



Pinsent Masons

BY E-MAIL ONLY

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Dear Tony

REVIEW OF GUIDELINES FOR MERGER REFERENCES

Thank you for your letter of 20 February 2008 inviting comments on the Guidelines for Merger References (the Guidelines) from Pinsent Masons.

We provide below our brief comments. We have not enclosed a non confidential version as our comments may be published in full.

We would agree that the Guidelines do not have, in the CC's words, any "critical shortcomings". As certain sections will be removed from the Guidelines and be subject to a separate consultation, we have focussed our comments on the market definition and competitive assessment sections. We make no comments on the remedial action nor public or special interest mergers sections.

Our two main comments are:-

1. It is confusing and unnecessary that the principles applied in the Guidelines differ from those in the OFT's Substantive Assessment or Market Definition Guidance. The principles for market definition and competitive assessment should be the same even if the depth of review and the legal test applied by the CC and OFT differ.

We provide below three simple examples but should clarify that they comprise neither an exhaustive list nor the most important differences;

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Issue	Guidelines/OFT Guidance References	Commentary
Failing firm defence	<p>Paras 3.61 – 3.63 Guidelines</p> <p>Paras 4.36 – 4.39 OFT Substantive Assessment Guidance</p>	<p>Despite a reduction in rivalry in the market, the OFT Guidance recognises potential benefits to consumers e.g. continuation of supply. This is not recognised in the Guidelines.</p> <p>The OFT Guidance gives express importance to the manner in which the purchaser will use the failing firm's assets post-merger. This is also not recognised in the Guidelines.</p> <p>The OFT Guidance states that decisions by profitable parent companies to close down loss-making subsidiaries are unlikely to satisfy the impending exit from the market element. The Guidelines state however that the failing firm defence may apply to divisions or subsidiaries that do not have a "viable future".</p>
Efficiencies	<p>Paras 3.26 – 3.27 and 4.44 Guidelines</p> <p>Paras 4.29 – 4.35, Part 7 OFT Substantive Assessment Guidance</p>	<p>Efficiencies that are beneficial even though there may be a SLC are considered by the OFT whereas this type of efficiency only seems to be considered by the CC in the context of vertical mergers (Para 4.44 Guidelines).</p> <p>For efficiencies to be approved, the Guidelines require at para 3.27 that (1) efficiencies materialise in a short space of time, (2) they be a direct consequence of the merger and (3) they will increase rivalry in the market.</p> <p>For rivalry increasing efficiencies the OFT requires at para 4.34 that (1) efficiencies are shown to arise clearly and are very likely to arise, (2) they be a direct consequence of the merger and (3) there be sufficient rivalry post-merger for there to be sufficient incentive to pursue the claimed efficiency and pass on that saving to the consumer.</p> <p>Whilst the Guidelines' first condition appears to cover the OFT's first condition (the CC condition <i>may</i> be stricter than the OFT) and the second conditions are clearly the same, it is unclear that the pass on requirement of the OFT's third condition is required by the Guidelines.</p>
Entry and expansion	Paras 3.47 – 3.48 Guidelines	Risk for potential entrants/expanding companies is a factor considered in the Guidelines but not present in OFT Guidance.

2. Just as the CC acknowledges the usefulness of respondees citing actual CC cases to illustrate comments on the Guidelines, reference to cases in the Guidelines would also be useful and bring the Guidelines to life, other bodies, such as the European Commission, take this approach.



Should you have any questions, please let us know.

Yours sincerely

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Partner

Pinsent Masons LLP
This letter is sent electronically and so is unsigned

cc Denis.Kelly@cc.gsi.gov.uk