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OUR REFERENCE

JRD/JQW

YOUR REFERENCE

31st March 2008

Dear Tony

REVIEW OF GUIDELINES FOR MERGER REFERENCES

I am writing in response to your letter to Geraldine Tickle of 20 February. As Geraldine noted in her e-mail to you of 3 March she has asked me to provide comments for Martineau Johnson.

From reading your letter we understand that, at this stage, you are canvassing views prior to a formal consultation process. We agree with the Competition Commission's view, noted in the first paragraph of your letter, that there are no serious shortcomings with the current guidance. Given the context of this process please therefore find below those issues that we consider it most relevant to consider highlighting during the formal consultation process. These comments are not exhaustive and we would be keen to participate in the formal consultation process.

Part 1: Introduction

1. Point 1.7 will require amendment to account for the possibility of the notifying party or parties to make a referral request in accordance with Article 4(4) EC Merger Regulation.

Part 2: Market definition

2. The Competition Commission's views as to the uses and potential application of market definition are clearly vital in this section. However, this section substantially reprises the European Commission's notice on market definition. While there will clearly be a desire to publish a complete document it is noteworthy that there is an abundance of competition guidance on market definition across the European Union all of which covers very similar ground.

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3. We recognise that the CC may hold different views from the European Commission and also that the European Commission's notice is not itself binding. However, we do wonder whether the replacement for CC2 could simply contain a summary of the main principles behind the European Commission's notice with additional text to provide depth in relation to issues where the CC has particular views.
4. We would also note that market definition precedents that were more obviously based on the same principles as the European Commission's may be more widely applied across the European Union. Clearly the CC is under no duty to provide precedent for other jurisdictions but given its standing and the relative size of the UK's economy within the Union there may be merit in considering the wider impact of decisions made by the CC.
5. This comment is made with some reserve as we recognise that highlighting the differences with the European Commission's views may give rise to difficulties both technical and political. Further, clearly it can be argued that if the UK is a separate jurisdiction then it is necessary to set out in full the application of these principles within the UK. Nevertheless, the underlying economic principles of market definition do not vary as between jurisdictions even if views as to their application may vary and their application to national economies with distinct characteristics may require them to be applied in a different manner. In our view there may today, the concept of market definition as set out in the European Commission's notice having been around for some time, be some merit in considering whether it is necessary to reiterate in full these principles in national guidance. There may even be some political advantage in being one of the first regulators to produce more streamlined documentation.

Part 3: Assessment of the competitive effects of a merger

Non-collusive oligopolies

6. The points made above in relation to part 2 cannot, in our view, be applied to part 3 of CC2. The UK's SLC test is distinct from the European Commission's significant impediment to effective competition ("SIEC") test and therefore it must be accompanied by full national guidance.
7. However, the amendments made to the EC Merger Regulation and the closing of the "enforcement gap" at the EC level does lead to some interesting questions that a reworking of CC2 could, in our view, usefully deal with.
8. Recital 25 of the EC Merger Regulation summarises the Commission's position that transactions which create or enhance a non-collusive oligopoly market structure are subject to the SIEC test and indeed in their view always were. Recital 25 provides as follows:

"In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective



competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned."

9. Commentary at the time suggested that the amendments to the EC Merger Regulation brought the substantive competition test into line with those of other jurisdictions including the UK. While it is very clear that the SLC test does also cover non-collusive oligopolies it may, in our view, be useful for the CC to set out whether it considers the SIEC test and the SLC test to have exactly the same parameters or whether there is still any meaningful distinction between the two. It seems apparent that the answer to this question would rely on the precise definition of non-collusive oligopoly employed by the CC and European Commission respectively. If the SLC and SIEC tests do cover very similar ground then it may be helpful to point this out in the section on non-coordinated effects of a merger (points 3.28 to 3.31).
10. While this document is likely to be used mostly by competition law practitioners it should, in our view, nevertheless be accessible to the non-expert. In this regard it may be useful to note in a reworked CC2 that the strengthening or creation of a dominant position which impedes effective competition has always fallen within the SIEC test and would also be caught by the SLC test. We would suggest that the concept of a dominant position is more readily grasped and therefore more useful than the current list of situations in which non-coordinated effects may arise (see point 3.29).
11. Thereafter, we would suggest the inclusion of some text explaining that both the SLC test and the SIEC test also cover non-collusive oligopolies. It is noteworthy that although widely used the term oligopoly is not always well understood and therefore we think that it may also be worth discussing the characteristics of the oligopoly market structure and providing some examples.
12. In short if the guidance were to make it clear that both the SLC test and the SIEC test cover transactions which result in or enhance dominant positions or non-collusive oligopolies the document would, in our view, be more accessible.



Vertical and conglomerate mergers

13. We note from your letter that the section on vertical mergers will be expanded. Presumably the section headed "Other types of mergers" (3.69 to 3.72) will also be substantially expanded to cover conglomerate mergers thus provide coverage equal to or above that provided by the European Commission's non-horizontal merger guidelines.

Please do not hesitate to contact me if you would like to discuss any aspect of the points raised above (Tel: 0870 763 1208 - e-mail: james.dilley@martjohn.com).

Yours sincerely

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