

**INTERNATIONAL BAR ASSOCIATION  
ANTITRUST COMMITTEE**

**WORKING GROUP RESPONSE ON THE REVISED DRAFT JOINT OFFICE OF FAIR  
TRADING/COMPETITION COMMISSION MERGER ASSESSMENT GUIDELINES PUBLISHED  
ON 14 APRIL 2010**

**Introduction**

1. The Working Group of the Antitrust Committee of the International Bar Association (the “Working Group” of the “IBA”) sets out below its response to the revised draft joint Office of Fair Trading (“OFT”)/Competition Commission (“CC”) Merger Assessment Guidelines of 14 April 2010 (the “Guidelines”). Further details of the IBA and a list of the members of the Working Group are set out in the Annex to this submission.
2. The IBA appreciates the opportunity to provide comments on the Guidelines and commends the OFT and CC (together, “the Authorities”) for putting these out for a further round of consultation. The IBA considers that the practice of submitting guidelines for wide-ranging consultation and engaging in an ongoing dialogue with private sector representatives is beneficial for stakeholders and the Authorities alike.
3. The Working Group welcomes the opportunity to engage further<sup>1</sup> with the Authorities in the important context of Merger Assessment Guidelines, which are intended to improve transparency, efficiency and predictability for all merging parties and their advisers. The Working Group recognises the considerable effort that the Authorities have made to reflect the comments received in the first round of consultation.
4. Overall comment: The Working Group considers that the clarity and content of the Guidelines have been enhanced significantly following the first round of consultation and the articulation of development(s) in the Authorities’ thinking. Nonetheless, the Working Group considers that there are a number of outstanding issues and that the Revised Draft Guidelines would benefit from further/additional amendments.
5. Incorporation of comments from the first round of consultation: The Authorities have made substantial changes in the Guidelines as a result of feedback from stakeholders.<sup>2</sup> The Working Group appreciates that, for the most part, the Authorities have reflected the IBA’s major comments. In particular, we note that:
  - Part 2 provides a simpler and clearer explanation of how the reference test is approached by the OFT and how the CC will approach the statutory questions it must answer.
  - The Guidelines are more consistent in explaining where and how the Authorities’ approaches diverge.
  - The Guidelines have been amended to reflect concerns as regards consistency with, and failure adequately or appropriately to cross-refer to, the OFT’s Jurisdictional and

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<sup>1</sup> The IBA submitted its comments on the draft joint Office of Fair Trading/Competition Commission Merger Assessment Guidelines of 29 April 2009 (the “Original Draft Guidelines”) on 28 August 2009.

<sup>2</sup> The Summary of respondents’ submissions and the Authorities’ responses, which was published at the same time as the Guidelines, indicates a number of revisions that have been made (to the Original Draft Guidelines).

Procedural Guidance (the “Jurisdictional Guidance”).<sup>3</sup> Indeed, the Guidelines incorporate changes that ensure greater consistency with other guidance published by the Authorities and the European Commission generally.

- The Authorities’ respective approaches to multiple theories of harm have been clarified.
  - The terminology as regards the counterfactual has been amended to ensure consistency with previous cases (*Coors*<sup>4</sup>): the transaction will be assessed against “the plausible but more conservative outcome”. We note, however, that *Coors* is not cited.
  - The Guidelines address concerns on the importance of market definition.
  - As regards non-horizontal mergers, the Guidelines no longer indicate that the OFT may presume anti-competitive effects from foreclosure, given ability and incentive. Moreover, the possibility that a vertical merger allows the merged firm to gain access to commercially sensitive information about the activities of non-integrated rivals is more prominently referenced (paragraph 1.139), albeit that *Alliance UniChem/Boots* is not referenced.
  - The Guidelines no longer contain a section on interim measures and remedies.<sup>5</sup>
  - Part 5 has been redrafted to “deal more with assessment, and less with procedure”<sup>6</sup> and reflect the developments in the case law in this area.<sup>7</sup>
  - The use of case references is more extensive.<sup>8</sup> For example, as regards countervailing buyer power, the Guidelines now cite *Cott/Macaw* where buyer power was the decisive or a major factor. However, there are some notable gaps and the approach to citation of relevant merger decisions and court judgments appears inconsistent as between different Parts. This is addressed in more detail below.
6. In addition, the Working Group welcomes the willingness to consider Practice Notes on aspects of the Authorities’ assessment.<sup>9</sup> We welcome, in principle, the intention to issue a joint paper addressing mergers involving multiple local markets; given the large number of retail mergers involving local markets and differentiated products, this is an important area for guidance. However, it is important that this guidance is forthcoming reasonably promptly and that the guidance carries as much weight as if it was contained in the Guidelines.
7. Whilst welcoming the above changes, the Working Group considers that a number of its previous comments not reflected in the Guidelines still merit consideration. These points are included among the comments set out below.

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<sup>3</sup> The Working Group had previously commented that the OFT’s more detailed guidance should be incorporated (by reference) and any differences in approach at the CC should be highlighted to avoid the risk of confusion in practice as regards the relative weight given to each set of guidance and as regards differences in approach at the CC: see paragraph 6 of the IBA’s submission of 28 August 2009.

<sup>4</sup> *Serviced Dispense Equipment Limited (SDEL) / Coors Brewers Limited (Coors)*, CC Report of March 11, 2005, para. 151.

<sup>5</sup> The Working Group had previously questioned whether it was necessary to retain Part 6 of the Original Draft Guidelines: see paragraph 78 of the IBA’s submission of 28 August 2009. The Authorities’ accept that this section was unnecessary since the contents are covered in other OFT and CC guidance.

<sup>6</sup> The IBA had previously indicated that, whilst welcome, Part 5 was “a little restricted to the mechanics of such cases”.

<sup>7</sup> Notably the outcome of the appeals in the *BSkyB/ITV* case.

<sup>8</sup> The IBA had previously noted that, whilst that the Authorities are not bound by their previous decisions, these provide valuable additional context to the principles and examples discussed.

<sup>9</sup> In its initial submission, the Working Group had encouraged the publication of Practice Notes on a more regular basis and, in particular, had suggested that it would be helpful from a practitioner’s perspective if, in the future, the Authorities were to expand upon their thinking and analysis of diagonal mergers in the form of a practice note or other supplemental guidance.

## General comments

8. Status of the Guidelines/flexibility in approach: The Working Group welcomes the introduction of the more nuanced language in paragraph 1.5. Flexibility is appropriate since it is virtually impossible to create a set of procedures fully applicable to all types of transactions subject to merger review. We recognise the Authorities' concerns as regards "*setting out too mechanistic and prescriptive an approach*". However, it would nevertheless be helpful to provide some examples of special features or circumstances that might lead the Authorities to depart from their Guidelines.
9. We consider that neither the Guidelines nor, the Jurisdictional Guidance provide sufficient detail in respect of several key issues of jurisdiction and procedure, in particular on the creation of a relevant merger situation. These omissions leave practitioners and clients in significant doubt as to whether transactions fall under the jurisdictional tests and are notifiable.
10. The following issues could be clarified either by way of an additional statement appended to the Jurisdictional Guidance or by a further paper prepared by the Authorities specifically directed at the relevant merger situation.
11. Material influence: We note that there is a "guidance lacuna" in relation to jurisdictional questions. Whilst the OFT has Jurisdictional Guidance, the CC does not. Given the importance of the CC's role in jurisdictional questions, we would welcome more detailed guidance from the CC, in addition to the overview contained in the draft Guidelines (paragraphs 3.12-3.16).
12. Share of supply: Neither paragraph 3.28 nor the section on this subject in the Jurisdictional Guidance provide sufficient detail as to the application of the share of supply test. In particular, it is unclear as to precisely which elements of commerce will be included or analyzed for the purposes of the share of supply test. This factor creates considerable difficulty in parties' assessment of whether or not to notify in borderline cases. The Authorities should consider including a section on local markets and their relationship with the share of supply test in the planned Practice Note on mergers in multiple local markets (paragraphs 3.26-3.30).
13. Use of practical examples and references to previous decisions/cases: The Working Group welcomes the increase in case citations. It would also be helpful if the substantial body of precedent on issues such as material influence and share of supply could be reflected in Part 3 (we note that the Jurisdictional Guidance does not cite available precedent).
14. Evidence and information requirements: The Working Group considers that the Guidelines do not strike the appropriate balance between, on the one hand, informing the parties of what is expected from them and, on the other hand, being overly/unduly prescriptive.<sup>10</sup>
15. We note the Authorities' concern that "*the publication would be weighed down by the inclusion of analytical detail relating to each information request, which would be suited to a specialist 'living' document or series of documents to supplement the guidelines.*" Nonetheless, in the absence of specialist documents<sup>11</sup>, parties are currently faced with uncertainty. In these circumstances, we would ask the Authorities to reconsider their decision not to incorporate additional commentary in the Guidelines. In particular, we invite the Authorities to re-evaluate the benefit of offering (in paragraph 4.146) additional commentary on the types of information

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<sup>10</sup> The Working Group welcomes the insertion of paragraph 4.16 concerning theories of harm and the submission of technical and econometric work.

<sup>11</sup> We note that the Authorities are presently engaged in drafting further guidance in respect of surveys.

that they will take into account in order to provide evidence of efficiencies. Further clarity on this point would be welcome, particularly since, in addressing some of the other comments as to the unduly high threshold for taking efficiency claims into account, the test for relevance as set out in the previous paragraph has been made less specific.

16. The Working Group would also welcome further clarity as to the extent to which, if at all, the OFT's approach to technical data and econometric work differs from the CC's. It would be helpful to understand the OFT's approach as, in transactions raising competition issues, parties are increasingly submitting to the OFT economic/econometric evidence upfront and they need to be clear on what the OFT expects, or has the resources to deal with, in Phase I.

#### **Part 4: SLC**

17. Effects on rivalry (paragraph 4.5): The Working Group notes the change of emphasis in the text around paragraph 4.5 about the assessment of "effects on rivalry" in determining whether a merger might lead to an SLC. In particular, the new draft removes the previous statement that "*the Authorities would not normally find an SLC without an expectation of adverse effects for consumers*" and emphasises instead that "*it is not an adverse effect on the outcomes of the process of competition (e.g. prices) that differentiates an SLC from a lessening of competition; it is an adverse effect on rivalry*".
18. The Working Group would welcome clarification on whether the new draft represents a change in the Authorities' substantive assessment of mergers. If so, it would be helpful if further details could be provided on how the Authorities will determine whether the reduction in rivalry is sufficient to differentiate an SLC from a lessening of competition, without evidence of harm to consumers or any other adverse outcome of the process of competition. By way of comparison, we note that the new draft US guidelines state: "*Regardless of how enhanced market power likely would be manifested, the Agencies normally evaluate mergers based on their impact on customers*". A comparable approach focused on consumer detriment is adopted in Australian guidelines for a jurisdiction which has a similar merger test to the UK.
19. The attempt to describe what constitutes an SLC as distinct from a mere lessening of competition is to be welcomed. However, there is still no real definition of "substantive" in a qualitative/quantitative or other sense which differentiates it from a non-substantive lessening of competition (a definition is provided in the competition authority guidance for the SLC-based merger control regimes in Australia and New Zealand).
20. Exiting firm (paragraph 4.24): The Working Group welcomes recognition that counterfactuals may include situations where firms exit the market for reasons other than failure. It would be helpful for the Guidelines to have further information on the types of scenario (and criteria) that would be accepted as appropriate counterfactuals, with only criteria (b) and (c) (in paragraph 4.25) having been satisfied.
21. Acquisition of failing firms (paragraph 4.29): The Working Group notes the OFT1047 Restatement of the OFT's position regarding acquisitions of 'failing firms', December 2008, which outlines the OFT's approach to analysing failing firm claims, indicates that the OFT "*will take account of prevailing economic and market conditions when assessing evidence put forward by the merging parties*". We would suggest that the Guidelines incorporate (by reference) this aspect of the OFT's guidance as set out in OFT1047, and highlight any differences in approach at the CC.
22. Parallel transactions (paragraphs 4.44-4.46): The Authorities have now indicated that a 'first come, first served' or 'first past the post' approach would not be appropriate in the context of a

voluntary notification regime and have identified (at paragraph 1.18) the differential treatment of parallel transactions between the UK and the EC. In these circumstances, the Working Group reiterates the need for additional information in the Guidelines. In particular, it would be helpful to include some discussion on the factors that the Authorities will take into account when deciding whether a parallel transaction is too speculative, including, if available, an appropriate case reference.

23. Consideration of evidence on efficiencies (paragraph 4.51): The Working Group considers the reference to the need for "*particularly compelling evidence*" here to be unjustified. The Group notes that in the Original Draft Guidelines, the section on efficiencies talked of the need for compelling evidence, but that this has been removed from the Guidelines (other than in paragraph 4.51). The Group accepts that forward-looking efficiencies assessments can pose challenges as regards providing suitable evidence but that is a question of providing convincing rather than particularly compelling evidence. As regards evidence on entry and expansion and on buyer power, these matters are part of the normal appraisal of competitive effects. There seems to be no basis for introducing a higher standard of evidence for those aspects of the assessment than is required for the matters that the Authorities might rely on to infer an SLC.
24. Market definition: As noted above, the Working Group welcomes the new text reiterating the importance of market definition. However, a number of issues arise, as detailed below.
25. Defining the market more narrowly (paragraph 4.52): The Working Group submits that this paragraph is unclear. Does it mean that if the market definition is not clear, the Authorities tend to assess market shares and if appropriate other concentration measures on alternative market definitions, starting with the narrowest plausible/likely definition?
26. Close substitutes (paragraph 4.53(a)): The Working Group would suggest defining close substitutes also in terms of their intended use or price.
27. Separate customer market (paragraph 4.53(c)): The Working Group notes that having a specific separate customer market (as opposed to segment) tends to diverge from the EU approach of defining only one relevant market and noting - if relevant - the scope for price discrimination within that market. It would be helpful if the Authorities could reference the cases in which the separate customer markets approach has been taken and comment on whether this proved to be a worthwhile development.
28. Hypothetical monopolist test (paragraph 4.59): The Working Group welcomes the Authorities' clarification as regards the references normally using a SSNIP of 5%. In our previous submission we proposed that, if the Authorities intend to apply a price rise which varies depending on the market under consideration, more guidance as to the appropriate figure and the reasons for it, should be provided. Notwithstanding the additional text in the Guidelines, we maintain that further guidance is required.
29. Transport costs (paragraph 4.71): The Working Group would recommend including an additional bullet to cover transport costs.
30. Local markets (paragraph 4.72): as the Working Group previously observed, the Guidelines contain only one reference to local markets. Whilst we note the Authorities' intention to issue a joint paper addressing mergers involving multiple local markets, if this paragraph is to be retained, reference should be made to relevant cases, notably supermarket mergers where fascias/isochrone analysis is undertaken.
31. A third dimension to market definition (paragraph 4.75): The Working Group would welcome clarification on whether the Authorities anticipate using this "*third dimension*" to market

definition only in exceptional cases, on the basis that in most circumstances, different conditions of competition within distinct customer groups should be captured in the overall assessment of product and geographic market definition. By way of comparison, the new draft US guidelines discuss "*Product Market Definition with Targeted Customers*" and "*Geographic Markets Based on the Locations of Customers*" within the sections on product and geographic market respectively, rather than as a separate "third dimension" to market definition. A similar approach of not distinguishing a "third dimension" is adopted in the Australian merger guidelines for a jurisdiction with a comparable merger test to the UK.

32. Measures of concentration (paragraphs 4.77-4.83): The Working Group welcomes the addition of text in the Guidelines expanding the explanation as to the types and use of concentration measure, including commentary on when the Authorities may attach less weight to the measures of concentration. However, the Working Group notes that paragraph 4.78(b) proposes a hypothesis in which relatively unconcentrated markets might still give rise to a competition concern. It is not clear what is meant by "*significantly more than*" the SSNIP. It is also not clear what experience the authorities are drawing from in making this suggestion. Thus the guidance here has the effect of introducing a new uncertainty as to intervention and it is not clear to us that the risk of this situation occurring (and the ability empirically to prove the point) merits inclusion of this suggestion.
33. Market share thresholds (paragraph 4.79): The Working Group would suggest that the attempt to remove the mistaken impression that the Authorities have a stricter approach for vertical mergers than for horizontal ones caused by the references to the respective 30% and 40% market share thresholds has not gone far enough, since it is positioned only by reference to the semantic distinction between "*very rarely*" and "*not often*". The Working Group considers that the OFT/CC should propose a clearer de minimis indicator or soft safe harbour for vertical mergers. This is in line with acknowledgement of "the well established principle that most non-horizontal mergers are benign or even pro-competitive" (paragraph 4.127).
34. HHI thresholds (paragraph 4.80): The Working Group notes that the April 2010 draft of the Horizontal Merger Guidelines (DoJ/FTC) contains different HHI thresholds.
35. References (paragraph 4.95): Are the references to "the merged firm" intended to be references to the target firm?
36. Buyer power (paragraph 4.98): The Working Group would suggest including the comment that buyer power is sometimes also referred to as "monopsony power".
37. Coordinated effects (paragraphs 4.103-4.126): The further detail in the guidance on this area is welcomed. However, given its complexity and the limited precedent available, we would reiterate the request for a suitably caveated checklist of factors indicative of co-ordinated effects or for the provision of further examples of the types of evidence which the authorities will put weight on when undertaking their analysis.
38. Questions to be examined by the Authorities (paragraph 4.105): The Working Group considers that the structure of the questions setting out the framework that the Authorities will apply to assess coordinated effects is not ideal. It seems to reverse the natural intuition in assessing coordinated effects - which is to observe first whether there is evidence for coordination pre-merger. If the OFT and CC nonetheless are of the view that the starting point should be the post-merger position, then we would suggest some clarification to question (b)(i). This asks whether, if the characteristics of the market were not conducive to sustainable coordination pre-merger, coordination is more likely post-merger. Given that the Authorities will have already concluded under question (a) that the characteristics of the market are so conducive post-merger, the answer to question (b)(i) will invariably be yes (i.e. coordination will always be

more likely where the market is conducive to coordination, than where it is not conducive). To address this, question (b)(i) perhaps needs to refer to the Authorities looking for evidence that coordination is likely to occur post-merger in this scenario.

39. Past suspected cartel behaviour (paragraphs 4.108-4.111): The Working Group is somewhat concerned by the Authorities' comments in relation to past suspected cartel behaviour. While we welcome the Authorities' acknowledgement that a negative inference in relation to tacit or explicit future collusion cannot "automatically" be made on the basis of activity in the past, we consider that including "suspected" past cartel activity as an indicator for the purposes of such analysis could be inappropriate in a wide variety of situations. Accordingly, we would propose the removal of the words "or suspected" from paragraph 4.110. We note that the draft US guidelines refer only to "previous collusion or attempted collusion", with no lower threshold around "suspected" collusion.
40. Evidence of unilateral price decreases being profitable (paragraph 4.109): This paragraph refers to "*evidence (e.g. on demand elasticities and profit margins) that unilateral price decreases would be profitable*" as an example of evidence to suggest that the market was tacitly coordinated before the merger. This statement would benefit from further clarification. Is the point that, where there is evidence that competitors would have had an incentive to decrease prices unilaterally but have not done so in practice, this may suggest that the market was tacitly coordinated?
41. Monitoring an understanding post-merger (paragraph 4.118): The Working Group would suggest that the latter part of this paragraph be caveated to acknowledge that the fact of knowing competitors' sales volumes and capacity is not in itself a particular indicator for coordinated effects. It is a standard aspect of many markets and of the process of rivalry, that firms will seek information on the position of competitors. (The reference to knowledge of the firm's own sales volumes and capacities is also slightly odd here – as all firms must know that.)
42. The Working Group agrees that the analysis of a non-horizontal merger by the competition authorities should address ability, incentive and overall effect. Nevertheless, certain parts of paragraph 4.131, which presents the general questions to be asked in these contexts, seem to be unclear and require amendment. We suggest the following drafting amendments to paragraph 4.131:
  - In subsection (a), "ability": the section commencing with "by competing less" until "circumstances?" is unclear. We would propose, instead, the wording "by limiting their access to inputs / customers". Such wording would be appropriate for both vertical and conglomerate mergers.
  - In subsection (c), "effect": the section commencing with "taking into account" until "as well?" is unclear. We would suggest deleting this.
43. Analysing partial input foreclosure (paragraph 4.135) – ability: The Working Group suggests (following accepted economic theory) that the Guidelines explicitly state that in order for a foreclosure strategy by the merged entity to be detrimental to competition, the possession of a significant degree of market power by the upstream firm would be required. The Guidelines continue to ignore this requirement in respect of partial input foreclosure; however, this is not the case in respect of customer foreclosure (paragraph 4.139).
44. We agree that the ability of rival manufacturers to avoid price increase by switching to other suppliers indicates the inability of the merging upstream firm to limit the access of the rivals to the input. However, in order to conclude that rivals could effectively switch, there do not

necessarily need to be "many" good substitutes for the input. Using the word "many" might create the wrong impression that a vertical merger would only be approved when the upstream market is characterized by multiplicity of competitors – which, of course, should not necessarily be the case. The omission of the word "many" (or the replacement thereof by the word "effective") is all the more important given that the Guidelines make no reference to the need to show any degree of market power by the upstream merging party in the context of input foreclosure.

45. Analysing partial input foreclosure (paragraph 4.135) – effects: According to accepted economic theories, the analysis of a vertical merger should focus on the effect of the merger on the overall output in the market. Such approach was adopted in the Original Draft Guidelines, which stated in paragraph 4.144 that: "*The Authorities will therefore also consider the likely effects of any input-foreclosing strategies on competition and on the competitive offering to final consumers*". We suggest that this text is reinstated.
46. The Working Group welcomes the removal of the statement that the OFT may presume anti-competitive effects from foreclosure, given ability and incentive. Nonetheless, in our view the Guidelines continue to give the wrong impression by suggesting that whenever both ability and incentive to foreclose exist, only efficiencies created by the merger may counter the anti-competitive effects. As the Original Draft Guidelines acknowledged, the foreclosure of one or more downstream competitors by the merged entity does not necessarily substantially lessen competition in the downstream market – regardless of efficiencies analysis.
47. Other settings of theory of harm: In paragraph 4.139, first bullet: in the third line, after "*the input market*", the words "or in the downstream market" should be added.
48. Coordinated effects arising from non-horizontal mergers (paragraph 4.141): We still consider that UK (or at least hypothetical) examples would be helpful.
49. Efficiencies (paragraphs 4.142-4.161): As noted above, we would still like to see more guidance on the particular types of data and/or studies the OFT and/or the CC is more likely to accept for the purposes of its analysis (without making this aspect of the Guidelines overly "economic" in nature).
50. Dynamic efficiencies (paragraph 4.143): The Working Group considers that a comment on dynamic efficiencies would be helpful. The Authorities indicate that only those efficiencies which affect such rivalry will be taken into account as part of the SLC analysis. This is consistent with their approach of defining competition purely in terms of rivalry when explaining what an SLC is but, absent a specific statement to the contrary, it may be taken to suggest that there is no room to consider dynamic efficiencies in the SLC analysis (e.g. in technology mergers where competition is 'for the market'), since these might arise notwithstanding a reduction in rivalry and may not be particularly timely relative to the effect on rivalry. Clarification as the treatment of dynamic efficiencies either at this stage or in the assessment of customer benefits would therefore be welcome.
51. Entry (paragraphs 4.162-4.174): Notwithstanding the Authorities' suggestion that it would be "*unwise to create a 'hierarchy' of factors constituting barriers to entry*", the Working Group considers that it would be useful for these to be presented in a logical order, albeit suitably caveated. Such an approach would be consistent with guidance documents in other jurisdictions, including Australia, New Zealand and Singapore. In any event, we suggest stating that this list is non-exhaustive.

52. We assume that the factors described in paragraph 4.173-4 are also relevant to paragraphs 4.93 et seq. on loss of potential competition - specifically whether the target firm is a potential entrant. We would recommend making explicit that the same considerations apply.

31 May 2010

## ANNEX

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide analysis in this area. Further information on the IBA is available at [www.ibanet.org](http://www.ibanet.org).

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