

1. Introduction to response of Smith & Williamson's Competition Services Team

Smith & Williamson's Competition Services Team welcomes the opportunity to respond to the Competition and Markets Authority ("CMA") consultation on the draft guidance on interim measures in merger investigations ("Draft Guidance").

Our Competition Services Team includes Nasoul Gopal (Head of Monitoring Trustee Services), Doug Hall (Head of Competition Services), Michel Alexander (Senior Manager & Competition lawyer) and Stacey Newman (Senior Manager) who have all acted as Monitoring Trustee ("MT") on behalf of the CMA and its predecessor the Competition Commission since 2009. They are supported by other colleagues within our Competition Services Team and this response contains the views of Smith & Williamson's Competition Services Team and not necessarily Smith & Williamson LLP's views.

Also, the comments below should not in any way be interpreted as our views in relation to a specific case, but they represent our general experience of monitoring Interim Measures in merger investigations in over 10 cases on behalf of the CMA / Competition Commission and our experiences of fulfilling a similar role for other competition authorities globally including on behalf of the European Commission.

We confirm that nothing in this response is confidential. We also confirm also that we would be happy to be contacted by the CMA in relation to our responses.

2. Is the content, format and presentation of the Draft Guidance sufficiently clear?

The format and presentation of the Draft Guidance is clear and follows an intuitive order.

3. Is the Draft Guidance sufficiently comprehensive? Does it have any significant omissions?

The draft guidance appears to be sufficiently comprehensive.

4. Do you have any suggestions for additional or revised content that you would find helpful?

In our view, the Draft Guidance could be strengthened with the inclusion of more practical examples similar to the content of paragraph 3.65.

For example, paragraphs 3.57 to 3.62 provide helpful guidance in relation to replacement of key staff or substantive changes to the merging parties' organisational or management structures.

Pursuant to Clause 5(i) of the template IEO no changes are made to key staff of the merging parties. In practice, however, key staff may leave during the Interim Measures for example as a result of uncertainty, especially at the target business, and it is important that this issue is being mitigated by the merging parties for example by introducing a retention scheme.

Our general impression is that not all merging parties appear to sufficiently consider and address this issue at the outset. Also, key staff is not always identified and / or not identified accurately because it is sometimes

perceived that key staff only entails senior staff whereas in practice this may entail staff of all layers within the business based on for example their experience, knowledge, technical ability and / or contacts with customers and suppliers.

In addition, the merging parties do not always keep this under review for the duration of the Interim Measures, i.e. they may fail to re-consider their assumptions following any key staff resignations thereby they may put the viability of the businesses at risk.

The Draft Guidance could be improved by addressing these points and by setting clear expectations around retention of key staff. Separately, the CMA may require the merging parties to provide a list of key staff as soon as the Interim Measures take effect and it may for example change the wording of the template IEO to reflect this.

Another example where the Draft Guidance may be strengthened is around hold separate requirements. The Draft Guidance includes helpful guidance around safeguards that may be expected. However, it maybe more explicit about the need for the merging parties to sufficiently educate their staff about the hold separate requirements and provide some best practices thereof. In our view, it is key that the merging parties:

- Undertake a robust risk assessment;
- Address the risks identified by introducing measures to ensure that they will adhere to the hold separate requirements;
- Ensure that all relevant staff is being sufficiently trained about (these measures to adhere to) the hold separate requirements; and
- Keep the measures under review and remind staff periodically.

5A. Comments on interim measures prior to completion (paragraphs 2.15 - 2.24)

We have acted as Monitoring Trustee for the CMA on cases where the merging parties completed the transaction at a global level subject to hold separate obligations for the UK businesses.

In our view, it is useful to include these examples in the Draft Guidance because this approach may assist the merging parties in integrating in jurisdictions where the deal has been cleared whilst the CMA's merger review process is not being compromised. We consider that in normal circumstances we should be in the position to effectively monitor the hold separate obligations.

5B. Comments on information exchange without a derogation (paragraphs 3.09 - 3.18)

The CMA notes in paragraph 3.24(c) that it has granted derogations to enable access for the acquiring firm to certain financial information from the target business for the purpose of financial oversight. We understand that these derogations may be for example granted to ensure that:

- The target business is being maintained as a going concern and has sufficient financial resource until the Merger review process is completed; and
- The acquiring firm and target business comply with their statutory and regulatory requirements.

In our view, it is important that certain aggregated financial data is being provided to the acquiring firm under strict safeguarding measures based on a reporting template which has been shared with the CMA upfront. Usually, we consider that the acquiring firm obtaining this information once a month should be sufficient to monitor the viability of the target business.

The CMA's current case-by-case approach appears not to reflect that the acquirer should obtain certain financial information which is strictly necessary to verify that the target business is being maintained as a going concern.

Alternatively, the Interim Measures could address that aggregated financial information which is strictly necessary may be provided to the acquirer on a periodic basis, based on a reporting template and subject to strict safeguarding measures in place.

The Interim Measures would require the Parties to:

- Inform the CMA about the safeguards in place after the Interim Measures would take effect (and no information is exchanged until CMA confirmation).
- Provide the CMA with a reporting template after the Interim Measures take effect (and no information is exchanged until CMA confirmation).
- Provide the CMA (and / or MT if applicable) with a copy of the monthly reporting pack.

5C. Comments on unavoidable consequential effects (paragraphs 3.19 - 3.21)

The Guidance may benefit from some practical examples to ensure that the reader may understand what integration actions entail and how the CMA would assess whether it may need to issue an Unwinding Order. Similar measures have been imposed in other jurisdictions which may assist the CMA.

5D. Circumstances in which the CMA will consider imposing a MT (paragraph 4.5)

An MT may be appointed during a merger review process to ensure that any pre-emptive action is avoided before the merger review is completed that could conflict with any final remedies' decision.

The CMA appears to direct merging parties more often to appoint a MT during Phase 1 than it has done historically. We welcome this as generally we perceive that, in cases with certain challenges, a timely appointment of an MT, may assist the CMA in monitoring that the Interim Measures are being adhered to. It may be more challenging for an MT to onboard at the commencement of Phase 2 when certain risks, such as outlined in paragraph 4.6, have already materialised in Phase 1.

An MT, based on previous experiences, may identify certain risks and may provide the merging parties and their advisers with helpful guidance to mitigate these risks before they materialize.

In our view, the CMA could therefore consider, in certain completed mergers, whether an MT would need to be in place from Day 1 of Phase 1. For example, if the CMA would be of a view that the risk factors set out in paragraph 4.6 may materialize during the merger review process. Based on our experience this may particularly be appropriate when:

- Certain assets that are potential remedies are at risk;
- There are material concerns around the viability of the target business;
- The target business is not a standalone business and is being supported by the acquiring firm; and
- Substantive integration has taken place between target business and acquiring firm.

6. Do you have any other comments on the draft guidance?

We appreciate the faith the CMA and Competition Commission have put into our MT team over the last 10 years and look forward to continuing in assisting the CMA that Interim Measures are being adhered to as this is in our view key to the UK's voluntary regime.

To that end, we welcome the CMA's recent changes in assigning more resource to the monitoring of the Interim Measures and a designated contact person for the MT.

As set out above, generally we consider the Draft Guidance to be comprehensive and helpful for merging parties and their advisers. However, the template IEO could in our view be improved further and we are happy to provide the CMA with some suggestions, if and when appropriate.