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In April 2008, the U.K. Competition Commission (CC) and the U.K. Office of Fair Trading (OFT) launched a joint review of their respective guidelines for the assessment of mergers. Both had started separately, the OFT with a mere 119-page draft document in March 2008.[1] The plan is for the two organizations to produce a single guidance document, consisting of revised and expanded guidance of matters already contained in several publications namely the CC *Guidelines*,[2] three OFT documents, *Mergers: Substantive Assessment Guidance*,[3] *Guidance Note Revising Mergers: Substantive Assessment Guidance*,[4] and *Revision to Mergers: Substantive Assessment Guidance – Dealing with the Exception to the Duty to Refer Markets of Insufficient Importance*.[5]

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[1] OFFICE OF FAIR TRADING, MERGERS - JURISDICTIONAL AND PROCEDURAL GUIDANCE, DRAFT GUIDANCE CONSULTATION DOCUMENT, OFT 526con (Mar. 2008), *available at* http://www.oft.gov.uk/shared_oft/consultations/oft526con.pdf.

[2] U.K. COMPETITION COMMISSION, MERGER REFERENCES: COMPETITION COMMISSION GUIDELINES, CC2 (April 2003).

[3] OFFICE OF FAIR TRADING, MERGERS: SUBSTANTIVE ASSESSMENT GUIDANCE, OFT 516 (May 2003).

[4] OFFICE OF FAIR TRADING, GUIDANCE NOTE REVISING 'MERGERS - SUBSTANTIVE ASSESSMENT GUIDANCE', OFT 516a (Oct. 2004).

[5] OFFICE OF FAIR TRADING, REVISION TO *MERGERS – SUBSTANTIVE ASSESSMENT GUIDANCE*, OFT 526b (Nov. 2007).

The important issue of merger remedies is already the subject of a CC *Consultation Draft Guidelines* (May 2008). The two organizations pooled their resources with a view to producing draft guidelines for public consultation at the end of 2008, with the aim of issuing definitive new joint guidelines in mid-2009. This is a most welcome development as much has happened since the introduction of the Enterprise Act in 2002.

This article intends to summarize briefly some of the emerging issues. The abiding approach, as represented by the many submissions to the CC-OFT Working Party, is for consistency between the two institutions charged with merger control in the United Kingdom, the OFT and CC, for consistency between the U.K. institutions and the European Commission, and for consistency in the application of the relevant economics to merger analysis. This will provide not only a roadmap for the competition authorities but, in a jurisdiction in which there is no compulsion to pre-notify any qualifying merger, guidance to the parties as to the likely attitude of the competition authorities.

In addition, while the revised guidelines will be "soft law," it is clear from the attitude and discussions of the Competition Appeals Tribunal (CAT), the body which would hear any review applications, that it expects guidelines to be followed by the relevant authority. At the very least, there will need to be good reasons for departing from the course of action indicated in the existing guidelines. This is no more than a subset of administrative law: official guidance creates legitimate expectations. In *Unichem Limited v. OFT*, for example, the CAT recognized that the existing guidelines were "no more than that" but, because they create expectations and are relied on by the parties, if the OFT

intended to reach a decision which differed from the outcome which might have been expected on the basis of the application of the guidelines, "… there will normally need to be good reasons."[6] Directly in relation to the CC's existing merger guidelines, the CAT observed in *Summerfields v. CC* that "the CC may have been in difficulty had it departed without good reason from its guidelines."[7] The existing guidelines state that the CC will apply them "flexibly and may, if it considers it appropriate to do so, depart from that approach." In the European Court of First Instance's (CFI) recent judgment in *Sun Chemical v. Commission*, the CFI may have gone slightly further in stating that the European Commission "is bound by notices which it issues in the area of supervision of concentrations."[8] Perhaps in the United Kingdom, after over four years of experience in applying the existing guidelines, the revised guidelines should be stated to be an authoritative and near-binding statement of the CC's approach to merger cases on which parties should be able to rely?

Given the role that the revised guidelines would serve, any revision must meet the obvious objectives of transparency, clarity, and comprehension. The existing guidelines are silent on a number of matters which have assumed importance since 2003. Moreover, doubtless in an effort to appear comprehensive, when addressing a matter, they typically set out a whole range of factors which need to be considered without any evaluation of whether some are more important than others. Also, in contrast to the European Commission's consolidated jurisdictional notice and its horizontal and non-horizontal

[6] Unichem Limited v. OFT, 2005 C.A.T. 18, at para. 119.

[7] Summerfields v. CC , 2006 C.A.T. 4, at para. 98.

[8] Case T-282/06, Sun Chemical v. Commission (not yet reported) (judgment of Jul. 9, 2007).

merger guidelines, the existing guidelines (perhaps understandably) are thin on references to decided cases. As past cases are usually a good guide to the resolution of future cases, the revised guidelines may well contain careful analyses of key cases.

The British system of merger control starts with establishing jurisdiction and rests on number key concepts such as the meaning of "enterprise," what is meant by two or more enterprises "ceasing to be distinct," what is meant by "control" or "material influence," and other matters. Perhaps surprisingly, there is still active dispute as to what these concepts mean and, in the end, they are legal points for resolution by the CAT. Any revised guidelines should set out in clear terms the authorities' own views of how they will interpret their own jurisdiction.

A crude analysis of recent references to the CC indicates that approximately one-third are cleared, one-third are blocked (though some are eventually cleared subject to suitable undertakings or remedies), and about one-third are abandoned following the reference to the CC. Reasons for abandonment presumably rest on the commercial disruption, uncertainty, and cost of a reference and perhaps a mature appraisal of the likely outcome. Perhaps this figure, when combined with those mergers which are blocked, suggests that existing guidelines do not offer sufficient guidance to influence merger decisions.

It should also be recognized that the U.K. merger process and in particular the CC's second phase is unusually long by international standards. Perhaps more importantly, there is no prospect of shortening this process and cutting to the essential

issues on which, for example, remedies may be discussed and accepted virtually at the beginning of any process. Clear guidelines are therefore essential.

An omission in the existing guidelines and the CC's procedural guidance is the role and nature of "evidence." This is paradoxical and, moreover, many of the submissions made in the course of the current review relate to the use of economics. In fact, when parties say "economics," they mean economic theory. A lamentable gap in the existing guidelines which must be remedied in the revised guidelines is that the OFT and CC should anchor their use of economic theory by references to empirical studies, where such theories have been tested, and think hard about the use of theory where there has been no empirical verification. Without such evidence, the theories merely become plausible hypotheses and should be weighed accordingly. A related evidential issue, ignored in the existing guidelines but becoming increasingly important in practice, is the use of contemporaneous documents in support of particular CC findings. There is nothing surprising about this. For years the best evidence to put to the CC was evidence which had not been created specifically for that purpose, but which supported a particular contention, for example, where a particular company submits that it regarded another as a credible potential entrant into a market. If there are contemporaneous documentation indicating that an undertaking was concerned about the threat of entry from a particular competitor and conducted its deliberations accordingly, such evidence should be afforded significant weight. There is evidence that the CC is becoming increasingly pressing for the production of such evidence. The opportunity should be taken for the CC to indicate

how it intends to exercise its powers under section 109 of the Enterprise Act 2002 and, in relation to empirical studies, what type of empirical evidence it requires in order to sustain any economic theory on which it or the parties may be seeking to rely.

In producing guidelines for both the CC and OFT, the opportunity will doubtless be taken to attempt to harmonize the differing approaches of the two organizations. For example, there is a slight but potentially important difference in the application of the SSNIP ("small but significant and non-transitory increase in price") test, that is, whether the hypothesized price increase should be 5 percent or higher, between 5 and 10 percent, or whether this test should not be employed at all as, for example, was the case in the *S v. Svitzer Wijsmoore/Adstream* inquiry.

The existing U.K. guidelines do not dwell much on the issue of "potential competition," certainly as compared to its European Commission and U.S. equivalents. The question of whether or not an undertaking is a realistic potential competitor or merely a perceived potential competitor is a difficult one, especially where contemporaneous evidence plays a role.[9] Of course, the fact that a competitor is perceived to be a competitor does not alter the fact that, in reality, it may not a potential competitor. Guidance on what is the best evidence on this would be welcome.

A further area of discussion lies in the theory of coordinated effects, namely the ability of parties to align their commercial activities following a merger, whether or not a situation exists where there are incentives to maintain coordination, and whether such coordination can be sustained over time (and, not least, notwithstanding satisfying these

[9] *See, e.g., Bucher Industries v. Johnston Sweepers* (2005) and *Heinz/HP Foods* (2006).

criteria, whether the company would indeed do so). The case law has developed significantly since the existing guidelines,[10] but there is a need to attempt to harmonize the current U.K. practice with the developments within the European Community (e.g., *Sony/BMG*, *T-Mobile Austria/tele.ring*, and the CFI's judgment in *Impala*).

Many of the more recent CC inquiries have related to acquisitions which, on their face, appear to be quite trivial (e.g., a single cinema or a single superstore site). While it is for the courts to determine ultimately what "a substantial part of the United Kingdom" actually is, some guidance is needed as to how such situations are to be determined, both as a matter of jurisdiction and substantively.

A further area in contention is what is meant by "material influence." In the recent *BSkyB/ITV* inquiry, the CC found a threshold of 7.5 percent or above did, in that situation, constitute "material influence," though this is currently under appeal before the CAT. Of particular importance is the way in which such evidence is evaluated: does it go merely to the jurisdictional question of whether there is "control"? Or, is it properly analyzed as an element required to be considered to establish whether or not there has been a substantial lessening of competition?

Two further themes are likely to assume greater importance in the revised guidelines than in the past. First is the treatment of barriers to entry. In most merger jurisdictions this is a fundamental question. The practice in the United Kingdom is to treat it pragmatically, that is to examine the costs of obtaining a 5 percent threshold market share and the possibility of that entry occurring within 2 years. These are quite

[10] *See, e.g., James Budgett Sugars/Napier Brown Foods* (2005) and *Wienerberger/Baggeridge Brick* (2007).

arbitrary parameters, unsupported by any empirical foundation. Moreover, proof of future structural changes is very difficult to produce or generate. The second issue is vertical mergers. The CC has had experience in analyzing the upstream and downstream foreclosure effects in cases such as *LSE/Deutsche Borse* and some of this can now be refined in revised guidelines.