Joint Comments of the American Bar Association's
Section of Antitrust Law and Section of International Law
on
Competition Commission and Office of Fair Trading
Draft Merger Assessment Guidelines

August 2009

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

Introduction

The Section of Antitrust Law and the Section of International Law (together, the Sections) of the American Bar Association submit these comments regarding the Competition Commission's (CC) and Office of Fair Trading's (OFT) (collectively, the "Authorities") April 2009 joint draft *Mergers Assessment Guidelines* (the *Draft Guidelines*).[1]

The Sections have substantial experience in the antitrust and merger control laws in the United States and other jurisdictions, and in the practical implications of those laws. These comments draw upon that experience, and the Sections hope and intend that they will assist the Authorities in their development of revised guidelines for merger review.

The Sections applaud the Authorities' efforts in developing the *Draft Guidelines* and inviting comment on them, particularly because doing so contributes to increased efficiency, consistency, and transparency of the merger review process. When the Enterprise Act 2002 (the Act) came into force in the United Kingdom, the CC and OFT

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1 http://www.oft.gov.uk/advice_and_resources/resource_base/consultations/current/merger-assessment-guidelines

each issued separate substantive merger guidance, and the drafting of a single set of updated substantive guidelines, reflecting the Authorities' experience in merger review under the Act during the past seven years and incorporating case-specific references to illustrate general Guidelines principles, is a welcome development.

The Sections submit these comments with the objective of focusing on those areas where we believe further clarification or reconsideration might be beneficial.

Summary of Specific Recommendation

The Sections make the following specific recommendations:

- Limit and provide additional guidance on the circumstances that would justify departure from the analytical framework set forth in the *Draft Guidelines*, and disclose when the Authorities are departing from that framework.
- Where appropriate, identify the relative significance that will be afforded to different categories of evidence relevant to the Authorities' assessment of key merger-related issues, and when announcing mergers, explain the weights placed on different types of evidence.
- Clarify the interaction of any apparent overlap between the *Draft Guidelines* and the OFT's *Mergers-Jurisdiction and Procedure Guidance*.
- Consider adopting safe harbors and/or providing additional guidance on what constitutes material influence or de facto control.
- Elaborate on the circumstances in which measures of concentration may be less relevant to the assessment of competitive effects.
- Consider clarifying that mergers falling below certain thresholds normally will not be challenged under a unilateral or coordinated effects theory.

- Provide more specific guidance on the conditions under which conglomerate and vertical mergers could raise competitive concerns.

Comments

I. Purpose of the *Draft Guidelines*

The language in the Introduction section of the *Draft Guidelines* is somewhat equivocal regarding the extent to which the document reflects the Authorities' general approach to merger review. The current draft states:

> the OFT and the CC will have regard to this guidance and will generally apply the methodology and analysis summarized in it. But they will consider each merger with due regard to the particular circumstances of each case, including the information available and the statutory time constraints applicable to the case. Accordingly, while aiming to use a systematic approach to investigations, the organizations will apply the approach described in this guidance flexibly and may, if they consider it right to do so, depart from it. Paragraph 1.5.

Given the breadth of economic activity to which the *Draft Guidelines* apply, it is indeed impossible to predict all of the possible issues that could arise with regard to every future proposed merger. Rigid application of each element of the analysis to every transaction may unduly raise compliance costs for merging parties. U.S. authorities thus seek to avoid a mechanistic approach to the application of the U.S. Merger Guidelines, and practitioners before U.S. agencies generally recognize both the necessity and the desirability of tailoring the application of the Merger Guidelines to the particular industry and transaction at issue.

However, the value of guidelines is a function of the degree to which they are perceived to reflect general policy and practice. In light of this, the Sections suggest that the Authorities underscore the fact that the Authorities will "depart from" the

systematic framework set forth in the *Draft Guidelines* only in limited circumstances and explain more clearly the conditions that may lead the Authorities to do so.

More specifically, the Sections recommend that the Authorities include additional practical examples of how they are likely to apply certain enforcement policies as well as more case references, particularly in more unusual or novel cases. For example, the specific guidance on fascia counts in retail mergers in footnote 70 is very helpful, and the Sections encourage the Authorities to provide more of this kind of practical guidance. Making use of such examples would make the Authorities' guidelines more accessible to a wider audience. They also should provide clearer guidance on the application of policy in cases where the Authorities have departed from stated practices or have taken unusual circumstances into account when making an enforcement decision. In the alternative and in all events, to the extent the Authorities may not already do so, the Sections suggest that on the occasions the Authorities depart from the *Draft Guidelines*, they publish the reasons for doing so.

II. Relative Weight Afforded to Categories of Evidence

Several sections of the *Draft Guidelines* set forth lists of relevant factors the Authorities may take into account in assessing a particular merger-related issue. Such issues include market definition (Paragraphs 4.62 and 4.65), input and customer foreclosure (Paragraphs 4.143 and 4.149), entry (Paragraph 4.190) and efficiencies (Paragraphs 4.200-4.208).

While these lists of relevant factors are fairly comprehensive, the *Draft Guidelines* do not provide significant commentary on which factors and types of evidence are likely to be of particular significance, whether all the factors are equally important, or

whether one or more of the factors are likely to be dispositive in reaching a conclusion. For example, the *Guidelines* could indicate that a merger involving significant concentration levels nevertheless could be cleared by the OFT if it is satisfied that barriers to entry are low and that entry is likely, timely and sufficient. However, efficiencies are unlikely to be considered dispositive at the OFT stage where the merger raises significant competition issues. While such guidance would be helpful in proceedings before either Authority, it would be especially helpful in the context of a Phase I investigation by facilitating the parties' and OFT's ability to identify promptly the key issues for investigation. This is particularly important given the United Kingdom's bifurcated antitrust review and the fact that a reference to the Competition Commission means very substantial delay and expense in completing a transaction.

Moreover, in certain respects the Authorities appear to be emphasizing broader theories of harm such as the closeness of competition and others over the importance of defining a relevant market. While the Sections recognize the limitations and difficulties that may be associated with defining a relevant market in certain instances, we are concerned that de-emphasizing the significance of market definition may result in insufficient consideration of all of the relevant competitive constraints, and thereby generate "false positives" as to the likelihood that a merger would produce anticompetitive effects.

III. Overlap Between the *Draft Guidelines* and OFT's Mergers - *Jurisdictional and Procedural Guidance*: Relevant Merger Situations

The *Draft Guidelines* and OFT's recently published *Mergers-Jurisdictional and Procedural Guidance* overlap in several respects, including the assessment of a relevant merger situation and interim measures and remedies, and the Sections urge that more be

done to explain what might otherwise be perceived as inconsistencies in approach between the two Authorities and/or between the procedural guidance previously provided and the *Draft Guidelines*' treatment of such procedural issues. For example, the OFT has issued its own guidance with respect to the assessment of relevant merger situations, which is somewhat more detailed than the *Draft Guidelines*. The OFT's guidance includes some size of shareholding-based criteria for assessing whether an acquisition is likely to result in one firm having "material influence" over another, and the *Draft Guidelines* do not.

The Sections suggest that, given the current risk of duplication, inconsistency and confusion in the application of policy, points of detail in the OFT's jurisdiction and procedural guidance (e.g., on shareholdings giving rise to presumptions of material influence) be incorporated by reference in the *Draft Guidelines*, with clear explanations of any differences with the CC's approach.

IV. Concepts of Control - Material Influence and De Facto Control

Section 26 of the Enterprise Act identifies three levels of interest that may constitute "control" for purposes of determining whether two enterprises will cease to be distinct: material influence, de facto control, and de jure or legal control. Paragraphs 3.9 through 3.22 of the *Draft Guidelines* discuss the various factors that the Authorities will take into account in assessing whether a party will acquire control of another enterprise, and the Sections suggest that the Authorities attempt to provide more concrete guidance on their approach to assessing this issue.

In particular, the Sections invite the Authorities to consider establishing a size of shareholding threshold below which a party will be deemed not to have material influence over another. We note that a number of countries have adopted such

thresholds at different ownership levels, consistent with the ICN's recommendation that objective tests in this area are preferable to subjective ones. Doing so would achieve greater transparency and provide greater certainty to parties that are affiliating with one another.

In addition, consistent with the Sections' recommendation set forth in Section III, the "Material Influence" and "De facto control" sections of the *Draft Guidelines* could be more specific in outlining which factors or types of evidence are likely to be dispositive (if any) or of greater relevance to the Authorities' assessment of whether a party is acquiring control of another.

For example, the Authorities may determine that the existence of substantial or special voting rights is more relevant than the industry "status" or "expertise" of the acquirer (which seems to be a more subjective or less precise factor) in measuring "material influence." As written, the *Draft Guidelines* do not draw any such distinctions in terms of the relative weight that the Authorities will assign to each factor.

One way to provide such additional guidance would be to incorporate by reference any additional detail set forth in the OFT's jurisdiction and procedural guidance and include an explanation of any differences with the CC's approach, as suggested in Section III.

V. Measures of Concentration - Relevance

Paragraph 4.84 of the *Draft Guidelines* observes that "the level of concentration in the relevant market. . .can be an indicator of the competitive pressure in that market." The *Draft Guidelines* appropriately recognize that there may be circumstances in which the Authorities will attach less or more weight to measures of market concentration, such as in cases where "they cannot be definitive" (Paragraph 4.86) about relevant market

boundaries or where there is "evidence of turbulence in concentration." (Paragraph 4.87).

The Sections suggest that the Authorities elaborate further on the circumstances in which measures of market concentration may be less relevant (e.g., in industries characterized by a bid model, rapid changes in market positions, or low entry barriers) or in which concentration data may understate the competitive significance of a transaction (e.g., where a small but especially aggressive rival is being acquired). It would be helpful for merging parties to be provided with a better understanding of the Authorities' view as to limits of market concentration analysis and when such an analysis may not be as relevant to the assessment of likely competitive effects. Conversely, it would be valuable to state where concentration increases may be more relevant, as in industries with high entry barriers or a history of proven collusive conduct.

VI. Unilateral and Coordinated Effects - Concentration Analysis and Thresholds

The *Draft Guidelines* offer a thorough discussion of the Authorities' approach to unilateral and coordinated effects analyses, but provide less guidance on the concentration analysis that should be employed and disavow any safe harbors. The discussion of concentration analysis is largely limited to the acknowledgment in paragraph 4.93 that markets with a post-merger HHI in excess of 2,000 are "highly concentrated," a suggestion that "combined market shares of less than 40 per cent will not often give the OFT cause for concern" over unilateral effects (footnote 68), and a qualitative discussion in paragraphs 4.122 through 4.124 about the role of concentration and symmetry in coordinated effects analysis. Footnote 68 states that:

> The Authorities do not consider there to be any specific "safe harbor" 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.

This footnote leaves ambiguity that the Sections suggest the Authorities dispel; if the reference to 40 per cent in the footnote is not intended to delineate a safe harbor of sorts, the Sections are unclear as to its purpose and suggest that this be clarified. The HHI thresholds cited in the *Draft Guidelines* correspond to the ones used by the European Commission in their horizontal merger guidelines, but importantly, the Commission states that concerns are "unlikely to arise" below the thresholds, whereas the OFT/CC guidelines state that the Authorities "may have regard to the thresholds." The Sections also suggest that the post-transaction HHI is only one factor of the analysis and that the Authorities provide guidance in the *Draft Guidelines* regarding how the change in the HHI resulting from the transaction will be regarded.

In addition, with respect to coordinated effects theories of harm, particular difficulties may arise in determining the evidence required to demonstrate pre-existing coordination. The Sections invite the Authorities to provide more detailed guidance on this issue.

VII. Conglomerate and Diagonal Mergers

The *Draft Guidelines* address the potential ability of conglomerate mergers to give rise to anticompetitive foreclosure through tying, bundling and portfolio effects. The Sections commend the Authorities for recognizing that conglomerate mergers may "provide substantial scope for efficiencies" (Paragraphs 4.153) and may give the merged firm an incentive to lower prices (Paragraph 4.164).

The Sections encourage the Authorities to re-evaluate the need for a separate analytical framework and theories of harm related to conglomerate mergers. In the United States, the prevailing practice is to refrain from challenging non-horizontal mergers *simply because* they create the precursor conditions to practices such as tying or bundling, which can be (and are) analyzed separately as conduct violations under Sections 1 and 2 of the Sherman Act, absent some reason to believe that anticompetitive foreclosure effects are likely. This policy has the dual effect of deterring anticompetitive conduct while at the same time avoiding the creation of impediments to socially-desirable and efficient non-horizontal mergers. In the event that the Authorities decline to follow this suggestion, the Authorities should clarify that it is competitive harm likely to occur as the proximate result of the transaction itself that will be the basis for an adverse decision on the transaction.

The *Draft Guidelines* also consider the possibility that coordinated effects might be facilitated by certain conglomerate mergers. The Authorities should consider outlining the specific factual and economic conditions that would raise concerns that such outcomes could occur. According to Paragraph 4.172, "foreclosed rivals may choose not to contest the situation of coordination, but may prefer instead to benefit from the increased price level." This paragraph appears to say that when rivals are not excluded outright but, instead, lose market share as a result of anticompetitive foreclosure by the merged firm, the merged firm might be able profitably to maintain higher than pre-merger prices in the second market because it would know that the disadvantaged firms would price similarly, to reap higher profit margins and for fear that their attempts to regain share through price competition would be met with even greater foreclosure

efforts from the merged entity. The Sections suggest that if such a theory is used as a basis for referral to the CC, the OFT should have found actual evidence, not just theoretical concerns, that such an outcome is likely..

Finally, with respect to the issue of diagonal mergers (Paragraph 4.168), the Sections invite the Authorities to provide additional examples and case references that illustrate potentially problematic transactions.

VIII. Vertical Mergers

The Sections welcome the *Draft Guidelines'* recognition that "[v]ertical mergers are generally efficiency enhancing" (Paragraph 4.134), but the Sections are concerned that the approach set out in the *Draft Guidelines* to assess vertical mergers are inconsistent with both that recognition and prior guidance in the OFT's "Mergers: substantive assessment guidance" ("OFT Mergers Guidance") and in "Merger references: Competition Commission guidelines," as well as the expressed goal of the *Guidelines* "to assist merger parties and their advisers by explaining the approach of the OFT when considering whether or not to refer a merger to the CC for further investigation, and the approach of the CC when exploring more extensively the questions posed in merger references."

The *Draft Guidelines* discuss the possibility that vertical mergers will produce anticompetitive effects through, inter alia, foreclosure. In Paragraph 4.145, the *Draft Guidelines* state that:

> In practice, if the OFT - in its role as a first screen in merger control - concludes that there is a realistic prospect 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. However, this presumption may be rebutted if there is clear evidence to the contrary. By contrast, the CC - as the determinative body in merger control role - will

> instead assess what would be the likely adverse effect of a profit-enhancing customer foreclosure strategy.

(See also paragraph 4.150.) In comparison, the May 2003 OFT Mergers Guidance indicates that the OFT would assess whether "the merger [is] expected to foreclose market access anti-competitively (e.g. by raising rivals' costs), or increase the ability and incentive of parties to collude in a market?" (OFT Mergers Guidance Paragraph 5.1.) It also indicated that the OFT was "developing and will, where possible, use financial modeling and simulation techniques to assess whether foreclosure is likely to be profitable post merger." (OFT Mergers Guidance Paragraph 5.4.)

It thus appears that the *Draft Guidelines* describe a process in which the OFT may engage in a truncated investigation, concluding in a rebuttable presumption that supports reference to the CC. Such an approach may have the unintended consequence of subjecting vertical mergers to a more uncertain and prolonged review than horizontal mergers, and appears to be an unnecessary departure from previous practice and guidance of the Authorities.[2] Specifically, while the OFT Mergers Guidance indicates that the OFT will consider all three factors (ability, incentive and likelihood) in deciding whether to refer to the CC, the *Draft Guidelines* seem to indicate that only two factors are sufficient for a referral. It will not always be the case that, having established ability and incentive to foreclose, a clear theory of consumer harm will have been established.

[2] The *Draft Guidelines* also present potential areas of inconsistency with EC policy on vertical mergers. At the OFT stage of review, once the OFT concludes that the merged firm may have an ability and incentive to foreclose others, an adverse effect on competition can be presumed (Para 4.145). The Sections raise the question of whether such a finding is sufficient for the OFT to conclude there is a realistic prospect of a substantial lessening of competition under the prevailing statutory test. Inconsistencies also may arise with footnote 87's observation that anticompetitive effects of input foreclosure may arise when the merged firm does not have upstream market power. In contrast, the EC non-horizontal merger guidelines clearly state that "for input foreclosure to be a concern, the vertically integrated firm resulting from the merger must have a significant degree of market power in the upstream market."

The recent European Commission experience in the *TomTom/TeleAtlas* case demonstrates this as, despite the second phase proceeding, no commitments or remedies were ultimately required of the merging parties.

Conclusion

The Sections appreciate the opportunity to provide comments and commend the Authorities' efforts to provide joint guidance in this important area of merger review. We believe the *Draft Guidelines* represent a significant step in improving the transparency and predictability of merger review in the United Kingdom. We would be pleased to respond to any questions regarding these comments, or to provide any additional comments or information that may be of assistance.