

GUIDELINES ON THE ASSESSMENT OF NON-HORIZONTAL MERGERS

CBI COMMENTS ON COMMISSION DRAFT NOTICE – 14 May 2007

The CBI welcomes the Commission's statement emphasising that the majority of vertical and conglomerate mergers do not raise competition problems. We appreciate also the Commission's commitment to providing clear and predictable guidance for business and the opportunity to comment on the draft Notice.

In the light of these comments the CBI would like to make the following preliminary points. Firstly, we agree with the view that such mergers are in a much lower risk category than horizontal mergers. They are of major importance in helping business to drive out costs and improve efficiencies through vertical integration, without the feature of combining existing market shares.

Secondly, the existing case law under the revised EC Merger Regulation applying to these mergers is quite limited. This means that the foundations of guidelines in this area cannot be as well-established as is normally the case. Extensive guidelines, which are not well-founded in established case law, risk creating an impression that such mergers are more problematic than they really are and thereby causing a chilling effect.

We recognise that producing clear guidance in this area is very challenging and consequently in many places the draft guidelines are quite speculative and imprecise. We give some examples together with other comments below.

Taking the above points into account we have to seriously question the practical usefulness of the guidelines in their present form and would propose that they are not finalised or issued at least pending further developments in the case law.

Particular examples of where clearer guidance is needed:

- Under paragraph 10 it appears that the Commission can intervene when such mergers significantly increase the market power of firms. The test however for blocking a merger refers to a dominant position by which effective competition would be significantly impeded, which we suggest represents a higher hurdle for intervention.
- It will be important for any guidelines to set out that any intervention must be based on the Commission carrying out a thorough analysis with supporting evidence of the likely competitive harm balanced by the efficiencies to be gained.
- The effect of any safe harbour in paragraph 25 is vitiated by the list of special circumstances where the Commission may still intervene. To compete effectively and grow their business, companies constantly drive to innovate but because of a recent innovation the merger may then be subject to a Commission investigation.
- An established company seeking to grow in a new market area may acquire a small company, such as in biotechnology, but it is not clear under paragraph 25(c) whether this would be considered to be a firm with a high likelihood of disrupting coordinated conduct, justifying intervention by the Commission.
- Paragraph 32 appears to give the Commission scope to consider almost any business practice as potential input foreclosure. It is said that it may occur in various and more subtle forms and consequently may be found by the Commission in a series of alternative or complementary possible strategies.

CBI