



Competition Law Association

British Group of the
Ligue Internationale du Droit de la Concurrence
(International League for Competition Law)

The OFT draft guidance consultation document Mergers - Jurisdictional and Procedural Guidance (The Consultation Document)

1. Introduction

1.1 These comments are submitted on behalf of the UK Competition Law Association (CLA)¹, which is affiliated to the Ligue Internationale Du Droit de la Concurrence. The CLA welcomes the consultation exercise and the opportunity it affords to comment on the draft guidance document. The CLA is limiting its comments to a few specific areas.

1.2 The CLA would also like to take the opportunity to welcome the announcement of a joint exercise between the OFT and the Competition Commission, in relation to substantive assessment. It agrees with the OFT's approach to streamlining with a view to ensuring consistency with the ECN/ICN guidelines insofar as possible. The CLA considers that given these international initiatives it would be helpful to practitioners, to highlight within the Consultation Document differences between certain of the regimes, for example the EU regime and the UK system as well as areas of similarity.

2. General Observations

2.1 The CLA welcomes the Consultation Document's approach of providing a clear and comprehensive guidance document based on experience, giving a number of examples where appropriate. The transparency of the OFT processes is undoubtedly enhanced by the Consultation Document and publication of templates and contact names on the website is helpful.

2.2 The CLA agrees with the OFT that it is preferable to include jurisdictional issues in the procedural guidance rather than in the substantive assessment guidance.

¹ The membership of the CLA includes barristers, solicitors and in-house lawyers, academics and other professionals, including economists, patent agents, the trademark agents. The main object of the CLA is to promote freedom of competition and to combat unfair competition.

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3. **Enterprises Para 3.9**

3.1 It would be helpful if the Guidance dealt with the circumstances when an outsourcing arrangement gives rise to a merger situation.

3.2 **Control (Paragraphs 3.13 - 3.17)**

3.3 In addressing circumstances when control of an undertaking changes, section 26(3) of the Enterprise Act 2002 refers to ability "materially to influence" the policy of an undertaking. The EC Merger Regulation, Regulation 139/2004 (ECMR) Article 3.2, addresses a similar issue using the concept of "decisive influence". In many cases the two concepts will apply equally to the same set of circumstances, however the concepts are not identical and circumstances can be envisaged where a transaction could fall under one system of merger control but not the other. The CLA considers it would be helpful if the OFT were to deal expressly with areas of difference between the two systems' approach to control, particularly bearing in mind the possibilities of reference back to the UK of a concentration being dealt with under the EC system.

3.4 The CLA notes that the issue of the scope of "material influence", as explained in the Consultation Document, is subject to any guidance received in the context of the **BSkyB** case, as noted in footnote 6.

3.5 It would be helpful if the Guidance recognised the similarities which appear to exist between decisive influence under the ECMR and the de facto control test referred to in paragraph 3.17.

4. **Informal Advice (Paragraphs 4.25 - 4.41)**

4.1 The CLA wrote to the OFT in February 2006 at the time of the withdrawal of Confidential Guidance and Informal Advice with its view that both were of value to the business community, as they allowed some transactions to proceed which otherwise would not have; some transactions to be called off; and some to move forward in a more efficient manner. The CLA notes the formalisation of withdrawal of Confidential Guidance. It welcomes the continuation of the system for obtaining Informal Advice.

5. **Pre-Notification Discussions (Paragraphs 4.42 - 4.48)**

5.1 The clarification and codification of the OFT's practice, in relation to pre-notification discussions, is welcome as is its move towards alignment of its procedures with those of the ECMR.

6. **Statutory Voluntary Pre-Notification (Paragraphs 4.53 - 4.63)**

6.1 The CLA welcomes the clarification at paragraph 4.55 of the circumstances in which the OFT considers that use of this process is particularly appropriate.

6.2 The CLA welcomes the idea that there should be a focussed approach to the information that is required from the parties. It is important to identify, at an early stage, the aspects of a transaction which are of particular concern to the OFT and the information which is material.

7. **Fast Track Reference Cases (Paragraphs 4.72 - 4.76)**

7.1 The CLA welcomes the introduction of a fast track reference process as it should lead to a shortening of timescales and costs savings, both for business and for the OFT. However the CLA notes that the parties would be required to describe the "theory of

harm” rather as is required under the ECMR when seeking a reference back to a national authority under Article 4.4. The CLA queries whether this will mean, in practice, that the fast track reference procedure might not be used as frequently as would be desirable. Cases could arise where the parties consider it is likely the OFT would make a reference at the conclusion of its normal procedure, but that the Competition Commission would clear the transaction. The parties accordingly may see no “theory of harm” to describe.

7.2 It would be helpful if the OFT could clarify, in the context of paragraph 4.75, how fast “fast” will be.

8. **Threshold Applied by the OFT (Paragraphs 6.31 - 6.33)**

8.1 The CLA refers to the statement that the OFT will assume a strong presumption in favour of initial undertakings or an initial order where there are “coherent concerns” of UK customers. The CLA considers that it is not appropriate to require undertakings or to make an order under section 71 or 72 of the Enterprise Act in light of the provisions of section 71(8) unless there are competition concerns. The CLA considers that this should refer to prima facie “justified concerns” or prima facie “competition concerns”, rather than coherent concerns. A concern may be coherent but not well founded in competition terms. Further, paragraph 6.31 is not consistent with paragraph 6.33, which refers to “competition concerns” nor with paragraph 6.32, which refers to “substantive concerns”. We would suggest it would be helpful if all of these paragraphs referred to the same concept of justified concerns grounded in competition issues.

9. **Initial Enforcement Orders (paragraphs 6.40 - 6.43)**

9.1 The CLA does not agree that unwillingness to provide initial undertakings may be “supportive evidence of the fact that pre-emptive action is in progress or in contemplation”. There may be valid commercial reasons why an undertaking is unwilling to provide an initial undertaking. The CLA considers that there should not be a presumption either way, and that it should be left open to the OFT to decide each case on its facts.

9.2 In general, the CLA would welcome a fuller explanation of the proceedings relating to the initial Orders.

10. **Procedure for consideration of undertakings in lieu (paragraphs 8.13 - 8.17)**

10.1 The CLA queries the need for a complicated system of sealed envelope ‘bids’. If the decision-maker acts impartially, the CLA does not see the sealed bid process as adding to the fairness of the decision.

11. **OFT Discretion in ‘near miss’ undertakings in lieu cases (paragraphs 8.18 - 8.23)**

11.1 The CLA sees no clear reason in principle why the OFT should not consider undertakings in lieu which are submitted after the CRM. While the provisions in paragraph 8.21 shows some welcome softening, the CLA queries whether there could be a further softening by reference to allowing some further time.

12. **The EC Merger Regulation (paragraph 10.1)**

The second sentence of paragraph 10.1 sets out that the NCAs may not apply their own competition laws to ECMR mergers except in certain limited circumstances. However in relation to these “certain limited circumstances” there is no comment in

the paragraphs that follow about transactions where a concentration is notifiable under ECMR and one party takes a stake in the concentrated body that does not confer decisive influence for ECMR purposes but which does confer material influence for UK merger control purposes. It would be helpful if the OFT could deal expressly with the lacuna in control which arises in such circumstances and to comment on whether it would seek to take jurisdiction where substantive concerns arise.

The Competition Law Association
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