

**JOINT WORKING PARTY OF THE BARS AND
LAW SOCIETIES OF THE UNITED KINGDOM ("JWP")¹**

NON-HORIZONTAL MERGER GUIDELINES

COMMENTS ON THE COMMISSION'S DRAFT NOTICE

May 2007

1. INTRODUCTION

- 1.1 On 13 February 2007 the Commission published for consultation its draft guidelines on the assessment of non-horizontal mergers under the EC Merger Regulation² ("Draft Guidelines"). The Draft Guidelines are intended to complement the guidelines issued by the Commission in February 2004 on the assessment of horizontal mergers under the EC Merger Regulation ("ECMR")³.
- 1.2 This paper sets out the comments of the JWP on the Draft Guidelines.

2. KEY POINTS

- 2.1 The JWP welcomes the Draft Guidelines as a useful analytical framework for the assessment of non-horizontal mergers. In particular the JWP welcomes the fact that the Draft Guidelines are soundly based on economic effects and that they provide clarity on a number of issues about which the Commission's past decisional practice has created some uncertainty.
- 2.2 Whilst welcoming the Draft Guidelines, the JWP considers that there is scope for the Guidelines to provide greater clarity on some issues.

Overview

- 2.3 The Overview contains a number of important and useful statements of principle. However, the JWP considers that the Overview would benefit from some refinement, especially in terms of emphasis. In particular:
- (a) the statement in paragraph 11 that "*non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers*" is thought to be unduly cautious. The JWP considers that it could usefully be strengthened to state that "*non-horizontal mergers are generally MUCH less likely ...*" (suggested insertion in capitals).
 - (b) paragraph 23 of the Draft Guidelines contains a statement that "*non-horizontal mergers pose no threat to effective competition unless the merged entity has market power in at least one of the markets concerned*". The JWP considers that the importance of this statement is such that it might usefully be included in the Overview.
 - (c) the JWP would favour a clearer statement about the potential for non-horizontal mergers to deliver efficiency benefits. In this regard the JWP would refer the

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² Council Regulation (EC) No 139/2004.

³ OJ 2004 C31, 05.02.2004, page 5.

Commission to the statement in the ICN Merger Guidelines Workbook (Worksheet H) that "*non-horizontal mergers have significant scope to create efficiencies*".

- (d) the Commission's decision in GE/Honeywell raised concerns about the possible existence of a so-called "*efficiency offence*" under the ECMR. Subsequent statements by Commission officials and the approach adopted in the Draft Guidelines suggest that the Commission does not recognise such a theory of competitive harm. However, the JWP considers that this might be made clear in the Draft Guidelines.

Safe harbours

2.4 The JWP welcomes the use of '*safe harbours*'. The Draft Guidelines propose a market share threshold of 30% and a post-merger HHI index of 2000. The JWP is concerned that the 30% threshold appears to be unduly cautious. The JWP recognizes that the 30% figure is to be found in the Commission's vertical agreements block exemption (VABE) and acknowledges that there is an argument for a degree of consistency between the two. However, vertical mergers are likely to deliver greater efficiencies than vertical contractual arrangements given the greater scope in such mergers for integration of production/distribution facilities. Moreover, the 30% threshold in the VABE is a legally binding threshold, whereas the 30% threshold in the Draft Guidelines is merely the level below which the Commission "*is unlikely to find concern*" in non-horizontal mergers. The JWP also notes that the 30% threshold would apply equally to conglomerate mergers for which the VABE does not provide a relevant benchmark; and that the 30% threshold in the Draft Guidelines is only slightly more than the 25% threshold in recital 32 to the ECMR which covers horizontal mergers as well as non-horizontal ones. The JWP therefore favours some increase in the market share threshold. Alternatively, the JWP suggests that the Guidelines should include *express* statements making it clear:

- (a) that only in exceptional circumstances would a non-horizontal merger below the 30% threshold give rise to concern;
- (b) that a non-horizontal merger would not be treated as conferring market power solely by reason of the fact that it exceeds the 30% threshold; and
- (c) that the degree of market power required before a non-horizontal merger is likely to be of concern will generally be well in excess of 30%.

3. OTHER COMMENTS

3.1 In addition to the Key Points identified above, the JWP comments on a number of other points below:

- (a) paragraph 18 describes horizontal mergers that give rise to non-coordinated effects. In this regard, the inclusion in the last sentence of the words "*-- and possibly some of its competitors as well --*" tends to confuse the distinction between coordinated and non-coordinated effects. It is suggested that this wording is removed from the main text and is included by way of a footnote to paragraph 18, along with a reference to paragraph 37 which describes how such a non-coordinated effect may arise. In any event, a footnote reference to paragraph 37 would assist the reader.
- (b) in paragraph 25, it would be helpful to clarify the meaning/identity of "*the markets concerned*".

- (c) also in paragraph 25, it appears that sub-paragraph (a) is included as a factor because it may suggest that market share is not reliable, even as an initial indicator of market power. By contrast, paragraphs (b) to (d) appear to address the possibility that a merger may give rise to coordinated effects. It may be worth making these distinctions in the text.
- (d) it is thought that the last sentence of paragraph 26 would be clearer if it were to read: *"Indeed, the existence of market power in at least one of the markets concerned is a necessary condition for establishing the possibility of competitive harm, but the existence of market power is not of itself sufficient to establish such harm"*.
- (e) there is a similar point in paragraph 28 to the one made above in relation to paragraph 18.
- (f) it is assumed that when assessing potential input and customer foreclosure the Commission will consider both short and longer term effects. If so, it may be helpful to include some reference to this.
- (g) in relation to conglomerate mergers, paragraph 90 states that *"In practice, the focus is on mergers between companies that are active in closely related markets"*. The point might also be made that conglomerate mergers between companies that are not active in closely related markets will rarely if ever give rise to competition concerns.
- (h) in relation to conglomerate mergers, paragraph 91 fails to include a reference to efficiencies of the kind included in paragraph 27 in relation to vertical mergers. It is believed that paragraph 91 should include such a reference.
- (i) in relation to the ability of a merged (conglomerate) entity to foreclose a market to its competitors (paragraph 94 *et seq*), the Draft Guidelines suggest that the most likely way for the merged entity to do this would be by engaging in *'bundling'* or *'tying'* practices. Reference to such practices would seem to support the point made in paragraph 2.4(c) that the degree of market power required before a non-horizontal conglomerate merger is likely to be of concern will generally be well in excess of 30%.
- (j) paragraph 98 should be amended to make it clear (as the Draft Guidelines make clear elsewhere) that, unless the new entity has market power it will not have the ability to foreclose.
- (k) paragraphs 117 to 119 seek to provide guidance on conglomerate mergers that give rise to coordinated effects. The JWP is not aware of a Commission decision which has found any such effects. This fact suggests that only in the most exceptional of circumstances is a conglomerate merger likely to give rise to such concerns. It would be useful to make these points in the Draft Guidelines by way of context.

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