

Competition Commission
Victoria House
Southampton Row
London
WC18 4AD
For the Attention of Tony Gooch

30 July 2009
Email Howard.Cartlidge@olswang.com
Direct line +44 (0) 20 7067 3146

Our ref. HAC\CDM
Your ref.

BY EMAIL

Dear Tony

Merger Assessment Guidelines Consultation

Olswang welcomes the opportunity to comment on the OFT and CC's draft joint merger assessment guidelines (the "Guidelines"). The adoption of a consistent approach by the two authorities is to be encouraged and we welcome the clarification the Guidelines provide on a number of points. We have a limited number of comments on the Guidelines which are detailed below. We deal firstly with specific comments on the text and secondly with more general considerations.

Market definition

1. Our primary concern with the Guidelines as currently drafted relates to the change in emphasis on market definition and market shares. It is apparent both from the Guidelines (para 4.46 *et seq*) and from the seminar on 1 June 2009 that there is to be less of a reliance on market definition going forward and more emphasis on the competitive constraints exercised by merging parties on each other.
2. Although an economic effects analysis seems sensible and allows much more flexibility, we are concerned as to the impact this could have on legal certainty. Market definition is firstly important in setting some degree of precedent for future cases. Secondly, as legal advisers we are tasked with assessing whether a proposed transaction raises serious issues. This task will be rendered more difficult if for example, high market shares will no longer necessarily indicate that a transaction could be problematic, and, of more concern,

that low market shares do not necessarily suggest that a transaction raises no competition issues. Legal certainty obviously impacts significantly on firms' decisions on whether to bid or not for a particular business and the resulting uncertainty may discourage firms from making bids in the first place, or from proceeding to a phase two investigation, particularly given that the emphasis on economic effects (as explained in paragraphs 4.102 – 4.104) is likely to involve an increased use of economists in cases which would not otherwise have required such analysis.

3. The apparent shift away from the CC's 25% market share threshold towards a less restrictive 40% "rule of thumb" is nevertheless to be welcomed. Despite the downplaying of market share thresholds in the Guidelines however, the reference to OFT practice indicating that market shares of less than 40% are unlikely to raise concerns should be moved from its current position in footnote 68 to the main text of the Guidelines (and confirmation that such practice will continue would be useful). It would also be useful to understand if this statement represents a shift in emphasis for the CC to a 40% market share test or is merely confined to OFT practice.
4. We note that the SSNIP test as explained in paragraph 4.55 refers to a figure of 5% which contrasts to the previously accepted range of 5-10%. It would be helpful if the Guidelines could clarify whether this signifies a move towards a 5% SSNIP test or whether the statement in paragraph 4.55 that "in some markets a different price increase may be postulated. This could be above or below 5%" means that the SSNIP test may be applied more flexibly by the parties and authorities. If the latter is the case the Guidelines should explain the circumstances in which the OFT/CC are likely to consider a 5% increase to be inappropriate.
5. We welcome the recognition in paragraph 4.62 of the validity and utility of survey evidence in establishing product market definition. Whilst we recognise that as all surveys are different it is impossible to give detailed guidance on this area, some practical tips could usefully be included, such as advising lawyers and economists to discuss proposed survey formats and samples with the OFT/CC before commissioning them.

Concentration Ratios and HHIs

6. In relation to paragraph 4.90 concerning concentration ratios, although the Guidelines briefly explain concentration ratios as with previous OFT guidelines there is no indication or guidance on what level of concentration will result in or would be likely to pose a competition problem. It would be helpful if the OFT and CC could use this opportunity to expand on their experience of this issue.
7. Similarly, with respect to the guidance on HHI thresholds, in paragraphs 4.91 – 4.93, in practice the thresholds listed, although now helpfully in line with those used by the European Commission, are very low and thus catch many mergers which are then

deemed not to present competition issues at all. This is exacerbated by the fact that any market with a post-merger HHI exceeding 1000 may be regarded as concentrated. This is more restrictive than the Commission's safe harbour approach of considering any HHI of below 1000 to be unlikely to raise competition issues.

Diagonal Mergers

8. We note with interest the reference in the Guidelines to the new concept of 'diagonal mergers'. Given that this is a new concept the OFT and CC could usefully explain its source for example, the Google/DoubleClick merger examined by the European Commission, and provide some more information on how this specific type of merger is to be assessed.

Public Interest Cases: Media Mergers

9. Although the Guidelines briefly describe the procedural steps with regard to media public interest mergers there is no further guidance provided regarding substantive assessment. Given the recent BSkyB/ITV merger decision the authorities (the CC in particular) obviously have accumulated significant knowledge in this area and more insights into this would be helpful once the law is settled.

Case law

10. On a general note we feel that the Guidelines would benefit from the inclusion of more references to case law which would illustrate how the principles in the Guidelines actually operate in practice. We note the inclusion of helpful case references in several sections of the Guidelines and consider that more such references could usefully be included.
11. For example, in paragraph 4.101 which explains the OFT and CC's use of fascia counts, it would be helpful to list some examples of cases where fascia counts have been used across different types of retail chain mergers. The guidelines could also give additional guidance on what ratios were previously used in a given industry and what geographic distances were considered appropriate. In this regard we welcome the guidance in paragraph 4.67, although again some specific case references which demonstrate the principles in this paragraph would be illustrative.

Joint Ventures

12. We note that the only specific references to joint ventures in the Guidelines are in relation to jurisdictional issues. In that regard it would be useful if the Guidelines contained more specific guidance on joint ventures, which can often raise complex substantive points, quite different from a normal acquisition scenario. For example, any assessment of the competitive effects of a joint venture should include an assessment of the degree of

competition between the joint venture and its parents and any co-ordination which may result between the parents. Such 'spillover' effects are not referred to in the Guidelines.

Approach to Specific Markets

13. In addition to more guidance on joint ventures, practitioners would also benefit from more guidance on the OFT and CC's likely approach to specific markets. For example, for markets such as supermarkets with which both authorities are very familiar, it would be very helpful if the Guidelines set out the current thinking on market definition and on the various factors which the authorities found key to assessing whether or not a market was deemed to be competitive. There is some limited guidance in the Guidelines on specific markets and this is to be welcomed, although we feel it could be developed and expanded.

Relevance of Existing Guidelines and EC Commission practice

14. As these Guidelines replace the existing CC and OFT guidelines on merger assessment it would be useful to understand whether the old CC and OFT guidelines are to be of any relevance whatsoever going forward. There are clearly some helpful sections in the current guidelines which are not reproduced in the draft Guidelines. For example, the CC's current guidelines contain useful guidance on areas such as bidding markets (paragraph 2.29) and sources of market shares (paragraph 3.6).
15. Finally, we suggest that it would be helpful if the Guidelines highlighted any areas of significant departure from previous guidance or from European Commission policy.

We would be happy to discuss any of the points raised above.

Yours sincerely

HOWARD CARTLIDGE