

# Interim Measures in merger investigations

Summary of responses to the consultation

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## Contents

	<i>Page</i>
1. Introduction .....	2
2. Issues raised during the consultation and our response .....	3

# 1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is the UK's primary competition agency. It works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.
- 1.2 The CMA is preparing new guidance to explain its approach in relation to interim measures in mergers investigations. The object is to update and consolidate the existing *Guidance on initial enforcement orders and derogations in merger investigations (CMA60)* and those sections of *Mergers: Guidance on the CMA's Jurisdiction and Procedure (CMA2)* which deal with interim measures.
- 1.3 The CMA ran a consultation from 1 May 2019 to 29 May 2019 on a draft of the new guidance. The consultation document and respondents' full responses are available on the consultation page.
- 1.4 This document summarises the comments received and explains how the CMA has responded to them. It is not intended to be a comprehensive record of all views expressed by respondents.

## 2. Issues raised during the consultation and our response

### The questions on which we consulted

The CMA's consultation sought views on the following questions:

- 2.1 Is the content, format and presentation of the draft guidance sufficiently clear?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.
- 2.2 Is the draft guidance sufficiently comprehensive? Does it have any significant omissions?
- 2.3 Do you have any suggestions for additional or revised content that you would find helpful?
- 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);
  - (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).
- 2.5 Do you have any other comments on the draft guidance??
- 2.6 The CMA received six written responses to the consultation. The respondents are listed in Appendix A, and non-confidential versions of all submissions are available on the consultation page.
- 2.7 Summaries of responses, which have been taken into account in finalising the guidance, are set out below together with the CMA's views on the comments.

### Respondent views and CMA response

- 2.8 Respondents generally considered that the draft guidance was clear, in terms of content, format and presentation.
- 2.9 Respondents made the following comments and suggestions:

- (a) Elaborate the list of potential pre-emptive actions set out in the footnote to paragraph 1.3 (one respondent).
- (b) The fact that Interim Measures can take the form of an initial enforcement order, interim order, or interim undertaking, and that either type of order may require unwinding of integration, is confusing. Clearer terminology would be helpful (one respondent).
- (c) In relation to paragraph 1.7, it is not clear that the purpose of the merger regime is to ensure a competitive outcome although it may do so in preventing a substantial lessening of competition (one respondent).
- (d) Before imposing Interim Measures there should be an assessment as to whether, irrespective of integration, the nature of the business and assets concerned is such that it is easy to divest if that is ultimately required (one respondent).
- (e) Interim measures can create considerable costs for merging parties. The CMA's approach to interim measures should be consistent with and proportionate to the United Kingdom's voluntary, non-suspensory merger filing regime. (two respondents).
- (f) 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 (one respondent).
- (g) To assist the merging parties with their planning, it would be helpful if the CMA were to include guidance on its internal processes and timeframes for whether interim measures are appropriate in the context of an anticipated merger (paragraph 2.17); requests for derogation from interim measures in the context of anticipated mergers expected to complete during the CMA's investigation (paragraph 2.24); requests for derogation from IO or IEOs before imposing an IEO or IO in the context of completed mergers (paragraph 2.30); the possibility of creating a tailored IEO (paragraphs 2.31 – 2.33); and requests for derogation from interim measures once in place (paragraphs 3.1-3.8). (one respondent).
- (h) 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 (one respondent).

- (i) The guidance should be more explicit about the need for the merging parties to sufficiently educate their staff about hold separate requirements and provide some best practices, such as undertaking a robust risk assessment; addressing the risks identified by introducing measures to ensure adherence to the hold separate requirements; ensuring that all relevant staff are being sufficiently informed; keeping the measures under review and reminding staff periodically (two respondents).
- (j) The guidance should say that Interim Measures will only be imposed in relation to anticipated mergers in the most exceptional of cases, consistent with a policy of carefully targeted intervention within a voluntary regime (one respondent).
- (k) The CMA's adherence to a policy of "almost always" relying on the Template IEO as set out at 2.29 to 2.31 is inconsistent with the principles of flexibility 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 is disproportionate to the objective of guarding against the risk of pre-emptive action. The 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 and delete the last sentence of paragraph 2.29 of the guidance; (one respondent).
- (l) The CMA should amend the last sentence of paragraph 2.24 of the 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." (one respondent).
- (m) Include in the guidance examples of cases where the merging parties completed the transaction at a global level subject to hold separate obligations for the UK businesses This would assist the merging parties in integrating in jurisdictions where the deal has been cleared without compromising the CMA's merger review process (one respondent).
- (n) In relation to interim measures in completed mergers, 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 (one respondent).

- (o) In a footnote to paragraph 2.26 the CMA says that it may consider that a transaction self-evidently raises no competition concerns where it is clear that the reference test will not be met but that this exception is unlikely to apply where the CMA has initiated an investigation on its own initiative through its mergers intelligence function. The respondent would welcome further explanation of this exception or distinction (one respondent).
- (p) Regarding derogations, while the Electro Rent judgment makes clear that only the CMA can grant derogations, questions and requests should be routed through the monitoring trustee for its view (one respondent).
- (q) It is generally advisable for merging parties to collate derogations sought within a single request (guidance, paragraph 3.6) but this is frequently not realistic. It is not satisfactory for the CMA to cite this as a cause for delay to the CMA's investigation. The respondent recommends that the CMA 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." and deletes the remainder of paragraph 3.6 (one respondent).
- (r) The CMA notes in paragraph 3.24(c) that it has granted derogations to enable access for the acquiring firm to certain financial information from the target business for the purpose of financial oversight. The CMA's current case-by-case approach appears not to reflect that the acquirer should obtain certain financial information which is strictly necessary to verify that the target business is being maintained as a going concern. Alternately, require the Parties to: Inform the CMA about the safeguards in place after the Interim Measures would take effect (and no information is exchanged until CMA confirmation); Provide the CMA with a reporting template after the Interim Measures take effect (and no information is exchanged until CMA confirmation); Provide the CMA (and / or monitoring trustee if applicable) with a copy of the monthly reporting pack (one respondent).
- (s) The guidance should also say that the parties must provide the monitoring trustee with information that is timely, complete, accurate and not misleading (one respondent).
- (t) The guidance (paragraph 3.10) suggests a quasi-regulatory approach by which the supposed self-assessment will be subject to CMA review. 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 (one respondent).

- (u) Merging parties will be sharing information pursuant to confidentiality agreements prior to CMA involvement. They should be encouraged to put a provision in any confidentiality agreement saying that information can also be shared with any monitoring trustee who may be imposed without the consent of the other party (one respondent).
- (v) The respondent recommends that the CMA:
- amends the second sentence of paragraph 3.13 as follows to make it clear that provisions of paragraphs 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.”
  - 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.”
  - 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:”
  - amends paragraphs 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...”. (One respondent.)

Regarding exchanges of information between merging parties during interim measures the generality of the measures stipulated in paragraph

3.14 et seqq. of the 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. The 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. The imposition of such measures in cases in which there is no credible threat of preemptive 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. In light of the above, the respondent recommends 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 preemptive 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:” (one respondent).

- (w) In the event that the merger is not cleared, or in the event of a divestment remedy being required following the conclusion of such remedy, recipients should be required to delete confidential information received (subject to any requirements to retain such information, for example regulatory requirements) (one respondent).
- (x) The guidance would benefit from examples of how the CMA would assess whether it may need to issue an Unwinding Order (one respondent).
- (y) At paragraph 3.29 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" (one respondent).
- (z) In paragraph 3.35 the respondent questions 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 acquiring business. It would help to expand and clarify this requirement, especially given compliance with the safeguards in paragraph 3.36 (one respondent).

- (aa) In paragraph 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 paragraph 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 (one respondent).
- (bb) The guidance should provide more detail on the meaning of "key staff" (two respondents). Pursuant to Clause 5(i) of the template IEO no changes are made to key staff of the merging parties. In practice, however, key staff may leave during the Interim Measures for example as a result of uncertainty, especially at the target business, and it is important that this issue is being mitigated by the merging parties for example by introducing a retention scheme. Our general impression is that not all merging parties appear to sufficiently consider and address this issue at the outset. Also, key staff is not always identified and / or not identified accurately because it is sometimes perceived that key staff only entails senior staff whereas in practice this may entail staff of all layers within the business based on for example their experience, knowledge, technical ability and / or contacts with customers and suppliers. In addition, the merging parties do not always keep this under review for the duration of the Interim Measures, i.e. they may fail to re-consider their assumptions following any key staff resignations thereby they may put the viability of the businesses at risk. The guidance could be improved by addressing these points and by setting clear expectations around retention of key staff. Separately, the CMA may require the merging parties to provide a list of key staff as soon as the Interim Measures take effect and it may for example change the wording of the template IEO to reflect this. (One respondent.)
- (cc) At paragraph 3.58 the respondent considers 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 (one respondent).
- (dd) Where an acquiring business is permitted by the CMA to exercise direct control over the commercial policy of a target business or to appoint an independent manager to run that business, it is important that there is a clear business plan against which to assess performance (for example, monthly trading) and decisions (for example, levels of capital expenditure invested). This would typically be the business plan of the target business in place at the time of acquisition. If, prior to the introduction of Interim

Measures, this business plan needs to be amended (for example, to implement measures to mitigate severe financial difficulty), such changes should be clearly documented with their rationale explained. (One respondent.)

(ee) While the respondent recognises 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. In light of this, the respondent recommends that paragraph 4.5 of the guidance be amended to state: “In exceptional cases, at phase 1, the CMA may consider it necessary to appoint a monitoring trustee...” (one respondent).

(ff) The CMA should consult with monitoring trustees on its roster about the appropriateness and practicalities of appointing a monitoring trustee (one respondent).

(gg) If risk factors are detected the CMA should appoint a monitoring trustee as quickly as possible because further damage can occur very rapidly. Therefore the CMA should not only consider a monitoring trustee at fixed points but should state that it may appoint a monitoring trustee at any time as soon as significant risk factors are identified (one respondent).

(hh) Regarding paragraph 4.6, in the respondent’s experience, even if appropriate and sufficient structures are put in place to ensure the continued separation of businesses, it can be the case that customers (and other third-parties, for example suppliers) will be or become aware that a target business has been acquired but are not, understandably, familiar with the requirements of Interim Measures put in place. This feature, potentially accompanied by an element of permitted integration (for example, as target business employees exit to pursue other opportunities and their roles are necessarily assigned, following the granting of derogations, to the acquiring party’s employees), may give rise to ‘creeping integration’, with customers increasingly viewing and dealing with the acquiring and target businesses as a single business. This can be a particular feature where customers were served by both of the merging businesses prior to acquisition. To seek to avoid this, it may be appropriate to communicate proactively with such parties to clarify the circumstances and the nature of the Interim Measures in place (one respondent).

(ii) It may be more challenging for a monitoring trustee at the commencement of Phase 2 when certain risks, such as outlined in paragraph 4.6, have

already materialised in Phase 1. A monitoring trustee may identify certain risks and may provide the merging parties and their advisers with helpful guidance to mitigate these risks before they materialize. The CMA could therefore consider, in certain completed mergers, whether a monitoring trustee would need to be in place from Day 1 of Phase 1. For example, if the CMA would be of a view that the risk factors set out in paragraph 4.6 may materialize during the merger review process. Based on the respondent's experience this may particularly be appropriate when: Certain assets that are potential remedies are at risk; there are material concerns around the viability of the target business; the target business is not a standalone business and is being supported by the acquiring firm; and substantive integration has taken place between target business and acquiring firm (one respondent).

- (jj)* Integration affects the ability of the target to compete independently even if customer/supplier perceptions are not affected. Eg: changes to decision making concerning production might not be visible externally but may affect the ability to compete by transferring decision-making power or sensitive information. This could affect competition between the parties or damage the target staff morale. Examples 5.5(d) and (e) below are steps affecting internal processes and might not be covered by paragraph 5.4 (one respondent).
  
- (kk)* The CMA should weigh the risk of pre-emptive action against the cost and disruption to the parties, ie, the threshold for unwinding should be variable (one respondent).
  
- (ll)* The respondent considers that it might be useful to include a section specifically dealing with sensitive sectors which may be subject to the reduced thresholds introduced in 2018 (one respondent).

## **CMA Response**

2.10 The CMA's response to the points above is as follows:

- (a)* The examples of pre-emptive action in footnote one are not intended to be comprehensive, but the footnote has been slightly expanded.
  
- (b)* The guidance follows the language of the statute. The CMA has attempted to make the guidance as simple as it can be by referring to "Interim Measures" wherever possible. Terms are defined at paragraphs 1.4 and 2.3.

- (c) The language of paragraph 1.7 has been adjusted in line with this comment.
- (d) The CMA imposes interim measures if it is investigating and it is necessary to protect the CMA's ability to remedy an SLC. How easy a carve-out will be in the event of prohibition does not determine whether interim measures are required.
- (e) Paragraphs 1.5 to 1.11 of the guidance explain the importance of complying with Interim Measures to preserve the pre-merger competitive structure of markets, and that the CMA's ability to impose Interim Measures and impose penalties where these have not been complied with, are the necessary corollary of having a voluntary regime. The CMA will act proportionately in imposing Interim Measures, whilst having regard to the necessity of preventing pre-emptive action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action.
- (f) The CMA does not accept that the proposed approach to Interim Measures places a disproportionate burden on merging parties. The CMA investigates only a small proportion of the mergers which take place in the UK, and, unlike most other jurisdictions, does not impose blanket suspensory obligations on all of the mergers which it investigates. For the reasons set out in the guidance, particularly at paragraphs 1.5 - 1.11, the CMA believes that the proposed approach is proportionate.
- (g) Internal processes in considering Interim Measures and derogations depend to a significant extent on case-specific factors, such as derogation complexity, pre-emptive risk, and timeliness and completeness of responses to information requests. Paragraph 3.2 provides guidance on the procedure for requesting derogations.
- (h) The CMA believes that the potential risks of integrating without first assessing whether the CMA might review the merger are clear from the guidance.
- (i) The text of paragraph 2.14 has been amended in response to this comment.
- (j) The voluntary regime is designed to avoid administrative burdens on innocuous transactions. However, once the CMA has decided to investigate a transaction, it is critical that any business that has been acquired continues, during the CMA's investigation, to compete independently with the acquiring business and is maintained as a going concern. The regime is also non-suspensory. The CMA reflects this by

ensuring that Interim Measures only prevent completion in exceptional cases. Effective control of integration (subject to derogations) in cases which the CMA is investigating is necessary to balance the efficacy of the regime against the desire to minimize administrative burden. This is reflected in the text at paragraphs 2.15ff.

- (k) The CMA disagrees with this comment. The use of a standard Interim Order plus derogations is in line with legislative intent. In 2014 Parliament revoked section 71 which allowed the OFT to negotiate interim undertakings at Phase 1. The default is an order without negotiation about its content, subject to the flexibility set out at paragraphs 2.29 - 2.33 of the guidance.
- (l) See the response to (k) above. As set out at paragraph 2.32 of the guidance, the CMA will consider creating tailored Interim Measures where the CMA is able to conclude in advance of imposing an IEO that: (a) certain of the risks of pre-emptive action that the standard form IEO is designed to prevent do not arise; and/or (b) the provisions of the standard form IEO may lead to undesirable consequences.
- (m) The CMA provides guidance on derogations seeking to exclude non-UK businesses from Interim Measures at paragraph 3.40 onwards.
- (n) The CMA notes that the fact that integration can be easily reversed does not mean that there is no risk of pre-emptive action. For example, independent operation of the target may be affected and exchanges of confidential information may take place.
- (o) Since the CMA's merger intelligence committee will only take a decision to investigate if it believes that there is a reasonable chance that the test for a reference to an in-depth phase 2 investigation will be met. The CMA is unlikely (absent further evidence) to be persuaded that such a case self-evidently raises no competition concerns.
- (p) Questions may be directed to the monitoring trustee, but derogation requests do not have to go through the monitoring trustee. The CMA will take appropriate steps to consult the monitoring trustee and keep them informed about derogations, but that does not mean that requests need to be routed through the monitoring trustee.
- (q) Paragraph 3.6 has been amended in response to this comment. However, the CMA continues to note that a drip-feed of multiple derogation requests can unnecessarily hamper the CMA's investigation and should therefore be avoided if possible.

- (r) As set out at paragraphs 3.15 and following the parties and their legal advisers should in the first instance self-assess what information flows are appropriate. If in doubt, they should contact the CMA.
- (s) The CMA believes that this is best addressed in the directions for appointing a monitoring trustee and in the monitoring trustee mandate.
- (t) Paragraphs 3.9 and following of the guidance have been amended to acknowledge that due diligence may be a legitimate reason for information flows, and that it is in the first instance for the parties and their legal advisers to decide what information flows are appropriate. The CMA believes that the text as it now stands is proportionate and practical.
- (u) The CMA considers this unnecessary. If there are agreements between the parties which are hindering the monitoring trustee in its duties then the CMA can direct the parties to change them as and when necessary.
- (v) After carefully considering these suggestions the CMA has made amendments to paragraphs 3.13-3.18 where appropriate. The CMA believes that the text of the guidance as amended is reasonable and proportionate in light of the considerations set out at paragraphs 1.5 to 1.11 of the guidance. Regarding the proposed amendment to paragraph 3.14, the CMA may check compliance without first having a positive reason to believe that the parties are not complying. Similarly, the CMA may check whether there were inappropriate information exchanges prior to the Interim Measures coming into effect.
- (w) If necessary, this is best dealt with by means of directions under the final undertakings/order.
- (x) This is dealt with in section 5 of the guidance which discusses unwinding orders.
- (y) The text has been amended for clarity.
- (z) The authorized individual should generally be someone from the acquiring business who could not take advantage of the information it receives from the target. Typically this is someone in legal or finance functions.
- (aa) If it is not possible or practical to ringfence the related business from the non-related business, then this is likely to be grounds for rejecting the derogation given that the non-related business could be integrated with the acquirer.



- (bb)* What constitutes key staff or a material change may depend on the nature of the business in question. Accordingly the CMA does not consider it appropriate for the guidance to be more prescriptive on this subject. If, on the facts of a particular case, the parties are in doubt as to which staff are key staff they should consult the CMA.
- (cc)* Paragraph 3.58 has been amended in response to this comment.
- (dd)* Paragraph 3.67 has been amended in response to this comment.
- (ee)* Whether a monitoring trustee is appropriate depends on the circumstances of the case rather than the stage of the investigation. Accordingly the CMA does not believe that any amendment of the proposed guidance is required.
- (ff)* The CMA disagrees with this suggestion. It would be unnecessary and inappropriate for the CMA to consult undertakings providing monitoring trustee services about the need for an practicalities of appointing a monitoring trustee.
- (gg)* Paragraph 4.5 has been amended in response to this suggestion.
- (hh)* The CMA shares this concern, but believes it is best dealt with by discussion with the parties on a case-by-case basis.
- (ii)* The CMA believes that paragraph 4.6 adequately covers these concerns.
- (jj)* Paragraph 5.4 has been amended in light of this comment.
- (kk)* The CMA believes that the guidance already gives due consideration to this suggestion.
- (ll)* The CMA believes this topic is adequately covered in CMA90.

## **Appendix A: List of respondents to the consultation on the draft guidance**

1. Freshfields Bruckhaus Deringer LLP
2. The Law Society of Scotland
3. Monitoring Trustee Partners BV
4. Nothhelfer Consulting Partnerschaft
5. RSM Corporate Finance LLP
6. Smith & Williamson