

Linklaters

Response to the Competition Commission's invitation for comments on its review of its Guidelines on Merger References

1 General Observations

We welcome the opportunity to comment on the review of the Competition Commission's ("CC") guidelines for merger references ("CC2"). These guidelines constitute an essential tool in understanding how the CC is likely to approach specific questions, and this element of transparency is greatly appreciated both by us and by our clients.

We also agree on the CC's decision to produce separate, and presumably more detailed, guidance in relation to remedies in merger cases. This is a key area and one which has seen a degree of evolution in CC decisions since CC2 was published, particularly in recent decisions such as *BSkyB / ITV* and *MidKent Water / South East Water*. It would be particularly helpful for the new guidelines on merger remedies to make as much reference as possible to the CC's experience in those and other previous cases, to make the revised guidance a useful tool for advisers in difficult or complex cases.

2 Suggestions for change and amplification

We agree with the CC's statement that although the guidelines do not display any critical shortcomings, the time is ripe, after over four years since the Enterprise Act 2002 came into force, to review them.

We have identified, and set out below, a number of areas which would benefit from being discussed in greater detail in the Guidelines. In keeping with the exploratory nature of this call for comments, our comments are high level in scope at this stage, but we will be happy to provide a further detailed response once the CC's revised guidelines are put out to consultation.

2.1 Vertical and conglomerate mergers

As already highlighted by the CC itself in its call for comments, the area of vertical mergers is not considered in detail in CC2. We would welcome amplification of the sections on both vertical and conglomerate mergers, as this would provide increased legal certainty.

2.2 Efficiencies

The current guidelines provide very little detail in relation to the role and relevance of efficiencies in the CC's merger review process. This is of significant importance in many of the cases on which we advise. By contrast, the European Commission's guidelines on the assessment of horizontal mergers under the EC Merger Regulation provide more detail and consequently certainty for clients. We would welcome clarification of the CC's approach to efficiencies.

2.3 Evidence gathering

We would very much welcome any guidance the CC could provide on the methods they use for gathering and assessing evidence. More specifically it would be helpful to understand what evidence the CC finds useful (and routinely makes use of), what the CC ascribes weight to, together with examples of evidence used in specific cases.

In particular, it would be helpful to understand to a greater degree what factors the CC takes into account when deciding to reverse (or not to follow in their entirety) its provisional findings.

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2.4 Local markets

We would like the CC's revised guidelines to contain much more detail in relation to the CC's approach to local markets. It would be helpful if the CC could provide clarity on the methodologies it employs in analysing local markets. This should be complemented by a more transparent approach in dealing with cases involving local markets as a reference progresses.

2.5 Failing firm defence

It would be helpful if the CC could provide as much guidance as possible in relation to the circumstances in which the failing firm defence will apply. The CC has considered this issue in a number of recent cases, and it would be helpful to see this experience reflected in the new guidelines, together with any further guidance the CC can offer business and their advisers.

2.6 References to cases

Throughout the revised guidelines, it would be extremely helpful for the CC to include references to cases, as the European Commission does in its own horizontal merger guidelines. This would assist business and their advisers in understanding the context in which the CC's guidance is provided and facilitate case analysis.

2.7 Material changes in circumstances

It would be helpful to understand how the CC deals with material changes in circumstances, or material changes in relation to the parties, in the course of the merger inquiry. We refer, for instance, to the circumstances which arose in the context of the *Kemira GrowHow Oyi / Terra Industries Inc* investigation, when Kemira GrowHow was the subject of a separate bid.

2.8 Focus of the inquiry in particular cases

There are cases when the focus of the CC's investigation does not need to encompass all of the markets affected by the merger referred to the CC. We refer in particular to the *Kemira GrowHow Oyi / Terra Industries Inc* case, where the OFT stated, in its press release referring the merger to the CC, that it had identified competition concerns in relation to certain chemicals process markets, but not in the fertilizer market which was the principal business of the parties to the JV. It would be helpful if the CC could provide greater clarity on how it deals with similar cases. We recognise however that this may be more a matter of procedure than substance.

2.9 Experience from appealed cases

We assume that the revised guidelines will reflect any experience that the CC has gained through the CAT appeal process, such as in relation to remedies in the *Somerfield / Wm Morrison* case.

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