

**COMPETITION COMMISSION REVIEW OF ITS GUIDELINES  
FOR MERGER REFERENCES**

**INITIAL CALL FOR COMMENTS**

**RESPONSE BY REED SMITH RICHARDS BUTLER LLP**

**31 MARCH 2008**

- 1 The following comments are submitted on behalf of Reed Smith Richards Butler LLP. With global capabilities and a multidisciplinary approach, our Antitrust, Competition, and EU Law Group represents clients with operations in the United States, Europe, and many other parts of the world. We regularly act for clients in merger proceedings in a wide range of jurisdictions, including before the Competition Commission (the 'CC').
- 2 We welcome the opportunity to respond to the CC's initial call for comments on its existing Guidelines (CC2). We look forward to providing more detailed comments on the CC's draft revised guidelines in due course.

### ***General approach***

#### References to past cases

- 3 In our view the current guidelines are somewhat detached from the CC's decisional practice. We appreciate that at the outset of the mergers regime under the Enterprise Act 2002 the CC would have wished to avoid making extensive references to experience gained under the previous UK mergers regime. However, a substantial body of decisional practice has since built up under the current regime and in our view the guidelines would benefit from making reference to relevant cases in which the issues discussed arose.
- 4 It might be thought that references to past cases would risk 'cluttering' the guidelines and be off-putting for a non-specialist reader. In our view, these risks could be avoided by adopting the approach taken by the European Commission in its guidance on mergers. The European Commission's guidelines on the assessment of horizontal mergers<sup>1</sup>, for instance, avoid these issues by generally confining references to past cases to the footnotes. References to cases that illustrate points made in the main body of the text would, in our opinion, be helpful. In addition, where a point can be illustrated by reference to an actual case, that may help bring the subject matter to life.

#### Relation with OFT guidance

- 5 Since both the OFT and the CC assess mergers under the same regime, consideration should, in our view, be given to producing common guidelines on the substantive assessment of mergers. Clearly there are important differences in the functions of each body with regard to mergers and the procedure differs in each case, but these could be reflected in separate

---

<sup>1</sup> Commission Notice, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ C31, 5.2.2004, p. 5.

sections of such common guidelines setting out the particularities of the merger process before each body. We suggest that such an approach would work well in relation to the sections on market definition (part 2 of CC2) and the assessment of the competitive effects of a merger (part 3 of CC2).

- 6 It is arguably in relation to remedial action (part 4 of CC2) that the CC's functions differ most significantly from those of the OFT under the UK merger regime. However, we understand that the CC will in due course be publishing separate guidance on merger remedies, and that the remedies section of CC2 will therefore be substantially curtailed. This development will remove a further possible reason to maintain separate CC and OFT guidelines on the substantive assessment of mergers.
- 7 In our view, combined guidance would contribute to making the UK mergers regime more easily understandable by non-specialists. It would also help maximise consistency of approach as between the OFT and the CC.
- 8 We welcome the OFT's current consultation on revised jurisdictional and procedural guidance<sup>2</sup>. In our view the OFT's substantive guidance (in so far as it is not covered in the revised jurisdictional and procedural guidance) would also benefit from being revisited with the benefit of the experience gained under the Enterprise Act. We would respectfully encourage the CC and OFT to collaborate in this area. Even if the two bodies do not issue joint guidance, it would be a missed opportunity if the CC and OFT did not work closely together in producing their respective guidelines.

### ***Market definition***

- 9 We suggest that part 2 of CC2 could usefully be expanded to refer to the particular issues that arise in relation to market definition in certain sectors. The use of 'flows' in the transport sector and 'isochrones' in the grocery and cinema sectors are two examples. Such references need not be very long: it would, in our opinion, be sufficient to point the reader in the direction of more detailed information contained elsewhere, including in past CC decisions.

### ***Assessment of the competitive effects of a merger***

- 10 Part 3 of CC2 discusses a range of complex issues. In our view its usefulness would be significantly enhanced by reference to real-world examples. Again, references in the footnotes alone would be helpful, concrete illustrations of particular points even better.

---

<sup>2</sup> *Mergers – jurisdictional and procedural guidance, Draft guidance consultation document, March 2008, OFT526con.*

*Conclusion*

- 11 We hope that these comments are helpful. Please contact us if you would like to discuss any points in more detail.

**Reed Smith Richards Butler LLP**

**31 March 2008**