

Merger Control in the UK: jurisdiction and substantive guidance

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Jurisdiction

EA02 is voluntary regime

- OFT can investigate where firms have >25% of relevant market (howsoever defined) or turnover of firm acquired exceeds £70 million per annum
- OFT can request repatriation of mergers notified to European Commission where the effect is most felt in the UK (or can provide third party views to EC where it considers it has something worthwhile to say)

Jurisdiction 2

- OFT is first stage investigator; where OFT 'has a belief' that mergers result in substantial lessening of competition in any market or markets in the UK, will make a reference to the Competition Commission (or accept 'undertakings in lieu')
- 'Interested' parties can challenge OFT decisions before the Competition Appeals Tribunal – two (non-referral decisions referred to date)
- 'Interested' parties can challenge CC decisions before CAT – one (blocking) decision referred to date

Enterprise Act 2002

- OFT decision taken independently of Ministers – formal arrangements set out in Act
- Change in test from ‘public interest’ to ‘substantial lessening of competition’
- OFT published guidance on practical application of UK merger control
- OFT (non-referral) decisions challenged twice in Competition Appeals Tribunal

Purpose and scope of guidance

- Section 106(1) EA02
- Guidance to companies and their advisers
- “Insight” to improve understanding of economics
- Focus on horizontal (competitive) effects
- Less discussion of vertical/ conglomerate effects
- Other information – ECMR, ancillary restraints...

Substantial lessening of competition

- “What it says on the box!”
- What is the effect of the merger on competition?
- Process begins by defining the relevant market
- Competition – product/ geography
- What is the proper “counterfactual”?

Market Definition (made simple)

- Market is defined by considering customer and competitor behaviour
- If prices rose 5-10%, would customers switch to buying competing products? If not, why not? If so, what would they buy?
- Would (could) competitors produce (more of) this product in response to this price rise? If not, why not? What are the costs of switching?

(Not so simple) Market Definition

- Bidding markets can be more complex to define
- Public procurement/ large investment – infrequent purchases means the market is less easy to observe
- Evidence focused on (a) who bid last time and (b) who will bid next time
- Bidding costs can be high and deter bidding!

Horizontal assessment

- What is the relevant frame of reference?
- Estimate market concentration to indicate potential concerns
- How does the merger affect competition – rivalry?
- Does the merger reduce/ remove any competitive constraints?

Anti-competitive effects

Non-coordinated (unilateral) effects

Is the merged entity able to raise prices without losing significant sales? Will other competitors follow suit?

Coordinated effects

Can firms align their behaviour? Are there sustainable incentives to coordinate behaviour?

Vertical assessment

- Market foreclosure more likely if there is market power at one (or more) point(s) in the supply chain
- Has the merged firm the ability to foreclose?
- Has the merged firm incentives to foreclose?
- What competitive constraints prevent foreclosure?

Conglomerate mergers

- Portfolio power – does it really exist?
- Can the merged entity bundle or tie its (complementary) products?
- Can rivals offer the same bundle?
- Do customers prefer “one-stop” shopping (which may be more efficient?)

Competitive constraints

Entry and expansion

Higher prices will stimulate entry: how easy is it for new firms to enter within two years? What evidence is there of entry (exit)? Are costs sunk?

Countervailing buyer power

Can customers constrain higher prices by switching (or threatening to switch)?

Efficiencies

Increased rivalry

Considered within the SLC assessment; must be (a) demonstrable, (b) merger specific, and (c) likely to be passed on to customers.

Customer benefits

Considered after the SLC assessment against the OFT's duty to refer.

Substantive guidance

Theory in guidelines is not enough

- Need evidence, properly assessed and weighed

Impact of IBA Health

- Focus on the evidence (and commercial documents provided by firms)
- Need to evidence “OFT belief”
- Reference test is lower; more references since IBA