

RESPONSE TO CONSULTATION ON THE COMPETITION COMMISSION GUIDELINES ON MERGER REMEDIES

1. Introduction

- 1.1 In May 2008, the Competition Commission (CC) published a consultation document entitled *Merger Remedies: Competition Commission Guidelines*. The purpose of these guidelines is to explain the CC's approach and requirements in the selection, design and implementation of remedies in merger inquiries referred to it by the Office of Fair Trading (OFT) under the relevant provisions of the Enterprise Act (the Act).
- 1.2 The guidelines seek to provide a single source of guidance on remedies for merger inquiries. This guidance therefore supersedes the CC's guidance on divestiture remedies, existing guidance on interim measures and guidelines on remedial action in the CC's general merger guidance. The approach outlined in the guidelines is consistent with these previous documents but has been updated and extended to take account of the CC's experience of inquiries in recent years, judgments of the Competition Appeal Tribunal and research into the outcomes of remedies. In devising this guidance we have taken into account the principles outlined by the International Competition Network (ICN) and the framework of merger control policy within the European Community.

2. Overview of responses and general issues

- 2.1 We received 11 separate, external submissions on the proposed guidelines. These submissions are reproduced in full on our website and the identity of respondents is also shown in section 4 of this paper. The CC also received helpful comments and suggestions from the OFT which were incorporated in the consultation draft. We would like to thank all involved in producing submissions on the guidance for the quality and usefulness of their responses. Following careful consideration of these submissions, the CC has now published a revised final version of the guidelines which takes account of the issues raised. We believe the consultation has materially improved the clarity of the guidelines.
- 2.2 In general, the guidance was welcomed for providing more transparency and detail on the CC's approach, providing a single source of guidance on merger remedies and building on the results of experience from research and individual cases. One respondent considered that the draft guidance was 'clear, reasonable and a welcome consolidation of the CC's existing guidance on merger remedies...'. Another respondent stated that 'as an overarching response, we strongly welcome the considerable expansion to the draft Guidelines which can only enhance transparency and a general understanding of the CC's approach and analytical framework...'.
- 2.3 The new guidance is significantly more explicit than previous guidance regarding the CC's approach to choice of remedies. One respondent expressed concern that a 'structural remedy (ie divestment) may appear to be the cleanest way to achieve a comprehensive solution—but fear from experience that over-reliance on structural remedies may not always be reasonable and practicable'. On the other hand, another respondent considered that the 'guidelines provide important and welcome policy flexibility' and that 'although the CC generally will prefer structural remedies, it will also consider non-structural remedies in appropriate cases'. In general, respondents appeared supportive of our approach to choice of remedies. Respondents also raised

comparatively few issues concerning the substantially new section on behavioural remedies.

- 2.4 Many of the issues raised by respondents were requests for more detail on how the CC would act in particular circumstances. We have responded to these requests by adding more references to previous cases and have clarified the text where appropriate. However, we have not added further detail in areas where action is highly dependent on the specific facts of the case.

3. Specific notable issues

- 3.1 Specific issues raised by respondents are set out below with the paragraph reference to which they relate in the draft guidance. The CC's response is shown in italics.

Part 1: Introduction and context

- 3.2 **Comprehensive solution**—Paragraph 1.7—One respondent was concerned that the CC in considering the Act's requirement 'to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable' appeared to interpret this as if 'nothing less than' a comprehensive solution would suffice. *Our approach is to seek a comprehensive solution subject to the constraints of practicality and reasonableness in accordance with the Act. We consider the existing text expresses this approach effectively.*
- 3.3 **Effectiveness and proportionality**—Paragraph 1.8 and 1.9—A respondent considered that the issues of effectiveness and proportionality cannot be considered in isolation from each other as appears to be implied by our use of a two-stage process where the CC considers effectiveness of remedies first and then considers costs. Another respondent also considers that we should be more explicit about assessing whether the remedy is disproportionate to the scale of the SLC. *We consider that the two stage process is a useful conceptual approach but this should not be interpreted as implying that the CC views effectiveness and proportionality in isolation from one another. Text about assessing whether a remedy is disproportionate to the SLC is now given more prominence in the guidance and we believe this also deals with concerns about the possible rigidity of the two-stage process.*
- 3.4 **Treatment of costs**—Paragraph 1.10—One respondent contended that costs to merger parties should not be given less weight than costs imposed on third parties. *The parties have the latitude to choose whether or not to proceed with the merger. Third parties do not have this choice and therefore we will continue to give less weight to costs incurred by the merger parties than costs imposed on third parties.*
- 3.5 **Relevant customer benefits**—Paragraph 1.16 to 1.20—One respondent was concerned that the CC should adopt the same counterfactual as it has used in assessing the SLC to determine whether the proposed relevant customer benefits would have arisen without the creation of the merger. Two other respondents raised similar issues. *We now clarify in the text that benefits should not be expected to result from plausible alternatives to a merger in order to be considered to be relevant customer benefits arising from the merger. However, we do not agree that these alternatives need to be limited to the selected counterfactual. The CC's views of plausible alternatives will depend on the specific facts of the case.*
- 3.6 **Process following final report**—Paragraphs 1.25 to 1.28—Several respondents considered that the procedure and timing for the negotiation and agreement of

remedies (post final report) was sometimes opaque and that an administrative timetable should be published for this phase. *We agree with the need to publish an administrative timetable for the remedies implementation stage of the inquiry although certain items, such as the length of the divestiture period, will normally be excised. We also now provide indicative timing in the guidance for the acceptance of divestiture undertakings in straightforward cases.*

Part 2: Choice of remedies

- 3.7 **Recommendations**—Paragraph 2.12—Several respondents requested clarification regarding the use of recommendations as remedies. *We have clarified that the CC will only generally use recommendations in the unusual circumstances where it lacks the jurisdiction to impose an effective remedy in its own right.*

Part 3: Divestiture and intellectual property remedies

- 3.8 **Defining divestiture packages**—Paragraph 3.6—Several respondents questioned our presumption that the starting point for defining a divestiture package will be divestiture of all or part of the acquired business. *We consider that the existing wording is appropriate as it allows divestiture from the acquiring business if this is not subject to greater risk in addressing the SLC.*
- 3.9 **Sunset clauses in divestiture undertakings**—Paragraph 3.8—Several respondents questioned use of a sunset clause of 15 years on prohibition of reacquisition of the divested business. *In the text we now adopt 10 years for the normal duration of a prohibition on reacquisition which is consistent with the EC model divestiture commitments.*
- 3.10 **Competition concerns arising from prospective purchasers**—Paragraph 3.15—Two respondents considered that requiring that any suitable purchaser should not give rise to any *potential* competition concerns was unduly stringent and may prevent purchase by any party with relevant sector experience. *In the guidance, ‘potential’ is now replaced with a ‘realistic prospect’.*
- 3.11 **Effectiveness of transfer of intellectual property (IP) rights**—Paragraph 3.28 to 3.33—Two respondents question why the CC would generally prefer to divest a business including IP rights rather than rely on transfer of IP rights alone. However, a respondent with particular responsibility for IP issues supports the CC approach and concludes that ‘only in rare circumstances should an SLC be remedied by a measure involving an IP right independently of the transfer of the business to which it relates’. *The text now makes clear the circumstances in which transfer of IP rights alone is likely to be an effective remedy.*
- 3.12 **Divestiture or licensing of IP rights**—Paragraph 3.28—A respondent could not imagine a plausible situation where divestiture (as opposed to licensing) of a patent or other right is appropriate to remedy an SLC as this would simply change the party possessing the monopoly right. *In practice we would normally consider licensing of IP rather than divestiture and the text now reflects this. However, there are instances where divestiture of IP may be an appropriate response, for example when there are several patents that convey market power or where there are non-IP factors that also convey market power and divestiture of one or more IP rights could effectively redistribute market power so as to remedy the SLC.*

Part 4—Behavioural remedies

- 3.13 **Role of OFT**—Paragraph 4.5—Several respondents did not believe it was appropriate for the CC to require merger parties to commit to provide monitoring resources as a result of the limitations in the OFT’s resources for this purpose. *We consider that it is not unreasonable for the creator of an SLC to pay for the reasonable monitoring and enforcement costs required in its resolution through behavioural measures.*
- 3.14 **Ex post enforcement**—Paragraph 4.6—Two respondents were concerned that the CC appeared to be ‘ignoring the disciplining effect of ex post enforcement of competition law when considering remedies’. *We consider the text does not imply that we are ignoring ex post enforcement but indicates that it is generally advantageous for the CC to construct remedies crafted to suit the particular circumstances of the case rather than rely on the general provisions of competition law.*
- 3.15 **Sunset clauses in behavioural undertakings**—Paragraph 4.7—A respondent considered that a sunset clause period of 15 years seemed unreasonably long. *In view of the variety of measures and situations that may be involved in behavioural remedies, we consider that any long-stop date will depend critically on the circumstances of the case and therefore we no longer indicate a ‘normal’ sunset duration for behavioural measures.*

Interim measures

- 3.16 **Anticipated mergers**—Paragraph 16 and 17 of Appendix A—Two respondents raised concerns that the CC might use its powers to prevent an anticipated merger completing even if this required merger parties to breach their contractual commitments to one another. *We note that interim measures have not normally been required in relation to anticipated mergers referred under the Act. However, we cannot rule out the possibility of using our interim order powers to prevent completion of anticipated mergers if completion might impede the CC later taking remedial action if it reaches an SLC decision.*

Respondents

We are grateful to the following for their responses to this consultation exercise:

Allen & Overy LLP
American Bar Association—Section of Antitrust Law and Section of International Law
Ashurst LLP
Freshfields Bruckhaus Deringer LLP
HellerEhrman (Europe) LLP
International Bar Association—working group of the Anti Trust Committee
Linklaters LLP
Reed Smith Richards Butler LLP
Sidley Austin LLP
Tesco plc
Trade Marks, Patents and Designs Federation

November 2008