

# TRAVERS SMITH

For the attention of: Tony Gooch  
Inquiry Secretary  
Competition Commission  
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31 March 2008

Dear Sir

## Review of guidelines for merger references

We write in response to your letter to Margaret Moore of this firm dated 20 February 2008, requesting comments on the Competition Commission's review of its guidance document, "Merger References: Competition Commission Guidelines" (CC2). While we do not consider that CC2 requires a fundamental review, we do consider there are a limited number of areas in which the guidance might be improved:

- 1 Relationship with OFT guidelines:** To the extent that the OFT and the CC intend to maintain separate guidelines in future, it will obviously be preferable to ensure that differences in tone and/or treatment are kept to a minimum. Clearly, given the different functions of the two bodies, there will be areas where it may be appropriate that the guidelines of each take slightly different approaches (an apparent example in the current OFT and CC guidelines is the failing firm defence). However, in such cases we think it is important that the reason for the different tone/treatment is explained. Such explanations (e.g. of the apparent distinction in respect of the failing firm defence) are not included in the current version of CC2.
- 2 References to decided cases:** From a practitioner's perspective, reference to decided cases throughout the text would be particularly helpful, both to provide concrete illustrations of principles outlined in the guidance and as a source of potentially more detailed guidance on specific areas. In most cases, footnotes would probably suffice (and this should prevent the guidance from becoming unwieldy in terms of length).
- 3 Evidence:** Whilst some guidance is provided already on the types of evidence which the CC has generally found to be useful in carrying out its analysis (for example at paragraphs 2.16-2.23), it would be helpful if this issue could be addressed in more detail throughout the guidance.

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- 4 **Enterprises ceasing to be distinct:** Paragraph 1.15 could usefully be expanded to include discussion of how the CC approaches the question of an enterprise being brought under common ownership or common control, especially in the light of cases such as the recent reference of B Sky B's acquisition of a 17.9% stake in ITV plc (albeit we note that the relevant appeals to the CAT have not yet concluded). It would be particularly helpful to include at least some discussion of the relevant concepts in the legislation (such as "associated persons") and to outline the types of evidence which the CC has found useful when conducting its analysis of these issues.
  
- 5 **Failing firms:** Paragraphs 3.61-3.63 could be amended to include discussion of how the CC approaches the "failing firm defence" in the light of its experience in cases such as Thermo/GV Instruments (2007), CBS/Hampden (2006), British Salt/New Cheshire Salt (2005), Corus/Arcelor (2005), Taminco/Air Products (2004) and Carl Zeiss/Bio Rad (2004). As with the question of enterprises ceasing to be distinct, it would be helpful to outline the types of evidence which the CC has found useful when assessing whether a firm would have been likely to exit the market in the absence of the merger. As noted above, it would also be helpful to explain any difference of approach as compared to the OFT on this issue.
  
- 6 **Vertical and conglomerate mergers:** Given their current brevity, we think paragraphs 3.64-3.72 could be expanded somewhat to include discussion of how the CC approaches these types of mergers, drawing on its experience from cases such as the bids for the London Stock Exchange, EWS/Marcroft and Heinz/HP. That said, we do not consider that CC2 needs to contain a particularly lengthy discussion of vertical and conglomerate issues and we note that only a limited number of cases of this type have arisen in the past.

If you require any clarification of the points made above, please do feel free to contact either Margaret Moore (020 7295 3255) or Nigel Seay (020 7295 3416).

Yours faithfully

**Travers Smith**

CC Denis Kelly  
Competition Commission