

# **Response by the Office of Fair Trading (OFT) on proposed draft interim guidance for mergers and conduct inquiries**

Detailed comments from OFT

May 2009

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# 1 MERGERS GUIDANCE

## Main comment

- 1.1 The Draft interim guidance on Mergers inquiries published in January 2009 (the Draft guidance) should state more clearly that the statutory duty of the Office of Fair Trading (OFT) under the Enterprise Act 2002 (the Act) is not affected by the introduction of the Co-operation and Competition Panel (CCP).
- 1.2 The substance of the above statement is in paragraph 2.11 (page 7 of the Draft guidance). We would suggest bringing that paragraph forward. It could be inserted in paragraph 1.7 (page 3 of the Draft guidance) following the description of the role of CCP in the second half of that paragraph.

## Other comments following the numbering of the Draft guidance

- 1.3 Paragraph 1.10 would benefit from making clear that the intervention of CCP does not affect the jurisdiction of the merger control authorities (primarily the OFT, the Competition Commission and the European Commission -in cases falling under the jurisdiction of the EC Merger Regulation).
- 1.4 The content of paragraph 3.1. (ii) might be misleading. The jurisdiction of the OFT under the Act is not affected regardless of the decision of CCP.
- 1.5 In paragraph 4.2 you may want to specify whether you would also be advising on jurisdictional as well as on substantive issues. This paragraph might also benefit from stating more clearly that CCP's actions do not preclude a possible merger assessment by the OFT (and potentially the Competition Commission) pursuant to the Enterprise Act 2002.
- 1.6 As the rest of the Draft guidance appears to be based on the OFT and the Competition Commission's published substantive and procedural guidance, we have no further comments but we would be pleased to

advise CCP on any specific issues CCP might consider our contribution would be helpful.

- 1.7 The OFT and the Competition Commission are expected to publish new procedural and joint substantive merger guidelines in the near future. These new guidelines have benefited from the experience the UK competition authorities have gained since the implementation of the merger control provisions of the Enterprise Act 2002.

## 2 CONDUCT GUIDANCE

### Main comments

- 2.1 OFT wonder if it might be worthwhile clarifying the scope of the guidance. 'Conduct' tends to be a term of art in competition law and widely used with reference to the unilateral conduct prohibitions, Article 82/Chapter II. Might it be worthwhile referring to 'co-operation and conduct' instead?

### Other comments following the numbering of the draft guidance

- 2.2 At paragraph 2.8 it might be helpful to clarify that in the case of cartels, such activities may constitute a criminal offence.
- 2.3 The content of paragraph 3.1. (ii) might be misleading. The jurisdiction of the OFT under the Act is not affected regardless of the decision of CCP. (Please see identical comments on the mergers guidance).
- 2.4 In paragraph 4.2-4.3 as in the Merger guidelines you may want to specify whether you would also be advising on jurisdictional as well as on substantive issues. This paragraph might also benefit from stating more clearly that CCP's actions do not preclude a possible investigation by the OFT (and potentially the Competition Commission) pursuant to the Competition Act 1998 and Enterprise Act 2002.
- 2.5 At paragraph 6.6 we think that it might be helpful to note that predatory pricing refers to below cost pricing strategies, which is one kind of price-based exclusionary conduct.
- 2.6 In paragraph 6.6 it may also be helpful to remind readers that the CCP does not have jurisdiction Competition Act 1998, Enterprise Act 2002 and EC Treaty.
- 2.7 At paragraph 6.18 if possible, it might be worth providing high-level examples of market power in the NHS internal market? This is an interesting area, and may not be all that obvious to those not familiar with the operation of the NHS internal markets.

- 2.8 P. 19, heading: suggest that this should refer to “Price-based exclusionary conduct”
- 2.9 Paragraph 6.28 Again, suggest predatory pricing properly refers to below cost pricing: maybe say something such as 'prevent successful entry by competitors through anti-competitive pricing strategy (e.g. predatory pricing).'?