RESPONSE TO CMA CONSULTATION: INTERIM MEASURES IN MERGER INVESTIGATIONS

Baker McKenzie welcomes the opportunity to comment on the CMA's consultation on proposed revisions to its guidance: Interim measures in merger investigations ("Draft Guidance") and to its template Initial Enforcement Order (IEO) ("Draft Template IEO"). Our comments are based on the experience of lawyers in our EU Competition and Trade Law practice group of advising on UK and international merger control. We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

1. Introduction

1.1 We agree with the amendments to the Draft Template IEO, which clarify the parties to whom the IEO will apply. With respect to the revisions in the Draft Guidance, these are helpful in that they set out clearly the CMA's expectations in relation to compliance with Interim Measures.

1.2 We expect that the proposed revisions have likely been triggered by the Competition Appeal Tribunal's recent judgment in *Facebook v CMA*[1] (relating to the *Facebook/Giphy* transaction), which approved the CMA's use of an IEO that was very wide in scope and made clear that pre-emptive action by parties is a broad concept, and that the CMA has a considerable degree of discretion in its use of Interim Measures.

1.3 However, fundamentally we consider that the Interim Measures tool, and the way in which the CMA uses it, is creating significant uncertainty in the UK merger control regime. The compliance expectations set out in the Draft Guidance are highly onerous. The fact that the CMA expects that the parties will, for example, provide tailored guidance and training for staff; provide periodic internal communications to monitor compliance, and establish internal reporting mechanisms, shows in and of itself how complex and overly-burdensome the process has become. These compliance measures will require significant resources, in addition to the resources that are needed to engage with the CMA in respect of the substantive merger investigation itself. In our experience, negotiation of and compliance with Interim Measures becomes a significant separate deal workstream in and of itself, in addition to the heavy workload already required to deal with the merger investigation itself. The fact that IEOs can be global in scope (e.g. *Google/Looker*, *Salesforce/Tableau*), adds to the complexity of ensuring compliance.

1.4 We appreciate the CMA's reasoning that a tightening of the Interim Measures tool is necessary to maintain a voluntary mergers regime. However, in our experience, the CMA has in recent years become increasingly interventionist such that in reality, the regime is voluntary in name only. The CMA frequently calls in completed cases for review, which are then subject to stringent Interim Measures. This regulatory risk, together with a merger review regime which (i) includes the nebulous share of supply jurisdictional threshold which creates complexity in assessing whether or not to notify and (ii) typically requires parties to provide extensive volumes of data within short deadlines (with the risk of financial penalty for failure to comply), means that the UK merger control regime is arguably one of the most difficult systems in the world to navigate. The CMA's highly interventionist approach raises significant planning and coordination difficulties for businesses, as well as increases the CMA's own workload for little return. The likelihood of being called in for review means that in practice, businesses and their advisors do not realistically view the UK regime to be truly voluntary.

1.5 While we appreciate that this consultation is not about wholesale reform (given that the merger control structure is set out in primary legislation), we want to take this opportunity to urge the CMA to

[1] [2020] CAT 23.

advocate an overall review of the system, and more specifically, support a move to a mandatory notification regime.

Baker McKenzie

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