

**RESPONSE OF CLIFFORD CHANCE LLP TO THE CONSULTATION ON THE DRAFT MERGER
ASSESSMENT GUIDELINES OF THE OFFICE OF FAIR TRADING
AND THE COMPETITION COMMISSION**

Clifford Chance LLP ("CC") welcomes the opportunity to comment on the consultation by the of the Office of Fair Trading ("OFT") and the Competition Commission (the "**Commission**") (together, the "**Authorities**") on their draft Merger Assessment Guidelines (the "**Draft Guidelines**"). In particular, we welcome the consolidation of four existing publications into one, and view this as a useful precedent for future consolidation of the various guidance documents of the two Authorities.

We set out below our observations on the Draft Guidelines, which follow the same structure as the Draft Guidelines.

PART 1: INTRODUCTION

- 1.1 As a general point, while we applaud the attempt to rationalise and consolidate different guidance documents, we have some concerns that – for an interim period at least – there will be a risk of confusion as a result of:
 - 1.1.1 overlapping guidance, such as that contained in Parts 1 and 3 of the Guidelines in respect of "the European dimension" and "the relevant merger situation" and the OFT's recently published "Jurisdictional and Procedural Guidance" (OFT1021); and
 - 1.1.2 sections of otherwise superseded documents that continue to apply, such as Chapters 7 and 8 of the OFT publication "Mergers Substantive Assessment Guidance" (OFT516b).
- 1.2 To address this, we suggest that the OFT and Commission websites that link to the guidance contain also a clear indication of the other relevant guidance documents that remain applicable (or sections of such documents), along with an explanation of the plans of each authority for future rationalisation and consolidation of this guidance.
- 1.3 In addition, CC submits that overlapping guidance should be avoided, as it will create confusion and uncertainty regarding the significance of omissions and use of different wording (and, in particular, whether differences signify differences in the approaches of the Authorities). Our preference would be for jurisdictional and procedural issues to be covered by a separate set of guidelines, published jointly by the Authorities and replacing all individual guidance notes published by the Authorities covering those topics.
- 1.4 As regards the wording of Part 1, we have the following specific observations:

- 1.4.1 paragraph 1.1. of the Draft Guidelines indicates that they supersede the OFT publication "Revision to Mergers: Substantive Assessment Guidance – Exceptions to the duty to refer markets of insufficient importance" (OFT516b), while footnote 1 indicates that OFT516b will continue to apply pending publication of a separate OFT guidance note;
- 1.4.2 In paragraph 1.5, the Draft Guidelines should contain a statement that if the Authorities do consider it right to depart from the guidance, they will explain to the parties why that is the case;
- 1.4.3 Paragraph 1.12 describes the EC Merger Regulation as applying to mergers "above a certain size". If the Draft Guidelines are to cover jurisdictional matters, then they should set out the jurisdictional thresholds under the ECMR in full.

PART 2: MERGER REVIEW BY THE OFT AND CC

- 2.1 Paragraph 2.5 of the Draft Guidelines now says that when assessing whether there is a "realistic prospect" of a substantial lessening of competition ("SLC") (but less than 50% chance) the OFT will take into account not only the degree of likelihood, but also the potential adverse effect on consumer welfare of an incorrect decision not to refer (the "downside risk"). There seems to us to be a material risk that the OFT would be acting *ultra vires* if it takes downside risks into account. Both the Enterprise Act ("EA") 2002 and the Court of Appeal in *IBA Health* refer to the test solely in terms of likelihood of SLC (as does the OFT's current guidance), and the downside risk appears to have no bearing on degree of likelihood of an SLC, or how "realistic" its prospect. Rather, it relates to the magnitude of the potential SLC, should it arise. We consider the suggestion that mergers could get referred on the basis of weak evidence, but significant downside risk, to be troubling.
- 2.2 Paragraph 2.10 should add that the Commission also applies the balance of probabilities test to the question of whether a relevant merger situation has arisen.

PART 3: RELEVANT MERGER SITUATION

- 3.1 As noted above, CC suggests that the Draft Guidelines cover only the assessment of competition issues and not issues of jurisdiction. If they do cover jurisdictional issues, we consider that they should contain the same level of detail as in the OFT's Jurisdictional and Procedural Guidance. In particular, the Draft Guidelines are missing significant and useful guidance that is available in separate publications of the Authorities in relation to almost every section of Part 3 of the Guidelines, (e.g. when a merger is "made public"; the definition of an enterprise, the test for material influence, calculation of turnover, the treatment of *de facto* control cases, the share of supply test etc).

Enterprises

- 3.2 In paragraph 3.8, the approach which the Authorities are taking when determining whether an enterprise is transferred rather than simply an asset is, in some cases, questionable and we consider those cases to be an illegitimate stretch of the statutory language which at some stage will need to be tested.

Material influence

- 3.3 In paragraph 3.16, is it being suggested that, for example, the covenants in loan agreements may confer material influence on the lender?

Controlling interest

- 3.4 We note that more than one entity can have a controlling interest in a company (paragraph 3.18) on the basis that one entity may have more than 50 per cent of the voting rights whereas another entity may have the right to appoint the majority of the board e.g. in a joint venture situation.

Associated persons

- 3.5 The Authorities make reference to the fact that "*entities may be considered to be 'associated persons' where they appear to have common incentives to act together for the purposes of gaining control over the acquired enterprise*" (paragraph 3.23). CC believes that the Draft Guidelines would benefit from greater clarity on this point and further explanation to what would be construed to be 'common incentives'.

PART 4: SUBSTANTIAL LESSENING OF COMPETITION

- 4.1 CC agrees that it is useful that the Draft Guidelines now address (at paragraph 4.6) the approach of the Authorities to mergers involving parties with "upstream" customers that are not end or final consumers. However, we disagree that an SLC affecting such upstream customers should be presumed to lead to the detriment of final consumers. At the very least, any such presumption should be rebuttable by the parties (paragraph 4.76 of the Draft Guidelines appears to indicate that this is possible). In particular, where the merging parties' customers compete with rivals that use different inputs to those supplied by the merging parties, and there remains plenty of competition in that downstream market, any lessening of competition in the market of the merging parties will often result only in a different apportionment of profits between the merging parties and their customers, and greater efficiencies on the part of the merging parties. CC's view is that competition policy should not act purely to regulate allocation of profits between businesses.
- 4.2 Paragraph 4.14 says that "*[w]here several concurrent theories of harm might arise, each of which may not individually constitute an SLC, the Authorities will make an*

overall assessment of whether or not the relevant SLC threshold is met. Because of the lower threshold of its reference test, the OFT may also consider there to be a realistic prospect of an SLC on the basis of multiple theories of harm that may not be validated according to the [Commission]'s 'balance of probabilities' assessment". We are concerned that this statement could be read as implying that the Authorities might conclude that there is a sufficient likelihood of an SLC on the basis of several types of harm, none of which is, individually, sufficiently likely to arise. The judgment of the Competition Appeal Tribunal (the "CAT") in *BSkyB and Virgin* does not, in our view, support such a broad and ambiguous statement. Consequently, paragraph 2.14 should in our view be reworded so that it states that if the Authorities conclude that a particular harm is sufficiently likely to arise (i.e. to the requisite degree of likelihood for the Authority in question), but would not in itself lessen competition substantially, they may nonetheless make an SLC finding if there are other harms that are, concurrently, sufficiently likely to arise and those harms, in aggregate, would lessen competition substantially. The Draft Guidelines should also recognise that if an SLC finding is dependent on several independent harms arising concurrently, that SLC may not reach the relevant threshold for likelihood, even if each type of harm is, independently, sufficiently likely to arise.¹

Failing firm defence

- 4.3 It is unclear to us whether the Draft Guidelines will replace the OFT's restatement of its position on the failing firm defence. That restatement did not contain any statement that decisions by profitable parents to close loss making subsidiaries would be unlikely to meet the failing firm criteria (although the OFT's substantive assessment guidelines do). That statement has, however, reappeared in the Draft Guidelines, and CC considers it to be incorrect. The inevitability of exit of a business is a question of fact: if a division is truly failing and cannot be restructured, then why should the profitability or otherwise of its shareholder(s) make a difference to that assessment? Previous cases of the OFT and Commission dealing with failing divisions suggest that the issue is one of evidence that exit is inevitable, rather than the likelihood that the criterion will be satisfied. Consequently, CC submits that the Draft Guidelines should state that:

¹ For example, if the independent events A, B and C each have a 60% probability of arising in particular timeframe, the likelihood that they will all occur in that timeframe will be closer to 20%. We recognise that SLC assessments do not involve mechanistic probability calculations of this nature, but submit that this principle should be reflected in some form in order to clarify the statement that the OFT might consider there to be a realistic prospect of an SLC on the basis of multiple, unlikely theories of harm.

- 4.3.1 decisions by profitable parent companies to close down loss making divisions can meet the criterion that exit was inevitable, subject to the parties being able to provide appropriate evidence; and that
- 4.3.2 in keeping with the statements in paragraph 4.24 of the Draft Guidelines, the OFT will look for compelling evidence that the profitable parent's decision to exit the business was inevitable, whereas the Commission will consider whether that decision was the most likely outcome.

Parallel transactions

- 4.4 The OFT has indicated in its Jurisdictional and Procedural Guidance that it does not apply the same "first come first served" approach of the European Commission to parallel transactions. That seems to us to be correct in the context of the differences between the EC and UK regimes and the standard of probability that the OFT applies. At the Commission stage, however, it seems that the Commission must select the one counterfactual that it considers "more likely than not" to arise. At the moment, the Draft Guidelines simply state that the relevant counterfactual for the Commission will depend on whether it expects the parallel transaction to proceed. That leaves a "black hole" in policy as regards parallel transactions with co-dependent counterfactuals that are both referred to the Commission, i.e. those cases in which each transaction gives rise to an SLC only if the other is cleared by the Commission. While this scenario has not yet arisen in the UK, it seems to us to be much more than an academic hypothesis, given that it has arisen before under the EC Merger Regulation, and given the long-term trend of increasing consolidation which the present recession is only likely to enhance. In any event, one of the effects of the recession is the exit of market participants which will both reduce the number of players and discourage new entry. Moreover, the difference in approach between the Authorities and the European Commission creates difficulties for parallel transactions where one falls under the EC Merger Regulation and the other under the EA 2002. CC therefore submits that the Commission should take this opportunity to decide what its approach will be, and give certainty to those operating in consolidating sectors. We understand the natural reluctance to create policy unless required to do so for a particular transaction, but think the issue sufficiently important to merit consideration in the Draft Guidelines.

Market definition: general approach

- 4.5 In paragraph 4.47 of the Draft Guidelines, the Authorities downplay the need to reach a conclusion as the relevant market definition. CC submits that, in practice, this raises a number of issues. As noted in the Draft Guidelines, market definitions are indeed a useful tool for practitioners when analysing a transaction and advising a client as to potential substantive risks involved in a transaction. If the Authorities move away from clearly defining the relevant markets, this is likely to reduce legal certainty and,

in turn, may discourage firms from bidding or entering into certain transactions in cases where it is difficult for their advisors to provide a clear risk analysis. Furthermore, the greater reliance on an effects based analysis will place a greater burden on the notifying parties to provide detailed economic evidence /econometric data to support the notification from the outset. This will only seek to increase the time and cost spent at Phase I of the notification process. Moreover, given that it is standard practice for much of the economic data provided to the Authorities to be redacted (or at least rendered inconclusive) in the final published decisions, this will likely reduce the amount of guidance the decisions (particularly at Phase I) can give in terms of useful precedent for future transactions even further, again significantly impacting on legal certainty. In addition, it should be noted that since the necessary economic data and survey evidence needed to carry out the effects based analysis is often very specific to the case in question, any conclusions drawn would have a much more limited application to future transactions.

- 4.6 Paragraphs 4.50-4.51 refer to the likely reactions of firms not currently in the market and the ability to switch into the market. CC notes that the Authorities should also take account of and make reference to the ability of some of the retail chains and supermarkets to very easily extend their product ranges (either permanently or temporarily) to compete on a relevant product market. Supermarkets can easily increase (or decrease) the ranges of the products they sell/display within a very short space of time. Notably the supermarkets have all been able very easily to enter into the selling of newspapers, clothes, DVDs and other electrical goods etc. Supermarkets and other retail outlets (e.g. Argos) require little capital or lead time to enter into a market and can often react on a seasonal basis e.g. the stores can readily adapt and switch to the selling on electrical goods to meet customer demand. Reference should be made by the Authorities to this inherent flexibility of many retailers to switch into most (consumer goods) product markets in the Draft Guidelines and the Authorities should expand on how they propose to take this into consideration.

Market definition: hypothetical monopolist test

- 4.7 In paragraph 4.55, the Draft Guidelines should clarify the types of transactions in which a price increase of more or less than 5% will be taken into consideration, as the difference could be material to whether an SLC is found to exist. In particular, CC submits that the Authorities should take account of retail price points when conducting the SSNIP test. For example, for many retail products there are standard price points which are followed (due to consumer perceptions), e.g. £1.29, £1.49, £1.69 etc. To apply the standard SSNIP test of 5% (i.e. a few pence) would ignore the reality of consumer purchasing habits. It would also deny the usefulness of much of the internal data generated by retailers, which often provides entirely relevant and insightful evidence (which will indicate only the impact on consumer switching in the event of a price rise to the next price point).

4.8 Paragraph 4.56 of the Draft Guidelines state that where "*the candidate market comprises several different products and price discrimination is possible, [...] the Authorities will generally assume that the hypothetical monopolist will increase its prices by 5 per cent on average but not necessarily uniformly, and will instead implement different price increases to its customers in a way that would lead to the highest profit.*" We have a number of objections to this approach:

4.8.1 where applied, it would add a great deal of complexity and uncertainty to market definition;

4.8.2 it addresses an issue (differing degrees of competition between differentiated products) that is more appropriately considered when assessing competitive effects;

4.8.3 it assumes that, having identified the level at which price increases are "significant", it is acceptable to consider increases below that threshold (i.e. *insignificant* price increases); and

4.8.4 most importantly, the notion of a "profit-maximising" hypothetical monopolist appears to allow the Authorities to vary the market definition methodology on a case by case basis in a way which excludes products that pose genuine competitive constraints.² For example, suppose the Authorities consider whether product D should be included in the scope of a product market that currently comprises products A, B and C. If product D exercises a significant constraint on the pricing of C, the approach outlined in paragraph 4.56 would allow the Authorities to exclude product D from the scope of the product market by assuming, say, a 1% price increase for product C, on the basis that consumers would not switch to product D. In short, product D would be excluded *because* it is competitive, when that is the very reason why it should be *included* within the relevant product market.

4.9 Paragraph 4.58 of the Draft Guidelines states that the Authorities will seek to take into account the possibility of "cellophane fallacy" issues clouding the assessment of coordinated effects by using "prices lower than the prevailing prices". That, however, assumes that the impact of existing market power on prices is or can be known. In practice, CC submits that assessing the level of the supposed "lower price" would be extremely complex (take, for example, the economic analyses conducted in the context of cartel damages claims) and further clarification as to how the Authorities

² Indeed, the very idea of a "profit maximising" hypothetical monopolist seems inconsistent with the SSNIP test: if the monopolist were always profit maximising, it would not impose any price increase that would result in an unprofitable degree of customer switching, and the scope of the relevant product market would never be expanded.

would seek to make such a calculation would be welcomed. We also query whether it is necessary to attempt to define a competitive market price in such a case. If the Authorities have already concluded – without defining the scope of the relevant market - that there is pre-existing tacit coordination (and see our comments on page 11 below regarding identification of existing coordination), is not the question simply whether the merger will reinforce those conditions? Moreover, it seems to us that by conducting a SSNIP test on the basis of prices other than the prevailing pre-merger prices, the Authorities would be going beyond a comparison of the effects of the merger with the relevant counterfactual (in which any pre-existing tacit coordination would also be reflected), and would risk excluding from the scope of the relevant market products that do exert competitive constraints on the parties, and will continue to do so post-merger.

Market definition: types of evidence

- 4.10 Recent OFT cases (such as *CGL/Somerfield*) have highlighted the growing importance of survey evidence particularly at Phase I. In this light, it is critical that advisers are able to conduct surveys pre-merger that are accepted by the Authorities at both stages of the review process and that there is consistency as between the two Authorities. Accordingly, the CC welcomes the Authorities' acknowledgment that further guidance is needed (as noted in the OFT/Commission seminar that was held on 1 June 2009 (the "**Seminar**")) and is encouraged that the Authorities are already engaged in drafting further guidance on the use of surveys.
- 4.11 In addition, there appears to be an inconsistency in the drafting of the second bullet point of paragraph 4.62 and the first bullet of paragraph 4.65. The former refers to the use of information derived from surveys whereas the latter does not. In our view, it should.

Market definition: online commerce

- 4.12 CC is disappointed with the lack of any guidance regarding the treatment of online commerce with respect to product and geographic market definition, in particular, with respect to retail mergers. This is of increasing importance, as has been highlighted in many recent cases such as *HMV/Ottakers* and *GAME/Gamestation* and is coming under increasing scrutiny by the European Commission. Indeed, it is often quoted that Tesco's turnover represents 12 pence in every pound in respect of high street spend. The latest market data suggests that the revenue generated by online commerce is in excess of that of Tesco and growing at a significantly faster rate. Online distributors and retailers can often provide a significant constraint on many traditional "bricks and mortar" retailers and, by its very nature, the internet can widen any geographic market to be at least national in scope. In addition, barriers to entry

are often low. Accordingly, CC would suggest that further consideration needs to be given as to how such treatment can be reflected in the Draft Guidelines.

Geographic market definition

- 4.13 In paragraph 4.67, the Draft Guidelines specify that for certain mergers (retail mergers in particular) catchments will be based on areas in which 80% of customers are located. CC recognises that this is based on past practice of the Authorities, but – given that the 80% threshold is not based on any firm or generally applicable rule³ - the Draft Guidelines should reaffirm that if competition concerns are identified, the Authorities will nevertheless look at competitive constraints posed from outside the catchment area, where appropriate. The Authorities might also consider providing that this "shortcut" will be more appropriate at the Phase I review stage rather than Phase II given the differing standards of proof that need to be satisfied at each stage.

Asymmetric constraints

- 4.14 CC would note caution when considering the use of asymmetric constraints. An example may be given of a situation in which a smaller retailer may impose a competitive constraint on a supermarket through the use of a different pricing mechanism. One example would be the use of preowned prices in relation to computer games whereby the prices charged by large grocery outlets for mint games may be constrained by the preowned prices of Gamestation or independent retailers.

Measures of concentration

- 4.15 With regards to the use of the Herfindahl-Hirschmann Index (“**HHI**”), CC welcomes the attempt by the Authorities to bring the guidance in line with the European Commission guidelines on the assessment of horizontal mergers. However, we note that the language used differs significantly from that employed by the European Commission. For example, the European Commission's guidelines stipulate that concerns are unlikely to be identified for mergers with an HHI between 1,000 and 2,000 and a delta of less than 250. In contrast, the Draft Guidelines provide that a market with a post-merger HHI above 1,000 may be regarded as being "concentrated", and that a delta exceeding 250 "may give cause for concern". Given that the HHI thresholds employed are very low, CC suggests that the wording employed by the European Commission (which is closer in form to a safe harbour) is more appropriate.

³ Notwithstanding the statement in footnote 49, there are very few areas in the UK in which 20% of the population are holidaymakers.

Horizontal mergers: market share thresholds

4.16 We welcome the statement in footnote 68 that "*previous OFT decisions suggest that market shares of less than 40% will not often give the OFT cause for concern*", subject to the following observations:

4.16.1 given its usefulness as a rough "rule of thumb", we consider that the statement merits inclusion in the main text of the guidance itself, rather than in a footnote;

4.16.2 if possible, the statement should also extend to reflect previous decisions of the Commission. If that is not possible, because the Commission *does* often identify concerns where market shares are less than 40%, then it is important that that difference in approach is explained in the Draft Guidelines;

4.16.3 it would also be helpful to include a few examples of cases in which the Authorities have identified concerns despite market shares being under 40% (as the footnote is currently very vague). For example, it appears that the 40% rule of thumb is less reliable in certain sectors, such as in relation to the retail and banking sectors; and

4.16.4 the Authorities might consider whether there is still a place for a 25% market share threshold that would be closer in terms to a safe harbour than the threshold previously applied by the Commission. For example, the Draft Guidelines might provide that where market shares are below 25%, concerns will only arise in very exceptional circumstances. Such a threshold would allow practitioners more scope better to reflect degrees of risk in their advice to clients, and would be consistent with the approach of the European Commission in its horizontal guidelines (see paragraph 18 of those guidelines).

Horizontal mergers: fascia counts

4.17 In paragraph 4.101 and Footnote 70, the Draft Guidelines appear to apply varying standards for fascia counts without clear justification. In particular, we understand that the link made in footnote 70 between the fascia count at the local level number of competitors and at the national is based on pragmatism (i.e. that it would not be reasonable to expect more fascias at local level than are present on a national scale), as opposed to any solid economic rationale. Consequently, it would be helpful if the Draft Guidelines were to explain how the relevant "intervention threshold" is determined by the OFT, perhaps by reference to examples of factors that were relevant in previous cases. We also believe that it would be of benefit if the OFT could emphasise in the Draft Guidelines that the number of fascias considered varies depending upon a range of factors including the nature of the distribution channels in

the sector and the nature of sector itself. It would also be of considerable use if the OFT could give some illustrations as to the relevant fascia counts used when considering the different sectors on the basis that it is accepted that the number of fascias for effective competition will vary depending on the nature of the sector e.g. pubs, pharmacies, groceries etc.

Horizontal mergers: increased buyer power

- 4.18 Paragraph 4.111 refers to the concept of "demand withholding". However, we believe that this is an atypical example of buyer power and a more likely example is one in which the buyer would demand further price reductions from the supplier (i.e. force the supplier to squeeze their margins), lowering the price of the product for the buyer, whilst not passing this price reduction onto the ultimate end consumer. [...] ⁴

Coordinated effects

- 4.19 Paragraphs 4.120 states that "*[p]ast cartel actions and proceedings in the same product market (in the UK or elsewhere) may also indicate that the conditions for coordination were met in that market.*" It was observed at the Seminar that actual coordination in a market can be good evidence that the conditions for tacit coordination are not present (as if they were, there would be no need for actual coordination). While that observation was described as glib, we consider that it nonetheless bears repeating in the Draft Guidelines. In addition, CC's view is that past cartel conduct is neither useful nor probative evidence of the likely future conduct of market players, given that recidivism is heavily punished.
- 4.20 In any event, we would also emphasise that the only evidence which could be taken into consideration by the Authorities in this respect is the actual decisions in which there has been a finding of coordination. The mere fact that there have been previous allegations made or there are ongoing investigations/proceedings in relation to alleged cartel activity in the market can be of no probative effect until such time as a decision is forthcoming. This is of particular concern with respect to the Commission which has no statutory powers pursuant to which it can investigate/draw conclusions as to cartel activity.
- 4.21 Paragraph 4.121 states that, in identifying whether there is existing coordination "*market outcomes pre-merger such as pricing and market share may be hard to reconcile with non-coordinated behaviour*". Given the recognised difficulty in distinguishing between a competitive market and one in which there is tacit coordination, that statement is not sufficient to allow businesses or practitioners to

⁴ [Redacted]

assess the risk that the Authorities will pursue a theory of harm based on pre-existing coordination.

Vertical mergers

- 4.22 In paragraph 4.141, the use of a 30% market share threshold to indicate which vertical mergers will "not often raise concern" (which we assume is an attempt to be consistent with the European Commission's non-horizontal merger guidelines) does not sit easily with the use of a 40% market share for identifying when horizontal mergers will "not often" raise unilateral effects concerns, given that horizontal mergers are widely recognised as having a greater propensity for anti-competitive effects. We suggest that the Draft Guidelines either provide for a higher threshold at which vertical mergers do not often raise concerns (which should be at least 40), or state the 30% threshold in stronger terms, e.g. "an upstream market share of less than 30% will raise concerns only in very exceptional circumstances".
- 4.23 In footnotes 88 and 91, a distinction is drawn between the approach to "purely vertical" mergers (in which a 30% screen will be applied) and "principally horizontal" mergers (in which the 30% screen will not be applied). We do not consider this to be a valid distinction, given that the post-merger conditions of competition may be exactly the same for both types of merger. While we do not dispute that the Authorities should assess the actual degree of market power of the merged entity, we submit that the market share screen is of equal relevance to both types of merger (whether the concern is input foreclosure or customer foreclosure).
- 4.24 Paragraphs 4.146 to 4.148 refer to the merging firms foreclosing "*access to important customers*". It might be more straightforward to discuss the issue in terms of the merging entities being important customers, and having the ability and incentive to cease purchasing from upstream rivals (or reduce purchases / purchase prices etc), in the same manner as the European Commission's non-horizontal merger guidelines. The current wording implies that there might be a concern if the merging firms would cause *independent* downstream customers to switch away from upstream rivals. However, that would only occur if the merged entity is able to offer an upstream product or service that is materially cheaper or better as a result of the merger – and it would be counter-intuitive to identify competition concerns on the basis that a merger will result in lower prices.

Barriers to entry and expansion

- 4.25 We would note that the Commission should make explicit reference in paragraph 4.175 to the ability of large grocery retailers and other multiple retail chains to easily enter or expand into markets without the need for significant capital investment or

long lead times. The flexibility of retailers to increase/expand their product ranges typifies the low barriers to entry in relation to many consumer goods products.

Diagonal mergers

4.26 CC notes with interest the insertion of a paragraph (4.168) regarding diagonal mergers. We assume the basis for this discussion is as a result of EU cases such as *Google/DoubleClick* but it would be useful to have further discussion of the way in which the propose to assess such mergers. Whilst we understand that there is limited case law in this regard, it would be helpful to for the OFT to provide further explanation using the sugar beet example as raised in the Seminar or the example of music publishing as to how it intends to deal with future diagonal mergers. We understand that the Authorities wish to "future proof" the guidance, but the single paragraph dealing with this type of potential concern risks an increase in uncertainty without providing firm guidance for practitioners as to this undeveloped theory of harm.

Barriers to entry

4.27 Paragraph 4.181 refers to reputation and experience as potential barriers to entry. In our experience, these barriers are easily alleged by customers that are opposed to a deal ("we would not use company Y as it does not have enough experience") and sometimes carry weight with the Authorities to a degree that is disproportionate to the objective supporting evidence. Consequently, it might be useful to add here a reminder that the question is whether customers would switch to supplier with less experience or reputation in the face of a small but significant price increase, and that the Authorities will base this assessment on objective evidence rather than subjective assertions.

4.28 Paragraph 1.187 states that "*[i]n assessing the likelihood of post-merger entry, the Authorities will evaluate whether entry is likely to take place at pre-merger prices.*" This implies that the Authorities will not consider whether entry would be *triggered* by a price increase or reduction in output, which CC submits must be incorrect (and is inconsistent with the preceding sentence of paragraph 1.187). We suggest that the paragraph should instead refer to whether "entry or expansion is likely to be triggered by a price increase or reduction in output or quality, and is likely to be sustainable at pre-merger prices."

Efficiencies

4.29 In our experience, gathering and developing evidence for merger-specific efficiencies that is of the standard required by the Authorities requires very close cooperation between the parties (which may be constrained to a degree by the need to avoid anticompetitive exchanges of information) and very long lead times. This, of course,

would not only be the case with respect to anticipated mergers but also completed mergers as the hold separate undertakings would prevent such an exchange of information taking place. CC invites the Authorities to consider how they might actively assist the parties in the gathering of efficiencies evidence and its analysis, through the use of their information gathering powers.

Other points

4.30 In addition to the above comments, we also had the following minor comments on Section 4 of the Draft Guidelines:

4.30.1 the Authorities might consider adding a paragraph to clarify that the principles contained in the Draft Guidelines will be applied in the same way to joint ventures as to other types of transaction;

4.30.2 paragraph 4.108 should explain how the Authorities identify situations of "perceived competition";

4.30.3 in footnote 77, the referenced paragraphs (4.195-4.198) do not appear to be relevant to the statement in the footnote.

PARTS 5 AND 6

5.1 As is the case for Parts of the Draft Guidance relating to jurisdictional aspects, we query the usefulness of including sections on the public interest cases and interim measures, when they repeat, summarise and possibly differ from guidance that is available elsewhere.

CLIFFORD CHANCE LLP

14 August 2009