

RESPONSE TO THE COMPETITION COMMISSION'S CONSULTATION ON APPLICATION OF DIVESTITURE REMEDIES IN MERGER INQUIRIES

1. Introduction

- 1.1. In June 2004, the Competition Commission (CC) published a consultation document entitled *Application of Divestiture Remedies in Merger Inquiries: Competition Commission Guidelines*. This document addressed a significant area in the CC's approach to merger remedies and provided transparency and an opportunity for public comment on the CC's proposed policy and practice.
- 1.2. The proposed guidelines are complementary to other advice and information produced under section 106 of the Enterprise Act 2002 and are to be read in conjunction with the CC's existing guidance document *Merger References: Competition Commission Guidelines (CC2)*.

2. Overview of response

- 2.1. We received 16 separate, external submissions on the proposed guidelines. These submissions are reproduced in full in the 'consultations' section of our web site. Respondents included competition authorities, law firms, trade bodies, individuals and regulators. The CC would like to thank all involved in producing these submissions for the quality and usefulness of their responses. Following careful consideration of these submissions, the CC has now published a revised final version of the guidelines which takes account of specific issues raised. The exercise has, we believe, improved the end product in general and in detail.
- 2.2. Respondents were supportive of the CC's proposed approach although most suggested specific areas of amendment or clarification. Respondents were particularly supportive of the consistency of the guidelines with approaches in the EU and USA, the proposed flexibility in applying the guidelines and the assessment of risk as a significant determinant of the form and process of divestiture.
- 2.3. In terms of overall approach, there was support from seven respondents for use of structural remedies, such as divestiture, in preference to behavioural remedies. However, two respondents felt that there should be no established preference in favour of divestitures.
- 2.4. The use of 'crown jewels' divestitures was the one specific issue which led to comments and requests for clarification from a majority of respondents. Our response to this and other significant issues is outlined in the following section in order of appearance in the text.

3. Specific issues

3.1. Process

Several respondents requested clarification of the CC's process for discussing and evaluating remedies.

- The text has been expanded and revised to provide further clarification of process features as in paragraph 1.9.

3.2. Onus on merger parties

Some responses indicated that there should be a clearer onus on the merger parties to satisfy the CC's requirements regarding the form of proposed divestitures.

- The guidelines have been revised to clarify the responsibilities of the parties as shown, for instance, in paragraphs 1.9, 3.1 and 4.3.

3.3 Interim undertakings

Some responses requested that the role of interim undertakings should be reflected in the guidelines.

- Paragraph 2.7 now notes that interim undertakings or orders will normally be required by the CC in cases involving completed mergers.

3.4 Defining the scope of divestiture packages

A variety of views was expressed both in support and opposition to the CC's preference to define the scope of divestiture packages using existing businesses and avoiding 'mix-and-match' solutions.

- The CC has maintained its views but expressed these as preferences rather than presumptions. The normal scope of a divestiture package (paragraph 3.1) has been redrafted to clarify that the CC will generally seek to define a divestiture package on the basis of a stand-alone business unit unless the merger parties can provide a satisfactory alternative.

3.5 'Crown jewels' divestiture packages

A majority of respondents expressed concerns or requested clarification regarding the use of crown jewels divestiture packages. The main issues of concern were circumstances of use, proportionality and practicalities of implementation.

- The guidelines have been redrafted (paragraphs 3.6 and 3.7) to clarify the exceptional circumstances in which crown jewels packages would be contemplated and to outline features of implementation.

3.6 Continuing links between purchasers and merging parties

Some respondents wished to clarify the continuing links that would be permitted by the CC between a purchaser and the merger parties.

- Guidance on continuing links is now outlined in paragraph 4.4. The CC will not permit links that compromise the purchaser's incentives to compete with the merger parties.

3.7 Timescale for divestiture

Several respondents requested an indication of the typical duration that the CC would allow for the length of the divestiture period.

- The maximum length of the divestiture period will normally be six months, but this duration will depend on the particular circumstances of the case, as considered in paragraph 5.5.

4. Respondents

We are grateful to the following for their responses to this consultation exercise:

Addleshaw Goddard
American Bar Association—Section of Antitrust Law and Section of International Law
Ashurst
S J Berwin
Civil Aviation Authority
Clifford Chance
CMS Cameron McKenna
Commercial Radio Companies Association
Competition Law Association / Martineau Johnson
European Commission—Competition DG
Europe Economics—Martin Howe
Hudson Institute—Irwin Stelzer
Professor S C Littlechild
Simmons & Simmons
Travers Smith Braithwaite
United States Federal Trade Commission and Antitrust Division of the Department of Justice

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