



London, 14 August 2009

Dear Tony,

**OFT/CC Joint Review of Substantive Merger Guidelines (the “Guidelines”)**

Many thanks for giving us the opportunity to comment on the Guidelines. We congratulate the OFT and CC on the creation of a document that we think provides detailed and comprehensive guidance for businesses. Having reviewed the Guidelines, we would like to make the following observations.

- ***The right allocation of tasks between OFT and CC is essential.*** We intend to take all possible steps to assist the Authorities with their merger analysis. We feel that we can most effectively allocate resources if (a) we are given a clear view of what will be required from us as early as possible in the process (ideally at the beginning of Phase 1), and (b) duplication of information requests is avoided by allowing sharing of information between the Authorities.
- ***We encourage clear conclusions on market definition where possible.*** At paragraph 4.48, the Guidelines say “*Since the process of market definition can be time consuming and resource intensive, the Authorities may not conclude on a market definition and may instead consider several alternative market definitions as part of the investigation.*” Conclusions on market definition are extremely helpful for in-house merger analysis, particularly when we know that certain market share thresholds have a significant bearing on merger review. For this reason, we would strongly encourage the Authorities to take a position on market definition in their decisions, where possible.
- ***The SSNIP test price increases would benefit from clarification.*** At paragraph 4.55, the Guidelines say “*the Authorities will normally apply a price increase of 5 per cent whilst assuming that all other prices remain unchanged. However, in some markets a different price increase may be postulated. This could be above or below 5 per cent. The guiding principle in this regard is that the price increase applied should be one that is judged small but significant in the particular market under consideration and is assumed to last for a non-transitory period.*” The Guidelines leave some doubt as to the level of price increase that we should apply in our in-house analysis. We believe that a range of price increases of 5% to 10% – as is normally applied in the SSNIP test – provides more legal certainty.
- ***A general model for applying the SSNIP test in multi-sided markets would be helpful.*** Mergers between internet businesses often involve analysis of multi-sided platforms. It would therefore be helpful if the Authorities could provide some guidance on how to approach market definition in this area. This could perhaps take the form of a footnote to paragraph 4.79 (which notes the difficulties of conducting an empirical hypothetical monopolist test in multi-sided markets). The importance of a close analysis of the effects of a price increase on each affected product market should be emphasised.

- **Important to assess “network effects” on a case by case basis.** In paragraph 4.182, the Guidelines say “*Network effects arise when services are provided over a network (eg in the case of telecommunications or transportation) or through a platform (eg in the case of a website).*” We consider that it is important to note that network effects will not arise in every network. We agree with the Guidelines’ statement that “*network effects need not be mutually reinforcing (eg viewers, listeners or readers may prefer fewer advertisements and more content)*”. In our experience network effects do not really matter in the search and advertising businesses. It is true that advertisers want to be where there are users, but users do not particularly want to be where there are advertisers, so there is no positive feedback.
- **We believe there should be some indication of the need for caution with market shares.** In markets characterised by high innovation, market shares are often subject to radical fluctuations and as such are unreliable indicators of a firm’s market power. Given the tendency for non-competition law experts to concentrate on market shares as conclusive evidence of market power, we consider that a cautionary footnote to paragraph 4.88 or 4.89 of the Guidelines would be helpful.
- **Some guidance on the circumstances when HHIs are likely to be relied on would be helpful.** At paragraph 4.91, the Guidelines say “*The HHI is a measure of market concentration that takes account of the differences in the sizes of market participants, as well as their number, but in practice the Authorities rely on it only rarely.*” It would be helpful to understand in what circumstances the Authorities would consider looking at HHIs, however rare.
- **It would be helpful to understand why different market share thresholds appear to apply for the assessment of anticompetitive effects in horizontal and non-horizontal mergers.** In footnote 68, in the section discussing unilateral effects in horizontal mergers, the Guidelines say:

*“The Authorities do not consider there to be any specific ‘safe harbour’ level of the combined market shares of the merger firms below which concerns over unilateral effects may be ruled out. However, previous OFT decisions suggest that combined market shares of less than 40 per cent will not often give the OFT cause for concern over market power leading to unilateral effects.”*

In paragraph 4.141, in the section discussing non-horizontal mergers, the Guidelines say:

*“So as to assess the degree of market power upstream, the Authorities may have regard to the market share of the upstream merger party. Although they do not consider there to be any specific ‘safe harbour’ level of market share below which the existence of market power may be ruled out, an upstream market share of less than 30 per cent will not often raise concern over market power in relation to anti-competitive input foreclosure.”*

It would be helpful to understand better the reasons for different market share thresholds for horizontal and non-horizontal mergers. Since, non-horizontal mergers are more likely to be pro-competitive or neutral, a 40% threshold would seem appropriate here also. We note that the EC Courts appear to require pre-merger dominance for a non-horizontal merger to raise

competition concerns. Further, in the context of non-horizontal mergers, it would be useful if the Authorities could provide some guidance on the application of downstream market share thresholds. In this regard, we note that footnote 3 to the EC Commission's non-horizontal merger guidelines says *"Where a merged entity would have a market share just above the 30 % threshold on one market but substantially below on other, related, markets competition concerns will be less likely."*

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We hope that the above is helpful. Please do not hesitate to contact us if you have further questions.

Kind regards,

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