Competition Law Association
British Group of the
Ligue Internationale du Droit de la Concurrence
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www.competitionlawassociation.org.uk

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Consultation on proposed revision to *Mergers – Substantive assessment guidance*

Comments of the Competition Law Association

The Competition Law Association ("CLA") welcomes the opportunity to comment on the OFT's Consultation on proposed revision to *Mergers – Substantive assessment guidance* (OFT933con) ("the Consultation").

Overall, the CLA considers that the proposed amendments to the OFT's *Substantive assessment guidance* ("the *Guidance*") are a positive development: the very fact that, in four years of merger control under the Enterprise Act 2002 ("EA02"), the exceptions contained in sections 22(2) and 32(2) EA02 have never been applied suggests that it is time for a re-think. Moreover, the Competition Commission ("CC") has itself voiced concern at having 'small' mergers submit to its "heavyweight and expensive" process.1

We consider it right that the OFT should spell out clearly the circumstances in which it considers the exception to be applicable. Businesses and their advisers appreciate the greater certainty that this will entail. We also consider it right that the OFT should look to avoid referring 'small' mergers to the CC, bearing in mind the costs of references to both public and private purses.2 Whilst the Consultation draws attention to the considerable cost to the public purse of a CC inquiry; it does not, however, (directly) point to the immense cost to the parties of a reference (relative to the size of the businesses/entities the subject of the merger), which will often lead to the abandonment of small mergers if the OFT does refer. Such cases can in effect be classified as analogous to "Type I" errors (assuming that the merger would not, ultimately, have been found to result in SLC), in that the abandonment has the same effect as a prohibition decision. To the extent that such reference decisions lead to *other* transactions not proceeding, their repercussions may be amplified.

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1 CC's response to the House of Lords Select Committee's inquiry into Economic Regulators, para 18, accessible at http://www.competition-commission.org.uk/rep_pub/consultations/responses/.

2 As the Consultation points out, the cost to the public purse is often considerably in excess of the figure of £400,000 contained in the *Guidance*. We comment on the cost to the private purse below.

We also agree with the following suggestions made by the Consultation:

- That the question should be whether a reference is proportionate, balancing (a) the huge cost of a reference both to the public purse and to the parties concerned and (b) the magnitude and likelihood of harm the merger might cause.

- That a market size threshold of £10 million is a reasonable "ball park" figure for the reasons given by the OFT and given the difficulties in quantification.

- That the OFT should keep the figure of £10 million, and its guidance on this issue generally, under review: future decisional practice may throw further light on the appropriateness of this figure and on the question of which situations justify the inapplicability of the exception.

We are, however, concerned that the proposed amendments do not offer sufficient certainty to businesses contemplating merging in small markets:

(a) The first of the two broad categories of cases identified by the OFT where use of the exception is potentially inappropriate – where the market is heavily concentrated and prospect of new entry is low – appears to be sufficiently broad as potentially to capture the majority of mergers to which the duty to refer applies: (i) if there is no heavy market concentration, then no coordinated effects will arise and the likelihood of unilateral effects will be low; and (ii) mergers in concentrated markets where there is a prospect of new entry will, in our view, be much less likely to give rise to a realistic prospect of SLC.

(b) We are not convinced that the precedent value of a case should itself trigger the inapplicability of the exception. This should only apply in wholly exceptional circumstances. Any precedent value to be gained in referring a merger which would otherwise benefit from the exception should be carefully weighed against the risk of abandonment of the transaction and the cost to both public and private purse of a reference.

(c) The language deployed in the Consultation – "two broad categories of cases where…use of the exception is potentially inappropriate" – is not in our view conducive to encouraging more predictability for business.

(d) We therefore consider it preferable for the OFT to state that the £10 million market size exception will be inapplicable only in exceptional cases. We suggest that the OFT provides guidance as to

those cases; the second of the bullet points at paragraph 7.8 of the Consultation, together with the list at paragraph 7.6 of the *Guidance*, would be a good starting point.

(e) At paragraph 5.2 the Consultation makes the point that it is desirable to establish the applicability of the exception without incurring the costs of the intensive 40-day Phase I process. However, we doubt that advisers will be able confidently to advise their client as to the applicability of the exception (and therefore as to the relative merits of notifying the merger, on the one hand, and completing, on the other) on the basis of the proposed amendment. And in relation to completed mergers, the OFT will, often, have little feeling at the outset for issues such as entry prospects in the market and so will doubtless wish to commence an investigation in relation to that issue in particular. That will usually entail a more general inquiry into the dynamics of the market. In those circumstances, we query whether the revised *Guidance* will have quite the cost-saving effect the OFT anticipates.

(f) To encourage certainty and predictability, and to realise the OFT's desire of establishing the applicability early in the process, we suggest that the OFT ought to be receptive to, and encourage, discussing – if appropriate in an iterative fashion – the application of the *de minimis* exception during pre-notification contacts. Any concerns about resource implications should be allayed by the fact that the cases in which the *de minimis* exception may apply will remain relatively few in number.

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