

The Competition Authority
Draft Merger Guidelines for Consultation (September 2013)

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October 2013

Overview: The following mainly minor comments should/could be considered against the backdrop of the author's previous submission in this consultative process.

1. Elements of Merger Review

1.2 and 1.12: The early reference to the "the relevant counterfactual" is of course very helpful but it is possible that the reference should be to "the relevant counterfactual(s)" as on occasions this may provide useful room for manoeuvre.

For example, there may be two credible/plausible candidates for "the situation in the absence of the merger being put into effect."

1.2(d): Barriers to exit do not appear to be mentioned in the document at all?

1.7: Perhaps replace "all possible theories of harm" with "all possible credible theories of consumer harm"?

1.9: Perhaps refer explicitly to concept of "quality-adjusted price"?

1.10: It might be useful to highlight explicitly that ultimately it is the final consumer that is the focus of attention. Credible theories of harm should (albeit perhaps on only in the medium - or long-run) involve harm to final consumers.

1.14: The failing firm "bar" is very high (perhaps appropriately so). As such, some reference to ailing firm might be helpful?

2. Market Definition

2.4: Perhaps replace "alternative markets" with "alternative plausible/credible markets"?

2.8: Perhaps replace "the behaviour of suppliers" with "the behaviour of (existing and/or potential) suppliers"?

2.12: It could be noted that this provides a very nice example of where the exiting situation does not provide a good candidate for the situation in the absence of the merger being put into effect.

2.13: Perhaps edit the last sentence to ... may be used to contribute towards the defining of relevant product markets?

3. Market Concentration

3.5: Perhaps edit to ... of a firm's possible market power."?

3.8: Could mention most recent five years' market share data?

3.10: Perhaps drop "perfect"?

3.13: Perhaps replace "potential entrant" with "potential (significant) entrant"?

3.13: Perhaps drop the last bullet point as the HHI would be well over 2500 in any case?

3.15: Perhaps drop this paragraph/sub-section?

4. Horizontal Mergers

Perhaps retitle as "Horizontal Mergers and Competitive Effects"?

4.1: Perhaps drop the sentence within the parentheses?

4.2: Drop the first sentence – it is unnecessary. Perhaps include "Mergers can benefit competition and consumers."?

4.7: Perhaps drop "of"?

4.9: Drop "to" from first sentence. Drop second sentence as it is not true in any meaningful sense.

4.12: Footnote 7 – I think this is a reference to multilateral effects? If so, perhaps mention explicitly?

4.20: Perhaps edit to "may well exercise" in the first sentence.

4.23: Edit to "products" in the first sentence.

Monopsony 4.27 to 4.29: It might be useful to note that the Authority is ultimately interested in harm to competition/downstream customers/final consumers explicitly somewhere in these paragraphs? (Otherwise the impression may be left that harm to selling firms/producers is in and of itself harm to competition.)

4.47 (a) and (b): Replace "." with ".".

5. Barriers to Entry and Expansion

5.3: Perhaps replace “give incumbents advantages” with “give incumbents significant advantages”?

5.5: The exclusion of the reference to two years seems good to me.

5.6: Replace “at current pre-merger market prices” with “at above current pre-merger market prices” or with at least “at or above current pre-merger market prices”?

In particular, if the investment was/were profitable at current pre-merger market prices it would have already occurred!?

5.18 (d): Replace “at competitive prices” with “at above competitive prices”. See 5.6 above.

5.18 (k): Ironically, this may well encourage entry. In practice, my guess is that many small firms enter with the hope of being acquired.

6. Efficiencies

6.1: Perhaps replace “mitigate adverse” with “mitigate against possible adverse”.

6.6: Perhaps edit to “are not likely to outweigh an initial finding of an SLC.”

6.7: Perhaps edit to “compensate for potential adverse competitive effects.”

6.9: Perhaps edit to “counterbalance potential adverse ... ”

6.12: Perhaps edit first sentence of footnote 20.

6.14: Are of sufficient what? In addition, not all the benefits are expected to be passed on!

7. Countervailing Buyer Power

7.1: Edit “Where all consumers” to exclude “all”.

7.5: Perhaps replace “a worsening” to “a significant worsening”?

7.10 (c): Perhaps remove “(or otherwise harm competition)”?

7.11: It would be useful to note that evidence from “third-parties” can also be suspect.

9. Failing Firms and Exiting Assets

Comment: It might be useful to note the possibility that when most (vast majority of?) assets would likely exit the relevant market, the Authority might consider the likelihood that an “ailing” firm would inform the appropriate choice of counterfactual(s).