

# **RESPONSE TO CONSULTATION**

## **Use of Interim Measures Pending Final Determination**

### **Comments on Competition Commission (UK) Guidance Package**

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## **Introduction**

We welcome the fact that the Competition Commission has decided to consult on this subject, and observe that no public consultation took place when the CC published its first Note in October 2004

## **General Comments**

As a general point, we think the Competition Commission should be careful not to impose excessive burdens on companies, and therefore should focus in any particular case on extracting undertakings, or imposing Orders, which are only those necessary to, and only those proportionate to, the statutory purpose of prevention of pre-emptive action. This is in particular important in two respects

- (a) we believe the CC should not impose excessive requirements which might deter or penalise completed mergers (part of the UK merger control system deliberately continued under the Enterprise Act), and
- (b) it is evidently not the case that interim measures in the case of anticipated mergers should be addressed from the same starting text, which is the approach taken in this guidance

The above comments are of particular importance in the current climate, where it is notable that, compared with the period before the Enterprise Act came into force, a relatively higher proportion of mergers referred by the Office of Fair Trading are cleared by the Competition Commission, and in addition a relatively higher proportion of mergers which are referred are abandoned

The guidance would be improved by detailing the CC's view of the circumstances which "might prejudice the outcome of the reference" as distinct from action which "might impede the CC from taking action later that may be justified by its decision on the reference". The latter concept is relatively self-explanatory, but the separate content of the former is not

## **Specific Comments**

### **Paragraph 13**

As remarked above, we believe that in the standard anticipated merger situation, the very detailed and lengthy Template is not the appropriate place to start. Where the parties are arms length and the passing of consideration is dependent upon either merger control clearance, or completion of the entire transaction, or both, the position should not be equated with that of a completed merger for these purposes

### **The Template**

The Template and the Compliance Statement reproduce the general statutory prohibition wording, as well as including lengthy and detailed restrictions on specific actions on an inclusive basis. The guidance makes it clear that the CC thinks that the detailed list may assist companies to know what it is they are restricted from doing. If that is the case, we would suggest that the Preamble should, in appropriate cases, include a statement that the detailed provisions are considered to cover the main potential concerns from the point of view of the CC

In respect of paragraphs 2(d) and (h), the obligation on the acquiring business to continue to offer goods and/or services in the way it did pre-merger, and to continue to observe contracts in the

way it did pre-merger, should we believe be seen as exceptional requirements rather than standard

In respect of paragraph 2(l), we would suggest that it is important that the restriction on the passage of commercially sensitive information should be subject to an express exception to allow, subject to appropriate safeguards, some representatives of the acquiring party and its advisers to obtain information from the target, including sensitive commercial information relevant to dealing with the reference procedure before the Competition Commission

### **The Compliance Statement**

We note the extensive length and scope of this Compliance Statement, which appears excessive or impractical in a number of respects, given that it is to be signed by the Chief Executive of an acquiring company

The current draft adopts in a number of respects catch-all wording based on general legal concepts. In other respects it requires confirmation of matters which will be outside the concrete knowledge of the Chief Executive. We think it should instead be limited to concrete factual matters within the knowledge of the Chief Executive of an acquiring target. To go beyond this places the Chief Executive, who is subject to potential personal criminal liability, in an unreasonable position.

We would suggest that paragraph (c) should for this reason be deleted, given that paragraph (d) is a statement of full compliance with the Undertakings. The Undertakings are clearly intended to be a practical statement of what is required by the CC in order to comply with the statutory restrictions (and perhaps to go beyond the statutory restrictions in some cases), and to require a Chief Executive in addition to address the general statutory definition appears duplicative and disproportionate.

We note that the Chief Executive will not be in a position to confirm the Statement at (e) from his own knowledge unless he has seen the pre-merger business plans of the target. This may be in conflict with paragraph 2(l) of the Template. Paragraph (f) appears to require the Chief Executive to know more about the target business' customer lists, their operation and updating than the restriction in paragraph 2(l) would permit.

The Chief Executive of the acquiring company is unlikely to be able to make a declaration in relation to paragraph (r) as this will not fall within the scope of his actual knowledge. We think also that the inclusion of "agents" is unclear, and may not be justified in this context.

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