

# Herbert Smith

## Response by Herbert Smith LLP to the Competition Commission Consultation on the Review of Guidelines for Merger References (CC2)

We welcome the opportunity to comment on the CC's review of its guidance on merger references. An updated version of the guidance which reflects the CC's experience will be useful to us and our clients. We have set out our comments following the order of the guideline, but by way of a general comment we feel that the guideline would in particular benefit from specific examples and illustrations.

### **Newspaper references**

Section 1.5 on newspaper references should be updated to refer to the new regime introduced in December 2003 under the Communications Act.

### **European mergers**

Section 1.7 on referrals under the ECMR should be updated to refer to the new Regulation 139/2004 and to reflect the new referral provisions under Article 4(4).

### **Enterprise**

Further guidance on the concept of what constitutes an 'enterprise' and the factors the CC is likely to consider in assessing whether a particular group of assets amounts to an enterprise would be helpful. It would be useful if this could be illustrated with specific examples which demonstrate the CC's interpretation of the concept.

### **Associated persons**

It would be helpful if the CC introduced a paragraph on the concept of associated persons. The CC has considered the application of the associated persons test under the equivalent provision of the FTA and it would be useful if, in this guideline, the CC included guidance on the factors which lead it to conclude that two or more persons acting together to secure or exercise control are to be regarded as associated with one another and should be treated as one person.

### **Efficiencies**

The section on efficiencies under the competition assessment is limited and it would be useful if this could be expanded. Further guidance on the use of efficiency defences and more guidance on the type of evidence required would be useful.

Also, in the section on remedies (section 4.11) the CC states that it will not consider environmental benefits. Given that it is government policy that matters that reduce greenhouse gas emissions or are otherwise likely to slow global warming are in the interests of all consumers, we believe that the CC should treat such environmental benefits as consumer benefits when that test is relevant to assessing a merger.

### **Vertical and conglomerate mergers**

More detailed guidance on how the CC examines vertical and conglomerate mergers would be helpful, in particular now the EC Commission has published its guidance on non-horizontal mergers. The CC should aim to issue clear and predictable guidance setting out a clear structure for determining when the CC may have concerns about mergers between companies that do not directly compete but may have vertical or other links on the market. Such guidance should recognise that concerns are unlikely to arise unless the merged entity has a significant degree of

market power on at least one market, and the CC could follow the EC Commission's approach of safe harbours in this respect. The assessment should start with a presumption that such transactions are pro-competitive and the CC should then determine whether, based on the specific circumstances, the transaction presents competitive concerns that outweigh the likely benefits.

### **Remedies**

We do not propose to comment at this stage on the remedies section as the CC has indicated that it intends to publish separate guidance on merger remedies which will incorporate within a single document remedies matters dealt with in CC2, CC8 and other guidance on interim measures, which will be put out for consultation later this year.

We look forward to commenting on this in due course.

**Herbert Smith LLP**

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