SUMMARIES OF RESPONSES TO CONSULTATION ON FIVE PUBLICATIONS REQUIRED BY THE ENTERPRISE ACT 2002

Introduction

The Competition Commission (the Commission) published for consultation on 18 September 2002 the Commission Rules of Procedure and four guidance documents which it is required to produce under the Enterprise Act 2002 (the Act). The consultation period ended on 10 December and these summaries of the responses relating to each document are issued simultaneously with the newly published version of the documents dated March 2003 now on the website.

The documents were:

- The Commission Rules of Procedure: September 2002
- General Advice and Information: September 2002
- Merger References: Competition Commission Guidelines: September 2002
- Market Investigation References: Competition Commission Guidelines: September 2002
- Statement of Policy on Penalties: September 2002.

The summaries of responses appear in this order, the two economic guidelines on mergers and markets being considered together

We received responses from 23 organisations (law firms, economic consultancies, representative bodies of business, competition lawyers and newspapers, regulators and government) and individuals. The responses often covered more than one document and the Commission would like to thank all involved in producing them for their time and trouble.

We also benefited from the contributions made at the Commission's open consultation seminar on the merger and market investigation guidelines attended by some 200 interested people on 18 November 2002.

The exercise has, we believe, improved the end product in general and in detail.

A list of respondents is attached as an Annex and we will make copies of the responses available on request unless any respondent has asked that his or her response should remain confidential.

THE COMMISSION RULES OF PROCEDURE

1. General comments

1.1 As a result of comments received and further policy development in the Commission there are some changes to the Rules. They are:

- Removal of any reference to Deputy Chairmen acting for the Chairman, because the statute already makes provision for this (Competition Act 1998 Schedule 7 paragraph 3 (5)).
- A new Rule 5 establishing a Standing Group whose functions will include, but are not limited to, work on remedies after the original group has completed its negotiations on remedies and implemented them.
- The inclusion of Rules 8.1 and 8.2 to require evidence to be taken on oath, or by affirmation.
- Revised provisions for the exclusion of matters in line with disclosure considerations in Rule 10 (5) (c) (formerly 9.9), new Rule 11.4, and revised Rule 14.1 (formerly 13.1)
- An expanded Rule 11 to clarify the remedies procedures before the report is completed, especially as regards consultation on and publication of proposed remedies.

1.2 Some of the points asking for more information about the stages of an inquiry are answered by material in General Advice and Information (A&I) Part 6: Procedures and Tables 2 and 3.

1.3 Likewise, there is more material on disclosure provisions in A&I Part 6, though it may well be that we shall amplify that further either in Chairman's Guidance or elsewhere.

1.4 One respondent sought some guidance on the use of structural or behavioural remedies in the Rules. These issues are dealt with at length in Part 4 of both the merger and market guidelines.

1.5 Another respondent raised the issue of consultation on post–report implementation of undertakings or orders. This is provided for in Schedule 10 of the Act and summarised in Part 7 of A&I.

2. Detailed comments

2.1 A number of responses asked that in circumstances where the Chairman gave advice to a group, the parties should also be given access to the Chairman, or his advice conveyed to the parties, or the advice formally recorded.

> - We have decided not to provide for this in the rules. A group must have regard to any advice given by the Chairman but ultimately it is the decision of the group that matters. If parties were to be given direct access to the Chairman whenever he offered a group advice it would unduly hinder the inquiry process. The Commission will note any advice given by the Chairman.

2.2 Some responses urged public hearings should be the general rule except when disclosure issues arose; others said that in most cases public hearings were not beneficial.

> - Accordingly, we have concluded that the balanced approach in the Rules which allows for both and sets out the relevant considerations for the group when deciding which to adopt is the one we should maintain.

2.3 A number of responses sought more certainty in the rules about the entitlement of the parties to an oral hearing.

> - It will not be necessary to have oral hearings in every single instance. We believe that the rules as drafted strike the right balance. Further guidance on oral hearings will be found in A&I Part 4 and the Chairman's Guidance.

2.4 Some respondents asked for a policy on investigation powers as well as penalties.

> - We believe that it is inappropriate to include policy considerations in what are rules of procedure. However guidance on the Commission's approach will be contained in the Chairman's Guidance.

2.5 Parties should have longer than 21 days to reply to provisional findings and the Commission should be willing to extend the period.

> - The Commission has to reach decisions on the competition questions and on remedies within a tight time-scale. Rule 10.5 provides for a minimum of 21 days. If Commission can allow longer it may do so but it would be unrealistic to promise that this will often be possible, especially for the more complex merger cases.

GENERAL ADVICE AND INFORMATION

1. General Comments:

1.1 A number of respondents felt there was a need for more explanation of:

- The functions of the Council and the relationship between the Council and the Commission.
- The timing of the remedies stage and the post-report implementation and enforcement process.
- The disclosure provisions and how they will work in practice, including a disputes facility for contested disclosure issues.
- The form and content of new-style reports.
- The regulatory references that may be made to the Commission.
- The review and appeal provisions.
- The relationship of the Commission and European competition bodies and law.
- The regulatory references which may be made to the Commission.

1.2 On all these points the final version includes some more information to the extent that it is available and so far as it is compatible with the balance of what is an overview document. We may publish more detail on some of these topics in the future, either in the Chairman's guidance or as a free-standing document.

1.3 Inaccuracies have been corrected and cross-referencing and unclear drafting improved.

2. Detailed comments

General

2.1 Mergers and market investigations deserve a separate document each for convenience of the parties.

- We achieved this for the economic guidelines but it was not suitable for an overview document designed to be accessible to all.

2.2 Anticipate new legislation e.g. the Communications Bill and the Water Bill.

- We decided to flag relevant points but not to anticipate the outcome of legislation. Further guidance may be issued in due course.

2.3 Include more material about the content of orders.

- As a general rule we decided not to repeat either substantial chunks of material in the Act (the possible content of orders is described in Schedule 8) or the Rules but to cross-refer.

Part 6: Procedures

3.1 It was this area that drew most comment.

3.2 Provide for a main party hearing prior to the issues statement.

- This does not occur at present. The prime function of the main party hearings is for the CC to explore with the main parties the key issues that appear to be at stake. Many of these issues are identified from the Commission's review of written information received from OFT and the parties, and third party hearings. Introducing another main party hearing would not be useful and would threaten the new tight timetable.

3.3 Include detail of what information the Commission would expect to be contained in submissions from main parties and more guidance about a typical hearing.

- Both good points but too detailed for this document. Additional guidance will be included in the internal Commission guidance and made available to all parties to inquiries and placed on the website in due course.

3.4 Include guidance about who can cross-examine witnesses, including expert witnesses.

- Rule 8.1 makes clear that this is a matter for each group to decide.

3.5 Parties should have longer than 21 days to reply to provisional findings and the Commission should be willing to extend the period.

- See comment on Rule 10.5 at paragraph 2.5 above.

3.6 Special reference groups also should publish provisional findings.

- Such groups will have discretion whether to publish provisional findings. The mandatory requirement to publish provisional findings is partly a reflection of the new duty to consult on certain key questions required by the Act which applies only to merger and market references.

3.7 Third parties should have a chance to comment on remedies before decisions are taken.

- Although the requirement to consult applies only to consulting the main parties (Rule 11.2) there is a requirement to publish a statement of proposed remedies on the website and the Commission would consider any representations third parties chose to make.

MERGER REFERENCES: COMPETITION COMMISSION GUIDELINES

MARKET INVESTIGATION REFERENCES: COMPETITION COMMISSION GUIDELINES

The following is a topic-by-topic summary of the main comments made by various respondents as a result of the Competition Commission's consultation on economic guidance.

1. General comments

1.1 A number of respondents questioned whether the OFT and CC should have separate guidelines. Some respondents suggested that the OFT and CC should prepare a single, common, text covering the issues of market definition and the application of the SLC test. However, others felt that separate guidelines were, on balance, sensible or necessary.

- After consultation with the OFT the CC decided that it was appropriate to maintain separate guidelines because of the different roles of the CC and the OFT. However, we have reviewed the differences between the two guidelines and removed any apparent inconsistencies. Where there is some variation, this reflects the different roles of the OFT/CC.

1.2 Some respondents suggested that other CC guidelines such as the General Advice and Information and the Rules of Procedure should be merged with the merger/market guidelines to make a single comprehensive booklet.

- The CC considered that separate guidelines for the different topics were required.

1.3 Some respondents questioned whether the guidelines made adequate reference to the fact that the implementation of competition law in the UK was a combined operation under EU and UK law. They requested more references to EU case law.

- Included in the revised version of the merger and market guidance (and also the General Advice and Information) is an explanation of the relationship between the UK merger regime and the EC merger regime, the relationship between the market regime and the application of the Competition Act 1998 and the impact of the EC modernisation provisions relating to the application of Articles 81 and 82 of the EC Treaty.

1.4 Some respondents argued for more examples to be inserted in the guidelines.

- The CC considered this request and decided to consider adding more examples to future drafts of the guidelines as experience developed in the new regime.

1.5 Some respondents suggested that the CC think seriously about a more readable form of presentation, whether by different layout, use of headings, bullet points, boxed paragraphs or whatever. They stated that the CC would benefit from its material being as accessible and readable as possible.

- In addition to providing further explanation of some points, the presentation has been revised.

1.6 Some respondents asked for more clarification of the distinction between the concepts of adverse effect on competition (AEC) and the substantial lessening of competition (SLC). Some stated that there was a lack of guidance on when the CC would consider that a merger had substantially lessened competition.

- The CC has made a number of amendments to the guidance to provide further explanation of the meaning of "SLC" and "AEC".

1.7 Some respondents noted that little indication was given as to market shares or concentration thresholds that might cause concern.

- The CC considered whether sufficient indication had been given to market shares or concentration thresholds that might cause concern and made changes where necessary (eg HHI thresholds were added).

1.8 One respondent stated that market investigations represented a considerable workload for the businesses and firms affected and it wished to see investigations conducted with maximum clarity and minimum cost. He said that on a number of occasions during the passing of the Enterprise Bill, Ministers gave assurances that investigations would only be carried out if there was found to be a significant effect on competition and that he would wish to see this principle endorsed by the guidelines.

- The CC considers that this is a matter for referring authorities within the terms of the legislation.

2. Introduction

2.1 One respondent stated that the introduction to the guidelines gave the CC considerable latitude to take a case-by-case approach and depart from the published guidance. He felt that the wording should be modified to give reassurance that the CC would aim at a consistent approach in assessing mergers.

- To address this concern, the revised text explains that the the CC will aim to use a systematic approach to investigations but that there may be circumstances in which it will be appropriate for the CC to depart from the approach described in the guidance.

3. SLC (Mergers)

3.1 Some respondents said that given the novelty of the SLC concept, the CC should treat this key issue in a separate section. The respondents said that the guidelines should also illustrate how the CC would decide if a merger met the SLC test. Another respondent said that the definition of a SLC differed from that in the OFT's guidelines and that it was set out so briefly in the CC guidelines as to provide little guidance.

- The CC considered these comments. As a result, it made the SLC a separate section and brought its treatment in the guidelines forward. The CC also considered whether it had sufficiently illustrated how it would decide if a merger met the SLC test and made changes where necessary. Lastly, the CC consulted with the OFT to make sure that the definition of a SLC did not differ materially between the two sets of guidelines Lastly, the CC consulted the OFT to make sure that, for the descriptions of the SLC in the two sets of guidelines, the sense and underlying concepts were the same.

3.2 Some respondents said that the guidance should explicitly identify the factual situation with which the CC would compare the post-merger competitive conditions (i.e. what is described in the OFT guidelines as the counterfactual).

- The CC guidance has been revised to explain its approach to the counterfactual.

3.3 One respondent noted that the OFT made it explicit that it would be guided by European case law as to the meaning of the expression '*prevention, restriction and distortion of competition*' whereas the CC gave no such indication. If the CC was to take a different approach its reasons should be clearly stated.

- The revised market guidance incorporates an explanation that the phrase will be interpreted broadly using its ordinary and natural meaning so as to include any adverse effect on competition or potential competition.

4. AEC (markets)

4.1 A few respondents asked for more guidance on the issue of when a market investigation might focus on a single firm, given the overlap with the Competition Act 1998 (CA). One respondent stated that whilst the CC might feel able to act in this way it would be helpful if the guidelines explored further the position in relation to Article 82 after the implementation of 'modernisation' in May 2004. Another respondent queried whether the introduction of market inquiries signified a change of position from the policy concerning the use of the monopoly provisions under the Fair Trading Act 1973 (FTA).

4.2 Another respondent stated that whilst single-firm behaviour was covered by the CA, there were a number of situations in which a large market share was the result of structural features of the market (including the ownership of intellectual property rights (IPRs) which could not be addressed under the CA). It said that market investigations under the Enterprise Act (EA) might be appropriate in such cases and it considered that the guidelines should recognise this possibility more openly.

- The revised market guidance includes an explanation of the types of cases that might be referred to the CC and refers also to the OFT guidance (OFT Market Investigation References). In particular, it comments on the relationship between the market regime and the CA and the implications of the EC modernisation provisions relating to the application of Articles 81 and 82. Further guidance may be provided in due course in respect of the EC modernisation.

5. SSNIP test

5.1 Some respondents said that the two exercises, of market definition and the assessment of competition, were likely to overlap and, that the CC should make this clear. Some stated that market definition was simply a tool for assessing competition or market power, and expected that it would be undertaken simultaneously as part of any broader assessment of competition or market power using similar information, for example about substitutability. To suggest that the exercise (market definition) would be carried out separately (from the competition assessment) would not reflect the reality of the CCs work in an investigation.

- The CC considered this point and as a result changed its treatment of the market definition and competition assessment in the guidelines.

5.2 Many parties queried why the CC used 5 per cent as the price rise to be used for the SSNIP test, when the OFT used 5 -10 per cent.

- The CC considered its treatment of this issue and made changes where it deemed necessary. The guidelines explain why the CC considers that it is appropriate for it to normally use 5% for the SSNIP test. As the OFT and CC have different roles there is no a priori reason why both sets of guidelines should use the same price increase for the SSNIP test.

5.3 Some respondents stated that a unique relevant product market might not necessarily result from the hypothetical monopolist test.

- The CC considered this comment and made changes where necessary.

5.4 Some respondents noted that there was little discussion in the guidelines of the so-called 0:1 fallacy whereby excessive importance was attached to intra-market competition and too little to competitive pressure from outside the defined market.

- The CC considered this comments and made changes where necessary.

6. Competitive versus existing prices for the SSNIP test

6.1 Some respondents stated that as the CC was interested in what the effect of a merger was on existing competition, it should assess market definition using prevailing prices. However, others believed that there might be reasons for using 'competitive' prices rather than prevailing prices.

- The CC considered its treatment of this issue and made changes where necessary.

7. Temporal markets/market segments

7.1 One respondent suggested that references to market segments were potentially confusing as compared to whether there were separate markets.

- The CC considered this and changed the section on market segments.

Chains of substitution

7.2 A few respondents said that it would be appropriate to list legislative barriers to entry, differing consumer preferences, marketing behaviour, advertising and pricing strategies as being additional factors to account for in determining the geographical extent of the market.

- The CC considered this and made changes where necessary.

8. Market shares

8.1 Some respondents noted that the CC guidelines did not state a preferred basis for calculating market share. These respondents said it would help if the CC expressed its preferred method of measurement.

- The CC considered this point but decided that the appropriate basis for calculating market share would depend on the individual investigation.

8.2 One respondent said that more guidance on what the CC regarded as a '*large market share*' or a '*relatively large market share*' would be useful.

- The CC added further guidance in the section on market shares on what size of market share would raise potential concerns

9. Herfindahl and other concentration measures

9.1 A number of respondents suggested that the CC should not disregard completely the HHI (or other concentration measures) in its analysis.

- The CC considered this comment and changed the section on HHI as a result.

9.2 Some respondents said that footnote 19 in the merger guidelines (which gave the mathematical expression for the HHI) be deleted as it was '*gratuitously technical*' and would probably puzzle more people than it enlightened.

- The CC deleted this footnote.

10. Information asymmetries

10.1 Some respondents said that the existence of some information asymmetries would not prevent intense rivalry. They said that the guidelines currently suggested that only with perfect or near perfect information could there be intensive rivalry and that this implied a very high test of a well functioning competitive market. They stated that any supplier would know more about the quality of its product than its customers - unless the product was a uniformly standard, basic commodity there would always be an information asymmetry between buyer and seller. As a result they claimed that this appeared to be a normal feature of markets rather than a distortion. The respondents said that the guidelines should be reworded to make it clear when an information asymmetry could be considered as a distortion in need of correction.

- The CC considered this issue and made changes where necessary.

11. Non-price competition

11.1 One respondent said that non-price competition was more prevalent than the drafting suggested and the guidelines should be amended accordingly.

- The CC considered this issue and made changes where necessary.

12. Impact on rivalry of a merger

12.1 A couple of respondents stated that a combined market share of 25 per cent was a very low indicative threshold for mergers giving rise to substantive issues. They suggested a higher threshold of 40 per cent.

- Although the guidelines state that a combined market share of 25% or above would normally be sufficient to raise potential concerns (paragraph 3.4) they also make it clear that a firm with a large market share will not necessarily be able to exercise market power (paragraph 3.3). Whether or not a particular market share is a concern will depend on the context.

12.2 One respondent said that the merger guidelines suggested that the CC might intervene even in a merger that would not meet the share of supply test (i.e. one in which the combined market share was less than 25 per cent). It said that it would be helpful if the CC could clarify that this would be highly unusual.

- The CC considered this issue and made changes where necessary.

13. Efficiencies

13.1 One respondent suggested that the section on efficiencies was very limited and should be expanded. He said that further guidance and discussion on the use of efficiency defences together with the guidance on the kinds of evidence which would be required would enhance legal certainty. Another respondent said that the present wording of the efficiencies section indicated an undue scepticism towards efficiency gains.

- The CC considered these points and redrafted the section on efficiencies.

14. Unilateral effects

14.1 Some respondents noted that the OFT guidelines had a more extensive checklist of points to consider in the context of unilateral effects.

- The CC considered this point and, in consultation with the OFT, redrafted the section on unilateral effects.

15. Co-ordinated effects

15.1 Some respondents suggested that, for clarity, the CC should mention that the co-ordinated effects resulting from a merger were also referred to as a situation of ‘collective dominance’ at the EU level.

15.2 Some respondents considered that the availability of punishment mechanisms against all members of a potential oligopoly was indispensable to the issue of whether co-ordinated behaviour was likely. One respondent queried whether the guidance was consistent with the Airtours judgment in this respect.

15.3 One respondent noted that the paragraphs on co-ordinated effects contained no discussion of the potentially crucial market impact of 'maverick' firms.

15.4 One respondent suggested that the stability of market shares over time might be a further characteristic that might facilitate co-ordination. Another respondent suggested that the degree of regulation in the market might limit the extent of competition in the market and foster co-ordination (and so could be added to the characteristics that might facilitate co-ordination).

15.5One respondent said that whilst excess capacity might make co-ordination more difficult, in some instances it could make co-ordination easier. This was because firms with excess capacity had an increased ability to retaliate and punish rivals who cheated on any tacit agreements. Similarly whilst the guidance stated that switching costs might also help facilitate co-ordination, in some instances switching costs could be shown to increase competitive pressure which might threaten any co-ordination.

15.6One respondent said that it would be helpful to know how the CC proposed to proceed if it found features of the market which gave rise to a breach of the CA (particularly with regard to collusion).

- The CC considered each of these points and, in consultation with the OFT, redrafted the section on coordinated effects.

16. Co-ordinated and unilateral effects

16.1Some respondents noted that the OFT guidelines classified instances where rival firms benefited from reductions in competitive pressure as a result of a merger but without tacit or express collusion as 'unilateral' anti-competitive effects. However, the CC guidelines defined such 'non-cooperative' outcomes as co-ordinated effects.

- The CC considered this point and, in consultation with the OFT, made changes to the unilateral effects and coordinated effects sections.

17. Barriers to entry, expansion and exit

17.1One respondent felt that forward and/or backward integration merited consideration as a possible source of market entry.

- The CC considered this point and incorporated it in the section.

17.2 One respondent, in particular, said there was considerable room for improvement in the CCs treatment of, essentially, supply-side issues. In the context of merger inquiries it pointed out that the CC only need consider the following question, '*if post-merger prices were to rise, would that price rise attract entry or other similar supply-side responses to defeat this exercise of market power by the merging firms?*' It said that the guidelines would be better focussed on this limited but crucial question.

- The CC considered this point and, as a result, redrafted the section on entry in the mergers guidelines.

18. Buyer power

18.1 Some respondents said the CC should refer to the ability of a buyer to constrain the activities of a supplier by threatening to stop purchasing other products sourced from the supplier. Additionally, the ability of customers to impose costs on the supplier (eg by refusing to buy other products, by delaying purchases or displaying the manufacturer's products poorly in retail outlets), and the ability of customers to foster new entry were other means that could be considered as means of constraining the activity of suppliers (and that were not in the guidelines).

18.2 Another respondent said that it was worth explaining that there could also be countervailing supplier power to a merger of buyers.

- The CC considered these points and made changes where necessary.

19. Failing firm defence

19.1 One respondent suggested that the OFT's treatment of the failing firm defence was '*more elaborate and arguably more stringent*' than the CCs.

19.2 Another respondent noted that whilst the guidelines dealt with failing firms they did not, in contrast to the DoJ/FTC guidelines, deal with failing divisions.

- The CC considered these points and discussed them with the OFT. It added a sentence on failing divisions or subsidiaries.

20. Conglomerate mergers

20.1 Some respondents noted that the OFT guidelines talked of conglomerate mergers and portfolio power – but that such issues were not dealt with in the CC guidelines.

- The CC considered this point and made some changes to the text.

21. Profitability

21.1 Some respondents felt that more guidance on how profitability would be considered was necessary.

21.2One respondent said that an analysis of profitability would be important but there was an implication that the CC would have a benchmark of what were considered to be acceptable profits and that anything above that would be considered excessive. It said that the guidelines might be improved by setting out the CC's approach to assessing profitability in the newer markets for services and products with a high intellectual property value, such as those in the media and software industries. A test such as the return on depreciated replacement cost of assets would not appear appropriate and it would be helpful for business to understand the CC's normal approach to these markets. It said that guidance on the cost of capital would also be useful.

21.3Another respondent said that the CC should acknowledge the very real difficulties with using profitability as a measure of market competitiveness. It said that high profits for a transitory period might well indicate a successful strategy by a particular company rather than any inherent lack of competition in the market, for instance.

- The CC considered these points and made changes, where necessary, to the section on profitability.

22. Remedies

22.1One respondent argued that the CC did not consider what it would do if it had the choice between recommending a change to public policy or a second-best solution which is in the CC's power to order.

- The CC does not think it necessary to add to its guidance as previously drafted(now mergers paragraph 4.21 and markets paragraph 4.21). In the case of mergers, it will generally be the case that recommendations on action by others will be additional to action taken by the Commission itself. The inherent uncertainty arising from making recommendations will be taken into account in market inquiries when deciding whether to make a recommendation and the application of the guidance will be on a case-by-case basis.

22.2In the draft merger guidelines the CC stated that it would not consider the costs of divestment to the respondents in deciding on remedies in the case of completed mergers. A number of the respondents expressed concern at this statement. One felt this represented a change in UK merger policy, which was inappropriate given the decision to retain a voluntary notification merger regime. Another respondent made a similar point stating that such an approach was inappropriate in a voluntary notification system. Another said that such an approach was '*unduly harsh*'.

- The CC changed its guidance to acknowledge that in exceptional circumstances the CC would consider divestment costs and to provide additional explanation of its approach to the consideration of divestment costs (mergers paragraph 4.10).

22.3 One respondent suggested that some guidance on the time period within which a divestment would have to be made would be useful.

- The CC consider that any information additional information of the sort suggested could be counter-productive because the period in which any divestment might be required will need to take into account the circumstances of the case, including the prevailing market conditions at the relevant time.

22.4Some respondents requested more guidance on whether (and if so how) the CC intended to appoint trustees to monitor the divestment process and the duties it would expect them to perform.

- The CC decided that it was sufficient to maintain their previous reference to trustees (mergers 4.25). The CC will consider providing additional guidance in due course.

22.5The identity of any buyer of a divestment package was potentially of importance and therefore merited some mention in the CC guidelines according to some respondents. One respondent also asked whether the CC would require an upfront identifiable buyer in particular cases.

- The CC decided that this too was an area that would be very much dependant upon the facts and circumstances of the case.

22.6One respondent said that the need for consultation, the time at which any consultation would be undertaken, and the time such consultation would take were all matters that could be covered in the guidelines.

- This topic is covered in rule 11 and General Advice and Information paragraph 6.22

22.7One respondent asked for more guidance on what was meant by ‘costs to society’ so as to illustrate what factors the CC will and will not consider with respect to remedies.

- The CC has substituted for this phrase an amplified explanation of the intended point, namely that when it has made an adverse finding, it is usually expected that the cost or disadvantage to the UK economy in general and customers in particular will outweigh the costs incurred by the person on whom remedies are imposed. (markets 4.10).

22.8A number of respondents expressed concern at the CC’s stated preference for structural remedies in relation to market investigations.

- ➢ The CC has considered this point and modified the guidance (markets 4.15).

22.9 With regard to merger investigations, one respondent said that the principle the CC should follow in setting remedies was to '*avoid the creation of a dominant position*'. As a result it said that the CC should not prefer one type of remedy over another; nor should it adopt a position of shifting the burden of proof onto the parties, in effect requiring them to show that prohibition and divestment are not the most appropriate remedies.

- ➢ The guidance explains that there are a number of factors that will be taken into account when determining a comprehensive remedy that is "reasonable and practicable" (paragraph 4.5). It then seeks to explain these factors, including the relative merits of different types of remedies. As to the latter, the CC considers that when deciding upon a remedy to address the competition concern, it is correct to use as its starting point, action that will restore the competition that has been, or is expected to be, lessened as a result of the merger. However, the guidance explains that other factors may mean other types of remedy need to be considered (paragraph 4.23).

22.10 One respondent noted that the Enterprise Act provided for the CC to amend licence conditions by way of an Order so long as it had regard to the relevant statutory functions of the relevant regulator. The respondent said it would be helpful if the guidelines could refer explicitly to this option. It said that if the CC concluded that changes to licences were required it would seem preferable for the changes to be made by Order rather than by recommending that the regulator take action. It said that if the latter option was taken, the risk remained that the licensee might object resulting in procedural problems if the issue then had to be referred back to the CC.

- ➢ The guidance (markets 4.43 and mergers 4.47) has been modified to include a reference to the CC's Order making powers to amend licences etc. Part 7 of General Advice and Information says that the CC will make an order in these circumstances (paragraph 7.6).

22.11 One respondent said that there should be a paragraph stating that the CC would give due consideration to the likely effects outside the UK of any proposed remedies (given the increasingly global nature of business). It said it would be helpful to indicate that the CC would consult with the affected respondents on the proposed remedies.

- ➢ The Enterprise Act gives power to the CC only to consider whether there is a SLC or a feature of the market affecting competition in the UK or a part of the UK. The procedures applicable when considering and implementing remedies (including consultation) are described in Parts 6 and 7 of the General Advice and Information.

STATEMENT OF POLICY ON PENALTIES

1. Main Points

1.1 In the light of the responses received, and the final text of the Enterprise Act 2002, a number of changes have been made to the Statement, as follows:-

- The Statement applies when the Commission is exercising its powers under section 109 of the Act. These powers are relevant to merger inquiries and various other types of inquiries. The application of the section and the CC's power to impose a penalty is explained in footnotes 1 and 2.

- The summary of the statutory background is expanded in paragraph 1.

- An express reference to the proportionality is included in paragraph 17.

2. Other Points

2.1 One commentator suggested that the maximum penalties should be referred to in the guidance.

- Provision is made (in footnote 5) for reference to be made to the statutory instrument that may be made under section 117(7) and General Advice and Information contains the maximum penalties in paragraph 6.14.

2.2 A number of comments were received concerning the level of discretion the Statement gave the Commission. Some felt that it was too much, while others were concerned that if a penalty was imposed automatically, innocent failures or failures that had not adverse consequences might be caught. Others were concerned that the policy might result in the loss of the spirit of co-operation between the Commission and parties that has been the characteristic of many of the Commission's inquiries.

- The Statement, in conjunction with the Commission's Rules of Procedure (Rule 9), gives each group discretion to decide whether or not to request information under section 109 and if it does, sufficient discretion to decide whether or not to impose a penalty in the event of failure to comply, and if so the amount while also setting out the questions it will address. The

discretion given to groups is intended to secure the spirit of co-operation favoured generally by parties and the Commission, while ensuring that there is in place sufficient deterrence to encourage information etc being supplied in time.

2.3 There were also requests for further detail on such matters as the factors that would be taken into account when determining whether the there is any reasonable excuse for failure to comply, the weight that would be give to each factor listed, and the likely amounts of penalties. Some commentators thought that the penalty should be determined by reference to turnover, others by reference to profits, but not in a formulaic way.

- ➢ The Commission considered these points but concluded that having regard to the test that applies when determining whether there has been any failure to comply with a notice, the desirability of adopting a flexible policy that could be applied to different circumstances, and the fact that there will be wide variation in the resources of the persons to whom requests for information are made, it would not be appropriate to provide additional detail. As experience develops, the Commission may be able to provide more information in guidance.

2.4 One commentator suggested that the Statement might contain detail as to how the Commission would measure the additional costs it incurs as a result of any delay in providing information etc. and that these costs should be taken into account when calculating the level of the fine.

- ➢ The assessment of additional costs will be as appropriate in the circumstances. Though the additional costs might be a relevant factor when determining the level of penalty, no express reference is made in paragraph 17 because to do so would place too great an emphasis on this factor in comparison with other factors.

2.5 One commentator queried whether the Commission would take account of the circumstances of third parties before deciding to impose a penalty, for example, their reluctance in terms of time and costs when they do not wish to intervene. Others thought that the burden placed by requests of information should be a relevant consideration.

- ➢ These points were considered. It is relevant that the Commission when carrying out its statutory functions is given power to require information and/or attendance of witnesses to give evidence. It is also relevant to note that the Commission's power to extend the period in which to publish its report applies only in respect of parties to the merger (relevant parties) and not to late submissions or failures to submit by third parties. The Statement enables all relevant factors to be taken into account when addressing the questions set out in paragraph 11. In particular, the resources of any person to whom a request is made may be relevant to the consideration of whether a penalty should be imposed (paragraph 13) and also the level of penalty (paragraph 17).

2.6 Two commentators commented upon the Commission's ability to extend the period in which to report in the event that the 'relevant party' had failed to comply fully with the information request.

- Paragraph 15 is expanded to explain that each time the Commission is considering whether or not to exercise either the power to impose a penalty it will also consider whether to extend the reporting period, and vice versa. However, the relevant group will have discretion as to whether to exercise one or both of these powers on each occasion. As to the period of extension, this is provided for in section 39 of the Act.

2.7 One commentator suggested that more information should be provided about the appeals process.

- More information about appeals to the Competition Appeal Tribunal is included in Part 8 of General Advice and Information.

2.8 A number of comments touched upon the procedure that the Commission will adopt when requesting information (e.g. determining the date by which information should be supplied) and determining whether to impose a penalty (e.g. whether there was reasonable excuse for failing to comply with the notice, and identifying any relevant factors).

- The Commission recognises the desirability for more information on these matters, but concluded that procedural matters would be better addressed elsewhere. In the short term, it is likely that they will be covered in the proposed revised Chairman's guidance, though as experience develops provisions may form part of the Commission Rules and/or General Advice and Information.

Annex : list of those who responded

We are very grateful to the following organisations for their thoughtful responses to our consultation exercise on the Procedural Rules, General Advice and Information, Guidelines on Merger References, Guidelines on Market Investigation References, and the Statement on Penalties.

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