

**INTERNATIONAL BAR ASSOCIATION  
ANTITRUST COMMITTEE**

**WORKING GROUP RESPONSE ON THE DRAFT JOINT OFFICE OF FAIR  
TRADING/COMPETITION COMMISSION MERGER ASSESSMENT  
GUIDELINES**

**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 draft joint Office of Fair Trading (“OFT”)/Competition Commission (“CC”) Merger Assessment Guidelines of April 2009. A list of the members of the Working Group is set out in the Annex.
2. 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).
3. The IBA appreciates the opportunity to provide comments on the draft Merger Assessment Guidelines and commends the OFT and CC’s practice of submitting guidelines for wide-ranging consultation and engaging in an ongoing dialogue with private sector representatives.
4. Overall comment: The Working Group welcomes both the publication of the draft joint Guidelines and the opportunity to comment on them: firstly, because they consolidate learning since the regime entered into force (and therefore improve transparency, efficiency and predictability for all merging parties and their advisers); and secondly, because they are a joint initiative and therefore improve harmonization in approach between the authorities. These initiatives are very much welcomed. The new Guidelines should also go some way to ensuring effective division of responsibilities between the Authorities, so that the right cases are dealt with by the correct authority in the right way. It is to be hoped that this process will continue and spread to other areas of OFT and CC practice (e.g. market investigation references).

**General comments**

5. The Working Group sets out below a number of general comments relating to the draft Guidelines and will address a number of comments relating to specific paragraphs.
6. Jurisdictional and procedural guidance: We note that Part 3 of the Guidelines provides guidance on certain jurisdictional and procedural issues. We consider that this Part is unnecessarily detailed given the existence of the OFT’s jurisdictional and procedural mergers guidance which was published recently. We would encourage the Authorities to make a clear demarcation between the two sets of guidance in order to remove uncertainty. We would suggest that the Guidelines incorporate (by reference) the OFT’s more detailed guidance on

jurisdiction and procedure, and highlight any differences in approach at the CC. Otherwise, the draft Guidelines omit the detail that is critical to understanding key concepts (such as the meaning of an enterprise and the different levels of control) and risk causing confusion in practice as regards the relative weight given to each set of guidance and as regards differences in approach at the CC. Clarity on the different approaches of the OFT and CC is all the more important given that, where a case raises a complex jurisdictional issue that cannot be resolved or is left open by the OFT, this will be part of the CC review of the case.

7. One area that we do consider would be suitable for these Guidelines, however, is the extent to which the OFT and CC take account of the different jurisdictional levels of control in their substantive analysis. *BSkyB/ITV* is an important example here and another useful recent case is *The Coca-Cola Company/Fresh Trading Limited*.
8. We recognise that it is not practicable for the Authorities to update the Guidelines on a regular basis. We would therefore encourage the publication of appropriate Practice Notes on a more regular basis and have welcomed the recent OFT communications on its approaches to failing firms' cases and to de minimis cases.
9. New policies and differences in approach: The Guidelines aim to highlight "the differences of emphasis, as well as the commonalities, between the two Authorities' approaches" (paragraph 1.2). We agree that it is very important for the Guidelines to explain where and how the Authorities' approaches diverge. In a number of areas, the draft Guidelines contain new articulations of policy which may not be widely recognized and understood (e.g. different standards/considerations/evidential burdens to the counterfactual (parallel transactions and competing bids), unilateral effects in differentiated product markets (closeness of competition analysis and coordinated effects)). Whilst some distinctions between their respective approaches are made in the Guidelines (e.g. paragraphs 4.145, 4.150 and 4.165), all such differences should be flagged. We suggest that the potential significance of these changes for decision-making procedure and outcome should be highlighted and further explained, preferably by use of practical examples and case references.
10. Differences in approach between the UK and EC: Similarly, the draft Guidelines contain statements of policy which differ from published guidance and approaches in other major jurisdictions, especially the EC (e.g. market definition (role of supply-side substitution) and the level of safe-harbour afforded by HHI thresholds; and non-horizontal mergers (specifically the factors necessary to demonstrate a significant risk of anti-competitive foreclosure in vertical and conglomerate mergers; and diagonal mergers as a new category for assessment). We consider that it would be helpful if these apparent differences in approach were highlighted and the reasons for the differences explained. This would be particularly helpful for non-UK based practitioners (and businesses) undertaking an initial analysis of a merger.
11. Case references: We welcome the fact that the OFT and CC have added more references to case law and information in the Guidelines. This brings the guidance more in line with European Commission precedent, most notably the Consolidated Jurisdictional Notice<sup>1</sup>. However, there are some notable gaps in the Guidelines. For example, there is only one case cited in the Guidelines between paragraphs 4.154 and 4.220, a section which includes the analysis of actual and potential competition, entry and expansion, and efficiencies. Other examples of statements/points which would in particular benefit from UK case examples (where available) include: where the SSNIP price increase has been above or below 5% and

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<sup>1</sup> Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2008 OJ C95/1.

the reasons why (paragraph 4.55) (as discussed further below, we have reservations about this approach anyway); and where the Authorities have used prices lower than prevailing prices as a starting point due to concerns regarding the “cellophane fallacy” (paragraph 4.58).

12. While we of course appreciate that the Authorities are not bound by their previous decisions, the decisions provide valuable additional context to the principles and examples discussed in the Guidelines. This is particularly the case as, although the OFT website has recently been improved, it is still not searchable for cases in the same way as the CC/European Commission websites are. Further, there are fewer helpful UK merger text books and decisional search software available to assist practitioners in obtaining the primary UK cases in support of specific principles.
13. We note that in some cases the Guidelines have had regard to EU cases, where relevant. We consider this helpful.
14. Evidence and information requirements: Whilst the Guidelines helpfully identify the types of information the Authorities will be seeking and taking into account in various areas, we would appreciate guidance on the studies, surveys and other evidence preferred by each of the OFT and the CC in such specific areas as, *inter alia*, SSNIP, unilateral effects (e.g. diversion ratios) and coordinated effects.
15. Moreover, the OFT and CC’s increased reliance on pre-existing documentary evidence in mergers is implicit from the Guidelines, but this principle is not set out clearly. Conversely, in several recent speeches and articles<sup>2</sup>, OFT and CC officials have highlighted the importance of documentary evidence in merger reviews. This trend should be codified in the Guidelines, along with guidance on what types of primary evidence will be most persuasive, perhaps separated by theories of harm.
16. Finally, paragraph 1.5 of the Guidelines states that the Authorities may depart from the approach described in the Guidelines should they “consider it right to do so”. This 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. For example, the ongoing financial crisis has arguably affected merger assessments to an extent (e.g. greater consideration of the availability of financing in some cases) and the Guidelines therefore also need to strike the right balance between providing clear guidance and having sufficient flexibility to navigate difficult/different macro-economic conditions. However, it would be helpful for the Guidelines to provide some examples of which special features or circumstances might lead the Authorities to depart from the Guidelines. Moreover, we would suggest the current language introduces too great a level of uncertainty and the Authorities’ discretion should be constrained to a degree by replacing “right to do so” with “reasonable to do so in all the circumstances”

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

17. Theories of harm (paragraphs 4.13-4.15): Whilst the OFT may not have the mandate / resources / time to decide whether an effect is definitively a unilateral effect or a coordinated effect in borderline cases, we would expect the CC to be able to do so as part of its in-depth analysis. We suggest some refinements to these paragraphs to indicate that the OFT (and not the CC) will not necessarily determine which of the two theories of harm is more likely, but that

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<sup>2</sup> See, for example, “Merging is such sweet sorrow”, speech of Peter Freeman, CC Chairman, at the BIICL Mergers Conference, November 13, 2008, paras. 14-16.

it will not refer unless the statutory test for reference is met; and that, further, by the time of the CC decision, the theory of harm must be clearly identified and articulated.

18. The Counterfactual (paragraphs 4.16-4.44): We welcome the Guidelines' explanation of the counterfactual as this aspect of the UK mergers assessment has evolved in recent years. Failing firm/division defences and parallel transactions are the two key areas in this regard, so it makes sense for the Guidelines to focus on these. It would be helpful if the Guidelines could indicate factors that may be taken into account in determining the duration of the "foreseeable future" (paragraph 4.16). Also, whilst we find it helpful that the Guidelines make clear the distinction between the OFT and CC approaches (paragraphs 4.21-4.25), it would be helpful for the Guidelines to provide more UK examples (e.g. *BOC/Ineos*).
19. However, there is some inconsistency as to the terminology used in the Guidelines and previous cases. In the Guidelines, the OFT/CC suggest that the OFT will base its counterfactual on the "most realistic"<sup>3</sup> scenario post-merger, as they will have to assess the likelihood of a significant lessening of competition against the "is or may be the case" test. The CC will base its counterfactual on the "most likely"<sup>4</sup> counterfactual, assessing a possible significant lessening of competition against the balance of probabilities test. It is unclear where the *Coors* case, in which the CC assessed the transaction not against the "most likely" standard, but against "the plausible but more conservative outcome"<sup>5</sup> test, fits with this analysis. Perhaps this could be clarified.
20. There is also some lack of clarity between the selection of the appropriate counterfactual and OFT/CC remedies analysis. The Guidelines suggest that the appropriate counterfactual in many cases will be the prevailing conditions of competition pre-merger and the OFT/CC guidance on remedies suggests that the Authorities will generally assess the effectiveness of a potential remedy against the conditions of competition pre-merger. There is, however, a potential tension where the OFT considers a different counterfactual than the pre-merger competitive conditions in a deal which requires a remedy. It would be useful for the Guidelines to include a sentence confirming whether the OFT would consider a different remedies standard in cases where the OFT tests the transaction against a different counterfactual to the prevailing conditions of competition pre-transaction<sup>6</sup>.
21. That said, in general, we think the guidance in relation to specific situations in which a differing counterfactual could be relevant is constructive.
22. The "failing firm defence" (4.27-4.33): The OFT/CC in practice have allowed more failing firm defence cases than the European Commission in recent years. We welcome this more flexible approach to failing firm defences.
23. Having said this, we note that there have been a relatively large number of "failing division" cases and yet this aspect of the Guidelines seems to be stricter than the failing firm defence. Clarification of the reasons for this would be useful. It would also be useful to have more guidance on evidence required in relation to the inevitability of exit, which would apply when the economy is not in recession. In particular, we note that OFT1047 - Restatement of the OFT's position regarding acquisitions of 'failing firms', December 2008, which outlines the

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<sup>3</sup> Guidelines, para. 4.21.

<sup>4</sup> Guidelines, para. 4.25.

<sup>5</sup> Serviced Dispense Equipment Limited (SDEL) / Coors Brewers Limited (Coors), CC Report of March 11, 2005, para. 151.

<sup>6</sup> Cooperative Group (CWS) Limited v OFT [2007] CAT 24 ("CGL"), page 37. CGL does not describe this situation in detail – it simply states that restoring competition to the pre-merger level was "not unreasonable in the particular circumstances of that case."

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.

24. Parallel transactions (paragraphs 4.40-4.42): The Guidelines differ from the EU position, which is: first notified, first assessed, where the competition assessment of the second case to be notified assumes that the first merger notified will go ahead (see e.g. *Karstadtquelle/MyTravel* and *First Choice/Tui*) ("first come, first served"). The EU position is clearer and gives greater certainty to business and its advisers, although it might perhaps be improved (and made more compatible for a voluntary notification system) if the criteria for "first come" were the conclusion of the legally binding agreement or announcement of a firm intention to make an offer or possible offer (corresponding to Rules 2.4 and 2.5 of the City Code). In the event that the OFT/CC choose not to take the EU first-come/first-served approach, it would be useful for the Guidelines to reference and briefly elaborate on the departure from the EU approach.
25. Rail franchise awards (paragraphs 4.43 – 4.44): This approach has worked in prior cases and we believe that it makes sense to continue it.
26. Market definition (paragraphs 4.46 - 4.83): We welcome, to an extent, the shift of emphasis away from market definition and towards competitive effects in UK merger control analysis. This includes the express acknowledgement that "market definition may therefore be considered concurrently with the assessment of competitive effects of the merger". We also welcome the comprehensive and economics-grounded coverage and level of detail the Guidelines go into in this area. It would be very useful to have the Authorities' approach to market definition specifically in relation to merger cases in one document. (Contrast with the EU position where the main market definition notice is dated and applies to antitrust cases generally: the EU Horizontal and Non-Horizontal Merger Guidelines' sections on market definition are less detailed than these Guidelines and refer back to the older EU notice). We also welcome the recognition of (i) the relevance of competitive variables (e.g. R&D, quality) other than price and (ii) the different constraints imposed by demand- and supply-side substitution. Similarly, the detailed guidance on some of the economic considerations e.g. SSNIP, own-price v. cross price elasticity of demand, evidence useful in the analysis of demand-side substitution is appreciated (paragraph 4.62).
27. It is helpful to have clarification on the relevance of the cellophane fallacy (e.g. where coordinated effects are likely) and the identification of some special issues with multi-sided markets.
28. We believe that market definition is still a necessary part of the competitive analysis in certain types of case. Without a disciplined analysis of market definition, for example, the constraints on competition may not be correctly identified (or at least not be ruled out). Indeed, in unilateral effects cases involving homogenous/undifferentiated products, in particular, market definition remains important.
29. Local markets: the Guidelines contain only one reference to local markets in paragraph 4.67. The OFT regularly delineates local markets for products and services as diverse as cinema, supermarkets, aggregates, storage and many others. The OFT/CC's approach to local markets ought to be more clearly defined in this text, in particular because several complex prohibition and remedies decisions have provided guidance on the assessment of local

markets. The difficulties in applying the share of supply test also stem to some extent from complexities in assessing local markets in the UK.

30. Market definition (paragraph 4.47): We would welcome further clarification of the following statement: “the unilateral effects arising from a horizontal merger will typically be the same regardless of whether the merger is framed as one generating high concentration within a narrow market, or as one involving the loss of close, direct competition within a broader market”. Whilst this may appear an obvious statement to the Authorities, some background examples would be helpful in fleshing this out.
31. Market definition (paragraph 4.50): We have concerns that the statement that the product and geographic market will be determined “by reference to demand-side substitution alone” represents a significant departure and a significant difference from the approaches of other jurisdictions, in particular the EC. We believe that if this approach is followed in the final Guidelines, this change in approach should be highlighted with more explanation of the rationale for the change.
32. Hypothetical monopolist test (paragraph 4.55): We query why the 5-10% SSNIP figure has been rounded down to 5%. We are also concerned by the practical implications of the suggestion that the appropriate price rise varies depending on the market under consideration. We propose that if the OFT and CC 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.
33. Constraints from firms’ reactions (paragraphs 4.68-4.71): It would be useful to have a footnote with examples. We welcome the list of examples of evidence which can be useful in distinguishing between the supply reactions of competitors and possible entrants.
34. Other aspects of relevant to market definition (paragraphs 4.73-4.83): We welcome the guidance given on these aspects and note that this goes well beyond the EU guidance in this respect as regards mergers.
35. Measures of concentration (paragraphs 4.84-4.93): Market shares are generally more important to the UK (and EU) competitive assessment than concentration ratios and HHI. Concentration ratios are rarely decisive, and in recent years HHIs have tended to be used as an “initial screen” only. We recommend that the Guidelines should distinguish between the Authorities’ relative weighting of these three measures more explicitly.
36. Another way of describing the relative importance of concentration measures – and perhaps this can be expressed as a gloss on what appears in the Guidelines already – is with reference to the theory of harm in question. So, e.g., for unilateral effects-based cases concerning a high combined market share (i.e. possible single firm dominance) where the relevant products are homogenous/undifferentiated, market shares are generally the most important measure of concentration. For coordinated effects cases, market shares are less important and the US initial screen of 5-4, 4-3, 3-2, 2-1 mergers would be more useful.
37. Horizontal mergers - unilateral effects (paragraphs 4.94-4.112): We welcome the clarification surrounding unilateral effects, especially regarding the largely economic nature of the assessment (diversion ratios, profit margins etc) in differentiated product cases. However, we do not think that the implicit guidance that the unilateral effects and the analysis are the same regardless of whether the merging parties would become dominant in a homogenous market, or are closer competitors for differentiated products in a more oligopolistic market will necessarily apply in all cases. For instance, we see a continued role for market definition and

market shares (>40%) in homogenous/non-differentiated product markets, as well as the need for a more flexible effects-based approach in differentiated product markets. Given the latter, it is also worth noting that we also have concerns regarding the likely increased need for providing econometric evidence in unilateral effects cases in differentiated markets and the concomitant burden on businesses. It would be useful if the Guidelines could limit this need, at least for the OFT review, and give further guidance on when econometric evidence would be most useful. Indeed, it would be helpful if the Guidelines expressly acknowledged that these complex techniques (and the consequent evidential burden) are not appropriate in all cases. Indeed, there would be scope for separate guidance on these techniques and we would welcome a consultation on this (covering, for example, when and how different techniques are used and what type of evidence is most appropriate from the merging parties).

38. Competitive force in the market (paragraph 4.107): We would suggest reference to “mavericks”.
39. Increased buyer power (paragraphs 4.110-4.112): We would suggest explaining that buyer power is also sometimes referred to as “monopsony power”.
40. Potential Competition (paragraphs 4.108 – 4.109): We suggest that the paragraph discussing potential competition be amended to describe more precisely the criteria used in assessing a theory of potential competition. For example, the Guidelines could use the same criteria for entry set forth in paragraph 4.174 -- i.e., that entry by the potential competitor must be timely, likely and sufficient. If these standards were adopted for potential competition, the OFT/CC should find a loss of potential competition only in situations where (1) the target firm would have been more likely than other potential entrants to have entered, and (2) entry and growth by the target firm would have added a competitive constraint more significant than that already provided by existing market participants or other potential entrants.
41. Coordinated effects (paragraphs 4.115-4.132): We note the continued uncertainty at EU level as regards the precise ambit of certain criteria for finding coordinated effects (following the *Impala* judgments), whilst taking into account recent EU coordinated effects cases (e.g. *ABF/GBI*). We agree that the Guidelines should not attempt to go to a deeper level of detail and interpret certain unclear aspects of the *Impala* judgments, if they do not need to. Having said this, we would like to see an explanation of any difference in the criteria to be applied, depending whether the transaction would give rise to a new risk of coordination or would increase a pre-existing risk of coordination. It would be helpful for the Guidelines to provide specific examples/UK merger decisions where coordinated effects were and were not found and the key reasons for this would be useful. We appreciate that although the OFT has referred three mergers to the CC under the coordinated effects theory, the CC did not find coordinated effects. Nevertheless, there should be sufficient experience here to comment. Until the CC makes a finding of coordinated effects, the Authorities should consider the potential benefit of making reference to salient EU and US cases, in addition to the three OFT referrals.
42. We note the absence of a non-exhaustive checklist of factors indicative of coordinated effects, such as that found in the EU Horizontal Merger Guidelines (e.g. inelastic demand, product homogeneity etc), although some of these factors appear in the Guidelines. Whilst we appreciate that there may be good reasons not to include such a list (the Authorities will not want to feel unnecessarily constrained by overly-prescriptive guidance), we nevertheless consider that it could be useful (particularly for non-UK based practitioners) to incorporate such a non-exhaustive checklist in the Guidelines as a starting point for the analysis, albeit that the list would be indicative and therefore non-binding on the Authorities.

43. We recognise that coordinated effects analysis is very complex and the thinking is still evolving. In the meantime, further guidance on the following points would be helpful: (i) the nature of pricing evidence required to distinguish between coordination and competition (e.g. relevance of parallel discounting); (ii) the types of evidence that each Authority gives most weight to when establishing pre-existing coordination; and (iii) the nature and value of evidence of past coordination. Moreover, the previous CC Merger References Guidelines contained useful commentary regarding the difficulties involved in identifying coordinated effects, notably that price parallelism is not in itself indicative of collusion, it could just be evidence that the market is working effectively. We consider that it would be helpful for the Authorities to include similar wording in the Guidelines around paragraphs 4.120 and 4.121.
44. We are also concerned about the type of evidence which may be used by the Authorities to demonstrate that conditions for coordination exist in a market (paragraph 4.120). The type of evidence on which the OFT appears willing to rely – “proceedings” rather than “decisions” - appears to undermine the basic jurisprudential presumption of innocence until guilt is proven and no doubt gives rise to practical considerations too, including as to how this material is to be communicated to parties so that they can defend themselves in the mergers context.
45. In that same paragraph, the Guidelines state that there may be evidence to suggest that the market was already coordinated before the merger, implying that the three (*Airtours*) conditions were met pre-merger. In particular, the Guidelines suggest that past cartel actions and proceedings in the same product market (in the UK or elsewhere) may also indicate that the conditions for coordination are met in that market. We would suggest that a different conclusion could also be reached, namely that tacit coordination was felt to be too difficult to achieve, with the result that the only way to achieve coordination was by means of explicit coordination (i.e. a cartel). Thus past behaviour may in fact be evidence that the conditions for tacit coordination are not met. Whether this is so can only be determined case by case and this should be acknowledged in the Guidelines.
46. We also suggest that the language in paragraph 4.128 concerning links creating the ability to coordinate, could benefit from some qualification, particularly in the case of trade associations where the exchange of competitively sensitive information is by no means inherent to their activities.
47. Non-horizontal mergers (paragraphs 4.134-4.135 and 4.152-4.153): Statements made in these paragraphs indicate that the OFT/CC view vertical mergers as “generally efficiency enhancing” and “less likely to lead to anti-competitive effects” and that conglomerate mergers “do not entail the loss of direct competition between firms in the same relevant market and are therefore less likely than horizontal mergers adversely to affect competition” and “may provide substantial scope for efficiencies leading to lower prices/better non-price offers to customers”. We agree with these statements.
48. Vertical mergers (paragraphs 4.134-4.151): The Guidelines are based on the “ability-incentive-effect” approach in the EU Non-Horizontal Merger Guidelines. This is to be welcomed because, unlike the EU Horizontal Merger Guidelines, the EU Non-Horizontal Merger Guidelines are recent, followed a detailed consultation, and take into account the Commission’s thinking in the two key EU “pure vertical” cases (*TomTom/Tele Atlas* and *Nokia/Navteq*). We note that “pure vertical” mergers are relatively rare, and that in the UK more mergers have been horizontal with vertical effects.
49. Paragraphs 4.134-4.136 could emphasise further that in practice many vertical mergers are unlikely to lead to an SLC (mirroring the EU Non-Horizontal Guidelines).

50. Input foreclosure (paragraphs 4.137-4.145): In general this section of the Guidelines does not clearly distinguish between mergers in which both parties hold market power, and mergers in which only one of them – either the upstream or the downstream player – holds market power, and in fact only refer to the situation where either the upstream party or the downstream party possesses market power. We would suggest that the analysis in the Guidelines should explicitly refer to both these scenarios, as the analysis of ability, incentives and overall impact on the market may be different under the different situations.
51. It would be helpful for the Guidelines to make explicit reference to cases where the vertical effects analysis involved consideration of whether the merged firm would gain access to commercially sensitive information about its non-integrated rivals, such as the *Alliance Unichem/Boots* decision.
52. Ability to foreclose (paragraphs 4.140-4.141): We have some concerns about the hypothetical example provided in footnote 87 (in which the scenario of two competing upstream firms producing undifferentiated inputs with plenty of spare capacity is discussed), as this seems a rather extreme example. The situation envisaged is that if one of these upstream suppliers merges with a downstream purchaser, the remaining downstream purchasers would face a suddenly created monopoly in the upstream market. The example does not appear to take into account downstream demand and fails to clarify that a competitive concern could arise, if at all, in only very specific circumstances (such as when the downstream merging firm is a very significant player in the downstream market and consumes a very substantial part of the quantity supplied by the upstream merging firm).
53. We note that the 30% threshold referred to in the Guidelines is only intended to give guidance and comfort that vertical mergers in which the upstream merger party holds a market share lower than 30% would not be suspected of raising potential foreclosure concerns. However,, it would be helpful if the Guidelines could also give an actual example of a vertical merger where the upstream party had a market share higher than 30% which nevertheless did not raise potential foreclosure concerns
54. The incentive to foreclose (paragraphs 4.142-4.143): We question whether an upstream firm holding market power, would have any incentive to restrict its inputs solely (or mainly) to its downstream business so as to foreclose downstream rivals. In any event, the effect of such action could very well be to strengthen competitors, and hence competition, rather than weakening it.
55. Foreclosure information/evidence (paragraph 4.143): We welcome the types of information/evidence that the Authorities “may take into account” when determining the merging firms’ incentive to foreclose input. This list should be stated to be non-exhaustive.
56. Effect of input foreclosure (paragraphs 4.144-4.145): Generally, we welcome the relevant factors which are to be taken into consideration in assessing the likely effects of any input-foreclosing strategies on competition and the competitive offering to customers. Nonetheless, certain aspects of paragraph 4.144 read together with paragraph 4.145 seem to set out a contradictory, and therefore, unclear, position. In paragraph 4.144, it is stated that “even if one or more downstream firms are denied access to the input, or face a higher price for it, competition in the downstream market is not necessarily substantially lessened nor are consumers adversely affected”. However, paragraph 4.145 directs that where the OFT determines that the merged firm will have the “ability and incentive to engage in input foreclosure, it may presume that such foreclosure will also have an adverse effect”. Whilst we understand that, acting as a first screen, there are practical limitations on the extent of the

OFT's review (having regard to resources and time), it is not clear to us that this is sufficient to justify this presumption. We invite the OFT to consider whether creating a presumption goes too far. The same comment applies to paragraphs 4.150 and 4.165.

57. Customer Foreclosure (paragraph 4.149): We welcome the list of information/evidence (see paragraph 4.143 above).
58. Conglomerate mergers (paragraphs 4.152-4.167): More UK merger decision examples (where available) should be included. We query whether the Guidelines should refer to category management.
59. Portfolio Effects (paragraph 4.156): Paragraph 4.156 suggests that a merger with portfolio effects may adversely affect consumers. This brief paragraph explains the portfolio effects theory by describing a situation where a horizontal merger may result in a merged firm having a product range advantage in markets where customers value variety.
60. However, in the example given, the merger appears to increase consumer welfare by creating an improved product range that consumers will value. This situation seems similar to demand-side efficiencies, described in paragraphs 4.215 – 4.220 of the Guidelines, where mergers can improve consumer welfare. Although there may be some loss of rivalry if the merged firm has an advantage over rivals, the OFT/CC should be concerned only if the loss of rivalry results in harm to consumer welfare due to exit of merger of rivals. We suggest that the Guidelines make clear that identifying consumer harm is very difficult in portfolio effects cases therefore few, if any, such cases will give rise to concerns. In this regard, we note that the EC Non-Horizontal Guidelines recognize that customer benefits may arise from portfolio effects and that competition concerns are unlikely to arise (see paragraphs 14 and 104 of the EC Non-Horizontal Guidelines).
61. Diagonal mergers (paragraph 4.168): We welcome the specific reference to and explanation about diagonal mergers. We agree that diagonal mergers are closer in their impact on competition to horizontal mergers than to vertical mergers. However, we consider that the concluding statement of paragraph 4.168 of the Guidelines, which provides that “although many diagonal mergers may be benign, the Authorities do not assume that they are” may suggest an unduly cautious approach, as even horizontal mergers are regarded positively absent any evidence to the contrary (unlike restrictive horizontal arrangements).
62. Absent an existing UK decision/case where diagonal issues have arisen, it may be beneficial for the Guidelines to make reference to cases at an EC level (e.g. *Google/DoubleClick*), or at least provide an hypothetical example to give insight into how the Authorities intend to deal with diagonal mergers. In any event, it would certainly be helpful from a practitioner's perspective if, in the future, the OFT/CC were to expand upon their thinking and analysis of diagonal mergers in the form of a practice note or other supplemental guidance (e.g. in the light of case experience).
63. Coordinated effects arising from non-horizontal mergers (paragraphs 4.169-4.172): Again UK (or at least hypothetical) examples would be helpful.
64. Entry (paragraphs 4.174-4.191): We welcome the detailed guidance on the assessment of entry (which is arguably more comprehensive than the equivalent guidance at EC level).
65. We propose that the OFT and CC should present the lists of relevant factors for analysis in some kind of logical order, so that parties can assess which elements are more important to the CC's and OFT's analysis than others. Moreover, in light of the current economic

conditions, perhaps some reference should be made to the need to have available financing for new entrants.

66. Paragraph 4.186 suggests that in examining the likelihood of entry the OFT/CC will examine whether firms 'intend' to enter the market. There are problems, however, with relying on intent evidence. Intent evidence is subjective, and competitors or entrants who may have something to gain or lose by the merger in their industry may not always choose to accurately reveal their intent. Furthermore, the announced merger may change firms' plans, so examining evidence of intent that existed prior to the merger announcement may miss examples of entry by firms who considered entry only after the merger was announced. We suggest that the OFT/CC should rely more on the ability and economic incentives for firms to enter the market than on their intent. Revising paragraph 4.186 to incorporate the ability and economic incentives test would harmonize this paragraph with the "ability and incentive" standard that is used in other paragraphs of the draft Guidelines (e.g., paragraphs 4.68, 4.190).
67. We welcome the list of information/evidence which the Authorities will gather (paragraph 4.190). We suggest stating that this list is non-exhaustive. However, there is no indication of which factor (if any) is most important or how the OFT/CC will weight analysis across these factors, which would be helpful.
68. Countervailing buyer power (paragraphs 4.192-4.199): It would be useful to cite at least one UK case where buyer power was decisive or a major factor in the Authorities' decisions. In this regard we suggest that the OFT/CC consider incorporating references to some of the following decisions: *Ocean Park/Orbital Marketing Services Group*; *Heinz/HP Foods*; *Cott/Macaw*; *Stonegate Farmers /Deans Food Group*; and *Linpac Group/McKechnie Paxton Holdings*. If possible, UK cases in support of other statements in the Guidelines should be referenced.
69. Efficiencies (paragraphs 4.200-4.220): We welcome the detailed guidance on the assessment of efficiencies (which is arguably more comprehensive than the equivalent guidance at EC level). The distinction between efficiencies which prevent an SLC from occurring and those "customer benefits" which can trump the anti-competitive effects of an SLC provides a useful clarification, although more guidance could be provided on which efficiencies are relevant to each stage and/or whether the same efficiencies can be argued at both stages of the analysis.
70. There is a relatively high burden of proof as regards successfully raising an "efficiency defence" at EC and UK level. Certainly the EC requires significant evidence/data in order to accept such a defence. We would like to see more guidance on the particular types of data and/or studies each Authority is more likely to accept for the purposes of its analysis (without making this aspect of the Guidelines overly "economic" in nature).
71. Paragraph 4.201 states that efficiencies "may" be taken into account where they benefit customers. It is not clear why the OFT/CC would choose to not take efficiencies into account, since efficiencies benefit the economy and consumers by freeing up the use of resources that may be deployed elsewhere to produce goods and services that consumers demand. We suggest that the Guidelines be revised to state that the general principle is that the OFT/CC will take efficiencies into account. If the OFT/CC wishes to retain the discretion not to take efficiencies into account in certain mergers, we encourage the OFT/CC to amend the Guidelines to identify the exceptional situations where it would not take efficiencies into account and its reasons for doing so.
72. Paragraph 4.204 states that the OFT/CC will credit efficiencies only if they are "very likely" to arise, and paragraph 4.205 suggests that the evidence presented in support of efficiencies

must be “strong” and “compelling”. This suggests that the CC would not credit efficiencies that are likely to occur from a merger (i.e., a greater than 50% probability) if the likelihood of efficiencies falls short of the less clear “very likely” standard. It is not clear why the CC would apply a higher evidentiary standard for demonstrating the likelihood of efficiencies than the “more likely than not” standard (see paragraph 2.10) applied when evaluating the likelihood of a lessening of competition. We suggest that the Guidelines reflect that the CC applies the same “balance of probabilities” or “more likely than not” standard for demonstrating the likelihood of efficiencies that it uses when evaluating the likelihood of harm.

73. Paragraph 4.204 also states that the efficiencies must arise within a period of time corresponding to the onset of any adverse effects on customers. The Guidelines suggest that the OFT/CC could disregard substantial efficiencies because the efficiencies are realized some time after any consumer harm manifests. We are not aware of economics literature suggesting that efficiencies should be disregarded if they are realized after any consumer harm occurs. Efficiencies derived from the merger may take a number of months or even years to be realised - for example, shifting production among facilities may take some time, and pre-existing purchasing contracts may not be immediately terminable. We suggest that the OFT/CC adopt a timeliness standard for efficiencies, similar to the standard set forth in paragraph 4.189 for entry, that the OFT/CC will credit efficiencies that are likely to arise within two years of the merger, with some flexibility to consider longer periods where appropriate (e.g. long-term nature of investment decisions in the markets concerned). Equally, the Guidelines should make clear that not only efficiencies that prevent the SLC, but also dynamic efficiencies which ultimately outweigh adverse effects are also potentially relevant.

## **Part 5: Public interest cases**

74. We note that Part 5 of the Guidelines provides guidance on public interest cases. Insofar as public interest cases are discussed in some detail in the OFT’s recent jurisdictional and procedural mergers guidance, we would encourage the Authorities to incorporate (by reference) this more detailed guidance (as currently drafted the only reference is in footnote 104).
75. Generally we consider that the guidance on public interest cases as set out in Part 5 is welcome, if a little restricted to the basic mechanics of such cases. While we appreciate that public interest cases are, by their very nature, facts specific, we question whether there any general points of principle that can be drawn from the limited experience that there has been of public interest cases, which can be incorporated into the Guidelines. As presently drafted the Guidelines only refer to these cases fleetingly in footnotes 105 and 125. In this regard, we note that the OFT’s Final Report on its Review of the local and regional media merger regime, OFT1091, June 2009, recommends that BIS should review, and may wish to restate, its own published guidance on its anticipated public interest intervention policy to reflect its albeit limited experience (see paragraphs 5.16 and 5.20).
76. We also note that, if the appeal in the *BSkyB/ITV* case is concluded in time, the Guidelines could usefully refer to the CAT judgment on how the sufficiency of plurality of media ownership should be assessed.

## **Part 6: Interim measures and remedies**

77. We note that Part 6 of the Guidelines (Interim Measures and Remedies) is basic, referring to existing guidance in this area (and we note that the OFT intends to publish separate guidance

on the exceptions to the duty to refer and on undertakings in lieu). We welcome this approach given that both the OFT and the CC have recently published (in June 2009 and November 2008 respectively) detailed guidance on these issues. In these circumstances, we question whether it is necessary to retain Part 6 of the Guidelines. In any event, we recommend that the OFT and CC consider adopting a joint approach to (and joint guidelines on) remedies, prior to doing so for market studies/market investigation references, in order to continue the work and momentum in UK merger control.

August 2009

**ANNEX**

**International Bar Association Antitrust Working Group  
on the draft joint Office of Fair Trading / Competition Commission  
Merger Assessment Guidelines**

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Tom McQuail (co-chair)	Howrey LLP
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