

## BURGES SALMON LLP

### RESPONSE TO DRAFT COMMISSION GUIDELINES ON THE ASSESSMENT OF NON- HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS

#### 1 INTRODUCTION

- 1.1 Burges Salmon LLP ("Burges Salmon") welcomes the opportunity to respond to the draft commission guidelines on the assessment of non-horizontal mergers under the council regulation on the control of concentrations between undertakings ("the Draft Guidelines").
- 1.2 Burges Salmon fully supports the Commission's attempt to clarify this difficult area of merger analysis. Our comments on the Guidelines are divided into two parts. General Comments on the Guidelines as a whole, and a number of specific comments on particular paragraphs.

#### 2 GENERAL COMMENTS

- 2.1 Although the overview acknowledges the scope for efficiencies provided for by vertical mergers, we consider that it is important that the guidelines correctly represent the position in respect of mergers generally and non- horizontal mergers in particular. The final guidelines should therefore specifically acknowledge that mergers (particularly non-horizontal mergers) are generally efficiency enhancing and therefore should be viewed in the main as pro-competitive, unless there are specific reasons for objecting on competition grounds.
- 2.2 In general terms, about the worst a non-horizontal merger can do is to create an incentive for the merged entity to abuse a dominant position. Given the existence of strong prohibitions against the abuse of dominance, this would seem to fall into a different category to the kinds of altering of market-structure that occur when horizontal mergers take place.
- 2.3 The key here seems to be paragraph 44 of the Draft Guidelines. However, given where it stands, this analysis seems to be restricted to one category of possible foreclosure as opposed to being of general relevance. Moreover, paragraph 44 does not go far enough to set out how the Commission intends to analyse a merged entity's incentives to abuse a dominant position. For example, the likelihood of detection section seems very limited. There is also nothing on the possibility of the undertaking concerned giving commitments to the Commission as to its future behaviour.
- 2.4 The Guidelines should therefore highlight from the start that some form of existing market power is required for there to be any level of concern (i.e. move paragraph 23 into the overview). In addition, we would like to see the inclusion of the Competition Commissioner's statement on publishing the Guidelines that '*the majority of vertical and conglomerate mergers do not raise problems*' included in the text of the guidelines themselves. Given that the Guidelines are intended to set out the correct approach to vertical mergers we believe an overview in the above terms would assist in dissuading an overly negative approach on the part of authorities to mergers that are by and large pro-competitive and efficiency enhancing.

#### 3 SPECIFIC COMMENTS

- 3.1 **Paragraph 6: "general guidance already given..."** It would be helpful if the Commission could specify exactly which parts of the general guidance previously

provided is particularly relevant to the assessment of non-horizontal mergers, as this is far from clear given the differences between the issues involved.

- 3.2 **Paragraph 9: "as regards the appraisal of non-horizontal mergers is without prejudice to..."** We think that this could simply (and more accurately) be replaced by the words "is subject to".
- 3.3 **Paragraph 13: "...the internalisation of double mark-ups".** While the meaning of this is clear, it is not so clear that this is a phrase that has generally been used in the past to describe the issue referred to. The economic problem is generally referred to as 'double marginalisation', and this is caused by the two independent mark-ups at the different levels of the production/distribution chain. However, the phrase is a new one to us.
- 3.4 **Paragraph 21: "The more immediate and direct the overall anti-competitive effect of a merger, the more likely the Commission is to raise competition concerns."** It is assumed that this is intended to convey the message that if the perceived possible anti-competitive effects are minor or insignificant then they will not lead to the Commission finding the merger to be incompatible with the common market. However, if this is what is intended, this is what it should say.
- 3.5 **Paragraph 43: "the likely incentives of the merged firm..."** It seems to us that this is very difficult territory for the Commission in assessing mergers. Assessing the creation or strengthening of dominance is one thing; however, any analysis of likely future behaviour is venturing into highly uncertain territory and therefore has a high probability of constituting unreliable analysis. This paragraph seems to go with the following paragraph, and the approach set out in paragraphs 43 and 44 to the likelihood of the future conduct of merged entities is by some way the least satisfactory treatment of any of the key points in the Draft Guideline.
- 3.6 **Paragraph 52: "Vertical mergers may entail some specific sources of efficiencies, the list of which is not exhaustive."** This is not a particularly helpful paragraph for prospective merging parties. It would be of considerably greater use to merging parties if the Commission were able to discuss some of the key efficiencies it recognises as resulting from non-horizontal mergers.
- 3.7 **Paragraphs 81 to 84: Vertical Integration:** The obvious scenario missing from those considered by the Commission is where a non-horizontal merger is necessary for a competitor to be able to enhance its efficiency so as to be able to compete with other businesses that are already vertically integrated. Under the Draft Guidelines this might be prohibited because it would increase the degree of symmetry in the market structure.
- 3.8 **Paragraphs 117 to 119: Coordinated effects and conglomerate mergers:** As with vertical integration, we fear that the risk of significant anti-competitive coordinated effects arising from conglomerate mergers appears somewhat overstated in the Draft Guidelines. In particular, it may be that the reason for the conglomerate merger is precisely to be able to compete with other providers on the basis of the same range of goods that they offer.

**Burges Salmon LLP**

**11 May 2007**