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Mr. Peter Park
Competition and Markets Authority
Victoria House
37 Southampton Row
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Consultation on interim measures in merger investigations

London, 24.05.2019

Dear Peter

We welcome the opportunity to comment on the Consultation Document of the Competition and Markets Authority (CMA) regarding the new draft version of guidance for interim measures in merger investigations (Guidance Document). This response is not confidential and may be published as is.

Our comments below are based on our experience of acting as monitoring trustee in merger investigations for the CMA and other competition authorities.

Overall, we welcome the publication of the Guidance Document which covers all relevant aspects in good detail and provides specific examples from recent case law.

In the following, we would like to comment on a few specific aspects of the Guidance Document:

Paragraph 4.5

The Guidance Document sets out that the CMA will routinely consider whether the appointment of a monitoring trustee is necessary at the beginning of phase 1 and when a decision is taken to hold an issues meeting.

From our experience, it is important for the CMA to act quickly as soon as pre-emptive action or certain risk factors have been discovered. This is because the situation may worsen fast. For example, further steps of integration might be taken or the deterioration of the target business through loss of key staff might continue. The sooner a monitoring trustee is appointed

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in these circumstances, the faster and more effectively these negative effects can be contained.

Therefore, we suggest that the CMA clarifies that the CMA not only considers these factors at specific points during the investigation, but may act immediately once pre-emptive actions or significant risk factors come to its attention.

Paragraphs 5.3/5.4

The Guidance Document differentiates between situations where unwinding is undertaken voluntarily following discussions with the CMA and the use of formal unwinding powers pursuant to an unwinding order or directions under interim measures. The use of formal powers is based on the CMA's own risk assessment.

We consider that the assessment whether or not to use formal unwinding powers should also take into account the cost and disruption caused by that measure. The CMA should weigh up the identified risk of pre-emptive action against the burden imposed on merger parties.

Some measures to unwind integration are considerably more burdensome than others. For example, to reverse the termination of development projects or to hire a senior employee can be very costly and should only be taken if one or several significant risk factors are present; however, other unwinding measures, which are primarily organisational in nature, might be straightforward and almost costless to implement, for example the adaption of decision-making processes and changes to the organisational structure. While merger parties usually agree to reverse organisational changes voluntarily, there can be situations where merger parties resist even such simple measures.

Therefore, we suggest that the threshold to use formal unwinding powers should be considerably lower where the unwinding measures are straightforward and do not create significant costs for the merger parties.

Paragraphs 5.4/5.5

The Guidance Document states that the CMA would typically use its unwinding powers where integration affects the way in



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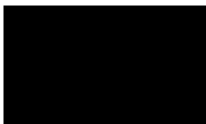
which customers and suppliers engage with, or perceive the independence of, the merging parties or if the risk of pre-emptive action significantly increases if immediate unwinding action is not taken.

We suggest that the CMA should also consider unwinding action when integration affects the ability of the target business to compete independently, even if this does not affect the way in which customers and suppliers engage with, or perceive the independence of, the merger parties. For example, changes to internal decision-making concerning key business processes like production might limit a firm's ability to compete independently even if the changes cannot be directly perceived from the outside. Such changes might disclose sensitive information to the other merger party and transfer decision-making power over key business processes. This might limit competition between the merger parties and could also negatively affect the performance of the target business in other ways., e.g. by lowering staff morale.

We note that some examples listed in para. 5.5 (d) (attending board meetings of the target business) and 5.5 (e) (functions or decision-making concerning production lines) are integration steps that affect primarily internal processes and might not be covered by the factors listed in para. 5.4.

Therefore, we suggest to include as an additional factor in the CMA's risk assessment the aspect whether integration steps are likely to limit the capability of the target business to compete independently.

Kind regards



Wolfgang Nothhelfer
Partner



Robert Nothhelfer
Partner