

COMPLETED ACQUISITION BY DIEBOLD, INCORPORATED OF WINCOR NIXDORF AG

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups

Introduction

1. On 30 August 2016, the Competition and Markets Authority (CMA), in exercise of its duty under section 22(1) of the Enterprise Act 2002 (the Act), referred the global acquisition by Diebold, Incorporated (Diebold) of Wincor Nixdorf AG (Wincor) (the Merger) for further investigation and report by a group of CMA panel members (the Group). We refer to Diebold and Wincor collectively as the Parties.
2. The Merger has completed in all jurisdictions, including the UK, although the interim measures (consisting of an [Initial Enforcement Order](#), a ring-fence and derogations) put in place by the CMA require Diebold to hold separate the UK operations of Wincor.
3. In its provisional findings on the reference notified to Diebold and Wincor (the Parties) on 20 December 2016, the CMA, among other things, provisionally concluded that the acquisition resulted in the creation of a relevant merger situation, and that the completed acquisition of Wincor by Diebold may be expected to result in an SLC in the market for the supply of customer-operated ATMs in the UK.
4. The CMA's analysis provisionally indicates that this SLC may be expected to result in adverse effects, and is likely to lead to an increase to the price of ATMs or lower quality in the Parties' offer than would otherwise be the case, absent the merger.
5. This Notice sets out the actions that the CMA considers it might take for the purpose of remedying the SLC in the UK, and any resulting adverse effects identified in the provisional findings.
6. The CMA invites comments on possible remedies by 10 January 2017.

Criteria

7. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.¹ The CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will then select the least costly and intrusive remedy that it considers to be effective.
8. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.²

Possible remedies on which views are sought

9. In merger inquiries, the CMA will generally prefer structural remedies rather than behavioural remedies because:
 - (a) structural remedies are likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) structural remedies do not normally require monitoring and enforcement once implemented;³ and
 - (c) behavioural remedies may not have an effective impact on remedying the SLC and its resulting adverse effects, and may create significant costly distortions in market outcomes.
10. In this case as we are not able to restore comprehensively the precise pre-merger conditions of rivalry, the difference between structural and behavioural remedies may not be clear cut, and a combination of structural and behavioural elements may be necessary.
11. At this stage the Group has provisionally identified the following remedies to encourage and assist a potential new entrant or an existing third party to enter or expand in the UK ATM market with the aim of compensating, to the maximum extent possible, for the competitive constraint that will be lost by the Merger:
 - (a) A structural remedy involving the sale and transfer of certain assets and rights in respect of Wincor's or Diebold's customer-operated ATM

¹ Section 36(3) of the Act.

² Merger Remedies: Competition Commission Guidelines (CC8), paragraph 1.9. CC8 has been adopted by the CMA Board.

³ CC8, paragraph 2.14.

business in the UK, potentially combined with behavioural elements to ensure that the remedy is effective; and/or

(b) A behavioural remedy involving the Parties making certain services or facilities available to a potential new entrant or an existing third party to enable them to enter or expand in the UK market.

12. The Group has also considered whether a price cap in conjunction with minimum quality, product range and service requirements would address the adverse effects resulting from the SLC. However at this stage the Group does not consider that a price cap would be likely to be effective as there is significant uncertainty around the prices, service levels and quality of the services that would need to be defined in the remedy. In addition, a price cap would not directly address the provisional SLC that we have identified by restoring rivalry between the Parties that would be lost due to the Merger.

Structural remedy – sale and transfer of certain assets and rights

13. The Group's current view is that the sale and transfer of certain assets and rights in respect of either Diebold's or Wincor's UK customer-operated ATM business to a suitable purchaser may be necessary as part of a comprehensive solution to all aspects of the SLC it has provisionally found.

Scope

14. To be effective in remedying the provisional SLC, any package of assets and rights would need to be appropriately configured to be attractive to potential purchasers and to enable the purchaser to operate effectively as an independent competitor in the UK.
15. The Group's current view is that the most appropriate package would comprise the operations of either Diebold's or Wincor's customer-operated ATM business in the UK, and could include the following:
- (a) transfer of the sales and maintenance team;
 - (b) transfer of existing customer contracts and the rights to fulfil these;
 - (c) a licensing/distribution arrangement to sell and maintain all or specified models of customer-operated ATMs;
 - (d) use of Diebold or Wincor brand name;
 - (e) access to software and parts; and
 - (f) access to relevant training, technical knowhow and R&D information.

16. All or some of the above mentioned elements would have to be specified for at least a minimum period, for which some ongoing monitoring arrangements may be necessary.
17. The Group welcomes views in relation to this proposed remedy, and any implementation issues that might arise but it specifically invites feedback on the following areas:
 - (a) Is the scope of the remedy mentioned in paragraph 15 comprehensive? Should anything be added to or deleted from this list?
 - (b) Should the Parties be allowed to propose which of the two businesses should be covered by the remedy? If not, which of the two Parties' (ie Diebold or Wincor) UK operations should be transferred under the remedy?
 - (c) Should the purchaser be granted the right to be the sole user of the relevant brand name in the UK ie Diebold or Wincor, which is transferred under the remedy?
 - (d) What should be the duration of any licensing/distribution arrangement?
 - (e) For how long should the Parties be required to continue to supply the ATM models covered by the remedy, related software and parts to the purchaser?

Identification of a suitable purchaser

18. The Group will wish to satisfy itself that a prospective purchaser is independent of the main parties, has the necessary financial and reputational capability to compete, is committed to competing in the relevant markets and that the remedy will not create further competition concerns.
19. The Group welcomes views in relation to the identification of a suitable purchaser and specifically invites feedback on whether the required purchaser needs to have experience of selling and/or maintaining ATMs in the UK.

Effective remedy process

20. At this stage the Group expects that the sale and transfer of assets and rights under the remedy could be achieved by a combination of sale of shares in the relevant UK legal entity of Diebold or Wincor and selling specific assets of that entity as they relate to the supply of customer operated ATMs in the UK.

21. The Group invites views on whether the Parties should be required to appoint an independent external monitoring trustee to ensure that the business to be divested is maintained during the course of the process and/or a divestment trustee to oversee the proposed remedy.
22. The Group will consider the appropriate timescale for implementing the proposed remedy and what procedural safeguards may be required to minimise the risks associated with this remedy option. The Group welcomes views on what would be an appropriate timescale and what procedural safeguards may be required.

Behavioural remedy - undertakings to assist entry or expansion

23. The Group also considered whether, in the absence of the sale of the customer-operated ATM business of one of the Parties in the UK, it would be possible to devise suitable behavioural remedies that would, on their own, encourage and assist a potential new entrant or an existing third party to enter or expand in the UK ATM market.
24. These could include the Parties assisting a potential new entrant or an existing third party at zero or reasonable cost, in respect of:
 - (a) Testing ATMs on the Parties' application software;
 - (b) Complying with any UK-specific regulation or specifications;
 - (c) Securing necessary certifications; and
 - (d) Providing maintenance services.
25. The Group welcomes views in relation to this proposed remedy, and any implementation issues that might arise but it specifically invites feedback on the following areas:
 - (a) The comprehensiveness of the services/facilities mentioned in paragraph 24;
 - (b) The time period over which this remedy would need to be in place; and
 - (c) What would be required for effective monitoring and enforcement?
26. The Group will also consider any other practicable behavioural or structural remedies that the main parties, or any interested third parties, may propose in order to address the SLC and any resulting adverse effects, including any behavioural remedies that could be required in a supporting role to safeguard the effectiveness of any structural remedies.

27. In determining an appropriate remedy, the Group will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that has been provisionally identified. The Group will also consider whether a combination of measures is required to achieve a comprehensive solution, and will evaluate the cumulative impact of any such combination of measures on the SLC or any resulting adverse effects.

Relevant customer benefits

28. The Group will have regard to the effects of remedial action on any relevant customer benefits within the meaning of section 30 of the Act arising from the merger situation. Such benefits might comprise lower prices, higher quality or greater choice of goods or services or greater innovation in relation to such goods or services. A benefit is only a relevant customer benefit if the CMA believes that:
- (a) the benefit has accrued to customers in the UK as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation; and
 - (b) the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.⁴
29. The Group welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent to which these are preserved by the different remedy options we are considering.

Next steps

30. Interested parties are requested to provide any views in writing, including any practicable alternative remedies they wish the Group to consider, by 5pm on the 10 January 2017.⁵
31. A copy of this notice will be posted on the [CMA's website](#).

⁴ Section 134 of the Act.

⁵ This notice of possible actions to remedy the SLC and any resulting adverse effects is given having regard to the provisional findings announced on 20 December 2016. The main parties have until 10 January 2017 to respond to the provisional findings. The Group's findings may alter in response to comments it receives on its provisional findings, in which case the Group may consider other possible remedies, if appropriate.