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**Response to the Consultation on the  
Competition Commission's  
Draft Guidelines on Merger Remedies**

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## **Comments on the Competition Commission's Draft Guidelines on Merger Remedies**

### ***Introductory remarks***

1. We welcome the publication of the Competition Commission's proposed guidelines on merger remedies (the "Guidelines"). The Guidelines increase transparency and predictability in an important field of merger control by allowing merging parties to assess the likely nature and scope of remedies with greater certainty than was previously the case. The Guidelines also enhance transparency of certain procedural aspects of merger investigations such as interim measures and the role of trustees.
2. The leading concepts in the field of merger remedies, such as the categorisation of remedies into structural and behavioural, are well established. While we appreciate the Competition Commission's initiative to expand on these concepts, it is important not to lose sight of these key principles.
3. We support the Competition Commission's flexible approach to behavioural remedies. Although structural remedies can be suitable where the behavioural remedies would be long-lasting and would require intense monitoring by the Competition Commission, in many situations the anti-competitive effects of a merger can be resolved by time limited behavioural remedies, particularly in multi-national mergers where the alternative to a behavioural remedy might be to divest assets located outside the UK.
4. The Competition Commission might want to draw on the experience of other competition authorities, notably the EC Commission, and express the Competition Commission's opinion on remedies not included in the draft Guidelines – including "co-branding", which we discuss below.
5. Next, we comment on a few topics which the Competition Commission may want to give some further consideration before finalising the Guidelines.

### ***"The Universe of Merger Remedies"***

6. Since the time remedies were first used in merger investigations, remedies have been classified into two categories: structural and behavioural. Competition regulators and courts have for decades used this distinction to signal that a remedy package which severs structural links is likely to be approved without much debate while behavioural remedies typically require closer scrutiny.<sup>1</sup>
7. The Guidelines introduce a category of merger remedies called "Recommendations on regulations and conduct" as a new third pillar of the "Remedies Universe" (see Figure

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<sup>1</sup> See e.g. Court of First Instance, case T-102/96 *Gencor v Commission* [1999] ECR II-753, 25 March 1999.

1). The Guidelines describe this new concept in extreme brevity: only a single paragraph (2.12) explains this principle. It states:

*“In some situations, the legal regulations or conduct applicable to a market may inhibit entry or restrict market outcomes [...]. In such situations it may be necessary for the CC to recommend modifications of these requirements for the Government of other controlling body to help address an SIC or control the adverse effects of a merger”*

8. Several issues arise:

- The language is widely worded and does not limit the Competition Commission’s Recommendations to narrowly defined issues affecting only the merging parties. The Recommendations, as drafted, could cover wide ranging policy initiatives affecting an entire industry.
- As a general matter, merger investigations, in our view, are not the right forum to introduce policy changes or other amendments to regulations (with exception of narrowly defined situations discussed below). Policy changes require detailed consideration and merger investigations generally do not allow sufficient time to conduct such review. Such changes should be left to the relevant Government policy maker and should not be introduced through the vehicle of merger control.

9. Paragraph 2.12 goes on to state:

*“It will, of course, be for the Government or other person to whom the recommendation is addressed to decide whether to act on the recommendation”*

10. This leaves several questions unanswered:

- If the Government rejects the Competition Commission’s Recommendation, would this in any way impact on the merger; for example, would the parties have to propose alternative remedies?
- Would the parties be free to implement the merger prior to Government approval of the Recommendation? If not, the merger may be delayed by months if not years pending Government approval.

11. In conclusion, we would welcome:

- (i) Explanation of the consequences of a Government rejection of a Recommendation and clarification that closing of a merger will not be delayed until Government approval of the relevant Recommendation has been achieved;
- (ii) Clarification that recommendations are an exception to the general remedy principles;
- (iii) Clarification that recommendations will not be used to introduce policy changes;

- (iv) Clarification that recommendations will be narrowly tailored to the specific circumstances of a case and will not impose any obligation or burden on other parties than the merging parties.

#### ***Acquired business v acquiring business***

- 12. In paragraph 3.6 of the Guidelines, it is proposed that divestiture of all or part of the acquired business should be the starting point in identifying a remedy package. It seems that this presumption unduly prevents the acquirer from upgrading to a stronger brand or more valuable assets. In such a case, the relevant test should be simply whether the purchaser of an acquirer's assets will operate as an independent and viable competitor to the merged entity; as a starting point, it should be entirely irrelevant whether the acquiring or acquired company's assets are being divested.
- 13. For example, if the acquirer has an asset with a 10% market share and the acquired business owns an asset with a 50% market share it is common practice to divest the asset with lower market share (and typically of lower value) and there should be no presumption that the larger asset should be divested simply because the acquired company owned it before the merger. As long as a third party can step in and exercise the same competitive pressure as the acquiring company did pre-merger, nothing should prevent divestiture of the acquiring company's asset. This principle is reflected in the opening sentence in paragraph 3.7 of the Guidelines.

#### ***Intellectual property remedies***

- 14. We note with interest the Competition Commission's comments on intellectual property remedies. This section covers a wide range of potential remedies; indeed, most remedies will have an element of intellectual property.
- 15. While we agree that the nature of the on-going link between licensor and licensee following the IP divestment is important in assessing whether the licensee will be a strong and independent competitor to the licensor, we are somewhat puzzled by the concluding remarks in the introduction to the section on intellectual property remedies:  
  
*"In view of the possible risks to effectiveness, as outlined above, that may result from using IP remedies, the CC will generally prefer to divest a business including IP rights, where this is feasible, rather than rely on IP remedies alone" (3.30)*
- 16. The distinction drawn here between divestment of "IP remedies alone" and a "business including IP rights", in our view, lacks clarity. It ought to be made clear, we suggest, that an IP remedy which allows the acquirer or licensee to compete effectively and independently of the seller or licensor should, as a presumption, be acceptable irrespective of whether the remedy is a "business".
- 17. There is nothing inherently positive in having parties divest more than what is required to allow effective competition post merger. The reference to a "business" may deter parties from tabling perfectly legitimate remedies, narrowly tailored to include certain intellectual property rights.

### ***Co-branding***

18. “Co-branding” remedies are commonly proposed in the field of FMCG<sup>2</sup> mergers. In essence, they allow a third party to introduce a new brand by marketing a product with both the merging parties’ brand and its own brand during a transitional time period. When the recognition of the new brand is sufficiently strong the merging parties’ brand can be removed from the relevant product. This is typically coupled with a non-compete provision which prevents the merging parties from re-launching the brand in the relevant geographic area within a certain time period.
19. Co-branding is often an efficient way of avoiding dilution of a pan-European or global brand while at the same time ensuring that competition is maintained in the market where the merger gave rise to competition concerns.
20. The Guidelines do not express an opinion as to the appropriateness of co-branding remedies. The EC Commission has extensive experience from this remedy and several cases have been published where the remedy has been allowed.<sup>3</sup> It would be helpful if the Competition Commission could opine on the acceptability of this remedy in its Guidelines.

### ***Hold-separate managers***

21. The appointment of hold-separate managers, in our opinion, should be kept to a minimum; it should be reserved to those situations where the merging parties clearly lack in-house capability, or willingness, to ensure that the merging companies are kept separate during the course of the investigation.
22. The introduction of hold-separate managers adds a layer of complexity to the reporting lines of the merging parties. The in-house legal team handling the Competition Commission’s investigation will often be fully occupied gathering information requested by the Commission and managing other related tasks such as site visits. To provide thorough answers within the tight deadlines imposed by the Commission it is essential that that team operates in an efficient fashion. By adding a hold-separate manager, a spanner is thrown in its works and the team becomes less efficient at this crucial time.
23. We suggest that companies with an existing in-house legal team which shows a genuine willingness to cooperate with the Competition Commission, as a presumption, should be relieved of the burden of having a hold-separate manager imposed on them. A senior member of the in-house legal team would typically be much better suited to act as hold-separate manager. Clarification to that effect would be welcome.

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<sup>2</sup> Fast Moving Consumer Goods.

<sup>3</sup> See e.g. EC Commission, case COMP/M.90 *Unilever/Bestfoods*, 28 September 2000.

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