



COMPETITION COMMISSION CONSULTATION

MERGER REMEDIES: COMPETITION COMMISSION DRAFT GUIDELINES

RESPONSE BY REED SMITH

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Introduction and general comment

1. The following comments are submitted on behalf of Reed Smith. With global capabilities and multidisciplinary approach, our Antitrust, Competition, and EU Law Group represents clients with operations in the United States, Europe, Asia and many other parts of the world. We regularly act for clients in merger proceedings both in the UK and a wide range of other jurisdictions.
2. We are pleased to have the opportunity to respond to the Competition Commission's ('CC') consultation on its draft guidelines relating to merger remedies ('Draft Guidelines'). We welcome the Draft Guidelines which bring together in one single document the CC's guidance on divestiture remedies, interim measures and remedial action (as set out in the CC's general merger references guidance). Having this guidance in one consolidated document is a helpful step forward.

Detailed Comments

3. We are pleased to see that the CC has cited relevant examples from its previous inquiries, CAT judgments and other sources such as the ICN Merger Remedies Review Project; citing practical examples for reference is very helpful in putting the guidelines in context. If anything we would like to see more examples, for example in paragraphs 1.18 to 1.20 it might be helpful to have references to some cases where customer benefits have specifically been taken into account.
4. Para 1.9 – It is stated that where two or more equally effective remedies are available, the remedy that is less costly (or less restrictive) will be chosen. However, the relative importance of the different factors to be considered does not appear entirely clear – is it the case that where Remedy A is slightly more effective but considerably more costly than Remedy B, then Remedy will A would always be chosen unless the cost was so high that it was deemed to be disproportionate?
5. Paras 1.18-1.20 – The CC's Merger References Guidelines of June 2003 included in the customer benefits section (paragraph 4.42) the example of possible increased innovation. We would suggest that this is a useful additional example that should be included in the section discussing customer benefits in these Draft Guidelines.
6. Para 1.26 – This paragraph refers to the fact that implement remedies through an Order as well as by obtaining undertakings. In our view, the section entitled 'Undertakings and orders' in the CC's Merger References Guidelines of June 2003 provided a useful summary explaining the choice between the use of orders and

undertakings. We think it would be helpful to keep the whole of this section in the Draft Guidelines.

7. Para 1.30 - We think it would be helpful to provide statistics here to set out how often interim undertakings have been used to date in relation to both completed mergers and anticipated mergers (as is done in relation to the use of structural remedies in footnote 23 on page 12).
8. Footnote 25, page 13 – In our view, it would be helpful to set out in the footnote what the particular constraints were on remedy selection in the Drager case, even if it is just summed up briefly in one or two sentences.
9. Para 3.11 – We agree that this would be difficult to police and presumably such a remedy would only be used in relatively rarely. We do however welcome this as an example of the CC’s flexibility and willingness to adopt new concepts from other jurisdictions and the ICN.
10. Paras 3.13-3.14 – Under the CC’s Guidelines on the application of divestiture remedies in merger inquiries of December 2004, it was stated at paragraph 3.6 that the use of alternative divestiture packages (or ‘crown jewels’ divestiture packages) would only be considered in exceptional circumstances. These Draft Guidelines do not refer to their use only in exceptional circumstances. Does this mean that the use of such packages is becoming increasingly common? If so, we would suggest that this trend is noted in the Draft Guidelines.
11. Para 3.28 – We welcome the inclusion of a separate section dealing with intellectual property remedies; this is a useful addition to the previous guidance.

Reed Smith