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Points on Competition Commission consultation document entitled "Application of Divestiture Remedies in Merger Inquiries: Competition Commission guidelines"

1. As paragraph 1.2 points out other relevant material is contained in the Merger Reference Guidelines (see part 4 remedies and in particular paragraphs 4.24 – 4.49) and the Rules of Procedure (rule 11). The Chairman's Guidance to Groups (paragraphs 12-14) also refers to remedies. It might be preferable if the divestiture guidance refers where appropriate to the relevant paragraphs in the other documents or consolidates them into one document so that the relevant guidance could be found in the same place.

2. There is little or no explanation in the guidance on the extent to which Commission staff (as opposed to members of the Inquiry Group or the Remedies Standing Group) will be actively involved in the various stages of the process. It is noteworthy that in the Federal Trade Commission (FTC) statement on negotiating merger remedies and in its "Frequently Asked Questions" it is clear that all the day-to-day work will be conducted with Commission staff rather than with Commissioners. The Competition Commission is of course differently constituted from the FTC but nonetheless it would be helpful for parties and their advisers to know how in practice the process will be managed as between staff and members.

3. It would be helpful if there were a more detailed treatment of the respective roles of the Inquiry Group and the Remedies Standing Group. Where the remedy requires an upfront buyer to be identified will the buyer be named in the undertakings or order (and thus approved by the Inquiry Group) or will the undertaking or order leave it to the Remedies Standing Group to approve an upfront buyer when one has to be identified before a transaction can proceed?

4. Although the Enterprise Act requires the Commission to decide whether to take action (or recommend action be taken by others) to remedy, mitigate or prevent an SLC in practice no doubt the initiative will often be taken by the parties. Again, as a practical matter the onus will presumably be on the parties to convince the Commission that a proposed remedy will remove the SLC. The FTC statement expressly puts the onus on the parties to show that a proposed remedy is adequate and effective.

5. A further point with respect to the relationship between the Inquiry Group and the Remedies Standing Group is the extent to which the report will be specific as regards the nature and scope of a divestiture remedy. Although in the course of the inquiry proposed remedies will be available for comment by third parties by appearing on the website, there must remain the risk that when it comes to detailed negotiation of undertakings or implementation by the Remedies Standing Group further issues will arise which may require the nature, scope or extent of the original proposed remedy to be modified. An illustration would help in paragraph 3.2 (or an appendix to it) to show the level of detail that is likely to appear in a report.

6. In paragraph 3.6 (use of "crown jewels" divestiture packages) it is implicit (but might better be explicit) that the definition of the crown jewel asset package will appear in the report rather than being elaborated when the undertakings are negotiated.

7. In paragraph 5.5 (timescale for divestiture) it would be helpful to have indicative guidance as to the likely time within which a divestiture must be carried out. In its "Frequently

Asked Questions" the FTC states that it generally requires divestitures to be completed within 3-6 months. The OFT Mergers (Substantive Assessment) Guidance states that the maximum divestment period is normally 6 months (paragraph 8.7)

8. The guidance could usefully contain information on how third party comments will be obtained throughout the process. Presumably third parties will have a set period to comment on draft undertakings when these have been negotiated pursuant to the findings of the report.

9. The guidance could clarify whether the CC has a preference for divestments to be made from the assets of the target enterprise or not. The OFT's preference appears to be that the divestment package comes from the assets of the acquired enterprise (para 8.7 Mergers – Substantive Assessment Guidance). The FTC states that the business to be divested can be from either the acquired firm or the acquiring firm (FTC FAQs, no.15). We suggest that the overriding factor should be whether the SLC is addressed by the remedy rather than from whose pre-existing assets the divestment is made.

10. It could be useful to spell out the consequences of non-compliance with remedies (use of court orders and contempt proceedings etc).

11. The FTC statement and FAQs do give more detailed guidance on a number of points. While the FTC obviously has the benefit of some years of experience it is perhaps still worth considering whether the proposed guidelines could be a little more detailed. Examples of the more detailed US approach include the following:

A. Statement of the FTC's Bureau of Competition on negotiating merger remedies

(a) The statement makes it clear that the staff will wish to talk not only with outside counsel but from representatives from inside the firm.

(b) The staff would expect to see financial and business documents showing that a business unit can operate autonomously e.g. it has operated autonomously in the past and is segregable from the parent. The statement itemises the kind of components that should be included in the divestment to show that it is a complete business.

(c) The statement makes it clear that the FTC staff may need to talk to suppliers, customers, competitors and the buyer or possible buyers.

(d) If the divestiture is primarily of intellectual property the parties must show an acceptable buyer exists and that divestiture to it will achieve the desired result.

(e) The statement is explicit as to the kind of transitional arrangements that may need to be entered into to ensure that the buyer will be an effective competitor in the relevant market.

(f) The statement makes the point that a proposed buyer has not only to have the financial ability to close the proposed divestiture but also that it has both the financial ability and the economic incentive to maintain or restore competition in the market. If the buyer requires financing FTC staff may wish to interview the entity providing the financing. The staff will conduct its own independent evaluation of the proposed buyer, interviewing third parties if necessary.

(g) Where an upfront buyer is required the purchase agreement must include a rescission clause which would be operated if the FTC did not approve the buyer or the terms of the purchase agreement.

(h) The statement warns that as the staff learns more about a prospective buyer it may need to change the divestment package or the terms of the divestiture agreement.

(i) The FTC staff are prepared to discuss term sheets early in the divestiture process.

(j) Even if the divestment order does not require a transitional services agreement, if the parties decide to execute one it must still be approved by the Commission.

(k) The statement also gives examples of provisions that the Commission would not accept in a divestiture agreement or ancillary documentation.

(l) The statement makes it clear that the parties must have obtained or required third party consents and approvals before a divestment proposal can be accepted by the Commission.

(m) A hold separate/maintain assets order may include specific benchmarks (e.g. levels of capital spending) by which the parties' conduct can be measured.

(n) The parties are encouraged to identify any required trustees/monitors early in the process.

(o) The statement lays down the information the parties must provide when seeking approval of a proposed divestiture. It is made clear that the staff will usually need to obtain additional confidential information directly from the buyer.

B. FAQs

(a) The FAQs identify a number of industries in which the Commission has required an upfront buyer.

(b) The FTC recommends that the parties take steps to keep key employees through the remedy process and to prevent the wasting of assets and the deterioration of customer and supplier relationships.

(c) The FAQs state that there have been instances in which the divestiture of one firms entire business in the relevant market was not sufficient to restore the competition and therefore not acceptable.

(d) The FAQs make it clear that the Commission may require that an entire package of assets be divested to a single acquirer.

(e) The FAQs make it clear that crown jewel provisions are not a penalty clause or punishment.

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