

# JOINT WORKING PARTY OF THE BARS AND LAW SOCIETIES OF THE UNITED KINGDOM ON COMPETITION LAW (JWP)

## COMMENTS ON THE DRAFT MERGER ASSESSMENT GUIDELINES PUBLISHED BY THE CC AND OFT ON 30 APRIL 2009

August 2009

### 1. INTRODUCTION

- 1.1 The Joint Working Party (JWP)<sup>1</sup> is pleased to have this opportunity to comment on the draft Merger Assessment Guidelines published jointly as a Consultation Document by the Competition Commission (CC) and the Office of Fair Trading (OFT) on 30 April 2009 (draft Guidelines). This paper has been prepared by certain members of the JWP who attended a meeting with members of the CC and OFT on 29 June 2009 to discuss the draft Guidelines and is based largely on comments made at that meeting.
- 1.2 The JWP welcomes the proposal by the CC and OFT to issue joint guidance as to the approach that the two Authorities will adopt when assessing mergers in future and the identification of differences in approach or emphasis that result from their differing roles under the UK system of merger control. Joint guidance should avoid the risk of inconsistency or lack of coherence that might arise if each Authority were to reflect developments in legal and economic thinking and recent experience by updating its own separate guidance notes. Joint guidance should also improve transparency and predictability for merging parties and their advisers. That said, the JWP considers that both the scope and the content of the draft Guidelines would benefit from further consideration as they evolve following the consultation if these objectives are to be achieved.
- 1.3 Section 2 of this paper contains a number of general observations and comments on the draft Guidelines. Section 3 contains comments on particular points in the draft.

### 2. GENERAL COMMENTS

- 2.1 The JWP offers the following by way of general observations and comments on the draft Guidelines.

#### ***Structure and focus of the draft Guidelines***

- 2.2 At present, the structure of the draft Guidelines seems to be closely modelled on the current CC guidelines on merger references<sup>2</sup>. Although those guidelines provide a useful starting point for developing joint CC/OFT guidelines, the JWP invites the CC and OFT to consider whether some modification of that structure may be appropriate in view of the differing roles of the CC and OFT in the merger control process and the detailed guidance available in other documents published separately by the CC and OFT, especially on procedural and jurisdictional matters.

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<sup>1</sup> The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprises barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. Its secretary is Louise Speke of the Law Society, 113 Chancery Lane, London WC2A 1PL (telephone: 020 7242 1222).

<sup>2</sup> CC2 – Merger References: Competition Commission Guidelines, April 2007.

- 2.3 It appears to the JWP that the case for joint guidance is clearest in relation to the analytical and methodological approach used by the CC and OFT when applying the SLC test. In theory, there is also a case for joint guidance on defining "relevant merger situations". However, as the draft Guidelines point out, this is more frequently an issue for the OFT than for the CC and the OFT has issued (and recently updated) its own, detailed guidance on this issue<sup>3</sup>. It is also an issue on which a finding by the CC is currently on appeal. In reality, therefore, the case for joint guidance on this issue seems less strong. Nor is the case for joint guidance clear in relation to a number of the other issues proposed to be covered by the draft Guidelines. Indeed, the differing roles of the CC and OFT in relation to some other issues results in a degree of complexity (and lack of clarity) in explaining them in the draft Guidelines. These factors cause the JWP to question whether some of the issues lend themselves to joint CC/OFT guidance in this document, as proposed; or whether it would be better to restrict the scope of the draft Guidelines. They might, for example, be restructured to focus largely (if not exclusively) on the approach of the Authorities to assessing the SLC test.
- 2.4 The JWP recognises that such an approach would require the CC to produce another document with revised guidance on other issues that are currently covered by its existing guidance on merger references and that this may not be achievable within the time frame envisaged by the CC/OFT for the current project. However, the JWP considers that in the longer term such an approach might result in greater clarity in the guidance provided by CC and OFT.
- 2.5 It may be more appropriate to consider some of the general comments that follow in the context of such a longer term project.

#### ***The SLC test and other issues***

- 2.6 The main focus of the draft Guidelines is on describing the analytical and methodological approach that the Authorities will adopt when seeking to determine whether a merger may give rise to a substantial lessening of competition (SLC). Consideration of that issue accounts for 41 of the 67 pages of the current draft. The JWP welcomes the guidance provided on this issue. That said, in a number of instances, the draft Guidelines refer to various approaches that the CC and OFT may apply when assessing SLC, but provide little practical guidance about the circumstances in which, or markets in which, one particular approach may be preferred over another. The JWP understands the challenges involved in providing this additional level of guidance; but the more guidance that the CC and OFT are able to provide in this regard, the more useful the Guidelines will be (*see also below under Illustrative references*).
- 2.7 The focus on the SLC test means that all "other issues" are covered, from both a CC and OFT perspective, in about 20 pages. On some of the issues the draft Guidelines provide a brief summary of fuller explanations that are provided in other publications issued by the CC or OFT (e.g. *CC8 – Merger Remedies: Competition Commission Guidelines, November 2008*; and *OFT: Mergers – jurisdictional and procedural guidance, June 2009*). On other issues which are not otherwise explained in a CC or OFT publication, the draft Guidelines provide a fuller explanation (e.g. where Part 5

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<sup>3</sup> OFT: Mergers - jurisdictional and procedural guidance, June 2009, at Section 3.

deals with the CC's assessment of *Public interest cases*, on which there is no other CC guidance<sup>4</sup>). This approach results in a somewhat "unbalanced" treatment of issues in the draft Guidelines. It seems to the JWP that this lack of balance is less than ideal -- although the JWP recognises that in practice it may not pose much of a problem for those with experience of CC and OFT procedures.

- 2.8 The JWP is concerned that it may create difficulty and potential confusion, however, for those who have little or no experience of CC and OFT procedures; and, more generally, the JWP suspects that the relative complexity of certain parts of the draft Guidelines is likely to make them difficult to follow for readers with little prior knowledge of UK merger control procedures<sup>5</sup>.
- 2.9 To minimise such risks for all readers, the JWP suggests the following as general objectives:
- that the CC/OFT should seek to achieve greater clarity about the relationship of the draft Guidelines with the various other guidance notes issued by the CC and OFT. For example, it is not clear which document will in due course contain the definitive description of the reference threshold applied by the OFT;
  - that the CC/OFT should ensure that there is no inconsistency between the draft Guidelines and guidance provided in other notes. This will be an ongoing requirement in future the need for which is highlighted by the OFT's recent adoption of new jurisdictional and procedural guidance; and
  - that the CC/OFT should try to ensure that there is some reference in the draft Guidelines to all potentially important issues dealt with in other guidance notes (e.g. joint ventures are not currently included) -- with appropriate cross reference to the publication in which fuller guidance is to be found.
- 2.10 If, as suggested above, the focus of the draft Guidelines were to be restricted in due course to assessment of the SLC test, that might be achieved by consolidating the treatment of all "other issues" (i.e. apart from SLC) into a single short section; that section might simply provide a brief overview sufficient to enable readers to understand the context in which the SLC test falls to be considered by the CC and OFT.

### ***Public interest cases***

- 2.11 As noted above, the OFT has issued guidance on its role in "public interest mergers"<sup>6</sup>. The CC has not yet done so. However, it seems to the JWP that Part 5 of the draft Guidelines does not sit very comfortably within this document. The JWP invites the CC (and OFT) to consider whether it might not be better for the CC to issue a separate guidance note on public interest cases derived from the material in the draft Guidelines.

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<sup>4</sup> By contrast, the OFT's role in public interest cases is explained in *OFT : Mergers – jurisdictional and procedural guidance, June 2009, at Part 9*.

<sup>5</sup> The CC/OFT may want to check this by road testing the draft Guidelines with persons with limited knowledge of UK merger control laws.

<sup>6</sup> See footnote 3 above.

- 2.12 If the Section is to remain in the draft Guidelines, the JWP considers that it would be helpful to dovetail it more closely with the equivalent section in the new OFT jurisdictional and procedural guidance and to give more focus to the interplay between the public interest and competition tests. Also, while the JWP recognises that the CC and OFT have recent experience of the public interest test in relation to a "media merger", the present Section seems to be unduly weighted towards such mergers.

***Differences between the CC and OFT approaches***

- 2.13 The JWP considers it important that the draft Guidelines should identify clearly the circumstances in which there is an important difference in approach or emphasis between the CC and OFT -- and that the Guidelines should explain the reason for the difference. At the moment identification of some of these differences is obscured by being "buried" in the text.
- 2.14 The JWP invites the CC and OFT to consider the case for including a list of the differences (or key differences) in the draft Guidelines, with appropriate cross-references to the details in the text. This would help readers to identify the differences in the approaches of the CC and OFT. It might also help them to understand the differences between the roles of the CC and OFT.
- 2.15 It would also help if differences between the CC and OFT approaches were more clearly identified in the text.

***Illustrative references***

- 2.16 The JWP considers that the draft Guidelines would benefit from much greater use of references to CC or OFT decisions<sup>7</sup> that illustrate particular points -- of the kind that are included in footnotes 40 and 41 as "illustrative examples", and in paragraph 4.101 and footnote 70.
- 2.17 The CC/OFT may like to consider the scope for including illustrative references of this kind in an Appendix, which would make updating easier.

***Changes and differences of approach***

- 2.18 In a number of areas, the draft Guidelines contain statements that reflect recent developments in approach by the CC or OFT and in a few cases entirely new approaches -- e.g. different approaches to the counterfactual (parallel transactions and competing bids) and unilateral effects in differentiated product markets (closeness of competition analysis). The JWP considers it is desirable to ensure that readers recognise these developments and changes and understand their potential significance for the decision-making process. To that end the JWP suggests that the changes be appropriately identified and explained in the draft Guidelines. Additionally (or in the alternative) this might be done in explanatory statements issued by the CC/OFT when formally announcing adoption of the new Joint Guidelines.
- 2.19 The JWP considers that a similar approach might be adopted to explain statements of policy in the draft Guidelines where they differ from published guidance and approaches of the EC or US jurisdictions -- e.g. market definition (role of supply-side

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<sup>7</sup> It may be that illustrative reference can be made also to EC decisions.

substitution) and the 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 the new category of "diagonal" mergers).

### **Market definition**

- 2.20 When announcing the consultation, the CC/OFT said that they wanted to "*downplay the role*" of market definition and "*especially of market shares and concentration ... in particular for analysis of unilateral effects*". More recently, the CC/OFT have depicted this more as a change of emphasis and of giving the correct weight to market definition.
- 2.21 For its part, the JWP recognises the limitations of market definition as a framework for assessing competition. However, the JWP would be concerned by a move too far from properly defining markets and an over-reliance on more novel/untested techniques, since that might:
- create problems in practice for merging parties -- in terms of preparing for substantive review, understanding the Authorities' concerns and gathering the evidence required to demonstrate, in tight time-frames, that competition concerns do not arise; and
  - risk important competitive constraints being missed.

If greater reliance is to be placed in future on alternative techniques at the expense of market definition the JWP suggests that clearer, more detailed and practical guidance on them should be published and debated.

## **3. PARTICULAR POINTS**

- 3.1 The JWP offers the following comments on particular points in the draft Guidelines. The paragraph numbers referred to are those in the draft Guidelines.
- **Paragraph 4.50:** the JWP has commented generally above about "*downplaying the role*" of market definition. In addition, the JWP would question the statement in this paragraph that "*The products that should be included in the relevant market, and the geographic boundaries of that market, are generally determined by reference to demand-side substitution alone ...*" (emphasis added). Although the statement appears to be qualified by subsequent wording in the paragraph, the JWP suggests that the word "alone" goes too far and should be omitted to avoid confusion.
  - **Paragraph 4.93:** the JWP considers that it may be useful to indicate that, in practice, the HHI thresholds are normally used to establish "safe harbours", rather than as prima facie indicators of excessive market concentration<sup>8</sup>.
  - **Paragraph 4.103:** the JWP considers that it would be useful if the draft Guidelines were to include more examples of the kind of evidence that the CC/OFT have found helpful in the past in analysing closeness of substitution.

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<sup>8</sup> See also paragraph 2.13 above about the difference between the UK and EC thresholds.

- **Paragraph 4.120:** the JWP is concerned about the type of evidence on which the Authorities may rely to demonstrate that conditions for coordination exist in a market. In particular, it is not clear that it would be appropriate as a matter of law (or consistent with respect for the rights of defence) to rely on '*proceedings*' rather than '*decisions*'. To do so could also give rise to practical considerations -- e.g. about how this material is to be communicated to parties so that they can address it in the context of a merger. It should also be noted that the existence of an unlawful cartel could in fact be evidence that the market is not one that lends itself to co-ordinated behaviour.

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