COMPETITION COMMISSION

OFFICE OF FAIR TRADING

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Date	03 March 2010	Email	

Dear Sir/Madam

This joint Office of Fair Trading (OFT) and Competition Commission (CC) letter is in response to the European Commission Competition Directorate-General's consultation on its draft Best Practices for the submission of Economic Evidence and Data Collection in cases concerning the Application of Articles 101 and 102 TFEU and in Merger Cases. The OFT and CC welcome the opportunity to comment on the document. Our response first puts forward general observations and second addresses more specific points in the draft document.

INVESTOR IN PEOPLE

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General Comments

The OFT and CC very much welcome the publication of this paper. We believe it acts as a commitment device aimed at improving quality standards in the submission of economic evidence for all parties involved in competition cases. We agree with the consultation paper that parties submitting economic evidence based on analytical models should commit to: choosing a framework consistent with industry facts and economic theory, stating both the hypothesis being tested and alternative hypotheses, listing the assumptions underlying the models presented, allowing step by step replication of the model results and should perform sensitivity analysis of both the economic model used and the specific results obtained**.**

The scope of the EU Document

The document title implies that it discusses a broad range of economic evidence types. We find that the document appropriately focuses on econometric evidence. The consultation paper does not, however, cover some other relevant sources of economic evidence that the OFT and the CC have found can sometimes be useful in the analysis of competition cases. Examples include more simple statistical techniques as well as diversion ratios and survey evidence.

While seeing the benefits of keeping these best practices tightly focused we would also suggest that the title is changed to recognise that they do not cover all forms of economic evidence that parties may wish to submit. To clarify this point we would also suggest the addition of the following paragraph at the start of the document:

> These best practices are focused on the submission and analysis of economic models including econometric analysis which forms part, or evidences these models. They are not intended to cover all forms of economic evidence that can be used in individual cases such as survey evidence for example.

For your information we are currently jointly producing draft guidelines on 'Good practice in the design and presentation of consumer survey evidence in merger inquiries' where we set out the joint OFT/ CC views on good practice. These guidelines are due to go out for formal external consultation in March 2010 and your views on these would be most welcome.

Financial data

The use of financial data is often important in cases but there is no reference to this in the document. This consultation provides an excellent opportunity to emphasise that financial data is frequently required within A101, A102 and merger investigations. It is very important that data submissions are accurate and meaningful and the need for high quality data could be emphasised. Terminology is important and the development of a glossary of standard terms could also help to ensure consistency of submissions and avoid misunderstanding. More detailed guidance on interpretation of key terms: such as avoidable costs and recommendations over methodologies e.g. for the allocation of common costs, would be useful to reduce any ambiguity for companies under investigation. Guidance would also be helpful on the appropriate criteria to define correct time-frames for cost and revenue data. When company financial results are submitted, the importance of reconciliation to published results could be underlined. These steps could improve the standard of financial submissions that are made and reduce the need for supplementary questions.

Differentiating between the two phases of Mergers' investigations

On mergers, the volume and complexity of relevant economic evidence will vary from case to case and may well be different in Phase I from the more in-depth analysis of Phase II. We think that the consultation paper should recognise the distinction between the preliminary phase of an investigation and the secondary one. We also believe the paper should clarify that the submission of economic evidence for a Phase I should not necessarily be as in depth as those required for a Phase II. In particular, in the primary phase, qualitative evidence – i.e. evidence of intent – pre-investigation statements and qualitative and financial companies' data are more likely to play a decisive role than advanced econometric techniques. We would not want parties to refrain from providing such qualitative evidence on the basis that they would not meet the advanced technical standards discussed in the document given the short timeframe of the first phase.

More detailed comments

The notion of "well established literature"

In paragraph 3, the consultation paper states that economic evidence should be based on “well established relevant literature”. This is one of the main criteria used to assess the credibility of the submitted evidence**.** It is however difficult to find a clear consensus on the definition of “relevant literature” and this potential ambiguity carries two possible risks:

- Risk 1: a too lax interpretation of what constitutes “well established relevant literature” might allow the use of published models that are not fit to provide insights in complex cases.

- Risk 2: a too strict interpretation of the definition could prevent the use of unpublished high quality contributions due to the time lag between the case and publication.

This is a difficult issue to tackle, but it is important to recognise the ambiguity implicit in what does constitute a relevant literature. We suggest that where there does exist ambiguity, parties should state why they believe the literature is relevant.

Additional guidance on how 'well established' literature is defined would also be helpful. We would be concerned if 'well established' meant that there had to be years of precedence behind it. For example the literature on behavioural economics impact on markets is new, but has been published in respected peer reviewed journals. We believe this should fall under "well established". Single pieces of literature which has not been published in a respected peer reviewed journal should not qualify as "well established".

Counterfactuals

The consultation paper briefly discusses the issue of counterfactuals in paragraph 48 under the heading of “further recommendations”. Counterfactuals constitute an essential part of the economic reasoning aimed at evaluating the possible outcomes of alternative scenarios. Linking this through to the sensitivity analysis of models parties should carry out would be useful. For example, stating that parties should consider the impact of other plausible alternative counterfactuals on their model.

Disagreeing on evidence

The consultation paper provides details on the standard of analysis that DG Comp will undertake to evaluate the evidence impartially and to differentiate between alternative hypotheses sustained by different parties where evidence is mixed. It would be useful if the paper could provide further guidance on the procedural aspects for managing disagreements, for example on the use of ‘hot tubs’ to narrow areas of disagreement between experts of the different parties.

Statistical issues

Interpretation of rejecting the null

Paragraph 18 states that parties should explicitly formulate the alternative hypothesis so that “rejection of the null hypothesis can be properly interpreted.”

We note that tests of a null hypothesis will often have power against many alternatives, in which case it is not necessarily clear that the alternative is accepted just because the null is rejected. Further whilst it may be possible to formulate the null and alternative so rejection of the null can be properly interpreted (as in footnote 9), this will not always be the case.

Data representativeness

Section 2.2 of the consultation paper discusses the issues of data relevance and reliability. The key phrase here is "Empirical evidence depends on the relevance and reliability of the

underlying data" and the observation that most data sets are incomplete or otherwise imperfect. It also offers a great deal of good advice about data inspection, how variables are measured, addressing miscoding, punching and other data errors. However, we think the commentary about sampling could be strengthened.

Specifically, the paper suggests that statistical techniques have been developed to cope with "sample selection problems", whereas except in some limited instances this is not necessarily true. Bias in samples can be particularly difficult to detect and account for. We find that overall this section underplays what it calls the "sample selection process". Of course, if data are complete or more-or-less complete sampling errors can be ignored. However with incomplete data, one would be wrongly relying on results that emerge from the sample data as being representative of some bigger picture.

The obvious and easy way to ensure representativeness is to rely on random sampling. Done properly this technique guarantees an absence of bias - so should be utilised if possible. But realistically, in most of the cases being considered here, data will not be collected by random sampling, so the point of emphasis should be placed on “representativeness”. We find that this section would be more convincing if there was some degree of challenge to examine the data and consider issues that might undermine confidence in representativeness. While this can be read in the phrase "a sufficient understanding of how the data were gathered and the sample selection process", we believe a greater emphasis on this issue would strengthen the paper.

On the “Bottom up” approach

The consultation paper states at paragraph 30, "It is recommended to follow a bottom up approach. In the context of regression models this would mean estimating simple models first." We found the term “bottom-up” confusing and suggest it is removed. The example given in footnote 14 suggests the term means an approach that starts with simple techniques and only moves onto the more complex if necessary. We thought it could be confused with recommending a general-to-specific modeling procedure, which we note may not always be appropriate

On known or potential rates of error

The consultation paper states in paragraph 40 that an econometric analysis should discuss the "known or potential rate of error" of a particular theory or technique when applied.

We were unsure what was meant by "rate of error", and suggest it might be more helpful to talk about the known and potential sources of error, as well as the likelihood and magnitude of these sources of error in the context of the analysis being submitted.

Once again we would like to add that we strongly support this document and that these comments are given with the goal of improving a very useful and constructive set of best practices.

Yours faithfully

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