

REVIEW OF MERGER ASSESSMENT GUIDELINES

COMMENTS ON DRAFT OF 14 APRIL 2010

1 INTRODUCTION

- 1.1 Charles Russell LLP welcomes the opportunity to comment on the draft guidelines on merger assessment, jointly published by the Competition Commission and the Office of Fair Trading (the “**Authorities**”) on 14 April 2010 (the “**Draft Guidelines**”). The Draft Guidelines helpfully summarise developments in the CC’s and the OFT’s thinking since the publication of the previous guidelines in 2003.
- 1.2 Please note that the comments in this response represent the views of Charles Russell LLP and do not represent the views of our clients. References to paragraph numbers are references to the Draft Guidelines.

2 OFT DUTY TO REFER MERGERS TO THE CC

- 2.1 Paragraphs 2.4 to 2.6 succinctly set out the OFT’s duty to refer mergers to the CC. Under sections 22(1) and 33(1) of the Enterprise Act 2002, the OFT has a duty to refer a merger if it is or may be the case that it has resulted or may be expected to result in a substantial lessening of competition. This statutory test is further explained in paragraph 2.6.
- 2.2 For clarity, we would propose amending the third sentence of paragraph 2.6 as follows:

<p>The OFT must make a reference to the CC when it believes that the merger is more likely than not to result in an SLC. The Act also contemplates the reference at lower ranges of probability. If the OFT believes that the relevant likelihood is greater than fanciful, but below <u>not greater than</u> 50 percent, it has a wide margin of evaluation in exercising its judgement...</p>
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- 2.3 The reason for proposing this amendment is that, under the wording in the Draft Guidelines, the OFT must make a reference if it believes that the merger is more likely than not to result in an SLC (i.e. over a 50% probability) and it has a wide discretion if the likelihood of the merger resulting in an SLC is less than 50%. However, the Draft Guidelines are silent as to the OFT’s powers if the likelihood of an SLC is evenly balanced (i.e. 50%).
- 2.4 We recognise that the current drafting of paragraph 2.6 reflects the Court of Appeal’s judgment in *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142. It is also acknowledged that the OFT’s assessment will not result in an exact quantifiable percentage and therefore, in practice, the

possibility of the OFT determining that the likelihood of an SLC is precisely 50% may be remote. Nevertheless, the Authorities' revised merger assessment guidelines presents an opportunity for the authorities to close this lacuna – or at least insert a footnote recognising that the lacuna exists and what their approach would be, should that circumstance arise.

3 **'CONTROL'**

3.1 Paragraph 3.10 of the Draft Guidelines refers to the authorities' discretion (rather than an obligation) to treat material influence and de facto control as equivalent to legal control. It is noted that this repeats the provisions of section 26(3) of the Enterprise Act 2002. However, it might be helpful if the merger assessment guidelines referred to the Authorities' duty to maintain consistency in their decision making so as to preserve legal certainty.

3.2 The Authorities may also wish to expand the guidance at paragraph 3.10 to refer to the Competition Appeal Tribunal's findings in *British Sky Broadcasting Group plc v Competition Commission & The Secretary of State* [2008] CAT 25. In particular, the Authorities may wish to refer to paragraph 104 of that judgment, where the CAT held that:

"Once it has been found that there is material influence over a company's policy there will be little scope for the exercise of a discretion to decline to treat that influence as giving rise to "common control" ... This is not to say that a case could not conceivably arise where it would be appropriate not to treat material influence as giving rise to common control, but no such case was elaborated in the written or oral pleadings, and we would expect it to be very exceptional."

4 **WHAT IS AN 'SLC'?**

4.1 In response to comments on the April 2009 draft guidelines, the Authorities have now sought to differentiate between a lessening of competition and a substantial lessening of competition. Guidance on this distinction is to be welcomed.

4.2 In paragraph 4.5 of the Guidelines, the Authorities state that they consider that whether a lessening of competition is substantial will depend on the extent of the reduction in rivalry, rather than the extent of any adverse effects on the outcomes of the process of rivalry, such as prices. However, paragraph 4.5 does not indicate how great the adverse effect on rivalry has to be in order for the lessening of competition to be substantial.

4.3 Moreover, the practical distinction between the effect on rivalry and the effect on the outcomes of the process of rivalry does not appear to be entirely clear.

4.4 It may be preferable for the Authorities to recast this paragraph so that it states that a merger lessens competition substantially when it weakens rivalry to such an extent that there would be an adverse effect on consumers.

5 **NON-HORIZONTAL MERGERS**

5.1 In paragraph 4.139, there appears to be a typographical error in the brackets at the end of the bullet on conglomerate mergers. We would propose deleting the word “is” in the phrase “*(and, if so, the size is of the pool of customers for the complementary products)*”.

5.2 In footnote 65, there is a reference to a theory of harm relating to access to commercially sensitive information in the context of a vertical merger being raised in the CC’s report in BSkyB/ITV. It would be helpful if some further explanation of the relevant theory of harm could be included here, as the theory of harm discussed in that report appears to relate to a horizontal, rather than a vertical, concern (see paragraphs 4.109 and 4.110 of the CC report).

Charles Russell LLP
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