

## **Merger Control in the United Kingdom**



**Further information**

If you would like further information on any aspect of this client note, please contact a person mentioned below or the person with whom you usually deal.

**Contact**

Susan Bright  
T +44 20 7296 2263  
susan.bright@hoganlovells.com

Janet McDavid  
T +1 202 637 8780  
janet.mcdavid@hoganlovells.com

Peter Citron  
T +32 2 62 69 236  
peter.citron@hoganlovells.com

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

6 September 2010

---

# Contents

<b>INTRODUCTION</b>	<b>1</b>
<b>THE SCOPE OF THE UK MERGER CONTROL REGIME</b>	<b>2</b>
<b>THE REVIEW PROCESS</b>	<b>3</b>
<b>MERGER NOTIFICATIONS</b>	<b>5</b>
<b>MERGERS GIVING RISE TO PUBLIC INTEREST CONSIDERATIONS</b>	<b>6</b>
<b>EXCLUSION OF MERGERS FROM THE COMPETITION ACT</b>	<b>7</b>

## Introduction

*The UK merger control regime gives the UK competition authorities wide ranging powers to examine the impact on competition within the UK of a large number of corporate transactions. The regime is set out in the Enterprise Act 2002.*

Mergers that meet the relevant jurisdictional tests are subject to an initial review by the Office of Fair Trading ("OFT"), following which they may be referred by the OFT to the Competition Commission ("CC") for an in-depth review. The main focus of the authorities is whether the merger leads to a substantial lessening of competition. If a merger is considered to have anti-competitive effects, the CC has the power to impose remedies on the parties. Such remedies might include a requirement to divest all or part of the acquired business.

The parties to a transaction may notify their merger to the OFT for clearance prior to completion but there is no duty to do so. The OFT will consider whether to clear notified transactions or whether to refer them to the CC. However, it will also examine non-notified transactions on its own initiative, possibly following complaints by third parties.

Although the UK merger control regime has largely been de-politicised, the Secretary of State for Business, Innovation and Skills (the "Secretary of State") (a government minister, formerly known as the Secretary of State for Business, Enterprise and Regulatory Reform and previously to that Secretary of State for Trade and Industry) retains the power to intervene in certain mergers that give rise to defined public interest considerations. The only public interest consideration specified when the Enterprise Act came into force was national security. However, the Communications Act amended the Enterprise Act by specifying further public interest considerations relating to media mergers including newspapers and broadcasting activities and, following the 2008 international banking crisis, the Government introduced the stability of the UK financial system as a new public interest consideration in order to allow it to clear Lloyds TSB's acquisition of HBOS despite the potential effects on competition.

This note does not deal with water industry mergers which are subject to separate procedures involving mandatory pre-clearance.

The European Commission has exclusive jurisdiction over many large mergers that have a "Community dimension" under the EU Merger Regulation. Whether a transaction has a Community dimension is assessed by reference to the principal parties' turnover both on a worldwide basis and within the EU. If a merger falls within the scope of the EU Merger Regulation, it will not generally be subject to review by the UK competition authorities. The EU Merger Regulation regime falls outside the scope of this note, but details are set out in a separate Hogan Lovells client note: *EU Merger Control*.

## The scope of the UK merger control regime

*The UK authorities only have jurisdiction to examine a particular transaction if it meets three criteria. First, the transaction must be considered to be a “merger” for the purposes of the UK merger control regime. In practice, many corporate acquisitions and joint ventures will be treated as mergers. Secondly, the transaction must meet either the £70 million UK turnover test or the 25% share of supply test. Thirdly, the transaction must generally have taken place within the past four months.*

The UK merger control regime applies to “relevant merger situations”. A relevant merger situation will exist if:

- there are two or more enterprises that cease to be distinct
- either:
  - the turnover in the UK of the enterprise being taken over exceeds £70 million (the “turnover test”) or
  - the parties are both engaged in supplying or consuming goods or services of the same description and supply or consume between them at least 25% of those goods or services in the UK or a substantial part of it (the “share of supply test”).

**Enterprises ceasing to be distinct:** Enterprises cease to be distinct when they are brought under common ownership or control. Enterprises are treated as coming under common control where:

- the purchaser becomes able materially to influence the policy of the target or
- the purchaser becomes able to control the policy of the target (referred to as “de facto” control) or
- the purchaser acquires a controlling interest in the target (referred to as “de jure” control).

The acquisition of any of these levels of control, including an increase from one level to a higher level, amounts to two enterprises ceasing to be distinct. If either the turnover test or the share of supply test is met, the transaction will be subject to the UK merger control regime.

**The turnover test:** The turnover test will be met if the turnover of the target company from sales to customers located in the UK exceeds £70 million.

Specific guidelines set out how turnover is to be calculated for these purposes. The test is based on the turnover (net of intra-group sales, sales rebates, VAT and similar taxes) of the enterprise in its most recently completed financial year. Acquisitions or disposals that have occurred since that time may also be taken into account. Special rules apply to the calculation of turnover of insurance companies and other financial institutions.

**The share of supply test:** In applying the share of supply test, the authorities will usually look at particular goods or services, rather than properly defined economic markets. They retain a large discretion as to the way in which they define the goods or services in question.

It is important to note that the share of supply test is only met if a share of supply of 25% or more is created or enhanced. In other words, both parties must supply or consume the same product or service. It is not sufficient that a company that has a share of supply of 25% or more acquires a company (or is

acquired by a company) which has no sales of the same description.

For the purposes of applying the turnover and share of supply tests, the UK competition authorities may treat a series of separate transactions between the same parties over a period of up to two years as taking place on the date of the last transaction.

**Special public interest cases:** In limited circumstances, a transaction may be examined on public interest grounds by the UK competition authorities even where it does not meet either the turnover test or the share of supply test. These transactions are dealt with separately below.

**Time limits:** The OFT normally has up to four months to investigate a transaction and decide whether or not to refer it to the CC after it becomes unconditional or is made public. In practice the OFT will usually complete its investigation in less time and will be under a statutory obligation to do so if the parties notify a prospective transaction using a merger notice (see further below).

## The review process

*There is a two stage approach to the review of mergers under the UK merger control regime. The first stage is carried out by the OFT, which carries out an initial investigation and decides whether a reference to the CC is required. If a transaction is referred to it, the CC will then carry out a second stage, a more in-depth investigation, following which it will decide what remedies (if any) will be required to overcome any competition concerns arising from the transaction.*

The bodies principally involved in the administration of merger control in the UK are the OFT and the CC. The Secretary of State also retains a role in respect of mergers that give rise to defined public interest issues, although the minister otherwise has no involvement in the review process. In addition, the Office of Communications ("OFCOM") has a role in respect of the public interest aspects of media mergers. Public interest mergers are dealt with separately below.

**Substantial lessening of competition:** The substantive test under the UK merger control regime is whether the transaction has resulted in a substantial lessening of competition. If the transaction has yet to take place, the test is whether it would result in such a lessening of competition if it was to take place. The OFT and the CC have published detailed guidance on how they will apply this test in practice.

**Customer benefits:** As well as looking at the effect that a merger has on competition, the UK authorities may also take into account any customer benefits arising out of the transaction. Relevant customer benefits are benefits to the customers of the parties in the form of lower prices, higher quality, greater choice or greater innovation.

The existence of customer benefits is relevant at two stages in the review process. First, the OFT may decide not to make a reference to the CC where it expects customer benefits to outweigh a substantial lessening of competition. Secondly, if a reference is made to the CC and the CC concludes that a merger will result in a substantial lessening of competition, it can take customer benefits into account in deciding on appropriate remedies.

**Preliminary review by the OFT:** The OFT will carry out the preliminary investigation into mergers that are notified to it. The OFT also keeps itself informed of corporate activity within the UK and regularly receives complaints from third parties about particular transactions. This leads the OFT to examine a large number of mergers that have not been notified to it.

The OFT's primary task is to consider whether there is a relevant merger situation and, assuming there is, whether the merger has resulted (or may be expected to result) in a substantial lessening of competition. The OFT will do this by examining any notification made to it by the parties and by requesting information of the parties and third parties.

If the OFT concludes that there is a relevant merger situation and it believes that it may be the case that competition will be substantially lessened as a result of the merger, it must generally refer the merger to the CC. The key exceptions to the obligation to make a reference are where the OFT decides:

- the market concerned is not sufficiently important to justify making a reference or
- the transaction gives rise to relevant customer benefits that outweigh the adverse effects of the transaction or

- an anticipated merger is not sufficiently likely to proceed or
- to accept undertakings from the parties in lieu of making a reference. The undertakings must remedy or prevent any adverse effects that the OFT has identified. In most cases, the OFT will have a strong preference for structural undertakings (for example, an undertaking to divest part of the target business) over behavioural undertakings (that is, undertakings relating to the manner in which the combined businesses will be operated in the future). If necessary, the OFT can make an order requiring the parties to comply with an undertaking that they have given.

The OFT is prohibited from referring a transaction if the time limit for doing so has expired. As explained below, if the parties have notified a transaction by way of a merger notice, the OFT is generally prevented from referring after the expiry of the relevant statutory period. In other cases, the OFT is generally unable to refer a transaction more than four months after the later of the transaction having been completed or material facts about the transaction having been made public or given to the OFT. These time limits can, however, be extended if the parties are negotiating undertakings in lieu of a reference with the OFT. While it is considering whether or not to refer a completed merger to the CC (but not an anticipated merger), the OFT has the power to accept undertakings from the parties (or impose an order) to prevent them taking any action that would prejudice the outcome of a possible reference, for example an undertaking not to integrate the two businesses.

**Failing firm defence:** In December 2008, the OFT published a note restating its position regarding the conditions required to satisfy the failing firm defence against a finding of an expected substantial lessening of competition. The OFT requires sufficiently compelling evidence that (i) the exit from the market of the target business in the near future is inevitable absent the merger and (ii) there is no realistic and substantially less anti-competitive alternative to the merger. The failing firm defence has so far only been accepted in a small amount of cases.

### Implications of a reference to the Competition

**Commission:** If the OFT refers a transaction to the CC:

- the parties to a completed merger will be automatically prohibited from carrying out any further integration without the CC's consent
- the parties to an anticipated merger will be automatically prohibited from acquiring any further interest in shares in one another without the CC's consent.

The CC may also accept undertakings from one or more of the parties that they will not take any action that might prejudice the final outcome of the merger reference. This might include an undertaking not to integrate the parties'

businesses. The CC also has the power to make an order preventing the parties taking any such action.

**Investigation by the CC:** Once a transaction has been referred to it, the CC will generally have 24 weeks (with the possibility of one extension of no more than 8 weeks) in which to examine the transaction and publish its report. This period may be extended in limited circumstances (including where the parties have failed to comply with a formal request for information or documents).

The CC now has significant powers to assist it in carrying out its investigation. For example, it can require any person (not just the parties) to:

- attend meetings to give evidence to the CC
- provide the CC with specified documents or information.

The CC has the power to impose fines on persons who, without reasonable excuse, fail to comply with a formal request for evidence, documents or information. There is no obligation to provide privileged information to the CC.

A person commits a criminal offence if he intentionally alters, suppresses or destroys documents that he has been required to produce, or if he supplies false or misleading information to the CC, the OFT or the Secretary of State. Conviction may lead to a fine and/or imprisonment for up to two years.

**The Competition Commission's report:** Following its investigation, the CC must publish a report on its findings. In particular, the report must set out any action that the CC considers necessary to overcome any substantial lessening of competition that it identifies.

If the CC identifies any competition concerns in its report, it may prohibit the merger altogether. Alternatively, it may allow the merger to proceed subject to certain structural or behavioural undertakings being given. If satisfactory undertakings cannot be obtained, the CC has the power to make a statutory order imposing appropriate remedies. When deciding on appropriate remedies, the CC may take into account any relevant customer benefits arising from the transaction.

If the CC concludes that the transaction does not lead to a substantial lessening of competition, it will allow the transaction to proceed unconditionally.

The OFT maintains a public register of all final orders and undertakings (including undertakings in lieu of a reference) made or accepted by the OFT, the CC or the Secretary of State.

**Appeals procedure:** Decisions of the CC (and of the OFT and the Secretary of State) can be appealed to the CAT on judicial review grounds. Any person aggrieved by the decision in question can make an appeal. Any appeal has to be brought within 4 weeks of the publication of the disputed

decision (or the applicant being notified of the decision if earlier).

Having heard an appeal, the CAT can either dismiss the appeal or quash the whole or part of the challenged decision (in which case the CAT may refer the matter back to the original decision maker for it to make a fresh decision).

## Merger notifications

*There is no mandatory notification requirement under the UK merger control regime. Parties are permitted to complete their transactions without seeking or obtaining prior clearance from the UK competition authorities. However, if a relevant merger situation is completed without prior clearance being given, the purchaser takes the risk that the UK competition authorities might subsequently object to the transaction, in which case he might ultimately be required to dispose of some or all of the acquired business, or indeed, some or all of his existing business.*

For this reason, a purchaser will often want to notify a transaction to the OFT and make completion of the transaction conditional on obtaining UK merger control clearance.

To obtain prior clearance of a merger, the parties must notify it to the OFT. They can do this either by submitting a completed "merger notice" or by using the OFT's non-statutory notification process. There is also scope for parties to ask for informal advice from the OFT on an anticipated transaction in certain limited circumstances. Each of these is described in further detail below.

**Merger notice:** The parties may choose to notify a transaction to the OFT by way of a merger notice. Doing so triggers a statutory procedure under which the OFT is required to decide whether to refer the transaction to the CC within a deadline of 20 working days (extendable by 10 working days). The merger notice procedure is only available for prospective mergers that have been made public.

Although the OFT's deadline for deciding on a merger is subject to extension in certain circumstances (for example, if the parties have failed to respond to a request for information), parties who submit a merger notice effectively impose a tight (and inflexible) deadline for the OFT to satisfy itself that the transaction should not be referred to the CC.

For this reason, the merger notice procedure is mainly used for mergers that do not give rise to substantive competition concerns.

The OFT will usually notify the parties of its decision before the statutory deadline has expired. In most cases, the expiry of the deadline will prevent the OFT from referring a transaction to the CC.

To benefit from a clearance decision, the parties must not complete the transaction before the OFT's decision. They must thereafter complete the transaction within six months.

**Non-statutory notification:** The OFT's practice is to accept requests for clearance from parties who choose not to use a merger notice form. For a large number of mergers this is the preferred procedure. In such cases, although there is no statutory deadline within which the OFT has to make its decision, it endeavours to do so within 40 working days and may do so more quickly in straightforward cases.

The OFT is keen to encourage parties to a proposed transaction to have initial discussions with the OFT before submitting any notification.

**Informal advice:** In certain limited circumstances the OFT may be willing to give the parties a confidential, non-binding, indication of its likely approach to key competition issues in relation to a proposed transaction which is not yet in the public domain. This process, known as 'informal advice' may be available where the parties can demonstrate a good faith intention to proceed with the transaction and the transaction

gives rise to a genuine competition issue which raises the possibility of a reference to the CC.

**Fast track references:** Exceptionally, on the request of the parties, the OFT may be prepared to accelerate its treatment of cases so that a referral to the CC is made as soon as possible. A fast track case could be referred to the CC within as little as 10 working days. This procedure may be of benefit to parties who accept that a transaction raises such significant prima facie competition issues that reference to the CC is inevitable.

**Fees:** Fees are payable in respect of merger clearances. The fees vary between £30,000 and £90,000 depending on the turnover of the enterprise taken over. If a transaction is notified to the OFT using a merger notice, the fee is payable when the notification is submitted. Otherwise, the fee is payable when the OFT announces that the merger has been cleared or referred to the CC.

Note that a fee may be payable in respect of relevant merger situations that have not been notified to the OFT but which the OFT has examined of its own volition.



## Mergers giving rise to public interest considerations

*Although the decisions on most mergers are taken by the OFT and the CC, the Secretary of State continues to make decisions in respect of mergers that give rise to defined public interest considerations.*

One of the key changes from the previous merger control regime is the formal removal of the Secretary of State from the review process. However, the Secretary of State retains the power to intervene in mergers that give rise to defined public interest considerations.

**Public interest cases:** The Secretary of State may intervene in cases that he considers give rise to public interest considerations. The only public interest consideration specified when the Enterprise Act came into force was national security. However, the Communications Act introduced further public interest considerations relating to media mergers:

- newspaper mergers:
  - the accurate presentation of news
  - freedom of expression
  - to the extent reasonable and practical, sufficient plurality of views in newspapers in each market for newspapers in the UK or a part of the UK
- broadcasting and cross-media mergers:
  - sufficient plurality of persons with control of media enterprises serving any audience
  - a wide range of high quality broadcasting that appeals to a wide variety of tastes and interests
  - a genuine commitment to OFCOM's standards code.

Since 2008 the stability of the UK financial system is an additional public interest consideration.

The public interest provisions allow the Secretary of State to issue an "intervention order" requiring the OFT to investigate a merger and report to him on it. In the case of a media merger, OFCOM will provide advice to the Secretary of State on the public interest aspects of the merger (and the OFT's report will not address public interest issues). Following receipt of the OFT's report (and OFCOM's advice in respect of a media merger), the Secretary of State may refer the merger to the CC for an in-depth review. Although the Secretary of State must accept the OFT's advice on jurisdiction and competition issues, in exceptional circumstances the Secretary of State can decide to disregard the OFT's recommendation that there should be a reference because of competition concerns if he considers that the competition issues are outweighed by the public interest considerations in favour of allowing the transaction to proceed without a reference. The CC will report to the Secretary of State on the public interest and competition aspects of the transaction.

Following his review of the CC's report, the Secretary of State will make a final finding in respect of the transaction. He may ultimately accept undertakings or impose an order on the parties to address any adverse effects that he has identified.

The Secretary of State must follow the CC's conclusions on any competition issues arising from the transaction.

**Special public interest cases:** There are also powers for the Secretary of State to refer mergers for investigation by the CC on special public interest grounds. Unlike the public interest cases referred to above, these powers also apply to mergers that do not meet the turnover or share of supply jurisdictional tests.

A transaction is only subject to the special public interest provisions:

- where one of the parties is a contractor of the UK Government who may hold confidential information or material relating to UK defence matters, and at least one of the merging enterprises is carried on in the UK or by or under the control of a UK incorporated company or
- at least one-quarter of all newspapers or broadcasting of a particular description supplied in the UK, or in a substantial part of the UK, is supplied by one of the parties

## Exclusion of mergers from the Competition Act

*The Competition Act 1998 contains an exclusion which applies to most mergers. Unfortunately, there is no “bright line” distinction between the control of mergers under the Enterprise Act and the regulation of anti-competitive agreements and conduct under the Competition Act.*

The Competition Act 1998 introduced two new prohibitions from 1 March 2000: the “Chapter I” prohibition on anti-competitive agreements and the “Chapter II” prohibition on abuse of a dominant position. Mergers are, in principle, excluded from both the Chapter I and II prohibitions. The exclusion covers transactions that:

- amount to “concentrations with a Community dimension” under the EU Merger Regulation, which are consequently subject to the exclusive jurisdiction of the European Commission or
- result in two or more enterprises “ceasing to be distinct” under the Enterprise Act (whether or not they amount to a qualifying merger).

**Ancillary restrictions:** Any provisions that are “directly related and necessary to the implementation of the merger provisions” are also excluded from the Chapter I prohibition. This language mirrors the wording in the EU Merger Regulation. There is an equivalent exclusion for conduct under Chapter II.

The OFT has published guidelines on mergers and ancillary restrictions which clarify the type of provisions that will be regarded as sufficiently closely linked to the merger to benefit from the exclusion. The OFT follows the **European Commission’s Notice on restrictions directly related and necessary to concentrations** which discusses the extent to which non-competition clauses affecting the vendor (but not the purchaser of a business), restrictions in IP licences and restrictions in purchase and supply agreements can be regarded as ancillary to the merger.

Where a restriction or conduct is not sufficiently closely and necessarily linked to the transaction to be ancillary, the possibility of the Chapter I or II prohibitions being applied remains.

**Clawback by the OFT:** The jurisdictional distinction between the merger control regime and the regime under the Competition Act is, however, clouded by the OFT’s power to claw back certain merger and joint venture agreements and look at them under the Chapter I prohibition.

This clawback power does not apply to:

- agreements that are subject to the EU Merger Regulation or
- protected agreements (see below).

The clawback power cannot be used if the transaction is a protected agreement that is one which:

- involves the acquisition of outright legal control or
- has been examined under the Enterprise Act and a decision made by the OFT not to refer to the CC or

- has been referred to the CC and found to give rise to a qualifying merger.

However, where a transaction only involves the acquisition of de facto control or “the ability materially to influence” (that is, less than outright control) and there has been no formal merger control review by the OFT, leading to a formal decision, there is the possibility of the OFT applying the Chapter I prohibition at some later date. In practice, this possibility is likely to be of most concern in joint venture transactions.

The power can only be exercised if the OFT considers that the agreement will infringe the Chapter I prohibition and will be unlikely to qualify as an exempt agreement. No sanction can be imposed under Chapter I for the period prior to the clawback being made.

It is necessary to review all documentation relating to a merger or joint venture to establish whether there are any restrictions that are unlikely to be regarded as ancillary restrictions but which may infringe the Chapter I prohibition.

Whether a transaction is subject to the EU Merger Regulation or the UK merger regime will be critical because in the former case the OFT cannot claw back the agreement for examination under Chapter I.

Parties to agreements such as joint ventures, which involve the acquisition of a degree of control less than outright control may wish to seek formal merger clearance, even where the risk of a reference to the CC is low, as a means of avoiding the risk of subsequent clawback and examination under Chapter I.

## www.hoganlovells.com

---

Hogan Lovells has offices in:

Abu Dhabi	Caracas	Hong Kong	Munich	Shanghai
Alicante	Colorado Springs	Houston	New York	Silicon Valley
Amsterdam	Denver	Jeddah*	Northern Virginia	Singapore
Baltimore	Dubai	London	Paris	Tokyo
Beijing	Dusseldorf	Los Angeles	Philadelphia	Ulaanbaatar*
Berlin	Frankfurt	Madrid	Prague	Warsaw
Boulder	Hamburg	Miami	Riyadh*	Washington DC
Brussels	Hanoi	Milan	Rome	Zagreb*
Budapest*	Ho Chi Minh City	Moscow	San Francisco	

"Hogan Lovells" or the "firm" refers to the international legal practice comprising Hogan Lovells International LLP, Hogan Lovells US LLP, Hogan Lovells Worldwide Group (a Swiss Verein), and their affiliated businesses, each of which is a separate legal entity. Hogan Lovells International LLP is a limited liability partnership registered in England and Wales with registered number OC323639. Registered office and principal place of business: Atlantic House, Holborn Viaduct, London EC1A 2FG. Hogan Lovells US LLP is a limited liability partnership registered in the District of Columbia. The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP, or an employee or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing. Rankings and quotes from legal directories and other sources may refer to the former firms of Hogan & Hartson LLP and Lovells LLP. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. New York State Notice: Attorney Advertising.

© Hogan Lovells 2010. All rights reserved.BRULIB01/155847.1

\*Associated offices