

CHAIRMAN'S GUIDANCE TO GROUPS

Introduction

1. This document sets out the guidance of the Chairman of the Competition Commission (the "Commission") to merger reference groups, market reference groups, and special reference groups. It should be read in conjunction with the Commission's Rules of Procedure which are binding on members of groups and which must be followed. It is issued to groups to help them determine how to proceed in accordance with the Rules.
2. The guidance has been issued by the Chairman under paragraphs 19A(7) and (8) of Schedule 7 to the Competition Act 1998, following consultation with the members and other appropriate persons. It will apply to all references made to the Commission on or after 20 June 2003.

General

3. A group must follow the rules and have regard to the contents of this guidance. In the event of any conflict between the rules and the guidance then the rules prevail. If a group encounters a situation which is not provided for in the rules or covered in this guidance, then the chairman of the group may consider whether to consult the Chairman having regard to all the circumstances of the situation in question.

Detailed Guidance

Appointment and Conduct of groups; Rule 4

4. Rule 4.6 allows the Chairman to attend and give advice to groups about the exercise of their functions under the new regime. Where the Chairman is unable to attend, then his deputy can attend instead, in accordance with the provisions of paragraph 3 of Schedule 7 to the Competition Act 1998.

Appointment of a Standing Group; Rule 5

5. This rule allows the Chairman to appoint a single standing group for the purpose of carrying out any general functions of the Commission such as accepting undertakings, varying or releasing undertakings or making, varying or revoking orders and final orders. These functions cannot be carried out in relation to a specific reference until the group responsible for that reference has ceased to exist. So a standing group will not do anything which an already appointed group is in the business of carrying out. The rule is intended to provide for those situations where a group has ceased to exist yet a function connected to the matter considered by that group needs to be attended to. This might include, for example, a matter which the OFT had under review in accordance with its duty to monitor undertakings and orders and in respect of which the OFT makes a recommendation to the Competition Commission to

vary an undertaking or to discharge a party from its obligation to comply with one.

The Timetable; Rule 6

6. The group must comply with the statutory timetable provided by the Act for the reference in question. However it must also make arrangements for an administrative timetable to be drawn up as soon as possible after it has been appointed. The group must also have regard to the views of the main parties when doing so. The timetable must provide for the major stages of the reference as described in rule 5(3). But this list of stages should not be regarded as exhaustive and the group may include other matters within the timetable if they consider that those matters would help them to determine the reference within the statutory and administrative timetables. For example, a group might wish to obtain the views of the main parties on possible customer benefits ahead of a consideration of that issue in the context of remedies as mentioned in paragraph 13 below.

Hearings; Rule 7

7. A group will need to decide which, if any, of its hearings should take place in public. In taking this decision, the factors which the group must have regard to are set out in rule 7.2. The factors include the views of the main and third parties. But these factors are not exhaustive and a group might also wish to consider whether, for example, a public hearing would be conducive to a greater confidence in the process or whether it would help them to identify customer benefits. It should take account of the approach taken by other groups to the question of deciding which hearings should take place in public. It is envisaged that during the course of a major reference which involves a significant consumer interest, at least one hearing will take place in public.

Joint Hearings; Rule 7

8. A joint hearing is a meeting at which more than one party or one party and another person or body attends. In deciding whether to hold a joint hearing the group should consider whether it would help the group to understand the industry or the issues, whether it would help the parties to reach a better understanding of each party's position and arguments, or whether it would encourage the submission of relevant evidence and views from those likely to be affected by the outcome of the reference. In deciding whether or not to hold a joint hearing in public the group must have regard to the factors set out in rule 7.2 and the guidance contained in paragraph 7 above.

Investigation Powers; Rule 9

9. The Act gives the Commission new powers to impose penalties on individuals or companies for failing, without good reason, to provide information within a reasonable time. This power carries considerable financial consequences and

must therefore be exercised carefully. A group must have regard to the Commission's Statement of Policy on Penalties before exercising it and would be advised to consult the Commission's lawyers. Groups should remember that full appeals on the merits can be made to the Competition Appeal Tribunal against both the decision to impose a penalty and the amount of the penalty.

10. Groups should also have regard to the overall contribution to the reference which the information in question might make if it were provided. If the information is unlikely to add significantly to the group's consideration of the reference then the group might wish to rely on rule 9.3 and ignore the information rather than proceeding to impose a penalty.

Provisional Findings; Rule 10

11. When a group notifies its provisional findings, the notice must give an explanation of its reasons for coming to them. The reasoning should be sufficient to enable a meaningful consideration of them by the parties. This applies equally to cases where the members of a group have reached different conclusions on their provisional findings. The parties should respond by giving their reasons why the provisional findings should not become final or should be varied. A group may wish to consider whether to hold a further hearing in the light of the response. A further hearing might not be necessary in every case.

Remedies; Rule 11

12. Rule 11 requires a group to have regard to the need to give as much notice as practicable of the actions which it considers might be taken by the Commission for the purposes of remedying the effects of completed or anticipated mergers or for the purpose of remedying the adverse effects identified in a market investigation. In some cases the actions will be specified in the notice of the provisional findings but if they are not then the group must notify the main parties as soon as practicable after it has notified its provisional findings.
13. The objective here is to eliminate impractical options and to pave the way for implementing effective remedies. In considering the question of remedies a group may, in particular, have regard to the effect of any action on any relevant customer benefits.
14. There is a duty to consult the main parties on remedies. In most cases consultation will involve an oral hearing but there may be cases where that will not be necessary. A group will be in the best position to judge how it seeks and responds to views having regard to the statutory and administrative timetables for the reference in question. A copy of the notice will be placed on the Commission's website and this might elicit responses from other interested persons to which the group can have regard. A group might also wish to consider seeking views on the question of customer benefits as part of its consideration of remedies.

Reports; Rules 13-15 (Preparation, Exclusion of Matter and Publication).

15. The group should ensure that any party who has given evidence to the Commission sees a copy of any summary of that evidence prepared by the Commission so that it can check the accuracy of the summary. Parties should be invited to identify any material which they would not wish to be included in the report and any evidence which they wish to be excised from the published report. They should be informed of the procedure for the making of excisions. The Act requires that the Commission's reports should contain the information necessary to understand its decisions and the reasons for those decisions. Ultimately therefore the final decision is for the group. Further guidance on disclosure matters is contained in paragraphs 18-25 below.
16. However, parties should have an opportunity to make further representations if there is a dispute between them and the group about whether or not a piece of evidence should be disclosed. In such cases, the party should write to the Commission's Chief Executive about their concerns. He will liaise with the group and the party about them.
17. If a member disagrees with any decisions contained in a report of the Commission then, if he so wishes, the report may include a statement of the member's disagreement and the reasons for it.

Disclosure of Information

18. During the course of a reference a group will receive information from a number of sources. These sources may be the parties to the reference, the public, other public authorities and the Commission's own research. In general this information will be "specified information" because it will come to the Commission as a result of its statutory functions¹. The Act places certain restrictions on the disclosure of specified information. However the restrictions do not apply if the information is in the public domain or if the person to whom the information relates consents to its disclosure.
19. Before a group discloses specified information it must have regard to three considerations. The first consideration is the need to exclude from disclosure (so far as practicable) any information the group thinks would be contrary to the public interest. The second consideration is the need to exclude from disclosure (so far as practicable) commercial information which it thinks might significantly harm the legitimate business of the undertaking to which it relates or information relating to the private affairs of an individual which might significantly harm the individual's interests if, in the case of both sorts of information, it were disclosed. The third consideration is the extent to which the information included in the second consideration is necessary to be disclosed for the purpose for which the group is permitted to make the disclosure.

¹ See section 238 (1) of the Enterprise Act 2002

20. It is not necessary for all of these statutory considerations to be satisfied in any particular case. It is open to a group to decide against disclosure on public interest considerations even though it might consider that their inclusion is necessary for a proper understanding of its report. These matters require careful consideration and a group faced with a difficult decision should consult the Commission's lawyers.
21. In addition to these legal considerations, a group must also have regard to the Commission's Statement of Policy on the Disclosure of Information in Mergers and Market Inquiries. The Commission's objective is to be open and transparent in investigations, whilst maintaining confidentiality of material provided.
22. Consistent with this objective, a group should ensure, on the one hand, that the main parties are treated fairly and, on the other hand, that the need to receive information from third parties, such as consumers and their representative bodies, suppliers and customers and other parties who may be affected by the group's decision, is not discouraged.
23. A group will need to have regard to the main principles of the Commission's policy. These are, first, the need to ensure a consistent approach to the disclosure of information in merger and market cases. Second, the desirability of specific non-confidential information supplied by third and, where appropriate, main parties, being disclosed to other main parties, and published before the notification of provisional findings, or as soon as is reasonably practical afterwards. Third, the advantages of providing main parties, and third parties as appropriate, with information extracted or summarised from papers produced by the group during the course of the inquiry.
24. The issues statement, the remedies statement, the group's provisional findings and Commission surveys will be disclosed to the main parties and to the general public. Evidence from the other main parties and from third parties will normally be disclosed to the main parties.
25. In practical terms it will help the group in relation to disclosable information if they ask the individual supplying the information for their consent to its disclosure in advance. Alternatively a group might ask an individual or party to submit two versions of their submissions: one for private consumption by the group and another version, which omits any confidential information, which may be disclosed. Even so, a group will still have to address the three considerations mentioned in paragraph 19 above and it would be sensible to ensure that a party's submissions show how the confidential information has been omitted.

Public Interest Cases

26. The Rules apply, including the requirements in relation to provisional findings, to those cases where references concerning mergers and market investigations, may be made to the Commission by the Secretary of State. He

may do so if he believes that a public interest consideration such as national security has arisen, where a merger involves a government contractor (a special public interest case) and where a merger has a Community dimension within the meaning of the EC Merger Regulation.

27. In these cases the Commission will consider and report to the Secretary of State. The questions a group has to decide will vary according to the type of reference. Detailed guidance is to be found in Parts V of the Competition Commission Guidelines on Merger References and Market Investigation References respectively.

Regulatory references

28. Regulatory references are those considered by special reference groups. The rules apply to their proceedings with the exception of Part IV (Findings on the terms of reference) covering provisional findings, exclusion of matter and remedies. Nevertheless it is open to a group considering a regulatory reference to decide whether to make provisional findings under its power to determine its own procedure.
29. In addition, in regulatory references the group should request the regulated company and the relevant regulator to send copies of all their evidence to each other. The group should send copies of any corrected transcript of any hearing with one such party to the other. Such evidence (including transcripts) should be so disclosed unless the group are satisfied that there are good reasons for not doing so. The group should pay particular regard to the question of whether any relevant consumer group has received enough information to enable it to make effective comments on the issues.

Additional material

30. In addition to this guidance a group will wish to consult the following material:-

CC1: Competition Commission Rules of Procedure
CC2: Merger References: Competition Commission Guidelines
CC3: Market Investigation References: Competition Commission Guidelines
CC4: General Advice and Information
CC5: Statement of Policy on Penalties
CC7: Statement of Policy on Disclosure of Information in Merger and Market Inquiries (in preparation).

Sir Derek Morris
Chairman

Date

