SLAUGHTER AND MAY

Slaughter and May response to the CMA consultation on interim measures in merger investigations

1. Introduction and summary

1.1 Slaughter and May welcomes the opportunity to comment on the CMA's proposed amendments to its interim measures guidance and template.

1.2 Our most important observation is that the CMA's current policy approach to interim measures seems inconsistent with Parliament's intention that UK merger control regulation should be non-suspensory. Indeed, the CMA's approach to interim measures is more intrusive and burdensome than more conventional suspensory regimes elsewhere.

1.3 The CMA's proposed amendments do not significantly improve this situation, and in some respects exacerbate it. A mandatory and suspensory regime with necessarily bright-line jurisdictional tests would paradoxically be less burdensome on business than the *status quo*.

1.4 We have set out below our detailed observations on other aspects of the proposed changes, in the format requested by the CMA. We invite the CMA to contact Anna Lyle-Smythe ([redacted]) or Philip McDonald ([redacted]) with any questions related to this response.

2. Question 2.1: Is the content, format and presentation of the draft guidance and draft template initial enforcement order sufficiently clear? If there are particular parts of the guidance or template initial enforcement order where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

The exceptions to paragraph 5(l) of the template order should be expressed more flexibly and clearly

2.1 Paragraph 5(l) of the template order contains the prohibition on exchange of confidential and proprietary information between the parties. It is subject to an exception for information exchange that is "strictly necessary in the ordinary course of business". The template provides examples where this exception applies: "where required for compliance with external regulatory or accounting obligations or for due diligence, integration planning [or the completion of any merger control proceedings relating to the transaction]" (the deletion of the merger control exception is discussed separately in paragraph 5.2 below). Paragraph 3.22 of the guidance gives brief and general guidance as to the significance of "ordinary course" as used throughout the template order.

2.2 Our experience in practice is that the CMA will typically require a derogation for parties to take advantage of these exceptions, especially with respect to financial information. When a derogation is then eventually granted, it is typically subject to strict conditions. This is sub-optimal:

(A) Such a significant difference between guidance and actual practice reduces transparency and legal certainty.

(B) It is normal for companies to require significant financial information for the preparation of financial and regulatory filings, the exact contents of which vary depending on the regulatory regimes to which they are subject, the nature of the business and the company's particular approach to reporting. This type of information exchange should generally be low-risk from the CMA's perspective.

(C) The CMA's insistence on going through the (frequently lengthy) derogations process for mandatory accounting disclosures often leaves parties scrambling to comply with their disclosure obligations at the last minute using minimal or even inadequate data. This distracts parties from both their usual work and the extraordinary exertion necessary to carry out a merger and to make merger control filings.

2.3 In light of the above, we believe that the CMA should give further guidance on the application of this exception. This guidance should state that, as long as parties restrict disclosure to what is strictly necessary, no derogation needs to be sought from the CMA. The guidance should also acknowledge that different companies are subject to different regulatory and reporting requirements, both as a matter of law and accounting practice, and that the exception extends to all such requirements.

Interim measures cannot logically apply to sellers post-completion

2.4 Changes throughout the template order could be taken to imply that sellers would be subject to interim measures even post-completion. We do not believe that this is intentional as:

(A) There is no logical basis for a seller to be subject to state compulsion in respect of a completed merger. At the point of completion, it becomes a third party with respect to the merger, and cannot be compelled by the CMA or the buyer to re-acquire the sold business.

(B) New drafting in paragraph 2.15 of the guidance suggests that the CMA's intention remains that the acquirer and the target are responsible for compliance post-completion.

2.5 We therefore suggest explicitly stating in the guidance that the responsibilities of the seller should terminate at the point of completion, and the order be varied or replaced on completion to give effect to this principle.

"Key staff" could be defined more precisely

2.6 We welcome the addition of the word "senior" to the definition of "key staff", and note that it reflects the CMA's established practice on this concept. However, we would suggest that further detail could be included in this definition. In particular:

(A) Executive board members would usually be considered key staff, as they typically represent the most senior executive and managerial functions in the organisation, and their performance is the most likely of any member of staff to be capable of affecting the viability of the business.

(B) Members of the executive committee or equivalent (i.e., the most senior executives below the board) are likely to be considered key staff, but (depending on the business's internal structure) a contextual analysis may reveal that some do not meet the criteria.

(C) Key staff usually would not include non-executive directors, as their typical function in businesses is to carry out high-level oversight on a periodic basis, rather than to discharge executive, managerial or business-critical functions. Most non-executive directors apply general business experience to the task of quasi-external scrutiny on behalf of shareholders. While broad knowledge of the industry is a useful characteristic in a non-executive director, they are by their very nature at a distance from the business, and are not supposed to be discharging essential roles. In addition, non-executive directors are much more likely to resign during a merger than other staff, especially where the target business is being delisted and therefore the non-executive role becomes defunct.

(D) Key staff usually would not include employees below the executive committee or equivalent. At these levels, employees typically work under a superior, alongside peers and (depending on the size of the business) over one or a number of subordinates. Together, superiors, peers and subordinates are very likely to be able to absorb the workload and functions of any employee who departs or changes role, and so imposing key staff restrictions on such employees would not normally be proportionate.

The CMA in practice takes a pragmatic approach to compliance statements that should be reflected in its template order and guidance

2.7 Paragraph 7 of the template order provides for compliance statements to be provided by the CEO or other persons agreed with the CMA. In our experience, a more pragmatic approach is needed on this, and specifically to permit other senior officers (with authority to bind the company) to sign these statements instead. This is logical as:

(A) the Financial Director/CFO and General Counsel frequently have better visibility over these matters than the Managing Director/CEO; and

(B) executive directors generally have authority to bind companies.

2.8 The CMA proposes to add a provision in footnote 80 of the guidance for separate compliance statements to be signed, potentially by several individuals in each party, depending on their structure, including individual shareholders signing on their own behalf. This could be overly burdensome:

(A) In many cases the directors of successive holding companies in investment structures, and in some cases the ultimate individual owners, are the same

person, and this policy could result in a single person signing a proliferation of practically identical compliance statements every two weeks in various roles. This would not add anything to compliance but could be a significant burden on the individual.

(B) Private individual shareholders who do not occupy roles in the company are not likely to have visibility over the matters to which the compliance statement relates. Requiring such individuals to sign compliance statements would not add anything to compliance, but would force an individual to give commitments in respect of matters outside of their control and knowledge, which is neither fair nor proportionate.

(C) Where the CMA considers that a compliance statement from the board of the company to which the order applies is not adequate, it should consult with the parties pragmatically to identify a single board (or set of individuals) best suited to giving the compliance statement, both in terms of sufficient seniority and knowledge of the matters to which the compliance statement relates. In substantially all cases, it should be possible for the CMA to agree to a single compliance statement from each party.

3. Question 2.2: Is the draft guidance sufficiently comprehensive? Does it have any significant omissions?

Paragraphs 5(d), 5(h) and 5(i) should be subject to an "except in the ordinary course" qualifier

3.1 Paragraphs 5(c), 5(e), 5(f) and 5(l) of the template order are subject to an "ordinary course" qualifier. There is no logical reason why paragraphs 5(d), 5(h) and 5(i) should not be subject to a similar qualification. Specifically, parties should be allowed to change the range of goods and services that they supply, transfer contracts to another business, or make changes to their key staff without a derogation from the CMA, as long as those changes are not merger-related and take place in the ordinary course of business.

There should be provision for situations in which interim measures conflict with other legal regimes

3.2 The CMA's policy approach to interim measures frequently conflicts with other regulatory regimes. The CMA's cautious approach to granting derogations then frequently leaves parties unable to comply with their regulatory obligations until the last minute. In some cases, the unavailability of a derogation has brought parties very close to suffering serious consequences for non-compliance with their regulatory obligations. Apart from the changes suggested in paragraph 2.3 above, we believe that a general exception from interim measures for compliance with legal obligations would be appropriate to avoid a situation in which a party to a merger is forced to choose between compliance with CMA interim measures and compliance with other laws.

The CMA should not stand in the way of non-commercial social interaction between businesses

3.3 We have observed that the CMA is in practice very slow to condone social meetings between senior management of merger parties, whether proposed as a derogation request or asserted as a situation in which no derogation is necessary. While social meetings are not essential in the same way as compliance with regulatory obligations, they are a fundamental aspect of doing business, and in practice present little if any risk in terms of pre-emptive action when appropriately managed (e.g. with a competition law briefing for all parties before the meeting). We consider that the CMA should take a more lenient approach to such meetings, and in particular should allow purely social and informal meetings.

4. Question 2.3: Do you have any suggestions for additional or revised content that you would find helpful?

4.1 See our response to questions 2.1 and 2.2.

5. Question 2.4: Do you agree with the policies set out in the guidance? In particular, we invite comments on the following points:

(a) To whom do the Interim Measures apply (paragraph 2.10); and

(b) Ensuring a smooth process (paragraphs 2.11-2.17).

The deletion of "substantive" in paragraph 5(c) of the template is unnecessary and burdensome

5.1 The prohibition on organisational changes in paragraph 5(c) is subject to an "ordinary course" qualifier as well as a "substantive" qualifier. Their meanings are quite distinct (it is possible to have a change that is outside the ordinary course but not substantive, or substantive but inside the ordinary course), and we believe that both are justified and proportionate qualifications to this rule, and there is no reason to delete "substantive". This deletion will accomplish little except to require more derogations requests in respect of non-substantive changes.

The deletion of the merger control exception to paragraph 5(l) of the template is unnecessary and burdensome

5.2 Parties to mergers that are subject to merger control review must inevitably collaborate on submissions to regulators. This includes:

(A) Giving constructive criticism on drafting, e.g. ensuring that characterisations of market dynamics are accurate;

(B) Ensuring consistency of approach, e.g. in terms of responses to requests for information; and

(C) Keeping each other apprised of communications with regulators, including clearances.

5.3 Many of these discussions may be carried on by outside counsel without any exchange of confidential information between the parties, but some aspects require input from individuals with appropriate expertise within the businesses. When carried out with appropriate safeguards, including limiting the list of recipients of information and redacting potentially sensitive information, it does not present a major risk from the CMA's point of view.

5.4 Deletion of this exception to the prohibition on information-sharing will make merger control review much more administratively difficult, and will reduce the quality of submissions both to the CMA and other authorities. We therefore consider that this exception should be retained, and that the guidance should be expanded to set out types of information exchange that is likely to be permissible under this exception.

The new drafting in paragraph 2.16 of the guidance is unnecessary and burdensome

5.5 The CMA suggests steps to proper implementation of interim measures at paragraph 2.16 of the guidance. We welcome inclusion of this detail, which reflects existing practice in many cases. However, we disagree with the characterisation of these as "likely to be, as a minimum, necessary to ensure effective compliance".

5.6 Effective compliance should be assessed contextually, and there will be circumstances in which these provisions ought not to be required by the CMA: e.g., communications to and guidance for staff in business divisions unaffected by the merger should not be considered to be necessary for compliance, and there should be a lower burden of compliance where a merger is anticipated or where the parties' businesses are located outside of the UK.

In paragraph 2.17 of the guidance, the CMA should be willing to give informal assurance that proposed approaches to compliance are sufficient (or not)

5.7 We welcome the CMA's acknowledgement in paragraph 2.17 of the guidance that it may engage with parties to assess their proposed approach to compliance with interim measures, which is reflective of existing practice. However, we are disappointed that the CMA does not propose to take any responsibility for its informal assurances that proposals do not raise significant concerns.

5.8 Some degree of reassurance that the CMA will not give informal comfort today and then begin enforcement proceedings tomorrow is important for legal certainty and transparency. We consider that the CMA should acknowledge that, where it does not object to a proposed approach to compliance, it considers that approach to be sufficient absent material changes in circumstances.

6. Question 2.6: Do you have any other comments on the draft guidance or draft template initial enforcement order?

6.1 The CMA's guidance sets out at paragraphs 2.22-2.25 the circumstances in which the CMA considers that interim measures may prevent completion of a transaction. It suggests that completion will normally be possible at Phase I, unless unusual circumstances could mean that completion would necessarily result in pre-emptive action. Footnote 27 provides the following examples of such circumstances: "(a) the act of

completion would directly lead to the loss of key staff or management or operational capability (e.g. through the loss of customer or supplier contracts) for the target business. This is more likely to occur in an asset acquisition than where a functioning business is being acquired, which could be preserved through a post-completion IEO; (b) the act of completion would result in significant changes to the acquiring or target businesses, which would be difficult or costly to reverse, e.g. the loss of regulatory licences."

6.2 In practice, we have found that the provisions of the template order may stand in the way of completion, even though they do not on their face prohibit it. Specifically, public companies may be subject to regulatory requirements to carry out steps at the point of completion that cannot be accomplished within the restrictions on integrative steps and information exchange.

6.3 Given these circumstances, the CMA should:

(A) make an explicit provision in interim orders permitting parties to take steps that are necessary ancillaries to completion, even where those might otherwise breach the terms of the order, unless the CMA explicitly intends to prevent completion;

(B) make clear in the guidance that prevention of completion is not usually intended, and the CMA will ensure that any derogations necessary to achieve completion will be granted expeditiously, acknowledging that many mergers are carried out on necessarily tight timetables;

(C) set out in the guidance a closed list of situations in which the CMA would consider prohibiting completion; and/or

(D) make provision in the guidance for imposing interim orders just after completion rather than just beforehand in mergers where these concerns arise, given that the CMA retains extensive powers to request information and to issue unwinding orders, and that parties are unlikely to be able to prejudice a reference or impede remedies during the short window between finalisation of completion and the imposition of an order in this manner.

Slaughter and May (AMZL/PJCM)
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