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Competition Commission
Victoria House
Southampton Row
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Attention Mr Tony Gooch

Dear Sir

Response to the consultation on the Office of Fair Trading and Competition Commission joint Merger Assessment Guidelines - April 2009

Simmons & Simmons welcomes the opportunity to comment on the draft Merger Assessment Guidelines (the "Draft Guidelines") prepared jointly by the Office of Fair Trading ("OFT") and the Competition Commission ("CC")

General Comments

Broadly, we consider the Draft Guidelines to be useful to legal advisers and their clients. The guidance offered is generally clear and helpful as a statement of how both the OFT and the CC (together the "Authorities") approach substantive analysis in mergers. This is reflected in the relatively few comments that we have set out below.

The approach of the OFT and the CC is described as being the same in many areas and this is to be expected. It is in these areas that it makes sense to have joint guidance. There is a risk, however, in preparing joint guidelines that the guidance offered on how the OFT and CC approach their assessment represents a compromise, focusing on the areas where the approaches are uniform and resulting in less detailed guidance being offered in areas where they diverge. This may have happened in certain areas of the Draft Guidelines, particularly as regards the differences between the types of evidence which merger firms should provide, the weight given to those types of evidence and the level of detail required at the two stages of the investigation. In our view, the Authorities should be distinguishing more between the level of information which they consider to be necessary and appropriate at each of the OFT and CC phases of the process. Any further detail on these differences would be useful.

We note that the Draft Guidelines contain a significant amount of detail which is duplicated in the OFT's *Mergers - Jurisdictional and Procedural Guidance* (OFT 527), in particular in relation to Part 3 on "The relevant merger situation". Although we recognise that one of the questions that both the OFT and the CC must answer relates to the existence of a relevant merger situation, it is less clear to us that this issue should form such a significant part of a document providing guidance on substantive assessment of mergers, particularly where the information simply summarises what is said elsewhere. The definition of "relevant merger situation" is the same at both the OFT and CC stage (although the standard to which the authority in question must be convinced that a relevant merger situation exists – or will exist – is clearly different). We had

understood that the OFT's *Mergers – Jurisdictional and Procedural Guidance* was intended to supersede Chapter 2 of the OFT's 2003 *Mergers – substantive assessment guidance* (OFT 516) which deals with the same issues. As such, it seems to us that Part 3 is largely superfluous and only serves to lengthen the Draft Guidelines unnecessarily. In the same way, much of the information in Parts 5 and 6 seem to us to be already dealt with adequately in other guidance documents.

We noted a number of typos in the Draft Guidelines, although we have not dealt with these in this response. We have also not made any comments on style and clarity of expression (provided the underlying meaning is clear), although we do consider that there are areas where improvements could be made.

Specific comments and suggestions for amendment

We set out below some specific comments and suggestions for improvement in relation to a number of areas of the Draft Guidance. We have dealt with these in the order in which they appear in the Draft Guidance document, not in any order of priority. References to paragraph numbers, footnotes and defined terms are references to paragraph numbers, footnotes and defined terms in the Draft Guidance document. Our aim in making these comments is to improve and, where necessary, clarify the Draft Guidance so as to make it a more helpful resource to clients and their legal advisers.

Para 3 21

We wonder whether the word "reference" at the end of the first sentence should be replaced with "merger situation for the purposes of a reference"?

Para 3 25 and 3 26

The cross-references in brackets in each of these paragraphs appear to be wrong. We would stress that we have not comprehensively checked all cross-references in the document.

Para 4 11, second bullet

It seems to us that the word "could" contained within brackets in the second line of the second bullet should be replaced with "would". We submit that both the worsening offer and the tacit collusion would need to extend beyond the merger firms for the merger to raise any coordinated effects concerns.

Para 4 13

We agree that it is possible for a merger to lead to both unilateral and coordinated effects. We also agree that the OFT may not need to form a view on the likelihood of both theories of harm if either of them is sufficient to satisfy its test for reference. We consider, however, that the CC will generally need to form a view on whether only one or both of unilateral or coordinated effects theories apply if it decides that the merger is more likely than not to result in an SLC, because the CC will then need to go on to consider what is the appropriate remedy.

Para 4.24

It is not clear to us what the words "or by evidence from the merger parties on the appropriate counterfactual" at the end of the first sentence add. Their presence tends to suggest that there is a real distinction between the two alternatives in that sentence, whereas it appears to us that the second alternative is simply a subset of the first. Indeed, the two bullet point examples which

follow would both, we submit, fall within the first alternative. We suggest either that the words be deleted or that it is made clearer what distinction is trying to be drawn.

Paras 4 37 to 4 39 - "Two or more bids are referred"

We found these three paragraphs to be somewhat confused. It is not clear to us that a comparison by the CC of two or more problematic mergers against each other would necessarily permit all such anti-competitive mergers. Would it be more accurate to replace the words "*permit all such anti-competitive mergers*" with "*always result in one (i.e. the least anti-competitive) being permitted, even if itself anti-competitive when compared with the status quo ante*"?

Para 4 39 – which states that the authorities (or, more correctly, the "CC") will consider the appropriateness of the counterfactual being one of the referred bids which does not raise prima facie competition concerns - appears to sit uncomfortably with the proposition set out in para 4 37 that "*the counterfactual is unlikely to involve any of the referred mergers because they all raise prima facie competition concerns*".

Para 4 62

We note the types of information which the Authorities may find useful in the analysis of demand-side substitution. Although some of these types of information may be readily available, some need more time to be gathered and compiled and others will require the commissioning of work from third parties. Therefore, the preparation of some of these types of information will have a significant cost implication for the merger firms in terms of money, time and resources. Accordingly, it would be very helpful to clients and legal advisers if the Authorities could provide some indication of the level of persuasiveness of each of the types of information listed. We submit that it is unrealistic for the Authorities to expect merger firms to provide all types of information in relation to all mergers, therefore, some guidance as to the types of information which have the greatest impact and upon which the merger parties should focus would be extremely helpful. It may be that this changes somewhat according to the type of merger, in which case some indication of what types of information are more important in a number of given types of case would also be useful. The same comment also applies in relation to the types of information which the Authorities will consider in defining the relevant geographic market set out in para 4 65.

Para 4 70

We would suggest adding at the end of this paragraph "*What represents a "significant" investment will be assessed in the context of the industry in question*".

Para 4 82

This paragraph describes a situation where a vertically-integrated firm supplies both the merchant market and has captive production. It would be helpful if the Authorities could indicate how they would approach a situation where the vertically-integrated firm consumed all its input internally. Presumably, the Authorities would also look at profit incentives to forego a portion of internal supply (or, alternatively, to expand production capacity) and start supplying the merchant market, as well as the costs and the time required in order to do this. Equally, where a firm supplies both the merchant market and has captive production, the Authorities would presumably consider any costs and the time involved in switching more supply to the external market.

Para 4.100, first bullet

Although we broadly agree with the proposition that unilateral effects are more likely in markets where there are fewer participants, this seems to be somewhat inconsistent with the point made in para 4.47. Perhaps this could be clarified?

Para 4.102

The penultimate sentence of this paragraph states that *"If firms producing close substitutes (in the product and/or geographic sense) merge, the merged firm is more likely to increase prices than if competitors not producing close substitutes merge"*. We wonder whether the words *"be able to"* should be inserted between *"likely to"* and *"increase prices"*? It seems to us that closeness of competition between the merger firms may affect their ability to raise prices, but that it would not necessarily impact upon their incentives to do so. There may be many other reasons why a merger between even the closest of substitutes would not result in the merged entity raising prices.

Paras 4.143 and 4.149

In these paragraphs, the Authorities set out the factors which they may take into account when assessing input and customer foreclosure incentives, in terms of analysing the trade-off between the profit of the merged firm in the upstream market and its profit in the downstream market. It would be useful if the Authorities could provide some indication of which of these factors are likely to be most persuasive for the Authorities in carrying out their assessment.

Para 4.155, footnote 95

We submit that the explanation of the difference between tying and pure bundling provided in this footnote is not clear. The second sentence of the footnote is particularly unhelpful in understanding this distinction.

Para 4.195

We submit that there may also be circumstances in which a merger may actually create the opportunity and incentives for a potential new entrant to enter the market. For example, the merger may cause customers of the merger firms to want to re-balance their supply and, therefore, look for an alternative supplier, which could be an existing competitor or a new entrant.

* * *

We hope that the above comments, suggestions and observations are helpful. We also hope that the points we have made are clear. Should this not be the case, or should you want to discuss any point, please do not hesitate to contact us.

Yours faithfully

Simmons & Simmons