

Response to the CMA's consultation on Guidance on initial enforcement orders and derogations in merger investigations**Introduction**

- 1.1 Addleshaw Goddard LLP welcomes the opportunity to comment on the draft Guidance on initial enforcement orders (**IEOs**) and derogations in merger investigations (the **Guidance**).
- 1.2 Our comments are based on our own experience. The comments are expressed on behalf of Addleshaw Goddard LLP and do not necessarily represent the views of the firm's clients.

(a) 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?

- 1.3 We welcome the Guidance, which will be useful for supplementing the CMA's publication *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*.
- 1.4 We believe merging parties may find it useful if the CMA were also to provide general guidance on how it assesses derogation requests which do not fall within any of the examples provided within the Guidance.
- 1.5 The Guidance notes that the CMA will consider where practicable submissions on derogations before imposing an IEO but that an IEO may be imposed without discussion of possible derogations where the CMA is unable to establish that a derogation is justified "*eg, because there is insufficient time available to review the merging parties' submissions.*" This can cause particular difficulties in the case of, for example, a competing regulatory obligation (such as a Traffic Commissioner route obligation) or a banking covenant (where an unqualified IEO can put the parties in breach from the moment the IEO is imposed). We appreciate that, in the event that the merging parties are unresponsive, the CMA will be forced to impose the IEO. Nevertheless, given the consequences, it would be helpful to have further guidance as to how long parties will have to make these submissions. We note that, as a matter of practice, this may only be a matter of a few days.
- 1.6 We note the CMA's advice in paragraph 3.4 of the Guidance to make derogation requests in one go if possible. Whilst we appreciate there are good reasons for this, in practice, our experience is that the need for derogation requests sometimes only emerges whilst operating under an IEO and therefore it is not always possible to anticipate these ahead of time.
- 1.7 We believe that the guidance provided in paragraph 3.11 of the Guidance on when the CMA may grant a derogation for information sharing for legitimate transaction execution purposes will be useful for merging parties. An additional example of a legitimate transaction execution purpose would be to comply with finance covenants. We note that the Guidance states that the CMA may grant a derogation in these circumstances where strictly limited to what is necessary for a legitimate purpose and appropriate safeguards are in place "*in particular to ensure that such information is not shared with and used by staff involved in the acquirer's commercial decision-making*". Whilst we appreciate the rationale for this requirement, we note that the CMA will need to consider making allowances for smaller businesses where there may not be large

numbers of staff able to undertake integration planning and at the same time not be any part of the commercial decision-making within the acquirer business.

- 1.8 The Guidance at footnote 27 states that the CMA may require merging parties to provide (or show evidence that they provided) suitable incentives in order to retain remaining staff. We anticipate that parties may find it hard to assess what in a particular context "suitable incentives" are, beyond business as usual incentives, (that is, not in any way providing disincentives for staff to continue working at the target company).
- 1.9 In practice, an issue may arise where a failing target is bidding for new work without purchaser backing, and failing in doing so without purchaser support because of concerns over security of supply. In this example, the IEO will have the opposite effect to the one intended as the target will fail to win new work and as a result it will be difficult to maintain the target business in line with its pre-merger business plans. The template IEO provides only that sufficient resources be made available for the development of the target business on the basis of its pre-merger business plan. Further guidance on the level of support that should be provided by an acquirer in these circumstances would be welcome. We discuss this further below, in the context of derogations.

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

- 1.10 We consider these ought to include giving the target the benefit of the acquirer's supply arrangements where these arrangements are not transferring with the target (e.g., insurance, fuel and maintenance contracts).
- 1.11 Paragraph 3.35 of the Guidance provides an example of a derogation request that will typically be declined as the acquirer assuming control of (or material influence over) the commercial policy of the target business. We would suggest there may be good reason for doing so to improve the customer offering of the target business (e.g., through reducing prices). Where this produces clear consumer benefits and does not reduce the ability of the purchaser to divest the target, we do not see in general a concern and would expect that the CMA would be capable of granting a derogation¹.
- 1.12 We strongly welcome the CMA's confirmation in paragraph 3.36 of the Guidance that it is prepared to grant wider derogations of the type in paragraph 3.35 of the Guidance in certain circumstances, e.g. where the target is failing (and we assume that the cross-reference to paragraph 3.29 should be to paragraph 3.35). Given the extreme and time-sensitive nature of the circumstances identified in paragraph 3.36, we would encourage the CMA to provide as much guidance as possible on these circumstances in the Guidance. For example, it would be helpful if the CMA could indicate whether it would be prepared to grant the following in such a scenario:

(a) white labelling (the purchaser supplying goods or services to the target, which in turn maintains its customer-facing relationship);

¹ See, for example, McGill's Bus Services / Arriva Scotland West merger inquiry (ME/5323/12).

- (b) deferral of non-viable business plans;
- (c) deferral of anticipated capital expenditure; and
- (d) additional management support.

(c) 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?

1.13 See paragraphs 1.10 to 1.12 above.

(d) 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?

- 1.14 Generally, we believe there is sufficient information to allow parties and their legal advisers to 'self-assess' in relation to contemplated actions that should not require a derogation, although we welcome the further guidance provided by the CMA.
- 1.15 We note the inclusion in paragraph 3.22 of the Guidance of derogation requests relating to non-overlapping businesses. It may be a more efficient way of operating the IEO regime, viewed in the context of the purpose of IEOs, if it was clear from the template IEO that non-overlapping businesses would not be caught by the IEO. Parties would then be able to self-assess (with advice) whether a particular business is an overlapping business. We believe that the addition of this paragraph in the Guidance may lead to an increase in the volume of derogation requests.
- 1.16 The definition of key staff in the template IEO is "*staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business*". It may be helpful for parties in self-assessing if the CMA provided further guidance on staff that would (and would not) typically be regarded as key staff. Further guidance could be provided on when staff's performance will typically affect the viability of the business, and consider, e.g., whether this is affected by the degree to which the staff are easily replaceable, e.g., with other staff within the same business taking over their duties. Further, it may be helpful in relation to staff departures if the CMA could clarify that derogations would not be required where the departure of staff from the target had been agreed in principle prior to imposition of the IEO.

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