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Competition and Markets Authority

Via Email:
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Consultation on interim measures in merger investigations

London, 30.04.2021

Dear Sir or Madame,

We welcome the opportunity to comment on the Consultation Document of the Competition and Markets Authority (CMA): *Interim measures in merger investigations,* and the template Initial Enforcement Order.

NOCON's comments below are based on our experience of acting as monitoring trustee in merger investigations for the CMA and other competition authorities. This response is not confidential and may be published as is.

For ease of reference, we refer to the proposed amended documents as "Amended Guidance" and "Amended Template IEO".

Overall, we welcome the proposed amendments. In the following, we would like to comment on a few specific aspects of the Amended Guidance and the Amended Template IEO.

(Substantive) changes to organisational structure or management responsibilities

In para. 5 c) of the Amended Template IEO, the CMA intends to delete the word "substantive". However, this change has not been reflected in the Amended Guidance and may lead to greater uncertainty about the scale of change the CMA is interested in preventing. For example, footnote 70 of the Amended Guidance states: "Changes to organisational structure or management responsibilities that are not substantive are not prohibited by the standard form IEO."

We note that the Amended Guidance only refers to "substantive" or "material" changes to the organisational structure or management responsibilities (e.g. paras. 3.40 c), 3.57 and 3.58). We suggest that the wording of the Amended Guidance and the Amended Template IEO would be more helpful if consistent and, therefore, we suggest the deletion of the word "substantive" in the Amended Template IEO is reversed.

In the event that the CMA wants to retain the proposed change to the Amended Template IEO, we suggest the CMA provides additional guidance as to which changes do not require a derogation. According to the Amended Template IEO, changes to the organisational structure or management responsibilities that fall within the ordinary course of business are exempt from the scope of the IEO. However, the Amended Guidance does not provide any practical examples what this may look like and the amended wording (without the word "substantive") may substantially broaden the scope of what kind of changes fall within the scope of the IEO.

In our experience, uncertainty around the scope of the IEO may lead to a large number of unnecessary derogation requests creating unnecessary burden for the merger parties and the CMA or alternatively lead to an interpretation of the guidance being made that is later challenged by the CMA.

Definition of Key Staff

The Amended Template IEO includes a definition of Key Staff with limited amendments. However, we note that the definition remains generic and the Amended Guidance does not include additional details as to what "senior executive or managerial responsibility" means.

We have observed in practice that some merger parties take an overly comprehensive approach and included middle management positions within the key staff definition (out of an abundance of caution). This resulted in a very large number of individuals considered key staff leading to a substantial number of derogation requests which were largely irrelevant in respect of preventing pre-emptive action. We suggest that additional guidance is offered to explain that "senior executive or managerial responsibility" is usually limited to board-level executives.

Definition of ordinary course of business

The Amended Template IEO defines the ordinary course of business as matters connected to the day-to-day supply of goods or services (or both) and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of the merger parties. The Amended Guidance lists a number examples of actions that do not qualify as ordinary course of business, i.e. the termination of a significant lease, major redundancy plans, or sales of assets that might impair either business's ability to compete independently.

We consider that this explanation may benefit from additional clarification. The CMA refers in its example of the termination of a significant lease, a matter considered in detail in the Electro Rent case. We note that the lease that was terminated in this case was for the sole UK premises of Electro Rent and follow the judgment that this was not connected to the day-to-day supply of goods or services.

However, in other industries (e.g. retail) this may be less clear-cut and the Electro Rent case provides limited insight. For example, a large retailer may perceive day-to-day business to include active management of its shop portfolio. Large retailers may operate tens, hundreds or thousands of stores and employ teams to manage this retail portfolio including utilising break clauses to open rent negotiations and close underperforming shops. In our experience the CMA is reluctant to accept any change relating to "structural assets" like leases as ordinary course of business, even if it is part of the day-to-day business of the merger parties. Given the CMA's approach, we suggest additional guidance could helpfully explain that the termination of any kind of lease is unlikely to fall within the ordinary course of business.

Kind regards

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