



**IBA Antitrust Working Group submission to the Competition Commission
consultation on draft merger remedies guidelines**

1. INTRODUCTION TO SUBMISSION

- 1.1 The Working Group of the Antitrust Committee of the International Bar Association (the "Working Group" of the "IBA") sets out its submission on the Draft Guidelines on Merger Remedies published by the Competition Commission (the "CC").
- 1.2 The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide analysis in this area. Further information on the IBA is available at <http://www.ibanet.org>.
- 1.3 The draft guidelines would supersede the CC's existing guidelines on divestiture remedies¹, existing guidance on interim measures and guidelines on remedial measures in the CC's general merger guidance², clarifying and extending this existing guidance to take account of the CC's experience of implementing remedies in recent years under the Enterprise Act 2002. The draft guidelines also cover areas such as intellectual property ("IP") remedies and behavioural remedies which are not covered in detail in existing guidance.
- 1.4 The IBA appreciates the opportunity to provide comments on the draft guidelines, as the provision of clear and predictable guidance for business (and their legal advisers) is an objective that the IBA wholeheartedly endorses.³

¹ Application of divestiture remedies in merger inquiries: Competition Commission Guidelines, December 2004 (CC8)

² Merger references: Competition Commission Guidelines, June 2003 (CC2)

³ Whilst outside the scope of the draft guidelines, the Working Group would also note the desirability of similar guidance to deal specifically with the remedies applicable in the context of market investigation references, in

1.5 The Working Group has commented on a number of aspects of the draft guidelines, but wishes to highlight the following key issues:

- *Specificity* - we believe that the draft guidelines would benefit from greater specificity. Whilst the document may have been prepared with a view to giving the CC maximum flexibility, a greater level of detail in many areas would benefit businesses (and their advisers) in applying the guidance to their particular transactions and circumstances.
- *Effectiveness and proportionality* - the draft guidelines propose a two-stage process for assessing the effectiveness of potential remedies before considering the costs that are likely to be incurred by these remedies. We believe that a rigid application of this two-stage process would be at odds with the integrated test set out in the Enterprise Act, which is to identify as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it. We would therefore recommend that the CC adopt a more flexible approach in this regard.
- *Interim measures* - we welcome the statement in the draft guidelines that the CC will adopt a case-by-case approach to interim measures. We also believe that a "one size fits all" approach is not appropriate. For example, in many transactions involving sophisticated businesses (e.g. businesses with their own internal compliance officers and a compliance/regulatory culture) the risk of pre-emptive action being taken is remote. We would therefore suggest that the CC does not adopt a presumptive approach to interim measures, and should also consider the nature of the businesses concerned and the feasibility of adopting a low-key approach.

1.6 The comments of the Working Group set out below follow the order of the draft guidelines, with headings in the remainder of this document reflecting the section headings of the draft guidelines.

2. **PART 1 - INTRODUCTION AND CONTEXT**

2.1 We agree with the CC that protective measures are required in order to limit the risk of merger parties taking steps to frustrate the CC's ability to achieve an effective solution in the event that it identifies a SLC. In particular, we support the use of interim undertakings in inquiries into completed mergers as a means of ensuring that the acquired business is preserved as going concern during course of the CC's investigation. However, the safeguards imposed by the CC should not exceed what is necessary for this purpose. The "voluntary" notification regime under the Enterprise Act generates significant benefits for industry, by enabling purchasers to compete effectively in auctions and to complete non-contentious transactions without obtaining

order to update and extend the existing guidance contained in the general market investigations guidance (Market Investigation References: Competition Commission Guidelines June 2003, CC3).

prior clearance from the competition authorities. This, in turn, generates significant benefits for consumers (see also comments in section 7 below, in relation to interim measures).

Effectiveness and proportionality

- 2.2 Paragraph 1.8 of the draft guidelines proposes a two stage process: the CC will assess the effectiveness of potential remedies before considering the costs that are likely to be incurred by these remedies. In our view, the statutory test in the Enterprise Act 2002, which requires the CC to identify as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it, is more elided than the two stage analysis proposed in the draft guidelines. The issues of effectiveness and proportionality cannot be considered in isolation from each other. There may, for example, be circumstances in which the CC has a choice between a relatively high cost, relatively intrusive, very effective remedy, on the one hand, and a relatively low cost, less intrusive, less effective remedy, on the other. In these circumstances, a strict application of the proposed two stage process (assuming both remedies satisfy a minimum standard of effectiveness) could fetter the CC's ability to exercise its statutory duty. We therefore recommend that the guidelines acknowledge that, in order to identify as comprehensive a solution as is reasonable and practicable to the SLC, it may be necessary for the CC to reconsider the issue of effectiveness following the analysis of proportionality.

Proportionality

- 2.3 In paragraph 1.9, we would welcome a statement that there are two different aspects to the analysis of proportionality. First, it involves identifying the least cost, least intrusive remedy, or package of remedies, which satisfy a minimum standard of effectiveness. Second, it involves analysing whether the least cost, least intrusive remedy package is proportionate to the *scale* of the SLC which the CC has provisionally identified. The guidelines refer to the first aspect but do not deal explicitly with the second, despite the recognition in paragraph 1.12 that "*in exceptional circumstances, even the least costly but effective remedy might be expected to incur costs that are disproportionate to the scale of the SLC and its adverse effects...*". It may be helpful to refer to the South East Water and Mid Kent Water merger in this context. Although this was a mandatory Water Industry Act reference, it provides a useful example of a case where the CC considered that prohibition would not have been a proportionate remedy, having regard to the scale of the effect on competition (i.e. limited prejudice) and the relevant customer benefits which the CC was confident would be passed on to consumers given the nature of regulation in the industry.
- 2.4 In paragraph 1.10, it would be helpful for the CC to expand upon the "*exceptional circumstances*" in which the cost of divestiture might be considered by the CC in selecting remedies in completed merger cases. We are not aware of any such cases and it would be helpful to provide more detailed guidance on this issue. It would also be

helpful for the CC to provide more detailed insight into the “unusual situations” referred to in paragraph 1.13 where the most effective remedies are selected even where they are only partially effective in remedying the SLC. In this context, it would be helpful to confirm that the purpose of a proportionate remedy is to restore competition to the pre-merger situation, but not to go any further than is necessary in so doing.

Relevant customer benefits (RCBs)

- 2.5 In paragraph 1.15, the draft guidelines state that the CC “*may*” take relevant customer benefits into account, as permitted by the Act, once it has decided on the existence of an SLC. It would be helpful if the CC would describe the circumstances (if ever) in which it would *not* consider the extent to which alternative remedies may preserve such benefits.
- 2.6 The Enterprise Act 2002 provides that a benefit is only a relevant customer benefit if it accrues from or is expected to accrue to relevant customers within the UK within a “*reasonable*” time. It would be helpful for paragraph 1.16 to elaborate on the length of time that is likely to be considered “*reasonable*” in this context.
- 2.7 We consider that, contrary to the position staked out in paragraph 1.18, the CC should take economic efficiency into account, regardless as to whether the benefits of increased efficiency can be clearly and immediately traced to an identifiable set of customers. If the merger improves efficiency, that could free up the merged firm to redeploy those assets for more productive use elsewhere. This ultimately generates benefits for consumers and for the economy generally.
- 2.8 Paragraphs 1.16 to 1.20 also reflect, in accordance with the relevant provisions of the Enterprise Act 2002, that a relevant customer benefit must be unlikely to accrue “*without the creation of that [merger] situation or a similar lessening of competition.*” We consider that, in applying this test, the CC should adopt the same counterfactual as it has taken into account in relation to its SLC findings. For example, if the counterfactual adopted by the CC in reaching its SLC findings did not contemplate a joint venture scenario between the merging parties, then the CC should *not* discount customer benefits on the basis that they might accrue through a joint venture.

Remedies process

- 2.9 Paragraph 1.22 of the guidelines states that the CC will start to gather information on possible remedies after the basis of a possible SLC has been identified, but any research of possible remedies will be hypothetical until the CC has provisionally identified an SLC. We would encourage the CC to adopt a more flexible approach in this regard and to state in the guidelines that it would be prepared to engage in a hypothetical discussion of potential remedies in cases where the merger parties are prepared to concede that the merger gives rise to a SLC before the provisional findings have been issued. In our view, this would not only expedite the CC's review process but would also lead to a more effective dialogue between the merger parties and the CC

on the issue of remedies. The CC could consider the introduction of a proforma template to enable merging parties to submit draft remedies proposals on a voluntary basis and without prejudice to the CC's provisional findings. Such a template could, for example, be modelled on the European Commission's Form RM.

3. PART 2 - CHOICE OF REMEDIES

Selection of remedies

- 3.1 While paragraph 2.16 provides an outline of the three conditions that will normally apply where the CC selects behavioural remedies as the primary remedial action, it would be helpful if the CC would devote the following paragraphs to more fully and clearly explaining the circumstances when each of the three conditions may apply. For example, one of the conditions listed is where "*divestiture and/or prohibition is not feasible...*". It would be helpful if the following paragraphs could give some description or examples of circumstances where the CC might take this view. The text does not give any example of this, although we note that paragraph 2.19 goes onto state that uncertainty over a suitable purchaser will *not* be sufficient for the CC to reach this conclusion.
- 3.2 We would also suggest the inclusion of a comment (perhaps in paragraph 2.21) to the effect that, where the SLC is expected to have a rather short duration (e.g. less than one to two years) then no remedy of any kind may be necessary.
- 3.3 We believe that behavioural remedies may have a greater prospect of success in regulated industries, where the parties have a culture of compliance with behavioural controls and there is an industry regulator to oversee ongoing implementation of the remedies. It would be helpful if the draft guidelines noted this, perhaps by reference to relevant merger cases such as *South East Water/Mid Kent Water* and the ongoing *Macquarie/NGW* merger in which the CC is currently consulting on a package of behavioural remedies. However, where the CC is consulting with a sectoral regulator on remedies, there is a need to ensure that the process is not "hijacked" in an attempt to deal with pre-existing (i.e. non-merger related) market imperfections.
- 3.4 As a more general point on choice of remedies, we believe that research by the CC into past merger remedies⁴ is incredibly useful in informing merging parties (and their legal advisers) of approaches taken in the past, how these approaches have worked in practice, and the lessons that can be taken from past cases. We would welcome further work in this area.
- 3.5 We would also welcome further comparative research⁵ by the CC into remedies adopted by other competition authorities, including the European Commission and Federal Trade Commission, notwithstanding the differences between the merger

⁴ E.g. Competition Commission: *Understanding past merger remedies: report on case study research*, updated August 2008.

⁵ Such as that summarised at paragraphs 47 to 71, *Ibid.*

control regimes. We note that paragraphs 2.23 and 2.24 of the draft guidelines refer to the desire to ensure that the CC's approach to remedies is consistent with the approaches adopted by international competition authorities in the context of multi-jurisdictional mergers.

- 3.6 It would also be helpful if the CC acknowledged in the guidelines that it may have regard to the practice of other competition authorities in its consideration of mergers that are national in scope, but raise similar issues to those already faced by other authorities. For example, the CC should find it instructive to consider remedies put forward by the merging parties such as "mix and match" divestitures (e.g. of retail branches) or behavioural commitments accepted by other competition authorities and proven to be effective, notwithstanding any differences in the merger control regimes.

4. **PART 3 - DIVESTITURE AND IP REMEDIES**

Package definition

- 4.1 Paragraph 3.8 states that the merging parties will be prohibited from subsequently purchasing assets or shareholdings sold as part of a divestiture package or acquiring material influence over them for 15 years. Previously, no timeframe was specified by the CC. We would suggest that 15 years may not be an appropriate timeframe in all cases and the CC should be prepared to impose a different time period in appropriate cases.

Divestiture of an existing business or package of assets

- 4.2 In paragraph 3.10, the CC notes that assets may be far more difficult to define or carve out from an underlying business and the CC may have less assurance that the purchaser will be supplied with everything necessary to operate competitively. It would be useful for the CC to provide more concrete guidance on how it would assess the viability of a package of assets, whilst appreciating that this will need to be considered on a case-by-case basis.
- 4.3 We believe that the CC should state explicitly in the draft guidelines that it is prepared to exercise its order-making power where customers frustrate the assignment of a divestiture package. Such a statement would assist merging parties in defining an appropriate package as it obviates the need, for example, for the merging parties to conduct due diligence on customer contracts to establish whether consent is required for contract assignment and, if so, the likelihood of such consent being obtained (which may only be forthcoming after lengthy customer negotiations).
- 4.4 In paragraph 3.11, the CC notes that 'virtual divestitures' have higher risks and costs than conventional divestiture (for example, resulting from the ongoing monitoring that would be necessary). The CC would therefore require good reason to justify such a remedy and would need to be assured that the risks of the virtual divestiture could be "*appropriately contained*". The CC has, however, only referred to 'virtual power plant' remedies (referring to the *Nuon/Reliant Energy* case) and this paragraph could be perhaps expanded to cover other situations where such proposals may arise.

Mix and match divestitures

- 4.5 In paragraph 3.12, the CC states that it has a preference for avoiding divestiture of a package of assets that combined the assets of more than one of the parties (so-called "mix and match" remedies), unless it can be shown to the CC's satisfaction that there is no significant increase in risk from such a remedies package. We would suggest that paragraph 3.12 could be expanded to state that the CC may be more willing to accept a mix-and-match package where an up-front buyer is proposed, but it will still undertake a careful review of the buyer's intentions and ability to operate the assets so as to maintain competition in the market.

Suitable purchasers

- 4.6 In paragraph 3.15(d), the guidelines states that "...the CC's approval of a purchaser may be subject to clearance by the OFT or other regulatory authority". Since the CC will have engaged in a detailed review of the merger and relevant markets by that stage of its investigation, we believe it should be well-placed to determine the suitability of a potential purchaser without the need for the OFT to examine and clear the transaction independently.

Continuing links and purchaser protection

- 4.7 In paragraph 3.18, the CC explains that purchaser protection may be necessary to enable the purchaser to establish itself as an effective competitor in the relevant market, for example, non-solicitation clauses for a limited period (i.e. one year). This is a welcome approach. We see no reason why a non-solicitation of key staff should not also be accepted by the CC in appropriate circumstances.
- 4.8 The CC also refers in paragraph 3.18 to "other measures" for purchaser protection but does not stipulate what these might be and how far it is prepared to go to establish the competing purchaser; such guidance would be useful for any vendors to know in advance of divestiture proposals.

Up-front buyers

- 4.9 We welcome the guidance in paragraph 3.19 confirming the CC's approach with respect to the requirements for an up-front purchaser. We agree with the CC that this is the most appropriate means to address doubts regarding the viability or attractiveness to purchasers of the composition of the divestiture package or where there may be only a limited pool of suitable purchasers. Cases such as *Hamsard/Academy* and *Kemira/Terra* show that the use of an up-front buyer can be a practical means to address composition risk and/or purchaser risk. It would, however, be helpful for the CC to provide further guidance on the procedure which is likely to be adopted in such cases and the conditions which are likely to apply. Paragraph 3.19 states, for example, that "...such up-front purchasers would need to be contractually committed to the transaction, for example". It would be helpful to elaborate on the "limited conditions" to which up-front purchasers are likely to have to commit.

- 4.10 It would also be helpful if the CC explicitly stated that it will relax/accommodate due diligence by an up front buyer in the context of any interim undertakings. This should include access by the Board of the acquiring entity in order to enable them to decide what divestment package would be appropriate to address the SLC.

Intellectual Property Remedies

- 4.11 We welcome the inclusion of guidance on IP remedies. We agree with the CC that IP remedies have the characteristics of both structural and behavioural remedies. We note that paragraph 3.28 of the guidelines is entirely consistent with the views of the ICN Merger Working Group on this issue.
- 4.12 In paragraph 3.31, the CC notes that the specific factors which will influence the design of an IP remedy include (a) the form and jurisdiction of the relevant IPR; (b) the relative specialisation of the IPR; (c) the rate of innovation expected in the relevant market, and (d) the forms of payment for IPR. It would be useful if the CC could provide more guidance based on case-law as to these specific factors, for example, what it considers to be “*highly specialised IP*”.
- 4.13 In paragraph 3.33, the CC points out that international cooperation with other national competition authorities will often be necessary where a merger is dependent upon IPRs due to issues surrounding international filings and licensing of patent rights. It would be useful for some guidance as to how such “*international cooperation*” would operate (as for example, filing issues would be a matter for national patent offices and there has never been historically in Europe or in the US, coordination of remedies between competition authorities and patent offices) and the relevant procedure that should be borne in mind for the merger parties.

5. PART 4 - BEHAVIOURAL REMEDIES

Design, monitoring and enforcement

- 5.1 In paragraphs 4.5 and 4.6 of the draft guidelines the CC articulates factors relating to the effective enforcement of behavioural remedies which we do not believe to be appropriate for the CC to take into account. These are:
- (i) the “*constraints on the OFT's resources and the possible limitations ... on the reporting role of customers and competitors*”; and
 - (ii) the preference for the CC to use its own remedial powers over the ex post enforcement of competition law.
- 5.2 The group does not believe it is appropriate for the CC to seek to compensate for perceived shortcomings in the OFT's effectiveness by imposing more draconian remedies on the parties than would otherwise be the case. Further, the group does not believe the CC to be correct in ignoring the disciplining effect of ex post enforcement of competition law when considering remedies, given the ECJ's ruling in Tetra Laval, where this was taken into account.

Duration

- 5.3 Paragraph 4.7 notes the CC's general practice of not including a sunset clause in behavioural remedies. However, markets change over time, leaving many remedies obsolete within a number of years. After a certain number of years, stale behavioural remedies may bear a greater risk of distorting markets than the potential harm to consumers of not having the behavioural remedies in place. We do not believe the burden should be placed on the merged firm to go through the statutory process of demonstrating there has been a significant "*change of circumstances*" in order for behavioural remedies to elapse. We believe that the draft guidelines should instead reflect a general policy of including a sunset clause in behavioural remedies. Further, it would be helpful if the CC would describe in paragraph 4.7 the general circumstances where it thinks sunset clauses should not apply, and explain the reasons why.

Restraining horizontal market power

- 5.4 In paragraphs 4.23 to 4.27, the CC states that it may consider prohibiting certain (above-cost) pricing practices, such as volume discounts, selective discounts or price discrimination. We would query why the CC would wish to prohibit companies from competing on the basis of price, as price competition ultimately benefits consumers. Conversely, a remedy that restricts price discounting clearly harms consumers, since some customers will be forced to buy at higher prices whilst others will choose not to buy at higher prices, resulting in a loss of output. The benefits of restricting price competition (where the pricing is above cost and not predatory) are speculative at best. If rival firms are not in a position to compete, perhaps a divestiture remedy is more appropriate than a prohibition on price competition to the detriment of customers.
- 5.5 In paragraph 4.26 the CC mentions pricing policies targeted at customers likely to switch suppliers. However, if there are significant numbers of customers likely to switch suppliers, this is suggestive of a market where there is competition, in which case the premise for imposing a remedy in the first place may be open to question.
- 5.6 Overall, we believe that efforts to prevent a merged firm from lowering prices should not form part of competition enforcement. In cases where it appears the merger will lead to more aggressive competition and lower prices, this may be a pro-competitive situation where the efficiencies from the merger outweigh any harm to customers from increased prices.

Controlling outcomes

- 5.7 While paragraph 4.28 outlines several types of remedies that can be used to control outcomes, the draft guidelines only go onto consider price caps in greater detail (at paragraphs 4.32 to 4.35). It would be helpful if the CC included more detail on the other potential remedies that fall within this category such as supply commitments, service level undertakings.

Synergy pass-back

- 5.8 We note that the draft guidelines do not make any mention of behavioural remedies which require the merging parties to pass-back a share of merger-related synergies to customers (either as the basis for a price cap mechanism, or as a standalone remedy). We are aware of two recent cases in which this has arisen (*South East Water/Mid Kent Water and Macquarie/NGW*). It would therefore be helpful if the draft guidelines included a separate section detailing the circumstances in which CC would expect merger synergies to be passed back as part of a behavioural remedy and, if so, the level of pass-back which the CC would view as appropriate (as a proportion of total synergies realised).

6. PART 5 - USE OF TRUSTEES AND THIRD PARTY MONITORS

- 6.1 We welcome the clarification in paragraphs 3.22 to 3.26 and Part 5 of the guidelines of the circumstances in which the CC would seek to appoint trustees or third-party monitors to assist in monitoring and implementation of Undertakings or Orders. We support the use of industry experts as third-party monitors, given the greater insight they can bring with respect to normal business practices in the particular industry or sector.

Use of divestiture trustees

- 6.2 Paragraph 3.26 of the guidelines states that, where the CC has reason to expect that the merging parties will not procure divestiture to a suitable purchaser within the initial divestiture period, it may require that a divestiture trustee is appointed before the end of the initial divestiture period, or in unusual cases, at the outset of the divestiture process. The CC does not elaborate what such “*unusual cases*” might be and further guidance on this issue would be useful.

7. APPENDIX A - INTERIM MEASURES

Introduction: interim powers and restrictions

- 7.1 As stated above, we believe that the “voluntary” notification regime under the Enterprise Act generates significant benefits for industry as it enables buyers and sellers to effectively allocate “competition risk” between them. This enables purchasers to compete effectively in auctions, particularly benefiting industry buyers who are more likely to be faced with potential competition issues and as a result might otherwise be unable to compete with financial buyers (whose bids are less likely to present the seller with potential competition issues). In turn this benefits consumers, as acquisitions by trade buyers will enable synergies to be achieved.

Purpose of standard interim Undertakings template

- 7.2 We welcome the use of similar standard templates by both the CC and the OFT, which reduces duplication of effort in negotiating interim measures at the outset of an enquiry and thereafter following a reference to the CC.

- 7.3 Where a "fast track" reference from the OFT is anticipated, a mechanism for negotiating interim undertakings with a joint OFT/CC team would be expedient and result in time and cost savings for all concerned. We would encourage the CC and the OFT to engage in order to develop such a mechanism.
- 7.4 Paragraph 10 of Appendix 8 states that the CC's template interim undertakings "*will be applied flexibly and will be adapted to meet specific requirements on a case-by-case basis.*" We welcome the CC's flexible approach but would suggest that the guidelines detail some of the carve-outs that the CC is typically willing to consider or has accepted in the past. These might include, for example, the flow of information for the purpose of compliance with regulatory and accounting requirements which has been a common carve-out in recent undertakings. In this respect, the draft guidelines should also clarify that regulatory requirements include market standard disclosures and listing rules in any jurisdiction, and should also explicitly cover the flow of information required to assess compliance with the undertakings, and information required to complete periodic compliance statements (in this respect see also paragraph 7.7, below).

Need for interim measures for anticipated mergers

- 7.5 Paragraphs 16 - 17 of Appendix A reflect the CC's intention to impose interim undertakings or an order in anticipated mergers. Paragraph 16 notes that there may be a need for interim measures in relation to asset acquisitions and certain share acquisitions. The Enterprise Act 2002 already provides a general restriction on share dealings in anticipated mergers, save for where shares are acquired "*...in pursuance of an obligation assumed before the publication by the OFT of the reference concerned.*"⁶ In the context of a share acquisition, any such interim measures would therefore operate to prevent the purchaser from complying with a pre-existing legal obligation, which was assumed prior to the OFT's reference to the CC. We would question the circumstances in which a party could ever feasibly undertake *not* to comply with a pre-existing legal obligation. Furthermore, we believe it would be inappropriate for the CC to make an order in these circumstances effectively frustrating the parties' legal obligations to complete where they may have specifically structured the transaction to fall within the exception set out in the Enterprise Act. Where purchaser and seller have allocated competition risk between them and structured a transaction to achieve this, the CC should not interfere with this risk allocation but should instead ensure that the merging entities are held separate pending final determination of the merger reference. We believe that the CC's proposals in this respect risk eroding one of the key benefits of the UK's merger control system.
- 7.6 Paragraph 16 also states "*to date under the Act, the circumstances of anticipated mergers have not normally required interim Undertakings*". It would be useful if the draft guidelines provided further detail of circumstances in which the CC *has*

⁶ Section 78 and 79(4).

previously imposed interim undertakings in anticipated mergers and the risks identified by the CC that led to this course of action.

Compliance and enforcement

- 7.7 Paragraph 18 of Appendix A describes the CC's usual practice of requiring monthly compliance statements from the CEOs of the companies providing interim undertakings. A potential issue can arise where the CEO of the acquiring company is asked to sign compliance statements which include representations about the *acquired company's* compliance, as the acquiring company will have no visibility of this during a hold separate period. In these circumstances, and given the potential criminal penalties for providing false information to the CC, the CEO of the acquiring company should either be permitted (i) to receive sufficient information from the acquired company in order to satisfy himself that the statement is accurate (by way of a carve out to the interim undertakings - see paragraph 7.4, above) and/or, (ii) he should be permitted to qualify his statement by reference to assurances given by the acquired company.
- 7.8 It is not unusual for merger parties to seek the CC's consent under interim undertakings for the provision of information for a specified purpose. In these situations, speedy processing and response to consent requests is a key issue for businesses, as there will frequently be commercial issues which are contingent on the consent being granted. It would be useful if the draft guidelines could provide an outline of the information required by the CC in order to process consent requests effectively, who within an inquiry team should be the default contact point in this respect (e.g. inquiry secretary, legal adviser, etc.), how requests are handled internally by the CC, and an indicative timetable that the CC would aim to meet in responding to consent requests.

ANNEX
International Bar Association Antitrust Working Group

Lawyer	Firm/Affiliation
Bruce Kilpatrick (Co-chair)	Addleshaw Goddard
Oliver Bretz (Co-chair)	Clifford Chance
Howard Cartlidge	Olswang
Kiran Desai	Mayer Brown International LLP
Pierre Dubois	Kirkland & Ellis International LLP
Andrea Gomes da Silva	Freshfields Bruckhaus Deringer LLP
Shaun Goodman	Cleary Gottlieb Steen & Hamilton
Susan Hutton	Stikeman Elliott LLP
Barry Joyce	US Department of Justice
Jonas Koponen	Linklaters LLP
Paul McGeown	Linklaters LLP
Tom McQuail	Howrey LLP
Benoît Merkt	Lenz & Staehelin
Nnaemeka (Emeka) Emmanuel Otagburuagu	Joseph David and Co
Michel Ponsard	UGGC & Associés
Gavin Roberts	Linklaters LLP
Ian Rose	Salans
Gerard Willsher	Pitney Bowes
Gian Luca Zampa	Freshfields Bruckhaus Deringer LLP