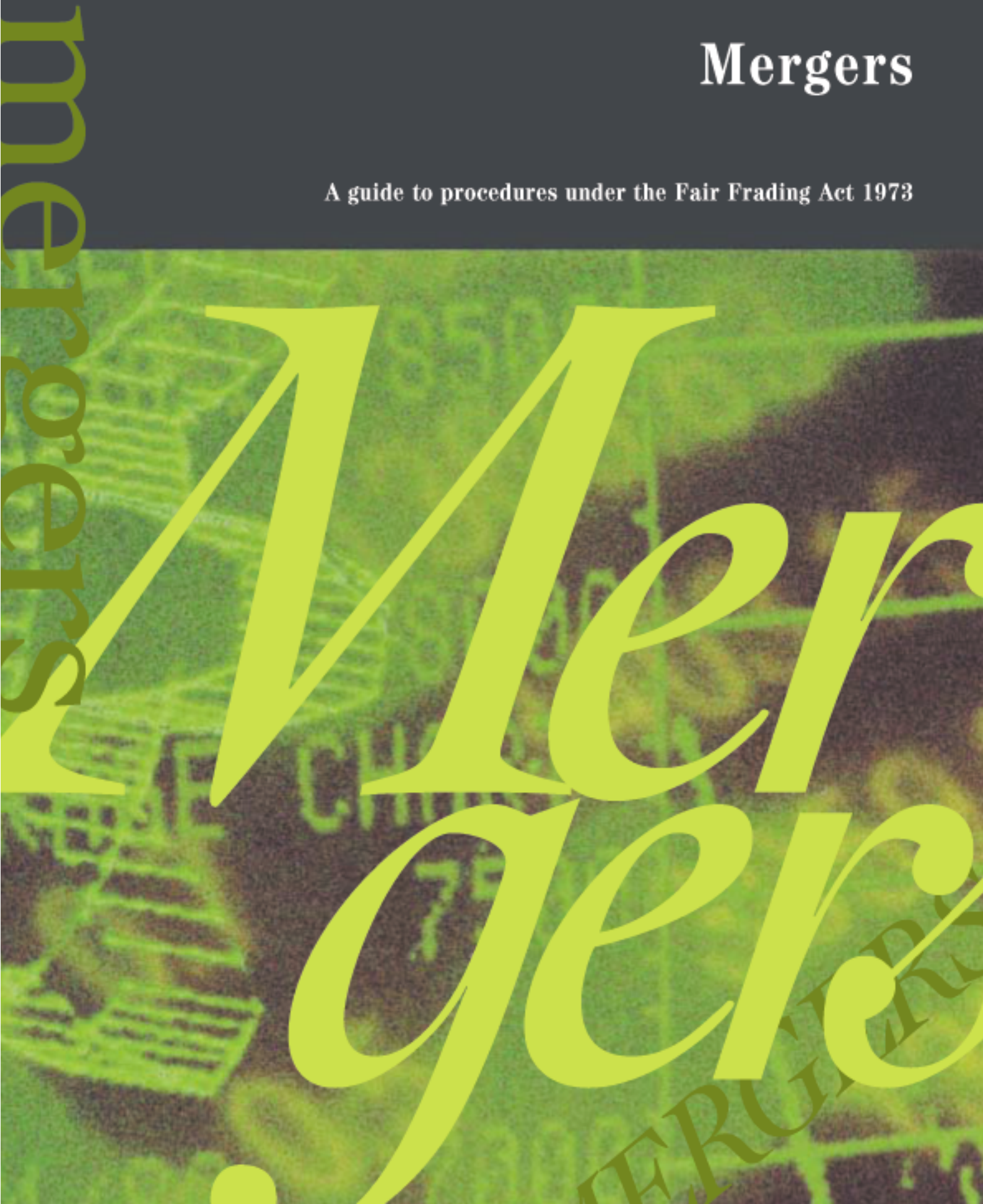


Mergers

A guide to procedures under the Fair Trading Act 1973



OFFICE OF FAIR TRADING

THE OFFICE OF FAIR TRADING is a Government department founded in 1973 and headed by the Director General of Fair Trading. Its main objective is to promote and safeguard the economic interests of consumers. The Office has statutory duties arising from over twenty pieces of legislation concerned with protecting consumers and encouraging competition. These duties include keeping the United Kingdom market for goods and services under review in order to identify and tackle trading practices of all kinds that may adversely affect consumers' interests. These may include anti-competitive practices in a whole sector of industry, or

practices on the part of individual traders which mislead or deceive consumers. Though the Office is small in size its scope is wide. Its activities can affect every area of business and play a leading role in ensuring fair treatment of consumers either by direct action, for example through consumer credit licensing, or indirectly, for instance by taking action against price-fixing.

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PREFACE

This booklet is designed to provide guidance to companies and their advisers on the law and procedures on the control of mergers. It is primarily concerned with those mergers in the United Kingdom that are covered by provisions of the Fair Trading Act 1973 (as amended), and the exclusions for mergers and ancillary restrictions from the Competition Act 1998. It also briefly looks at those mergers that fall to the European Commission under the European Community Merger Regulation, and the relationship between domestic and European merger control systems. It explains the roles and procedures of the Office of Fair Trading, the Department of Trade and Industry (DTI), and the Competition Commission. This new version expands upon and supersedes the previous edition, published in 1999, and includes the information previously contained in the separate booklet *Merger Submissions*.

Although it covers most of the points likely to be of immediate concern to companies and their advisers, this booklet makes no claim to be comprehensive and has no standing as a legal authority. It cannot, therefore, be seen as a substitute for the Fair Trading Act and the regulations and orders made under the Act, or the Competition Act 1998, or for the European Community Merger Regulation and other regulations and guidance issued by the European Commission, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the legislation should seek legal advice.

On 26 October 2000, the Secretary of State for Trade and Industry announced the outcome of the review of UK merger control by publishing, "Mergers: The response to the consultation on proposals for reform". Some of the proposed changes require amendment to legislation, where this was not required interim measures, including a new policy on reference decisions, were implemented with immediate effect. At the same time, DTI published a consultation paper setting out details of the plans to exempt small and medium-sized companies from payment of the £5,000 merger fee.

Where possible, this booklet reflects those interim measures and highlights where further changes might take place.

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1 INTRODUCTION

SCOPE OF THE BOOKLET

1.1 Under the terms of the Fair Trading Act 1973, the Director General of Fair Trading has a duty to keep himself informed about merger situations within the United Kingdom and to recommend to the Secretary of State for Trade and Industry any action which he thinks it is expedient that the Secretary of State should take. Those mergers, policies and procedures that are covered by the Act form the main subject matter of this booklet. Chapter 2 sets out the statutory criteria that determine whether a merger qualifies for investigation. Chapters 3 to 6 outline the framework and procedures within which mergers are considered by the Director General and the Secretary of State and, in particular, how their impact on competition is assessed. Chapter 6 also deals with the exclusion from the prohibitions in the Competition Act 1998 for merger situations and ancillary restrictions. Chapters 7 and 8 examine the way in which the Director General advises the Secretary of State, and Chapter 10 considers special provisions applying to certain categories of merger. Some very large mergers have a 'Community dimension', and Chapter 9 briefly describes the application of the European Community Merger Regulation and what functions the OFT and the Department of Trade and Industry (DTI) perform under this law. The procedures for pre-notified mergers are described in Appendix A while the procedures for considering restrictions ancillary to a merger are described at Appendix B.

WHO DOES WHAT?

1.2 The Act assigns distinct roles to the Director General, the Secretary of State and the Competition Commission. How these roles inter-relate is summarised in the following paragraphs.

1.3 The Director General (appointed by, but independent of, the Secretary of State) heads the OFT – a non-ministerial government department. Under the Act, he has a duty to monitor business transactions which may result (or may already have resulted) in the merger of two or more separate enterprises. He advises the Secretary of State whether such mergers should be referred to the Competition Commission for further investigation and subsequently, if there has been a reference, on what action to take after the Competition Commission has reported. If asked to do so, the Director General will also advise whether restrictions in an agreement are ancillary to a merger and hence excluded from the prohibitions in the Competition Act 1998. In cases where a merger is being contemplated, the Director General can – after consulting the Secretary of State – provide




confidential guidance to the parties involved. In proposed or completed mergers, the Director General can, where so requested by the Secretary of State, negotiate undertakings in lieu of a reference to the Competition Commission. He is assisted by administrative, legal, economics and accountancy staff within the OFT. The activities of the OFT in relation to mergers are co-ordinated by the Mergers Branch.

1.4 The Secretary of State heads the DTI and has overall responsibility for merger control and the policy framework within which it operates. After considering the advice offered by the Director General, the Secretary of State decides whether to make a reference to the Competition Commission and what action to take following an adverse report by it. The Secretary of State announced, in October 2000, that it would be his policy to accept the advice of the Director General on whether or not to refer mergers to the Competition Commission, save in exceptional circumstances. These exceptional circumstances might include, for example: where a merger raised national security issues; where there had been a material change after the Director General had given his advice; or where the Director General's advice conflicted with the views of the sectoral regulator.

1.5 The Competition Commission is an independent body consisting of members appointed by the Secretary of State and drawn from industry, commerce and academic life. The Chairman of the Competition Commission is a full-time appointment, whereas the other members perform their functions on a part-time basis. The Competition Commission investigates mergers referred to it to determine whether there is a merger situation that qualifies for investigation and, if so, whether that merger operates, or may be expected to operate, against the public interest. Subsequently, it reports its conclusions to the Secretary of State. The Competition Commission has no authority to investigate any merger unless it has been asked to do so by the Secretary of State following advice from the Director General.

KEEPING THE OFT IN THE PICTURE

1.6 Both proposed and completed mergers are covered by the legislation. Most cases considered by the Director General's staff at the OFT are still at the proposal stage. Generally, it is in a company's own interests to inform the OFT about a projected merger in advance, so that any decision about reference to the



Competition Commission can be taken before the agreement has been finally concluded. There is always a risk that, if a reference is made after completion, the merged businesses might have to be separated again should the Competition Commission find the merger's operation to be against the public interest.

ROLE OF THE EUROPEAN COMMISSION

1.7 Under the European Community Merger Regulation, the European Commission has jurisdiction over those large mergers that have a 'Community dimension' (calculated by reference to the turnover of the merging companies). These mergers have to be notified to the European Commission. National law does not normally apply to them although there are exceptions to this (see paragraph 9.7). However, the OFT is involved in the European Commission's decision-making processes and companies may find it helpful to keep the OFT informed of an intention to notify and of any problems which they encounter (see Chapter 9). Information on certain mergers which effect the essential interests of the UK's security may not be disclosed to the European Commission; in other cases the UK may seek reference back to it of a merger which otherwise falls to the European Commission to consider, or may take measures to protect legitimate interests in mergers which are otherwise being examined by the European Commission. In any of these situations a merger may then fall to be considered under the merger provisions of the Fair Trading Act 1973.

FURTHER INFORMATION

1.8 Further information can be obtained from:

The Mergers Branch,
Office of Fair Trading,
Fleetbank House,
2-6 Salisbury Square,
London EC4Y 8JX.

Tel: 020 7211 8915/8917/8918, Fax: 020 7211 8916

and from the OFT's website (www.offt.gov.uk)

what is

2 WHAT IS A MERGER?

2.1 The Fair Trading Act definition of 'a merger situation' is very wide and covers several different kinds of transactions and arrangements. A company that buys or proposes to buy a majority shareholding or a significant minority shareholding in another company provides the most obvious example, but the transfer or pooling of assets or the creation of a joint venture may also give rise to a merger situation. The Act's provisions apply both to mergers that have already taken place and to those that are proposed or in contemplation. Merger situations (whether a qualifying merger or not) are excluded from the scope of the prohibitions in the Competition Act 1998 which apply to anti-competitive agreements (the Chapter I prohibition) and the abuse of a dominant position (the Chapter II prohibition). In some circumstances this exclusion can be withdrawn to allow the merger to be considered under the Chapter I prohibition.

THE BASIC CRITERIA

2.2 To qualify for investigation (generally known as 'a qualifying merger') a merger situation must meet four criteria. In making a reference to the Competition Commission, however, the Secretary of State need only take the view that a qualifying merger may exist. It is for the Competition Commission to determine, in the course of its investigation, whether the case referred does satisfy the criteria. These are as follows:

- a two or more enterprises (that is, business activities of any kind) must cease to be distinct or there must be arrangements in progress or in contemplation which will lead to enterprises ceasing to be distinct;
- b at least one of the enterprises must be carried on in the United Kingdom or under the control of a body corporate incorporated in the UK (which means that a merger between two foreign companies may still qualify for investigation if either of them controls any enterprise which is carried on in the UK or by a UK company);
- c either the merger must not yet have taken place or have taken place not more than four months before the reference is made, unless it took place without public announcement and without the Secretary of State or the Director General being told about it (in which case the four-month period starts from the announcement or the time the Secretary of State or the Director General is told); and

merger

d either:

- i) the enterprises which cease to be distinct supply or acquire goods or services of a similar kind and, as a result of the merger, together supply or acquire at least 25% of all those goods or services supplied in the United Kingdom or a substantial part of it. This means that the merger must result in an increment to the share of supply or consumption and the resulting share must be more than 25% (here referred to as 'the share of supply test' and not to be confused with the evaluation of 'market share' used in the economic assessment discussed in Chapter 6, although the term 'market share test' has been commonly used in describing the law); or
- ii) the gross value of the world-wide assets being acquired must be more than £70 million (known as 'the assets test').

ENTERPRISES CEASING TO BE DISTINCT

2.3 There are two ways in which enterprises can 'cease to be distinct':

- a they are brought under common ownership or control; or
- b there is an arrangement or transaction between the persons carrying on the enterprises so that one of them will cease to be carried on in order to prevent competition between them – for example, Company A may agree with Company B that B will close down operations which compete with those of A.

Throughout this booklet the term 'person' is used in the sense it has in the Fair Trading Act, in which it can cover a partnership or a company as well an individual.

CONTROL

2.4 'Control' is not limited to the acquisition of outright voting control but includes situations falling short of outright control. The Act distinguishes three levels of control:

- a Company A may acquire the ability materially to influence the policy of Company B;
- b Company A may acquire the ability to control the policy of Company B (known as '*de facto* control'); and



c Company A may acquire a controlling interest in Company B (known as '*de jure*', or 'legal control').

2.5 It is not only the size of a shareholding that determines whether the holder can materially influence the policy of the company concerned. Plainly, the distribution of the remaining shares is a key factor. Among other things that need to be taken into account are whether the holder has board representation or whether any agreements with the company enable the holder to influence policy. Special provisions in the constitution of the company – such as restrictions on voting rights – may also be relevant.


2.6 Nevertheless, a shareholding of 25% or more generally enables the holder to block special resolutions; consequently, this proportion is likely to be seen as automatically conferring the ability materially to influence policy - even when all the remaining shares are held by only one person. But the OFT may examine any case where there is a shareholding of 15% or more in order to see whether the holder might be able materially to influence the company's policy, while, very occasionally, a holding of less than 15% could also attract scrutiny. Equally, there are no precise criteria for determining when a shareholding gives the holder *de facto* control of a company's policy; a view has to be taken case by case in the light of the particular circumstances.

2.7 A 'controlling interest' generally means a shareholding carrying more than 50% of the voting rights in a company. Only one shareholder can have a controlling interest but it is not uncommon for a company to be subject to the control (in the wider sense) of two or more major shareholders at the same time – in a joint venture, for instance. Thus, as explained in the preceding paragraph, a significant minority shareholder may be seen as being able materially to influence a company's policy even though someone else owns a controlling interest.

ACQUIRING CONTROL BY STAGES

2.8 Should a shareholding that confers the ability materially to influence a company's policy increase to a level which gives control of policy or a controlling interest, that further acquisition will produce another merger situation potentially liable to reference to the Competition Commission. The same applies to a move from control of policy to a controlling interest.

2.9 In principle, therefore, if Company A acquires Company B in stages, this could give rise to three separate qualifying mergers: first, as Company A moves to



material influence; then to control of policy; and, finally, to a controlling interest. But further acquisitions of a company's shares by a person who already owns a controlling interest do not give rise to a new merger situation.

2.10 For the purposes of a merger reference, where a person acquires control of an enterprise (in any of the three senses described in paragraph 2.4) during a series of transactions within a single two-year period, the Act allows them to be considered as having occurred simultaneously on the date of the last transaction.

THE SHARE OF SUPPLY TEST

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

- a together either supply or acquire goods or services of a particular description;
and
- b will – after the merger takes place – supply or acquire 25% or more of those goods or services, in the United Kingdom as a whole or in a substantial part of it.

2.12 Where an enterprise already supplies or acquires 25% of particular goods or services, the test is satisfied so long as its share is increased as a result of the merger. And it does not matter how small an increase may be achieved, provided that the combined share exceeds 25%.

2.13 The Act allows the Secretary of State wide discretion in describing the relevant goods or services, requiring only that – in relation to that description – the parties' share of supply or acquisition is 25% or more. In assessing the economic effects of a merger, however, the OFT (and subsequently, if a reference is made, the Competition Commission) must determine whether the goods or services described in the share of supply test constitute a meaningful market (see paragraphs 6.8-6.10).

2.14 The share of supply test may be applied to the United Kingdom as a whole or to a substantial part of it. There is no statutory definition of 'a substantial part'. The House of Lords has ruled that while there can be no fixed definition, an area must be of such size, character and importance as to make it worth consideration for the purposes of merger control.¹ Factors which have been taken into account in past cases include the size of the specified area, its population, its social, political, economic, financial and geographic significance, and whether it has any particular characteristics that might render it special or significant.

¹ See *Regina v Monopolies and Mergers Commission and another ex parte South Yorkshire Transport Limited* – [1993] 1 WLR 23.



THE ASSETS TEST

2.15 The 'assets test' is satisfied where the gross value of the world-wide assets being taken over exceeds £70 million. The test applies to the value of the total assets of the acquired enterprises. Where none of the enterprises remains under the same ownership and control – in a partnership merger, for example – the value of assets 'being taken over' is interpreted as the value of the assets of all the enterprises which cease to be distinct, *except* the enterprise with the highest-value assets.

2.16 To calculate a company's asset value, the tangible and intangible fixed assets, investments and current assets are added together and any provisions for depreciation, renewals or diminution in value are deducted. Other liabilities are not deducted.

2.17 The test is applied to the book value of the assets at the time of the merger or, if it has not yet taken place, at the time of reference to the Competition Commission. The figures in the latest published accounts are normally sufficient, unless there have been significant changes since the accounts were prepared.

EXCLUSION FOR MERGERS AND ANCILLARY RESTRICTIONS FROM THE PROHIBITIONS OF THE COMPETITION ACT 1998

2.18 Agreements and conduct that give rise to mergers, as well as any restrictions that are directly related and necessary to the implementation of the merger ("ancillary restrictions"), are generally excluded from the prohibitions in the Competition Act 1998. This is the case whether the merger qualifies for consideration under the Fair Trading Act or not. Thus, the Director General may, in such cases, need to take a view as to whether a merger situation arises even though it may not qualify for consideration under the merger provisions of the Fair Trading Act. The aim of the exclusion is to prevent agreements or conduct from being subject to control under both the Competition Act and the merger provisions of the Fair Trading Act and to prevent agreements giving rise to mergers from being subject to control under the Competition Act when it was not thought necessary to control them under the merger provisions of the Fair Trading Act. However, to ensure that the exclusion does not allow significantly anti-competitive transactions to escape scrutiny altogether, it can be withdrawn in certain limited circumstances – these issues are set out in more detail in the OFT publication *Exclusion for Mergers and Ancillary Restrictions* (OFT 416).

3.1 The Act requires the Competition Commission to take into account ‘all matters which appear to them in the particular circumstances to be relevant’ in determining whether a merger operates or may be expected to operate against the public interest. In particular, section 84 stresses the desirability of the following five points:

- a maintaining and promoting effective competition;
- b promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom with regard to the prices, quality and variety of the goods and services supplied;
- c promoting through competition the reduction of costs and the development and use of new techniques and new products, and facilitating the entry of new competitors into existing markets;
- d maintaining and promoting the balanced distribution of industry and employment in the United Kingdom;
- e maintaining and promoting competitive activity in overseas markets on the part of United Kingdom producers and suppliers.

3.2 Because of the weight attached to them, the Director General and the Secretary of State also take particular account of these factors when considering whether a reference should be made to the Competition Commission.

3.3 Most mergers raise no public interest issues. The merger control process is designed to identify those where such issues *might* arise, so that they may be examined thoroughly and objectively following reference to the Competition Commission. A merger which reduces competition is the most common example of a merger which may not be in the public interest.

3.4 Ever since the monitoring process was first introduced in 1965, a primary concern of the reference policy of successive governments has been the control of mergers that would have adverse effects on competition in the United Kingdom. It is widely accepted that competitive markets provide the best means of improving economic efficiency and encouraging wealth creation. This is because competition:

- a promotes the efficient allocation of limited resources between competing uses in the sense that it allows consumers to express their preferences for alternative goods and services through the prices they are willing to pay;



- b puts pressure on firms to perform as efficiently as possible;
- c provides a mechanism for flexible adjustment to changes in the economy whether in consumer preferences or technological possibilities; and
- d protects consumers from exploitation by producers.

Any merger which seems likely to reduce competition in a way or to a degree that would give the merged business lasting market power is therefore a prime candidate for reference.

3.5 Nevertheless, in some cases, a merger which appears to threaten competition might also offer the prospect of greater efficiency through economies achieved by larger-scale production, or improvements in manning levels or other practices. Here again however, in order that the effect on the public interest may be assessed, a reference is likely so that the Competition Commission has an opportunity to evaluate the balance between the reduction in competition and the probable efficiency gains.

3.6 Adverse effects on competition are not the only grounds on which a reference may be made. The Government has indicated that, in exceptional cases, a reference might be based on other public interest issues. This approach was made explicit in July 1984, when the then Secretary of State announced that references would be made primarily, but not exclusively, on competition grounds. From time to time, successive Secretaries of State have confirmed that policy.

3.7 In October 2000, the Secretary of State announced that it would be his policy to accept the advice of the Director General on reference, save in exceptional circumstances. Such exceptional circumstances were not expected to arise often: examples might include mergers; raising national security issues; where there had been a material change in circumstances since the Director General advised; or where the advice conflicted with the views of a sectoral regulator.

4 EVALUATING A MERGER

4.1 The main aim of the OFT's evaluation of a merger is to establish its potential effect on competition. Other possible public interest issues are also considered where they may be relevant. However, while drawing attention to these issues in the advice he gives to the Secretary of State, the Director General may choose not to advise whether these non-competition issues themselves constitute grounds for reference to the Competition Commission. Currently stated government policy is taken into account as well as the formal provisions of the Fair Trading Act (see Chapter 3, 'Reference policy').

4.2 Some industries are subject to special regulatory control. While any merger that affects an undertaking in this category is evaluated in the normal way, the OFT additionally takes account of any regulatory provisions that might be relevant, and the views of the relevant regulator (see Chapter 10, 'Special provisions').

THE COMPETITION ASSESSMENT

4.3 In assessing the implications for competition of different mergers, the OFT does not adopt a rigid or mechanistic approach. No two cases are identical and weight is given to various factors according to the circumstances. Nevertheless every assessment always follows a similar basic pattern.

4.4 First, the markets in which the parties to the merger are engaged have to be identified. Plainly, it is where markets directly overlap – in a 'horizontal merger' – that there is the most obvious possibility that there will be a reduction in competition. But competition issues may also arise where the merger involves markets that are 'vertically linked' (affecting different stages of the production or supply of the same goods or services). Where there is no overlap or connection between the markets of the parties to the merger, there is little likelihood that the merger will adversely affect competition in those markets.

4.5 Secondly, the structure of the markets affected by the merger must be analysed so that the likely effects of the merger on the nature and degree of competition in those markets that are relevant can be assessed. Here, the extent and impact of any barriers to market entry, including those provided by imports, are a crucial consideration, while such factors as the buying power of customers may be relevant. The size and growth rates of the markets involved – on the prospects for new entry, for example – might also have a bearing on the assessment.



4.6 The judgment that has to be made is whether the merger would give rise to a degree of market power that would allow the merged company to raise prices or reduce quality to the detriment of its customers or to operate in some other way that could be against the public interest. In making its evaluation, therefore, the OFT will require information that relates to the topics discussed in the following sections.

MARKET DEFINITION

4.7 The matters which will be taken into account by the OFT in assessing the case for reference to the Competition Commission are set out more fully in chapter 5 below. Briefly however, the OFT will consider

- a the product market and the extent to which one product is substitutable for another
- b the geographical market; which may be wider or narrower than the United Kingdom
- c the market structure, including the size of the increment to market share and the number and scale of the competitors
- d entry barriers; not only the cost of entry or expansion but control of necessary inputs such as know how, technology and reputation
- e buyer power; and
- f vertical links

Although the OFT likes to see information about benefits, such as efficiency gains, which might offset detriments to competition, it will often conclude that the trade off between efficiency claims and potential detriments to competition are best considered by the Competition Commission in a more detailed investigation.



5 PROCEDURES

NOTIFYING MERGERS TO THE OFT

5.1 Although the Director General has a duty to keep himself informed of transactions which may result in merger situations, there is no general requirement to notify mergers to the United Kingdom competition authorities except in the case of newspaper mergers which must have the prior consent of the Secretary of State (see paragraphs 10.2-10.5).

5.2 In order that the Director General can fulfil his statutory duty, the OFT obtains information about such transactions from a variety of sources including the media and third parties. In most cases however, information is supplied voluntarily by the parties to a merger. Telling the OFT about an anticipated merger in advance can avoid the risk that the completed transaction may be ordered to be undone following a reference to, and an adverse finding by, the Competition Commission. The OFT welcomes the opportunity to discuss the issues informally with those involved.

SUBMISSIONS ABOUT MERGERS IN THE PUBLIC DOMAIN

5.3 In order for the OFT to be able to assess a projected merger quickly, any submission it receives must be clear and complete, setting out the terms of the transaction and outlining any competition or other public interest implications that may be foreseen. On receipt of such a submission, the OFT nominates a specific administrative case officer to take primary responsibility for dealing with the case, and an economist, and the name of the administrative case officer is passed to the individual who made the submission. In subsequent exchanges, the merging parties and their representatives should regard that officer as their point of contact within the OFT. The work of individual case officers is co-ordinated and overseen by the Director of the OFT's Mergers Branch who would normally seek a meeting with the parties if there appeared to be significant competition or other public interest issues at stake.

5.4 Whether it is proposed or completed, every potential qualifying merger is evaluated by the OFT when it becomes public knowledge. The parties involved will be required to make a written submission setting out the necessary information. They can make use of a standard Merger Notice form under the voluntary pre-notification procedure, which lays down a statutory timetable that guarantees a decision on reference to the Competition Commission within 35 working days. Alternatively, they can make an informal written submission or use



the common notification form – published by the competition authorities in the UK, France and Germany for mergers falling to be examined in two or more of these countries – which generally ensures a decision within 45 working days (see paragraphs 5.21-5.23).

VOLUNTARY PRE-NOTIFICATION

¹ This procedure was introduced under the Companies Act 1989 and amended by the Fair Trading Act (Amendment) (Mergers Pre-notification) Regulations 1994 (SI 1994/1934).

5.5 The voluntary pre-notification procedure¹ makes provision for a proposed merger to be considered within 20 working days, with a maximum extension of 15 working days. Subject to some exceptions, the merger would be automatically cleared where no reference had been made by the end of that period. A fee is payable in advance (see paragraph 5.29). Under this procedure, a company must use the prescribed Merger Notice form to set out the basic information that the OFT will require about the transaction, with details of the markets involved. The completed form may be submitted by post or by hand (but *not* by fax) together with the appropriate fee made payable to the Office of Fair Trading. The form itself has been designed to provide the Director General with sufficient information to allow him to decide, at an early stage, that there are no grounds to recommend a reference.

5.6 This procedure can be used only to provide formal notification of a proposed merger which has already been made public. It does not apply to completed mergers, or to proposed mergers which have not yet been publicised. The procedures are described in Appendix A.

INFORMAL SUBMISSIONS/Common Notification Form

5.7 Over the years, companies and their advisers have generally preferred to advise the OFT of a proposed UK merger by means of an informal submission (which, so far as the OFT is concerned, is as equally acceptable as formal pre-notification). While there is no prescribed form for such submissions, chapter 6 of this booklet gives guidance on the kind of information the OFT requires. The competition authorities in the UK, France and Germany have, in addition, published a common form of notification for mergers which fall to be examined in two or more of these countries. Copies of the form and guidance notes are available from the OFT (see page 52). Once this information has been supplied, companies can generally expect a decision within 45 working days. With an informal submission a fee is not payable unless and until the Secretary of State makes a merger reference or announces a decision not to make a reference.



COMPETING BIDS

5.8 Where there are competing bids for the same company, the OFT tries to consider them simultaneously but that may not be possible when the bids have not been made at the same time or where they raise different issues. Although the Secretary of State may have power to refer both bids to the Competition Commission, it does not follow that, because one is referred, the other will be also. As in the case of a single bidder, each case must be considered individually on its own merits.

REPRESENTATIONS FROM THIRD PARTIES

5.9 For public cases, the OFT will invite comments on the (prospective) merger situation from interested third parties by means of an Invitation to Comment notice published through the Regulatory News Service and through its website at www.ofc.gov.uk. The OFT may also wish to target consultations more specifically and so may request details of your customers, suppliers and/or competitors. Customers' views may be of value in assessing the degree of substitutability between different products or services and therefore in defining the relevant market. In addition, the OFT seeks to estimate the degree of buyer power exercised by major customers, which may act as a restraint on any market power resulting from the merger. Competitors, as well as customers, may be asked for their opinions on such matters as the degree of substitutability between their products and those of the merged company, and whether they believe that the merged company might behave anti-competitively. When there are adverse views, the parties proposing the merger are normally told of the nature of the concerns expressed (but not the identity of the persons involved) and they are given the opportunity to comment.

CONFIDENTIAL GUIDANCE

5.10 Before a proposed merger becomes public knowledge, the companies concerned can seek, through the OFT, confidential guidance from the Secretary of State on whether it would be likely to be referred to the Competition Commission. This process can also provide some indication of whether undertakings in lieu of a reference might be acceptable (see Chapter 7). If they want to follow this path, the company or companies involved are expected to prepare a submission in much the same way as they would were the merger already public. Indeed, submissions originally prepared for confidential guidance often form the basis of subsequent 'public' submissions.



5.11 The OFT evaluates any request for confidential guidance as it does for public cases. Similarly, the Director General makes a recommendation to the Secretary of State on the basis of the OFT's evaluation. It is, however, never possible to give a binding guarantee that the proposed merger would not be the subject of a reference. No final decision can be made until the merger has been announced and other interested parties have the opportunity to express their reactions or come forward with new information. At that stage, the Director General and the Secretary of State are always free to take a different view in the light of any additional facts or comments that are presented.


5.12 Because of the limited information available while the matter remains confidential, it is sometimes impossible to reach a conclusion on the likelihood of a reference – particularly in circumstances where the target company is unaware of the bidder's approach and the OFT does not have full information on the target's activities. If it is not possible to form a view, the Director General advises the Secretary of State that no guidance can be given.

5.13 In every case, the OFT informs the person seeking confidential guidance what decision the Secretary of State has reached on the basis of the information that has been made available. That decision falls into one of four categories:

- a the merger appears unlikely to raise any competition issues that would warrant reference to the Competition Commission at the public stage;
- b it is impossible to say whether or not the merger would raise competition concerns that would warrant reference at the public stage;
- c the merger appears to raise competition concerns that would warrant reference at the public stage but such concerns might be remedied by undertakings; or
- d the merger appears to raise competition concerns that would warrant reference at the public stage.

On occasion, the Secretary of State might also want to identify wider public interest issues which could be relevant to the analysis of the case.

5.14 The Director General, the Secretary of State, and OFT and DTI staff all fully respect the confidential nature of this procedure, and no public announcement is ever made about the outcome. **The OFT requires any company seeking such guidance not to reveal that fact (or the advice given) to any other party even after the merger proposal becomes public. Both the OFT and DTI**



would be concerned by any breach of trust in this respect – either by the companies or by their advisers – and they might take the view that they could not offer those responsible any such guidance in future. This still applies if only one party to a transaction seeks guidance. The OFT will, however, normally be willing, on request, to inform the other party of the terms of the guidance given.

INFORMAL ADVICE

5.15 In order to assist the planning and consideration by companies and their advisers of possible mergers, the Mergers Branch is prepared to give advice on a more informal basis on the likely competition issues arising out of a prospective merger situation which has not yet been made public. This informal advice – which is usually given orally at a single meeting – is merely the Branch's view of the prospective merger situation and does not take account of the views of third parties or other government departments. In requesting informal advice, the party or parties will need to provide brief information about the prospective transaction, the market or markets involved, and the potential effects of the merger. Although the information should be brief, the quality and accuracy of the Branch's advice will, to a large extent, reflect the quality of the information provided. **As with confidential guidance, the Branch would not expect recipients of informal advice to disclose to any other party the fact that it had been requested or given.**

MERGERS PANEL

5.16 When the OFT assessment concludes that a merger may raise significant competition or other public interest issues, a meeting of the Mergers Panel is usually called. This Panel (which should not be confused with the City Panel on Takeovers and Mergers mentioned in paragraph 5.33) is formed of a group of officials from the OFT and other government departments and regulators, and attendance will vary depending on the case under consideration. The Mergers Panel is generally chaired by the OFT's Director of Competition Policy. Its role is to assist the Director General in framing his advice. It does not seek to reach consensus on the case for reference but is an opportunity for all interested departments and regulators to explore the issues and make known their views. Following the Panel meeting, the Director General is informed of the discussion and will then decide on the terms of a formal submission to the Secretary of State to recommend whether or not the merger should be referred to the Competition Commission, or whether undertakings in lieu of a reference should be sought.




5.17 For a merger which, in the OFT's view, does not raise significant public interest issues (as in roughly 80% of cases in any one year), the Mergers Branch, acting on behalf of the Director General, circulates a paper to Panel members to recommend that the merger should not be referred or – where the request has been made under the confidential guidance procedure – to indicate that it is unlikely to merit reference. Those members who disagree with the recommendation or who think that the case raises issues that should be discussed by the Panel can request that a meeting be held.

THE SECRETARY OF STATE'S DECISION

5.18 In any public merger situation, the Secretary of State's decision to refer or clear the merger, or to accept undertakings, is announced by means of a DTI press notice. The parties to the merger are informed by the OFT as soon as possible after publication (and they are normally given five minutes warning that an announcement is imminent). The Stock Exchange is also promptly notified, and the announcement is relayed on the Exchange's Regulatory News Service. This is to ensure that, where it involves listed companies, the decision is brought to the notice of all interested buyers and sellers of shares at the same time. Where confidential guidance has been sought, the Secretary of State's decision is passed directly to the parties concerned by the OFT. In this case, the terms of the decision must remain confidential to those seeking guidance (see paragraph 5.14).

5.19 When the Secretary of State decides to make a reference, the public announcement briefly explains the reasons for that decision although there is no obligation to do so. While there is no statutory requirement to publish a decision not to refer a merger to the Competition Commission, it is normal practice to make such an announcement in order to remove any doubts. For both reference and non-reference decisions, the Secretary of State says whether the decision is in accordance with the Director General's advice. In October 2000, the Secretary of State announced that it would be his policy to accept the Director General's advice, save in exceptional circumstances (see paragraph 3.7).

5.20 In significant merger cases, currently those public mergers which have been considered by the Mergers Panel, shortly after the Secretary of State announces his decision, the Director General will publish his advice. This advice will appear on the OFT's website (www.of.gov.uk) and publication will be announced on the Regulatory News Service. It is hoped that this practice might be expanded to include a wider range of cases as resources permit. Publication of his advice



should bring the Director General more into line with the European Commission (which publishes its decisions on mergers falling within the ECMR); bring greater openness to the UK's merger process; and, hopefully, benefit companies by increasing the amount and quality of the precedents available to them. In publishing his advice, the Director General will, of course, continue to respect the confidentiality of the information provided to him by the parties to a merger and third parties. It is also intended that the Director General should publish, on the OFT's website, his advice to the Secretary of State on adverse Competition Commission merger reports and his advice on proposals for undertakings in lieu of reference (see paragraph 7.10).

STATUTORY AND ADMINISTRATIVE TIMETABLES

5.21 There is a statutory limit to the period during which the Secretary of State can refer a completed merger to the Competition Commission for investigation. The general rule is that such a merger cannot be referred if it has taken place at least four months previously. In cases where material facts have not been disclosed to the Director General or the Secretary of State or otherwise made public however, the merger remains vulnerable to reference for four months from the date on which such facts are so disclosed or made public.

5.22 In the case of the voluntary pre-notification procedure (see paragraphs 5.5 and 5.6), the legislation allows a maximum of 35 working days for the OFT to consider a merger and the Secretary of State to make a decision.

5.23 While no other statutory time limits are laid down, the OFT and the DTI have adopted administrative timetables. These should ensure that, in most cases, a decision on reference to the Competition Commission of a public merger will be made within 45 working days of the receipt by the OFT of a satisfactorily complete submission (that is, providing sufficient information to enable it to begin its evaluation).

CONFIDENTIALITY

5.24 It is strict OFT policy to observe confidentiality in all aspects of its operation. Under section 133 of the Act, information relating to a business may not be disclosed without the consent of the person carrying on that business. There are, however, certain exceptions, for example, if such disclosure is for the purpose of facilitating the performance of the Director General's statutory functions, or in pursuance of a European Community obligation.



5.25 Other government departments and regulators with an interest in the case may be given information in confidence so that the Director General can take account of their views about a possible reference to the Competition Commission. When there is a reference, the OFT normally makes available to the Competition Commission all the information it has received (except where that information is confidential under other legislation, for example in European Commission cases). This applies to material supplied both by the parties to the merger themselves and by third parties.

5.26 The OFT also attaches great importance to companies and their advisers respecting the confidentiality of guidance and informal advice (see paragraph 5.14 and 5.15).


FALSE OR MISLEADING INFORMATION

5.27 There are penalties for supplying false or misleading information to the competition authorities. Section 93B of the Fair Trading Act (inserted by the Companies Act 1989) makes it an offence knowingly or recklessly to supply false or misleading information to the Director General, the Secretary of State or the Competition Commission in connection with their functions under that Act. It is also an offence to give false or misleading information to any third party knowing that they will then supply it to the Director General, the Secretary of State or the Competition Commission. The penalties for breaching this provision are a fine, or a maximum of two years imprisonment, or both.

FEES

5.28 Subject to some limited exceptions, any merger which qualifies for reference to the Competition Commission is subject to a fee. The main exceptions is where the interest acquired or being acquired is less than a controlling interest (see paragraph 2.4) and a Merger Notice has not been submitted in relation to the acquisition.

5.29 For a pre-notified merger using a Merger Notice, payment must be sent with the completed Notice. The period for considering the Notice does not begin until the first working day after the correct fee has been received. A refund may be made if a merger is found not to qualify for investigation. When a merger is found to fall within the scope of the European Community Merger Regulation, a refund must be made. The merger fee cannot, however, be refunded if the merger notice is simply withdrawn.



5.30 For other mergers (including proposed mergers) which involve the acquisition of a controlling interest, the fee is payable by the person or group of persons acquiring such an interest and becomes payable either on the making of a reference or when the Secretary of State announces a decision not to refer the merger to the Competition Commission. At this point an invoice will be issued. Payment must be made within 30 days of the date of the invoice.

5.31 Fees vary according to the type and size of the merger. Details of the current fee scales are available from the Mergers Branch. The fees in force, when this booklet went to press, were as follows:

- value of gross assets acquired £30 million or less £5,000*
- value of gross assets acquired over £30 million
but not over £100 million £10,000
- value of gross assets exceeds £100 million £15,000

* In October 2000, the Secretary of State published a consultation paper seeking views on a proposal to exempt small and medium sized businesses from having to pay the £5,000 fee. At the time of writing, this consultation process had not been completed.

5.32 Fees are also payable for an application for the Secretary of State's consent to the transfer of a newspaper or newspaper assets, and on the making of a merger reference under the Water Industry Act 1991 (see Chapter 9).

THE CITY CODE

5.33 The procedures under the Fair Trading Act focus on the underlying economic and other substantive effects of a merger. The City Code on Takeovers and Mergers applies to offers for all listed and unlisted public companies (and certain other companies) resident in the United Kingdom. The Code operates principally to ensure fair and equal treatment of all shareholders in relation to offers. The OFT is not responsible for its administration or interpretation. Any enquiries should be addressed to:

The Secretary,
The Panel on Takeovers and Mergers,
PO Box 226,
The Stock Exchange Building,
London EC2P 2JX.

Tel: 020 7382 9026, Fax: 020 7638 1554.

6.1 The following sections describe the kind of information that the OFT generally requires in order to take a preliminary view of whether a merger is likely to qualify for investigation and, if so, of its possible effect on competition and the public interest. The emphasis on the effect on competition reflects the fact that successive Secretaries of State have reaffirmed that this is the primary, although not the only, basis for deciding whether there should be a reference to the Competition Commission.

6.2 Nevertheless, it should be appreciated that the requirements set out here are for guidance only and they may not apply exactly in every case. The OFT is fully conscious of the costs that unnecessarily detailed preliminary enquiries can impose on business and it adopts a pragmatic approach case by case; sometimes it may be able to make an assessment with less extensive information. Before a full formal submission is made, the OFT is always willing to have a preliminary discussion with the parties to a merger in order to try and identify the specific information it will need and to offer advice on how it can be best presented.

6.3 Sometimes the OFT may need more, or more comprehensive, information than is described here. It asks for any such additional details as soon as it clear it will be necessary, but – if the timetables are to be met – replies will also have to be supplied quickly. Requests for such information normally suggest a short deadline for a full response. If that deadline cannot be met, it will be necessary to suspend the non-statutory timetable until the additional information is provided.

6.4 In making a submission it is useful to adopt the headings and ordering set out in the following sections.

GENERAL BACKGROUND

6.5 As required under section 93B of the Fair Trading Act, all the information submitted to the OFT must be accurate and not false or misleading. There should be at least two copies of every document submitted. The OFT needs, first, some general information.

- **Contacts** – Always give a named contact with phone and fax numbers.
- **Timing** – In general, the OFT works to the timetables set out in paragraph 5.4. While we will try to speed up the procedures in any case where a decision is required more quickly, this may not always be possible without disadvantaging other cases under consideration, while the demands of the particular case



itself sometimes make it impracticable to accelerate the process. Nevertheless, if a quick decision is needed, the submission should clearly explain both why the case is so urgent and why the submission was not made any earlier.

- Type of case – Whether the submission covers a merger that is proposed or has already been completed, and whether it is a public case or a request for confidential guidance. **Remember that requests for formal confidential guidance (or requests for informal advice) when a proposal has not been made public are, indeed, confidential.** The OFT responds to such requests on the understanding that the request itself, as well as the terms of any advice or guidance given, are not revealed in any way to third parties.
- Summary description – Include in any submission a summary of the transaction, stating:
 - the names of the acquiring company and of the target;
 - the type of transaction (for example, whether it is an agreed bid, whether it is a full takeover or the acquisition of assets or of a minority shareholding giving material influence, or whether it is a joint venture);
 - whether there are external timetable constraints (for example, if the transaction is governed by the City Code on Takeovers and Mergers);
 - a brief description of the business being acquired;
 - the areas of overlap between acquirer and target; and
 - the reasons for the acquisition.
- Supporting documentation – Provide two copies of the most recent Annual Report and Accounts of the merging enterprises and, where relevant, copies of the Offer Document and Listing Particulars and any press releases or newspaper cuttings. Any other printed information which helps the OFT's understanding is always welcome.
- European Community Merger Regulation – Confirm that the merger falls outside the scope of the Regulation, or explain any uncertainties there may be.



- The parties – Give the full legal name of the parties involved, their domicile and, if they are parts of groups, explain their position in the group and give similar information on relevant related companies. Any parts of the acquiring group, other than the acquiring company, that carry on business which overlaps with that of the target or which have a vertical relationship (see paragraph 6.12) with that business should be identified. Please also provide information for the most recently available year on the turnover of the businesses involved, their operating and pre-tax profits or losses as well as gross assets information (see paragraph 6.6) and the value and nature of the consideration being paid.

JURISDICTION

6.6 The OFT's first task is to determine whether, in its view, a merger qualifies for investigation. Essentially, it needs information to satisfy itself that two or more enterprises have ceased or will cease to be distinct, in the meaning of the Act; that at least one of the enterprises is carried on in the United Kingdom or by or under the control of a body corporate incorporated in the United Kingdom; that the merger did not take place more than four months before the submission; and that the merger meets either the assets test or the share of supply test.

- **Assets test** – We need information to allow us to determine whether the value of the gross assets worldwide being taken over at the time of the takeover exceeds £70 million.
- **Share of supply test** – It may be difficult to determine whether the merger meets the share of supply test. In the past, the term 'market share test' has been commonly used among specialists, but this is a somewhat ambiguous phrase. The Act defines the test criteria as follows: 'at least one quarter of all the goods [or services] of [any] description which are supplied in the United Kingdom, or any substantial part of [it]'. The goods or services described in determining whether the merger meets the share of supply test do not necessarily correspond to those that constitute the relevant economic market or markets. For instance, there might be other products to which customers could readily switch because, although they are not identical, they are effective substitutes. While the OFT would want to take such factors into account in its economic assessment (see paragraph 6.8-6.10), they might not be relevant in deciding whether the merger satisfied the test, and therefore qualified for investigation.



We need information on the merging enterprises' share of supply in the United Kingdom (imports are, therefore, taken into account in the calculation) or in a substantial part of it. The term 'substantial part' is not easy to define. The Act gives no guidance, but the House of Lords has ruled¹ that there is no fixed cut-off point (by reference to geography and arithmetic alone) below which an area must automatically cease to be considered 'substantial'. The area must, however, be of such size, character and importance as to make it worth considering for the purpose of the Act. Your own views will be taken into account in relation to the case under consideration. We therefore ask you to include information about the area in which the relevant products are supplied and about the area within which any competing suppliers offer similar products or close substitutes. You should explain how the share of the products in those areas has been calculated (preferably by value, or by volume of sales) and indicate the source and reliability of the information.

¹ See *Regina v Monopolies and Mergers Commission and another ex parte South Yorkshire Transport Limited* – [1993] 1 WLR 23.

ASSESSMENT OF COMPETITION EFFECTS

6.7 The main purpose of our assessment is to establish what effects, if any, the merger is likely to have on competition. The OFT wants to identify where there is an overlap between the products of the business of the acquiring company and the target – that is to say, where they are currently in competition. It is also necessary to identify any element of vertical integration which could affect competition in 'upstream' or 'downstream' markets (for example, where one of the merging companies makes something which is used by the other company and by other businesses as a component in another product, or where one company is a manufacturer and the other is a wholesaler or retailer of the goods concerned). It is often helpful to have a description of the manufacturing process and the 'supply chain' from manufacturer to end user.

MARKET DEFINITION

6.8 Market definition is crucial to the assessment of the effects of a merger. The product and geographical markets in economic terms may not, as previously noted, necessarily equate with the descriptions used to determine whether a merger qualifies for investigation and the companies may wish to argue for alternative definitions. The OFT welcomes the companies' views on these points, even though it needs to make up its own mind.



¹ For further information on this topic, see Market Definition in UK Competition Policy, *OFT Research Paper No1, February 1992*, or The Competition Act 1998 – *Market Definition, OFT 403, March 1999*.


6.9 It is not the purpose of this document to consider market definition in detail¹ but we do ask for information about three specific matters.

- Demand-side substitutability – Are there products that are close substitutes for those made or sold by both the merging businesses, in the sense that customers could switch easily to those alternatives in response to an increase in prices in the overlapping products?
- Supply-side substitutability – Are there other companies that might be considered to be in the same market as the merging enterprises, even if they do not currently supply the same goods and services? This would be the case if the other companies could begin to supply the same goods or services quickly and without significant extra cost by switching production, given the stimulus of an increase in price of those goods or services.
- The geographic market – The area within which current buyers of the product (and close substitutes) could readily buy from other suppliers usually defines the geographic boundaries of a particular market. Among factors that might limit buyers' ability to go to elsewhere are transport costs, differences in regulation and consumer preferences.

6.10 Where appropriate, the OFT will require information about any imports into the United Kingdom. Please also provide details if the market is thought to be wider than the United Kingdom – stating, in particular, which countries or areas should be included and why. You should also explain the significance of transport costs or any tariff or other impediments to trade across national or European Community boundaries. If the market is less extensive than the whole of the United Kingdom, please explain the limiting factors (such as transport costs), and indicate the effective radius of the market (x miles from the factory, for example) and provide appropriate supporting information. In describing a localised market, a map is often helpful.

HORIZONTAL OVERLAPS

6.11 For each of the relevant markets, please give figures for the current total value of the market (in £ sterling). Where the parties' combined share of a market is 10% or less (and, thus, the increment is 5% or lower) the OFT would normally want no more than an indication of the market share, the increment and the total market value. But where the market shares or the increments to such shares are



larger, the OFT will require more detail – with information about the market shares of each party to the merger, of each of the main competitors (separated if possible), and of all of the minor competitors together. It is helpful if this information can be set out in tabular form. We shall require a valuation of the total market, although a breakdown of market shares in terms of volume rather than value may be acceptable where value figures are not readily available or where volume is thought to provide a more useful basis for analysis. The figures you supply should normally be those for the most recent year for which they are available. If market shares vary significantly from year to year, however, information for several years may be more useful. If the market is thought to be wider than the United Kingdom, it is helpful to have separate figures for the domestic market and for imports and exports.

VERTICAL LINKS

6.12 The OFT may be concerned about the effects of vertical links - acquisition of a major supplier or a customer – if they could distort competition in a related market, and companies should explain the nature of any such effects where they might be anticipated. We do not normally ask for more detailed information if none of the merging businesses has a share of 10% or more in an ‘upstream’ or ‘downstream’ market. In other cases, we ask you to provide details of the market shares of the merged or merging businesses in relevant markets, the shares held by competitors in those markets and the extent to which the merging businesses supply to or acquire from competitors.

ENTRY BARRIERS

6.13 Low barriers to entering a particular market considerably reduce any concerns there may be about the effects of a merger on the market structure. Where there are no horizontal overlaps nor any issues associated with vertical links, or where the combined shares of the parties in the relevant market are 10% or less and the increment to share is 5% or less, we normally do not require any information about barriers to entry. For other cases, however, any information you can supply is likely to speed our assessment. In general terms, the higher the initial market share and the larger the increment, the more information it is helpful to have in this area. What constitutes a ‘barrier to entry’ can vary greatly from market to market.¹ Among such barriers encountered in the past are: technical and other advantages enjoyed by a well-established company; regulatory barriers covering tariffs, patents, or licensing; reputational barriers established by

¹ For further information on this topic, see Barriers to Entry and Exit in UK Competition Policy, *OFT Research Paper No2*, March 1994.



brand names; a history of anti-competitive behaviour in the market, such as predatory pricing, which might constitute an entry barrier; high advertising costs; and the 'sunk' costs of entry, such as research and development costs, the cost of creating a distribution or servicing network. When we assess such barriers it may be helpful to know whether the market is growing or contracting and the history of entry and exit (new entrants and those leaving the market in the last 5-10 years).

THIRD PARTIES


6.14 For public cases the OFT will invite comments on the prospective merger situation from interested third parties by means of an Invitation to Comment notice published through the Regulatory News Service and on the OFT's website. It may also want to target consultations more specifically and so it is helpful if companies provide details of a selection of customers and competitors – generally, at least five of each (where possible, please give the names of individuals and their phone and fax numbers, and addresses). We may choose to contact other or additional third parties. We will also take note of any unsolicited comment we may receive.

OTHER PUBLIC INTEREST ISSUES

6.15 One benefit of competition is that it encourages firms to seek and to adopt improvements in efficiency. Consequently, there must always be anxieties that any merger, which reduces competition, may weaken the pressure to reduce costs and to innovate, at least in the longer term.

6.16 On the other hand, mergers can themselves contribute to efficiency gains. First, the change in ownership and management may be enough to bring about improvements in the way the formerly separate businesses are run. Secondly, the bringing together of those businesses may allow facilities to be rationalised or economies of scale to be achieved.

6.17 Generally speaking, in making its assessment of a merger, the OFT does not closely involve itself in evaluating claims for gains in efficiency although it would like to see any information that might be available about anticipated improvements in this area. Any judgement that needs to be made about the trade-off between efficiency claims and the potential detriment to competition is usually better left until after a more detailed investigation by the Competition



Commission. This is one of the factors that the Director General would take into account when he advised the Secretary of State whether a reference to the Competition Commission would be justified.

6.18 A merger's effects on employment or regional development, or its implications for national security are among other issues that could have public interest implications. But since it is government policy that reference to the Competition Commission should be based primarily on competition grounds, it would be only in very exceptional circumstances that such considerations as these might be a decisive factor. Nevertheless, the OFT notes any representations it receives on public interest issues and – after consulting other government departments when appropriate – the Director General takes them into account when he formulates his advice to the Secretary of State.


6.19 If you believe that the merger brings public interest benefits it is worth making this clear, drawing attention to any matters that may be relevant and offer some evaluation of the effects.

ANCILLARY RESTRICTIONS

6.20 As already noted, mergers and ancillary restrictions are generally excluded from the prohibitions of the Competition Act 1998. The consideration of whether restrictions are ancillary to a merger situation will be dealt with by the OFT's Mergers Branch. Where the parties to a merger require a view on these matters the Mergers Branch will also require sufficient information to be able to deal with that request. The following information should, usually, be provided:

- A copy of the relevant agreement identifying each restriction which is considered to be ancillary to the merger;
- An explanation of why each restriction is considered to be directly related and necessary to the implementation of the merger; and
- Why restrictions might be subject to the prohibition in Chapter I of the Competition Act 1998 were they not considered to be ancillary to the merger.

6.22 In the case of a public merger, whether or not a qualifying merger within the meaning of the legislation, the OFT's Mergers Branch may wish to seek the views of third parties on the ancillary restrictions arising from the merger situation. It will be for the parties to the merger to indicate in their submission which elements of the arrangements are commercially confidential. If the OFT is unable



to seek public comments, then it may be unable to express a view as to whether there is a merger situation and whether the restrictions are ancillary. Where the parties (or party) are seeking Confidential Guidance (see paragraphs 5.10 – 5.14) as to the likelihood of reference to the Competition Commission and also a view on ancillary restrictions, any comments expressed on the latter will only be the view of the Mergers Branch and will not form part of the Confidential Guidance.

6.23 Because of the statutory and administrative timescale set out for the consideration of mergers, it may not always be possible to give a response on the question of the ancillary restrictions at the same time as announcing the decision on the merger.

6.24 A more detailed description of the Director General's approach to the consideration of ancillary restrictions and some examples of some fairly common types of restrictions are contained at Appendix B.

OTHER BACKGROUND INFORMATION

6.25 You may, of course, offer any other information you think relevant. You might, for example, want to refer to earlier Competition Commission reports dealing with the same markets, to contacts with other government departments or regulators about the merger, either because they have responsibilities in the relevant areas or because they are customers (this is particularly helpful where the request is for confidential guidance), and to any contacts with overseas competition authorities. You are also welcome to give your own views on the competition implications or any other effects of the merger.

COMMON NOTIFICATION FORM

6.26 In 1997, the competition authorities in the United Kingdom, France and Germany published a form for the notification of mergers which may be subject to control in two or more of those countries. It would be helpful if anyone using that form could take account of the guidance in this booklet in responding to the questions.

7.1 Some mergers may cause concern about loss of competition because of an overlap which gives the merged company a significant share of a specific market although it involves only part of that company's activities. Sometimes the company may resolve the problem by divesting itself of part of its business; alternatively, in order to counter the concerns that have been raised, it may give a formal commitment about its future conduct (known as 'behavioural undertakings'). Under provisions of the Companies Act 1989 and the Deregulation and Contracting Out Act 1994, the Secretary of State may accept binding undertakings from a merged business as an alternative to making a reference to the Competition Commission.

7.2 These provisions can be used only where the Director General has recommended to the Secretary of State that the merger – whether proposed or completed – should be referred to the Competition Commission, and has specified what effects adverse to the public interest he considers it may have or might be expected to have. Any undertakings must be aimed at remedying or preventing the adverse effects identified.

7.3 Divestment of part of the merged company's business must take the form of the division of the whole or part of a specific business activity, or the separation of particular enterprises through the disposal of assets or shares. Typically, undertakings are given to sell – within a stated period – one of the overlapping businesses that have occasioned the concern about reduced competition.

7.4 While such 'structural undertakings' are generally the more appropriate remedy for competition problems in a merger situation, behavioural undertakings can provide a means of seeking to ensure that a merged company does not behave anti-competitively, for example by following a particular course of conduct made possible by the merger.

7.5 An acquiring company can always take the initiative to propose suitable undertakings if it thinks that they may be appropriate to meet any competition concerns that it foresees. Alternatively, the OFT may invite companies to consider whether they want to offer undertakings where it thinks that a merger raises issues that would justify summoning a meeting of the Mergers Panel.

7.6 On occasion, the Director General may consider that a reference to the Competition Commission is advisable but undertakings in lieu might be appropriate. Provided the parties to the merger indicate that they would be willing to give such undertakings, he so advises the Secretary of State.



7.7 The Secretary of State cannot seek undertakings in lieu unless the Director General has recommended a reference and has specified particular adverse effects which the merger might have. The Secretary of State can, however, decide not to seek undertakings in these circumstances. Where the Director General recommends that undertakings would be appropriate and the Secretary of State agrees, the DTI normally issues a public announcement saying the merger will be referred to the Competition Commission unless satisfactory undertakings can be obtained. In order to give interested third parties an opportunity to comment, the announcement normally specifies what adverse effects are to be remedied by the undertakings as well as giving an indication of the undertakings proposed. If the decision is made not to accept the Director General's advice, the Secretary of State will consider whether to refer the merger to the Competition Commission or clear it without requiring undertakings.

7.8 If the Secretary of State asks him to do so, the Director General tries to negotiate suitable undertakings with the parties concerned. Until these discussions are concluded, the normal timetable for considering a merger may be suspended (except the 4 month statutory deadline – see paragraph 2.2(c)). Nevertheless, the Secretary of State usually sets a time limit for negotiations and the aim is always to complete them as quickly as possible. Supplementary undertakings may be given where, for example, it is impossible to arrange for divestment before the acquiring company gains control of the target, and in the case of completed mergers. The aim of such undertakings is to provide for any safeguarding action which might be necessary pending a divestment.

7.9 It is worth noting that the statutory deadline for dealing with completed mergers means that discussions on undertakings in lieu need to be well advanced in the early days of assessment if there is to be a realistic chance of acceptance before the deadline for reference is reached. Even more so if undertakings are sought in a case which has been referred back to the UK under Article 9 of the European Community Merger Regulations. In such a case, a report must be published and the findings of an examination of the concentration must be announced no more than four months after reference back. Hence, to allow a realistic time for the Competition Commission to consider the case, it would normally be necessary to accept undertakings in lieu or to make a reference to the Competition Commission within a fortnight of the reference back under Article 9.

7.10 Arrangements are made by the DTI to publish details of undertakings that have been agreed and accepted by the Secretary of State, together with the



Director General's advice on the adverse effects that the merger might have had (the Director General's advice is also published on the OFT's website). Publication is designed to ensure that interested third parties are aware of the undertakings. This is important because, in the event of a breach of undertakings, they may take action in the courts under section 93A of the Fair Trading Act.

7.11 Once they are in place, the undertakings are monitored by the OFT in order to ensure compliance so that the Director General may advise the Secretary of State if it is considered that any of them should be amended or replaced. Any changes that are agreed are published in the same way as the original undertakings.

INTERIM MEASURES

8.1 When a merger is referred to the Competition Commission, there are powers – under section 74 of the Fair Trading Act – to stop the parties taking any action which might prejudice the reference or make it difficult for the Secretary of State to take action on the Competition Commission’s findings in the event of an adverse report. Where the merger has not yet been completed, section 75(4A) of the Act prohibits the parties from acquiring interests in each other’s shares during the reference period without the Secretary of State’s consent.

8.2 The Secretary of State has, however, issued a general consent exempting from this ban transactions between members of the same group in the shares of members of the group. Parties can also apply for a special consent to acquire shares during the reference period. A company that wants to do this can either make its views known before the decision on reference has been announced or seek a special consent after the reference has been made.


8.3 In considering any request for such special consent the Secretary of State takes into account the need to prevent the bidding company from increasing its level of control over the target. This means that he would not normally give consent to a holding of more than 15% of the shares in the target company.

8.4 Where a merger does not involve the acquisition of shares or where it has already been completed, the Secretary of State, instead of making an interim order under section 74, usually requests the Director General to seek interim undertakings to restrain the parties from acting in a way which might prejudice the outcome of the Competition Commission’s inquiry or his own subsequent action. Such undertakings normally require the merged company not to proceed with the transaction nor to take further steps to integrate the businesses until the outcome of the Competition Commission investigation has been made public.

INVESTIGATION BY THE COMPETITION COMMISSION

8.5 The Competition Commission’s duty is to investigate and report on whether the merger qualifies for investigation (see paragraph 2.2) and, if so, whether it operates, or may be expected to operate, against the public interest.

8.6 If it does so conclude, the Competition Commission, in its report, normally recommends action to remedy or prevent the adverse effects that have been identified. In some cases, it might recommend that the merger should not take place. It can also recommend that assets, shares or interests in shares already



acquired should be disposed of, or that the merger should be allowed only subject to conditions.

8.7 In assessing the implications of a merger for the public interest, the Competition Commission takes account of the factors laid out in section 84 of the Fair Trading Act (see paragraph 3.1).

8.8 The time allowed for an Competition Commission inquiry is decided by the Secretary of State. It is usually three months, but can be up to six months. The Secretary of State has discretion to grant one extension of up to three months.

8.9 A detailed description of the work of the Competition Commission and its procedures is given in the booklet *The Role of the Commission*, published by The Stationery Office, and available from Stationery Office bookshops.

8.10 When it has completed its investigation of a merger, the Competition Commission submits its report to the Secretary of State, copied to the Director General. Such reports generally include:

- a a summary;
- b the Competition Commission's analysis of the effects of the merger and its conclusions on whether the merger qualifies for investigation and whether it operates, or may be expected to operate, against the public interest, plus – in the case of an adverse finding – recommendations on remedies;
- c a factual description of the companies involved in the merger, their development and current activities;
- d a description of the market or activities in the United Kingdom which will be affected by the merger;
- e arguments for and against the merger put forward by the companies involved; and
- f the views of third parties.

ACTION AFTER THE COMPETITION COMMISSION HAS REPORTED

8.11 The Secretary of State is required to lay all merger reports before Parliament and to arrange for their publication in full although there is an obligation to remove any material which, if published, would be contrary to the public interest or would seriously and prejudicially affect particular interests. The aim is to publish all merger reports within 20 working days of their submission by the Competition Commission.



8.12 Where the Competition Commission does not make an adverse finding and it concludes that the merger should be allowed to proceed – or, if completed, be left intact – the Secretary of State has to accept that finding and can take no further action, apart from arranging for the publication of the report. Where the Competition Commission concludes that the merger does operate, or may be expected to operate, against the public interest it normally recommends remedies to counter the effects it has identified. The Director General also advises the Secretary of State on remedies and may put forward alternatives to those proposed by the Competition Commission. The Secretary of State usually announces what remedial action would be appropriate at the same time as publishing the report. Although required to take account of any recommendations or advice from the Director General, the Secretary of State is not bound by them and may choose to impose different remedies or allow a merger to proceed unconditionally despite an adverse report by the Competition Commission, but it is unusual for him to do so.

8.13 When there is an adverse finding, the Secretary of State normally asks the Director General to seek undertakings to remedy or prevent the adverse effects identified by the Competition Commission. Alternatively – or if the parties are unwilling to give undertakings that are regarded as satisfactory – the Secretary of State can make a statutory order under the Act.

8.14 Such undertakings or orders may:

- a provide for a proposed merger to be stopped;
- b require the parties to dispose of shareholdings or interests in shares, or limit the exercise of voting powers in respect of those shares;
- c provide for the break-up of a company or group by the sale of assets or a subsidiary; or
- d control the conduct of the merged company by, for example, prohibiting discrimination or regulating the company's prices or charges.

The parties may also be required to publish certain information about their activities or to provide such information to the Director General.

8.15 All such undertakings and orders are published. In addition, all orders are laid before Parliament and divestment orders require the approval of Parliament before they are made. The Director General is responsible for monitoring compliance with both undertakings and orders. He also has a duty to keep them under review and to recommend to the Secretary of State any changes he considers appropriate.

the European Community

9 THE EUROPEAN COMMUNITY MERGER REGULATION

regulation

9.1 Under the European Community Merger Regulation¹ the European Commission has jurisdiction over 'concentrations with a Community dimension' as defined in the Regulation. National authorities may not apply their own competition laws to these mergers, except in certain limited circumstances.

¹ This procedure was introduced under the Companies Act 1989 and amended by the Fair Trading Act (Amendment) (Mergers Pre-notification) Regulations 1994 (SI 1994/1934).

9.2 The United Kingdom competent authorities for the purpose of the Merger Regulation are the Secretary of State, the Director General and (in limited circumstances) the Competition Commission. The OFT undertakes the initial scrutiny of individual cases, is generally responsible for contact with the European Commission on such cases, and proposes a line to take on the Commission's draft decisions.

CONCENTRATIONS

9.3 As from 1 March 1998, concentrations with a Community dimension are defined as those where either:

- a (i) the combined aggregate world-wide turnover of all undertakings concerned is more than ECU 5 billion; and
- (ii) the aggregate Community-wide turnover of each of at least two of those undertakings is more than ECU 250 million; or
- b (i) the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2.5 billion; and
- (ii) in each of at least three Member States, the combined aggregate turnover of all of those undertakings is more than ECU 100 million; and
- (iii) in each of at least three of the Member States included for the purposes of b(ii) above, the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and
- (iv) the aggregate Community-wide turnover of at least two of the undertakings concerned is more than ECU 100 million; unless
- c in either case above, each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. (Prior to March 1 1998, only the requirement at A together with the proviso applied.)



- 9.4 Those mergers that fall within the provisions of the Regulation must be notified to the European Commission within not more than one week after either:
- a the conclusion of the agreement; or
 - b the announcement of a public bid; or
 - c the acquisition of a controlling interest.

The European Commission has prescribed the form in which a notification should be made. This is set out in Form CO, published as an annex to the Commission's Implementing Regulation 3384/94, which can be obtained from:

The Merger Task Force,
Commission of the European Communities,
Rue de la Loi 200
B1049 Brussels,
Belgium

Tel: (+3 22) 295 9770. Fax: (+3 22) 296 4301


9.5 Concentrations must not be implemented for at least three weeks (or longer if the European Commission extends the period) after notification. The Commission has one month from receipt of the notification to decide whether the merger falls within the scope of the Merger Regulation and, if so, whether there are serious doubts as to its compatibility with the Common Market.

9.6 If doubts exist, the Commission normally opens proceedings to initiate a full investigation. In reaching a view on compatibility, it must consider whether the merger creates or strengthens a dominant position as a result of which competition would be significantly impeded in the Common Market or in a substantial part of it. After it initiates proceedings, the Commission has four months to reach a decision.

EXCEPTIONS

9.7 In some circumstances a merger which would normally fall to be considered under the European Community Merger Regulation (ECMR) may instead, in whole or in part, fall to be considered under the Fair Trading Act. There are three relevant provisions of Community law.

- Article 296 of the Treaty of Amsterdam (formerly Article 223 of the Treaty of Rome) provides that Member States are not obliged to supply information



the disclosing of which it considers to be contrary to the essential interests of its security, and may take such measures as it considers necessary for protection of these essential interests. This provision has been used in relation to defence mergers.

- Article 21 of the ECMR allows Member States to take appropriate measures to protect legitimate interests, such as public security, plurality of the media, and prudential rules. It does not, however, prevent the European Commission examining the competition implications of such a merger.
- Article 9 of the ECMR allows the European Commission to refer a merger back to a Member State
 - a if it threatens to create or strengthen a dominant position in a distinct market within a Member State; or
 - b affects competition in a market within a Member State which is a distinct market but which does not constitute a substantial part of the Common Market.

The DTI and appropriate government departments take the lead on liaison with the parties to a merger and the Commission on mergers falling within Article 296 of the Treaty or Article 21 of the ECMR.

9.8 Normally, however, mergers that fall within the provisions of the ECMR are not subject to the United Kingdom merger control procedures described elsewhere in this guide. Nevertheless, the Commission always consults the UK competition authorities about such mergers, and the Regulation provides for the national competent authorities to assist the Commission in its assessment.

9.9 The OFT receives copies of all merger notifications sent to the Commission and it informs the Commission of any competition concerns such mergers may raise for the United Kingdom.

9.10 If the Commission decides to open proceedings to initiate a full investigation, OFT staff participate in any hearings with the merging companies and third parties in Brussels. OFT representatives also attend meetings of the Advisory Committee of Member States, which must be consulted before the Commission can reach a final decision on those cases which have been referred for a full investigation.



9.11 It is helpful if mergers with a Community dimension involving United Kingdom companies are brought directly to the attention of the OFT at the earliest possible stage, in addition to the mandatory notification to the European Commission.

COAL AND STEEL PRODUCTS

9.12 Any merger that involves a producer or distributor of coal or steel products, as defined in the Treaty of Paris, requires the prior authorisation of the European Commission under Article 66 of that Treaty. Without such authorisation it cannot proceed. If it involves both Treaty of Paris products and other products, the merger may also qualify for investigation under the Fair Trading Act. Approval by the European Commission under the Treaty does not preclude a merger reference to the Competition Commission in respect of the non-Treaty products.

10.1 Special provisions apply to mergers involving certain industries, specifically newspapers, rail, and water and sewerage undertakings.

NEWSPAPERS

10.2 The assessment and clearance of newspaper mergers are the responsibility of the Secretary of State. The Director General is not involved, unless such a merger falls outside the special provisions and satisfies the Fair Trading Act share-of-supply or assets tests, in which case it may be liable for consideration as an ordinary merger.

10.3 The Secretary of State's prior written consent is required for any merger which concentrates, in the hands of one newspaper proprietor, newspapers with an average paid-for circulation of 500,000 copies or more per day of circulation. A 'newspaper proprietor' is any person who has at least one-quarter control of a newspaper. Except in certain limited circumstances, the Secretary of State cannot give consent until the Competition Commission has investigated and reported on the proposed merger. It is a criminal offence to go ahead with a newspaper merger without consent, or to breach any conditions attached to a consent.

10.4 A newspaper merger may sometimes be linked in the same transaction to the merger of non-newspaper businesses. In such circumstances, the Secretary of State may make parallel references of both mergers. But, where only the newspaper element of such a dual merger is referred, the Competition Commission investigation would not normally consider any non-newspaper aspects of the transaction unless they had a direct bearing on the newspaper merger.

10.5 For advice on newspaper mergers, contact:

The Competition Policy Directorate,
Department of Trade and Industry
1-19 Victoria Street, London SW1H 0ET

Tel: 020 7215 6781/6772, Fax: 020 7215 6565, DTI switchboard: 020 7215 5000

MERGERS OF WATER OR SEWERAGE UNDERTAKINGS

10.6 In some circumstances, mergers of water or sewerage undertakings are subject to mandatory reference to the Competition Commission. Under the Water Industry Act 1991 the Secretary of State must refer any merger involving two or



more 'water enterprises' if the gross assets of both the target and at least one of the water enterprises of the acquirer exceed £30 million. (A 'water enterprise' is an enterprise carried on by a water or sewerage undertaking appointed under section 6 of the Water Industry Act 1991.) The Director General of Fair Trading has a duty to advise the Secretary of State on whether a water merger meets the criteria for reference. Before doing so, he consults the Director General of Water Services.

10.7 In reporting on the effects on the public interest of any merger referred under the Water Industry Act, the Competition Commission must have regard to the number of water enterprises under independent control. This is to prevent prejudice to the ability of the Director General of Water Services to make comparisons between different enterprises in carrying out his regulatory functions. The Competition Commission must also have regard to the public interest factors set out in section 84 of the Fair Trading Act.

REGULATED UTILITIES

10.8 There are no special provisions under UK merger legislation for regulated utilities such as electricity, gas, telecommunications or rail. A merger in these industries, however, may well require the modification of an operating licence or give rise to other issues falling within the ambit of the relevant regulator. For this reason, the OFT and the regulators work closely together on such mergers. In some cases, the regulator may issue a consultation document in respect of the merger, the responses to which will inform the views offered to the Director General of Fair Trading. Neither the Director General nor the Secretary of State are bound by the regulator's views but they are required to give attention to them.

APPENDIX A

PRE-NOTIFIED MERGERS

appendix

A.1 The Companies Act 1989 introduced a new procedure for voluntarily pre-notifying mergers. As amended by the Fair Trading Act (Amendment) (Merger Pre-Notification) Regulations 1994 (SI 1994/1934) this procedure allows for consideration of a proposed merger within a prescribed time period of 20 working days, followed by a maximum extension of 15 working days. If no reference has been made at the end of this period, the merger is automatically cleared, subject to certain exceptions.

A.2 Where a company wants a forthcoming merger proposal to be assessed under the pre-notification procedure, it must provide the OFT with details of the projected transaction and the markets involved, using the prescribed form of Merger Notice. Copies of the form, with further guidance on current procedures, can be obtained from the OFT at the address shown on page 52. Consideration of the proposals will not begin until the day after the fully completed form and the appropriate fee has been received (see paragraph 5.29).

SUBMISSION OF A MERGER NOTICE

A.3 A Merger Notice may be given only by an 'authorised person', defined as any person carrying on an enterprise to which the notified arrangements relate. The authorised person may, however, appoint a representative – such as a firm of solicitors – to complete the Notice on his behalf and to act for him in further correspondence with the OFT.

A.4 The completed Notice may be delivered to the OFT by post or by hand, but not by fax.

TIMING

A.5 The pre-notification period begins on the first working day after receipt of the Notice – with the requisite fee. (Working days exclude Saturdays, Sundays and days which are bank holidays in England and Wales.) Any Notice received after 5.00pm or on any day which is not a working day is deemed to have been received on the next working day. The period for considering the Notice begins on the working day following that. The consideration period expires 20 working days later (or on the last working day of any extension period). The OFT writes to the 'pre-notifier' (the authorised person or the appointed representative who submits the Notice) to confirm receipt of the Notice and the date on which the consideration period expires.

A.6 If the Director General decides to extend the consideration period, the OFT so informs the pre-notifier before the original consideration period expires – usually in writing. In some urgent cases notice may be given by phone, with subsequent confirmation in writing.



A.7 Companies that intend to pre-notify mergers subject to the City Code on Takeovers and Mergers should bear in mind the need to reconcile submission of the Notice with the requirements of the Code. If they are seeking a decision by the first closing date of an offer, they will need to submit the Notice to the OFT well before the posting of the offer document. The Secretary of State cannot be bound by the offer timetable however, and the Director General has discretion to extend the consideration period.

REJECTION OF A MERGER NOTICE

A.8 The Director General can reject a Notice for four reasons:

- a he suspects the information given in the Notice, or subsequently, to be false or misleading;
- b he suspects that the parties do not propose to carry the pre-notified arrangements into effect;
- c the parties fail to provide on time, or at all, the information specified in the Notice, or any supplementary information requested by the OFT; or
- d the notified arrangements appear to be a concentration with a Community dimension within the EC Merger Regulation.

A.9 The Director General can reject a Notice at any time during the consideration period. His decision takes effect from the moment it is sent to the pre-notifier or an authorised representative. The OFT will give notice in writing, although advance notice is normally given by phone.

REQUESTS FOR FURTHER INFORMATION

A.10 On receipt of the Notice, the OFT may decide that it needs further information in order to analyse the effects of the merger. It will normally make a written request for information and will specify the time by which the information must be provided. If the information is not supplied by that time, the Director General has discretion to reject the Notice. Alternatively, in urgent cases the OFT may request information informally by phone.

A.11 Any information supplied in response to a written request must be given in writing. Information delivered after 5.00pm, or on any day which is not a working day, will be deemed to have been received on the next working day.



WITHDRAWAL OF A MERGER NOTICE

A.12 A company can withdraw a Notice at any time. The withdrawal must be made in writing by the pre-notifier or an authorised representative, and may be delivered by hand, post, fax, or telex. The merger fee cannot, however, be refunded unless the merger is caught by the European Community Merger Regulation, or the merger is found not to qualify.

EXCEPTIONS TO AUTOMATIC CLEARANCE

A.13 There are some limited circumstances in which a pre-notified merger can still be referred to the Competition Commission after expiry of the consideration period (whether extended or not). These are where:

- a the Notice is rejected by the Director General;
- b the Notice is withdrawn;
- c the proposed merger is completed before expiry of the consideration period;
- d before the merger covered by the Notice is completed – any of the enterprises concerned enters into an unrelated merger with any other enterprise not covered by the Notice;
- e the merger covered by the Notice is not completed within six months of the expiry of the consideration period;
- f any information supplied by the pre-notifier (or any associate or subsidiary) is in any material respect false or misleading;
- g any material information which is, or ought to be, known to the pre-notifier (or an associate or subsidiary) is not disclosed at least five working days before the end of the consideration period (such information must be given in writing.); or
- h the Director General has given notice that the Secretary of State is seeking undertakings in lieu of reference and has not been notified by the relevant person that it is not willing to give such undertakings. If the person concerned does give such a notice, the Secretary of State then has 10 working days within which to make a reference.

APPENDIX B

EXCLUSIONS FOR ANCILLARY RESTRICTIONS

appendix

GENERAL

B1 The Competition Act 1998 introduces two prohibitions: one applying to agreements which prevent, restrict or distort competition within the United Kingdom ('the Chapter I prohibition'); the other applying to conduct by undertakings which amounts to abuse of a dominant position in a market which may affect trade within the United Kingdom ('the Chapter II prohibition'). There are certain specific exclusions from both prohibitions for mergers and ancillary restrictions which is contained in Schedule 1 to the Competition Act 1998. The following paragraphs provide further details about the definition of ancillary restrictions and the procedures that the OFT will follow in establishing whether or not a restriction is ancillary.

B2 Many merger cases involve the acceptance of restrictions which go beyond the merger agreement itself. A seller of a business, for example, sometimes accepts a **non-competition** obligation which prevents him from competing with that business. Where such restrictions are *'directly related and necessary to the implementation of'* the merger agreement, they are known as ancillary restrictions. The concept of ancillary restrictions is well developed in European Community law under the Merger Regulation, which provides that ancillary restrictions are covered by any decision declaring a merger to be *'compatible with the common market'* (that is, a clearance decision). This provision aims to avoid the need for parallel proceedings under the Merger Regulation and Articles 81 and/or 82 of the EC Treaty. While no equivalent provision is made for ancillary restrictions under the merger provisions of the Fair Trading Act, the combined operation of that Act and Schedule 1 to the Competition Act 1998 will have a similar effect. Thus, if restrictions are ancillary to a merger, they will not fall to be considered under the Competition Act.

THE DIRECTOR GENERAL'S APPROACH

B3 The Director General's approach to ancillary restrictions follows the European Commission's Notice regarding restrictions ancillary to concentrations.¹

¹ OJ C203, 14.8.90, p5.

DEFINITION OF ANCILLARY RESTRICTIONS

B4 Schedule 1 of the Competition Act provides that a restriction must be **directly related and necessary** to the implementation of the merger if it is to benefit from the exclusion

B5 In order to be directly related, the restriction must be connected with the merger, but ancillary or subordinate to its main object. The main object of a merger agreement may be for one company to buy a particular manufacturing operation from another, for example. The added obligation of supplying certain raw materials to enable the manufacturing operation to continue is directly related to the merger agreement, but subordinate to it. Any contractual arrangements which go to the heart of the merger, such as the setting up of a



holding company to facilitate joint control by two independent companies of a new joint venture company, are not classed as subordinate. Such arrangements are part of the merger agreement itself and will form part of the assessment of the merger under the Fair Trading Act.

B6 A restriction is not automatically deemed directly related to the merger merely because it is agreed at the same time as the merger or is expressed to be so related. If there is little or no connection with the merger, such a restriction will not be ancillary.

B7 In addition to deciding whether a restriction is to be considered to be directly related, it must also be established whether it is necessary to the implementation of the merger. This is likely to be the case where, for example, in the absence of the restriction, the merger would not go ahead, might have less chance of succeeding if it did, or would proceed only at considerable extra cost or over a considerably longer period. In determining the necessity of the restriction, account will also be taken of whether its duration and geographical scope are proportionate to the overall requirements of the merger. The Director General will consider all of these factors in the context of each case.

EXAMPLES OF ANCILLARY RESTRICTIONS

B8 Although the answer to the question whether a restriction satisfies the requirements of the Schedule 1 exclusion depends on the circumstances of the case, it is possible, drawing on the European Commission's notice, to set out some general points on how commonly arising restrictions – non-competition clauses, licences of industrial property and know-how, and purchase and supply agreements – will be handled.

Non-competition clauses

B9 Non-competition clauses often arise in the context of the acquisition by one undertaking of all or part of another undertaking. Such clauses, if properly limited, are generally accepted as essential if the purchaser is to receive the full benefit of any goodwill and/or know-how acquired with any tangible assets. The terms of the clause must not, however, exceed what is necessary to attain that objective. The Director General will consider the duration of the clause, its geographical coverage, and the products affected. In general terms, a five year period¹ will normally be acceptable where both goodwill and know-how have been acquired, and a period of two years where only goodwill is involved. Longer periods may be acceptable depending on individual circumstances. Any restriction must relate only to the goods and services of the acquired business and to the area in which the goods and services were established under the previous owner.

¹ Currently subject to review and consultation by the European Commission.



Licences of industrial property and know-how

B10 Where an undertaking acquires all or part of another undertaking, the transaction often includes the transfer of rights to industrial or commercial property or know-how. In some instances, the seller may need to retain ownership of such rights to exploit them in the remaining parts of his business. In such cases the purchaser will normally be granted access to the rights under licensing arrangements.

B11 In this context, restrictions in exclusive or simple licences of patents, trademarks, know-how and similar rights may be accepted as necessary to the implementation of the merger and, therefore, covered by the definition of ancillary restrictions in Schedule 1. The licences may be limited in terms of their field of use to the activities of the business acquired and may be granted for the entire duration of the patents, trade-marks or similar rights, or the normal economic life of any know-how.

B12 If the licences contain restrictions not within any of the above categories, they are likely to fall outside the definition of an ancillary restriction and, therefore, will not be covered by the Schedule 1 exclusion.

Purchase and supply agreements


B13 Purchase and supply agreements may be acceptable where an acquired business was formerly part of an integrated group of companies and relied on another company in the group for raw materials, or where it represented a guaranteed outlet for the company's products. In such circumstances purchase and supply agreements between the new and former owners may be considered ancillary for a transitional period so that the businesses concerned can adapt to their new circumstances. Exclusivity will not, however, be acceptable save in exceptional circumstances.

Other types of restriction

B14 Restrictions other than in one of the above three categories may be considered ancillary. There may be other types of restriction that are directly related and necessary to the implementation of a merger and which may, therefore, be covered by the Schedule 1 exclusion, depending on the circumstances of the particular case.

ESTABLISHING WHETHER RESTRICTIONS ARE ANCILLARY

B15 Issues relating to ancillary restrictions will be dealt with by the OFT's Mergers Branch in conjunction with the assessment of the merger to which the restrictions relate. If parties to a merger require a view as to whether restrictions are ancillary for the purposes of the Schedule 1 exclusion, they should so indicate when making a merger submission. To enable the request to be considered, the following information must be provided:

- 
- details of each restriction which is considered to be ancillary and a copy of the relevant agreement(s);
 - an explanation of why each restriction is directly related and necessary to the implementation of the merger; and
 - an explanation of why each restriction may be subject to the prohibition in Chapter 1 of the Competition Act if it is not considered to be ancillary to the merger.

B16 The OFT may seek the views of third parties on the ancillary elements of the merger. If parties seeking Confidential Guidance from Ministers through the Mergers Branch as to the likelihood of a merger situation being referred to the Competition Commission also seek a view as to whether any particular provisions may amount to ancillary restrictions, any view expressed on the latter will be only the view of the Mergers Branch and will not form part of the Confidential Guidance.

B17 On the basis of the information provided, the parties will be advised in writing whether the restrictions are considered to be ancillary and covered by the Schedule 1 exclusion. This applies even where the merger is found not to qualify for investigation under the Fair Trading Act because it does not meet the share of supply or assets test (see paragraph 2.2). As far as possible, this assessment will be carried out within the Mergers Branch's timetable for considering the merger.

B18 If some or all of the restrictions are not considered to be ancillary, the parties will need to consider whether the relevant restriction infringes the Chapter I prohibition and whether notification for guidance or a decision is appropriate. In so doing, they will need to bear in mind that an agreement will be caught by the prohibition only where it has an appreciable effect on competition within the United Kingdom (see the Competition Act guideline *The Chapter I Prohibition*).

B19 It may be the case that a restriction is considered not to be ancillary because, for example, its duration is excessive. In such cases it will be possible to discuss with the Mergers Branch what would be acceptable.

INVOLVEMENT OF SECTOR REGULATORS

B20 The regulators for gas and electricity, water, telecommunications and railways have concurrent powers under the Competition Act but no jurisdiction under the merger provisions of the Fair Trading Act, although they are routinely invited to comment on a merger that affects their particular sector. Where the OFT is considering restrictions ancillary to such a merger, the relevant regulator will be consulted in relation to the ancillary elements. In general, any case where restrictions are not considered to be ancillary and fall to be examined under the Competition Act and relate to the industry sector of a regulator will be dealt with by that regulator (see the Competition Act guideline *Concurrent Application to Regulated Industries*).

CONTACT ADDRESSES AND PUBLICATIONS

CONTACT ADDRESSES

For further information about the application of competition law to mergers in the United Kingdom (apart from newspaper mergers), and to obtain copies of the Merger Notice form or common notification form, contact:

The Mergers Branch, Office of Fair Trading,
Fleetbank House, 2-6 Salisbury Square,
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Fax: 020 7211 8916.

OFT switchboard: 020 7211 8000.

For further information about newspaper mergers, contact:

The Competition Policy Directorate,
Department of Trade and Industry,
1-19 Victoria Street, London SW1H 0ET.

Tel: 020 7215 60356781/6772,

Fax: 020 7215 6565.

DTI switchboard: 020 7215 5000.

To obtain copies of the European Communities Form CO (incorporated in Implementing Regulation 3384/94), contact:

The Merger Task Force,
Commission of the European Communities,
Rue de la Loi 200
B1049 Brussels, Belgium.

Tel: (+3 22) 295 9770. Fax: (+3 22) 296 4301

PUBLICATIONS

Copies of the Fair Trading Act 1973, and other Acts of Parliament and statutory orders made under them, the Competition Commission booklet *The Role of the Commission* and reports of individual merger investigations by the Competition Commission can be purchased from Stationery Office bookshops or, by post, from:

The Stationery Office Publications Centre,
PO Box 276, London SW8 5DT.

Telephone orders: 020 7873 9090.

General enquiries: 020 7873 0011.

The OFT publications referred to in this booklet can be obtained, free of charge, from the following address:

Office of Fair Trading, PO Box 366,
Hayes UB3 1XB.

Tel: 0870 60 60 321.

A list of OFT publications dealing with competition policy issues is on the inside back cover.

**OFFICE OF FAIR TRADING PUBLICATIONS DEALING WITH
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- OFT 401 The Chapter I prohibition
- OFT 402 The Chapter II prohibition
- OFT 403 Market definition
- OFT 404 Powers of investigation
- OFT 405 Concurrent application to regulated industries
- OFT 406 Transitional arrangements
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- OFT 408 Trade associations, professions and self-regulating bodies
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- OFT 416 Exclusion for mergers and ancillary restrictions
- OFT 417 Application to the telecommunication sector

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- OFT 423 Director General of Fair Trading's guidance as to the appropriate amount of a penalty
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MINI GUIDES

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