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MERGER FEES

Summary of responses to
the consultation on
possible changes to the
system of charging firms
for the costs of merger
control

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dti

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Changes to the system of charging firms for the costs of merger control

Consultation responses for the consultation beginning on 4 August and ending on 3 November 2004.

1. Introduction and Background

1.1 What follows is a summary of responses received to this consultation. A number of complex issues were raised during the consultation and the Government is currently considering responses very carefully in deciding the way forward on possible changes to the charging system. The intention is to publish a full Government response later in the year that will set out any changes to the system. If there are any interim developments, these will be set out on the DTI website (<http://www.dti.gov.uk/ccp/topics2/mergers.htm>), and will be notified directly to those who responded to the consultation.

1.2 This consultation was undertaken as part of the Government's review of the system of charging firms for the costs of merger control. The charging system was introduced in 1990 on the basis that the amount recovered should broadly equate to the administration costs of the competition authorities. But fee levels have not been increased since their introduction and income now falls significantly below costs. This shortfall is currently being met through general taxation, when it could be argued that it should be more properly borne by the acquiring parties.

1.3 The Government is therefore reviewing the system and invited views from business and other interested parties on a range of options including:

- an increase in fees to achieve either greater or full cost recovery;
- introduction of any increases through a phased approach;
- charging of fees for material influence cases, special merger situations or cases considered under Article 21(4) of the EC Merger Regulation; and/or
- a fee structure based on one or more of the following: a flat fee; a banded fee based on turnover of the company being acquired; or an additional fee where a case is referred for further investigation to the Competition Commission.

1.4 Views were sought in response to a formal written consultation document, as well as in a series of meetings with interested parties.

2. Responses Received

2.1. Twenty-six responses to the consultation, covering the views of 32 organisations, have been received. These include a total of 11 responses from competition law firms and 3 responses from law societies/ associations. Responses have also been

received from the business community, including 9 responses from individual businesses and 3 responses from representative organisations. A list of the organisations whose responses are publicly available and details of how to view them is at Annex A.

2.2. A number of very useful comments were made on the various options identified in the consultation document and we are most grateful to everyone who took the time to let us have their views. The Government is considering all representations very carefully in deciding the way forward.

2.3. Responses were generally opposed to a move to full cost recovery, although only a minority argued that no fee increase whatsoever could be justified. Opinions varied on whether fees should be charged in material influence cases, but there was a general view in favour of not charging for special merger situations and Article 21(4) cases. Most respondents favoured the retention of a banded fee structure, with banding based on the size of the enterprise being acquired. Respondents also raised several additional issues relating to the merger fees regime which were not directly covered in the consultation document. There was no particular divergence of views between the business community and other respondents on any of the options.

2.4. The responses to the questions asked in the consultation, and the additional issues raised by respondents, are dealt with in detail below.

3. Responses by Question

Question 1

Would an increase in fees be appropriate and, if so, should this be to achieve (a) full cost recovery straight away or in a phased approach or (b) merely greater cost recovery?

Eighteen respondents strongly opposed a move to full cost recovery, with two who commented on the matter offering no particular objections. The most common reasons given for opposing full cost recovery were that such a move would:

- discourage some merger activity, particularly for smaller mergers, but also for some larger mergers where the economic rationale for the transaction was marginal. Two respondents to the consultation referred to specific transactions where a significant increase might have brought the viability of the transaction into question. One respondent argued that the potential ‘chilling’ effect of any significant fees increase would be exacerbated as the market for mergers had lacked confidence in the recent past;
- ignore the public good element to merger control as it would impose all of the cost burden on the merging parties, rather than attributing an element to general taxation;

- result in a significantly higher fee in the UK than for every other jurisdiction in the world except the USA, and so act as a disadvantage to UK business;
- be seen as unfair given that merging parties can already incur significant regulatory costs in undertaking a merger. For example, responses to the consultation would suggest that the professional fees incurred by merging parties for an OFT investigation raising no competition concerns can be up to £50k, rising to £500k - £1m for a case referred to the CC;
- have an adverse impact on the process for the regulatory consideration of mergers, for example by discouraging merging parties from cooperating to the extent that they currently do with the competition authorities. This could impact on notification of a merger to the competition authorities and/or provision of information during an inquiry. It was also argued that a deal might be structured in order to ensure that regulatory consideration would take place under the European Community Merger Regulation (ECMR), where no fee is currently payable, rather than under the UK regime. However, one respondent thought it more likely that a significant fee increase would encourage the parties to seek consideration of a case under the ECMR only where a possible choice already existed, rather than basing the whole structure of the transaction on avoiding the fee;
- remove any incentive on the Competition Authorities to control their costs. It was argued that, without an external cost constraint, cases might be subjected to unnecessarily detailed scrutiny. Linked to this is the comment made by a number of respondents that merger investigations were already unnecessarily detailed, and that merging parties should not have to meet the full costs of this.

In addition, two respondents suggested that a system of merger fees unrelated to individual case costs involved an element of cross-subsidy. It was argued that, where these fees are very high, the unfairness resulting from this cross-subsidy increases significantly. One respondent said that accurate cost data for the Enterprise Act regime needed to be collected over a sufficiently long period to justify more than limited changes to the present structure.

Six respondents argued that no fee increase whatsoever would be appropriate. The main reasons cited for this view were that any increase would have the effect of discouraging merger activity and that there is a case that all the costs of merger control should be borne by the general taxpayer on the basis that it is the whole community which benefits.

A move to greater cost recovery was supported by eight respondents, primarily on the basis that such a step was reasonable given that no increase had taken place since 1990.

Question 2

If a phased approach to the introduction of full cost recovery is taken, how best might this be done?

Eight respondents supported a phased approach to the introduction of any fees increase, with two identifying an increase each year by inflation plus a specific amount as their preferred approach. This was considered the best way of providing certainty to business as to the level of fees to be incurred in the future.

Two respondents argued that there was no need to introduce changes through a phased approach as long as sufficient notice was given.

Question 3

Should fees be charged for material influence cases?

Just over half of all respondents commented on this, with ten broadly in favour of a charge being introduced. They considered that sufficient legal certainty now existed on what represented material influence, given that case law had now built up and the OFT had published detailed guidance. Six respondents argued that certainty did not exist, particularly at the edges of material influence, and that either no fee, or a lower fee, should be charged. Concern was also expressed by three respondents that there was potential for multiple fees to be incurred by the same purchaser given that a new merger situation may arise on an increase from one level of control to another. One respondent commented that a possible concern for Government was that the introduction of a fee might discourage the acquisition of material influence as a possible way of investing in relatively new companies.

Question 4

Should fees be charged in special merger situations or cases considered under Article 21(4) of the EC Merger Regulation?

Most respondents – 16 out of 18 that commented on this issue – opposed charging in such cases. Reasons included that this was essentially a political process, intervention was unpredictable (particularly as no intervention in a special merger situation had yet taken place under the Enterprise Act) and the introduction of a fee would discriminate further against those industries where a public interest existed. In addition, it was noted that the chargeable case costs would be low as most work at the first stage of investigation would be undertaken by MoD or Ofcom. Two respondents were in favour of charging, noting that it removed the potential for normal cases having to cross-subsidise the costs of work undertaken.

Question 5

What merits and drawbacks do you see with the following options for a possible future fee structure, and which would be your preferred option?

- ***Option 1 - Flat fee***

- **Option 2 - Banded fee based on the turnover of the enterprise acquired, using turnover bands currently in place.**
- **Option 3 - Banding of fee based on turnover of the enterprise acquired, using new bands with greater differentiation between larger acquisitions.**
- **Option 4 - Flat fee for all qualifying mergers, with an additional fee for those mergers referred to the Competition Commission for further investigation**
- **Option 5 - Banding of fee based on turnover of the enterprise acquired, with an additional banded fee for those cases referred for further investigation to the Competition Commission.**

The majority of those who responded to this question favoured the retention of a banded fee structure, with most arguing that Option 3 (or a variant thereof) would be most equitable as it would give greater differentiation between small and large merging companies. Two respondents suggested a revised version of Option 3 with banding levels which provided greater granularity.

Option 1, based on a single flat fee, was favoured by two respondents, on the basis that it provided certainty for business in terms of regulatory costs and was straightforward to administer. Five respondents objected to the introduction of a flat fee as the costs would fall disproportionately on small businesses.

Four respondents favoured the introduction of an additional fee for those mergers referred to the Competition Commission (Options 4/5). This is seen as the most cost reflective approach, with CC costs being recovered only from those parties whose mergers are in fact referred. One respondent favoured a variant of Options 4/5, with a flat fee charged at phase 1 and a banded fee at phase 2. The second stage fee would be determined by the Competition Commission, and might be based on such factors as turnover, amount of work undertaken and whether an adverse finding was reached. A similar approach is taken in Germany.

Nine respondents specifically opposed Options 4/5 arguing, amongst other things, that they would: lead to more cases being abandoned at reference stage; reduce the required predictability of what costs would be incurred; be unfair to parties whose cases are subsequently cleared by the CC, particularly as they will face large additional time and legal costs where a reference is made.

Rather than applying turnover bands, four respondents favoured moving to a structure of fees based on the consideration paid. This was considered a more accurate measure of the value's transaction and therefore a better way of determining the level of fee to be charged. Two respondents said that the use of consideration paid could present difficulties: for example, there may be commercial sensitivity about revealing the price; it might be open to manipulation; and it was not

always clear what the acquisition price is (e.g. final price may be dependent on performance of the acquired enterprise over time).

One respondent suggested that the current approach towards defining the turnover of the enterprise acquired should be amended so that it was limited to those entities which form part of the target's group for Companies Act purposes.

Question 6

Are there any other ways in which the merger fees regime might be improved?

Responses also raised issues relating to the merger fees regime which were not directly covered in the consultation document:

(i) Foreign acquirers

Three respondents said that it appeared unfair that an overseas acquirer of a UK company should be exempt from paying a merger fee. They were not aware of other jurisdictions where merger fees were not payable by a foreign acquirer, and failure to charge in the UK would therefore put UK enterprises at a disadvantage. Respondents also argued that there should not be practical difficulties with recovering the amount due: foreign acquirers were not expected to avoid paying a fee as it seemed unlikely that they would wish to create hostility to their organisation from the merger control authority in a significant jurisdiction.

(ii) Charities

One respondent suggested that the OFT should have discretion to waive the merger fee where the parties concerned were, for example, non-profit making organisations. They noted that the merger between the Imperial Cancer Research Fund and Cancer Research Campaign was a qualifying merger and that a fee had, therefore, been paid.

(iii) End the practice of charging fees for merger clearances where the parties have not submitted a notification

Where the OFT investigates a merger that was not pre-notified and subsequently clears the merger, a fee may be charged under the current arrangements. Two respondents argued that, as notification is voluntary and the parties had correctly assessed in advance that there were no significant competition issues, the charging of a fee appeared unjust and could be considered to have undermined the principle of voluntary notification.

(iv) Higher fee for cases considered under a merger notice

One respondent suggested that it could be appropriate to charge a higher fee for cases which are formally notified to the OFT under a Merger Notice. The benefit for the parties of formal notification is that the OFT is required to reach a decision within a statutory timeframe and it would not be unreasonable for the parties to have to pay an extra fee for that benefit.

(v) Transparency of costs

One respondent said that any fee increase should be accompanied by greater transparency and accountability on the part of the competition authorities in relation to the costs incurred in carrying out merger investigations.

It was also suggested that, in calculating costs, no account should be taken of costs related to the role of the competition authorities in non-chargeable cases, and more general merger policy work.

Annex A

Responses to the consultation on possible changes to the system of charging firms for costs of merger control were received from the following organisations. (Please note: this list excludes responses made in confidence). Copies of responses may be viewed by appointment in the DTI, 1 Victoria Street, London. Please contact Ian Lomas on 020 7215 5009 for further information on viewing the responses.

Allen & Overy LLP
Archant
Ashurst
Baker & McKenzie
Capital Radio Group*
CBI
Centrica Plc
Chrysalis*
Clifford Chance LLP
CMS Cameron McKenna
Competition Law Association
Competition Law Sub-Committee City of London Law Society
Commercial Radio Companies Association*
CVC Capital Partners
EMAP*
GWR*
Joint Working Party of the Bars and Law Societies of the UK
Macfarlanes
Martineau Johnson
The Newspaper Society
Northumbrian Water Ltd
Norton Rose
Richards Butler International Law Firm
Scottish and Southern Energy
Simmons & Simmons
SMG*
South West Water Ltd
Tindle Radio*

* Views were given during a meeting, with the notes of that meeting representing the views of those present

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