

28 May 2019

Michael Jewell and Peter Park
Competition and Markets Authority
Victoria House
37 Southampton Row
London WC1B 4AD

Dear Sirs,

Interim measures in merger investigations

We are writing in response to the new draft guidance on interim measures in merger investigations (the “draft Guidance”), published by the CMA on 1 May 2019, and the consultation process thereon.

We act as monitoring trustee on a wide range of cases, including in respect of CMA and European Commission merger cases, working with parties subject to Interim Measures, and with hold separate managers, in monitoring the implementation of and compliance with such measures. We have acted on CMA cases involving each of IEOs, IOs, and interim undertakings, during phase 1 and phase 2.

Overall, we consider that the draft Guidance is both comprehensive and helpful. It sets out clearly the circumstances where Interim Measures may be introduced, the requirements and expectations in respect of such measures, and the importance of ensuring that the pre-merger *status quo ante* is maintained in relevant circumstances.

We make the following additional comments (by reference to the paragraph numbering in the draft Guidance), reflecting our experience of the practical application of Interim Measures:

- 1.3: although the list of potential pre-emptive actions set out in the footnote to paragraph 1.3 is not intended to be exhaustive, other possible pre-emptive actions which we consider can be particularly prejudicial, and therefore may require to be prevented, include i) the sale of equipment (in addition to failing to maintain equipment), ii) the integration of IT systems, and iii) the integration / non-maintenance of brand(s).
- 1.11: we consider this point to be of particular importance (as further highlighted at paragraph 3.7 of the draft Guidance). In our experience, issues in respect of actual or potential non-compliance with Interim Measures can arise where executives make assumptions as to how to apply specific requirements without consulting their legal advisors and / or the monitoring trustee (if appointed). This issue can in particular arise as the process continues over time, with the on-going requirements of Interim Measures not necessarily being at the forefront of executives’ thinking as they undertake their day-to-day business.

THE POWER OF BEING UNDERSTOOD

AUDIT | TAX | CONSULTING

RSM Corporate Finance LLP, RSM Legal LLP, RSM Restructuring Advisory LLP, RSM Risk Assurance Services LLP, RSM Tax and Advisory Services LLP, RSM UK Audit LLP, RSM UK Consulting LLP and Baker Tilly Creditor Services LLP are limited liability partnerships registered in England and Wales, with registered numbers OC325347, OC402439, OC325349, OC389499, OC325348, OC325350, OC397475 and OC390886 respectively. RSM Employer Services Limited, RSM HR Limited, RSM UK Tax and Accounting Limited and RSM UK Management Limited are registered in England and Wales with numbers 6463594, 3539451, 6677561 and 3077999 respectively. RSM Northern Ireland (UK) Limited is registered in Northern Ireland at Number One Lanyon Quay, Belfast, BT1 3LG with number NI642821. All other limited companies and limited liability partnerships are registered at 6th Floor, 25 Farringdon Street, London, EC4A 4AB. The UK group of companies and LLPs trading as RSM is a member of the RSM network. RSM is the trading name used by the members of the RSM network. Each member of the RSM network is an independent accounting and consulting firm which practises in its own right. The RSM network is not itself a separate legal entity in any jurisdiction.

RSM Legal LLP is authorised and regulated by the Solicitors Regulation Authority, reference number 626317.

Baker Tilly Creditor Services LLP is authorised and regulated by the Financial Conduct Authority for credit-related regulated activities, financial services register number 619258.

We consider that it is helpful i) for parties and / or their legal advisors to notify in writing each of the relevant officers and personnel within the affected business(es) of the Interim Measures, the obligations therein, and their practical impact, ii) for this communication to be documented to evidence which officers and personnel have been notified, and iii) for periodic updates to be provided so as to remind individuals of the on-going obligations. It is often helpful to designate a single point of contact, for example the group legal counsel, to be available to deal with internal queries as they arise.

Updates as to the on-going nature of Interim Measures can also be highlighted internally through the circulation of the compliance statements required to be submitted by, typically, the Chief Executive Officer to the CMA on a regular basis (as set out at paragraph 7.1 of the draft Guidance). In our experience, businesses often obtain confirmation of compliance from relevant personnel internally (typically across the key operational and commercial functions) in advance of the CEO issuing such compliance statements to the CMA; this can also act as a process to ensure that relevant personnel receive regular reminders of Interim Measures and the requirements thereof.

As part of the process to ensure that relevant personnel are aware of the requirements of Interim Measures, we believe it is helpful i) to draw attention to the comments at paragraphs 3.22 – 3.23 of the draft Guidance in respect of the application of actions being in the ‘ordinary course of business’ – which in our experience is a typical rationale for actions being taken – and the importance of consulting with the CMA in advance of undertaking any actions where there is uncertainty as to whether these actions fall within the definition, and ii) to ensure that relevant personnel are clear as to the date on which Interim Measures have become effective, particularly where this occurs subsequent to completion of the transaction or otherwise where integration actions have already been implemented (as contemplated in paragraphs 3.19 – 3.21 of the draft Guidance) – the cut-over from the position pre- to post-Interim Measures should be clearly recognised.

As a related point, we sometimes see uncertainty as to which personnel are considered to be Key Personnel. This can give rise to issues in respect of who requires formally to be made aware of Interim Measures, and to what level of detail (in addition to lack of clarity as to which personnel are critical to be retained). We recommend that this issue is assessed early. Although dependent on the specific businesses involved, we have acted on cases where the entire work-force has been notified of Interim Measures, albeit at different levels of detail for different employee grades.

- 3.16(b): in the event that the merger is not cleared, or in the event of a divestment remedy being required following the conclusion of such remedy, recipients should be required to delete confidential information received (subject to any requirements to retain such information, for example regulatory requirements).
- 3.67: where an acquiring business is permitted by the CMA to exercise direct control over the commercial policy of a target business or to appoint an independent manager to run that business, it is important that there is a clear business plan against which to assess performance (for example, monthly trading) and decisions (for example, levels of capital expenditure invested). This would typically be the business plan of the target business in place at the time of acquisition. If, prior to the introduction of Interim Measures, this business plan requires to be amended (for example, to implement measures to mitigate severe financial difficulty), such changes should be clearly documented with their rationale explained.
- 4.4: formal assessment and approval of potential purchaser(s) will be undertaken by the CMA not by the monitoring trustee, although the monitoring trustee may assist at the CMA’s request.
- 4.6: in our experience, even if appropriate and sufficient structures are put in place to ensure the continued separation of businesses, it can be the case that customers (and other third-parties, for example suppliers) will be or become aware that a target business has been acquired but are not, understandably, familiar with the requirements of Interim Measures put in place. This feature, potentially accompanied by an element of permitted integration (for example, as target business employees exit to pursue other opportunities and

their roles are necessarily assigned, following the granting of derogations, to the acquiring party's employees), may give rise to 'creeping integration', with customers increasingly viewing and dealing with the acquiring and target businesses as a single business. This can be a particular feature where customers were served by both of the merging businesses prior to acquisition. To seek to avoid this, it may be appropriate to communicate proactively with such parties to clarify the circumstances and the nature of the Interim Measures in place.

Separately, the provision of incomplete or unclear data to the CMA, even if unavoidable (for example, if the record-keeping of the target business is poor), which gives rise to concerns or uncertainty in carrying out the assessment of other risk factors, may in itself represent a further risk factor.

If helpful to discuss any matters relating to Interim Measures we would be happy to do so. Otherwise, we look forward to finalisation of the draft Guidance.

Yours faithfully

Paul Elliot
Partner, Head of Competition, RSM