

Guidance on the use of interim measures pending final determination of merger references

Background: interim powers and restrictions

1. When a merger has been referred to the Competition Commission (CC) by the Office of Fair Trading (OFT) under the Enterprise Act 2002 (the Act), the CC has the power to prevent 'pre-emptive action' during the course of an inquiry, that is action which might prejudice the outcome of the reference or impede the CC from later taking such action as may be justified by its decision on the reference.¹
2. The CC may accept interim undertakings from the parties concerned to refrain from doing things which would constitute pre-emptive action, or it may make an interim order to achieve the result it seeks. The CC can also, for the same purpose, adopt any initial undertakings or order implemented by the OFT in relation to a completed merger within seven days of a reference being made.²
3. These interim/initial undertakings and orders (referred to collectively in this document as 'interim measures') continue in force—subject to subsequent variation, release or revocation by the CC³—until final determination of the reference, when they automatically expire. In cases where the CC has made an SLC (substantial lessening of competition) finding and decided to implement final remedies, final determination occurs on acceptance of final undertakings or the making of a final order, rather than when the CC report containing the SLC finding is published.
4. During the course of an inquiry into a *completed* merger, the Act prohibits the merged parties from taking further steps to integration without the CC's consent if no interim measures are in force. During the course of an inquiry into an *anticipated* merger, the Act prevents the merging parties from acquiring any interest in shares in a company to which the reference relates without the CC's consent if no interim measures are in force.
5. When a merger reference is received by the CC, it will consider on a case-by-case basis whether the statutory restrictions described above are sufficient to prevent pre-emptive action, or whether it is necessary to accept interim undertakings, make an interim order or adopt any initial undertakings or order implemented by the OFT. In cases where a decision is made to adopt the OFT's initial measures, the CC will also consider whether they are sufficient to prevent pre-emptive action, or whether, in the light of the reference, they need to be strengthened by way of variation of the undertakings or order. In all cases where interim measures are implemented, the CC will keep them under review during the course of the reference.
6. For both anticipated and completed mergers where either of the parties is a company incorporated outside the UK, the CC will require undertakings from both the parent and its UK subsidiary.

¹See further *General Advice and Information, CC4*, paragraphs 7.11 to 7.16.

²Sections 80 and 81 of the Act.

³Or unless the CC replaces the undertakings or order with a different type of measure (as envisaged in sections 80(7) and 81(7) of the Act).

Need for interim measures for completed mergers

7. While the statutory restrictions on dealing in relation to completed mergers prevent the parties from 'completing any outstanding matters' or 'making further arrangements' in connection with the merger and from transferring the ownership or control of any enterprise to which the reference relates, there may be scope for pre-emptive action which falls outside the remit of these statutory restrictions. For example, the acquirer may have significant incentives to run down or neglect the business or assets of the acquired business, or to extract know-how and other commercially sensitive information from the acquired business,⁴ in order to reduce its competitive capability should divestiture be required.
8. The CC will normally expect to receive interim undertakings from the acquirer in a completed merger, to clarify how that party will treat the acquired business pending final determination of the reference and/or to reinforce or supplement the prohibitions set out in the statutory restriction. The template set of undertakings in the attached Annex contains a number of such provisions, for example a requirement that customer lists are operated separately and that any existing supplier or customer contracts continue to be serviced by the business which is party to them. The CC may also seek to restrict information flows between the parties and require the ring-fencing of information so that it can be destroyed or returned to the acquired business if this were required by any remedy that may be imposed by the CC. However, as noted above, the CC will examine the need for interim measures on a case by case basis, and it will be open to the parties to demonstrate that such undertakings are neither necessary nor appropriate on the particular facts.
9. Recent CC experience indicates that the acquiring party in completed mergers will often be keen to negotiate undertakings, in order to clarify precisely what action it may carry out pending final determination of the reference. It will be in the best interests of both the CC and the parties to conclude all negotiations on interim undertakings speedily. The speed at which these negotiations can be concluded will be dependent on the speed and quality of information provided by the parties and the complexity of the subject matter. However, if appropriate undertakings cannot be agreed, the CC may decide to impose an interim order.
10. In relation to initial undertakings and orders implemented by the OFT and adopted by the CC following a reference, the statutory time limit for adoption does not allow for detailed consideration of the scope of the measure or permit time for significant renegotiation of the terms of any undertakings. The CC will normally re-examine the scope of the undertakings or order *after* adoption, to determine whether any additional safeguards or clarifications are necessary, and may seek or impose variations, if appropriate.

Need for interim measures for anticipated mergers

11. The statutory restriction on dealing for anticipated mergers prevents the transfer of shares, but not assets, pending final determination of the reference. Hence, there may be a need for interim measures in relation both to asset acquisitions and to certain share acquisitions (in the latter instance, where there is a concern that assets may be transferred from the seller to the acquirer prior to final determination of the reference). In such cases, the CC may put in place interim measures requiring the

⁴The latter might fall outside the remit of the statutory restriction if the acquired business had been at least partially integrated with the business of the acquirer prior to the reference.

two parties not to proceed with the acquisition or with any related purchases or integration pending final determination of the reference.

12. To the extent that interim measures may be required in relation to anticipated mergers, a set of undertakings or an order will be prepared preventing the parties from proceeding with the acquisition or with any related purchases or any integration of the relevant businesses pending final determination of the reference. Such measures are likely to differ from those contained in the template interim undertakings for completed mergers (see Annex).

Purpose of standard interim undertakings template

13. The consideration of interim measures—particularly in relation to completed mergers—will normally take place in the very early stages of an inquiry, possibly before the inquiry group has been appointed.⁵ Should such measures prove necessary, the CC will be keen to deal with them expeditiously and efficiently, in order to reduce the risk of pre-emptive action and to allow resources to be focused on the inquiry itself. In addition, the parties concerned will benefit from a degree of certainty regarding the CC's general approach to interim measures. Wherever possible, the CC will seek to proceed by way of the acceptance of undertakings rather than by imposing an order. For these reasons, the CC has prepared a template set of interim undertakings for completed mergers (see Annex).
14. The annexed template represents a starting point for discussion between the CC and the relevant party or parties. The template will be applied flexibly and will be adapted to meet specific requirements on a case by case basis. The template is not intended to deal exhaustively with all matters that the CC may reasonably wish to see included in interim undertakings. The CC will want to ensure that no major changes are made to the acquired business that would prejudice the inquiry or the taking of remedial action following the inquiry.
15. In some cases, it may be necessary to put in place interim measures that go beyond the safeguards contained in the template. Any additional safeguards may be included in the interim measures accepted by the CC or they may be put in place by means of a variation to the interim measures or by directions. Additional safeguards may involve the appointment of a hold separate manager with executive powers to operate the acquired business separately from the acquirer and in line with the interim measures for the duration of the investigation. Alternatively or in addition, they may involve the appointment of a monitoring trustee to monitor and report on compliance with the interim measures. The appointment of a hold separate manager and/or a monitoring trustee will be at the expense of the acquiring party.
16. The CC will normally consider the appointment of a hold separate manager and/or a monitoring trustee at the outset of an inquiry and it will review the issue throughout the inquiry. The appointment of a hold separate manager and/or a monitoring trustee is more likely where particular risk factors have been identified. Such factors include, for example: past breaches of the interim measures; substantial integration of the two businesses prior to the interim measures; subject to the necessary consents from the CC, the need for further or continued integration of the business throughout the inquiry, for example if the acquired business was not a stand-alone business; the absence of the pre-merger senior management of the acquired business; and/or the existence of strong incentives for the current senior management function of the

⁵In which case, any decision to accept interim undertakings, make an interim order or adopt initial measures will be taken by the Remedies Standing Group. See the CC's *Rules of Procedure*, CC1, rule 5.6.

acquired business to operate the acquired business on behalf of the acquirer. This last risk factor in particular will suggest the need for the appointment of a hold separate manager.

17. In certain circumstances the CC may require interim undertakings from both the acquirer and the acquired business, for example where the senior management of acquired business has transferred with the business. In such circumstances the template interim undertakings will be amended to reflect the fact that they are being provided by the acquired business.

Compliance and enforcement

18. In relation to completed mergers to ensure compliance with interim measures, the CC will normally require the Chief Executive Officers of the companies providing undertakings to provide a monthly compliance statement.⁶ In addition, the CC may require further information or a further statement of compliance to be provided on an ad hoc or periodic basis. In certain circumstances, for example where there has been significant integration of the acquired business into the acquiring business or where there has been a limited or no transfer of the senior management of the acquired business, the CC may also require a representative of the *acquired* business to prepare a monthly report to the CC in such form as may be directed by the CC for the purpose of monitoring compliance with any interim undertakings given by the acquiring business.
19. It is a criminal offence to provide, either knowingly or recklessly, false or misleading information to the CC.⁷ In addition, to the extent that a person fails to comply with any interim undertakings that it has given or any interim order imposed on it, compliance may be enforced by means of civil proceedings brought by the OFT or the CC for an injunction or for interdict or for any other appropriate relief or remedy in one of the UK courts.⁸

⁶The matters set out in the template compliance statement are a starting point for discussion between the CC and the relevant party or parties. The template will be adapted to meet specific requirements on a case-by-case basis.

⁷Section 117 of the Act.

⁸Section 94 of the Act. In addition to enforcement by the OFT or the CC, any person affected by the contravention of undertakings or an order who has sustained loss or damage as a result of such contravention may also bring an action for damages against the party bound by the undertakings/order.

**TEMPLATE INTERIM UNDERTAKINGS
(COMPLETED MERGER)**

ACQUISITION BY X (ACQUIRER) OF Y (TARGET)

**Undertakings given by x to the Competition Commission pursuant to
section 80 of the Enterprise Act 2002**

Whereas, on *[date]*, the OFT made the reference to the CC under section 22 of the Act concerning the completed acquisition by X of Y:

And whereas the CC wishes to ensure that no action is taken pending final determination of the reference which might prejudice that reference or impede the taking of any action by the CC under Part 3 of the Act which might be justified by the CC's decisions on the reference:

And whereas the reference has not been finally determined in accordance with section 79(1) of the Act:

Now X hereby gives to the CC the following undertakings pursuant to section 80 of the Act for the purpose of preventing pre-emptive action.

Management of the Y business until determination of proceedings

1. Except with the prior written consent of the CC, X undertakes that it will not during the specified period take any action which might prejudice the reference concerned or impede the taking of any action under the Act by the CC or other party which may be justified by the CC's decisions on the reference, including any action which might:
 - (a) lead to the integration of the Y business with the X business;
 - (b) transfer the ownership or control of Y or any of its subsidiaries; or
 - (c) otherwise impair the ability of Y to compete independently in any of the markets affected by the acquisition.

2. Further and without prejudice to the generality of paragraph 1, X will at all times during the specified period, procure that except with the prior written consent of the CC:
 - (a) the Y business is carried on separately from the X business and Y's separate sales or brand identity is maintained;
 - (b) the Y business is maintained as a going concern and sufficient resources are made available for the development of the Y business, on the basis of its pre-merger business plans;
 - (c) except in the ordinary course of business, no substantive changes are made to the organizational structure of the Y business or to the management responsibilities within the Y business;

- (d) the nature, description, range and quality of [*goods and/or services*] currently supplied in the United Kingdom by each of the two businesses are maintained and preserved;
- (e) except in the ordinary course of business for the separate operation of the two businesses:
 - (i) the assets of the Y business are maintained and preserved, including facilities and goodwill;
 - (ii) none of the assets of the Y business are disposed of; and
 - (iii) no interest in the assets of the Y business is created or disposed of;
- (f) there is no integration of the information technology of the two businesses, and the software and hardware platforms of the Y business shall remain essentially unchanged, except for routine changes and maintenance;
- (g) the [customer] [supplier] lists of the two businesses shall be operated and updated separately and any negotiations with Y's [customers] [suppliers] in relation to the Y business will be carried out by the Y business alone and for the avoidance of doubt X will not negotiate on behalf of the Y or enter into any joint agreements with the Y;
- (h) all existing contracts continue to be serviced by the business to which they were awarded;
- (i) no changes are made to key staff or to the organizational structure of the Y business or to the management responsibilities within the Y business;
- (j) no key staff are transferred between the two businesses;
- (k) all reasonable steps are taken to encourage all key staff to remain with the Y business; and
- (l) no business secrets, know-how, commercially sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to the two businesses, shall pass, directly or indirectly, from Y (or any of its employees, directors, agents or affiliates) to X (or any of its employees, directors, agents or affiliates), or *vice versa*, except where strictly necessary in the ordinary course of business and on the basis that, should the merger be prohibited, any records or copies (electronic or otherwise) of such information wherever they may be held will be returned to the relevant business and any copies destroyed.

Compliance

- 3. X shall procure that each of its subsidiaries complies with these undertakings as if it had given them.
- 4. X shall forthwith provide to the OFT and the CC such information or statement of compliance as either of them may from time to time require for the purposes of monitoring compliance by X and its subsidiaries with these undertakings. In particular, on the [●] 200[●] and subsequently on the [●] of each month, (or, where the [●] does not fall on a working day, the first working day thereafter) the Chief Executive Officer of X shall provide a monthly statement to the CC on behalf of X

confirming compliance with these undertakings in the form set out in the Appendix to these Undertakings.

5. At all times, X will actively keep the CC informed of any material developments relating to the Y business which includes but is not limited to:
 - (a) details of staff who leave or join the Y business
 - (b) any Y business plant breakdowns which have halted production for more than 24 hours or changes in the Y business' production arrangements which have affected the working pattern of more than five Y business employees;
 - (c) all substantial customer volumes won or lost by the Y business including any substantial changes in customers' demand; and
 - (d) substantial changes in the Y business contractual arrangements or relationships with key suppliers.
6. X shall comply insofar as it is able with such written directions as the CC may from time to time give to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with these undertakings.

Interpretation

7. The Interpretation Act 1978 shall apply to these undertakings as it does to Acts of Parliament.

8. For the purposes of these undertakings:

'the acquisition' means the acquisition by X of Y, completed on *[date]*;

'the Act' means the Enterprise Act 2002;

'an affiliate' of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on from time to time and any enterprise that the second person carries on from time to time would be regarded as being under the common control for the purposes of section 26 of the Act;

'business' has the meaning given by section 129(1) and (3) of the Act;

'the CC' means the Competition Commission;

'control' includes the ability directly or indirectly to control or materially to influence the policy of a body corporate or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, and in the case of a body corporate, a person shall for the purposes of these undertakings be deemed to control it if he holds, or has an interest in, shares of that body corporate which amount to 10 per cent or more of its issued share capital or which carry an entitlement to vote at meetings of that body corporate of 10 per cent or more of the total number of votes which may be cast at such meetings;

'the decisions' means the decisions of the CC on the questions which it is required to answer by virtue of section 35 of the Act;

'key staff' means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business;

'the OFT' means the Office of Fair Trading;

'the ordinary course of business' means matters connected to the day to day supply of [*goods and/or services*] by Y and does not include matters involving significant changes to the organizational structure or related to the post-merger integration of Y;

'the specified period' means the period beginning on the date of these undertakings and terminating when the reference is finally determined in accordance with sections 79(1) and (2) of the Act;

'subsidiary', unless otherwise stated, has the meaning given by section 736 of the Companies Act 1985 (as amended);

'the two businesses' means the X business and the Y business;

'X' means [*full registered name of acquirer*];

'the X business' means the business of X and its subsidiaries carried on as at [*date of acquisition*];

'Y' means [*full registered name of target*];

'the Y business' means the business of Y and its subsidiaries carried on as at [*date of acquisition*]; and

unless the context requires otherwise, the singular shall include the plural and vice versa.

FOR AND ON BEHALF OF X PLC

.....	Signature	Signature
.....	Name	Name
.....	Title	Title
.....	Date	Date

Compliance statement for X

I [insert name] confirm on behalf of X that:

- (a) X has complied with the undertakings given by it and accepted by the CC on [date] ('the Undertakings') in the period from [insert date] to [insert date].
- (b) X's subsidiaries have also complied with the Undertakings in the period from [insert date] to [insert date].
- (c) No action has been taken by X in the period from [insert date] to [insert date] that will impede the taking of any action by the CC which may be justified by its decision on the reference.
- (d) X and its subsidiaries remain in full compliance with the Undertakings and will continue actively to keep the CC informed of any material developments relating to the Y business in accordance with paragraph 5 of the Undertakings.
- (e) The Y business has been maintained as a going concern and sufficient resources have been made available for the development of the Y business, on the basis of its pre-merger business plans.
- (f) The Y business's customer/supplier lists have been operated and updated purely for the purposes of the Y business without any involvement of X.
- (g) All customer/supplier negotiations for the Y business have been carried out independently of X.
- (h) There have been no substantive changes to the nature, description, range and quality of any goods and/or services currently supplied in the United Kingdom by the Y business.

Assets—including facilities and goodwill

- (i) Except in the ordinary course of business, none of the assets of the Y business have been disposed of.
- (j) Except in the ordinary course of business, no interest in the assets of the Y business has been created or disposed of.
- (k) Except in the ordinary course of business, all of the assets of the Y business have been maintained and preserved as they were before the merger.

Contracts

- (l) All existing contracts awarded to the Y business continue to be serviced by Y.

Information technology systems

- (m) There have been no changes to the software and hardware platforms of the Y business, beyond routine changes and maintenance.

Staff

(n) No changes have been made to or to the key staff or the organizational structure of the Y business or to the management responsibilities within the Y business.

Material developments

(o) Except as listed in paragraph (p) below there have been no:

- (i) plant breakdowns at the Y business which have halted production for more than 24 hours or changes in the Y business's production which have affected the working pattern of more than five employees of the Y business;
- (ii) substantial customer volumes won or lost for the Y business and no substantial changes to the Y business' customer contracts; or
- (iii) substantial changes in the Y business contractual arrangements with key suppliers.

(p) [List of material developments]

Confidential information

(q) No business secrets, know-how, commercially sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to the two businesses has passed, directly or indirectly, from Y (or any of its employees, directors, agents or affiliates) to X (or any of its employees, directors, agents or affiliates), or vice versa.

FOR AND ON BEHALF OF X

Signature

Name

Title

Date