

## Emap plc/ABI Building Data Ltd Merger Inquiry Response by Emap plc to the Competition Commission's Provisional Findings

### *Overview – Burden of Proof*

1. In this document Emap plc (**Emap**) responds to the provisional findings (**Provisional Findings**) notified to it by the CC on 11 November 2004 and subsequently published on the CC's web site on 15 November 2004.
2. Emap's position in relation to the Provisional Findings can be very simply stated: the evidence in this case does not support the conclusion that Emap's acquisition of ABI Building Data Ltd (**ABI**) may be expected to result in an SLC.
3. Emap submits that the CC has clearly failed to discharge the burden of proof necessary to support an adverse finding in this case. On a balance of probabilities test,<sup>1</sup> there is no basis for believing that this merger is more likely than not to result in an SLC.
4. Indeed, the only truly objective independent evidence in this case – namely, the Robson Rhodes survey – is entirely consistent with Emap's core arguments. It shows that customers have many options; other products are ready substitutes for PICD; Glenigan and ABI's products are not "must have" for the very large majority of customers; and customers are highly price sensitive. As Emap demonstrated in its opening statements at the second hearing, even if one assumes that a relatively high proportion of churn is for non-price reasons, the survey results show that a like-for-like price increase of 10% by a hypothetical monopolist (i.e. a price increase that was not accompanied by any increase in product quality) would be unprofitable.
5. The survey results indicate very strongly that the merged entity would continue to face constraints on its pricing behaviour post-merger that would prevent it from raising prices without offering commensurate improvements in product quality. The CC has put forward no credible reason for not relying on its own survey and its unwillingness to accept that the relevant market is wider than PICD is hard to fathom in the light of this weight of evidence.
6. The CC's attempt to use the survey selectively to support its view that the merger would lead to an SLC actually demonstrates the inherent weakness of its own case. In the Summary section, for example, the CC states (paragraph 5) that "two-thirds of those who gave a view would continue to use PICD if prices increased by 10%" and uses this result to argue that customers' sensitivity to price is low. However, this result also shows that one-third of customers would be lost if prices were to rise by 10%; in an industry characterised by high fixed costs, the CC's own modelling in the Working Paper on Market Definition demonstrates that to lose such a significant proportion of customers would be unprofitable (and the survey is actually worse for the CC's case than suggested in the Summary section given that it shows that only 35% of Glenigan customers and 40% of ABI customers would not change their behaviour in response to a 10% price rise). In short, the CC's attempt to use the survey to support its case does not stand up to even the most perfunctory of economic appraisals.

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<sup>1</sup> This is acknowledged by the CC to be the correct test in its own guidelines (Merger References: Competition Commission Guidelines, June 2003 (CC2), at paragraph 1.19). This is also recognised by the Court of Appeal to be the correct test (*IBA Health v. OFT* [2004] EWCA Civ 142, at paragraph 46 per Morritt V-C and at paragraphs 81-82, per Carnwath LJ).

*Structure of this response*

7. The remainder of this response focuses on certain procedural and evidential aspects of this inquiry that are of concern to Emap, and the CC's views on market definition and its treatment of the Robson Rhodes survey evidence. For the record, it should be noted that, just because particular statements in the Provisional Findings are not specifically addressed in this response, this should not be taken to indicate that Emap agrees with them.<sup>2</sup>

*Certain procedural and evidential aspects of this inquiry*

8. There are several aspects of the way this inquiry has unfolded which are of concern to Emap. Firstly, the CC appears to have formed a negative view in this case at the early stages of this inquiry. That was apparent from the tenor of the CC's questions at the first hearing when, for example, the Chairman suggested<sup>3</sup> that

“...at the bottom end you are pricing so cheaply nobody else is going to be able to match you and at the top end you are screwing the customers for as much as you can get out of them.”

The use of the highly pejorative word “screwing” caused great concern on Emap's part.

9. Similarly, at the second hearing on 20 October, it was apparent from the opening remarks of the Chairman that the CC had probably already come to the provisional view that this merger would result in an SLC. Tellingly, the Chairman stated towards the start of the hearing<sup>4</sup> that

“In the interests of being as transparent and open as we can be, we thought it would be helpful at the end of this afternoon's session for me to give you a brief indication of what our current thinking is. That is what I will do at the end of the afternoon.”

10. In response to a question by Mr Carter (for Emap) as to whether the members of the Group would be prepared to revise their “current thinking” on the basis of the discussions during the course of that hearing, the Chairman confirmed that they would, but in fact it now appears that the Group's views were negative, even at that stage. The nub of the CC's “current thinking” was that “there would be less competition as a result of the merger;”<sup>5</sup> a conclusion very similar to the Provisional Findings. Whilst the Chairman, in communicating the Group's “current thinking” later in the hearing, noted that the Group would “take on board” Emap's comments, in particular about the survey, It appears that the CC has, on the contrary, sought to dismiss or marginalise the crucial results of the survey that support Emap's case.

11. These two episodes suggest that the members of the Group in effect made up their minds at an early stage in this inquiry.

12. Secondly, although Emap has owned ABI since May 2004, the effect of the interim undertakings it has had to give, both to the OFT and the CC, has meant that it has had no control over the day-to-day conduct of ABI's business. That in itself is not a matter for concern or for complaint; as a general point, Emap accepts the need for hold-separate undertakings in cases involving completed mergers. ✂.

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<sup>2</sup> Emap commented in detail on the CC's Working Papers and, as most of those comments do not appear to have been addressed or considered, the CC should consider the comments made on the Working Papers as incorporated by reference in this response where relevant to the Provisional Findings and published supporting evidence on which the CC relies. A particular example of note is the CC's rejection of the comprehensive switching analysis performed by Emap, in favour of the CC's own telephone interview of just 15 customers. That point is addressed in more detail in paragraph 16 below.

<sup>3</sup> Transcript of 2 September hearing, at page 51.

<sup>4</sup> Transcript of 20 October hearing, at page 13.

<sup>5</sup> *Ibid*, at pages 54-55.

13. ✂.
14. Thirdly, it is unfortunate, to say the least, that not all the members of the Group appointed to hear this inquiry have been present at the two main party hearings held with Emap. At the first hearing on 2 September, only three out of four of the members of the Group were present. At the second hearing on 20 October, again only three out of four members were present, but this time a different group of three. Emap acknowledges that members of the Group will have been briefed by staff and will have seen the transcripts of the hearings. Nevertheless, it is regrettable that Emap has not been given the opportunity to present its views on the merits of the case in a hearing attended by all four members of the Group. The views of those members of the Group who were not present at the hearings will inevitably have been coloured by the briefings they were given by staff and by other members of the Group, whereas it is possible that those individuals might have come to a different view had they been able to engage in discussion with Emap, face-to-face, at a hearing. It is similarly a matter of regret to Emap that the site visit to Glenigan was attended only by the Chairman and one other member of the Group (who unfortunately was unable to attend for the full duration).
15. Fourthly, in relation to the evidence on entry barriers, it is worrying that the Provisional Findings do not appear to recognise that

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16. Finally, the manner in which the CC has rejected Emap's evidence on the lack of customer switching between Glenigan and ABI is also a matter of concern. Emap provided evidence that very little switching takes place between Glenigan and ABI, which suggests that the two companies are not particularly close competitors. By interviewing a tiny sample of 15 customers (of which six said they switched although Emap had only identified two of the six), the CC concluded that Emap's analysis was inaccurate and likely to have been understated.<sup>6</sup> However, Emap explained that at least two of the four customers which were not picked up appear to have switched after the dates covered by the data used in the matching analysis. Emap also provided other possible reasons for why these customers were missed out. Without further checks of the CC's customer sample, checks which cannot be conducted by Emap as a result of the undertakings it has given to the CC, it is unsafe for the CC to rely in its Provisional Findings on its telephone survey to dismiss one of Emap's most compelling pieces of evidence.

*The CC's views on market definition and its treatment of the Robson Rhodes survey evidence*

17. As stated above, there are serious concerns about the CC's approach to market definition in this case, and the fact that the CC seems intent on downplaying the significance of the results of the Robson Rhodes survey, particularly those dealing with the SSNIP test. The results of the survey are strongly supportive of Emap's case, yet the CC's approach has been to focus on the use and characteristics of PICD products, and to brush to one side the range of insights given by the survey into market definition. This is clear from the CC's conclusions on the product market in paragraph 4.71 of the Provisional Findings:

“The characteristics of PICD and the way it is used indicate that PICD is an economic market. Although many customers use a variety of means of finding new business, PICD is used for a very specific purpose, for which over a third of customers do not see an alternative product. The other sources of information on potential sales do not

<sup>6</sup> Provisional Findings, at paragraph 5.29.

provide the comprehensive and timely supply of relevant leads required by such customers. The qualitative and quantitative evidence, taken as a whole, indicates that PICD is the appropriate set of products to use as a basis for assessing the competitive constraints on the merged business. In our view, given the disparate nature of other products and methods used by companies to identify new business, and the fact that over a third of Glenigan and ABI customers saw no effective substitute for PICD, such products do not sufficiently compete with PICD to be sensibly regarded as competing in the same market.”

18. The CC cannot reasonably draw any definitive conclusions on market definition from the mere observation that PICD products have particular uses and characteristics that other products do not offer. Emap submits that that observation is an unsound basis for an analysis of market definition as it says nothing about the competitive constraints facing PICD providers.<sup>7</sup> The CC should instead have focused on the SSNIP test to work out whether a hypothetical monopolist of PICD would be able profitably to increase prices. The CC’s own guidelines clearly state<sup>8</sup> that the CC “will adopt [the SSNIP test] concept wherever it is feasible to do so” as a basis for market definition, and the CC’s decision not to do so in this case is not convincingly explained. The CC has not so far suggested that it would be infeasible to conduct a SSNIP test in this case (indeed, Robson Rhodes has conducted one), so the issue of feasibility does not arise. The mere fact (noted by the CC in paragraph 4.69 of the Provisional Findings) that 34% of Glenigan and 26% of ABI customers did not know, or were not sure, what their response to a 10% price increase would be is not an adequate basis for dismissing the answers to that question, given the key result that 22% of Glenigan customers and 25% of ABI customers clearly said they would stop subscribing in response to a 10% price increase.
19. Furthermore, the result that over one-third of Glenigan and ABI customers saw no effective substitute for PICD products is also an insufficient basis for concluding that PICD is the relevant market. A more neutral interpretation of that result would be that nearly two-thirds of Glenigan and ABI customers *did* see effective substitutes for PICD products (the number of “don’t-knows” shown at Figure 10 of the survey in Appendix B is very small). In other words, the very survey result that the CC relies on to prove its case actually points in the opposite direction. One is thus left with the clear impression that the CC has attempted to use the survey evidence in the way that best supports its own view that this merger would be anti-competitive.<sup>9</sup>
20. But that is to turn the function of a CC inquiry on its head. The purpose of a CC inquiry is to ascertain the facts and then draw conclusions, not reach conclusions first and then see if the evidence can be interpreted to support that view. The CC’s approach in this case has an *Alice in Wonderland* quality to it, in which the sentence is announced before the verdict has been delivered.<sup>10</sup>

<sup>7</sup> See also Emap’s note of 21 September 2004 which argued that to define the product market purely in terms of the characteristics of the product concerned was circular. Emap also drew attention to paragraph 36 of the European Commission’s Notice on market definition (OJ C372, 9.12.97, p. 5) where it is stated that “differences in product characteristics are not in themselves sufficient to exclude demand substitutability, since this will depend to a large extent on how customers value different characteristics.”

<sup>8</sup> Merger References: Competition Commission Guidelines, June 2003 (CC2), at paragraph 2.2.

<sup>9</sup> Similarly, it is of concern that the CC considered the results of the independent survey for some considerable time, apparently suggested amendments disfavouring Emap be made to them (see paragraph 23 below) and finally shared them with Emap for comment only a few days before the second hearing.

<sup>10</sup> “Let the jury consider their verdict,” the King said, for about the twentieth time that day. “No, no!” said the Queen. “Sentence first - verdict afterwards.” “Stuff and nonsense!” said Alice loudly. “The idea of having the sentence first!” “Hold your tongue!” said the Queen, turning purple. “I won’t!” said Alice. “Off with her head!” the Queen shouted at the top of her voice.”” See *Alice’s Adventures in Wonderland*, Chapter 12, by Lewis Carroll.

21. Emap's concerns in this case are compounded by the CC's explanation of why it considers it unsafe to rely on the results of the SSNIP test. At paragraph 4.70 of the Provisional Findings the CC states:

"However, we remain concerned as to how much weight can be placed on these results. The survey attempted to measure responses to a hypothetical situation. (18) Assumptions are needed to take account of customers that would leave in any event. As the survey report states (Appendix B), the relatively high number of people who were not able to give a definitive answer to this question can probably be explained by the complexity of the decision. We remain of the view that the range of assumptions that needs to be made about the interpretation of the survey evidence relating to how customers would respond to a price rise prevents a clear conclusion from being drawn. Even if, on balance, the calculations from the survey evidence showed that a price increase of 10 per cent was likely to be unprofitable, this needs to be seen in a context where over a third of customers believe there is no effective substitute for the sales lead generating products, where price is not the main reason for customers switching away from the product, and where prices have been profitably increased. Taking the evidence as a whole, we consider that it shows the principal competitive constraints on Glenigan and ABI operate from within the supply of PICD, which should accordingly be the starting point for assessing the competitive constraints that will remain on Emap post-merger.

(18) Respondents might have had difficulties in answering these particular hypothetical questions, which came at the very end of the survey. Moreover, we note the evidence of inconsistencies in responses between the questions where customers were asked whether they would continue to subscribe if prices rose by 10 per cent and the question where respondents were asked what was the maximum price they were willing to pay: for example 12 per cent of those who said their subscription would continue following a 10 per cent price rise quoted a maximum price below 10 per cent higher than their current price. 35 per cent of those who would stop subscribing quoted a maximum price over 10 per cent above current prices. See also Appendix B."

22. It seems odd that the CC is willing to place so much weight on the result that a third of customers saw no effective substitutes to PICD products, when it is at the same time so eager to dismiss the result relating to the SSNIP test. In fact, it is not credible for the CC to suggest, as it does in footnote 18 of the Provisional Findings, that the complexity of the question may have contributed to respondents not understanding what was being asked. It is implausible that such design flaws in the survey should only have come up at such a late stage, given that the CC was closely involved in the design of the survey, and given that a pilot study was conducted in order "to test the questionnaire for clarity, logic and relevance to ensure that the final questionnaire used in the main survey was as robust as possible" (Appendix B, at page 3). The response to the SSNIP test question (Appendix B, at page 15) is unambiguous and the CC is wrong to dismiss or marginalise it: 22% of Glenigan and 25% of ABI customers stated that they would stop subscribing in response to a 10% price increase. This is a sufficient proportion of customers to render such a price rise unprofitable.
23. At the staff meeting on 27 October, Emap's representatives asked the CC staff to clarify a statement appearing in the Robson Rhodes report (Appendix B, at page 14) to the following effect

"...it should be noted that respondents were not asked to confirm that the price rise was the reason for stopping the subscription. The question does not ask for respondents to indicate if they would have stopped the subscription in any event."

Specifically, Emap's representatives asked the question whether that statement had been inserted by Robson Rhodes of their own initiative, or at the instigation of the CC. Rather to Emap's surprise, the CC staff indicated that the report had been prepared in consultation with

the CC,<sup>11</sup> and that this comment had actually been included at the instigation of the CC. Emap's representatives asked the CC to provide Emap with copies of the earlier drafts of the report and the relevant correspondence with Robson Rhodes, so that Emap could understand more fully the circumstances in which this comment had been included. By letter of 8 November, the CC informed Emap that the Group had "carefully considered this" but had "concluded that it is not appropriate to make the correspondence with its contractor available." Emap regards this state of affairs as profoundly unsatisfactory. It lends further weight to Emap's suspicion that the CC regards the results of the SSNIP test as somehow "inconvenient", and that it is consequently seeking to downplay them.

24. Although the CC claims to base its conclusion on "the evidence as a whole", Emap is not sure what evidence is being referred to. If it is the observation that a third of customers saw no effective substitute for PICD products, that evidence supports Emap's case, since it suggests that the majority of customers think there *are* effective substitutes. It is difficult to see how the CC can credibly rely only on the minority view of respondents to that question and ignore the fact that the majority of customers actually said the opposite. If it is the observation that price is not the main reason for customers switching away from the product, Emap has already explained that, even taking account of underlying churn, the results of the survey question dealing with reservation pricing show that a like-for-like price increase would be unprofitable.<sup>12</sup> As to the so-called evidence of profitable price increases in the past, the CC appears to ignore the very basic point that this is not a proper like-for-like comparison, because the products were significantly enhanced during the period under consideration.

#### *Conclusion*

25. In conclusion, Emap submits that the totality of the evidence in this case falls a long way short of justifying an adverse finding, and that the CC has failed to satisfy the necessary burden of proof. The CC has wrongly sought to dismiss or marginalise the crucial results of the survey that support Emap's case. If the CC were to confirm the its Provisional Findings in their current form, this would provide a clear basis for challenge before the CAT. Emap therefore urges the CC to reconsider its Provisional Findings.

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<sup>11</sup> Emap notes that this point is now explicitly acknowledged in Appendix B, at page 1 of the Provisional Findings.

<sup>12</sup> Emap's views are summarised at paragraph 4.86 of the Provisional Findings.