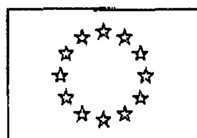

EUROPEAN COMMISSION
Competition DG

Director General

Brussels,
COMP D(2004)

Mr Paul Geroski
Chairman
Competition Commission
Victoria House
Southampton Row
London WC1B 4AD

Fax: 00 44 20 7271 0367

Subject: Consultation on Divestiture Remedies

Dear Paul

I refer to your letter of 21 June 2004 enclosing the Competition Commission's (CC) consultation document on divestiture remedies. We are grateful to the CC for granting us an extension to 27 September 2004 of the deadline for reply which was originally set for 17 September 2004.

We have read the consultation document with much interest. Indeed, members of our Merger Remedies Network met with members of your Remedies Directorate on 24 June 2004 to discuss our experiences of merger remedies implementation in the light of the consultation document. I know that my colleagues found the meeting instructive as I hope that your colleagues did as well.

As for our written comments on the consultation document, I would first like to congratulate the CC on producing such a succinct yet informative guidance document. In particular, we welcome the:

- reference to the "principle of proportionality" in point 1.8 although we would recommend that this be qualified by inserting the following language: "taking into account the need to attract a prospective purchaser that is able to operate the divested business as a viable competitor";
- stated preference for structural remedies with clear guidance for when behavioural remedies may be contemplated in point 1.9 of document;
- typology of constraint on effective remedial outcomes into the three broad categories of composition risks, purchaser risks and asset risks in point 2.4 of the document;

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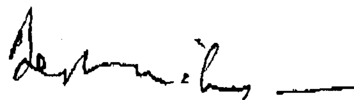
- presumption for divestiture of an existing business and presumption against "mix and match" divestitures in paragraphs 3.3 to 3.5 although we believe that this would benefit from clarity:
  - as to what "minimum package of assets" may constitute a "stand-alone business"; and
  - as to the circumstances where "mix and match" divestitures may be considered as well as the minimum parameters that such packages must have (e.g. that they must be at least equivalent to a "stand-alone business" in terms of their effectiveness);
- use of "crown jewels", in point 3.6. Here we would recommend that the:
  - crown jewels are used a "fall-back" remedy to be invoked only if the main remedy envisaged fails; and
  - existence of such a "fall-back" may be made public whilst its precise content should be redacted from the public version of the remedy so as to alleviate your concerns over the likelihood of purchasers being "primarily attracted by the ancillary assets".
- dual requirements of "independence" and "capability" for assessing the suitability of prospective purchasers in point 4.1;
- need for the CC to review the "divestiture agreement" in point 4.3, although we would recommend that you extend this to any significant ancillary agreements that are necessary for the prospective purchaser to operate the divested business as a viable competitor to the merging parties;
- possibility for the CC to require an "up-front buyer" in point 4.4, although we do not think that this should be restricted to scenarios of composition and/or purchaser risks but should also be considered in cases of significant asset risks such as in mix and match divestitures where even if the scope of the composition of the divested business may well attract suitable purchasers, nevertheless any prolonged delays in implementation of the divestiture may seriously hamper the ability of the purchaser to successfully integrate the divested business in good time to provide a viable competitive constraint to the merging parties;
- presumption in point 5.2 that "parties to a merger may have significant incentives to run down or neglect the business ... in order to reduce future competitive impact", which accords with our own experience in some cases;
- requirement for a monitoring trustee in point 5.4, which we believe is essential to reduce the various risks identified under point 2.4 of the guidance document;
- expectation in point 6.1 of the document that the trustee be nominated and approved before the undertakings are accepted is in our view an important innovation allowing the trustee to get involved early on in the design and implementation of the undertakings. Unfortunately, under our current system such a possibility is not open to us although we are considering ways and means of strengthening our relations with trustees;

- equally, we agree with your proposals in point 6.2 that the CC approves the trsutee's remuneration agreement so as to ensure that the merging parties do not use this as a means of undermining the trustee's independence, although we would also recommend that you pay attention, to conflict of interest, liability and confidentiality clauses in the trustee mandate which may be used either to induce bias or to render the trustee's monitoring ineffective.

I hope that you find the above comments useful. We remain at your disposal should you wish any further input from us.



Yours sincerely

Philip LOWE

Director General

c.c.: David Roberts – Director of Remedies, Competition Commission