

NEW LAWS MAKE CARTELS ILLEGAL

The new Enterprise Act received Royal Assent in November 2002 and will come into effect in stages in spring/summer 2003, introducing a new regulatory regime for competition law. A recently published OFT guide sets out the main competition provisions of the Act.

Mergers

There are two significant differences in how potential mergers will be assessed in future:

- Generally speaking, decisions on whether to allow mergers, and on what conditions, will no longer be made by the Secretary of State for trade and industry. Instead, the Competition Commission (CC) will make most decisions.
- With certain exceptions, mergers will be assessed purely against a competition test, not a "public interest" test. Mergers will typically be refused – or have conditions imposed on them – if there's a "substantial lessening" of competition, says the guidance notes.

The OFT is (or rather, will be) required to investigate mergers which meet either (a) the turnover test, ie, the turnover of the target company exceeds £70m (approximately equal to €100m), or (b) the "share of supply" test, by which the merging organisations would together supply an increased proportion amounting to at least 25% of goods or services, either in the UK as a whole or a "substantial part". (The OFT will not investigate if a merger triggers assessment by the European Commission.) Note that there need not be an outright purchase of one of the parties: "material

influence" may be enough to justify an investigation.

If the OFT believes that a merger may result in "a substantial lessening of competition", then it must either refer the merger to the Competition Commission or secure undertakings from the businesses concerned. (However, the OFT need not refer a merger if the market is "of insufficient importance" or if there are "obvious benefits to customers" outweighing the effect on competition.) The OFT also has the power to make orders to prevent the businesses from integrating while the merger is being examined.

If a merger is referred to the CC by the OFT, it will undertake a full examination as to whether the merger may result in a substantial lessening of competition. The CC will have the power to prevent the merger or impose conditions.

There's a number of special cases: mergers involving defence-related companies, newspapers or water companies may be examined regardless of the other tests referred to above. The Secretary of State can also step in if there are public interest issues (but national security is, at present, the only permitted public interest issue that can be grounds for intervention).

The OFT is required to complete its investigation within four months (though in practice it expects to do so much more quickly). In urgent cases, merging parties may send a "merger notice" to the OFT which will then have 20 working days to investigate (extensions are allowable). The Competition Commission will normally have 24 weeks to examine any mergers referred to it and to make decisions

on conditions to be imposed (if necessary); detailed negotiations on the final terms will follow.

Businesses may appeal OFT, CC or Secretary of State decisions to the new Competition Appeals Tribunal which will review the "lawfulness and fairness" of the decision and may require the relevant body to reconsider.

Markets

The OFT may refer entire markets for examination by the Competition Commission if the structure of the market or the conduct of suppliers or customers is harming competition. Regulators for the telecoms, gas, electricity, water, rail and aviation industries may also refer markets to the CC for investigation.

To make a reference under this heading, there must be reasonable grounds for suspecting that there is some aspect of a market that prevents, restricts or distorts competition in the supply or acquisition of goods or services. As with mergers, the OFT may accept certain undertakings from market participants to avoid a referral to the CC. It may impose orders on, or accept undertakings from, market participants. However, the CC must complete its investigation within two years. The Secretary of State may intervene in cases of national security.

In an interview in the *Financial Times* (18 November 2002), CC chairman Derek Morris indicated that consistently high levels of profitability in a market would be an indication that it may not be adequately competitive.

Cartels

The Enterprise Act introduces a new criminal offence for *individuals* who dishonestly engage in cartel agreements. This is over and above the Competition Act 1998 provisions that impose civil sanctions on businesses that enter

into anti-competitive agreements. The prohibited cartel activities are:

- price-fixing
- limitation of supply or production
- market-sharing
- bid-rigging

The maximum penalty is five years imprisonment and/or an unlimited fine. The OFT will have the power:

- to compel people to answer questions, provide information and hand over documents
- to enter premises under warrant and seize relevant documents
- of surveillance under the Regulation of Investigatory Powers Act 2000.

There are potential jail sentences and fines for anyone who fails to provide information, provides false information or destroys documents.

The cartel rules only apply to so-called horizontal agreements, ie, those between businesses at the same level in the supply chain; vertical agreements do not fall foul of these rules, nor do agreements which are made outside the UK and no attempt is made to implement them here.

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Useful links

- Information on the competition aspects of the Enterprise Act is available from the OFT at www.oft.gov.uk. Look in particular for some of the consultation papers issued when the legislation was still a bill. Also see www.dti.gov.uk/ccp

- The insolvency aspects of the act are addressed at www.insolvency.gov.uk/reform.htm.