ashurst

CMA'S CONSULTATION ON THE DRAFT GUIDANCE ON INITIAL ENFORCEMENT ORDERS AND DEROGATIONS IN MERGER INVESTIGATIONS

RESPONSE OF ASHURST LLP

Introduction

Ashurst LLP welcomes the opportunity to respond to the consultation by the Competition and Markets Authority ("**CMA**") on its draft "*Guidance on initial enforcement orders and derogations in merger investigations*" (22 March 2017) ("**the draft IEO guidance**"). This response contains our own views, based on our experience of advising and representing clients on merger control issues, and is not made on behalf of any of our clients.

We confirm that the contents of this response are not confidential. We confirm also that we would be happy to be contacted by the CMA in relation to our response.

1. **Does the guidance generally provide sufficient information in relation to the CMA's practice in relation to IEOs and derogations (in particular as concerns process and timing)? Are there any aspects of the CMA's practice on which further information would be useful?**

1.1 Overall, we find the new guidance to be helpful. We welcome both the clarity on particular issues and also the consistency of approach which published guidance promotes, not least given the CAT's views that, although guidance is "*no more than that*", it is widely relied upon and there should therefore be "*good reasons*" for departing from it.[1]

1.2 We also welcome the confirmation that IEOs (or specific obligations within an IEO, or the application of the IEO to particular markets) will be lifted "*as early as is appropriate*". We consider this approach is essential to maintain the required proportionality of the burden of an IEO on the merging parties.

1.3 We note the cross reference to paragraphs 7.28 to 7.31 and Annexe C of "*Mergers: Guidance on the CMA's jurisdiction and procedure*" (CMA2), together with the comment at paragraph 1.5 of the draft IEO guidance that where there is any inconsistency between the two documents, the most recently published will prevail. It would be simpler, and remove the risk of confusion, to maintain a single source for all guidance on the subject of IEOs. Moreover, the cross-references redirecting the reader to consult CMA2 for the next point in the discussion disrupt the flow of the draft IEO guidance and notably undermine the user-friendliness of the document. At the very least, the cross-referenced content should simply be repeated. However, we consider that the best approach would be to integrate the contents of the draft IEO guidance into an updated and expanded new Annexe C to the CMA2 guidance. In this way, all the guidance on this topic would be combined into a single document.

1.4 We note the emphasis in a number of parts of the draft IEO guidance on dealing with issues as part of pre-notification discussions (for example, whether an IEO is needed at all, whether and which derogations can be agreed up front, etc). We agree that the CMA should be willing to engage in such discussions at an early stage in the process. This should increase commercial certainty for businesses and reduce costs if these issues can

[1] See **Unichem v OFT** [2005] CAT 8 at paragraph 95.

be dealt with in a focussed way. There is a broader point about the duration of upfront discussions and "front-loading" of the review process, but we consider that this relates more to the extent of information which is required before a Merger Notice is accepted as complete.

2. **Are there any other significant examples of derogations that stakeholders consider should typically be granted by the CMA where sufficiently specified, reasoned, and evidenced?**

2.1 Overall, we welcome the extensive guidance and examples concerning the types of derogation which are likely to be granted where sufficiently specified, reasoned and evidenced, as well as the categories of derogation which are not likely to be granted.

2.2 However, with regard to the acquirer and the target amending any existing commercial agreements between them or entering into new agreements, we consider that granting such requests may be appropriate in certain circumstances. We would question whether this type of derogation should therefore be listed in the examples of derogations which the CMA would be unlikely to grant, and would urge a case-by-case approach.

3. **Are there other specific actions that arise commonly in practice in relation to which further guidance on the CMA's likely approach would be useful?**

3.1 We have no comments.

4. **Do merging parties and their legal advisers consider themselves able to 'self-assess' in relation to contemplated actions that should not require a derogation? If not, what additional information would be useful to help merging parties and their legal advisers make this kind of assessment?**

4.1 The assessment which the CMA envisages is one of risk and degree. Our experience in advising clients on these issues means that we are well equipped to make such judgments. The most useful information to support decisions about whether a contemplated action requires a derogation is actual examples from merger cases and decisions. We therefore encourage the CMA to continue to publish reasoned derogation decisions and to update the draft IEO guidance on a regular basis.

5. **Views on any other aspects of the guidance**

5.1 We have no further comments.

Ashurst LLP
April 2017