

## OFT and CC publish joint merger assessment guidelines

On 16 September 2010, following a public consultation in 2009 and a call for further comments on a revised draft in April/May 2010, the OFT and the Competition Commission (“CC”) published the final version of their new joint merger assessment guidelines.

The guidelines, which are now in force, are designed to assist companies and their advisers by providing greater clarity on how the competitive impact of mergers is assessed by the OFT and the CC. The new guidelines revise and expand previous guidance contained in several publications issued separately by the OFT and CC, drawing on their joint experience of enforcing the Enterprise Act merger regime since it came into force in 2003.

Key revisions compared to previous guidance include the following:

- a shift in emphasis towards a more effects-based approach and away from a detailed assessment of market definition. For example, the guidelines now provide more detailed guidance on horizontal unilateral and coordinated effects:
  - Unilateral effects are more likely where customers have little choice of alternative supplier, for example due to the level of switching costs or network effects. In relation to undifferentiated products, the guidelines explain that unilateral effects resulting from the merger are more likely where the merger eliminates a significant competitive force in the market. With differentiated products, unilateral effects may arise due to the fact that a price increase may become less costly when the products of the two firms are brought under common ownership.
  - In relation to coordinated effects, the authorities will examine whether there is evidence that the firms in the market were co-ordinating pre-merger and will examine whether the merger
    - makes co-ordination more stable or effective, given the characteristics of the market (such as the ability to reach and monitor coordination, the extent to which the market is concentrated, whether there are barriers to entry and whether customers have buyer power). If there is no evidence of pre-merger co-ordination, the OFT and CC will examine whether the merger makes it more likely that the firms in the market will start to co-ordinate.
- explanation of the concept of ‘theories of harm’ and a commitment to use such theories when assessing whether or not a substantial lessening of competition (“SLC”) has been created by the merger. The guidelines explain that a merger gives rise to an SLC when it has a significant effect on rivalry over time. Therefore, evidence on likely adverse effects will be a key factor in the assessment.
- more clarity and detail in relation to the counterfactual, barriers to entry and efficiencies:
  - The counterfactual position needs to be reasonably foreseeable, and not speculative. However, the OFT and CC will also consider the effects of the merger in the context of events or circumstances that are not sufficiently certain to be included in the counterfactual.
  - Barriers to entry that potential and actual competitors may encounter are taken into account to assess how the merger may affect the likelihood of new entry or expansion. The authorities will consider not only the scale of any barriers to entry and/or expansion but also whether firms have the ability and incentive to enter the market. The guidelines note that the fear of entry might deter the merged firm from exploiting any market power resulting from the merger and in such cases the OFT and CC need not expect that entry would actually take place.

- Efficiencies arising from the merger may enhance rivalry, with the result that the merger does not give rise to an SLC. The guidelines set out a number of examples, such as cost savings and network effects. However, the guidelines point out that the efficiencies must be timely, likely and sufficient to prevent an SLC from arising and must be a direct consequence of the merger, judged relative to what would happen without it.

The guidelines will apply with immediate effect. In carrying out their functions the OFT and the CC will have regard to the guidelines, although each merger will be assessed on the basis of the particular circumstances of the case. The OFT and CC have confirmed that they intend to publish future clarification, as appropriate, on specific aspects of merger analysis as these arise. In particular, there is presently a joint OFT/CC project on the design of surveys for use in merger analysis and a joint commentary on retail mergers.

***Gillian Sproul***

Partner  
T +44 20 3130 3313

***Kiran Desai***

Partner  
T +32 2 551 5959

***Jens Peter Schmidt***

Partner  
T +32 2 502 5517

***Nathalie Jalabert-Doury***

Partner  
T +33 1 53 53 43 43

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