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Our ref 9E/JYB/PCB
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David Roberts
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Dear Sirs

Application of Divestiture Remedies in Merger Inquiries: Competition Commission Guidelines - Consultation Document

Simmons & Simmons welcomes the opportunity to comment on the draft of the Application of Divestiture Remedies in Merger Inquiries Competition Commission Guidelines (the "Guidelines) circulated for consultation

We welcome the publication of the Guidelines in principle, find them helpful and feel that they provide useful clarification in some areas There are, however, certain issues that are of concern to us and certain points that we consider merit further clarification

In particular

General Points

1 The procedures relating to remedies during the Competition Commission's investigation and following its report are described in various documents, including the Merger References Competition Commission Guidelines, the Rules of Procedure and the General Advice and Information guidance note We feel that the Guidelines would provide an opportunity to set out in one document and in more detail the procedures relating to remedies In particular, we feel that the Guidelines would benefit from a description of the various procedural stages from the provisional remedies statement, through to notices of the proposed undertaking or order under Schedule 10 of the Enterprise Act 2002 and the adoption of final undertakings/remedies

2 We would welcome more detail on the involvement of the parties and third parties in negotiating the divestiture package The Guidelines do not expressly refer to the possibility of consultation with the parties in relation to possible remedies and paragraph 3 2 states that the scope of the divestiture package will be defined by the Competition Commission Although clearly it is for the Competition Commission to determine the remedies appropriate to address the substantial lessening of competition ("SLC") identified, we feel that the involvement of the parties (and third parties) at an early stage is undoubtedly desirable in order to ensure that the remedies identified are practicable and proportionate. Indeed, at paragraph 4 49 of the Merger References Competition Commission Guidelines it is stated that "the [Competition Commission] welcomes the

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possibility of accepting undertakings that the parties put forward as being those they are willing to enter into and which the [Competition Commission] considers would provide a comprehensive solution"

3 We also feel that further discussion on the use of behavioural remedies (as distinct from purely protective measures) in conjunction with divestiture remedies would be useful The Guidelines touch upon this in paragraph 1 9, but, given that such behavioural remedies *are often crucial to ensure that the divestiture does remedy the SLC identified by the* Competition Commission (for example, through continuation of administrative services for a transitional period following divestiture to ensure that the divested business can continue to operate effectively), we feel that there would be merit in giving further guidance on this

4 We consider that thought could also be given to publishing model texts for divestiture commitments and trustee mandates, as has been done by the European Commission The parties to a merger would find it very useful to have an indication of the specific issues which are likely to be dealt with and which the Competition Commission considers important

Specific Points

Reference to Group

5. The capitalised reference to "Group" in paragraphs 2.6 and 4.4 is presumably a reference to the inquiry group If so, this should be made clear

"Presumption" for divestiture of an existing business and against a mix and match divestiture

6 The Guidelines state that there is a "presumption" for divestiture of an existing business and against a "mix and match" divestiture We are concerned that the use of the word presumption is unduly prescriptive Any divestiture, which is intended to remedy an identified SLC, should be assessed on a case by case basis and must be reasonable and practicable for such purpose and have regard to the principle of proportionality In defining the appropriate divestiture package, it is necessary to have regard to the identity of the *proposed purchaser and the nature and extent of its existing business activities* A divestiture package which may be suitable for one purchaser may not be suitable for another Also, a mix and match divestiture, which can be tailored to its existing business, may be the most effective method of attracting a suitable purchaser Consequently, we feel that a statement that there is a "presumption" for divestiture of an existing business and against a mix and match divestiture is unhelpful and suggest, therefore, that the word "presumption" should be replaced with "preference" This would be consistent with the approach taken in the Merger References Competition Commission Guidelines (paragraph 4 15)

7 A similar issue arises in relation to the focus on an "existing business". Again, the divestiture package which is ultimately identified as being appropriate, reasonable and practicable to remedy the SLC, while still having regard to the principle of proportionality and the identity of the purchaser, may or may not be an existing business The Competition Commission in its guidelines on Merger References focuses rather on the viability of the business Whilst it may be easier to establish that an existing business is a viable one, there are other considerations that must be taken into account We therefore consider that viability is a more relevant consideration than whether or not the divestiture relates to an existing business and that "viable business" should be used in place of "existing business" in the Guidelines

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Use of "crown jewels" divestiture packages

8 As with the first-choice divestiture package, the primary purpose of a crown jewels *divestiture package is to remedy an identified SLC. The crown jewels divestiture would* still need to be reasonable and appropriate. Also, it would be difficult to define ex-ante a final crown jewels divestiture package which would be appropriate for all purchasers As written, we would submit that too much emphasis is placed on such crown jewels divestitures being used as a mechanism to incentivise parties to successfully divest their first-choice package (and, indeed, almost as a punishment for failing to do so) The approach taken by the European Commission under which "crown jewels" divestiture packages are simply seen as an alternative divestiture commitment "which has to be at least equal if not better suited to restore effective competition" (paragraph 23 of the European Commission Notice) appears to us to be more appropriate and proportionate We consider that the involvement of the parties in the definition of a crown jewels package (as with any other divestiture package) is particularly important

9 As the parties bear the costs of divestiture, and will be keen to complete the merger or integrate the acquired business as soon as possible, they will have a strong incentive to conclude the divestiture as quickly as possible, without a "punitive" fall-back divestiture requirement

Independence of suitable purchasers

10. We feel that it would be helpful to clarify what would constitute a "significant connection" between a purchaser and the parties to a merger Presumably this would include a shareholding and a directorship Would it, however, also cover an employment (managerial) or consultancy relationship? We would welcome further detail on this

Asset risk to retained business

11 The Guidelines rightly state that where the Competition Commission considers that there is asset risk or completion of the divestiture may be prolonged, a requirement may be *imposed that an up-front buyer completes the acquisition of the divested business before* the merger may proceed or progress to integration We would add to this that the Competition Commission should also have regard to the impact of a prolonged divestiture process on the business to be retained

12 We would also suggest that an alternative to requiring that the divestiture to a suitable purchaser be completed before the merger is allowed to proceed or progress to integration, would be the appointment of a divestiture trustee once a sale and purchase agreement for disposal of the divested business has been signed with a suitable purchaser, who would manage the process up to completion. In this way, the main merger would be allowed to proceed or complete and the business to be divested could be transferred to an appointed divestiture trustee to be disposed of, reducing the uncertainty and asset risk for both the divested and retained businesses

Use of hold separate undertakings

13 The guidelines indicate that the Competition Commission may require "hold separate" undertakings when asset risk is perceived to be significant. We would submit that the use of hold separate undertakings should be the rule, rather than the exception, in all cases relating to competed mergers

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Continuing links between the purchaser and the parties

14 In paragraph 5.7, it is suggested that, before providing approval at the end of the divestiture process, the Competition Commission will want to ensure that the divestiture agreement contains no provisions that are inconsistent with the remedial objectives of the divestiture The Guidelines refer to continuing financial links between the purchaser and the parties as potentially undermining the competitive incentives of the divested business Transitional supply arrangements (such as, for example, accounting or payroll services in return for reasonable remuneration) are not always of a nature to impact the competitive incentives of the parties and may be necessary for the effective operation of the divested business, at least in the short term We consider that the Guidelines should distinguish between links impacting the strategic commercial behaviour of the divested business and those which are largely administrative and transitional.

Involvement of OFT in selection of suitable purchaser

15 In paragraph 4 25 of the Merger References Competition Commission Guidelines, it is stated in relation to divestitures that "the [Competition Commission] will generally require the subsequent purchase to be approved, usually by the OFT" Paragraph 4 3 of the Guidelines states that it is the Competition Commission which is responsible for approving the purchaser We appreciate that the OFT might need to approve the disposal of the divested business under merger control provisions and also that it might have an ongoing monitoring role If, however, the OFT is to be involved in some other way in the approval of the purchase and/or purchaser, then we would welcome further clarification of the extent and nature of such involvement

Yours faithfully

Simmons & Simmons