The CMA's consultation on
Draft revised guidance on interim measures in merger investigations

7 April 2021

Response of Freshfields Bruckhaus Deringer LLP

5 May 2021

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RESPONSE TO THE CMA'S CONSULTATION ON ITS DRAFT REVISED GUIDANCE ON INTERIM MEASURES IN MERGER INVESTIGATIONS

of 7 April 2021

1. Introduction

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the CMA's consultation on the draft revised guidance on interim measures in merger investigations of 7 April 2021 (***Draft Revised Guidance***) and the draft revised template initial enforcement order (***Draft Revised Template***).

1.2 This response is based on our substantial practical experience associated with our involvement in CMA cases involving interim measures, although comments in this response do not purport to represent the views of specific clients.

1.3 We have commented on the CMA's approach to the use of interim measures in previous consultations.[1]

1.4 As requested by the CMA, we have structured our response along the following lines:

(a) our comments on the changes proposed in the Draft Revised Guidance including the sections '*To whom do the measures apply?*' and '*Ensuring a smooth process*';

(b) areas where further guidance from the CMA would be useful; and

(c) our comments on the changes proposed in the Draft Revised Template.

1.5 As a general point, the Draft Revised Guidance includes a significant level of detail on the CMA's expectations of the merging parties – including education and training, information disclosure, continuing compliance – all resulting in a substantial administrative burden on merging parties. We would encourage the CMA to provide greater detail on its internal processes, and include commitments from the CMA on the steps it will take to ensure a fair and reasonable approach to fulfilling its statutory duties in relation to the use of interim measures.

2. Changes proposed in the Draft Revised Guidance

To whom do the Interim Measures apply?

2.1 We welcome the greater clarity provided by the amendments to paragraph 2.10 of the Draft Revised Guidance, including the guidance on their application to investment vehicles and private individuals. However, the guidance does not address the CMA's expectations where an investment vehicle or private individual does not have any oversight or control of the decision-making or board level supervision, for example, where arms-length arrangements are in place. The CMA should amend the guidance to confirm that interim measures will not be imposed on entities or individuals with no oversight or control over decision-making or board level supervision.

[1] See 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; and the response to the CMA's consultation on draft guidance on interim measures in merger investigations submitted by Freshfields on 1 May 2019.

2.2 We are concerned that the amendments now provide that interim measures will '*typically*' be imposed on overseas parents, rather than '*to the extent appropriate*'. As the CMA will appreciate, in many cases, the UK business of a merging party accounts for a relatively small proportion of the group's global business, and/or the UK business may have limited interactions with group entities located overseas, such that there is no realistic prospect of the types of pre-emptive action to which the statute is addressed. Accordingly we consider that the current wording *'to the extent appropriate'* is more appropriate. In addition, it would be useful to have further guidance from the CMA on:

(a) whether there are circumstances in which the CMA may decide to exclude overseas entities from the application of interim measures in the first instance and, if so, what criteria would the CMA apply (in addition to the existing guidance in paragraph 2.36 of the Draft Revised Guidance which provides that the CMA will only be able to reach a view on variations to the standard form IEO where there is sufficient time and information available and specifies the types of information that will be required to allow the CMA to make this assessment); and

(b) how long it would envisage that overseas entities will typically be subject to IEOs before the CMA would be willing to consider and grant a derogation. Paragraph 3.43 of the Draft Revised Guidance states that the CMA is '*likely to be particularly cautious about granting derogations on this basis at the earlier stages of its investigation where the full scope of the merging parties' activities may not yet have been fully analysed*'. In our experience, such derogations have not been granted for a number of weeks. It would be useful to understand, for example, whether: (i) the CMA considers that there is a minimum period of time which it will need, or has taken in the past, to feel sufficiently comfortable that such derogations can be granted; and (ii) there are circumstances in which the CMA could grant such derogations at an earlier stage in the process, including due to the existence of certain factors which make the decision sufficiently straightforward or because the merging parties are able to provide (or have provided in previous cases) relevant information to the CMA in a timely manner.

Ensuring a smooth process

2.3 We generally welcome the additional level of detail provided in this section of the CMA's Draft Revised Guidance in understanding the CMA's expectations of the merging parties, particularly in paragraph 2.16 concerning the steps the CMA generally considers to be necessary to ensure effective compliance. This should provide a useful framework for parties and their advisers to ensure compliance. We do, however, have the following suggestions, which we would encourage the CMA to consider, to further improve this section:

(a) Overall, the CMA's expectations set out in paragraphs 2.13 to 2.16 of the Draft Revised Guidance suggest that the merging parties will be required to conduct a compliance audit similar to that which is usually conducted by a monitoring trustee when preparing the report mentioned in paragraph 4.2 of the Draft Revised Guidance. It would be helpful for merging parties, their advisors and monitoring trustees if the CMA can clarify:

(i) whether the effect of this is to impose a separate obligation on the merging parties (even where a monitoring trustee has been appointed);

(ii) whether there are material differences in the CMA's expectations in each case, including the nature and standard of the review to be performed and the information to be provided; and

(iii) if there is a monitoring trustee appointed, whether the work performed by the monitoring trustee can serve to satisfy the CMA's expectations of (some or all of) the steps set out in paragraphs 2.13 to 2.16, to avoid unnecessary duplication and to allow the merging parties to comply with their obligations more quickly and efficiently.

(b) In paragraph 2.13, where the CMA seeks details of 'actual communications' with employees and third parties about the merger, we would suggest it be clarified that this does not require details of *every* such communication, which would be difficult logistically and administratively burdensome to provide to the CMA. The Draft Revised Guidance could note that such information can be provided in summary form and by reference to the planned communications, where applicable. For example, 'an email substantially in the form of the planned communication was sent to customers A, B and C' or 'an email substantially in the form of the planned communication was sent to X staff, with ad hoc follow-up discussions where staff had queries'. To the extent that individual employee/customer communications lead to a breach (eg regarding representations of brand identity or during customer negotiations) these already need to be reported to the CMA as part of ongoing reporting obligations. Similarly, we suggest amending item (ii) in paragraph 2.13 so that it reads '*existing plans for integration of the target business (where available)*', as the acquirer may not have detailed integration plans and should not be expected to develop and provide detailed integration plans at such an early stage if they do not exist.

(c) In paragraph 2.15, the CMA acknowledges the limitations on the acquirer's ability to monitor fully the target's compliance, but still requires the acquirer to take '*all necessary steps*' to ensure the target's compliance. That paragraph also acknowledges that the acquirer may be constrained by the extent to which it has a controlling interest. This seeks to impose a strict liability standard on acquirers in relation to the compliance of the target. Strict liability is not justified in the language of the statute and is not an appropriate standard as a matter of policy or practice. In light of these recognised limitations, we would suggest that the acquirer should be required to take *'all necessary steps which are reasonable in the circumstances'*. It is also unclear how the CMA expects this to work in practice including who will be monitoring the target and who will be able to monitor the target to the standard expected by the CMA. Further guidance is required on these points and particularly in relation to the depth at which the monitoring must occur, taking into account the breadth of the operations that are to be monitored ie all ordinary course activities of the target. The CMA should also provide detailed guidance on how it expects this would work in a transaction involving the acquisition of material influence or de facto control, rather than

full legal control. In practice, in these situations an acquirer simply will not have sufficient 'control' over the target business to impose the operational structure needed to support and monitor compliance with an IEO. Further guidance on the CMA's expectations in this regard is required.

(d) Paragraph 2.16 sets out the CMA's expectation that the merging parties will conduct a thorough review of their respective businesses to identify risk areas before tailoring the steps they will take to comply with their obligations. Given the completion of a thorough review may not be possible in very short order, resulting in the tailored guidance and staff training required by paragraph 2.16(a) possibly not being ready or feasible at the time the IEO comes into effect, we would suggest clarifying that the risk-based approach advocated in the Draft Revised Guidance should allow for a flexible approach. This flexibility should be factored into the CMA's 'minimum' expectations. For example, would it be preferable to allow the merging parties the flexibility to initially provide broader guidance/training (prioritising speed over tailoring), subsequently followed up with more tailored training and/or guidance once the review of risk areas had been completed? Similarly, and again reflective of the risk-based approach the CMA advocates, although it is implicit in the new wording, it would be helpful to clarify that tailored guidance and training can include providing different levels and depth of training and guidance to different groups of officers and employees. So for example, an undertaking should feel comfortable being compliant with its obligations in relation to overseas staff who do not interact with third parties or customers by giving them broader guidance/training. This risk-based approach will also be important for businesses with large numbers of staff or with staff whose work patterns mean that the provision of training or guidance may take a number of days to be rolled out or can be logistically difficult to arrange.

(e) A small comment: a second '24' appears in superscript at the end of paragraph 2.16(d) without an accompanying footnote. It is unclear whether this is a typographical error or whether the content of the footnote (perhaps providing examples or previous cases) is missing.

2.4 We consider that paragraph 2.11 of the Draft Revised Guidance may not reflect actual recent practice and may require updating to set the expectations of merging parties and their advisers. For example, paragraph 2.11 suggests that certain measures (such as non-disclosure agreements or the imposition of a monitoring trustee) may be taken if there is a failure to inform the CMA of potential pre-emptive action. However in our experience the CMA routinely expects non-disclosure agreements to be in place regardless of whether there has been any 'failure'. Recent practice and paragraphs 4.5 and 4.6 of the Draft Revised Guidance also indicate that a monitoring trustee will be appointed more frequently, or in broader circumstances, than paragraph 2.11 suggests.

Interim measures in completed mergers

2.5 Paragraph 2.29 of the Draft Revised Guidance specifies that the CMA would normally impose an IEO in completed merger cases which it is investigating '*regardless of the level of control acquired*'. As set out above in paragraph 2.3(c), the

CMA should provide detailed guidance on how an acquirer with material influence or de facto control will in practice be expected to comply with this obligation, considering it is not feasible to take responsibility for the compliance of the target business over which they do not have legal control. The CMA must also take into account the limited ability of the acquirer when considering derogation requests. We would suggest that it would be appropriate for reasons of feasibility and proportionality for the CMA to commit to take into account the level of control acquired when considering derogation requests. For example, a transaction involving the acquisition of material influence could realistically be subject to fewer IEO restrictions and/or benefit from more extensive derogations than a transaction involving the acquisition of legal control on the basis that the acquirer's ability to engage in pre-emptive action is likely to be more limited in such cases.

3. Areas where further guidance from the CMA would be useful

3.1 We consider that companies and their advisers would find it helpful if the Draft Revised Guidance were to include greater detail on some of the CMA's thinking (including the internal processes and 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 2.18 of the Draft Revised Guidance). Although the guidance includes some examples of previous cases and states that these are relatively rare, there is little practical guidance on the circumstances in which the CMA is likely to issue an IEO that commences before completion. The Draft Revised Guidance should make clear that interim measures will only be imposed in the context of anticipated mergers in the most exceptional of cases. It would also be useful to understand either:

(i) the factors that the CMA will consider in the future when deciding to impose interim measures in an anticipated merger; or

(ii) the factors in previous cases that have led the CMA to impose an IEO pre-completion (without naming the specific cases in which the factors arose);

(b) requests for derogation from interim measures in the context of anticipated mergers expected to complete during the CMA's investigation (paragraph 2.27 of the Draft Revised Guidance);

(c) requests for derogation from interim measures before imposing interim measures in the context of completed mergers (paragraph 2.33 of the Draft Revised Guidance);

(d) the possibility of creating a tailored IEO for anticipated deals where the IEO is likely to be conditional upon completion (paragraphs 2.34 to 2.36 of the Draft Revised Guidance). A rigid adherence to using the template IEO in certain circumstances (eg where the target is in financial difficulties and following existing business plans is unfeasible or unwise) is likely to be unreasonable and disproportionate. We suggest that the CMA insert at the end of paragraph 2.26 an express statement that it 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, where appropriate and time permits; and

(e) requests for derogation from interim measures once those measures are in place (paragraphs 3.1 to 3.8 of the Draft Revised Guidance).

3.2 Interim measures can result in practical challenges during the formulation or consideration of remedies by the merging parties. In particular, undertakings in lieu are typically designed under significant time pressure and therefore seeking and waiting for derogations to be granted can consume precious time at a critical stage of the process. It would be helpful for the CMA to provide more detailed guidance on the CMA's approach to derogation requests relating to remedies including during the undertakings in lieu stage or during negotiation of a post-Phase 2 divestment, including:

(a) allowing for the provision of sufficient information to the acquirer about the target business to identify, design and assess potential divestment packages or other potential remedies;

(b) facilitating the acquirer's oversight of the provision of information about the divestment package to potential acquirers of the divestment package;

(c) allowing for the provision of sufficient information to the acquirer about the target business to sell divestment businesses; and

(d) the safeguards that the CMA will require in the context of derogations granted for the purposes of remedies.

3.3 In the light of the Competition Appeal Tribunal's *Electro Rent* decision and the greater use of monitoring trustees, the Draft Revised Guidance would benefit from more clarity on the role of the CMA in relation to the monitoring trustee, and the role of the monitoring trustee in relation to the merging parties. In particular, more detail on the following issues would be useful for merging parties, their legal advisers and monitoring trustees:

(a) the matters that will be within the scope of the monitoring trustee's role. For example, the main role for monitoring trustees now seems to be the initial compliance audit which, as we set out above in paragraph 2.3(a), appears to overlap with obligations being given to the merging parties which may lead to duplication;

(b) the circumstances in which the CMA will not follow guidance provided, or recommendations made, by the monitoring trustee. Given the monitoring trustee's independent position and knowledge of the merging parties' businesses, the CMA should depart from the monitoring trustee's guidance or recommendations only in exceptional circumstances. The Draft Revised Guidance should set out the circumstances when this may occur and a process that the CMA will follow in these rare instances, including the provision of a detailed justification for the proposed departure; and

(c) greater clarity on the meaning of the '*ordinary course of business*', in addition to the guidance provided in paragraphs 3.22 and 3.23 of the Draft

Revised Guidance. A typical business will have a different understanding of this term compared with the CMA, with the *Electro Rent* case being just one example. For example, there may be circumstances in which action the CMA considers to be an IEO breach is indeed the addressee acting in the ordinary course, such that preventing the action from occurring would be a deviation from the ordinary course and itself a breach of the IEO. Without more detailed guidance, the default position then becomes one where parties have to seek a 'derogation' to conduct their business in the ordinary course, which is inefficient, burdensome and can contribute to the deterioration of the addressee's business. Therefore, further guidance on the meaning of the term should be provided.

4. Changes proposed in the Draft Revised Template

4.1 Paragraphs 5 and 6 of the Draft Revised Template (and paragraph 3 of the template compliance statement) refer to '*all necessary steps*' being taken to ensure compliance. In line with our comments above in paragraph 2.3(c), this wording neither takes sufficient account of the limitations on the acquirer's ability to ensure the target's compliance with the interim measures given the hold separate requirements imposed on the target, nor of where the acquirer's degree of control over the target is more limited. We would suggest that it would be appropriate to make similar amendments to the Draft Revised Template to refer to *'all necessary steps which are reasonable in the circumstances'* to avoid acquirers finding themselves potentially in breach of their interim measures obligations in circumstances in which this would be disproportionate or where meeting the high standard of '*all necessary steps*' is legally or practically impossible.

4.2 The amendments proposed in paragraph 5(l) remove '*the completion of any merger control proceedings relating to the transaction*' from the list of examples of reasons for sharing business secrets/know-how/commercially-sensitive information where strictly necessary in the ordinary course of business. It is unclear to us why this has been removed, and why due diligence and integration planning, which are also related to the merger, remain in the list of examples. We suggest that this be retained.

4.3 We welcome the inclusion of '*[senior]*' in relation to the positions of executive or managerial responsibility within the definition of 'key staff'. This will be particularly useful where a merging party has a large business with multiple levels of executives or managers. We would further welcome the CMA's openness (and an indication of this in the Draft Revised Guidance) to negotiating with parties further bespoke amendments to the definition of 'key staff', to provide greater certainty to the CMA and merging parties, and to assist with monitoring and ensuring compliance.

4.4 Recognising that the Draft Revised Template is the template IEO that will be issued in relation to completed transactions, which is appropriate given that it is the most common application of an IEO, it would nevertheless be helpful if the CMA could also either provide an equivalent template for those rarer instances where an IEO comes into effect before completion, or indicate in the Draft Revised Template what key differences should be expected in such circumstances (for example, the insertion of a new paragraph 4 noting that the IEO does not prohibit the completion of the transaction provided that the merging parties observe the restrictions in the IEO).

5. Concluding remarks

5.1 We appreciate the opportunity to respond to this consultation. We would be happy to discuss with the CMA any of the issues raised in this response if that would assist.

Freshfields Bruckhaus Deringer

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