

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

Response to the consultation on the draft Guidance

Introduction

1. In February 2006 the Competition Commission (CC) issued for consultation its amended *Guidance on the use of interim measures pending final determination of merger references* (the Guidance).

Overview of responses

2. We received two responses. The comments contained in these responses are reproduced in full in the 'consultations' section of our website. Both the respondents were law firms. Following careful consideration of these responses, the CC has now published a revised final version of the Guidance, which takes account of specific issues raised.
3. In the light of the responses, the CC has reviewed the Guidance and made a number of clarifications and amendments. The CC's response to each set of comments is shown below in bold, and appropriate changes have been made to the Guidance where required.

Comments

4. Slaughter and May suggested that the CC should be more willing to provide guidance on issues of interpretation.
5. **The CC believes that the parties and their advisers are best placed in the first instance to make an assessment of whether any changes to the businesses breach the interim measures as they would be the most knowledgeable about any impact the change they are proposing is likely to have on the businesses in both the short and the long term.**
6. Slaughter and May proposed that the CC commit to concluding the process of negotiation of interim measures within an administrative timetable.
7. **The CC will always be keen to deal with interim measures expeditiously and efficiently, in order to reduce the risk of pre-emptive action and to allow resources to be focused on the inquiry itself. The CC also notes that it will also be in the parties' best interests to conclude all negotiations on interim measures as quickly as possible, in order to make clear the basis on which they may continue their businesses through the investigation. 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.**
8. Slaughter and May and Simmons and Simmons both requested clarification on the nature of interim measures required for anticipated mergers.

9. **The statutory restriction on dealing for anticipated mergers¹ prevents the transfer of shares pending final determination of the reference. 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 parties not to proceed with the acquisition or with any related purchases or integration pending final determination of the reference.**
10. Simmons and Simmons requested guidance on the CC's view of circumstances which 'might prejudice the outcome of the reference'.
11. **The CC believes that the parties and their advisers are best placed in the first instance to make an assessment of the effect of any changes to the businesses and whether they might prejudice the outcome of the reference as they would be the most knowledgeable about any impact the change they are proposing is likely to have on the businesses in both the short and the long term.**
12. Simmons and Simmons suggested that the confidentiality requirements in the interim undertakings should be subject to an express exception to allow, subject to appropriate safeguards, some representatives of the acquiring business and its advisers to obtain information from the target business, including sensitive commercial information relevant to dealing with the reference.
13. **The CC has in previous inquiries permitted certain information flows between businesses, where this has been demonstrated to be necessary. However, the CC will seek an absolute prohibition unless it is convinced that particular information flows are necessary.**
14. Slaughter and May and Simmons and Simmons had some reservations about the CC's approach to the template statement of compliance (the statement). The various points raised in relation to the statement are set out below.
15. The CEO is required to warrant compliance with matters which would not normally be within the direct and personal knowledge of an individual at that level of managerial responsibility.
16. **The CC is aware that the CEO is asked to warrant compliance in relation to matters that are not all within his direct and personal knowledge. However, the CC believes that the CEO has the authority to ensure that people with direct and personal knowledge report to him on the matters with which he is required to warrant compliance.**
17. It should suffice that the CEO of the acquiring business's UK entity signs the statement.
18. **Where the acquiring business is not incorporated in the UK the CC would require undertakings from both the UK subsidiary and the acquiring business (or the ultimate parent of the UK subsidiary and the acquiring business) as the UK subsidiary would not be capable of binding the acquiring company.**

¹Section 78 of the Enterprise Act 2002.

19. The statement requires the CEO to certify a series of facts which do not always mirror the undertakings.
20. **Following its consideration of the consultation responses, the CC has revised the statement to mirror the template interim undertakings.**
21. The CEO should simply be required to certify compliance without further detailed elaboration of what that entails; the approach taken in the statement is unduly burdensome.
22. **The CC believes that in order to certify compliance the CEO would have to ensure that the interim measures have not been breached in any way. As the statement reflects only what the company has committed to do during the course of the inquiry, and as it does not create any further obligations, the CC does not consider that this is unduly burdensome.**
23. It would be more reasonable for the CC to seek confirmation of the veracity of the facts set out in paragraphs (e) to (q) of the statement from the acquired company, rather than the acquiring company.
24. **Both the template interim undertakings and the statement represent a starting point for discussion between the CC and the relevant party or parties. Both the template interim undertakings and the statement will be applied flexibly and where the CC is convinced that the facts of a particular case merit some adaptation, adaptations will be made. The template interim undertakings are not intended to deal exhaustively with all matters that the CC may reasonably wish to see included in interim measures or the statement. The CC wants 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. In some cases, it may be necessary to go beyond the safeguards contained in the template interim undertakings, for example by installing a hold separate manager or a monitoring trustee at the expense of the acquiring party to ensure compliance with some or all of the interim measures. In certain circumstances the CC may require interim measures from both the acquirer and the acquired entity, for example where the senior management of the acquired company has transferred with the business. In such circumstances the template interim undertakings will be adapted to reflect the fact that they are being provided by the acquired company. In certain circumstances, for example where there has been significant integration of the acquired business into the acquiring business or where there has been 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 measures that apply to the acquiring entity.**
25. Slaughter and May questioned the need to keep the CC actively informed of any material developments relating to the acquired business. They considered that this imposed a further layer of reporting and regulation and was an additional burden.
26. **The CC wants 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. By being kept actively informed of any material developments, the CC will be in a position to judge whether it considers the action that is being taken could prejudice the inquiry or the taking of remedial action.**

27. It has been suggested that the appointment of a monitoring trustee is a serious intervention and adds an additional layer of complexity to the acquirer's compliance procedure together with significant additional costs, and that a monitoring trustee or hold separate manager should be reserved for cases in which a breach of interim measures has occurred.
28. **The CC will not require the appointment of a monitoring trustee or a hold separate manager in all cases. However, it is necessary for the CC to ensure that its interim measures are effective in preventing pre-emptive action, and experience has led the CC to consider that, where particular risk factors have been identified, a monitoring trustee and/or a hold separate manager is likely to be necessary in order to achieve this aim. These risk factors include, for example: past breaches of the interim measures; substantial integration of the two businesses prior to the interim measures being put in place; the need for further or continued integration of the businesses (subject to CC approval) throughout the inquiry; 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 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.**
29. It has been suggested that it is unrealistic to expect that a hold separate manager or monitoring trustee would be able to assume management responsibility in relation to the acquired business where it has no experience of operating a business in the relevant sector.
30. **Since a hold separate manager will normally hold executive powers, the CC considers that it will be necessary for a hold separate manager to have experience of operating a business in the relevant sector. However, a monitoring trustee will normally perform a compliance monitoring and reporting role and will not normally have executive powers. Although relevant sector experience may be an advantage, the CC does not consider that it will normally be necessary for a monitoring trustee to have experience of operating a business in the relevant sector. The particular skills and experience that a hold separate manager or monitoring trustee will require will depend on the nature of the businesses involved and on the nature of the interim measures in place.**

Respondents

31. We are grateful to both Slaughter and May and Simmons and Simmons for their responses to this consultation exercise.