



**Mergers between businesses in the UK are regulated by the Enterprise Act 2002, which, in given circumstances, allows the UK competition authorities to investigate their effects on the UK market.**

In the first instance, a merger qualifying for investigation may be investigated by the Office of Fair Trading (OFT). The OFT decides whether or not a merger should be referred to the Competition Commission (CC) for further investigation. The OFT must refer any merger which it believes has resulted, or may be expected to result, in a substantial lessening of competition (SLC) in a UK market.

When a merger is referred to the CC, it will conduct a more detailed investigation than the OFT to determine whether the merger has resulted or may be expected to result in an SLC.

Mergers which raise issues of public interest may be dealt with differently. The Secretary of State may intervene by giving notice to the OFT that he believes that it is, or may be the case, that public interest considerations are relevant. In such cases, the Secretary of State decides whether to clear the merger or to refer it to the CC. At the present time, national security and media mergers are the only relevant public interest considerations.

### **Mergers qualifying for investigation**

A merger only qualifies for investigation by the UK competition authorities where it is a 'relevant merger' and where it satisfies either the 'turnover' or 'share of supply' test.

A 'relevant merger' situation arises when two or more enterprises 'cease to be distinct'. That is, where two or more business activities of any kind are brought under common control. Control means 'material control' and is not limited to voting control and may arise with a stake as low as 10%. Increases in the level of control may also be caught.

A relevant merger will qualify for investigation only if:

- the turnover in the UK of the enterprise over which control is being acquired exceeds £70 million; or
- when the merger itself creates or enhances a 25% share of supply (or purchases) of a particular type of goods or services in the UK (or in a substantial part of it).

### **Notification and filing fees**

Businesses in the UK are not obliged to notify a merger to the competition authorities. In practice, however, it is usual to do so in the interest of legal certainty.

The merger may be notified to the OFT either informally, or by way of Merger Notice - an optional statutory pre-notification procedure. Parties to a planned merger may also seek informal advice from the OFT as to whether a particular transaction is likely to be referred to the CC for in-depth investigation.

Subject to certain exceptions, mergers that qualify for reference to the CC are subject to a fee. Where a Merger Notice is made, the fee is payable immediately. In other cases, including informal submissions, a fee is payable either when the OFT refers the merger to the CC or when it publishes its decision not to make a reference. The level of the fee varies depending on the type and size of the merger concerned and from 1 October 2009 may range from £30,000 to £90,000. Small and medium companies (as defined in the Companies Act 2006) are exempt from payment of merger fees.

## Legal test

In short, an SLC occurs where a merger weakens rivalry to such an extent that customers are harmed.

As mentioned above, the OFT decides whether or not a merger should be referred to the CC and in so doing must refer any merger which it believes has resulted, or may be expected to result, in an SLC in a UK market. For the CC to reach an adverse decision in relation to a merger it must either have resulted in an SLC or be expected to do so.

Both the OFT and CC have published detailed guidance on how they intend to apply the SLC test.

## Procedure and timetable

In the first instance, a merger qualifying for investigation will be investigated by the OFT, which reports its findings and decides whether the merger should be referred to the CC for further investigation. In certain cases, the OFT may decide that any adverse effects on competition caused by the merger can be remedied relatively easily and it may, in such cases, be prepared to accept undertakings from the parties instead of making a reference to the CC.

The OFT has 30 working days to investigate mergers notified by way of a Merger Notice and works to a non-binding timetable of 40 days when investigating mergers notified by informal means. Where no notification by the parties is made to the OFT it has four months from completion of the merger or material facts coming to its attention (if later) in which to investigate.

If the OFT refers a merger to the CC the parties are prevented from acquiring each other's shares for the time the CC takes to conclude its investigation. In cases where the merger has already been completed, the parties are prevented from taking any action to further integrate the businesses concerned, without the CC's consent.

Once a merger has been referred to the CC it will undertake a detailed investigation to determine whether the merger results in an SLC and its findings will be published. Where no SLC is found the merger can proceed unhindered. Where the merger is found to result in an SLC, the CC will suggest remedies to counter its anti-competitive effect and may order the parties to take corrective actions.

The CC has a maximum of 24 weeks in which to undertake its investigation, to report its findings and to reach a decision on remedies. In certain exceptional circumstances this period may be extended by up to eight further weeks.

**This note is for guidance only. It cannot be a substitute for professional legal advice.**

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