



**REVIEW OF MERGER ASSESSMENT GUIDELINES: A JOINT PUBLICATION OF THE
COMPETITION COMMISSION AND THE OFFICE OF FAIR TRADING**

RESPONSE TO THE CONSULTATION DOCUMENT OF APRIL 2010

1. INTRODUCTION

1.1 Ashurst LLP welcomes the opportunity to comment on the "Review of Merger Assessment Guidelines: Consultation Document, April 2010" ("**the draft Guidelines**") published by the Office of Fair Trading ("**OFT**") and the Competition Commission ("**CC**") - together "**the Authorities**". We regularly advise clients who are parties to mergers, or who are interested third parties or complainants in relation to mergers.

1.2 As indicated in our response to the 2009 consultation, we welcome the decision of the OFT and CC to produce joint guidelines in relation to merger control and consider that this approach will increase clarity and consistency. We also welcome the decision of the OFT and the CC to issue further detailed guidance on specific issues, such as the analysis of mergers involving multiple local markets, and the use of survey evidence. We would encourage the Authorities to produce supplementary documents on evidence and information requirements, as suggested in the Authorities' response to the first consultation, at page 6.

1.3 We note that the Authorities have gone some way to accommodate the large volume and variety of comments received in relation to the original draft guidelines, dated April 2009 ("**the original draft guidelines**"). We outline in this response those areas of the draft Guidelines where we believe that further expansion or clarification is still required.

2. PART 3: THE RELEVANT MERGER SITUATION

2.1 We note that the OFT Jurisdictional Guidance looks at the meaning and application of the relevant merger situation concept in considerable detail, and that certain revisions have now been made to the draft Guidelines to help ensure consistency with the detailed guidance published by the OFT. We remain of the view, however, that it might be preferable simply to refer readers to that guidance, rather than briefly summarising or repeating parts of it, which inevitably omits much important detail.

3. PART 4: A SUBSTANTIAL LESSENING OF COMPETITION

Theories of harm (paras. 4.7-4.15)

3.1 As set out in our response to the first consultation, we would welcome clarity on the statement at paragraph 4.7 that both the Authorities (i.e. the CC and the OFT) "*construct theories of harm at the outset of the respective phases of an inquiry*". Whilst this is something that the CC can and does do, given the work undertaken by the OFT at Phase I, as regards the OFT, our experience is that the OFT certainly does not present the parties with theories of harm at the outset of an inquiry. Indeed, we imagine it would no doubt find it difficult to do so given that its information gathering will not have started. If, as a matter of internal procedure, the OFT sets out at the beginning of a case theories of harm that may be relevant, paragraph 4.7 should make this clear.

The counterfactual: The exiting firm scenario (paras. 4.27-4.33)

- 3.2 We welcome the clarification in the revised draft Guidelines on the types of information that the Authorities may examine when assessing whether a firm is failing. The revised draft Guidelines refer specifically to the Authorities examining the firm's balance sheet to determine the profile of assets and liabilities, and the action that management has taken to address the firm's position. The draft Guidelines also refer to the examination of contemporaneous documents such as board minutes, management accounts and strategic plans.
- 3.3 However, it would be helpful if the OFT and CC were to expand the current section of the draft Guidelines on the failing firm defence in order to include additional case references, from both the OFT and the CC, to illustrate how they have applied accounting and documentary evidence in practice.
- 3.4 In addition, we note that the Authorities have indicated¹ that an explanation of the timescale within which a firm would have to fail in order to meet a failing firm defence would be artificial and misleading. The Authorities indicate that this would be a "judgement call" for an authority, depending on the precise facts and evidence available. Nonetheless, we remain of the view that further guidance on this point would provide greater certainty to merging firms and their advisors, and additional case references and explanations would be helpful.

Market definition (paras 4.52-4.76)

SSNIP test – use of 5 per cent illustrative price increase

- 3.5 At paragraph 4.59, the draft Guidelines indicate that a price increase of 5 per cent will typically be postulated, rather than the usual 5 to 10 per cent. The draft Guidelines go on to state that in some markets a different price increase may be used, the guiding principle being that the price increase applied should be one that is judged to be small but significant in the particular market under consideration.
- 3.6 The Authorities have noted that a number of respondents to the 2009 consultation sought further clarification on this point. However, the Authorities' response does not appear to address these concerns.² We remain of the view that it would be useful if the OFT and CC could provide further information on their rationale for preferring to use a 5 per cent increase in price, and the circumstances in which a 5 per cent price increase is likely to be considered to be inappropriate. In this connection, we note that the OFT's current merger guidelines appear to indicate a more flexible approach, referring to a "5 to 10 per cent" price increase³, this being in line with the European Commission's guidance on market definition⁴. We also note that the CC has itself sometimes considered 5 to 10 per cent when applying the SSNIP test in merger cases⁵, and that this point was the cause of some debate at the 1 June 2009 seminar.
- 3.7 As set out in our response to the 2009 consultation, we are concerned that a reliance on a postulated 5 per cent price increase (rather than the usual 5-10 per cent price increase) may lead to situations where markets are defined too narrowly. This is particularly likely where the own price elasticity of demand increases as prices rise (which is a common

¹ Summary of respondents' submissions and the Authorities' response, page 10.

² Summary of respondents' submissions and the Authorities' response, pages 12 and 14.

³ **Mergers – Substantive Assessment Guidance**, OFT, May 2003, at paragraph 3.17.

⁴ See paragraph 17 of the European Commission's **notice on the definition of the relevant market for the purposes of Community competition law**, OJ C372, 9 December 1997.

⁵ See, for example, the **Report on the anticipated acquisition by Pan Fish ASA of Marine Harvest NV**, Competition Commission, December 2006, paragraph 5.35.

assumption). Under these conditions, estimates of substitution at prevailing pre-merger prices, in response to a 5 per cent price increase, might well understate the substitution that might occur at higher hypothetical monopoly prices.

- 3.8 We are further concerned that paragraph 4.59 also suggests that it may be appropriate to apply the SSNIP test using a price increase of below 5 per cent. We find it difficult to imagine circumstances where this could be the case and, if this is indeed the Authorities' view, we consider it essential that the rationale and circumstances of application be explained in much more detail, as we would consider this highly unconventional.
- 3.9 The definition of artificially narrow markets will raise issues similar to those discussed below (in relation to supply-side substitutability), potentially resulting in:
- (a) artificially high "headline" market shares for the parties to mergers, higher market concentration levels, and hence greater prima facie competition concerns;
 - (b) an increased evidential burden on merger parties to demonstrate that competitive constraints are sufficiently strong to counteract any potential adverse effects on competition, and a potential *de facto* shifting of the burden of proof (see also paragraph 3.15 below);
 - (c) multiple narrow markets being identified and examined separately, increasing the burden on the parties, regulators and interested third parties;
 - (d) implications for Chapter II cases, where market definition precedents from merger cases are often used; and
 - (e) a reduction in the value of market definition precedents.

Role of supply-side substitutability

- 3.10 The decision of the Authorities to "downplay" the role of supply-side substitution in the original draft Guidelines generated considerable opposition, and the Authorities have subsequently emphasised that it was not their intention to suggest that supply-side substitution was irrelevant.⁶ However, we consider that a reading of the revised draft Guidelines indicates that it remains the case that insufficient weight will be placed on this form of competitive constraint.
- 3.11 The revised draft Guidelines continue to emphasise that demand-side substitutability will be the key concept in market definition, with reduced emphasis on supply-side substitutability. For example:
- "The boundaries of the relevant market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the Authorities may aggregate several narrow markets into one broader one on the basis of considerations about the response of suppliers to changes in prices. They may do so when production assets can be used by companies to supply a range of different products that are themselves not demand-side substitutes..."* (para 4.67 of the draft Guidelines, emphasis added).
- 3.12 Accordingly, the revised wording of the Guidelines continues to suggest that there is considerable flexibility for the Authorities to ignore this source of constraint, even where it ought properly to be included in the analysis in order to produce a market definition and market shares which are in any way meaningful. As a consequence, and whilst we agree that there is sometimes merit in viewing market definition and competitive constraints "in the round", we remain concerned that the change of emphasis and reduction in

⁶ Summary of respondents' submissions and the Authorities' response, pages 12 and 13.

importance of supply-side substitutability may lead to the identification of artificially narrow markets.

- 3.13 In particular, a distinction has historically been drawn between supply-side substitutability and new entry on the basis of the time, costs and likelihood of production/supply-switching occurring. Supply-side substitutability has therefore been viewed historically as a stronger and more immediate constraint than new entry. If, as envisaged by the draft Guidelines, supply-side substitutability is now given less weight in the analysis of market definition, it would appear that there may be a "blurring" of the concepts of supply-side substitutability and new entry.
- 3.14 This, in turn, may lead to artificially narrow market definitions based primarily on demand-side substitutability, and bearing little resemblance to the market realities. In turn, artificially narrow market definitions will often lead to artificially high market shares and concentration levels, and these findings will "set the scene" for the analysis of competitive effects. (See also our comments below in relation to measures of concentration.)
- 3.15 As set out in our response to the original consultation, we are concerned that the envisaged change of emphasis may result in a shift in the burden of proof, with an increased evidential burden on merger parties to prove that competitive constraints are strong, such that their artificially high "headline" market shares in a narrowly defined market do not translate into adverse effects on the competitive process. This could subvert the basic legal position that the burden of proof is on the CC to demonstrate that a merger may be expected to result in a substantial lessening of competition. This could also result in increased instances of findings of market dominance in Chapter II cases, on the basis of reliance on artificially narrow market definitions from merger cases as precedents.
- 3.16 There have been many cases where defining markets on the basis solely of demand-side substitutability would have led to multiple markets, each of which would have then been subject to a separate analysis of competitive constraints, but where a consideration of supply-side substitutability justifies the definition of just one market.
- 3.17 One case in which a focus on demand-side substitutability would have erroneously led to multiple markets being defined was *Grainfarmers/Centaur Grain* in 2008, where the parties were both active in the purchase and marketing of wheat, barley, oats, different types of pulses, rye/maize and oilseeds. Whilst from a demand-side perspective there was very limited scope to switch between different product types (and then only for some types of end-user), on the supply-side the purchase and marketing of these different products used common facilities. The OFT did not reach a firm view on market definition, but considered that the most appropriate market definition was likely to be the procurement and supply of all grain, pulses and oilseeds⁷.
- 3.18 In *John Thompson/AB Agri (NI)* in 2008, the OFT considered the market for ruminant feeds. Each of the parties supplied a range of different grades of beef cattle, dairy cattle and sheep feeds, and the OFT found that there did not exist demand-side substitutability between feeds for these animals due to their different nutritional requirements. However, from a supply-side perspective, the feeds were "*virtually equivalent*". In this case, the OFT defined one market for all ruminant feeds, facilitating a more straightforward analysis of competitive effects⁸.

⁷ **Anticipated merger between the Grainfarmers Group and Centaur Grain Group**, OFT decision of 30 October 2008, at paragraphs 13-15.

⁸ **Anticipated acquisition by John Thompson Limited of the Northern Ireland Compound Animal Feed business and assets of AB Agri Limited**, OFT, 2 July 2008, at paragraph 16.

- 3.19 Similarly, in *Taminco/Air Products* in 2004, the OFT found that although there was limited demand-side substitution between three different types of methylamines, there was supply-side substitutability between the production of these product categories, which justified the definition of a single market⁹.
- 3.20 Particularly in cases involving, for example, chemicals and other industrial products, it is often the case that customers have very specific product requirements, and can purchase only very specific grades or product variants. However, from a manufacturer perspective, supply-side substitutability between different product grades/variants is straightforward.
- 3.21 Paragraph 4.67 of the draft Guidelines, whilst seeking to explain the role of supply-side substitutability, leads to a real lack of clarity about where supply-side substitutability fits into the Authorities' analytical framework. As explained above, in our view, the draft Guidelines should be amended to more openly and cogently recognise the important role that supply-side substitutability can play.
- 3.22 Finally, the new approach envisaged by the draft also risks damaging the value of precedents on market definition, because:
- (a) as noted above, in many cases an artificially narrow view on market definition will be reached. This, in turn, will raise prima facie concerns about future merger situations which would otherwise have raised little concern, potentially increasing the burden of proof on, and costs incurred by, the merger parties; and
 - (b) in other cases, separate market definitions will be reached for very specific grades or variations of products which would historically have been viewed as part of a wider market. When future merger cases arise which involve similar (supply-side substitutable) products, the precedents on market definition will be of little value.

Other market characteristics

- 3.23 We note that the short description of chains of substitution, which appeared at paragraph 4.77 of the original draft Guidelines, does not feature in the revised draft Guidelines. In addition, the description of R&D competition, at paragraph 4.83 of the original draft Guidelines, also fails to appear in the revised draft. The reasons for excluding this material are unclear.
- 3.24 We also note that in the description of self-supply (paragraph 4.69), the draft Guidelines indicate that inputs produced by the merger firms for self-supply should be included in the relevant input market only if it would be profitable for them to forgo use of the input, instead selling it into the merchant market. However, it may be possible for the merger firms readily to increase in-house production in order to supply the input to third parties without disrupting in-house consumption. the possibility of a rapid increase in the in-house production of the input, such that in-house consumption need not be foregone in order to supply third parties, should also be explicitly acknowledged in the Guidelines.
- 3.25 The description of secondary markets (paragraph 4.69) is considerably shorter than that contained in the original draft Guidelines (paragraphs 4.80-4.81). We consider that the original description, which sought to distinguish between system markets, dual markets and multiple markets, would be more helpful to firms and their advisors.

Measures of concentration (paras 4.77-4.83)

- 3.26 Paragraphs 4.84 to 4.87 explain that the OFT and CC may have regard to commonly-used measures of the degree of market concentration in assessing mergers, as these can be

⁹ **Anticipated acquisition by Taminco NV of the European methylamines and derivatives business of Air Products and Chemicals Inc**, OFT decision of 16 July 2004, at page 2.

indicators of the competitive pressure in a market. However, measures of concentration will have a value only where they are based on a properly defined market, under which supply-side substitutability has been fully taken into account.

3.27 As indicated in our response to the first consultation, we believe it would be useful if the OFT and CC could provide further guidance on the weight they intend to place on such measures of concentration in their analysis. For example, the revised draft Guidelines do not comment on the extent to which market shares would ordinarily be deemed to carry greater weight within the analysis than, for example, concentration ratios or HHIs.

3.28 In addition, the text of paragraph 4.52 of the draft Guidelines is very unclear:

"Market definition is a useful tool, not an end in itself. Its primary purpose is to identify the 'relevant market', which provides a framework for the analysis of the competitive effects of the merger. As part of their analysis, the Authorities may also define a market for the particular purpose of measuring and evaluating market concentration. For this latter purpose, markets may be defined more narrowly than the relevant market, because concentration measures will be more instructive when the narrowest possible market that satisfies the hypothetical monopolist test is used." (paragraph 4.52)

3.29 Since the relevant market for the purpose of assessing an SLC is typically the narrowest market that satisfies the hypothetical monopolist test, the final sentence in particular of paragraph 4.52 does not appear to make sense.

3.30 More generally, it is not clear to us why the OFT/CC now appear to be advocating an approach whereby one market definition may be used for the assessment of whether an SLC is expected to arise, but a different (narrower) market definition may be used when calculating measures of concentration. The revised draft Guidelines also indicate that:

"The Authorities will define the relevant market sufficiently broadly to identify the arena within which rivalry takes place, typically by the inclusion of close substitutes to the products of the merger firms. By contrast, markets defined for the purpose of measuring concentration may feature a narrower set of products (or a smaller geographic area) than the relevant market, in order to ensure that market shares provide a reliable indication of market power" (para 4.58)

3.31 If the relevant market is properly defined for the purposes of assessing whether an SLC is expected to arise, then this market should include all material (actual and potential) demand- and supply-side constraints. Any measure of market concentration should, as a minimum, reflect all of these (actual and potential) substitutes in order to convey meaningful information as to the competitive pressures within the market.¹⁰ Indeed, should a narrower subset of products be defined for the purposes of calculating market shares and other concentration measures, this will fail to take account of the aggregate constraint imposed by competition from those products that are within the relevant market but excluded from the concentration calculations.

3.32 If, additionally, the Authorities wish to examine the strength of competition within a particular sector of a differentiated goods market, then it should be borne in mind that market shares and other concentration measures based on broad and narrow market definitions may both be misleading as to the strength of competition. Other potential sources of evidence, such as diversion ratios, would be more informative.

3.33 Furthermore, the draft Guidelines already advocate an approach where supply-side substitutability may not properly be taken into account, and where postulated price

¹⁰ This is notwithstanding the various caveats that must be attached to the different measures of concentration, as summarized at paragraph 4.78 (a) and (c) of the draft guidelines.

increases of only 5 per cent are envisaged. Both of these factors are likely to lead to potentially over-narrow markets being defined for the purposes of assessing an SLC. To then use an even narrower market definition for calculating measures of concentration runs a high risk of producing meaningless data.

- 3.34 The OFT's and CC's practice so far has been to use the same market definition for calculating measures of concentration and assessing the likelihood of an SLC. This apparent change of approach would, in our view, limit the usefulness of measures of concentration by excluding certain relevant constraints. It will reduce the importance of precedents, and lead to confusion amongst merger firms and their advisors.

Non-horizontal mergers: coordinated effects (para 4.141)

- 3.35 The draft guidelines note at paragraph 4.141 that vertical mergers may create or strengthen coordinated effects by, for example:

- (a) allowing the merged firm to gain commercially sensitive information about non-integrated rivals (n.b. this assumes that there is no secret price discounting);
- (b) reducing the number of players in the market (through foreclosure);
- (c) increasing the level of symmetry in a market (where other players are already vertically integrated);
- (d) increasing market transparency (e.g. by giving upstream producers control of downstream prices);
- (e) increasing the punishment mechanisms available to vertically integrated firms which become important suppliers or customers of their rivals;
- (f) increasing barriers to entry into the market (the mechanism here is not explained); or
- (g) reducing buyer power (if the merger involves the acquisition of an otherwise disruptive customer).

- 3.36 However, whilst paragraph 4.127 of the draft Guidelines acknowledges that "*most non-horizontal mergers are benign or even pro-competitive in their effect*", we consider that this point should also be made in the section dealing with coordinated effects. Moreover, and as we commented in response to the first consultation, the draft guidelines do not mention that the existence of vertical integration can actually undermine the sustainability of collusion, by hindering market transparency in a number of ways. For example:

- (a) competitors of vertically integrated firms will be able to observe only the final product price and not any internal transfer price (which might be lower than any tacitly "agreed" price for the semi-finished product);
- (b) the vertically integrated firm might not buy any or much of its requirements from competing suppliers. In these circumstances, the vertically integrated firm will gain little knowledge of competitors' prices, and competitors will have little knowledge of the vertically integrated firm's volume requirements; and
- (c) vertical integration might well impede coordination in other ways, such as by permitting various efficiencies to be achieved (thus creating a downward pressure on prices or improving quality), and/or otherwise leading to greater asymmetries in cost structures.

- 3.37 These points should be set out in the guidelines, in order to provide a more thorough and balanced discussion of the topic.

- 3.38 Paragraph 4.141 of the draft guidelines goes on to state that, as with vertical mergers, conglomerate mergers may create or strengthen the risk of coordination. The draft guidelines indicate that this may occur by:
- (a) enhancing competitors' ability to agree on a collusive outcome;
 - (b) increasing the scope for punishment;
 - (c) increasing the ability to detect deviations from any collusive "agreement";
 - (d) reducing the incentives of foreclosed rivals to contest a situation of coordination; and
 - (e) increasing multi-market contact.

3.39 However, as set out in our response to the first consultation, the draft guidelines make no attempt to explain the mechanisms through which the risk of coordination would be increased, presumably in part reflecting the paucity of literature in this area. It is also entirely possible that conglomerate mergers might reduce the risk of coordinated outcomes by, for example, reducing the level of symmetry in a market (e.g. in circumstances where most suppliers in the market are single-product firms), or where firms offer "bundles" of products, thereby reducing the transparency of individual product prices and permitting secret discounting. As is the case with vertical mergers, these points should be set out in the guidelines, in order to provide a more thorough and balanced discussion of the topic.

4. **PART 5: PUBLIC INTEREST CASES**

4.1 We note that the CC intends to produce its own comprehensive guidance on its procedures for merger investigations, and we welcome this. In our view, the majority of the material contained in Part 5 of the draft Guidelines would sit much more naturally as part of such guidance (as it focuses more on procedures and legal basis than substantive assessment) and could be given more comprehensive (and therefore helpful) treatment than the current brief summary approach.

4.2 We also remain of the view (as indicated in our response to the 2009 consultation) that some of the content in these sections, insofar as they concern the procedure and powers of the OFT and the Secretary of State, is dealt with more comprehensively in the OFT's Jurisdictional Guidance and the relatively brief treatment in these draft Guidelines is not particularly illuminating. It may be preferable simply to refer readers to the OFT Guidance.

4.3 At paragraph 1.15 and in Section 5, concerning mergers falling under the ECMR, in addition to the circumstances already cited, we think it is also worth noting that mergers between licensed water companies which fall under the ECMR may nevertheless be subject to the mandatory reference regime under sections 32 to 35 of the Water Industry Act 1991,¹¹ and to refer readers to "Water Merger References: Competition Commission Guidelines, CC9".

5. **AREAS REQUIRING EXPANSION/FURTHER EXPLANATION IN THE JOINT GUIDELINES**

Bidding markets

5.1 The only reference in the draft Guidelines to bidding markets is at paragraph 4.104, in the context of a discussion of the scope for allocating bids amongst competitors as a basis for

¹¹ On the basis that the application of this regime constitutes the protection of a legitimate interest under Article 21(4) of the ECMR.

competitive coordination. However, as we explained in response to the first consultation, we consider that it would be very helpful if the draft Guidelines could be expanded with a section outlining the issues specific to bidding markets, together with appropriate case references.

- 5.2 As illustrated by a number of previous cases, bidding markets, which are characterised by large, infrequent contracts, often raise particular issues as regards market definition, market shares and the assessment of rivalry.
- 5.3 For example, the CC's existing merger guidelines recognise that in bidding markets, which tend not to have multiple buyers and multiple sellers over a continuous time period, competition for contracts occurs only at particular times. The CC's existing guidelines indicate that in these circumstances, the application of the SSNIP test might lead the CC to consider each contract as a market in itself. However, where this would not be helpful in understanding the dimensions of the market within which rivalry between firms occurs, the CC's existing guidelines suggest that it will be necessary to consider other factors relevant to market definition, such as information on the firms bidding for contracts, how they bid, and their track record in bidding for contracts. The CC's existing guidelines state that this type of information may be more informative as to the significance of firms in the market than, for example, their market shares at any specific point in time.¹²
- 5.4 In this regard, the OFT comments on this issue in its guidelines on the assessment of market power under the Competition Act 1998. It states that:

*"Sometimes buyers choose their suppliers through procurement auctions or tenders. In these circumstances, even if there are only a few suppliers, competition might be intense. This is more likely to be the case where tenders are large and infrequent (so that suppliers are more likely to bid), where suppliers are not subject to capacity constraints (so that all suppliers are likely to place competitive bids), and where suppliers are not differentiated (so that for any particular bid, all suppliers are equally placed to win the contract). In these types of markets, an undertaking might have a high market share at a single point in time. However, if competition at the bidding stage is effective, this currently high market share would not necessarily reflect market power."*¹³

- 5.5 For example, in its report on *Compass Group/Rail Gourmet Holding/Restorama/Gourmet Nova*, the CC stated that:

*"As the supply of on-train food services to [train operating companies] operates through a series of contracts, which are let at different times by the [train operating companies], it would not matter for the purposes of competition if one company held all the contracts at any point in time, as long as this or other factors did not restrain or prevent the possible entry of a competitor, each time one of those contracts was tendered, or else act to restrain or prevent the regular tendering of contracts."*¹⁴

- 5.6 Moreover, in bidding markets, the closeness of competitors may be assessed by the extent to which they have won/lost contracts from one another. For example, in the context of the merger between *Express and Arla* (two processors of fresh liquid milk with similar coverage of England by virtue of their network of depots and dairies), the CC observed that:

"The parties submitted that although they were clearly competitors, they were not each other's closest competitor. The evidence supports this claim. Since 2000,

¹² At paragraph 2.29.

¹³ **Assessment of market power** (December 2004), at paragraph 4.4.

¹⁴ **Compass Group PLC/Rail Gourmet Holding AG, Restorama AG and Gourmet Nova AG**, Cm 5562 (July 2002), at paragraph 2.15.

*Express has lost/gained [...] supply arrangements for fresh processed milk to the national multiples—Arla UK has lost/gained [...]. However, only one has involved a national multiple switching supply to a group of stores directly between Arla UK and Express. Rather, it seems to us that, of the four major processors, Wiseman has been the most dynamic in gaining market share. As a result of a lack of investment in new processing infrastructure by both the merger parties (although particularly by Express), they have fallen behind their two main rivals in being able to compete aggressively."*¹⁵

5.7 The European Commission's horizontal merger guidelines go on to indicate that:

*"In bidding markets it may be possible to measure whether historically the submitted bids by one of the merging parties have been constrained by the presence of the other merging party."*¹⁶

5.8 In *Express/Arla*, the CC also commented on the risk of coordination in the context of a bidding market:

*".. a coordinated outcome will not be sustainable if there is potential for disruption by new competitors or by customers themselves. In general, coordination is more difficult in bidding markets when individual tenders are large relative to the size of the market, and when transactions take place infrequently. In both instances, this is because it raises the incentive for one of the firms to deviate unilaterally from the coordinated outcome"*¹⁷

Price discrimination

5.9 The only reference to price discrimination in the draft Guidelines is found at paragraph 4.53, in the context of a discussion of the possibility of defining different markets for different customer groups. Given that price discrimination can impact on various aspects of merger analysis, we would query whether a short description of the OFT's and the CC's approach to assessing price discrimination would assist merging parties and their advisers. Such a description could cover, for example, the conditions that must hold for a firm to be able to price discriminate (such as having the ability to discriminate between customers, perhaps due to temporal demand, and the inability of customers to undermine price discrimination by engaging in arbitrage).

Acquisition of varying levels of control

5.10 Finally, in cases where one firm acquires limited control over another, this may affect the substantive analysis to the extent that competitive incentives are different from those which would exist in a full merger situation. A short description of the OFT's and CC's

¹⁵ **Arla Foods amba/Express Dairies plc**, Cm 5983 (October 2003), at paragraph 5.120.

¹⁶ **Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings** (2004/C 31/03), at paragraph 29.

¹⁷ Cited above, note 15, at paragraph 5.117. Similarly, in the context of the proposed acquisition of Dräger Medical AG & Co KGaA of certain assets representing the Air-Shields business of Hill-Rom Inc. (Hill-Rom), a subsidiary of Hillenbrand Industries, the CC considered that the bidding nature of the market, a lack of price transparency, and the smaller market shares of rivals rendered coordination unlikely, despite the market being highly concentrated following the merger:

"The incentives to undercut a prevailing level of prices to win a high-value tender would be high and, due to the lack of transparency in the market and the infrequency of purchases, the threat of retaliation low. Moreover, the fact that the merged party would have such a large market share even by comparison with its nearest competitor leads us to believe that the risk of this type of coordination of pricing is not high."
(Dräger Medical AG & Co KGaA/Hillenbrand Industries, Inc., (May 2004), at paragraph 7.13).

approach to this issue, together with case references (such as *BSkyB/ITV*¹⁸), would be helpful.

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7 JUNE 2010

¹⁸ **Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc: Report sent to Secretary of State (BERR)**, Competition Commission, 14 December 2007.