Herbert Smith Freehills LLP

Response to CMA Consultation on Interim Measures in Merger Investigations (CMA108CON)

1. INTRODUCTION

1.1 Herbert Smith Freehills LLP (HSF LLP) welcomes the opportunity to respond to the CMA's Consultation on Interim Measures in Merger Investigations. The comments set out in this submission are those of HSF LLP and do not reflect the views of individual clients.

1.2 Interim measures (IMs) have become a key feature of UK merger control and were introduced as a quid pro quo for having a voluntary regime, which has historically been seen as attractive and flexible for businesses. However in more recent times, the cost and complexity of IMs means that much of the benefit of a voluntary regime is seen as being lost. A recent informal survey indicates that the external legal cost of administrating IMs tends to account for 20 to 30% of overall phase 1 legal fees.

1.3 In addition there are considerable burdens placed on the business and on senior management time by the regime, relating to the need to put internal compliance measures in place, the possible use of a monitoring trustee and expense involved in that process and inefficiencies in the businesses being acquired, e.g. the costs of replacing staff that leave, impaired decision-making as the acquired business has no real direction. We understand the regime is similarly burdensome to operate for the CMA.

1.4 In view of the above and the CMA's substantial discretion in imposing IMs, a breach of which can result in significant fines for the parties concerned, there is a need for clear and comprehensive guidance as to what is expected of the merging parties in relation to IMs. This is particularly important as the CMA expects the merging parties to self-assess compliance risks and will not be able to pre-emptively give assurances that a particular approach to compliance will be sufficient for the purposes of Interim Measures (paragraph 2.17 Draft Revised Guidance).

2. RESPONSE TO CONSULTATION QUESTIONS

2.1 *Is the content, format and presentation of the draft guidance and draft template initial enforcement order sufficiently clear?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

Addressees of the Interim Measures

2.1.1 Paragraph 2.10 of the Draft Revised Guidance, which deals with addressees of the IMs, has been amended but needs further clarification. The revised text indicates that in completed mergers IMs may be imposed on the target business and the target business's ultimate parent company (whether based in the UK or overseas). The text should be amended in order to make it clear that this refers to any relevant parent company (or "topco") within the acquired target group. IMs in completed mergers should not be addressed to the seller, as the seller will have relinquished legal ownership and control of the target on completion.

Extra-territorial application

2.1.2 Proposed changes to paragraph 2.10 also indicate that the IMs will "typically" be addressed to overseas parents. In our view such an approach would be disproportionate and impose a further unnecessary burden on the merging parties. It will mean that multinational companies with a number of business divisions outside the UK may be seriously hampered in their operations through IMs affecting all their worldwide business activities, without any clear practical benefits.

2.1.3 Instead, the CMA should adopt a pragmatic and proportionate approach when considering imposing IMs against overseas businesses, balancing the risk of pre-emptive action, which will often be low, against the cost to businesses which is likely to be high. In addition, the risk of deterrent to inward investment of an unnecessarily wide approach by the CMA can also not be ignored.

2.1.4 We note there is currently an inconsistency between the text in the Draft Revised Guidance, which refers to IMs being "typically" imposed on an overseas parent, and the text in the Draft Revised Template IEO which refers to "to the extent appropriate". We support the approach taken in the Revised Template rather than in the Revised Guidance. If the CMA decides to adopt an approach of imposing IM's on an overseas parent as a matter of course, it is important that derogations are granted by the CMA as a matter of urgency and at the earliest possible opportunity during the inquiry, in order to exclude appropriate non-UK businesses of the merging parties from the scope of the IMs.

Acquirer responsible for taking necessary steps to ensure compliance by the target

2.1.5 Proposed changes set out in paragraph 2.15 expressly state that in completed cases, the acquirer is normally additionally responsible for taking all necessary steps to ensure compliance by the target.

2.1.6 In paragraph 2.16 the CMA considers that merging parties should take a risk-based approach to the design and implementation of any steps taken to ensure compliance with IMs, and that this involves undertaking a thorough review of each area of the merging parties' respective businesses in order to identify any risks for compliance.

2.1.7 It is difficult to see how the acquirer will be able to engage with the target in order to identify the relevant risks and to adopt the necessary compliance measures, in light of the restrictions imposed on it by IMs, which prevent it from exchanging with the target the very type of information that is relevant in order to develop tailored compliance measures.

2.1.8 The CMA recognises the difficulty faced by an acquirer as a result of IMs, noting in paragraph 2.15 that merging parties' ability to take steps to ensure compliance is affected by the hold separate provisions contained within IMs, but does not provide further guidance as to how the merging parties can develop appropriately tailored compliance measures.

2.1.9 We welcome the CMA's wider guidance on specific compliance steps set out in paragraph 2.16 of the Draft Revised Guidance, but we believe that more detailed guidance is necessary in order for this to be of real benefit to the merging parties.

- In relation to the **requirement for tailored guidance and staff training**, we believe there should be further guidance both on how to identify the relevant staff which should receive guidance and training as well as on the key elements of a training programme.

- In relation to **internal communications**, the Draft Revised Guidance recognises that the nature of the information contained within such communications is complex and therefore best conveyed in writing, but there is no guidance as to what complex information might be included in internal communications. We understand that the contents will vary on a case by case basis, but some basic guidance would be helpful.

- In relation to **governance structures, delegations of authority and ongoing oversight and reporting mechanisms**, it is not clear how these obligations and other obligations set out in the Draft Revised Guidance would apply in the context of an asset acquisition. There should also be express clarification that an exchange of information between merging parties in completed mergers relating to governance structures, internal oversight and reporting mechanisms fall outside the scope of IMs.

2.2 *Is the draft guidance sufficiently comprehensive? Does it have any significant omissions?*

2.2.1 We believe the Draft Revised Guidance would benefit more widely from a number of clarifications and more detail in order to streamline the operation of the IMs regime as much as possible, both in the interest of the parties involved and the CMA.

IMs in anticipated mergers

2.2.2 We note there is no additional or updated guidance on the application of the IM regime in anticipated mergers. The Draft Revised Guidance (paragraph 2.18) suggests that the circumstances in which the CMA will consider IMs necessary for anticipated mergers are relatively rare. Nevertheless, for the period from 2018 until March 2021, around 15% of all IMs imposed by the CMA in phase 1 did relate to anticipated mergers. Given this level of intervention more detailed guidance on the use of IMs in relation to anticipated mergers is essential.

Different types of transactions

2.2.3 The Draft Revised Guidance and the IMs regime does in our view currently not sufficiently differentiate between the different types of relevant merger situations. Compliance measures in the context of a share acquisition will be very different from those that can be implemented in an asset acquisition, and the risk and nature of pre-emptive action will differ materially as between acquisitions of 'de jure' or 'de facto' control and material influence. This should be reflected more clearly in the Draft Revised Guidance.

Impact of Brexit

2.2.4 As a result of Brexit there will be a significant increase in the CMA's merger control caseload, and simplification of the IM regime, with clear and comprehensive guidance, should therefore also assist the CMA. Transactions may be subject to parallel reviews by the CMA and the EU Commission. In such cases we would encourage the CMA to accept there is no need to impose IMs in

relation to anticipated mergers given that the mandatory standstill obligation under the EUMR will in any case eliminate the risk of pre-emptive action.

Impact of Covid-19

2.2.5 There is also no reference to the impact of Covid-19 in the Draft Revised Guidance. Whilst we do not advocate any temporary changes to the IMs regime in response to Covid-19, more detailed practical guidance on continued compliance with IMs in the context of Covid-19 would be welcome. The pandemic has resulted in an increased number of derogation requests and no learnings from the experience are reflected in the Draft Revised Guidance. As a minimum the Draft Revised Guidance should clarify how these derogation requests have been dealt with by the CMA in these exceptional circumstances.

2.3 *Do you have any suggestions for additional or revised content that you would find helpful?*
Draft Revised IEO Template

2.3.1 We would find it helpful if the CMA could provide more detailed guidance on the scope of information that can be exchanged in the "ordinary course of business" pursuant to paragraph 5(l) of the Draft Revised IEO Template. It would also be helpful if the CMA could explain the reasoning for its proposed deletion in this paragraph to permitting the exchange of information required for "the completion of any merger control proceedings in relation to the transaction".

2.3.2 We note that the CMA proposes deleting the word "substantive" from paragraph 5(c) regarding changes made to the organisational structure of, or the management responsibilities within, the affected businesses except in the ordinary course of business. We would be grateful if the CMA would explain its reasoning for this deletion, particularly given that it would make the obligation in this paragraph more onerous for merging parties. If the CMA proceeds with this deletion, it would be helpful if the CMA could at least provide additional guidance on the scope of "ordinary course of business" referred to in this paragraph.

Revised Draft Guidance and derogations

2.3.3 We would find it helpful if the CMA could provide additional guidance on the types of derogations that are generally granted by the CMA, including updating the "Derogations generally granted by the CMA in previous cases" section of the Guidance to reflect the CMA's practice since 2019. We would also find it helpful if the CMA could provide further guidance on the information and evidence typically

required for these types of derogations, to help streamline the process for granting such derogations.

2.3.4 We note that additional guidance on these matters would be particularly welcome given that previously granted derogations published on the CMA's website are often subject to extensive redactions, making it difficult to ascertain the nature of the derogation and the information/evidence relied upon by the CMA.

2.3.5 In addition, we query whether individual/tailored derogation requests could be developed in relation to the most commonly granted derogations, to help alleviate the administrative burden in making and agreeing such requests both for merging parties and the CMA. We also think it would be very helpful for all parties concerned if published derogations could be maintained not just on individual case pages but as part of a comprehensive register which, if feasible, could be searched by theme or keyword in a similar way to the CMA's main case search page.

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