

**JOINT WORKING PARTY OF THE BARS AND
LAW SOCIETIES OF THE UNITED KINGDOM (“JWP”)¹**

**COMMENTS ON THE COMMISSION’S DRAFT NOTICE ON
REMEDIES ACCEPTABLE UNDER REGULATIONS (EEC) NO
139/2004 AND (EC) NO 802/2004 (“DRAFT NOTICE”)**

1. Introduction

- 1.1 The JWP welcomes the guidance and clarification provided by the Commission’s Draft Notice on remedies acceptable under Regulations 139/2004 and 802/2004.
- 1.2 In view of the increased use of divestments and other forms of remedy to enable mergers to proceed that would otherwise be prohibited, it is important to ensure that the basis upon which the Commission is prepared to accept such remedies is clearly stated and understood, not least so that businesses and their advisers can plan accordingly. The JWP considers that the Draft Notice substantially achieves that objective.
- 1.3 This Paper contains the comments of the JWP on the Draft Notice. Most of the comments are made with the aim of further enhancing the clarity of the Draft Notice.
- 1.4 Notwithstanding the level of detail provided in the Draft Notice, the JWP hopes that the Commission will continue to adopt a flexible approach when considering possible remedies and to accept solutions that are appropriate and proportionate to the particular circumstances of each case.

2. Comments on the Draft Notice

- 2.1 **Paragraph 9:** the first sentence describes the Commission's power to accept commitments that prevent a *"significant impediment of effective competition"*. In the second sentence, however, the Draft states that *"The commitments have to eliminate the competition concerns entirely"* (emphasis added). Similar statements appear elsewhere in the Draft Notice. It is assumed that *"the concerns"* referred to are those that are expected to give rise to a *"significant impediment of effective competition"* -- and, in particular, do **not** include any other possible (lesser) competition concerns that are not expected to have such an effect. The JWP recommends that this be clarified in the text.
- 2.2 **Paragraph 17:** the JWP understands the reasons why the Commission generally prefers structural remedies; the Office of Fair Trading and the Competition Commission (in the UK) have a similar preference. The JWP also welcomes the express recognition in the Draft Notice that remedies may be regarded as structural by reason of their **effect** on the market (ie structural remedies are not required to be structural in nature). The JWP is concerned, however, that the statement in the Draft Notice that *"Commitments relating to the future behaviour of the merged entity may be acceptable only very exceptionally in very specific circumstances"* (emphasis added) overstates the case and would appear to limit

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JOINT WORKING PARTY OF THE BARS AND LAW SOCIETIES OF THE UK

- 2 -

unduly the use of behavioural remedies. The JWP would point out that the Court of First Instance has stated that categorisation of a commitment as behavioural or structural is incidental to an assessment of the effectiveness of the commitment in remedying an identified competition concern. It has also stated that a behavioural commitment which will be effective must be accepted². The JWP refers the Commission also to the statement of the UK Competition Commission³ in its Guidelines on the use of divestment remedies in merger cases (albeit under a slightly different legal regime): "*However, behavioural remedies may be considered more suitable in some circumstances, for example where the SLC is expected to be of limited duration or where the relevant customer benefits expected from a merger are substantial and behavioural remedies are more likely to be more effective in preserving these than structural remedies.*" The JWP considers that the current wording in the Draft Notice should be amended to indicate a more positive (and less restrictive) approach to the use of behavioural remedies. Possible wording to replace the last three sentences in paragraph 17 is suggested below:

"Whilst commitments that are structural in nature or effect are generally preferable, there are circumstances where the Commission will be prepared to accept commitments relating to the future behaviour of the merged entity. Indeed, on occasion such commitments may be more appropriate than structural undertakings⁴. However, only exceptionally and in very specific circumstances will such commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands etc be acceptable, because they will generally not eliminate the competition concerns. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring in line with considerations set out in paragraphs 13-14, 66, 69, and if they do not risk leading to distorting effects on competition".

- 2.3 **Paragraph 23:** the second sentence notes the possibility that, in order to be "viable", a divested business may need to include activities in related markets in which the Commission has not found a competition concern. Whilst accepting that this may on occasion be necessary, the JWP would expect such situations to be very much the exception rather than the rule. In order to ensure that the Draft Notice conveys the correct impression, the JWP suggests that (at the least) the words "**on occasion**" be inserted after "*necessary*" at the end of line three.
- 2.4 **Paragraph 24:** the JWP recognises that the wording proposed is carried over directly from paragraph 14 of the current notice. However, the JWP considers that the wording is vague and insufficiently clear. In particular, it is important to avoid giving the impression (as the proposed wording does) that divestment remedies may be disapproved based on vague, non-specific concerns about "*uncertainties and risks related to the transfer of a business to a new owner*".
- 2.5 **Paragraph 25:** footnote 34 envisages that the Commission may revoke a clearance decision if the description of the business to be divested (per para 27) is incomplete and

² See : Case T-10/96, *Gencor Ltd v. Commission* [1999] ECR II-753, [1999] 4 CMLR 971, para. 318-319; and Case C-12/03 [2005] ECR I-987, *Tetra Laval v. Commission*, paras. 85-89.

³ See : *Application of divestiture remedies in merger inquiries: Competition Commission Guidelines*.

⁴ Consider inserting examples, possibly based on those contained in the Guidelines of the UK Competition Commission referred to in footnote 3.

**JOINT WORKING PARTY OF THE BARS AND
LAW SOCIETIES OF THE UK**

- 3 -

the parties fail to complement the business with the additional assets required. The JWP considers that the importance of this statement is such that it could usefully be included in the main body of the Draft Notice, rather than being relegated to a footnote.

- 2.6 **Paragraph 26:** it would be helpful to clarify upfront in this paragraph (rather than relying on the later statement in para 30) that the Commission generally assesses the 'viability' of a proposed divestment as a remedy *without* regard to the particular requirements of a possible future purchaser (with an appropriate cross reference to the exception described in para 30).
- 2.7 **Paragraph 33:** it might be clearer if the words "*remedies that involve divestment of*" were to be inserted in the first line after the words "*has a preference for*".
- 2.8 **Paragraph 34:** it is suggested that the 'hostile bid' situation may lend itself to a remedy involving alternative divestments (in effect a reversal of the crown jewels divestment process) -- ie a commitment by the acquirer to divest of its own business, *unless* the acquirer can satisfy the Commission within a short period after the acquisition that divestment of the acquired business (ie the business belonging to the target) would be an acceptable remedy.
- 2.9 **Paragraph 37:** the meaning of the word "*uniform*" in this paragraph is not clear and may cause uncertainty and confusion. It is suggested that the word "*discrete*" (meaning distinct) may be more appropriate. It is also considered that the requirement for the package of brands and assets to be "*immediately viable*" in the hands of a suitable purchaser may in practice prove impossible to satisfy -- and, in consequence, be disproportionate. It is suggested that a phrase like "*viable within a matter of months*" (or something similar) would be a more realistic requirement.
- 2.10 **Paragraph 38:** a number of the provisions in this paragraph seem to be unnecessarily prescriptive and restrictive. For example, it is not clear why granting of IP rights should be considered acceptable *only* if divestiture of a business is not possible. Likewise, the requirement that a licence of IP rights will normally have to be "*without any field of use ... restriction*" (emphasis added) would seem to be disproportionate -- for example, where the activities of the divested business are limited and the IP rights are applied by the licensor in wholly unrelated fields.
- 2.11 **Paragraph 42:** the JWP considers that, in addition to a "fix-it-first solution", an "up front remedy" should also be capable of addressing possible concerns about the existence of suitable licensees -- and should therefore be referred to in this paragraph.
- 2.12 **Paragraph 45:** it is not clear to the JWP why it is thought to be "*indispensable that interim preservation and hold separate measures [should] apply to all assets included in both divestiture alternatives*". If such measures are applied to the "*first divestiture*", it should be unnecessary to apply hold separate measures also to the crown jewel assets. That said, there may be a case for applying an interim preservation measure (though not a hold separate measure) to the crown jewel assets as well as to the first divestiture assets.

- 2.13 **Paragraph 49:** the JWP suggests that there are very few situations in which it is likely to be appropriate to exclude financial purchasers from the outset. Many financial purchasers have a proven track record of recruiting good trade management and have been instrumental in transforming acquired businesses into more effective businesses and competitors. Indeed, in recent years, the Commission has generally moderated its attitude to financial buyers as suitable purchasers of divested businesses, as reflected in its most recent Best Practice Guidelines on the model text for divestiture commitments -- which state expressly that purchaser requirements "*can generally be met by either industrial or financial investors. The latter must demonstrate the necessary management capabilities and "proven expertise" which can in particular be met by financing a management buy-out.*" The remedies regime already provides ample opportunity for the Commission to disapprove potential buyers. That being so, there is no obvious reason for the Commission to discriminate against financial purchasers from the outset. It is suggested that the statements in this paragraph should be modified accordingly.
- 2.14 **Paragraph 52:** the JWP questions whether the time limit should be fixed by reference to the date of the Commission's decision. It is entirely foreseeable that, at the time of the Commission's decision, other regulatory approvals (either merger approvals in other jurisdictions, or approvals of industry specific regulators) may still be outstanding so that the merger may not be completed for several months after the date of the Commission's decision. The JWP suggests that the time limit should be fixed by reference to the date when the acquirer has obtained all other necessary regulatory approvals (such approvals to be identified in the decision which would also include an obligation on the parties to notify the Commission of receipt of such approvals). *As an alternative* a fixed date could be included in the decision which would be intended to allow the parties a reasonable time to obtain such approvals – although the date of completion of the transaction (or when the acquirer obtains *de facto* or *de jure* control of the target business) would apply if it was earlier than the date fixed in the decision.
- 2.15 **Paragraph 56:** it is suggested that it be made clear (at the least by way of a footnote) that the fact that "*no additional Commission decision for the purchaser approval will be required*" does not dispense with the need (if there be one) to make a separate filing under the EC Merger Regulation for clearance of the divestment transaction.
- 2.16 **Paragraph 59:** the final sentence requires that rights be waived comprehensively and "*permanently*". It is understood and accepted that any such waiver should be *irrevocable* by the minority shareholder on its own initiative. However, it is not considered necessary to require that such a waiver be permanent. It should be possible for the Commission to permit the waiver to be removed if the Commission is satisfied that the circumstances have changed such that, if the minority shareholder were to exercise the waived rights, that would no longer give rise to a substantial impediment to effective competition.
- 2.17 **Paragraph 71:** it is envisaged that the Commission will accept an application for an extension during the first divestiture period only if the parties was unable to meet the deadline for reasons '*outside their responsibility*'. It is believed that this test may be unduly restrictive and result in the Commission refusing to grant an extension in circumstances

where, based on its current practice, it might be expected to agree one. It is suggested that the key to a decision to grant an extension (or not) should be whether the party has complied with the sale process as envisaged in its commitments and whether the monitoring trustee is satisfied that it has done so. In those circumstances, the JWP would hope and expect that the Commission would look favourably on an application for a short extension, unless it was clear that the sale was not capable of being completed within that further period. The JWP recommends that the paragraph be amended accordingly.

- 2.18 **Paragraph 74:** the JWP would be very concerned if the power described in this paragraph were to be used to any significant extent. Indeed, the JWP assumes that in practice the power would be used very rarely and only in the most exceptional circumstances, for example, where it would otherwise be necessary to prohibit the merger outright. On that basis it may be useful if the Draft Notice were to make this clear.
- 2.19 **Paragraph 87:** it should be made clear that the 90 day period will be extended to 105 days only where the modified version of the commitments constitutes a material change to the proposed remedy -- and does not constitute, for example, mere 'fine tuning' of a proposed remedy following market testing.
- 2.20 **Paragraph 92:** a similar point arises on this paragraph -- in connection with the statement that the Commission will accept modifications to commitments after Day 65 only where it can determine, without need for further market-testing, that such commitments fully and unambiguously resolve the identified competition problems. The JWP accepts that the Draft Notice should warn parties of the dangers and risks of late submission of modified commitments. Equally, however, the JWP would hope and expect that the Commission would apply some discretion in this regard. The JWP would suggest that the paragraph be amended to provide some limited flexibility to the Commission after Day 65.
- 2.21 **Paragraph 104:** the JWP is concerned by the suggestion in the Draft Notice (at footnote 110) that the sale and purchase agreement for the divested business must impose on the purchaser an obligation to maintain the acquired business as a competitive force in the market and not to on-sell the business within a short (unspecified) time-span. Clearly these are issues for due consideration when the acceptability of the remedy is assessed by the Commission. However, the JWP is doubtful that it would be appropriate to require that such provisions be included as a matter of course as contractual obligations between the seller and the purchaser of the divested business -- although there may be exceptional cases where it might be appropriate to do so.
- 2.22 **Paragraph 116:** as a practical matter, it may be unrealistic to expect that the monitoring trustee will be able to take on its role *"immediately after"* the adoption of a Commission decision, at least in relation a Phase I conditional clearance. See further the comment re para 120 below.
- 2.23 **Paragraph 120:** there is an obvious inconsistency in this paragraph between the requirement (in the third sentence) that the monitoring trustee be in place *"immediately*

**JOINT WORKING PARTY OF THE BARS AND
LAW SOCIETIES OF THE UK**

- 6 -

after the Commission decision"; and the requirement on the parties (in the fourth sentence) *"to propose a suitable trustee immediately after the Commission decision"*.

3. Comments on the Draft Amending Regulation

- 3.1 Annex IV, Para. 1.1(ii): the meaning of the phrase "the conditions for their implementation" should be clarified.
- 3.2 Annex IV, Para. 2: this paragraph should refer also to "serious doubts" in relation to commitments offered in Phase 1.
- 3.3 Annex IV, Para. 5: the extent of the information required by Form RM may be difficult to provide, especially in relation to commitments offered in Phase 1; and it may be appropriate (especially in Phase 1 proceedings) to allow Form RM to be clarified or supplemented in the period following its submission.
- 3.4 Annex IV, Paras. 5.10 and 5.11: these obligations should be limited to 'material' changes.

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