Law Society of Scotland

70 Years 1949-2019

Consultation Response

Interim measures in merger investigations

May 2019

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Competition Law sub-committee welcomes the opportunity to consider and respond to the CMA's consultation: *Interim measures in merger investigations*.[1] The sub-committee has the following comments to put forward for consideration.

General remarks

We welcome the CMA's Consultation Document, which should bring additional clarity to its policy and practice in relation to interim measures in the context of merger control.

The CMA's policy in this area should aim to complement the voluntary system and to safeguard on the aims of the merger control regime in the UK. The interim measures regime should be proportionate and used strictly for the stated and proper objectives. It is lawful for undertakings to seek to acquire or merge with other businesses. It is essential that the CMA is able to intervene, investigate and where necessary, remedy any adverse effects amounting to a substantial lessening of competition. Interim measures can create considerable costs and inefficiencies and the CMA is right to be aware of that.

[1] https://www.gov.uk/government/consultations/interim-measures-in-merger-investigations

Response to questions

1. Is the content, format and presentation of the draft guidance sufficiently clear? If there are particular parts of the guidance where you feel greater clarity is necessary, please be specific about the sections concerned and the changes that you feel would improve them.

In light of our comments above, we emphasise the importance of clarity and certainty, of benefit to the merging parties. Resort to court or the CAT is not likely except in relation to significant issues and the CMA has considerable discretion. The CMO will wish to act proportionately in the exercise of its wide discretion in this area; recognising that in the ordinary course there is likely to be little constraint in the exercise of its power.

The Consultation Document refers variously to several objectives of interim measures. Firstly, the existing terminology can be confusing as regrads the differences between an IEO and IO and both IEOs and IOs include orders to unwind pre-emptive action. Clearer terminology would be helpful. It might also be helpful to set out an expectation on merger parties to take a responsible approach to progressing with integration measures.

Para 1.6 states that it is essential that interim measures to preserve the pre-merger competitive structure of markets should be effective. Further in paragraph 1.7 it is critical that any business which has been acquired continues during the CMA's investigation to "compete independently" and be maintained as a going concern. This is reference to the risk of prejudicing the ability of the CMA "to ensure a competitive outcome". It is not clear that the purpose of the merger regime is to ensure a competitive outcome but clearly it may do so in preventing a substantial lessening of competition. There should also be an assessment as to whether, irrespective of integration, the nature of the business and assets concerned is such that it is, in reality, easy to divest if that is ultimately to be required.

In paragraph 2.26 we would suggest that the exceptions to imposing an IEO in completed merger cases arise where the CMA is provided with compelling evidence there is no risk of pre-exemptive action.

In footnote 34 the CMA suggests that a transaction which self-evidently raises no competition concerns would not necessarily automatically attract an IEO but an exception would be where the CMA initiated an investigation on its own initiative. We would welcome further explanation of this exception or distinction.

It would also be helpful to address the occasions where irrespective of integration the nature of the business and its structure remains relatively easy to divest, if required, reinstating a viable competitive entity.

At 3.2.9. it is not clear why a derogation is unlikely to be granted where the target business will continue to have access to its pre-existing back-office support functions. It would perhaps be clearer if "will continue to have access" were replaced with "continues to have".

In 3.35 we question whether it is realistic to have an individual who has the role in the acquiring business of taking decisions on matters referred by the target business but is not to have "a commercial or strategic role" within the business. It would help to expand and clarify this requirement, especially given compliance with the safeguards in 3.36.

In 3.44 it may be impossible for staff from a "related" business to avoid interacting with staff from a "non-related" business. The question should always be whether the activities or contacts in 3.44 really render remedial action difficult and whether they prejudice remedial action. It should be borne in mind that businesses which at present are integrated to a greater or lesser degree are bought and sold all the time without too much difficulty.

At 3.58 we consider the obligation to demonstrate "no other options available" should be amended so that the wording is “no other realistic or economically feasible options" or similar.

2. Is the draft guidance sufficiently comprehensive? Does it have any significant omissions?

We think the draft guidance is sufficiently comprehensive, subject to the comments in this response.

3. Do you have any suggestions for additional or revised content that you would find helpful?

We consider it might be useful to include a section specifically dealing with sensitive sectors which may be subject to the reduced thresholds introduced in 2018.

4. Do you agree with the policies set out in the guidance? In particular, we invite comments on the following points:
(a) Interim measures prior to completion (paragraphs 2.15-2.24);
(b) Information exchange without a derogation (paragraphs 3.09-3.18);
(c) Unavoidable consequential effects (paragraphs 3.19-3.21); and
(d) Circumstances in which the CMA will consider imposing a monitoring trustee (paragraph 4.5).

Monitoring Trustees and Hold Separate Managers ("HSMs") should ideally be competent in the area they are asked to understand and monitor and, as regards HSMs, manage. HSMs should have experience in the sector involved as otherwise there is a risk to the competitiveness of the target business.

5. Do you have any other comments on the draft guidance.

It may be useful to consider whether the CMA should indicate an expectation that alongside the assessment undertaken as to whether to approach the CMA, undertakings and advisers should take sensible account of the need to have regard to the risk of intervention and the need to avoid precipitate integration.

For further information, please contact:
Carolyn Thurston Smith
Policy Team
Law Society of Scotland
DD: 0131 476 8205
carolynthurstonsmith@lawscot.org.uk