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GIBRALTAR COMPETITION AND MARKETS AUTHORITY

REMEDIES NOTICE FOR OFFERS OF UNDERTAKINGS IN LIEU OF REFERENCE

This notice (the "Remedies Notice") specifies the information and documents to be submitted by the merger parties for the purpose of offering undertakings in lieu of reference ("UIL") pursuant to section 128 of the Competition Act 2020 (the "Act").

The information requested allows the Gibraltar Competition and Markets Authority (the "GCMA") to examine whether the proposed UILs offered by the merger parties (or a modified version of them) might be acceptable to remedy, mitigate or prevent in a clear-cut manner the substantial lessening of competition ("SLC") identified by the GCMA in its decision pursuant to section 74 or 85 of the Act.

The level of information required by the GCMA will vary according to the type and structure of remedy proposed. This Remedies Notice refers to a 'business' to be divested. This is because the GCMA generally prefers divestiture of an existing business that can compete effectively on a stand-alone basis independently of the merger parties over divestiture of part of a business or a collection of assets.

Nevertheless, the Remedies Notice can be used when the proposed divestiture comprises part of a business. Similarly, the Remedies Notice can be used where the UILs offered involve divestment of multiple businesses: a single Remedies Notice should be submitted for the full UIL offer, but distinctions between the individual divestment packages making up that offer should be highlighted where relevant. In such circumstances, parties are encouraged to discuss with the GCMA case team the likely information requirements of the GCMA.

Parties are not obliged to complete all aspects of this Remedies Notice but doing so as far as possible will enhance the GCMA's ability to assess effectively the UILs offered. Failure to complete all aspects of this Remedies Notice by the end of the five working day period for offering UILs will not automatically invalidate the UIL offer. If parties consider that any particular information requested by this Remedies Notice may not be necessary or relevant for the GCMA's assessment, they are asked to provide adequate reasons for this. Again, parties are encouraged to discuss such omissions with the case team in advance of making their submission.

The GCMA does not automatically refuse behavioural remedies as UILs. However, in general, it is unlikely that behavioural remedies will be sufficiently clear cut to address identified competition concerns and therefore to be suitable for the purposes of UILs. This Remedies Notice therefore focuses on structural remedies. Nevertheless, if the merger parties wish to offer a behavioural remedy as a UIL they should provide answers to questions 1 to 3 of the Remedies Notice as well as an indication of the timetable for implementation of the proposed remedy and any potential barriers to such implementation.

MERGER REMEDIES NOTIFICATION FORM

DESCRIPTION OF THE UIL AND HOW IT WILL ADDRESS THE SLC

1. Provide:

- (i) a general description of the UILs offered
- (ii) any conditions for their implementation, and
- (iii) the proposed text of the UILs offered (as a separate document).

2. Describe how the UILs offered will remedy, mitigate or prevent in a clear-cut manner the SLC identified by the GCMA or any adverse effect which has or may have resulted from it or may be expected to result from it.

3. Provide a **non-confidential summary** of the nature and scope of the UILs offered and how, in your view, they will remedy, mitigate or prevent in a clear-cut manner the SLC identified by the GCMA or any adverse effect which has or may have resulted from it or may be expected to result from it. The GCMA may use this summary in order to test the UILs offered with third parties (including potential purchasers).

INFORMATION ON THE BUSINESS TO BE DIVESTED

This section sets out information that should be provided in relation to the current operation of the business to be divested. For divestments that are currently divisions but not separate entities, the information provided should be at the divisional level, but parties are encouraged to discuss with the GCMA how best to do this in order to ensure the right balance of information between questions 4 to 8 and questions 9 to 15.

4. Describe the business to be divested generally, including:

- (i) the entity(ies) belonging to it (and which form a part of the divestment)
- (ii) its registered place of business and head office
- (iii) its other locations for production or provisions of services
- (iv) how, in broad terms, it operates and is managed
- (v) an overview of its organisational structure, and
- (vi) whether a disposal of shares or assets is proposed.

5. List and describe the products or services supplied by the business to be divested and any new products or services planned.

6. Provide details of the key assets and liabilities of the business to be divested including:

(i) staff, including those employees at managerial level who are critical for the operation of the business to be divested, describing their functions

(ii) production facilities

(iii) key intellectual property rights and licences

(iv) key intangible assets, including brands

(v) leases and freehold property

(vi) working capital and other such assets or liabilities

(vii) cash

(viii) debt and other financial liabilities

(ix) any debt or leasing obligations that will pass with the business to be divested, and

(x) other liabilities not covered above (for example, pensions).

Highlight if any of the above assets come from more than one party to the merger (that is, whether a 'mix and match' divestiture is proposed).

7. Provide a customer list for the business to be divested with revenue (in GBP) generated in the most recent financial year and list and describe key supplier contracts, including setting out when any key customer or supplier contracts are due for renewal.

8. Provide summary financial statements for the business to be divested at profit and loss level for each of the two most recent financial years, the current financial year and a forecast period of two financial years. The table below provides a guide to how you may wish to present the information. For the current financial year, you should, as necessary, split the information between actual and forecast information. Where the SLC relates to more than one product type or market, you should also provide a breakdown by product type/market.

Business to be divested	Historical FY-2	Historical FY-1	Current FY	Forecast FY-1	Forecast FY-2
Revenue (GBP)					
Cost of sales (GBP)					
Gross profit (GBP)					
Earnings Before Interest Taxes Depreciation Amortisation (GBP)					
Depreciation (GBP)					
Earnings Before Interest Taxes (GBP)					
Source of data					

ASSETS EXCLUDED FROM THE BUSINESS TO BE DIVESTED AND CONTINUING LINKS TO THE MERGER PARTIES

This section sets out information that should be provided in relation to the existing parts of the business to be divested that will not form part of the proposed divestiture package.

9. Where relevant, describe any of the operational or management functions which will not form a part of the business to be divested but which are currently necessary for the functioning of the business. This description should include such functions as:

(i) research and development

(ii) production

(iii) marketing and sales

(iv) logistics

(v) relations with customers

(vi) relations with suppliers, and

(vii) the maintenance and provision of IT systems and various support functions (for example, payroll, general finance, accounting and regulatory compliance).

Please note any material changes in such arrangements in the last two years.

10. Set out what transitional service arrangements you would include as part of the divestment with regard to the functions referred to in Question 9 in the event they are required by the purchaser. Please specify your proposed key terms and duration of any such arrangements.

11. Where relevant, describe in detail (including terms and duration) any continuing links between the business to be divested and other businesses controlled by the merger parties, such as:

(i) supply, production, distribution, service or other contracts

(ii) shared tangible or intangible assets

(iii) shared or seconded personnel

(iv) shared IT systems or other systems

(v) shared customers, and

(vi) administrative and other support functions.

12. For each of the links referred to in Question 11, describe any changes envisaged and the expected timing of these changes.

13. Describe the customers or groups of customers which will not form a part of the proposed business to be divested but which are currently customers of the business to be divested.

Provide the total turnover generated by these customers (in GBP and as a percentage of the total turnover of the business to be divested).

14. Describe any other areas where the business to be divested differs from the nature and scope of the business as currently operated.

15. Where carve-out arrangements are likely to impact on the operation of the business to be divested, describe any arrangements envisaged for carving out or reconfiguring the business to be divested from its existing form.

REMEDY IMPLEMENTATION PROCESS

The purpose of this section is to allow you to explain to the GCMA how the business will be divested to a suitable purchaser in an acceptable timeframe. The more information that you are able to provide when completing this part of the Remedies Notice, the more the GCMA is likely to be able to have confidence that a suitable purchaser will be found.

16. Provide a proposed timetable for divestment setting out key milestones including preparation of documentation and filtering of potential purchasers.

Please note that the GCMA has 50 working days beginning on the day after the GCMA gives the notice required pursuant to section 87(1)(b) of the Act to accept UILs.¹

17. State whether there are likely to be significant due diligence, statutory or regulatory issues that may delay the divestment process. These may include any third party rights, obligations, consents (including the transfer of leases), licences and regulatory approvals. Set out the expected timeframes for resolving each of these.

18. Suitable purchasers. Please answer either part (i) or (ii):

(i) If you have already identified a potential purchaser, explain why you consider this buyer would meet the GCMA's purchaser suitability criteria.²

(ii) If you have not yet identified a potential purchaser, explain the reasons why, in your view, the business will be acquired by a suitable purchaser in the timeframe proposed in Question 16. List likely purchasers for the business to be divested highlighting those potential purchasers whom you have already approached with a view to a sale and summarising the strength of their interest and their capability to complete a transaction within the timescale proposed. Where you have already approached potential purchasers, submit any expressions of interest, informal or formal offers or any draft heads of terms.

19. If you do not consider that divestment to an upfront buyer is required in this case, please provide reasons for this.³

¹ Subject to a possible extension of up to 40 working days if the GCMA considers that there are special reasons for doing so.

² See Annex A – Suitable Purchaser Criteria.

³ An 'upfront buyer' means having a buyer in place with a signed sale and purchase agreement (generally conditional from the buyer's perspective only on GCMA acceptance of the UILs and completion of the main transaction if it remains anticipated) before the GCMA accepts the UILs. The upfront buyer would need to meet the GCMA's purchaser suitability criteria.

20. In instances of multiple businesses to be divested, state whether and why these are intended to be sold to several buyers or to one. If to several, explain whether you intend to 'package' some of the businesses to be divested together in order to achieve a sale.

21. Set out whether you consider the appointment of a monitoring trustee would be appropriate in this case. If you do not consider that a monitoring trustee is required in this case, please provide reasons for this.

It is important to note that the GCMA continually adapts its approach to remedies to ensure that it is fulfilling its statutory duty in light of a dynamic and evolving economy. It therefore reserves the right to amend this notice from time to time in line with regulatory experience gained and expertise acquired.

ANNEX A – SUITABLE PURCHASER CRITERIA

The identity and capability of a purchaser will be of major importance in ensuring the success of a divestiture remedy. The merger parties will therefore need to obtain the GCMA's approval of the prospective purchaser.

The GCMA will wish to satisfy itself that a prospective purchaser is independent of the merger parties; has the necessary capability to compete; is committed to competing in the relevant market; and divestiture to the purchaser will not create further competition concerns. The relative importance that the GCMA attributes to each of these criteria will depend on the circumstances of the investigation. These criteria are considered in more detail below:

(a) The acquisition by the proposed purchaser must remedy, mitigate or prevent the SLC concerned or any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable.

(b) Independence. The purchaser should have no significant connection to the merger parties that may compromise the purchaser's incentives to compete with the merged entity (e.g. an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance). It may also be appropriate to consider links between the purchaser and other market players.

(c) Capability. The purchaser must have access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor. For example, a highly-leveraged acquisition of the divestiture package which left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion. The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority.⁴

(d) Commitment. The GCMA will wish to satisfy itself that the purchaser has an appropriate business plan and objectives for competing in the relevant market(s), and that the purchaser has the incentive and intention to maintain and operate the relevant business as part of a viable and active business⁵ in competition with the merged party and other competitors in the relevant market.⁶

(e) Absence of competitive or regulatory concerns. Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.

Except in circumstances where a divestiture trustee is in place, (the merger parties are responsible for securing a prospective buyer and demonstrating that it satisfies the GCMA's

⁴ This is because the GCMA wishes to be satisfied that the divestment to the proposed purchaser will in fact go ahead. To the extent that a purchaser would face difficulties in obtaining such consents, this may call into question the suitability of the purchaser.

⁵ The GCMA will routinely ask to see the proposed purchaser's annual accounts and business plan for the acquired business in assessing whether this criterion is satisfied.

⁶ The GCMA will normally require the selling party to require from the divestment purchaser a warranty reflecting this obligation, or a variant of it, in its sale and purchase documentation.

criteria for a suitable purchaser. However, the GCMA will keep the progress of the divestiture under close scrutiny.

Where the merger parties receive interest in the divestiture package from multiple prospective buyers, they may ask the GCMA to evaluate the suitability of a small set of short-listed purchasers. This is to avoid the merger parties progressing with one prospective purchaser, possibly through lengthy due diligence, and this purchaser then being found not to satisfy the GCMA's purchaser suitability criteria, and the merger parties having to start the assessment process afresh.

In requiring that the proposed purchaser be independent of and unconnected to the merger parties, the GCMA will pay close attention to any links that would exist between the merger parties and the purchaser following divestment. This includes any proprietary interest that the merger parties would retain in or over the divested business that could impede the successful, independent operation of the divested business.⁷

Purchasers may require access to key inputs or services at appropriate terms from the merger parties, on an interim basis, in order to enable the divestiture to operate effectively. Such arrangements may be permitted by the GCMA for a limited period. The GCMA may also permit or require non-solicitation clauses or other measures to protect the purchaser from the merger parties for a limited period (e.g. up to one year) to enable the purchaser to become established as an effective competitor in the relevant market(s).

In terms of determining whether the proposed purchaser has the financial resources, expertise, incentive and intention to maintain and operate the divestment business, the GCMA is seeking to assess whether the purchaser will compete vigorously in the future on the basis of what it has acquired to address the SLC or the adverse effect resulting from it. The GCMA will consider carefully the evidential basis on which the merger parties (and the proposed purchaser) assert that the proposed purchaser will have an incentive to compete going forward⁸.

On the basis that the GCMA will approve a divestment purchaser only where it is confident that the acquisition by that proposed purchaser does not itself create a realistic prospect of an SLC within any market or markets in Gibraltar, the GCMA would not expect to investigate this transaction. This is regardless of whether or not the transaction constitutes a relevant merger situation under the Act.

⁷ The GCMA may require that such links be severed or otherwise addressed as part of the remedy.

⁸ The GCMA will scrutinise the purchaser's incentives particularly carefully in a situation in which the purchaser is paying no compensation for the divested assets or business, or a price that is materially below market value.