Interim measures in merger investigations

Summary of responses to the consultation

1 May 2019
CMA60resp

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1. Introduction

Background

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 12 June 2018 to 20 July 2018 on a draft of that guidance. This document summarises the comments received and explains how the CMA has responded to them. The consultation document and respondents' full responses are available on the consultation page.

1.4 **In light of further developments since that consultation was run, the CMA will run a further consultation on a revised version of the draft guidance before finalising it.**

2. Issues raised during the consultation and our response

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

(a) Is the content, format and presentation of the draft guidance sufficiently clear?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.

(b) Is the draft guidance sufficiently comprehensive? Does it have any significant omissions? Do you have any suggestions for additional or revised content that you would find helpful?

(c) Do you agree with the policies set out in the guidance? In particular, do you agree with the policy set out in relation to the use of Interim Measures in anticipated mergers which are expected to complete during the course of the CMA's investigation?

(d) Do you have any other comments on the draft guidance?

2.2 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.

2.3 Summaries of responses are set out below, together with the CMA's views on the comments in question, which have been taken into account in the draft guidance.

Respondent views

2.4 Respondents generally considered that the draft guidance was clear, in terms of content, format and presentation.

2.5 Respondents made the following comments and suggestions:

(a) Include fuller references, and in particular dates, for the cases footnoted, and more cross-references. Insert footnotes to more cases (One respondent.)

(b) Consider creating a separate internal team dedicated to handling Interim Measures. Interim Measures, particularly requests for derogations from IEOs, tend to be very case-specific and can create challenges for the parties and their advisers. Given the serious consequences of getting it wrong (significant penalties, as seen in Electrorent/Microlease), this in

turn can lead to the CMA case team having to deal with complex questions within a tight timeframe. In order to allow the case team to focus on reviewing the substantive issues raised by the transaction, we consider that it would be appropriate for the CMA to create a separate unit with suitable expertise to review proposed derogations in parallel. This approach would minimise the risk of delay to the substantive assessment by the main case team. The parties in turn, would benefit from dealing with CMA staff who have experience of the issues typically associated with derogations. (One respondent.)

(c) Clarify that the CMA may take additional steps at phase 2 whether or not an initial enforcement order (IEO) has been imposed, including replacing, amending or supplementing the obligations imposed at phase 1. Confirm that the CMA will always reassess any IEO in the event of a reference to phase 2, and keep merging parties' obligations under review throughout the course of a phase 2 investigation, as currently detailed at footnote 99 and paragraph 11.9 of CMA2. (One respondent.)

(d) Add guidance in section 2 on when an IEO is likely to be made, distinguishing between notified and non-notified cases, with reference to paragraph C.14 of CMA2. (Two respondents.)

(e) C.5 of CMA2 stated that the use of interim measures in anticipated mergers would be limited to the relatively rare cases that the CMA considers raise concerns about pre-emptive action that is difficult or costly to reverse. Whilst paragraph 2.4 of the Draft Guidance still notes that an IEO in anticipated mergers would be a relatively rare occurrence, it does not limit it to cases where pre-emptive action would be difficult or costly to reverse. Does the CMA consider that IEOs could be imposed in anticipated mergers in a broader range of circumstances? (One respondent.)

(f) Would the CMA consider interim measures necessary where merging parties intend to make material changes to their business operations or seller intends to make changes to the target business (e.g. by changing financing arrangements) where these arise in unavoidable circumstances and where decisions are taken unilaterally by the relevant party. If so, a footnote to explain this would be useful. (One respondent.)

(g) Provide more detailed guidance on the use of IEOs to prohibit completion of anticipated mergers. While the CMA has not, to date, used this power, the possibility of a prohibition on closing has, in our experience, become an important issue in contractual negotiations regarding the allocation of

antitrust risk between merging parties. Consequently, further guidance on the circumstances in which a prohibition on closing might be imposed, and the steps that parties can take to avoid such an order, would be extremely valuable. In particular:

(a) are there scenarios other than asset sales in which such a prohibition may be imposed (e.g. where important customer or supplier contracts are likely to be terminated through change of control provisions)?

(b) where key staff, management capability or other important assets are not being acquired, can the risk of a prohibition be mitigated by ensuring that those staff are available on secondment for a suitable period, or through appropriate transitional services arrangements? (One respondent.)

(h) With respect to the use of interim measures in completed mergers, we note that the CMA will, where possible, provide merging parties (or their advisers) with advanced notice of the imposition of an IEO. Given any interim measure in a completed merger will take effect as soon as the order is made, is the CMA able to give an indication of how long in practice that advance notice is likely to be? (One respondent.)

(i) Paragraph 2.23 of the Draft Guidance states that other interim measures, for example requiring the appointment of a monitoring trustee or a hold separate manager, may be imposed. We note that paragraph C.26 of CMA2 gave examples of other forms of interim measures that have been used in past cases, for example confidentiality agreements and logs. Has the CMA deliberately removed these additional examples from the Draft Guidance due to lack of anticipated use? (One respondent.)

(j) CMA should make the IEO process more efficient by publishing derogations simultaneously with the IEO or IO. (One respondent.)

(k) No mention is made of the form of interim measure which the CMA expects to use in anticipated cases which are not notified but where the CMA has initiated an investigation on its own initiative through its mergers intelligence function. Will these be treated differently from other anticipated cases? The CMA should in these cases, if time allows and the circumstances are appropriate, start discussions with merging parties as soon as possible with a view to creating a tailored IEO. (one respondent.)

(l) Footnote 29 provides the form of a declaration that parties requesting a derogation should be prepared to sign. This guidance should be made explicit in the main body of the text and should be clarified. In particular

the CMA should explain what it means by "be prepared to sign a declaration" – this implies that a declaration will not be required in all cases, but there is no indication of when the CMA might deem it necessary. In our view, requiring merging parties to sign such a declaration as a matter of course is unnecessary and adds a layer of administrative burden which would bring inefficiencies to the interim measures process. Further insight into the CMA's approach to declarations would be helpful. (One respondent.)

(m) Has the CMA in any particular case agreed derogations permitting the target to benefit from the acquirer's supply arrangements where these arrangements are not transferring with the target this in any particular case? We consider that it would also be useful if the CMA developed template texts for the main types of derogations, especially those which form standard derogation requests. (One respondent.)

(n) Electro Rent creates considerable confusion about the role and powers of the CMA and the monitoring trustee. We therefore recommend that there should be greater clarity on the roles of the CMA and the monitoring trustee in such cases. (One respondent.)

CMA Response

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

(a) Fuller footnotes and additional cross-references have been added throughout the document.

(b) The CMA has increased the expertise and number of staff working on phase 1 derogation requests. In particular, in the past year members of the CMA's team of Remedies Business and Financial Advisers (RBFA) have routinely been working on phase 1 mergers on which interim measures have been imposed.

(c) Section 1 of the draft guidance has been clarified as requested.

(d) Additions have been made to section 2 to deal with these points.

(e) Section 2 of the guidance in the subsection headed "Use of Interim Measures in anticipated mergers" has been updated to reflect the CMA's current practice. Following problems with compliance, interim measures are now being used in a wider range of cases.

(f) Footnote added. If changes are made in contemplation of the merger they may be of concern to the CMA even if they are ostensibly made without agreement with the other merging party.

(g) Footnote added. The CMA may prevent completion if it will necessarily result in pre-emptive action. This might be the case, for example, where: (a) the act of completion would directly lead to the loss of key staff or management or operational capability (eg through the loss of customer or supplier contracts) for the target business. This is more likely to occur in an asset acquisition than where a functioning business is being acquired, which could be preserved through a post-completion IEO; (b) the act of completion would result in significant changes to the acquiring or target businesses, which would be difficult or costly to reverse, eg the loss of regulatory licences.

(h) Footnote modified. The amount of advance notice the CMA will give when imposing interim measures will depend on the circumstances. The CMA seeks to avoid unnecessary inconvenience to the merging parties but will impose an order without notice if it considers it necessary to prevent pre-emptive action.

(i) Footnote added. These elements of CMA2 were initially omitted in an attempt to reduce the length of the guidance

(j) Where the merging parties have clearly demonstrated that some of the provisions are not relevant to a specific merger, the CMA will publish a derogation for those provisions simultaneously with the IEO or IO, provided that the merging parties have engaged with the CMA on such derogations on a timely basis.

(k) It is unusual for the CMA to send an enquiry letter regarding an anticipated merger. As in any other case the CMA would take steps to minimise the burden of any interim measures if the parties commence discussions with the CMA in good time.

(l) All requests for derogations must be reasoned and accompanied by relevant evidence. The person submitting the derogation request should in all cases sign a declaration in the form indicated.

(m) The CMA will generally reject requests to permit any action that is intended to extract or accelerate the realisation of any revenue, cost or other synergies arising from the merger during the CMA's investigation, which is not necessary for the viability of the target business. The CMA will develop more specific templates if this appears efficient.

(n) The CMA believes that the respective roles of the CMA and the monitoring trustee are clear following the CAT judgment in Electro Rent. The guidance has been amended to reflect that judgment.

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

1. Allen & Overy LLP
2. Baker McKenzie
3. Clifford Chance LLP
4. The Law Society of Scotland
5. Orrick
6. White & Case