

**Response to the  
Competition Commission**

*Merger Remedies: Competition Commission Guidelines  
Consultation Draft – May 2008*

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## 1. INTRODUCTION

- 1.1 We welcome this opportunity to comment on the Competition Commission's (the **CC's**) May 2008 consultation draft document *Merger Remedies: Competition Commission Guidelines* (the **Draft Guidance**). These comments follow the useful seminar launching the Draft Guidance that the CC held on 27 May 2008 (the **Seminar**).
- 1.2 In general we consider the Draft Guidance to be clear, reasonable and a welcome consolidation of the CC's existing guidance on merger remedies, the CC's practical experience of merger inquiries since the implementation of the Enterprise Act 2002 merger regime, judgments of the Competition Appeal Tribunal and research into the outcomes of remedies.
- 1.3 Our specific comments and suggestions on the Draft Guidance are set out in more detail in the sections that follow.

## 2. INTRODUCTION AND CONTEXT

### ▪ *Effectiveness*

- 2.1 This section of the Draft Guidance states that the CC will first assess the effectiveness of remedies in addressing the SLC and resulting adverse effects before going on to consider the costs likely to be incurred by the remedies and proportionality issues (paragraph 1.8). During the Seminar Ms Ross recognised that there are grades of effectiveness and that the CC will assess at the second stage of the process all remedies that would be effective at some level. We consider that it would be helpful to include this clarification in the Draft Guidance. In addition, we consider that in practice the CC is likely to carry out an assessment that is not as clear cut as a two-stage test; the effectiveness of a remedy will be reconsidered once the relevant costs have been assessed. We would encourage the CC to reflect this in the Draft Guidance.
- 2.2 We note that the Draft Guidance does not contain any guidance in relation to acquisitions of minority shareholdings. It would be helpful for the CC to clarify in the Draft Guidance whether it takes a different approach to remedies in the case of acquisitions of minority shareholdings and, if so, on what basis.
- 2.3 In paragraph 1.10 of the Draft Guidance it is stated that for completed mergers the CC will not normally take account of costs or losses that will be incurred by the parties as a result of a divestiture remedy. We suggest that this is wrong in principle, since the sanctioning of parties to mergers subject to review under the Enterprise Act 2002 should form no part of the CC's approach to remedies. The same principles of proportionality should apply to divestiture remedies, whether imposed in respect of anticipated or completed mergers. Furthermore, we do not believe that the statement reflects the CC's practice. As stated in paragraph 3.7, the CC normally seeks to identify the smallest viable package, a principle which, we believe, is applied equally to anticipated and completed mergers. As between two or more equally effective divestiture remedies, the cost to the merger parties is a factor to be taken into account in all cases.

## 3. CHOICE OF REMEDIES

### ▪ *Types of remedies*

- 3.1 We note that both the Court of First Instance (in *Gencor Ltd v Commission*, T-102/96 paragraph 319), and the ECJ (in *Commission v Tetra Laval BV*, C-12/03P paragraph 86 referring to *Gencor*) confirmed that the categorisation of a remedy as behavioural as opposed to structural is immaterial.

We therefore consider that the Draft Guidance should draw fewer distinctions between structural and behavioural remedies and instead focus on the issues attached to the various types of remedies.

- 3.2 This section of the Draft Guidance states that where a party to a merger has built up a minority shareholding in the target, a decision to prohibit the merger may also require that party to reduce its shareholding to below a specified maximum level at which the CC judges that the SLC will be remedied (paragraph 2.4). We consider that jurisdiction to impose such a remedy can only arise in a case where the minority shareholding is found to have created a completed merger (at the material influence or *de facto control* level). If it has not done so, then the CC should go no further than to require the abandonment of the proposed merger. We note that the CC's current *Merger References Guidelines* (CC2) state at paragraph 4.24 in relation to anticipated mergers "this will usually need to be reduced to a specified maximum level below which the CC judges there could be *no possibility of material influence*" (emphasis added). We believe that this paragraph of the current Guidelines applies the wrong test, in addition to incorrectly extending it to cases where there is no completed merger..
- 3.3 The CC's revised approach should clarify that if a remedy has the effect of eliminating material influence this eliminates *ab initio* any risk of SLC and such remedy is therefore effective by definition. This should be reflected in the Draft Guidance. However, as under the relevant statutory provisions the CC is required to achieve a reasonable and practical solution to the SLC, the CC is under a duty to consider solutions which, even without the removal of the merger situation, nevertheless remove the SLC.
- 3.4 Prohibition (paragraphs 2.3 and 2.4) and divestiture (paragraphs 2.5 and 2.6) could be dealt with under a common heading (following the approach in the bottom row of Figure 1) as the two issues may be linked (particularly in the case of an acquisition of a minority shareholding).

#### **4. DIVESTITURE AND INTELLECTUAL PROPERTY REMEDIES**

- *Scope of divestiture packages*

- 4.1 The Draft Guidance explains that the CC will look to identify as a starting point a divestiture package from the acquired business rather than the acquiring business (paragraph 3.6). We would suggest that there should be no presumption that an effective remedy is more likely to be found by divesting assets of the acquiring business. In many situations, notably in the case of agreed transactions, the distinction between the acquiring and acquired businesses is arbitrary. Divestment is not necessarily achieved more readily or more effectively, on any systematic basis, from acquired assets, rather than from those of the acquirer.
- 4.2 The Draft Guidance recognises in paragraph 3.10 that the capabilities and resources of prospective buyers are likely to be more critical to the success of a divestiture of a package of assets than the success of a divestiture of an existing stand-alone business. However, the Draft Guidance does not make any allowance for alterations to the scope of a package of assets in accordance with the existing capabilities and requirements of potential purchasers (for example, in the case where a potential purchaser already has the necessary production or research and development facilities needed to run the business to be divested). We would invite the CC to consider this point further and make provision for it in the Draft Guidance.
- *Preference for avoiding 'mix-and-match' divestitures*
- 4.3 This principle (stated in paragraph 3.12) should not apply in cases where there is no necessity for the divested assets to be in common ownership. For example, it should not apply to sets of divestments of local outlets to cure local overlaps, or of unrelated product lines to cure separate product overlaps,

where the divested assets may be sold to several different buyers and may equally come from the portfolio of the acquirer or acquired business.

- *Suitable purchasers*

4.4 The Draft Guidance contains examples of purchaser connections to the merger parties that may compromise the purchaser's independence and incentives to compete (paragraph 3.15). Equity interests are specifically mentioned in paragraph 3.15(a). We would welcome further clarification on the level of equity interest that the CC would consider likely to amount to a significant connection for these purposes.

4.5 Paragraph 3.17 of the Draft Guidance states that the CC will generally wish to evaluate all prospective buyers against the criteria before any one is granted exclusivity to carry out detailed due diligence. We suggest that the CC also expressly states that it will not use this process to select, of all the purchasers which satisfy its criteria, the one who it considers to be the most suitable.

- *Use of monitoring trustees*

4.6 We suggest that the appointment of a monitoring trustee is often unnecessary, particularly in the case of divestment of marketable securities or readily saleable stand-alone businesses (especially where divesture can be effected by share sale), where the required divestment can be achieved quickly and unambiguously (see paragraph 3.23 of the Draft Guidance).

- *Intellectual property remedies*

4.7 We welcome the new section in the Draft Guidance providing some clarity on the CC's approach to intellectual property remedies (paragraphs 3.28 to 3.33). Some specific guidance here on global intellectual property rights would also be useful, in particular where assets are located outside the UK.

## 5. BEHAVIOURAL REMEDIES

5.1 We would suggest that the ability to predict the duration of an SLC does not arise so rarely as is suggested in paragraph 4.7, not only in cases like Stena AB/P&O where new infrastructure will alter the competitive landscape but also in sectors characterised by rapid technological evolution and frequent innovation, where experience shows that leading market positions do not endure. A long-stop date for behavioural remedies of 15 years seems excessively long in today's world. We note that the CC may specify a limited duration if measures are designed to have a transitional effect but that, where measures need to apply as long as an SLC persists, the parties will need to apply for variation/cancellation on the basis of a significant change of circumstances or, in the absence of an OFT review, wait for the long-stop period to expire. In our view, the remedy would generally be unnecessary or ineffective after ten years at most in almost all cases.

## 6. INTERIM MEASURES

6.1 The Draft Guidance sets out the circumstances where the CC may seek interim measures for anticipated mergers in similar terms to the CC's existing Guidance on the use of interim measures pending final determination of merger references (Appendix A). However, during questioning in the Seminar, the CC has gone further than the Draft Guidance and suggested that it would consider making an order that prevented the parties from proceeding with the acquisition even if this required them to breach their contractual obligations to complete. We have concerns with this. Quite apart from the fact that the CC could gain comfort in the acceptance of hold-separate undertakings, we consider that any such order would subvert the UK's voluntary notification regime which is inappropriate in the absence of statutory reform.

**Allen & Overy LLP**