\(^{139}\) Merger Remedies: CC Guidelines, November 2008.
\(^{140}\) Sections 82 to 84.
\(^{141}\) Where such a recommendation is made to the Government, the latter must issue a public response within 90 days of receipt of the recommendation.
\(^{142}\) Paragraph 1.9 Merger Remedies: CC Guidelines.
\(^{143}\) Paragraph 1.10, Merger Remedies: CC Guidelines.
\(^{144}\) Section 41(4).
\(^{145}\) Paragraph 1.11, Merger Remedies: CC Guidelines.
Where the CC recommends divestment it will generally insist upon the appointment of a trustee to safeguard the business pending its disposal and to monitor parties’ compliance with undertakings and will generally require the subsequent disposal to be approved by the CC.

Where the CC recommends partial divestment, it will be particularly concerned to ensure that the package of assets to be divested can form the basis of a business that will be effective in the hands of a purchaser to restore the *status quo ante*\textsuperscript{146}.

Situations in which the costs of the remedy appear disproportionate to the issue identified may be one of the exceptional cases in which the CC may decide not to take remedial steps\textsuperscript{147}. Insofar as any remedies ordered by the CC may prejudice any customer benefits that may arise from the merger, this may lead the CC to clear the merger unconditionally or to modify a remedy or impose a lesser remedy than might otherwise be deemed appropriate\textsuperscript{148}. The concept of customer benefits for the purpose of the remedies assessment is broadly the same as the concept of customer benefits that may justify a decision by the OFT not to refer notwithstanding a SLC (see further above). In other words, there must be evidence of objective, merger-specific benefits that can be quantified and that are likely to materialise within a reasonable period of time. Cases in which these criteria will be met are likely to be exceptional.

Remedies may be imposed by order, however, in most cases the CC will accept undertakings from the parties in preference to exercise of its order-making powers. Undertakings become legally binding from the moment they are accepted by the CC. The types of provisions that may be included in orders are restricted to those set out in Schedule 8 to the Act but no such limitation applies to *undertakings*\textsuperscript{149}. Schedule 8, however, is broad enough to cover most forms of remedies that the CC is likely to wish to impose.

Remedial undertakings – and indeed all forms of undertakings accepted by the Authorities in exercise of their functions under the Act – can be enforced by the Authorities in the same way as orders, that is, by civil proceedings for injunctive or other relief\textsuperscript{150}. Parties in breach of orders or undertakings may also face third party claims for damages or other relief\textsuperscript{151}.

The Act expressly contemplates that the CC may require the OFT to negotiate undertakings with the parties for its approval\textsuperscript{152}. The OFT maintains a register of final undertakings and orders and has a duty to monitor the implementation of undertakings and orders and to advise the CC about their variation, revocation or enforcement.

\begin{itemize}
  \item \textsuperscript{146} Paragraph 3.7, Merger Remedies: CC Guidelines.
  \item \textsuperscript{147} Paragraph 1.12, Merger Remedies: CC Guidelines.
  \item \textsuperscript{148} Section 41(5) and Paragraph 1.15, Merger Remedies: CC Guidelines.
  \item \textsuperscript{149} This limitation applies even if the order is made in consequence of a breach of a remedy undertaking. As noted above, undertakings may contain provisions which go beyond those set out in Schedule 8.
  \item \textsuperscript{150} Section 94(6), (7).
  \item \textsuperscript{151} Section 94(3), (4).
  \item \textsuperscript{152} Section 93.
\end{itemize}
The procedure to be observed in negotiating orders and undertakings is set out in Schedule 10 of the Act. This procedure provides for publication of the proposed undertaking or order for third party consultation.

**Inter-relationship with the Competition Act 1998**

Arrangements which result in mergers within the meaning of the Act are generally excluded from the regime for the control of anti-competitive market behaviour established by the Competition Act 1998.\(^{153}\)

The exclusion is automatic and extends to “any provision directly related and necessary to the implementation of the merger provisions”, i.e. ancillary restraints such as non-competition clauses (subject to appropriate limitations of scope and duration), licences of industrial, intellectual and commercial property rights, and purchase and supply agreements. The assessment of whether a restraint is truly ancillary to a merger or concentration is made by the OFT, in consultation with sectoral regulators, where appropriate. There is extensive case law under the ECMR as to what constitutes an ancillary restraint, to which the OFT is required to have regard in applying the Act.

To benefit from the exclusion, it is not necessary that the merger should also “ qualify for investigation” (i.e. the exclusion applies irrespective of the turnover of the business being acquired, or of the market share being created or strengthened).

There is, however, in relation to the prohibition on anti-competitive agreements but not in relation to the prohibition of abuse of marketplace dominance, a mechanism for withdrawal or “clawback” of the exclusion for mergers.\(^{154}\) The purported purpose of this clawback is to prevent an anti-competitive agreement from being structured in such a way as to fall outside the scope of competition scrutiny.

An agreement may be ‘clawed back’ by an OFT direction in writing. Such a direction may be issued only where:

(a) the OFT considers:
   (i) that the agreement will, if not excluded, infringe the Chapter I prohibition; and
   (ii) that it is unlikely to merit unconditional individual exemption; and

(b) the agreement is not a “protected agreement”. Protected agreements fall broadly into three categories:
   (i) mergers qualifying for investigation which the OFT has decided not to refer to the Competition Commission;

\(^{153}\) Schedule 1, Competition Act 1998.

\(^{154}\) Paragraph 4, Competition Act 1998.
(ii) qualifying mergers found to be such by the Competition Commission on a reference, including on the mandatory reference of a water merger; and

(iii) qualifying and non-qualifying mergers based on the acquisition of legal control, e.g. the acquisition of more than 50 per cent. of the voting rights of a company conferring on the acquirer of the shares the ability to pass ordinary resolutions.\(^\text{155}\)

Significantly, a merger that has not been cleared by the OFT (or, if referred to the Competition Commission, formally classified as a merger) will not be protected from clawback where it is based on the acquisition of less than a legal controlling interest, e.g. where only \textit{de facto} control or material influence is transferred. These arrangements may be clawed back for assessment under the prohibition of anti-competitive agreements, notwithstanding the expiry of the four-month review period applicable to mergers under the Act. In practice this provision requires that clearance under the Act of these latter categories of merger be obtained in order to avoid the risk of clawback.

\(^{155}\) Paragraph 5, Schedule 1, Competition Act 1998.
9. PUBLIC INTEREST CASES

One of the primary objectives of the reforms to UK merger control introduced by the Act in 2003 was the de-politicisation of the system of control. Under the old merger regime, the Secretary of State was the ultimate decision-maker. Decisions to refer mergers to the CC were taken by the Secretary of State taking into account the advice of the Director General of Fair Trading. Where the CC concluded that a merger was likely to harm the public interest, it fell to the Secretary of State to decide what action, if any, ought to be taken in consequence. Persistent criticism of this form of political involvement in UK merger control led the Government to commit to take politics out of merger control.

Intervention notices

The Secretary of State does, however, retain powers of intervention in relation to certain mergers. The Secretary of State may issue an intervention notice if a merger raises a “public interest consideration”\(^{156}\). The types of public interest that are relevant for this purpose are defined, either by the Act or other legislation or by statutory instrument:

For example:

(i) The public interest consideration of national security was drafted into the Act.

(ii) Under the Communications Act 2003 (Communications Act) there are public interest considerations in relation to newspaper and media mergers. In the case of newspaper mergers, there are powers to intervene to ensure plurality of media ownership, accurate presentation of the news, free expression of opinion and a plurality of views in each newspaper market\(^{157}\). In media cases the Secretary of State may intervene to ensure plurality of media ownership, a wide range of high quality broadcasting and the attainment of certain standards for programme content\(^{158}\). BSkyB/ITV (May 2007) is the only example of such an intervention notice issued on this basis to date. Guidance on the operation of the public interest provisions relating to newspaper and other media mergers was issued by the DTI in May 2004.

(iii) In October 2008 the Secretary of State introduced the public interest consideration of ‘maintaining the stability of the UK financial system’ in the context of the proposed Lloyds/HBOS merger.

Intervention notices have been issued on this basis in relation to a number of mergers falling within the European Commission’s exclusive jurisdiction under the ECMR, including General Dynamics/Alvis PLC (2004) and General Electric Company/Smiths Aerospace Division (2007).

---

\(^{156}\) Section 42(2).

\(^{157}\) Section 375 (2A) & (2B) Communications Act 2003.

\(^{158}\) Section 375 (2C) Communications Act 2003.
The Secretary of State has the power to issue an intervention notice whilst simultaneously seeking Parliament’s approval for the recognition of a further category of public interest consideration (as exercised in the Lloyds/HBOS merger). Should Parliament decline to recognise the proposed new category within 24 weeks, the intervention notice, in effect, ceases to operate and the reference (if already made) is cancelled159. Nevertheless, if the OFT report to the Secretary of State prior to the reference had indicated that it believed that the merger would result in a SLC, the CC can continue as if an OFT reference had been made under section 56(3).

The issue of an intervention notice has the following effects:

(i) The OFT may, by notice to the person who gave any relevant Merger Notice, agree to an extension of the timetable, which including any extension already given, must not exceed 20 days160.

(ii) In tandem with its consideration of the competition issues, the OFT will invite representations on the public interest consideration which it will summarise in a report to the Secretary of State161. This public interest report will be presented to the Secretary of State along with the OFT’s findings on the competition issues (which the Secretary of State is bound to accept)162.

(iii) Should the Secretary of State conclude that public interest issues are not material to the outcome, the case will be processed by the OFT (and possibly the CC) in the usual way163.

(iv) However, if it is concluded that the public interest issues are material, the Secretary of State has a broad discretion in deciding whether the transaction ought to be cleared or referred to the CC or whether to seek undertakings in lieu from the parties164. However, in reaching a decision, the Secretary of State may take into account only the specified public interest consideration(s) and the likelihood of a SLC. The Secretary of State is obliged to accept the advice of the OFT on jurisdiction and the likelihood of a SLC, but may make a reference to the CC on the basis of specified public interest considerations. Where the OFT advises that the merger should be referred to the CC on substantive competition grounds as well, the merger will be referred on both grounds in tandem.

159 Section 53(2).
160 Section 97(4).
161 Section 44(3).
162 Section 44(2). Also note that the Communications Act requires OFCOM to produce a report in newspaper and media cases where the Secretary of State has issued an intervention notice. The reporting obligations of the OFT are amended in such cases to avoid duplication of work.
163 Section 56(1).
164 Section 45 and Schedule 7, paragraph 3.
(v) Should the Secretary of State decide to refer the transaction to the CC on public interest grounds alone, the reference will restrict the CC’s investigation to the public interest issues raised by the transaction. If the Secretary of State concludes that there is a likelihood of a SLC, the reference will cover both the competition and the public interest issues. In the event of a combined reference, the CC is required to decide the issue of whether a merger situation has arisen which is likely to lead to an SLC, and must then reach a conclusion on the overall public interest (taking into account both any SLC and specified public interest consideration(s) (but not other factors))\textsuperscript{165}. These findings may include recommendations for remedial action\textsuperscript{166}.

(vi) The CC’s findings on the overall public interest are advisory only; the Secretary of State decides whether to make an adverse public interest finding and if so what remedial action ought to be taken in the event of such a finding\textsuperscript{167}. Following receipt of the CC report in cases involving newspaper and media considerations the Secretary of State will also be advised by OFCOM. However, the findings of the CC on the SLC issue (assuming it forms part of the reference) bind the Secretary of State\textsuperscript{168}.

(vii) If the Secretary of State concludes, following the report of the CC, that no public interest consideration is relevant to the case, the CC deals with the SLC and, if relevant, the issue of remedies in the normal way\textsuperscript{169}.

A flowchart indicating the typical shape of a merger inquiry raising public interest considerations is attached at Annex C.

**Special merger situations**

The Act also gives the Secretary of State a pre-eminent role in the case of mergers that do not meet the jurisdictional thresholds but which do raise defined public interest issues. Originally, such cases were restricted to Government contractors holding confidential materials relating to defence. However, the Communications Act extended the relevant category of cases to certain media mergers. In cases involving either the supply of newspapers of a particular description or broadcasting of any description, carried out in the UK or a substantial part of it, a special merger situation arises where at least 25 per cent. of the media is supplied by the person or persons by whom one of the enterprises concerned is carried on\textsuperscript{170}. There is no requirement that this share of supply should increase as a result of the merger.

\textsuperscript{165} Section 47(5), (6).
\textsuperscript{166} Section 47(7), (8). The remedial powers of the Secretary of State mirror those accorded to The Authorities by Schedule 8 of the Act.
\textsuperscript{167} Section 55(2).
\textsuperscript{168} Section 54(7).
\textsuperscript{169} Section 56(6).
\textsuperscript{170} Section 378 Communications Act 2003.
The Secretary of State must issue an intervention notice to start the merger control procedure in relation to these so-called “special merger situations”\textsuperscript{171}. That notice must specify the defined public interest consideration that the Secretary of State believes to be raised by the merger\textsuperscript{172}. Taking into account a report from the OFT as to whether a special merger situation has arisen, which may include advice and recommendations in relation to the specified public interest consideration and which will include a summary of representations received by the OFT, the Secretary of State decides whether or not to refer the merger to the CC. This decision is based on the specified public interest consideration. The SLC test does not apply\textsuperscript{173}. However, the decision of the OFT on whether or not a special merger situation has arisen binds the Secretary of State. The CC’s substantive report is confined to the public interest consideration specified in the reference. Following the CC report, the Secretary of State decides (within 30 days) if remedial action is appropriate and, if so, what form it should take.

\textsuperscript{171} Section 59.
\textsuperscript{172} Section 60(1)(b).
\textsuperscript{173} Section 62(2).
10. Judicial Review

Any party aggrieved by a decision of the OFT, Secretary of State or CC in relation to the merger review process may apply to the Competition Appeal Tribunal (CAT) for a review of that decision\(^{174}\). For these purposes, ‘decision’ is broadly defined so that it could include, for example, a decision by the OFT to reject a competitor or customer complaint in respect of a merger\(^{175}\). The right of appeal also extends to a decision by the CC to impose monetary penalties.

Appeals to the CAT are heard by a chairman (the President of the CAT or a person drawn from a panel of chairmen appointed by the Lord Chancellor) and two other members (drawn from a panel appointed by the Secretary of State). The CAT is supported in the performance of its functions by the Competition Service. The procedure followed by the CAT is set out in the Competition Appeal Tribunal Rules.

Appeals against merger decisions must be lodged within 4 weeks of the date on which the applicant was notified of the disputed decision, or the date of publication if earlier\(^{176}\). Lodging an appeal does not have a suspensory effect on the decision to which the appeal relates\(^{177}\).

In determining an application for review, the CAT is statutorily bound to apply the same principles as would be applied by the High Court on an application for judicial review\(^{178}\). (Where, however, the appeal is against the imposition of a penalty, the CAT will conduct a full rehearing on the merits of the case\(^{179}\).) Judicial review is the means by which the High Court supervises the administrative acts of public bodies or other individuals or bodies charged with public functions. It follows that the grounds of review include error of law; manifest error of appreciation of the facts (for example, where the reasoning in an appealed decision is logically unsound); manifest unreasonableness; bias; or procedural irregularity\(^{180}\). The review process under the Act is concerned with the procedure and decision-making process used by the public body, and it is not a means for the reviewing body to substitute its own decision for that of the body whose decision is being reviewed.

*IBA Health* clarified the CAT’s scope of review under the Act. In considering the appeal from the decision of the OFT to clear the merger, the CAT claimed that it was incumbent upon it to consider whether the decision taken by the OFT was one “reasonably” open to it\(^{181}\). In judging whether or not the OFT had acted “reasonably”, the CAT indicated that it would be guided by the ordinary and natural meaning of that standard. This was widely viewed by commentators as an attempt to broaden the scope of the CAT’s powers of review under the Act. On appeal from the

---

\(^{174}\) Section 120.
\(^{175}\) Section 120(2).
\(^{176}\) Rule 26(1), Competition Appeal Tribunal Rules 2003.
\(^{177}\) Section 120(3).
\(^{178}\) Section 120(4).
\(^{179}\) Section 114(5).
\(^{180}\) “[T]he Tribunal has jurisdiction, acting in a supervisory rather than appellate capacity, to determine whether the OFT’s conclusions are adequately supported by evidence, that the facts have been properly found, that all material factual considerations have been taken into account, and that material facts have not been omitted” (*Unichem Limited v OFT*, Case no. 1049/4/1/05, para. 174).
\(^{181}\) *IBA Health v Office of Fair Trading*, Case no. 1023/4/1/03, para. 225 et seq.
CAT, however, the Court of Appeal rejected the CAT’s more expansive interpretation of the review standard. Instead it confirmed that the test was whether the decision was so unreasonable that no reasonable person could have reached it, that is, the orthodox *Wednesbury* standard.\(^{182}\)

The CAT can either dismiss an appeal or quash the decision in whole or in part. Where the CAT quashes a decision, it will refer the matter back to the original decision-maker with a direction to re-make the decision in accordance with the CAT ruling. To date, the CAT has decided on:

- Four substantive appeals in respect of OFT merger decisions, of which one was quashed and remitted to the OFT for re-consideration\(^{183}\), one was withdrawn\(^{184}\) and two were dismissed\(^{185}\).

- Four appeals in relation to CC decisions, of which two were partially overturned (which concerned decisions of the Secretary of State)\(^{186}\) and two were dismissed\(^{187}\).

- One appeal in relation to a decision made at the sole discretion of the Secretary of State, which was dismissed\(^{188}\).

It should be noted that an appeal lies, on a point of law only, from a decision of the CAT to the Court of Appeal and requires the leave of either the CAT or the Court of Appeal. To date, there has only been one such appeal to the Court of Appeal, which was dismissed\(^{189}\).

© Slaughter and May November 2009

*This publication is for general information only. The application of the merger control rules under the Enterprise Act 2002 to any particular transaction will depend on its facts and this publication should not be relied upon as a substitute for specific legal advice. If further information or advice is required please contact your usual advisor at Slaughter and May or any member of the Firm’s Competition Group.*

\(^{182}\) *IBA Healthcare Limited v Office of Fair Trading & Ors* [2004] EWCA Civ 142.

\(^{183}\) *Unichem Limited v Office of Fair Trading*, Case no. 1049/4/1/05.

\(^{184}\) *Federation of Distribution Wholesalers v Office of Fair Trading*, Case no. 1030/4/1/04.

\(^{185}\) *Unichem Limited v Office of Fair Trading*, Case no. 1049/4/1/05, *Celesio AG v Office of Fair Trading*, Case no. 1059/4/1/06. N.B. There have been two other appeals to the CAT against OFT decisions regarding the approval of purchasers of divested businesses (Co-operative Group (CWS) Limited v OFT, Case no. 1081/4/1/07, Aggregate Industries Limited v OFT, Case no. 1086/4/1/07 – ongoing as at date of publication).

\(^{186}\) *BSkyB v Competition Commission and Secretary of State*, Case no. 1095/4/8/08, *Virgin Media v Competition Commission and Secretary of State*, Case no. 1096/4/8/08.


\(^{189}\) *IBA Healthcare Limited v Office of Fair Trading & Ors* [2004] EWCA Civ 142.
OFT becomes aware of merger (from: Merger Notice, notice or material facts/publicity about a merger or otherwise)

OFT assesses whether it believes the merger qualifies for investigation, i.e.
- meets definition of a merger
- meets share of supply test or turnover test

Case officer appointed
- further questions put to parties
- third parties invited to comment

Is it a difficult case?

Issues meeting held
- issues letter sent in advance
- written response may be submitted

OFT decides whether it believes merger may result in substantial lessening of competition

Are there significant issues remaining?

Clear

OFT has duty to refer to CC unless exceptions apply

OFT must publish its decision on its website and on Regulatory News Service

Clear

Main exceptions:
- SLC can be addressed by undertakings in lieu
- Proposals for merger not sufficiently advanced
- Market not of sufficient importance
- Merger likely to lead to consumer benefits

Timetable:
Merger notices: 20 days to refer (unless extensions apply).
Administrative (non-binding) timetable for clearance applications: 40 days.
Effective notice of completed merger: 4 months to refer (unless extensions apply)
ANNEX B: FLOWCHART INDICATING A COMPETITION COMMISSION MANDATORY WATER MERGER INQUIRY

TIMETABLE:
Maximum of 24 weeks to complete investigation (+8 weeks maximum for special reasons) and report

Information gathering & analysis
- Third party hearings
  - Statement of issues
    - Issues hearings with main parties
  - Report drafting, verifying information, considering request for exclusions from disclosure
    - Group’s provisional decision on the effect of the merger on the comparative regime
      - Group’s consideration of possible remedies
        - Notifying and publishing provisional findings and possible remedies
          - Adverse finding decision
            - Parties’ responses on remedies
              - Consultation including possible hearings with main parties and third parties
                - Are there any offsetting customer benefits (CB)?
                  - No
                    - Consideration of remedies and customer benefits
                      - No
                        - Prohibit merger (or lesser remedy) having regard to circumstances
                          - Yes
                            - Do CBs (exceptionally) override competition detriments?
                              - No
                                - Final preparation of report including exclusions from disclosure – publication on website (hard copy available)
                                  - CC implements remedies via orders and undertakings (where appropriate)
                                - Yes
                                  - Merger cleared
        - Yes
          - Merger cleared

- Potentially extensive consultation with WSRA

ANNEX B: Flowchart indicating a Competition Commission Mandatory Water Merger Inquiry

NoYes
NoYes
NoYes

Information gathering & analysis
- Third party hearings
  - Statement of issues
    - Issues hearings with main parties
  - Report drafting, verifying information, considering request for exclusions from disclosure
    - Group’s provisional decision on the effect of the merger on the comparative regime
      - Group’s consideration of possible remedies
        - Notifying and publishing provisional findings and possible remedies
          - Adverse finding decision
            - Parties’ responses on remedies
              - Consultation including possible hearings with main parties and third parties
                - Are there any offsetting customer benefits (CB)?
                  - No
                    - Consideration of remedies and customer benefits
                      - No
                        - Prohibit merger (or lesser remedy) having regard to circumstances
                          - Yes
                            - Do CBs (exceptionally) override competition detriments?
                              - No
                                - Final preparation of report including exclusions from disclosure – publication on website (hard copy available)
                                  - CC implements remedies via orders and undertakings (where appropriate)
                                - Yes
                                  - Merger cleared
        - Yes
          - Merger cleared

- Potentially extensive consultation with WSRA
ANNEX C: FLOWCHART INDICATING A TYPICAL MERGER RAISING PUBLIC INTEREST CONSIDERATIONS

Case continues without further action

Is the public interest consideration new (i.e. not specified in legislation and approved by parliament)?

Yes

Secretary of State lays an order specifying public interest consideration(s) in the legislation

No

Secretary of State serves intervention notice

OFT investigates competition aspects of the case and collates information on the public interest considerations

OFT reports to the Secretary of State on:
- whether the merger may qualify for investigation
- whether the merger may result in a SLC
- the representations made on the public interest considerations

Secretary of State has power to refer:
- on public interest consideration grounds (where OFT has concluded that there is no SLC); or
- on public interest consideration and competition grounds (where the OFT has concluded that there may be a SLC)

Reference on public interest consideration grounds only

Reference on public interest consideration and competition grounds

Secretary of State decides to refer

Secretary of State serves intervention notice

Secretary of State decides to refer

Secretary of State clears merger

Case reverts to OFT for decision on reference

Parliament considers the order (NB. any issue that is not approved within 24 weeks of the issuing of the intervention notice must be disregarded in a current case)

Secretary of State may consider whether a case raises public interest considerations up to the time when OFT takes a reference decision

Secretary of State decides to refer

Continue on next page

Continue on next page

Timetable:
Extension of OFT merger notice timetable following service of an intervention notice (by up to 20 days).
CC has maximum of 24 weeks to report to the Secretary of State (+ 8 weeks maximum for special reasons)
CC considers whether a merger will operate against the public interest (with regard only to the public interest consideration(s) mentioned in the reference and the possible SLC). If so, considers remedies.

CC reports its conclusions to the Secretary of State.

Secretary of State decides whether there is a public interest consideration that it relevant to the case.

If there is a relevant public interest consideration, Secretary of State decides whether merger may be expected to operate against the public interest (with regard only to the issue(s) mentioned in the reference).

If action is necessary, Secretary of State secures remedies by:
- seeking undertakings (through OFT)
- making a final order

Where the Secretary of State decides no public interest consideration is relevant, the case reverts to the CC.

Limits on progress of the case e.g. CC is prevented from reporting to the Secretary of State until all public interest issues mentioned in the reference are approved by parliament or until 24 weeks has passed since the merger notice was served.
CONTACT ADDRESSES

London
One Bunhill Row
London EC1Y 8YY
United Kingdom
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Paris
130 rue du Faubourg Saint-Honoré
75008 Paris
France
T +33 (0)1 44 05 60 00
F +33 (0)1 44 05 60 60

Brussels
Square de Meeûs 40
1000 Brussels
Belgium
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
47th Floor
Jardine House
One Connaught Place
Central
Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
2903/2905 China World Tower 2
No.1 Jianguomenwai Avenue
Beijing 100004
People’s Republic of China
T +86 10 5965 0600
F +86 10 5965 0650

www.slaughterandmay.com