



The Lloyds-TSB and HBOS Merger: Competition Issues

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On 18 September 2008, the banking groups Lloyds TSB and HBOS announced that they had reached agreement on the terms of an acquisition by Lloyds of HBOS. Normally a merger of this size and scale would be referred by the Office of Fair Trading (OFT), to the Competition Commission (CC) for a full inquiry into the effects on competition before it could be cleared. In this case, the Secretary of State for Business and Enterprise said that the public interest of ensuring the stability of the UK financial system outweighed competition concerns raised by the OFT and as such, the merger did not need to be referred.

This note examines how and why this happened: how competition law was changed to bring a new public interest ground of ensuring the “stability of the UK financial system” and gives details of the different roles of the competition authorities and the Secretary of State in the process of clearing the merger. It also sets out concerns expressed by the OFT, the press and consumer groups about possible negative effects of the merger for consumers, particularly in regard to current accounts, mortgages and SME banking services. It goes on to summarise some of the powers of consumer groups, the OFT and the CC to investigate further if the competition concerns are realised in practice.

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1 Background

Halifax Bank of Scotland (HBOS) is a financial services group that provides a range of banking, insurance, financial services and finance-related activities in the UK and abroad. Its UK turnover in 2007 was £4.25 billion.¹

On 16 September 2008 the HBOS share price fell by 40% following two days of “market turbulence caused by the collapse of Lehman Brothers.”² An article in the *Sunday Times*, explained some of the background:

¹ Office of Fair Trading, [Anticipated acquisition by Lloyds TSB plc of HBOS plc Report to the Secretary of State for Business Enterprise and Regulatory Reform](#), 24 October 2008, p10

² “Global meltdown continues” [guardian.co.uk](#), 16 September 2008

HBOS was still solvent, and still on course to make profits this year. In spite of fears about its dependence on short-term funding, it was finding finance from other banks. The financial crisis, however, was getting worse.

In light of what had happened to Lehman and Merrill it was unlikely the plunge in HBOS's share price would be halted by any assurances about the bank's strength. And there was a risk that retail customers would catch the scent of panic and start pulling out funds.

[...] Fear was HBOS's greatest enemy. The bank holds about £258 billion in customer deposits, according to research by Citigroup, while it has lent its customers £456 billion. That leaves a funding gap of almost £200 billion that has to be raised from the financial markets.

With the credit crisis reaching new heights over last weekend, the fear was that HBOS would struggle to find more than £155 billion of funding needed in the next 12 months.

Asian and Middle Eastern banks were becoming cautious and pulling funding lines from all western institutions. The lack of liquidity was making it more expensive for banks to borrow money in the wholesale markets. And the cost of buying insurance against banks going bust - and being unable to pay their loans - was soaring through the roof. HBOS was soon leading the pack of international banks that the credit markets were fretting about.

The uncertainty in the credit markets prompted the stock markets to follow. Besides the funding fears, HBOS has a bigger exposure than anyone else to Britain's rapidly slowing housing market and a 30% share of the buy-to-let mortgage market, which has been of growing concern to credit-rating agencies.

The bank's shares had already fallen about 80% over 12 months. By the time the London market closed on Monday, HBOS shares were a further 18% down.³

On 17 September it was reported by the *Independent* that "Britain's largest mortgage bank cannot and will not be allowed to fail" due to having "some £258bn in retail deposits".⁴ Speculation about a possible merger began.

The *Financial Times* reported that on the night of 17 September 2008, the Government had "brokered a deal to save the country's largest mortgage lender from a crisis of confidence" and said that Lloyds had been the only lender willing to take on HBOS without a large government guarantee.⁵

Lloyds TSB is a UK based financial services group providing a wide range of banking and financial services, primarily in the UK, to personal and corporate customers. UK turnover in 2007 was £18 billion.⁶

On 18 September 2008 Lloyds TSB and HBOS announced that they had agreed the terms of an acquisition:

Lloyds TSB and HBOS announce that they have reached agreement on the terms of a recommended acquisition by Lloyds TSB of HBOS. Under the terms of the Acquisition,

³ "Rescue led to the creation of a super bank; Crash of 2008" *The Sunday Times* 21 September 2008

⁴ "With HBOS under renewed attack, forced takeover may be the solution" *The Independent*, 17 September 2008

⁵ "Lloyds TSB seals £12bn HBOS rescue" *FT.com*, 18 September 2008

⁶ Lloyds TSB website, [company overview](#) [on 5 December 2008]

HBOS Shareholders will receive 0.83 Lloyds TSB Shares for every 1 HBOS Share. The offer values HBOS at £12.2 billion (based on Lloyds TSB's closing price on 17 September 2008 of 279.75 pence). Existing Lloyds TSB Shareholders will own approximately 56 per cent. of the issued share capital of Lloyds TSB as enlarged by the Acquisition and existing HBOS Shareholders approximately 44 per cent.⁷

Following the announcement of the Government's £37 billion of capital investment support⁸ for banks on 13 October 2008,⁹ and the subsequent fall in the HBOS share price,¹⁰ the terms of the acquisition were subsequently revised on 13 October:

The revised terms agreed with HBOS are that HBOS shareholders will receive 0.605 Lloyds TSB shares for every 1 HBOS share. At the same time, an offer will also be made to HM Treasury to exchange HM Treasury preference shares in HBOS for equivalent preference shares in Lloyds TSB.¹¹

On 24 October the Office of Fair Trading (OFT) published a report on the proposed merger of the banks for the Secretary of State for Business and Enterprise. The report summarised the rationale for the merger:

Lloyds submits that the transaction was negotiated and announced over a very short period of time. The deal was negotiated and agreed in the context of the sharp worsening of the global financial markets in mid-September, when HBOS's position in terms of share price and funding became increasingly vulnerable.

Lloyds submits that the merger will allow it to build the UK's leading financial services company with leading market positions and a platform to create a highly efficient group.

For HBOS, the transaction was seen as a means to minimise the risks of further erosion to its position and the continuation of its activities in view of its otherwise uncertain future.¹²

More details about the predicted market share of the merged bank for particular banking products are given as an appendix to this note. At the time, the *Financial Times* estimated that the merged bank will have a 28 per cent share of the UK mortgage market (a £255.8bn mortgage loan book), and a 15.4 per cent share of the savings market.¹³ The *Sunday Times* also commented on the size of bank that would be created by the merger:

The new bank is huge. Its brands include Scottish Widows, Cheltenham & Gloucester, Clerical Medical, Birmingham Midshires and Insight Investments, as well as Lloyds TSB, Halifax and Bank of Scotland.

⁷ Joint HBOS/Lloyds TSB announcement, [Recommended acquisition of HBOS plc by Lloyds TSB Group plc](#), 18 September 2008

⁸ Library Research Paper 08/77 on the [Banking Bill](#) (published on 10 October 2008) gives further background to the financial crisis in general and details other responses to aid the stability of the banking sector, including the Government's recapitalisation scheme.

⁹ Treasury statement [on financial support to the banking industry](#), 13 October 2008

¹⁰ "Lloyds TSB revises terms of HBOS takeover" [Daily Telegraph](#), 13 October 2008

¹¹ Lloyds TSB press release, [Lloyds TSB announces revised terms for the acquisition of HBOS and the raising of £5.5 billion of new capital](#), 13 October 2008

¹² Office of Fair Trading, [Anticipated acquisition by Lloyds TSB plc of HBOS plc Report to the Secretary of State for Business Enterprise and Regulatory Reform](#), 24 October 2008, p10

¹³ "HBOS deal raises fears over choice" *Financial Times*, 20 September 2008

It will be the biggest bank in current accounts, the biggest in mortgages, the biggest in savings, the biggest in personal loans and cards, the biggest in household insurance, and the biggest in personal loans and credit cards.

Although its reach will be smaller in corporate and commercial banking, it will dominate these areas in Scotland, where it will have a 50% market share. Quite simply, it is huge.¹⁴

2 How did competition law allow for the proposed merger to take place?

2.1 What normally happens in a merger situation

Under part 3 of the *Enterprise Act 2002*, most mergers above a certain size and which meet one of two thresholds (detailed below) are referred to the Competition Commission (CC) by the OFT for a full inquiry into the competition effects. The mergers may be either completed (that is, may have happened already) or anticipated. The OFT must normally make a reference to the CC if it believes that there is or may be a relevant merger situation that has resulted or may be expected to result in a “substantial lessening of competition”. A relevant merger situation is created if one of the following thresholds is met:

- the value of the UK turnover of the enterprise acquired (or to be acquired) exceeds £70 million (the turnover test); or
- the share of supply of goods or services in the UK or in a substantial part of the UK held (or to be held) by the merged enterprise is at least 25 per cent (the share of supply test).

If at least two-thirds of the group [of CC members appointed to consider the merger] decide both questions in the affirmative, there is an anti-competitive outcome from the merger and the CC must go on to consider remedies.¹⁵

In line with this, the Lloyds TSB/ HBOS merger was referred to the OFT, because HBOS's UK turnover is above £70 million.¹⁶ Given that the first threshold was met, the second threshold does not appear to have been considered. The OFT made a report to the Secretary of State for Business and Enterprise on 24 October 2008.¹⁷ Section 44(6) of the *2002 Act* sets out that the OFT report can include advice and recommendations on the public interest consideration mentioned in the intervention notice and, as per section 44(3)(b), it can pass on representations about this that it has received from interested parties.

The OFT found that, in relation to the proposed merger that “arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation”.¹⁸ It further found that the creation of that merger situation may be expected to result in a “substantial lessening of competition within a market or markets in the United Kingdom for goods or services, including personal current accounts, banking services to small and medium enterprises (SMEs), and mortgages”.¹⁹ It found that as such, further

¹⁴ “Rescue led to the creation of a super bank; Crash of 2008” *The Sunday Times* 21 September 2008

¹⁵ Competition Commission, [CC4 – General Advice and Information](#), March 2006, p11

¹⁶ Office of Fair Trading, [Anticipated acquisition by Lloyds TSB plc of HBOS plc Report to the Secretary of State for Business Enterprise and Regulatory Reform](#), 24 October 2008, p11

¹⁷ Office of Fair Trading, [Anticipated acquisition by Lloyds TSB plc of HBOS plc Report to the Secretary of State for Business Enterprise and Regulatory Reform](#), 24 October 2008

¹⁸ *Ibid*, p4

¹⁹ *Ibid*

inquiry by the Competition Commission was warranted.²⁰ The full OFT report, [the Anticipated acquisition by Lloyds TSB plc of HBOS Plc](#) is available online. The final OFT report's conclusions were summarised in a press notice:

- there is a realistic prospect that the anticipated merger will result in a substantial lessening of competition in relation to personal current accounts (PCAs), banking services for small and medium sized enterprises (SMEs) and mortgages
- the OFT's concerns on PCAs and mortgages are at the national (Great Britain) level, while its concerns on SME banking services are focused on Scotland. In addition, the OFT cannot exclude competition concerns arising at the local level in relation to PCAs and SME banking services,
- no further competition concerns are considered to arise in relation to the other identified overlaps between the parties in retail banking (savings, wealth management, personal loans, credit cards and pensions), corporate banking (banking services to large corporations, asset finance/fleet car hire) and insurance (PPI, life, general), and
- in the absence of any offer of remedies from the parties, it would not be appropriate to deal with the competition concerns arising from the merger by way of undertakings in lieu of reference to the Competition Commission.²¹

2.2 How the competition law was amended for this merger

Under the provisions of section 42 of the *Enterprise Act 2002* (hereafter, the “2002 Act”), the Secretary of State for Business and Enterprise can issue an intervention notice in mergers in particular circumstances.²² These are where the Secretary of State perceives the relevance of one or more “public interest considerations” to the merger in question.²³ “Public interest considerations” are set out in section 58 of the *2002 Act* and explicitly cover the “interests of national security” and certain media mergers. Section 58(3) and (4) however, allows for further categories to be added by the Secretary of State:

- (3) The Secretary of State may by order modify this section for the purpose of specifying in this section a new consideration or removing or amending any consideration which is for the time being specified in this section.
- (4) An order under this section may, in particular—
 - (a) provide for a consideration to be specified in this section for a particular purpose or purposes or for all purposes;
 - (b) apply in relation to cases under consideration by the OFT, OFCOM, the Commission or the Secretary of State before the making of the order as well as cases under consideration on or after the making of the order.

Section 42(3) of the *2002 Act* confirms that the public interest categories do not need to be specifically listed at the time of the intervention by the Secretary of State:

²⁰ Ibid

²¹ Office of Fair Trading, [OFT report to the Secretary of State on Lloyds/HBOS merger](#), No. ME/3862/08, 31 October 2008

²² Department for Business, Enterprise and Regulatory Reform, [Intervention Notice given in pursuance of section 42 Enterprise Act 2002](#), 18 September 2008

²³ *Encyclopaedia of Competition Law*, Sweet and Maxwell, Part 1, Mergers: United Kingdom Control, 1-943, September 2007

(3) For the purposes of this Part a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in section 58 or is not so specified but, in the opinion of the Secretary of State, ought to be so specified.

Under section 42(7) of the 2002 Act, where new considerations are added, they must be “finalised” by Parliamentary approval as soon as “practicable”:

(7) Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised, he shall, as soon as practicable, take such action as is within his power to ensure that it is finalised.

Subsection 8 defines what is meant by “finalised”:

(8) For the purposes of this Part a public interest consideration is finalised if—

(a) it is specified in section 58 otherwise than by virtue of an order under subsection (3) of that section; or

(b) it is specified in that section by virtue of an order under subsection (3) of that section and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with subsection (7) of section 124 and within the period mentioned in that subsection.

Section 124(7) sets out that a new public interest consideration category must be approved by Parliament within 28 days of being made by a resolution of each House.

The intervention notice in the proposed merger of HBOS and Lloyds TSB was issued to the OFT on 18 September 2008. In it, the new public interest consideration to be approved by affirmative resolution was detailed as “the stability of the UK financial system”.²⁴

The resolution, [*The Enterprise Act 2002 \(Specification of Additional Section 58 Consideration\) Order 2008*](#) (SI 2008/2645) was duly laid before Parliament on 7 October 2008. It was debated and approved in the House of Lords on 16 October 2008,²⁵ considered by the Second Delegated Legislation Committee in the House of Commons on 20 October 2008,²⁶ and then approved by the Commons by deferred division on 22 October 2008.²⁷ It came into force on 24 October 2008. The Order inserts a new paragraph 20B into Schedule 8 of the 2002 Act. Paragraph 20B gives the Secretary of State the power to use orders to specify the new public interest consideration of “the interest of maintaining the stability of the UK financial system.”²⁸ By the power in this Order, a section 58(2D) was then subsequently inserted into the *Enterprise Act 2002* which provides for this new public interest consideration.

²⁴ Department for Business, Enterprise and Regulatory Reform, [*Intervention Notice given in pursuance of section 42 Enterprise Act 2002*](#), 18 September 2008

²⁵ HL Deb 16 Oct 2008 [c849-864](#)

²⁶ Second Delegated Legislation Committee, *The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008*, 20 October 2008

²⁷ HC Deb 22 Oct 2008 [c428](#)

²⁸ [*The Enterprise Act 2002 \(Specification of Additional Section 58 Consideration\) Order 2008*](#) (SI 2008/2645), explanatory notes

2.3 The role of the competition authorities and the Secretary of State for Business and Enterprise

Under section 45 of the *2002 Act*, after receiving the OFT's report the Secretary of State, if involved because of public interest, must then decide whether to make a reference to the Competition Commission for further investigation of the merger. It is also however, "open to the Secretary of State to clear a merger at this stage on public interest grounds and this notwithstanding advice from the Office of Fair Trading to the effect that it will likely result in a Substantial Lessening of Competition [SLC]."²⁹

On 31 October 2008 Lord Mandelson, the Secretary of State for Business and Enterprise, published his decision not to refer to the Competition Commission the merger between Lloyds TSB Group plc and HBOS plc under Section 45 of the *2002 Act*. The decision explains that despite the concerns about a substantial lessening of competition raised by the OFT, these were outweighed by "significant" benefits to the public interest to ensuring the stability of the UK financial system:

The Secretary of State has decided that the new public interest consideration now provided in Section 58(2D) of the Act, the stability of the UK financial system, is relevant to this case.

12. Taking account only of the substantial lessening of competition and the relevant public interest consideration, the Secretary of State believes that the creation of the relevant merger situation is not expected to operate against the public interest. The OFT has decided that it is or may be the case that the creation of the relevant merger situation may be expected to result in an anti-competitive outcome, in particular in view of its potential to result in a substantial lessening of competition in the market for personal current accounts, for banking services to small and medium sized enterprises (SMEs) in Scotland, and in the supply of mortgages. However, having had regard in particular to the submissions made to the OFT by the tripartite authorities (HM Treasury, the Financial Services Authority and the Bank of England), the Secretary of State considers that the merger will result in significant benefits to the public interest as it relates to ensuring the stability of the UK financial system and that these benefits outweigh the potential for the merger to result in the anti-competitive outcomes identified by the OFT. As a result of this decision, no reference will be made to the CC.³⁰

2.4 Shareholder agreement

To go ahead, the merger needed to be approved by shareholders of both banks. Lloyds TSB shareholders voted on the matter on 19 November 2008 and were reported to have voted 95.98% in favour of the takeover.³¹ Similarly, HBOS shareholders voted 12 December 2008, with over 95% reported to have been in favour of the merger.³² A statement on the HBOS website states that the acquisition is therefore likely to become effective on 16 January 2009.³³

²⁹ *Encyclopaedia of Competition Law*, Sweet and Maxwell, Part 1, Mergers: United Kingdom Control, 1-944, September 2007

³⁰ [Decision by Lord Mandelson, the Secretary of State for Business, not to refer to the Competition Commission the merger between Lloyds TSB Group plc and HBOS plc under Section 45 of the Enterprise Act 2002](#), 31 October 2008.

³¹ BBC news, [Lloyds TSB approves HBOS takeover](#), 19 November 2008

³² *HBOS shareholders support takeover by Lloyds TSB*, "[FTadvisor.com](#)", 12 December 2008

³³ HBOS plc, [Recommended acquisition of HBOS plc by Lloyds TSB Group plc Results of HBOS Shareholder Meetings](#), 12 December 2008

2.5 Other competition issues

EU Competition law

A report from the *Financial Times* suggested that government action described above is “unlikely to face problems from European Commission competition authorities, because the British focus of both banks meant Brussels had no jurisdiction.”³⁴ Indeed, in general the *European Community Merger Regulation (Council Regulation No. 139/2004)* only applies if the annual turnover of the combined businesses exceeds specified thresholds in terms of global and European sales. This is summarised on the BERR website:

Broadly speaking mergers involving enterprises with an aggregate world-wide turnover of more than Euro 5bn (around £3.5bn) and where the aggregate Community-wide turnover of each of at least two of the enterprises concerned is more than Euro 250m (around £200m) will be investigated by the European Commission taking into account the views of Member States.

However, mergers where more than two-thirds of the Community-wide turnover of each enterprise concerned is in the same Member State, are not caught by the EC Merger Regulation.³⁵

Appeal to the Competition Appeal Tribunal by the “Merger Action Group”

An article in the *Scotsman* from 19 November 2008 reported that “senior banking figures” have drafted a letter to the Competition Appeal Tribunal (CAT) to lodge an appeal against the decision taken by Lord Mandelson not to refer the merger to the Competition Commission. Indeed an application, under section 120 of the *Enterprise Act 2002* was published by the CAT on 1 December 2008.³⁶ The application was made by the “merger action group” described on the application as “an unincorporated association of persons and businesses established in Scotland”.³⁷

Under section 120 of the *Enterprise Act 2002*, any person “aggrieved” by a decision of the OFT, the Secretary of State or the Competition Commission in relation to a relevant merger situation or a special merger situation, may apply to the Competition Appeal Tribunal for a review of that decision.³⁸ Section 120(4)-(6) of the 2002 Act details what the CAT can do in this situation:

- (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
- (5) The Competition Appeal Tribunal may—
 - (a) dismiss the application or quash the whole or part of the decision to which it relates; and
 - (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal.

³⁴ “Takeover rules set to be bypassed” *Financial Times*, 18 September 2008, p6

³⁵ Department for Business, Enterprise and Regulatory Reform website, [European Community Merger Regulation \(ECMR\)](#) [on 5 December 2008]

³⁶ Competition Appeal Tribunal, [Summary Of Application Under Section 120 Of The Enterprise Act 2002, Case No: 1107/4/10/08](#) 1 December 2008

³⁷ Competition Appeal Tribunal, [Summary Of Application Under Section 120 Of The Enterprise Act 2002, Case No: 1107/4/10/08](#) 1 December 2008

³⁸ Competition Appeal Tribunal website, [About the Tribunal](#) [on 5 December 2008]

(6) An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal under this section to the appropriate court.

The grounds for review are summarised in the application. They are essentially that 1.) Lord Mandelson failed to keep an open mind in arriving at his decision to put aside OFT concerns about the takeover – that his discretion was fettered by statements made by the Prime Minister and members of the Cabinet when the merger was first announced that competition rules would be waived; and 2.) that the grounds for making the decision at the time the decision was taken “were not reasonable” given that the Government subsequently provided other means to ensure financial stability after the merger was announced, but before Lord Mandelson’s decision was taken.³⁹:

1. On 18 September 2008, the Secretary of State announced that he would clear the Merger on public interest grounds relating to the stability of the UK banking sector, despite the fact that at the time of the announcement no such consideration was a recognised ground of public interest under the Act. In so doing, he unlawfully fettered his discretion and this was reinforced by other public statements on or around 18 September 2008 by senior members of government, most notably the Prime Minister and Chancellor of the Exchequer. Had the Secretary of State kept an open mind, he could have taken the Decision in light of the facts as they stood on 31 October 2008, instead of how they seemed on 18 September 2008, during which period dramatic changes in the approach of governments to the world banking system occurred with a move to direct recapitalisation by injections of public capital. The fetter on the Secretary of State’s discretion led to a disproportionate market outcome in that the Merger was cleared without remedies even though it raised serious competition problems.

2. The Secretary of State, having granted himself the discretion not to refer the Merger to the CC, then proceeded to exercise his discretion unreasonably and irrationally instead of having regard to the circumstances prevailing in late October and being guided by the analysis of the OFT.

3. By preferring the conclusions of the Financial Services Authority (“FSA”) to those of the OFT in relation to the ability of HBOS to provide effective competition as a standalone entity, the Secretary of State has taken account of an irrelevant consideration or has failed to respect section 46(2) of the Act.

4. By relying on the FSA’s inaccurate views as to the provisions regarding aid granted by Member States under the Treaty Establishing the European Community, the Secretary of State has taken into account an irrelevant consideration.

5. The Decision violates the principle of proportionality by not inquiring into the adverse competitive impact of the Merger.⁴⁰

Following requests from the Secretary of State for Business and Enterprise and Lloyds TSB and HBOS banks it was agreed that the case would be decided with “exceptional expedition” in order for the result to be known before the HBOS shareholders meeting on 12 December 2008.⁴¹ The hearing was held on 8 and 9 December 2008 and the judgment handed down on 10 December.

³⁹ “Last-ditch legal bid could still thwart takeover, bankers hope” *The Scotsman*, 19 November 2008

⁴⁰ Competition Appeal Tribunal, [Summary Of Application Under Section 120 Of The Enterprise Act 2002, Case No: 1107/4/10/08](#) 1 December 2008

⁴¹ Competition Appeal Tribunal Judgement Summary, [1107/4/10/08 Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform \[2008\] CAT 36](#), 10 December 2008

The full judgement and a summary are available on the CAT website.⁴² The CAT dismissed the Merger Action Group's claim because it could not be shown that the Secretary of State's discretion had been fettered:

The Tribunal dismissed the Applicants' contention that the Decision was vitiated on the basis that the Secretary of State was fettered by the statements of the Prime Minister and Chancellor of Exchequer. While it was clear that the government was in favour of the merger and had committed itself to making legislative changes to enable the Secretary of State to intervene in respect of the Merger, the Applicants had not shown that the Secretary of State had failed to exercise his discretion independently. The Tribunal held that the unchallenged evidence of the Secretary of State clearly showed that he had met officials to discuss the advice and submissions received and, having satisfied himself that all the evidence and options had been fully examined, he reached the Decision. The Tribunal also referred to a statement by the Secretary of State to the House of Lords [[HL Deb 16 October 2008 c849-864](#)]. The statement indicated that the Secretary of State would ensure that he received all available advice and views before reaching the Decision and that he had an "open mind" to both competition and public interest considerations.⁴³

The CAT also dismissed the other grounds for review put forward by the Merger Action Group:

As we mentioned earlier the Applicants' Notice of Application included a contention that in considering the continuing need for the Merger the Secretary of State closed his eyes to, or at least paid little attention to the availability of the government bailout package for banks, which in the Applicants' submission presented a real alternative to the need for the Merger in order to save HBOS. [...]

90. The main problem with this argument is that it is simply unsustainable in the light of the evidence. The question of the need for the Merger to go ahead in the light of the government rescue package was discussed by the Secretary of State during the House of Lords debate to which we have referred. In the run up to the Decision the Secretary of State received representations from several sources dealing with this issue, as referred to in the witness statement of Mr Saunders (see paragraphs 26-34 thereof). In particular the Tripartite Authorities urged the view that the recapitalisation programme was complementary and not alternative to the Merger and, accordingly, that the Merger was necessary notwithstanding the recapitalisation programme. Further, this very issue was specifically considered in the briefing note dated 28 October 2008 prepared for the Secretary of State by his officials. This note is referred to by Mr Saunders at paragraphs 24ff of his statement.

91. The evidence is therefore all one way and there is simply no basis for the allegation that the issue of the continuing need for the Merger was not properly considered by the decision-maker. Nor, for the reasons already given, is there any substance in the claim that the Secretary of State wrongly took account of the views of the FSA on the competitive strength of HBOS in preference to the position of the OFT, or failed to have regard to the Commission's latest position on state aid. It follows that these points, whether under a label of irrationality or failure to take account of relevant considerations or some other label, also fail.

⁴² Competition Appeal Tribunal Judgement Summary, [1107/4/10/08 Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform \[2008\] CAT 36](#), 10 December 2008

⁴³ Competition Appeal Tribunal Judgement, [1107/4/10/08 Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform \[2008\] CAT 36](#), 10 December 2008

92. Finally although the Applicants originally contended that the EC law principle of proportionality was engaged and infringed in respect of the Decision, Mr Forrester abandoned this point in the course of his oral presentation to us, and we therefore say no more about it.⁴⁴

The Merger Action Group sought permission to appeal to the Court of Session. The CAT refused permission:

In any event we reached clear conclusions in relation to the Applicants' case, as set out in the judgment ([2008] CAT 36), and considered that the case was essentially without legal merits on any of the points that were argued. No other compelling reason occurs to us for the matter being taken further. I am afraid the Applicants must persuade the Court of Session if they wish to pursue it. Permission is therefore refused.⁴⁵

If the merger does go ahead, then normal competition rules will apply to the new bank and the OFT would be able to launch a market investigation if it has reason to suspect abuse of a dominant market position.⁴⁶ For further details about what possible actions for if the competition concerns are realised, see section 4.

2.6 Has competition law been applied in this way before?

Adding a new public interest category

Since the *Enterprise Act 2002* came into force, changes have been made to the public interest categories, but only by statute. Specifically, the *Communications Act 2003* added several "media public interest considerations" to the *2002 Act*.

[(2A) The need for—

- (a) accurate presentation of news; and
- (b) free expression of opinion;

in newspapers is specified in this section.

(2B) The need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom is specified in this section.

(2C) The following are specified in this section—

- (a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;
- (b) the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- (c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to

⁴⁴ Competition Appeal Tribunal Judgement, [1107/4/10/08 Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform \[2008\] CAT 36](#), 10 December 2008

⁴⁵ Competition Appeal Tribunal Judgement, [1107/4/10/08 Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform \[2008\] CAT 37](#)

⁴⁶ For further information about market investigations see Office of Fair Trading, [Market Studies: Guidance on the OFT approach](#), November 2004

broadcasting of the standards objectives set out in section 319 of the Communications Act 2003.]

Intervention by the Secretary of State on public interest provisions

Prior to this case, the Secretary of State has only issued one intervention notice under the public interest provisions before:

...[it] arose in the case of the acquisition of BSkyB of 17.9 per cent of the shares of ITV plc. The Secretary of State issued an intervention notice on 26 February 2007. A reference was made to the CC which considered that the transaction would give rise to an SLC; however, it did not consider that the transaction endangered the plurality of the media. The Secretary of State decided in January 2008 that BSkyB should reduce its shareholdings in ITV to below 7.5 per cent.⁴⁷

3 Competition Concerns

3.1 The House of Lords

During the debate on the *Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008* on 16 October (before Lord Mandelson's final decision on the matter was taken) Lord Razzall raised several competition concerns. He asked whether the Government would impose a cap on the percentage of retail deposits that the bank could hold. He also wanted to know whether the Government would require any closures where there was already an HBOS and a Lloyds TSB in the same town and wanted clarification about what would happen to depositor protection once the two banks merged:

It is not as if the banking industry has been noted for its non-competitive business practices. As the consumer organisations have drawn to everyone's attention, over the years the banks have been in serious difficulties over practices such as ATM charging; the mechanics of the clearing system, whereby no one quite knows what happens to their money after it leaves one bank account and before it appears in another; and unfair overdraft charging, on which the banks have often been criticised. The merger is not taking place in what is, *prima facie*, a competitive environment. Two major high street banks—which on some reports will have 30 to 40 per cent of UK current account business—are being put together in a way which would never have been allowed were it not for the current circumstances of the economy.

The noble Lord, Lord Hunt of Wirral, raised a number of the concerns that consumers, consumers' organisations and noble Lords will inevitably have. Due to their increased power with the banks, the Government have the opportunity to insist on rigorous conditions. For example, will they attempt to impose on the merged bank a similar restriction on the proportion of retail deposits that it can have? It is understood that such a requirement was imposed on Northern Rock, so that it could not have more than 1.5 per cent of the aggregate retail deposits in the UK. As a result, the week before last Northern Rock had to close many accounts because of a danger of breaching the 1.5 per cent threshold. Will the Government impose a similar requirement on this bank?

What will the Government do where there is a branch of Lloyds and of HBOS in the same street or the same town? Will closures be required? Will there be a restriction on the number of closures? Theoretically, these banks are competing with each other. What will be the Government's position on closures?

⁴⁷ *Competition Law*, Richard Whish, Sixth Edition, Oxford, 2008, p953

Which? is concerned that the two banks will be allowed to maintain separate banking licences, thereby triggering separate calculations for purposes of deposit protection. If someone has £50,000 deposited with Lloyds and £50,000 with HBOS, will they have £50,000 protection for each deposit following the merger, or will they lose the protection in one of the banks?⁴⁸

Lord Borrie asked whether the new public interest consideration was still needed given the subsequent package of government assistance now available to the banks:

I thought I would start by making the point that during the past three or four weeks, we have seen a tremendous general intervention by the Government through the Treasury in the banking system. I am thinking particularly of the United Kingdom, but we know that similar events have taken place in many other countries as well. We know also that two of the banks to have received financial assistance are Lloyds-TSB and HBOS. Given that, how urgent is this public-interest-consideration intervention into Lloyds-TSB/HBOS now, in order to favour the merger, when it is already going to receive benefits under the so-called bail-out package that has been agreed? Has the level of urgency changed?⁴⁹

Lord Whitty suggested that there should be a consumer panel to represent consumer interests in the merged bank:

Finally, and somewhat cheekily, I suggest that consumer institutions ought to be represented in the newly-merged bank. It would behove the management of the new bank to establish internally a proper and authoritative consumer panel representing both individual and business interests. That would give a lot of reassurance to consumers and to all parts of this House.⁵⁰

In reply, Lord Mandelson was keen to stress that he had not yet received the OFT's final report on the matter and as such, had not yet made a decision about whether the public interest consideration would outweigh any competition issues. He did however, make assurances of "vigilance" in respect of competition issues, but would not comment on whether he would attach any conditions to the merger:

There is no question of putting aside or disregarding competition issues. They will continue to be monitored, and any abuse carefully assessed and acted upon. I emphasise, and do so in particular to my noble friends Lady Kingsmill and Lord Borrie, that all normal powers remain available to the competition authorities to protect consumers now and in the future. I understand the concerns that have been expressed and we will be vigilant. I do not, however, want to anticipate any time limit on that vigilance. Therefore, I do not envisage a one-, a two- or a three-year review following whatever decision I take on the merger in due course. I will not be drawn on conditionality in advance of my decision, but I assure your Lordships that, should a decision be taken for the merger to go ahead, we will not relax our vigilance at any time when it comes to the proper protection of consumers. I am sure that the prospective management of this potentially merged bank will have heard the suggestion of my noble friend Lord Whitty of the creation of a consumer panel.⁵¹

⁴⁸ HL Deb 16 Oct 2008 c854

⁴⁹ HL Deb 16 Oct 2008 c857

⁵⁰ HL Deb 16 Oct 2008 c859

⁵¹ HL Deb 16 Oct 2008 c863-4

3.2 The House of Commons

During the consideration of the *Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008* on 20 October, by the Second Delegated Legislation Committee, Jonathan Djanogly MP asked similar questions to those asked by the Lords, about how the competition aspects of the proposal would be kept under review and whether there would be any conditions attached to the merger:

The consumer group, Which?, has written to me to point out that in creating a super-bank with this merger, the Government must ensure that the consumer does not lose out, as the sector is one in which it believes competitive incentives have already been weakened. Does the Minister agree with this perspective, and would he explain how the Government have reviewed the competition aspects of their proposals and tell us what plans they have for their future review?

Provision is made in the Enterprise Act 2002 for the Secretary of State to take that course of action. While the circumstances and the purpose of the proposals are unusual, their legality cannot be called in to question. Concerns that would usually be raised to force the Secretary of State to clarify the need for such an order are of less immediate concern when viewed in the light of the current problems, but will the Minister explain what conditions the Government will require of these two banks? For example, will they impose restrictions on retail deposits and the closing of branches, which the Minister will appreciate will have a distinct impact on competition in the marketplace?⁵²

Gareth Thomas, Minister of State, (Trade, Investment and Consumer Affairs), replied to these concerns. He stressed that there were a number of bodies who would keep watch of competition aspects of the merger and also that there would be opportunities for a select Committee to scrutinise the final decision of Lord Mandelson:

There are a series of powers and bodies that can investigate whether there has been an abuse of market power and whether action needs to be taken by public authorities.

The hon. Member for Caithness, Sutherland and Easter Ross referred to a number of issues that have been debated in the public domain and have been investigated by bodies such as the Office of Fair Trading. It has considerable powers available to it to investigate market abuses and to insist on action being taken to prevent that abuse being perpetuated. Similarly, there is the Competition Commission, as the hon. Gentleman will be aware. Both Which? and Consumer Focus have indicated that they will watch the merger and its impact on the high street in the coming months. Consumer Focus is particularly important, because it has the power to lodge a super-complaint if it believes there are substantial consumer concerns which can trigger an OFT investigation. Certainly, it will trigger debate and substantial questions.

As for future competition, I believe that we have the regulatory scrutiny that we require available to us. Most people will recognise that the OFT and the Competition Commission have done a good job in challenging previous practices which have been an abuse of competition and therefore unacceptable. On the specifics of the merger, scrutiny to date and the various conditions that might be added, let me clear about the process. If the House, as I hope it will, endorses this statutory instrument, we are simply granting the power to the Secretary of State to allow financial stability to be considered alongside competition questions. A decision on whether to allow the merger has not been made.

⁵² Second Delegated Legislation Committee, Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008, Monday 20 October 2008, c4

The Secretary of State has to receive a report from the OFT, which has been promised for 24 October. He will consider that report and other issues which the OFT might want to provide to him. I cannot therefore speculate about the different types of conditions that could be attached until the Secretary of State has seen the OFT report. There will clearly be opportunities for the Select Committee to scrutinise the decision that the Secretary of State takes in the usual way. I hope that both hon. Gentlemen will understand that I cannot at this stage speculate on what conditions might be made.⁵³

3.3 The OFT

The OFT, in its full report to the Secretary of State, [*the Anticipated acquisition by Lloyds TSB plc of HBOS Plc*](#) compares the possible effects of the merger against a counterfactual – an alternative scenario. Normally the OFT would 'test' the competitive impact of a merger against the pre-merger competition conditions of the time. However, the OFT's report explains that because of the "highly unusual circumstances surrounding this case", in particular the subsequent measures announced by the Government to support the banking system, that testing against pre-merger conditions would not be appropriate.⁵⁴ The OFT, after much deliberation and consideration of the differing opinions of the parties involved as to what the counterfactual should be, decided upon two counterfactual scenarios which run sequentially:

- Government would not have allowed HBOS to fail, and rather would have intervened in the short term with some form of rescue package: the Stage I counterfactual. In these circumstances, the OFT believes it is realistic to consider that HBOS would still be able to exert competitive pressure in the market (although it recognises the possibility that HBOS might, at least in the short term, be a weaker force when compared to the HBOS prior to the current financial crisis).
- In the medium to longer-term, Government would have withdrawn its support, leaving either a fully independent HBOS once more, or an HBOS in the hands of a 'no overlap' purchaser: the Stage II counterfactual. In these circumstances, HBOS would also constitute a significant player in the market place in the medium term.⁵⁵

The OFT assessed the impact of the proposed merger against both the Stage I and Stage II counterfactuals in order to determine whether it may be expected to result in a substantial lessening of competition.

One of the areas the OFT thought there would be a substantial lessening of competition was in the market for personal current accounts (PCAs). The OFT expressed concern that Lloyds would not have enough incentive to compete for new customers, which in turn would cause it focus on making more profit from current customers rather than trying to attract new customers:

In relation to PCAs, the OFT has concerns at the national (Great Britain) and local levels. The merger will remove a firm, HBOS, that was (at least until less than two months ago) a major driver of competition in the market, and strengthen the current market leader, Lloyds. In addition, the merger will significantly increase Lloyds' share of the market. As a consequence of its increased market share, coupled with characteristics of the market such as high levels of customer inertia and a limited

⁵³ Second Delegated Legislation Committee, Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008, Monday 20 October 2008, c6

⁵⁴ Office of Fair Trading, [*Anticipated acquisition by Lloyds TSB plc of HBOS plc Report to the Secretary of State for Business Enterprise and Regulatory Reform*](#), 24 October 2008, p23

⁵⁵ Office of Fair Trading, [*Anticipated acquisition by Lloyds TSB plc of HBOS plc Report to the Secretary of State for Business Enterprise and Regulatory Reform*](#), 24 October 2008, p23-24

degree of price discrimination, it is expected that its incentives to compete for new customers (and those of the other major banks in the market) will be diminished – in essence, the increase in Lloyds' customer base will encourage it to attach more weight to enhancing margins on current customers than to customer acquisition.⁵⁶

And then later in the report, in relation to PCAs:

In summary, the merger will significantly increase Lloyd's share of the market and, as a consequence, it is expected that its incentives to compete (and those of the other major banks in the market) will be diminished. This theory of harm applies under both Stage I and Stage II counterfactuals. In addition, the merger will remove a firm that the OFT considers was, at least until less than two months ago, a major driver of competition in the PCAs market; and will strengthen the current market leader. While more likely against Stage II, the OFT considers that it is realistic also to occur against Stage I. The OFT therefore considers that there is a realistic prospect that the merger will result in a substantial lessening of competition in the PCA market at both the national (GB) and local level.⁵⁷

The OFT also had similar concerns in regard to banking provision for small-to-medium enterprises (SMEs), particularly in Scotland:

In relation to SME banking, the OFT's concerns are focussed on Scotland and are similar to those in relation to PCAs - the increased incentive on Lloyds to enhance its margins on current customers. The OFT also cannot exclude competition concerns arising at a local level across Great Britain.⁵⁸

The mortgage market was also an area of concern for the OFT against the stage II counterfactual:

In relation to mortgages, the OFT considers there is a realistic prospect of an SLC [Substantial Lessening of Competition]. However, the OFT's concerns are more marginal. Evidence suggests that the mortgages market may be tighter than it was prior to the 'credit crunch' so that barriers to entry may be higher and customer switching is more difficult. Under these market conditions, the combination of the largest and third largest mortgage providers is significant enough to cause concern. [...]

12. The parties submitted that the transaction will lead to significant cost savings [REDACTED] of Lloyds and HBOS, while creating the largest and most effective retail franchise in the UK, enabling better access and service for customers. While plausible, the OFT did not receive sufficiently compelling evidence to conclude confidently at the Phase I stage of analysis that the claimed efficiencies and consequent customer pass-through would occur, and would occur such as to offset the competition concerns identified in relation to PCAs, SME banking and mortgages.⁵⁹

However, not all retail banking product markets caused concerns:

No further competition concerns were considered to arise in relation to the other identified overlaps between the parties in retail banking (savings, wealth management,

⁵⁶ Ibid, p5-6

⁵⁷ Ibid, p42-43

⁵⁸ Ibid, p6

⁵⁹ Office of Fair Trading, [Anticipated acquisition by Lloyds TSB plc of HBOS plc Report to the Secretary of State for Business Enterprise and Regulatory Reform](#), 24 October 2008, p6

personal loans, credit cards and pensions), corporate banking (banking services to large corporations, asset finance/fleet car hire) and insurance (PPI, life, general).⁶⁰

3.4 Press and consumer group comment

Some reports in the press have raised concerns that the merger would lead to a lessening of competition and consumer choice in the banking sector.⁶¹ In particular, the *Financial Times* speculated that the merger could eventually lead to higher rates for consumers and a decrease in consumer lending:

The main threat to competition lies ahead once the crisis has ended. A bank with a 30 per cent share of current accounts, and a similar presence in the UK mortgage market, will be able to exert huge pricing power. In a concentrated industry that will be dominated by about five clearing banks, the combined Lloyds-HBOS is all too likely to try to push existing customers on to higher mortgage rates rather than offer new services and lower prices.

Nor is the merger an attractive short-term prospect. If Lord Mandelson, business secretary, is prepared to sanction the creation of an anti-competitive behemoth, he should not be surprised if it ignores government calls to maintain lending as the UK enters recession. As it tackles the very real risk of a rise in defaulting mortgages, the enlarged bank may have to shrink its balance sheet.⁶²

Consumer group *Which?* urged the Secretary of State to ensure that there would be measures to protect consumers from “detrimental behaviour” by the merged bank:

The merger may be necessary for short-term stability, but the Government must take a long-term view of the effects this will have on a sector where consumers are already losing out due to weak competition.

“On behalf of all consumers, we urge the Secretary of State to ensure measures are put in place to prevent this new ‘super bank’ from engaging in behaviour that is detrimental to consumers.” [...]

Which? does not believe the normal competition regime is sufficient to deal with the weakening of competition that results from this ‘super bank’. *Which?* is seeking assurances from the Secretary of State that special measures will be taken to prevent the merged parties further harming competition.⁶³

The new consumer group, Consumer Focus, wrote to Lord Mandelson on 14 October 2008 expressing “considerable concerns” in relation to the impact of the merger on consumers. The letter also recommends a number of actions to help consumers:

- To protect the rigour of the UK competition regime, we would want to see a sunset clause to an intervention in the form of a commitment to revoking the order within three months.

⁶⁰ Ibid, p6

⁶¹ See for example, “Consumer bodies warn tie-ups might lead to less choice” *Financial Times*, 19 September, p4

⁶² “Investors should block HBOS deal: the proposed merger with Lloyds TSB is anti-competitive” *Financial Times*, 11 November 2008

⁶³ *Which?* Press release, [Government urged to consider long-term effects of Lloyds / HBOS deal](#), 23 October 2008

- We have particular concerns that the surveillance that will be needed by regulators should operate with the primary goal of avoiding harm to consumers rather than harm to competitors.
- To ensure vigilance, we are calling on the Office of Fair Trading to initiate an investigation into the mortgage market in its next Annual Plan and to consider the same for other markets affected by the merger, including for SMEs as consumers.
- We would ask for an immediate review to be launched on the regulation of retail financial services, recognising that the hotch-potch of current arrangements, including the Banking Code, the OFT and the Financial Services Authority serve neither consumers nor, in terms of better regulation, banks themselves.
- We call for more active support by the Government for interventions that can promote transparency for consumers in the financial services markets.
- We propose that you ask Lloyds TSB, reflecting taxpayer support and its potential dominance, to consider setting up a Consumer Panel for the merged bank, with access to the Board, to be a safeguard for the consumer interest.
- Because there is a risk of local markets being dominated by the new bank, in terms of branches, we are calling for Government to complete a national map of branch overlap and local competition to point to where it would make sense to see branches offered to competitors.⁶⁴

The *Financial Times* reported reactions from some other consumer groups to the proposed merger. Concern was raised specifically about a reduced choice of products on the market, particularly in relation to higher risk specialist lending:

Consumer groups raised concerns yesterday that the new bank will have huge pricing power, although Lloyds made it clear it would continue to maintain the same level of mortgage lending to consumers and small businesses.

Andrew Hagger, of Money.net.co.uk, said: "It is a concern that consumers will be faced with a far more limited choice of products on the back of this merger and the previously announced Abbey takeover of A&L." "No matter what the terms of the merger and the size of the new beast, we are waving goodbye to an element of competition in the personal finance market."

Lloyds TSB is more conservative in certain areas of lending than HBOS, which may mean that the new super bank will not be as willing to lend in areas such as buy-to-let or self-certified mortgages - although it has pledged to continue lending to mortgage and small business customers.

HBOS has focused on slick advertising and established itself as a consumer champion offering supermarket-style "pile 'em high and sell 'em cheap" products pioneered by Andy Hornby, chief executive.

Louise Cuming, head of mortgages at moneysupermarket.com, said of the brands in the two banks: "Lloyds have always run a conservative ship and I have no doubt the merged operation will have a diminished appetite for higher risk specialist lending."⁶⁵

⁶⁴ Consumer Focus [Chief Executive Ed Mayo letter to Lord Mandelson](#), 14 October 2008

⁶⁵ "HBOS deal raises fears over choice" *Financial Times* 20 September 2008

4 What happens if the competition concerns are realised?

As detailed above, there are a number of bodies who have stated that they will keep watch of the merger and can respond to competition concerns. There are differing levels of action available by different authorities depending on the severity of the breach of competition rules.

The first port of call for individual consumers with concerns would normally be a consumer group. The new consumer group, Consumer Focus was set up by provisions in the *Consumers, Estate Agents and Redress Act 2007*. It was created by the merger of the National Consumer Council, energywatch and Postwatch.⁶⁶ The Consumer focus website explains that its powers include “the right to investigate any consumer complaint if they are of wider interest, the right to open up information from providers, the power to conduct research and the ability to make an official super-complaint about failing services.”

A super-complaint is made to the OFT and is defined under section 11(1) of the *Enterprise Act 2002* as a complaint submitted by a designated consumer body that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'. Under section 11(2) of the *2002 Act*, the OFT must, within 90 days after the day on which it receives the complaint, publish a response stating how it proposes to deal with the complaint, and in particular:

- (a) whether it has decided to take any action, or to take no action, in response to the complaint, and
- (b) if it has decided to take action, what action it proposes to take.

If the OFT decides to take no action, the response must state why.

The OFT does not have to wait for a super-complaint to be made before it can begin to investigate a market. Whether by a super-complaint or not, if the OFT suspects that a market is not operating effectively, it can undertake a market study.⁶⁷ The OFT has powers to obtain documents and information from businesses suspected of committing an infringement as well as from their competitors, customers or suppliers. It can also enter and (when a warrant is obtained), search premises. Anyone who fails to cooperate with an investigation (e.g. does not respond to a notice or refuses to provide requested information or documents), obstructs OFT officials or hides, destroys or falsifies relevant documents may be guilty of a criminal offence punishable by a fine and/or, in some cases, imprisonment.⁶⁸

For example, the OFT may choose investigate whether there has been an abuses of a dominant position. Section 18(1) of the *Competition Act 1998* prohibits, in certain circumstances, conduct by companies which amounts to an abuse of a dominant position. The prohibition is based however, not on the *holding* of a dominant position in the market, but on the *abuse* of that position. Before deciding if there had been an abuse of a dominant position the OFT must first conduct a detailed examination of the market concerned and the effects of the company's conduct.⁶⁹

Guidance from the OFT sets out by way of example the sorts of practices which may be considered to be an abuse of a dominant position:

⁶⁶ Department for Business, Enterprise and Regulatory Reform press release, [Strengthened consumer protections come into force](#), 2 October 2008

⁶⁷ Office of Fair Trading, [What we do](#) [on 5 December 2008]

⁶⁸ Office of Fair Trading, [Powers of investigation](#) [on 5 December 2008]

⁶⁹ Office of Fair Trading, [Abuse of a dominant position](#), 2004

...that conduct may constitute an abuse if it consists of:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions
- (b) limiting production, markets or technical development to the prejudice of consumers
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.⁷⁰

For further information about abuses of a dominant position, see the OFT's guide [Understanding Competition Law: Abuse of a Dominant Position](#), 2004.

The range of remedies available to the OFT will depend upon which anti-competitive provisions have been broken. In general, if the OFT considers that a law has been infringed, it will write to those concerned to explain the case against them and give them a chance to respond, both in writing and by meeting with OFT officials. If it is subsequently decided that there has been a breach of competition law, it will notify the infringing businesses and publish the decision in the Register on the OFT website. It may issue directions (e.g. ordering the business to change or terminate the offending agreement or stop the offending conduct) and if a business fails to comply, it may seek a court order to enforce them. Alternatively, it can conclude that there are no grounds for action. In this case the OFT will notify those concerned and may publish a decision to this effect on its website.⁷¹ More details about the OFT's enforcement powers are provided in the OFT's guide [Understanding Competition Law Guide: Enforcement](#), 2004.

Under section 131 of the 2002 Act, the OFT may make a market investigation reference to the Competition Commission (CC). The reference can be made where the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK. Under section 132 of the 2002 Act the Secretary of State for Business and Enterprise may also such a reference to the Competition Commission. The OFT would generally make a reference to the CC when:

- when it has reasonable grounds to suspect that there are market features, which prevent, restrict or distort competition, but not to establish a breach of the CA98 [*Competition Act 1998*] prohibitions;
- when action under CA98 has been or is likely to be ineffective for dealing with the adverse effect on competition identified.⁷²

The CC then has a duty to prepare and publish a report into a market investigation which must be done within two years.⁷³ If it concludes that there is an adverse effect on competition, section 138(2) of the *Enterprise Act 2002* requires it to take such action as it

⁷⁰ Office of Fair Trading, [Abuse of a dominant position](#), 2004, para 2.5

⁷¹ Office of Fair Trading, [Enforcement](#) [on 5 December 2008]

⁷² Office of Fair Trading, [Market investigation references](#), March 2006, section 2.3

⁷³ Section 137(1) Enterprise Act 2002

considers “reasonable and practicable” to prevent these effects on competition and any consequential effects on customers. CC guidance describes some of the remedies available:

- (a) remedies designed to make a significant and direct change to the structure of a market by a requirement, for example, to divest a business or assets to a newcomer to the market or to an existing, perhaps smaller, competitor;
- (b) remedies designed to change the structure of a market less directly by reducing entry barriers or switching costs, for example, by requiring the licensing of know-how or intellectual property rights or by extending the compatibility of products through industry-wide technical standards;
- (c) as a particular category of (b), recommendations for changes to regulations found to have adverse effects on competition or detrimental effects on customers, for example, by limiting entry to a market;
- (d) remedies directing firms (whether sellers or buyers) to discontinue certain behaviour (for example, giving advance notice of price changes) or to adopt certain behaviour (for example, more prominently displaying prices and other terms and conditions of sale)
- (e) remedies designed to restrain the way in which firms would otherwise behave, for example, the imposition of a price cap;
- (f) monitoring remedies, for example, a requirement to provide the OFT with information on prices or profits.

Most of the examples above are remedies that would fall to the Commission itself to impose. Examples of remedies that would require action by other persons or bodies such as government, regulators and other public bodies include changes to regulations and measures to increase market transparency.⁷⁴

Further information about enforcement powers of the CC is given in part 7 of the CC’s guidance document [CC4:General Advice and Information](#).

⁷⁴ Competition Commission, [Market Investigation References: Competition Commission Guidelines](#), June 2003, p41

Appendix:

Potential for combined market share of financial products

The OFT's final report lists the possible market share in certain retail banking products that the newly merged bank might have. The following table takes extracts from the OFT's report concerning the market share for each product.⁷⁵ Where numbers appear in squared brackets, it means that they have been edited by the OFT to protect confidential information.

Type of product		Extracts taken from the OFT report: Estimated market share for the product were the merger to go ahead
Areas where the OFT had competition concerns		
Personal Current Accounts (PCAs)		On the basis of 2007 market share estimates, the merged entity will be the clear market leader in terms of stock of PCAs in Great Britain, with a combined market share of 33 per cent (increment 14 per cent). The next three players (RBSG [Royal Bank of Scotland Group], HSBC and Barclays) have market shares between 14 and 17 percent, and the concentration ratio of the top four players in the market (C4) is increased by the merger from 67 per cent to 80 per cent. All other players have shares of less than ten per cent each. ⁷⁶
Banking services for small-medium sized enterprises (SMEs)	In Great Britain	According to Lloyds, the parties' combined market share of banking to SMEs (stock) in Great Britain is [20-30] per cent (increment [0-10] per cent). The merged entity will be the second largest player in the market, the first being RBSG with a market share of [20-30] per cent. The other big four banks (Barclays and HSBC) each have market shares in the 15 to 20 per cent range. [...]For start-ups, the combined market share is [20-30] per cent (increment [0-10] per cent). RBSG has [20-30] per cent of the market, Barclays [20-30] per cent, HSBC [10-20] per cent and Santander [10-20] per cent.
	In Scotland	In Scotland the parties' market shares are very different from those in Great Britain as a whole, and the combined market share is significantly higher. According to Lloyds, in 2006 HBOS had [30-40] per cent of the SME stock, and Lloyds had [0-10] per cent (combined [40-50] per cent). ⁵⁷ For start-ups, the market shares in Scotland in 2007 were [10-20] per cent for HBOS and [10-20] per cent for Lloyds (combined [30-40] per cent). ⁷⁷
Mortgage products		Lloyds estimates that the merging parties' combined market share is [20-30] per cent (increment [5-15] per cent). The next player in the market is Grupo Santander with [10-20] per cent, followed by Nationwide with [0-10] per cent, Barclays

⁷⁵ Office of Fair Trading, [Anticipated acquisition by Lloyds TSB plc of HBOS plc Report to the Secretary of State for Business Enterprise and Regulatory Reform](#), 24 October 2008

⁷⁶ Ibid, p31

⁷⁷ Ibid, p47-48

	with [0-10] per cent, RBSG with [0-10] per cent and Northern Rock with [0-10] per cent in 2007. ⁷⁸
Areas where the OFT did not have competition concerns	
Savings accounts	In 2007, according to number of accounts in the UK, HBOS was estimated to be the largest provider of savings accounts, 76 and Lloyds the third largest. The parties would have a combined market share of [20-30] per cent (increment [0-10] per cent) in the UK (according to balance). ⁷⁹
Personal loans	Lloyds is the largest provider of personal loans in the UK with [10-20] per cent of the market by value. HBOS is the joint second largest with nine per cent, giving the merged entity a combined market share of [20-30] per cent . ⁸⁰
Consumer credit market	The merger would bring together two of the larger players in the consumer credit card market, with a combined market share of [20-30] per cent (increment [0-10] per cent). However, there are a number of remaining sizeable players in the market, including Barclays (with a market share of [10-20] per cent), RBSG, HSBC, MBNA and Capital One, and a number of smaller competitors. ⁸¹
General insurance market	Lloyds and HBOS act as both underwriters and distributors of general insurance. They each supply a wide range of life and general insurance products, being particularly active in the home and motor insurance segments. Their combined market share in general insurance is [0-10] per cent. Taking a narrow market definition and considering the two segments in which the parties' market shares are most significant, the combined market share is [10-20] per cent (increment [0-10] per cent) in home insurance and [0-10] per cent (increment [0-10] per cent) on motor insurance. ⁸²
Payment Protection Insurance (PPI)	Self-evidently within the narrow 'own label' PPI product market definition above, each supplier has a 100 per cent market share in every product market in which it operates, and there are no overlaps between the parties. However, Lloyds is the largest distributor of PPI overall, and HBOS the third largest. In overall PPI distribution, the parties' combined market share is [10-20] per cent. In PPI underwriting, the parties' combined market share is [20-30] per cent , representing both own-brand and third-party distribution. ⁸³
Wealth management services	Although the parties noted that it is difficult to estimate the overall size of the market for wealth management, they

⁷⁸ Ibid, p54

⁷⁹ Ibid, p60

⁸⁰ Ibid, p62

⁸¹ Ibid, p62

⁸² Ibid, p63

⁸³ Ibid, p65

	estimate that their individual market shares are less than five per cent, and that their combined market share would be 'considerably' below [10-20] per cent. ⁸⁴
Pensions	Taking a cautious approach and considering pensions as a separate product market, the parties' combined market share is less than [10-20] per cent. There are two other players with market shares above ten per cent, and eight competitors with individual market shares between [0-10] per cent. ⁸⁵
Banking services to large corporations	Lloyds submits that the geographic market is global due to the worldwide nature of corporate banking and that there are a number of international banks providing services in the UK. In Lloyds/Abbey the CC considered that the market for financial products sold to customers larger than SMEs is global. Third parties generally considered the geographic market to be at least UK-wide, and possibly wider. Lloyds estimates that the merged entity's share of supply would be below [0-5] per cent on a global basis. In the UK, the parties estimate that their combined market share is [10-20] per cent. ⁸⁶
Treasury and capital markets	<p>There are three main areas of overlap in treasury and capital markets between Lloyds and HBOS:</p> <ul style="list-style-type: none"> • Financial markets: Both parties supply risk management and hedging products to their SME and large corporate customers. These products facilitate the hedging of a variety of risks including interest rates, inflation, commodity prices and currency exposure. • Capital markets: Both parties provide services for securitisation, loan syndication and corporate bonds. Lloyds also provides some equity advisory services, while HBOS has historically confined this service to its own assets. • Structured debt origination: Products offered include project finance for large infrastructure and energy projects, asset finance for the marine, rail and aircraft sectors, and acquisition finance for leveraged transactions and management buyouts. In a number of these sectors HBOS also provides equity in addition to debt. <p>[...]The parties' combined market share as a result of the merger is below 15 per cent in each of the three segments.⁸⁷</p>
Fleet car hire	Taking the geographic market to be the UK, the combined

⁸⁴ Ibid, p68

⁸⁵ Ibid, p68

⁸⁶ Ibid, p69

⁸⁷ Ibid, p70

	<p>market share of the merging parties will be [10-20] per cent, making them the largest provider of fleet car hire services in the country. The market shares of the next two largest players are [0-10] per cent each. ⁸⁸</p>
<p>Life insurance</p>	<p>The combined gross market shares of Lloyds and HBOS post-merger aggregating across the life market is [10-20] per cent. ⁸⁹</p>

⁸⁸ Ibid, p71

⁸⁹ Ibid, p71