CONCENTRATIONS (DIVESTITURE): COMMISSION GUIDELINES

Subject: Concentrations
Undertakings (conditions)

Industry: All industries

Source: Commission Statement IP/02/1091, dated 18 July 2002

(Note. Applications for clearance of mergers, acquisitions and joint ventures are increasingly being approved only when the parties concerned agree to various forms of condition, of which by far the most usual is the divestiture of existing holdings either in specific companies or in specific areas of commercial activity. It is therefore salutary to have the Commission's draft guidelines on the forms divestiture may take: standard models are offered for comment. Similarly, when parties to a proposed concentration are willing to give appropriate undertakings, and those undertakings necessarily involve the appointment of a trustee - for example, where a company to be divested does not yet have a buyer, - a standard model covers the matter of trustee mandates. The Commission is inviting comments on its drafts.)

The Commission has published for consultation draft standard models for divestiture undertakings offered by merging parties in cases presenting competition problems. The standard models -- on divestiture undertakings and on trustee mandates -- are designed to serve as best practice guidelines to help merging parties and their legal representatives in their dealings with the Commission.

Under the Merger Regulation, which was adopted in 1989 and came into force in September 1990, companies can offer undertakings to enable the Commission to clear a merger or acquisition which otherwise would create or strengthen a dominant position. Given the legally binding timetable set out in the Regulation, timing is crucial when merging parties reach the so-called remedies stage in merger review procedures. To make the negotiation and implementation of undertakings more effective and efficient for both the merging parties and the Commission, the Commission has decided to develop standard models for divestiture undertakings and trustee mandates under the Merger Regulation. The use of these standard models will relieve the merging parties and the Commission of the heavy demands in terms of timing and resources that would otherwise be required to negotiate the terms and conditions for undertakings and trustee mandates from scratch under tight time constraints and allow both the merging parties and the Commission to concentrate more on the actual substance and implementation of the undertakings.

The draft standard models are based on the experience the Commission has gained in fashioning remedies during the 12 years since the implementation of the Regulation. They also take account of the Commission's explanatory Notice on

Remedies, adopted in December 2000. Like the Commission's Notice on Remedies itself, the standard texts are intended to increase the level of transparency and legal certainty for the merging parties offering the undertakings. Business and legal circles as well as other interested parties can find the Standard Model for Divestiture Undertakings and the Standard Model for Trustee Mandates on the Internet; and the purpose and nature of both texts as well as an explanation of their main elements are set out in an Explanatory Note at: http://europa.eu.int/comm/competition/mergers/legislation/divestiture_undertakings/index.html

The first model describes all requirements for achieving full and effective compliance with divestiture undertakings. More specifically, it is designed (i) to describe clearly the business to be divested, the divestiture procedure and the obligations of the parties in relation to the Divested Business for the interim period until divestiture has been completed and (ii) to set out the qualifications which the Commission requires for an acceptable purchaser for the divested business. The Standard Model for Trustee Mandates sets out the role and functions of the Trustee. It prescribes in detail the role and function of the trustee in the process in order to enable the trustee to expedite compliance with the undertakings.

Interested parties have until the end of September 2002 to submit their comments to the Commission's Merger Task Force. On the basis of the comments received, the Commission intends to adopt standard texts for divestiture undertakings and trustee mandates as best practice guidelines at the end of 2002. ■

MARKET POWER (COMMUNICATIONS): COMMISSION GUIDELINES

Subject: Market power

Industry: Electronic communications

Source: Commission Statement IP/02/1016, dated 9 July 2002

(Note. There is an interplay in this sector between the regulatory legislation and the requirements of the rules on competition; and, since the legislation has introduced the concept of "significant market power", the Commission has, reasonably enough, proposed guidelines on the meaning of what it describes in its statement as this new concept. However, the statement also points out that the concept is equated to that of dominance of the market under the well established rules set by Article 82 of the EC Treaty and the case law of the Court of Justice.)

The Commission has adopted Guidelines on market analysis and the assessment of Significant Market Power, as required by Directive 2002/21/EC on a new common regulatory framework for electronic communications service (the Framework Directive). The Guidelines set out the principles to be used by national regulatory authorities to define markets and analyse effective

competition. They were developed on the basis of existing case law and the Commission's practice in the enforcement of the rules on competition under European Community law and result from the joint initiative of Mario Monti, Commissioner for Competition, and Erkki Liikanen, Commissioner for Enterprise and the Information Society.

On 7 March 2002, the European Parliament and the Council of Ministers adopted the new regulatory framework for electronic communications, consisting of four Directives and one Decision. The final adoption of a Directive on data protection in the telecommunications sector will take place shortly. The five Directives will apply in national markets from 25 July 2003. The new legislative package overhauls the existing regulatory framework by modernising and simplifying existing regulation with the aim of encouraging more competition and greater transparency of regulation in this crucial sector of the European economy. The Commission will complete the legislative package with a single new Directive on competition in electronic communications networks and services, based on Article 86 of the EC Treaty, which is a consolidation of related existing texts. This Directive will apply from the same date as the five Directives of the Parliament and Council.

Recognising the complex and dynamic character of today's electronic communications markets, the Framework Directive provides a new definition of undertakings with "significant market power" (SMP) by equating SMP in the new regulatory framework with the concept of dominance under Article 82 of the EC Treaty. In aligning SMP with the concept of dominance, the Framework Directive foresees a need to guide national regulatory authorities in applying the competition law concepts of "relevant market" and "dominant position". It therefore requires the Commission to adopt Guidelines on market definition and the assessment of SMP for those authorities to use in the application of the new concept of SMP.

The new regulatory package will impose *ex ante* regulatory obligations only where there is no effective competition, that is, where there are one or more undertakings with SMP in a relevant market (generally excluding emerging markets). Conversely, where competition is effective and no operator is deemed to have SMP, regulators are obliged to remove any obligations imposed under the current regulatory framework. The concept of SMP is therefore central to the procedure for deciding which operators will be subject to *ex ante* regulation.

The Guidelines are based on the relevant case law of the Court of First Instance and the Court of Justice and on the Commission's own decision-making practice in defining the relevant market and applying the concept of single and collective dominance, in particular with regard to electronic communications markets. Other competition law notions, such as "leveraging of market power", are also addressed in the Guidelines. The Commission Guidelines adopted today are the definitive version, following the adoption of a draft version in March 2001 and a public consultation thereon. The text was also discussed with national regulatory and national competition authorities on two different occasions. The Guidelines will be reviewed and revised by the Commission as and when necessary. ■