MONITORING TRUSTEE PARTNERS

To:	Michael Jewell and Peter Park Competition and Markets Authority Victoria House 37 Southampton Row London WC1B 4AD	Email: [redacted]
cc:	Steven Pantling Competition and Markets Authority	Email:
From:	Jan Jaap Snel and Clive Douglas Monitoring Trustee Partners B.V.	Email:
Date:	27 May 2019	

Dear Michael and Peter,

Response by Monitoring Trustee Partners B.V. ("MTP") to the CMA consultation on draft guidance on interim measures in merger investigations

We had the pleasure of meeting Peter, Steven Pantling and Sara Mirabella in the CMA's offices on 4th April 2019 and thank you for inviting MTP to participate in the public consultation exercise and comment on the CMA's revised draft guidance on interim measures in merger investigations.

Our comments are made from the perspective of a monitoring trustee and, as such, are primarily practical rather than legal in nature:

1. Circumstances in which the CMA will consider imposing a monitoring trustee.
   We agree with and support the text set out in paragraph 4.5 of the draft guidance on the circumstances in which the CMA will consider imposing a monitoring trustee. However, we suggest that in practice it may be useful and prudent in certain situations, particularly in respect of phase 1 initial enforcement orders, for the CMA to consult with one or more monitoring trustee organisations on its roster (as referred to in paragraph 4.8 of the draft guidance) on an informal basis about the appropriateness and/or practicalities of imposing a monitoring trustee. MTP would certainly be open and receptive to an informal conversation with the CMA in such situations.

2. Exchange of information between merging parties during Interim Measures [paragraphs 3.12 & 3.15].
Given the UK's voluntary, non-suspensory merger filing regime, merging parties will not know in advance if the CMA intends to require the appointment of a monitoring trustee until the CMA informs the parties of its intention in this regard. However, prior to the appointment of a monitoring trustee, the merging parties will have negotiated and signed a confidentiality/non-disclosure agreement and exchanged information pursuant to it, which typically will include approval for each party to share confidential information received from the other(s) to 'any governmental department or body having requisite authority' (or similar wording).

In order to clarify and ensure that, as and when a monitoring trustee has been appointed, a merger party is entitled to disclose and share information with a monitoring trustee without having to obtain prior approval of the other merger party/ies, we suggest parties to a proposed merger should be encouraged to include in their confidentiality agreements provision for each party to share any information disclosed to it by the counterparty/ies not only with 'any governmental department or body having requisite authority' (or similar wording) but also with 'any monitoring trustee that the United Kingdom Competition and Markets Authority or any other governmental body having requisite authority subsequently directs the parties (or either or any of them) to appoint' (or similar wording).

3. Duties of merging parties and their advisors with respect to provision of information to monitoring trustees.
As mentioned in paragraphs 3.9 and 3.12 of the draft guidance, merging parties have a legal duty to self-assess whether information exchanges are compliant with relevant laws both prior to Interim Measures being imposed and during any period when Interim Measures are in force and effect. If Interim Measures are put into effect which involve the appointment of a monitoring trustee, we suggest – bearing in mind the facts surrounding the involvement of the monitoring trustee in the *Electro Rent Corporation* case [2014] CAT 4 referred to in the guidance - that the CMA's guidance refers to a further duty on the merging parties not only to provide the monitoring trustee with information that is compliant with relevant laws, but is also complete, accurate and not misleading.

A corollary to the above concerns timeliness of the provision of information to monitoring trustees. In order for a monitoring trustee to act on behalf of the CMA and carry out his or her function to the best of his or her abilities, it is incumbent on merging parties and their advisors to ensure that if questions are put to a monitoring trustee about whether an action the parties are contemplating is restricted by an Interim Measure made by the CMA, not only must complete, accurate and non-misleading information be provided to the monitoring trustee, the monitoring trustee must also be given sufficient time to assess and process the information and consult with the CMA.

4. Clarification of the role of monitoring trustees with respect to derogation requests under Interim Measures and related lines of communication between merging parties, monitoring trustees and the CMA.
The reason why merging parties should be under a positive legal duty to provide monitoring trustees with complete, accurate and non-misleading information is to ensure that monitoring trustees have sufficient opportunity to process and assess the information to an extent which fully informs the CMA and helps the CMA to reach a fair and appropriate decision.

However, given that the CAT's decision in the *Electro Rent Corporation* case implies that parties subject to Interim Measures should only rely on derogation decisions made by the CMA itself and not rely on opinions offered by monitoring trustees – an implication which could lead to the parties to bypass discussion with monitoring trustees on such issues altogether - we suggest that the guidance makes it clear that although questions that parties subject to an Interim Measure under which a monitoring trustee has been appointed can only be taken by the CMA itself, such questions should be routed through the monitoring trustee and not directed to the CMA.

This is because the monitoring trustee's role in this situation is to collect and assess information received from the parties and forward it to the CMA together with the monitoring trustee's views and recommendations. The CMA will then make the decision on the derogation request on the basis of the information provided to it this way and issue its written decision direct to the parties and simultaneously to the monitoring trustee.

This suggestion is not to detract or reduce the role of the monitoring trustee in monitoring the operation of an Interim Measure, but rather to clarify that the monitoring trustee only has full power and authority to act as the CMA's agent for the purposes of collecting and assessing relevant information, but the monitoring trustee's agency role does not extend to or include the power to make decisions on behalf of the CMA and any duties a monitoring trustee has towards the merging parties is limited accordingly.

We hope that these comments are helpful and useful to the CMA and we would be pleased to discuss them with you further in person or otherwise.

Yours sincerely

[redacted]

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