

# Competition law

## Briefing

## MACFARLANES

### How the credit crunch is affecting merger analysis

Whilst the credit crunch still shows little sign of abating, opportunities for trade buyers have been better for some time given lower asset prices combined with the lack of competition from financial investors such as private equity houses. Hardly rocket science. The interesting question is whether the challenging economic environment also increases opportunities for consolidation that may otherwise have proved a step too far. This memo identifies some of the issues that could be relevant for your business.

### Dealing with the antitrust risk

Deals leading to high market shares often come with an “antitrust price” – e.g. divestments to appease regulators that do not undermine the overall strategic rationale for a deal, but does that price change depending on the macro-economic climate? Two recently announced deals – British Airways and American Airlines, and Lloyds TSB/HBOS – may suggest that companies in relatively strong positions can try to use competition law to turn the turmoil in global markets to their advantage.

### BA/AA

- British Airways has twice tried to enter into a strategic alliance with American Airlines which would allow both carriers to co-ordinate on schedules and frequencies across the Atlantic.

Each time the number of slots that would have had to have been divested at Heathrow was considered too high.

- The airlines are hoping this will be a case of third time lucky with regulators in Europe and the US being more amenable to the proposal this time around. BA’s chief executive, Willy Walsh, has stated that he is confident of winning approval from regulators given the radical and fundamental change that the aviation market has been through.
- One of BA’s arguments is that the “open skies” agreement between the EU and the US has moved the goalposts for the purposes of assessing the competitive impact of the proposed alliance. But will BA also argue that because the airline industry is in crisis that in itself is a reason to approve the alliance?

### Lloyds TSB/HBOS

- There has been much talk about the UK Government’s decision to issue an intervention notice in the Lloyds TSB/HBOS case which means that the Secretary of State, rather than the competition authorities, will have the final say on whether or not to approve the deal.
- Currently the only specified public interest grounds are national security and various media-related issues (such as media plurality and the protection of freedom of expression).

Importantly, however, the Government has the power to add other grounds at very short notice and has announced that “the stability of the UK financial system” should be specified as a new public interest test. Comments from the Chancellor appear to suggest that the decision has already been taken, although the Secretary of State has yet to receive the reports from the OFT covering both the competition and public interest aspects of the case on which his decision should be based.

- Although Parliament needs to ratify the Government’s proposal to include a new public interest ground, it is expected that Parliament will simply rubber-stamp the plan. This will allow the Government to approve the Lloyds TSB/HBOS deal whether or not any substantive competition issues arise because – in the Chancellor’s words – the public interest can “trump” competition.
- There may be scope for others in the financial sector to seek to rely on the new public interest too, for example those seeking to acquire any Bradford & Bingley assets following its nationalisation.

As a general rule, the fact that parties may wish to merge to be better equipped to face the challenges of recession or higher input costs is not in itself a reason for regulators to approve mergers they might otherwise have

found problematic. However there are other factors that may help secure approval for consolidation plans:

- One argument that we may hear more frequently over the next few months in support of an otherwise problematic merger is that the target is a “failing firm” and that it was unlikely to have survived independently or there was no other likely acquirer.
- Similarly, if the merging parties can genuinely show that there will be efficiencies from their planned merger that will benefit consumers that too may tip the balance. Whilst incumbent on the merging parties to prove the point if they want to rely on it, this argument was recently accepted for the first time in the UK as far as the London radio stations of GCap and Global Radio were concerned.

### Where does this leave your business?

Now may be a good time to dust off tentative merger plans, or simply act opportunistically. Take JPMorgan Chase. In the last couple of months it has taken advantage of the credit crisis by acquiring both Bear Stearns and Washington Mutual. As for any antitrust assessment clearly each case will need to be assessed on its merits. But consolidation that would lead to high market shares may not just be an aspiration for chief executives; it could turn into reality.

Such opportunities don't just exist for household names, or those involving companies that are just too important to fail. Difficult times may have a silver lining for companies who are able to exploit the situation to their advantage, and to the advantage of their shareholders.

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### Contact details

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