

REFERENCE RELATING TO THE COMPLETED ACQUISITION BY CAPITA GROUP PLC OF IBS OPENSYSYSTEMS PLC

Notice of possible remedies under Rule 11 of the Competition Commission Rules of Procedure

Introduction

1. On 19 November 2008, the Office of Fair Trading (OFT), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred to the Competition Commission (CC) for investigation and report the completed acquisition by Capita Group plc (Capita) of IBS OPENSYSYSTEMS PLC (IBS) (the acquisition).
2. In its provisional findings on the reference notified to Capita and IBS (the main parties) on 1 April 2009, the CC inquiry group (the Group) concluded provisionally that the acquisition had resulted in the creation of a relevant merger situation; and that the creation of that situation may be expected to result in a substantial lessening of competition (SLC) in the market for the supply in the UK of revenues and benefits (R&B) software and related services supplied by the same supplier as a single system (the R&B market). The Group expects that the acquisition will lead to higher prices, lower service levels and/or lower levels of innovation than would otherwise be the case in that market.
3. This Notice sets out the actions which the Group considers might be taken by the CC, including any recommendations it might make for action on the part of others, for the purpose of remedying the SLC and any resulting adverse effects and invites comments on possible remedies (see note).

Criteria

4. In choosing appropriate remedial action, the Group shall have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.¹ When deciding on an appropriate remedy, the Group will first consider the effectiveness of different possible remedies in addressing the SLC. The Group will then assess the costs of those remedies that it expects to be effective in addressing the SLC. If there are two or more remedies that the Group considers equally effective, it will choose that remedy which imposes the least cost or restriction. In assessing proportionality in completed mergers such as this, the CC will not normally take account of the costs or losses that will be incurred by the merged parties as a result of a divestiture remedy.²

Possible remedies on which views are sought

Divestiture

5. The Group invites views on whether the divestiture by Capita of all or part of the IBS business would be effective in addressing the expected SLC.

¹Section 35 (4) of the Act.

²[Merger Remedies: Competition Commission Guidelines, CC8, November 2008, paragraph 1.10.](#)

Full divestiture

6. The Group considers that divestiture of the entire IBS business to a suitable purchaser would be an effective remedy for the expected SLC as it would restore the competitive situation absent the merger.

Partial divestiture

7. Given that the SLC identified relates only to the R&B market, the Group is considering whether an alternative divestiture package involving only the R&B business unit of IBS could be effective. The CC will normally seek to identify the smallest viable, stand-alone business that can compete successfully on an ongoing basis.³
8. The Group would therefore be interested to hear views on how a divestiture package comprising only the R&B business unit of IBS could be effective in addressing the SLC. In particular, the Group will need to consider:

(a) how any practical difficulties in separating the IBS business at a business unit level (into R&B and other activities) could be successfully overcome. In particular:

- what restructuring would be required to the IBS business—this will depend to an extent on the identity of any potential purchaser and the scope of assets acquired, for example: intellectual property, sales and marketing functions, customer support services, facilities, etc;
- whether it is feasible to establish an independent R&B business unit with the appropriate management and staffing as well as the necessary sales and marketing, customer support and product development capability;
- how any facilities and/or customer support services shared between IBS's R&B business unit and its other business units could be separated;
- how any necessary intellectual property (eg software code), product development capability and other know-how could be separated between R&B and other activities; and
- whether it would be straightforward to identify and legally transfer out R&B assets and liabilities from the IBS business;

(b) whether the R&B business unit of IBS could compete effectively in the market, including in terms of customer perceptions, on a stand-alone basis or in combination with another business; and

(c) whether a divestiture package comprising only the R&B business unit would attract suitable purchasers (eg because there is no track record of this scope of activities operating in the market on a stand-alone basis).

Suitable purchasers

9. The Group also invites views on the identity of possible suitable purchasers for the divestiture packages described above. In general, as described in the CC's guidance, the CC takes the view that a suitable purchaser should have no significant

³Ibid, [paragraph 3.7](#).

connection to the merger parties that may compromise the purchaser's incentives to compete; have access to appropriate financial resources, expertise and assets; have an appropriate business plan; and be free from competition concerns.⁴

10. In relation to the divestiture process, the Group would be interested to hear views on whether purchasers should be given an option to bid as they wish for either the whole of IBS or the R&B business unit only. This would give potential purchasers an opportunity to make their own choice.
11. The Group also notes that a divestiture trustee may be appointed to ensure divestiture to a suitable purchaser if the merger parties are unable to secure divestiture within an initial divestiture period.⁵ Given the potential complexities of identifying a partial divestment package, the Group may need to consider whether to appoint a divestiture trustee at an early stage in the process.

Behavioural remedies

12. The Group considers at this stage that behavioural remedies would be unlikely to be effective in addressing the SLC.
13. Remedies whereby Capita would, for example, maintain a choice of the IBS or Capita software systems for existing and new customers, continue to invest in both software systems, or waive any fixed term in any existing contract, would not restore rivalry in the R&B market and so would not address the SLC.
14. Remedies in the form of a price control (eg a reduction in fees charged to new customers to a specified percentage below the average of historical fees) would not address the reductions in service levels identified as part of the adverse effects of the SLC.
15. Price control remedies would also be unlikely to be practicable to implement because contracts with each customer are unique with different service requirements, such that prices are individually negotiated. An average contract value, for example, is not particularly meaningful. Moreover, there is a range of prices that would need to be regulated (including initial licence fees, implementation fees and annual maintenance fees) that would make a price control extremely complex and costly to design and monitor in a market characterized by extensive information asymmetries between customers and suppliers.
16. The Group has not identified any other behavioural remedies that would overcome these complex design and monitoring issues. However, the Group will consider any alternative behavioural remedies that would be effective in remedying the SLC.

Other measures

17. The Group will consider any other practicable remedies—whether structural or behavioural, or involving recommendations to others—that the main parties or any third parties propose in order to address the expected SLC and any resulting adverse effects.

⁴Ibid, paragraph 3.15.

⁵Ibid, paragraph 3.26.

Relevant customer benefits

18. The Group will have regard to the effects of remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the merger situation. Such benefits might comprise lower prices, higher quality or greater choice of goods or services in any market in the UK or greater innovation in relation to such goods or services.⁶ A benefit is only a relevant customer benefit if the CC believes that: (a) the benefit has resulted from the creation of the relevant merger situation concerned or may be expected to do so within a reasonable period; and (b) the benefit was, or is, unlikely to arise without the merger or a similar lessening of competition.⁷
19. The Group welcomes views on whether any relevant customer benefits exist, and, if so, the nature, scale and likelihood of such benefits.

Next steps

20. The main parties and any third parties are requested to provide any views in writing, including any practical alternative remedies they wish the Group to consider, by 20 April 2009 (see note).
21. A copy of this notice will be posted on the CC website. Other interested parties are requested to provide any views in writing, including any other practical remedies they wish the Group to consider, by 20 April 2009.

(signed) CHRISTOPHER CLARKE
Group Chairman
1 April 2009

Note: This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings announced on 1 April 2009. The main parties have until 27 April 2009 to respond to the provisional findings. The Group's findings may alter in response to comments it receives on its provisional findings, in which case the Group may consider other possible remedies, if appropriate.

⁶Ibid, paragraph 1.14.

⁷Ibid, paragraph 1.16.