

CMA's consultation on interim measures in merger investigations

(1 May 2019)

Response by Freshfields Bruckhaus Deringer LLP

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 **Freshfields Bruckhaus Deringer**



RESPONSE TO THE CMA'S CONSULTATION ON

DRAFT GUIDANCE ON INTERIM MEASURES IN MERGER INVESTIGATIONS

of 1 May 2019

1. Introduction

- 1.1 Freshfields Bruckhaus Deringer LLP (*Freshfields*) welcomes the opportunity to comment on the CMA's consultation on the draft guidance on interim measures in merger investigations of 1 May 2019 (the *Draft Guidance*) and the related consultation document (the *Consultation Document*).
- 1.2 We have commented on the CMA's approach to use of interim measures in previous consultations.¹ In particular, we submitted detailed comments on the CMA's initial enforcement order (*IEO*) process in response to the CMA's consultation on draft guidance in relation to the use of IEOs and the derogations that might be granted to IEOs opened in March 2017 (the *2017 Consultation*). Our position on the points raised in that response has not changed. While the observations below focus on new points raised by the revised Draft Guidance, common themes remain.
- 1.3 Our comments below are based on our substantial practical experience with CMA cases involving interim measures. Comments in this response do not purport to represent the views of specific clients.
- 1.4 Terms defined in the Consultation Document or Draft Guidance have the same meaning in this response.

2. **Question 2.1: Is the content, format and presentation of the draft guidance sufficiently clear?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.**

- 2.1 Specific comments on the Draft Guidance are set out below in response to Questions 2.2 and 2.4. These comments highlight two overarching themes:
 - (a) The CMA's approach to interim measures should be consistent with and proportionate to the United Kingdom's voluntary, non-suspensory merger filing regime. In principle, we agree with the CMA's view that the voluntary, non-suspensory merger filing regime is beneficial – to both the CMA and merging parties – in giving merging parties greater flexibility and reducing regulatory obstacles to those mergers which are clearly unproblematic (Draft Guidance paragraph 1.5). However, a number of provisions of the Draft Guidance (see response to Question 2.4 below) appear to be at odds with the principles of flexibility and reduced regulatory burden for non-problematic mergers and therefore risk undermining the essential benefits of and policy reasons for the non-suspensory regime. Indeed, in some cases (see paragraph

¹ See response to the CMA's consultation on its CMA2 guidance on jurisdiction and procedure submitted by Freshfields on 6 September 2013 (the *CMA2 Submission*) and response to the CMA's consultation on draft guidance in relation to the use of initial enforcement orders (IEOs) and the derogations that might be granted to IEOs submitted by Freshfields on 12 April 2017.



5.13 below) the Draft Guidance appears to impose compliance formalities on merging parties that go *beyond* compliance measures typically required in the context of a mandatory, suspensory regime. We have commented previously on significant burdens imposed on both the CMA and the merging parties as a consequence of using interim measures to impose a quasi-suspensory regime.² In its current iteration, the Draft Guidance imposes an increased administrative burden on all parties that is disproportionate to the objective of guarding against pre-emptive action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action.

- (b) Effective management of the interim measures process requires reciprocal commitments. The Draft Guidance raises the bar that merging parties have to meet in order to demonstrate compliance with interim measures but does not set out commitments on the part of the CMA to take actions that will – to the extent possible – ensure that disruption to the merging parties’ day-to-day business operations is kept to a minimum. The interim measures process – including education, negotiating derogations and continuing compliance – places a significant administrative and financial burden on merging parties. To assist the merging parties with their planning, it would be helpful if the CMA were to include guidance on its internal processes and standards in the Draft Guidance (see response to Question 2.2 below).

3. **Question 2.2: Is the draft guidance sufficiently comprehensive? Does it have any significant omissions?**

- 3.1 As a general matter, the Draft Guidance is a useful document that will aid merging parties and their advisors in designing and implementing frameworks to ensure compliance with interim measures.
- 3.2 However, there remain areas of procedural uncertainty where further information on the internal processes that the CMA will follow and guidelines as to the expected timeframe for response from the CMA would be welcomed. This would enable merging parties more effectively to manage the degree of commercial disruption that is inherent to the interim measures process. For example, where an IEO is imposed, it would allow merging parties to plan for commercial matters that require to be put on hold pending CMA consent.
- 3.3 In particular, it would be helpful if the CMA could provide an overview of the internal processes it follows, including expected timeframes for relevant procedural steps, in relation to its assessment of:
- (a) whether interim measures are appropriate in the context of an anticipated merger (paragraph 2.17);
 - (b) requests for derogation from interim measures in the context of anticipated mergers expected to complete during the CMA’s investigation (paragraph 2.24);

² CMA2 Submission, paragraph 2.7 et seqq. Response to the 2017 Consultation submitted by Freshfields on 12 April 2017, paragraph 2.2 et seqq.



- (c) requests for derogation from IO or IEOs before imposing an IEO or IO in the context of completed mergers (paragraph 2.30);
 - (d) the possibility of creating a tailored IEO (paragraphs 2.31 – 2.33); and
 - (e) requests for derogation from interim measures once in place (paragraphs 3.1-3.8).
- 3.4 Similarly, while we agree that, in principle, it is generally advisable for merging parties to collate derogations sought within a single request (Draft Guidance, paragraph 3.6) as a practical matter this is frequently not realistic during the course of an investigation while the interim measure is in place. Recognising that a drip-feed of multiple derogation requests is inherent in the interim measures process, it is not satisfactory for the CMA to cite this as a cause for unnecessary delay to the CMA’s investigation, and ultimately a delay in lifting the interim measures completely.
- 3.5 In light of this, we recommend that that the CMA:
- (a) amends the first sentence of paragraph 3.6 to state: “*Where possible, it is generally advisable for merging parties to collate derogations sought within a single comprehensive written request.*”
 - (b) deletes the remainder of paragraph 3.6.
- 4. Question 2.3: Do you have any suggestions for additional or revised content that you would find helpful?**
- 4.1 See responses to Question 2.2 and Question 2.4.
- 5. Question 2.4: 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)**
- Interim measures in anticipated mergers*
- 5.1 We agree that the circumstances in which the CMA might consider imposing interim measures in the context of an anticipated merger should be relatively rare (Draft Guidance, paragraph 2.15). However, as explained in response to the 2017 Consultation, we consider that the Draft Guidance should make clear that, consistent with a policy of carefully targeted intervention within a voluntary regime, interim measures will only be imposed in the context of anticipated mergers in the most exceptional of cases.³
- Interim measures conditional upon completion*
- 5.2 The Draft Guidance attributes the CMA’s policy of “*almost always*” imposing IEOs in the form of the standard form template available on the CMA’s website (the **Template IEO**) to the need to impose an IEO quickly in completed mergers (Draft Guidance, paragraph 2.29). While the Draft Guidance states that the CMA may consider creating a tailored IEO – as opposed to granting derogations from a standard form IEO – in the context of an anticipated merger (Draft Guidance, paragraph 2.31)

³ Response to the 2017 Consultation submitted by Freshfields on 12 April 2017, paragraph 2.7 – paragraph 2.8.



it maintains that a standard form IEO with relevant derogations is “*likely to be the appropriate approach in nearly all cases*” (Draft Guidance, paragraph 2.33).

- 5.3 As submitted in response to the 2017 Consultation, we do not agree with the CMA’s policy of “*almost always*” relying on the Template IEO.⁴ While we agree that in a number of circumstances the Template IEO (and derogations thereto) may be appropriate, a rigid adherence to this approach (eg where the target is in financial difficulties and following existing business plans is unfeasible or unwise) is inconsistent with the principles of flexibility and reduced administrative burden for those mergers that clearly do not raise competition concerns that are the hallmarks of the voluntary regime. In particular, a policy of “*almost always*” relying on the Template IEO irrespective of whether the merger is completed or anticipated (Draft Guidance, paragraph 2.33) is disproportionate to the objective of guarding against the risk of pre-emptive action. As submitted previously, a tailored IEO would allow for the CMA to effectively mitigate against this risk while minimising the call for multiple discussions around derogation requests going forward which are time and resource intensive for both the CMA and the merging parties.⁵
- 5.4 Therefore, at a minimum, we consider that the Draft Guidance should expressly state that the CMA will consider the creation of a tailored IEO in the context of anticipated mergers expected to complete during the CMA’s investigation, where the CMA is likely to issue interim measures conditional upon completion. The Draft Guidance recognises the opportunity in this context for the merging parties to initiate early discussions with the CMA in relation to interim measures and any necessary derogations (Draft Guidance, paragraph 2.24). Accordingly, there is scope to discuss the possibility of an IEO tailored to the facts of the case.
- 5.5 In light of the above, we recommend that the CMA, at a minimum:
- (a) amends the last sentence of paragraph 2.24 of the Draft Guidance so that it states: “*This will enable the CMA to minimise the inconvenience to the merging parties resulting from Interim Measures by considering, and if appropriate granting, derogations or creating a tailored IEO (see paragraph 2.31) prior to completion.*”
 - (b) deletes the last sentence of paragraph 2.29 of the Draft Guidance (which refers to the CMA’s approach in completed mergers).

(b) Information exchange without a derogation (paragraphs 3.09 - 3.18)

Exchanges of information between merging parties prior to interim measures being imposed

- 5.6 These provisions de facto apply to *all* qualifying mergers, given the CMA’s wide discretion to impose IEOs which typically will arise subsequent to the information exchange. The Draft Guidance (paragraph 3.10) suggests a quasi-regulatory approach by which the supposed self-assessment will be subject to CMA review. Moreover, the Draft Guidance suggests that the following safeguards are “*likely*” to be appropriate in (apparently) *all* circumstances where confidential, proprietary or

⁴ Response to the 2017 Consultation submitted by Freshfields on 12 April 2017, paragraph 2.14 – paragraph 2.16.

⁵ *Ibid.*



otherwise commercially sensitive information is shared between merging parties (including for example for the purpose of due diligence) prior to completion:

- (a) full ring-fencing of such information; and
- (b) use of internal and or external clean teams, requiring all individuals accessing such information to enter into non-disclosure agreements.

5.7 The requirement to demonstrate that such safeguards are in place in all scenarios where confidential, proprietary or otherwise commercially sensitive information is shared between merging parties for the purpose of due diligence appears to be disproportionate and impractical. For some businesses, the vast majority of potential acquisitions concern companies with which there is no competitive nexus whatsoever. In these circumstances, exchange of confidential, proprietary or otherwise commercially sensitive information for the purposes of due diligence without recourse to ring-fencing or clean teams is entirely compatible with the provisions of Chapter 1 CA98 and Article 101 TFEU.

5.8 Moreover, were the restrictions in paragraph 3.17 of the Draft Guidance to be applied to financial information shared prior to completion and the imposition of interim measures, they would effectively prevent meaningful due diligence, such that the acquiring party would not be able to discharge its obligations to assess the value of the target with due care and skill.

5.9 In light of the above, we recommend that the CMA, at a minimum:

- (a) amends the first sentence of paragraph 3.10 to state: “*Where information which is confidential, proprietary or otherwise commercially sensitive has been shared between merging parties (for example, for the purpose of due diligence) prior to Interim Measures coming into force **and the exchange has the potential to impact competition (for example, where the merging parties are actual or potential competitors)** the CMA may check that the merging parties have taken appropriate steps to control the information flow **where it has reason to believe that insufficient steps have been taken in the context of the merging parties’ obligation to comply with relevant laws, in particular Chapter 1 CA 98 and Article 101 TFEU.** Where the merging parties are **actual or potential competitors or the exchange of information is otherwise liable to impact competition**, safeguards are likely to include: (a) taking steps to ensure that such information is fully ring-fenced (with appropriate IT firewalls in place and physical ring-fencing measures where needed); and (b) restricting information to internal and/or external “clean teams” and, **if necessary**, requiring all individuals who had access to such information to enter into non-disclosure agreements.*”
- (b) adds, as a new paragraph 3.10: “*The CMA recognises that it is ultimately for the merging parties (assisted by their legal advisors) to self-assess the nature and extent of safeguards that are appropriate to control the flow of information between the parties prior to completion. The CMA further recognises the legitimate need of acquiring parties to exercise due care and skill when conducting due diligence on potential acquisition targets.*”



- (c) amends the second sentence of paragraph 3.13 as follows to make it clear that provisions of paragraph 3.13 – 3.18 apply to information exchanged while interim measures are in place: “*As with the statutory requirements, it is incumbent on the merging parties, assisted by their legal advisers, to self-assess whether information exchange **while interim measures are in place** might amount to pre-emptive action, and apply for a derogation if it might.*”
- (d) amends the second sentence of paragraph 3.14 to make it clear that its concerns here relate to compliance with interim measures: “***Where the CMA has reason to believe that insufficient steps have been taken in the context of the merging parties’ obligation to comply with the terms of the interim measures, the CMA may check that, in self-assessing, the merging parties have taken appropriate steps to control the information flow.***”
- (e) amends paragraph 3.15 to state: “*The following are examples of what the merging parties, assisted by their legal advisers, should consider where confidential or proprietary information is to be exchanged between the merging parties **while interim measures are in place.***”
- (f) amends paragraph 3.17 and 3.18 respectively as follows to make it clear that they apply to information sharing while the interim measure is in place:
 - (i) “*Where financial information is to be shared **while interim measures are in place**, the merging parties should create a reporting template detailing any information that is to be shared.*”
 - (ii) “*In particular, **while interim measures are in place**, it is unlikely to be appropriate to share the target business’ consolidated gross margins...*”

Exchanges of information between merging parties during interim measures

- 5.10 The generality of the measures stipulated in paragraph 3.14 et seqq. of the Draft Guidance is disproportionate to the objective of guarding against pre-emptive action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action.
- 5.11 Paragraph 3.13 of the Draft Guidance refers to the obligation incumbent on merging parties to self-assess whether information exchange might amount to pre-emptive action and to apply for a derogation if so. This is consistent with the merging parties’ obligation under paragraph 4 of the Template IEO not to take any action which might prejudice a reference or impede the taking of remedial action – including any action which might impair the ability of the merging parties’ businesses to compete independently in any of the markets affected by the transaction – without the prior written consent of the CMA.
- 5.12 However, the Draft Guidance maintains that the merging parties should take certain actions to control information flow in *all* cases – irrespective of whether such information exchange may potentially impose a risk of pre-emptive action as described above – including:
 - (a) keeping detailed records of *all* communications between the merging parties (paragraph 3.14);



- (b) limiting disclosure of information to named individuals (paragraph 3.16(a)) who are required to enter into non-disclosure agreements (paragraph 3.16(b)); and
 - (c) creating a reporting template detailing any financial information to be shared, which is likely to be limited to historic consolidated profit and loss account, balance sheet and cash flow information (paragraph 3.17(a) and (b)).
- 5.13 The imposition of such measures in cases in which there is no credible threat of pre-emptive action (eg where there is no competitive nexus between the merging parties) is at odds with the voluntary, non-suspensory nature of the UK merger control regime and even with accepted practice in the context of certain mandatory, suspensory regimes.
- 5.14 In light of the above, we recommend that the CMA, at a minimum:
- (a) amends paragraph 3.15(c) to state: “*where the merging parties, assisted by their legal advisers, consider that information exchange could risk pre-emptive action, the safeguards (procedural or otherwise) that need be put in place to remove that risk.*”
 - (b) amends paragraph 3.16 to state: “*Such procedural safeguards, which should be clearly set out in writing, may, for example include:*”
- (c) Unavoidable consequential effects (paragraphs 3.19 - 3.21)**
- 5.15 We have no comments on this section.
- (d) Circumstances in which the CMA will consider imposing a monitoring trustee (paragraph 4.5)**
- 5.16 While we recognise that there may be certain circumstances in which the CMA considers it necessary to appoint a monitoring trustee at Phase 1, it is important to make clear that this is anticipated only in exceptional cases.
- 5.17 In light of this, we recommend that paragraph 4.5 of the Draft Guidance be amended to state: “*In exceptional cases, at phase 1, the CMA may consider it necessary to appoint a monitoring trustee...*”.
- 6. Question 2.5: Do you have any other comments on the draft guidance?**
- 6.1 As a general matter, we welcome the CMA’s willingness to provide further clarification and guidance on the use of interim measures and derogations thereto. We also recognise the CMA’s efforts to ensure a consistent approach to the imposition and application of interim measures via the involvement of the Remedies Business and Financial Advisors (RBFA) team.
- 6.2 At the same time, it is imperative that the Draft Guidance is consistent with the character of the UK’s non-suspensory, voluntary regime and that best practice is proportionate to the objective of guarding against pre-emptive action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. In view of this, we hope that the CMA will take account of the comments and



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adopt the specific amendments suggested in this response. We would welcome the opportunity to engage further with the CMA on any of the points raised.

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