

objective 4: controlling mergers

Mergers and acquisitions of business enterprises may affect the way markets work. We use our powers under the Enterprise Act 2002 to investigate completed and proposed mergers that meet certain turnover or market share thresholds. We refer such mergers to the Competition Commission where we believe that it is, or may be, the case that they have resulted, or may be expected to result, in a substantial lessening of competition.

Performance against our annual plan

<p>Objective</p> <p>We will keep markets open and competitive through merger control.</p>	
<p>Our commitment</p>	<p>Our performance</p>
<p>Make references to the Competition Commission or accept undertakings in lieu of all mergers which we believe may substantially lessen competition:</p> <ul style="list-style-type: none"> • we expect to consider between 180 and 230 public mergers. • of these we expect 30 to 50 to raise more complex issues and hence be considered by a case review meeting. • based on experience, we expect to refer to the Competition Commission or accept undertakings in lieu of reference for between 10 and 20 mergers. 	<ul style="list-style-type: none"> • Considered 172 public mergers. • 26 cases considered by a case review meeting. • Referred 12 cases to the Competition Commission. • Accepted undertakings in lieu in two cases.
<p>Seek sound reform of the European Community Merger Regime (ECMR).</p>	<ul style="list-style-type: none"> • Lobbied successfully for reforms of the ECMR.

During 2003-04, the OFT spent £1.81m on achieving this objective. This money was allocated as follows:

Staff costs:	£1.59m
Administration costs:	£0.22m

Enterprise Act

The framework for UK merger control changed significantly in June 2003 when Part 3 of the Enterprise Act 2002 came into force.

Under the Act, the majority of UK merger decisions are taken by the OFT and the Competition Commission as specialist, independent competition authorities. Ministers only become involved where there are defined public interest issues.

The OFT, rather than the Secretary of State for Trade and Industry, decides directly which mergers are referred to the Competition Commission in the vast majority of cases. This decision is based on whether we believe that it is, or may be, the case that a merger has resulted, or may be expected to result, in a substantial lessening of competition within a

UK market or markets. This competition test replaces the public interest test set out in the Fair Trading Act 1973.

Full guidance on our merger procedures and the substantive assessment of mergers was published in May 2003.

Case Review Meeting

Prior to the implementation of the Enterprise Act – and following informal consultation – a new mechanism, the Case Review Meeting, was set up to help evaluate merger cases raising complex competition issues. This replaced the OFT Mergers Panel.

Concerns had been expressed about the transparency and composition of the Panel, which was made up of officials from government departments as well as the OFT and sector regulators.

The Case Review Meeting will usually be attended only by OFT officials. Its purpose is to ensure that internal OFT views are rigorously and carefully tested before decisions are taken. Where the merger proposal involves a regulated industry, a sector regulator may also be represented.

Merger cases

The OFT examined a total of 267 mergers and merger proposals in 2003-04. Of these 56 were reviewed under the Fair Trading Act and 211 under the Enterprise Act.

Under the Enterprise Act, the OFT must investigate mergers where the UK turnover associated with the enterprise being acquired is over £70m (under the Fair Trading Act, this figure related to gross worldwide assets), or if the merger will create or enhance a 25 per cent share of supply of a particular product or service in the UK, or a substantial part of the UK.

If the OFT believes that it is or may be the case that a merger has resulted, or may be expected to result, in a substantial lessening of competition, we must refer it to the Competition Commission unless:

- we can fix the competition problem by agreeing binding undertakings with the merging parties in lieu of a reference;
- the merger is insufficiently advanced to warrant a reference;
- we believe the affected markets are not of significant importance to warrant a reference; and
- we believe that consumer benefits resulting from the merger outweigh its adverse effects.

In 2003-04 the following mergers were referred to the Competition Commission:

Date of Reference	Jurisdiction	Parties	Status	Conclusion
7 July 2003	FTA	Arla - Express Dairies	Report Published	Not against public interest
30 July 2003	FTA	J Sainsbury – Springwater	Laid aside	
14 August 2003	EA	WBB - Tarmac	Cancelled	
22 August 2003	EA	Stena - P&O	Report Published	Against public interest
25 September 2003	FTA	March - GUS	Report published	Not against public interest
31 October 2003	EA	Unum - Swiss Life	Cancelled	
3 December 2003	EA	AAH Pharmaceuticals - East Anglian Pharmaceuticals	Cancelled	
18 December 2003	EA	Drager - Air-Shields	CC inquiry in progress	
30 December 2003	EA	Carl Zeiss - Bio-Rad	CC inquiry in progress	
13 January 2004	EA	Firstgroup - Scotrail	CC inquiry in progress	
12 February 2004	EA	Conva Tec - Acordis	Cancelled	
3 March 2004	EA	National Milk Records - Cattle Information Services	Cancelled	

Undertakings in lieu of a reference to the Competition Commission were given in the following cases:

Date of Reference	Jurisdiction	Parties
2 September 2003	FTA	Astrium N.V./European Aeronautic Defence and Space Company N.V.
9 January 2004	EA	IVAX International GmbH /3M Company

iSOFT - Torex

An OFT decision not to refer a merger to the Competition Commission was the subject of a legal challenge, culminating in a Court of Appeal judgement.

The decision to clear the merger of two healthcare IT companies, iSOFT and Torex, was appealed to the Competition Appeal Tribunal (CAT) by a third company, IBA Health Ltd, in November 2003.

The CAT upheld the appeal and asked the OFT to reconsider its decision. It also ruled that in carrying out its duty to refer relevant mergers to the Competition Commission, the OFT must satisfy itself that there is no significant prospect of a substantial lessening of competition, and that there is no significant prospect that an alternative view may be reached by the Competition Commission.

In taking the case to the Court of Appeal, we argued that the CAT had wrongly interpreted the Enterprise Act test for merger references, and had erred in its understanding of the nature and scope of judicial review of OFT merger decisions.

In February 2004, the Court of Appeal upheld the CAT's finding on the proposed merger but disagreed with the CAT's view of the relevant test to be applied by the OFT. It confirmed that in carrying out its duty to refer relevant mergers to the Competition Commission the OFT needs a positive belief (not merely a suspicion) that is reasonably and objectively justified by the relevant facts that the merger may result in a substantial lessening of competition. Where the likelihood of a substantial lessening of competition is less than 50% but more than fanciful, the OFT has a wide discretion.

We welcomed the Court of Appeal's judgment as a sound basis for future merger assessments.



March - GUS

On our advice, the Secretary of State for Trade and Industry referred the completed acquisition by March UK Ltd, an associate of Littlewoods Ltd, of the home shopping and home delivery business of GUS plc to the Competition Commission.

Our initial investigation under the Fair Trading Act concluded that the acquisition raised a significant prospect of a substantial lessening of competition in mail order and the related activity of business-to-consumer parcel delivery, warranting further investigation by the Competition Commission.

March UK Ltd is controlled by Sir David and Sir Frederick Barclay, who also control the Littlewoods home shopping, home delivery and high-street retailing businesses.

The Competition Commission found that, compared with the alternative scenario of the former GUS businesses being wound down or ceasing to be effective competitors, the merger might be expected to benefit consumers and might not be expected to lead to a substantial lessening of competition. This conclusion was accepted by the Secretary of State and the merger was cleared.



Stena - P&O

We referred the proposed acquisition by the ferry company Stena AB of certain routes operated by P&O on the Irish Sea to the Competition Commission under the Enterprise Act.

We believed that if the transaction went ahead it might be expected to result in a substantial lessening of competition in the market for the supply of ferry services for freight from Great Britain to Ireland. Although ferry services on the Irish Sea were characterised by over-capacity, the merger would remove a leading supplier and significantly increase concentration of supply. A number of customers had also raised concerns that the merger would lead to increased prices.

The Competition Commission confirmed that the proposed transfer of P&O's Liverpool-Dublin route was expected to result in a substantial lessening of competition. This transfer would give Stena scope to increase prices to some customers of ferry services into the Irish Sea and should therefore be blocked. However, it decided that the transfer of the Fleetwood-Larne route would not be expected to result in a substantial lessening of competition and should be allowed to proceed.

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Carlton Communications - Granada

Carlton Communications and Granada were given the go-ahead to merge after the OFT negotiated a series of undertakings.

The proposed merger had been referred to the Competition Commission under the Fair Trading Act in March 2003 after we raised concerns about its potential impact on competition, particularly in the sale of TV advertising.

The Commission found that in two areas relating to the sale of advertising airtime the merger would be expected to operate against the public interest, but that these adverse effects could be remedied if:

- Carlton and Granada accepted a package of safeguards proposed by the ITC and gave an undertaking that the other ITV regional licensees should have the option to roll-over existing airtime sales contracts;
- ITV advertisers had the option to renew the terms of their 2003 contracts without change (but with an automatic adjustment should viewing figures fall).

Working closely with the ITC and Ofcom, we secured the agreement of the two companies to the remedies in November. The undertakings were accepted by the Secretary of State and the merger went ahead.



Safeway – Wm Morrison, Asda, Sainsbury and Tesco

Wm Morrison gave statutory undertakings to the Secretary of State to sell off a number of its stores following a Competition Commission investigation into the company's proposed takeover of Safeway.

The Competition Commission found that the acquisition of Safeway by Wm Morrison would operate against the public interest in certain local areas where the number of competing supermarkets would fall below a particular level. However, it recommended that the merger be allowed, subject to the divestment by Wm Morrison of one-stop grocery stores in 48 localities, together with five smaller grocery stores.

These undertakings were negotiated by the OFT and accepted by the Secretary of State in December 2003. Wm Morrison's takeover of Safeway went ahead in March 2004.

The Competition Commission concluded that an acquisition of Safeway by Asda, Sainsbury's or Tesco would operate against the public interest at both a national and local level. These proposed mergers were therefore blocked, and prohibition undertakings from each of the companies were negotiated by the OFT and accepted by the Secretary of State.

EC Merger Regulation

The European Community Merger Regulation (ECMR) gives the European Commission exclusive jurisdiction over mergers that exceed certain turnover thresholds. Over the year, proposals to reform the Regulation were discussed in Council Working Groups. The amended Regulation was formally adopted in January and comes into force on 1 May 2004.

Among the changes agreed are:

- a new substantive test to prohibit mergers that would 'significantly impede effective competition' (SIEC);
- simplification of referral mechanisms (Articles 9 and 22) and the introduction of a pre-notification case allocation system which allows the merging parties to request referral of a merger to the best-placed competition authority;
- strengthening of the Commission's information-seeking and enforcement powers; and
- 'stop the clock' provisions allowing more time and flexibility for the consideration of complex cases and remedies.

During the Council Working Group negotiations, we pressed for a change to the substantive test from a dominance-based test to one based on the concept of substantial lessening of competition. Our concern was that the current 'dominance' test might not be robust enough to deal with all mergers harmful to competition. The new Regulation makes clear that the SIEC test can capture all anti-competitive mergers.

The Regulation is accompanied by a package of reforms to address concerns about due process, including:

- European Commission guidelines on the assessment of mergers between competitors ('horizontal merger' guidelines) and on best practices;
- the appointment of a Chief Economist within the Competition Directorate-General at the European Commission; and
- the setting up of internal peer review panels to assess cases within the Competition Directorate-General at the European Commission.

EC casework

As the competent authority in the UK, we received details of all mergers notified under the ECMR. We examined significant cases and provided the UK's views to the European Commission. We also represented the UK at all hearings and Advisory Committee meetings at which the European Commission's draft decisions were considered by member states.

We made one request under Article 9 of the ECMR to refer to the UK competition authorities a merger previously notified to the European Commission. This request, which concerned the merger between Arla Foods and Express Dairies, was granted by the Commission. We subsequently referred the merger to the Competition Commission under the Fair Trading Act. The Commission eventually recommended that the merger be cleared, and this was accepted by the Secretary of State.