Interim Measures in merger investigations

Summary of responses to the consultation

December 2021
CMA108 consultation

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1. Introduction and summary

Background and summary

1.1 The Competition and Markets Authority (CMA)[1] has set out in published guidance, *Interim measures in merger investigations* (CMA108), information for the business and legal communities and other interested parties on its practices and processes in connection with its powers under the Enterprise Act 2002 (as amended) (the Act) to impose interim measures in merger investigations.[2] It took effect from June 2019 and superseded the previous guidance issued by the CMA.

1.2 The CMA has also published a template Initial Enforcement Order (IEO), which is a form of interim measures imposed at phase 1, to be used in completed mergers.

1.3 In this summary document, CMA108 is referred to as 'the Current Guidance' and the template IEO is referred to as the 'Current Template IEO.'

1.4 On 7 April 2021, the CMA published a consultation document proposing certain amendments to the Current Guidance and the Current Template IEO to reflect recent developments and current practice. These changes are intended, in particular, to provide further clarity in relation to whom interim measures will typically apply, and the CMA's expectations as to the steps that merging parties should take to ensure compliance with interim measures.

1.5 Following a consultation from 7 April 2021 to 5 May 2021 on the proposed changes, the CMA is publishing final updated versions of the Current Guidance and the Current Template IEO.

Purpose of this document

1.6 The consultation document that accompanied the draft updated versions of the Current Guidance and Current Template IEO (respectively, the Draft Revised Guidance and the Draft Revised Template IEO) set out a narrow set of topics on which respondents' views were sought, set out in Annex A to this document. This document summarises the key issues raised by the responses, the CMA's views on these issues, and the changes the CMA has

[1] The CMA is the UK's economy-wide competition and consumer authority, and works to promote competition for the benefit of consumers, both within and outside the UK. Its aim is to make markets work well for consumers, businesses and the economy as a whole.
[2] This guidance forms part of the advice and information published by the CMA under section 106 of the Act.

made to the Draft Revised Guidance and the Draft Revised Template IEO as a result. This document is not intended to be a comprehensive record of all views expressed, nor to be a comprehensive response to all individual views. Non-confidential versions of all responses to the consultation are available on the consultation web page.[3]

1.7 This document should be read in conjunction with the consultation document, which contains further background on the aims behind the CMA's updated guidance. It should also be read in conjunction with final updated versions of the Current Guidance and Current Template IEO (respectively, the Final Revised Guidance and the Final Revised Template IEO), which were published on 21 December 2021 and apply to any cases in which interim measures are imposed after the date of publication.

[3] The consultation web-page can be found at https://www.gov.uk/government/consultations/interim-measures-in-merger-cases.

2. Issues raised during the consultation and our response

2.1 The CMA received six responses to the consultation. Responses were from legal advisers, associations of legal advisers and a monitoring trustee. A full list of respondents can be found in Annex B.

2.2 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.

2.3 A number of respondents submitted suggestions that fall outside the scope of the draft updates proposed to the Current Guidance and Current Template IEO, which are therefore not considered in detail in this consultation response.

2.4 Further detail on respondents' views is set out below.

CMA108

Chapter 2: Timing and implementation of Interim Measures – to whom do the Interim Measures apply?

Summary of responses

2.5 Respondents made the following comments and suggestions to this section of the guidance, which is aimed at helping businesses understand to whom the CMA will typically address interim measures in merger cases:

(a) The CMA should not make the seller responsible for compliance with Interim Measures post-completion, at which point it no longer has knowledge of or control over the target's behaviour.

(b) It would be inappropriately burdensome for Interim Measures to be 'typically' addressed to overseas parents, as this will mean multinational companies with business divisions outside the UK may be seriously hampered in their operations, without any clear benefits. The risk of pre-emptive action is low compared to the high cost to business.

(c) 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. This is particularly the case where Interim Measures have global scope.

The CMA's Views

2.6 The CMA's response to the points above is as follows (paragraph references are to the Final Revised Guidance or the Final Revised Template IEO, as applicable):

(a) The language of footnote 22 has been adjusted in line with this comment, to clarify that in completed mergers the CMA will not normally address interim measures to the target business' pre-completion ultimate UK parent, unless there are case-specific factors which indicate this would be appropriate.

(b) The CMA considers that it is appropriate for the CMA typically to address Interim Measures to overseas parents. The CMA notes that actions carried out by overseas business divisions may be captured by the concept of pre-emptive action, which the Competition Appeal Tribunal (CAT) has stated is a broad concept which captures the possibility of prejudice to the reference and includes action which has the potential to affect the competitive structure of the market during the CMA's investigation. The Tribunal has also observed that the CMA's ability to regulate merger activity effectively, including through interim measures, is a matter of public importance. See *Intercontinental Exchange v CMA* [2017] CAT 6; *Electro Rent Corporation v CMA* [2019] CAT 4; *Facebook v CMA* [2020] CAT 23 and *Facebook v CMA*, [2021] EWCA Civ 701. The CMA considers that this approach is not disproportionate due to the ability of overseas parents to seek derogations as appropriate, including in relation to non-overlapping businesses, as set out in paragraph 3.45 of the guidance.

(c) 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.

Chapter 2: Timing and implementation of Interim Measures – ensuring a smooth process

Summary of responses

2.7 Respondents made the following comments and suggestions to this section of the guidance, which is aimed at helping businesses understand the CMA's

approach to assessing compliance with interim measures and the CMA's expectations of the steps that merging parties should take for that purpose:

(a) The CMA should not make investment vehicles or private individuals responsible for compliance where they do not have oversight or control over the target, including where arms'-length arrangements are in place.

(b) The Draft Revised Guidance does not sufficiently differentiate between different types of relevant merger situation, such as where only material influence or de facto control is acquired. The acquirer should for instance be subject to fewer obligations under Interim Measures where only material influence is acquired.

(c) It is not clear how obligations concerning governance structures, delegations of authority and ongoing oversight and reporting mechanisms under paragraph 2.16(c)-(e) of the Draft Revised Guidance would apply in the context of asset acquisitions.

(d) The Draft Revised Guidance should clarify the CMA's expectations as regards the role of the monitoring trustee, including in particular how the initial compliance audit relates to the compliance steps the merging parties are required to take and when the CMA will not follow guidance or recommendations made by the monitoring trustee.

(e) It may not be possible for merging parties to take a risk-based approach in the short term in the way required by paragraph 2.16 of the Draft Revised Guidance, which should be factored into the CMA's expectations of the minimum steps necessary.

(f) It is not clear how for the purposes of paragraph 2.16(a) of the Draft Revised Guidance merging parties should identify the relevant staff that require guidance and training as well as the key elements of any training programmes.

(g) It is not clear what complex information should be included in internal communications likely to be best conveyed in writing for the purposes of paragraph 2.16(b) of the Draft Revised Guidance.

(h) The CMA's position in paragraph 2.17 of the Draft Revised Guidance that it will not pre-emptively give assurances that a particular approach to compliance will be sufficient precludes merging parties' ability to make informed assessments of risks and take appropriate compliance measures.

The CMA's Views

2.8 The CMA's response to the points above is as follows (paragraph references are to the Final Revised Guidance or the Final Revised Template IEO, as applicable):

(a) The CMA notes that paragraph 2.15 already reflects the principle that the ability of merging parties to take steps to ensure compliance may be limited by the nature of oversight or control that they exercise over the other merging party (and that this principle would apply equally to entities such as investment vehicles and private individuals).

(b) The CMA considers that paragraph 2.15 adequately addresses these concerns.

(c) The CMA has added text within new paragraph 2.17 to clarify that in situations where the target business does not have separate management, compliance steps (including putting in place adequate governance structures and oversight and reporting mechanisms) should be undertaken either by the relevant parent company or by a Hold Separate Manager appointed by the CMA. The CMA has added text in that footnote clarifying that in certain circumstances it may not be necessary or appropriate for the merging parties to enter into a written delegation of authority. Otherwise, the CMA believes that paragraph 2.15 adequately covers the CMA's expectations as regards compliance with Interim Measures where only material influence or de facto control is acquired.

(d) The CMA notes that it is ultimately merging parties' responsibility to comply with interim measures. In circumstances where a monitoring trustee has been appointed, the CMA recognises that merging parties may wish to take into account any analysis carried out or recommendations made by the monitoring trustee in their approach taken to ensure compliance with interim measures. For the avoidance of doubt, the guidance at paragraph 4.3 is clear that decisions on derogations are only taken by the CMA, which will take into account all relevant factors (including any guidance provided or recommendation made by the monitoring trustee). The CMA has also added text within new footnote 26 to clarify that the *procedural* steps which the CMA expects merging parties to take to ensure compliance do not overlap with the *substantive* initial report on merging parties' compliance, which is typically produced by a monitoring trustee where one has been appointed by the CMA.

(e) The CMA does not accept that merging parties may not be able to take a risk-based approach to compliance in the short term. The CMA considers that the guidance is sufficiently clear that Interim Measures need to be imposed quickly, particularly in completed mergers, for merging parties to be able to allocate resources to compliance processes accordingly. The CMA notes that a risk-based approach in this context might involve a more conservative approach being taken in the short term as the merging parties' factual understanding of the circumstances at issue develops.

(f) The CMA has amended paragraph 2.16(a) to clarify that the CMA would expect merging parties to assess whether staff operate in 'higher risk areas' from the perspective of whether their day-to-day responsibilities could ordinarily involve them taking actions that could be affected by the applicable Interim Measures.

(g) The CMA considers that paragraph 2.16(b) adequately covers these concerns. The CMA notes that the Final Revised Guidance is intended to set out principles that can be applied on a case-by-case basis, and it is not possible to provide an exhaustive description of the approach that the CMA will apply to all aspects of its work.

(h) The CMA does not consider that it would be appropriate for the CMA to pre-emptively give assurances about merging parties' proposed approach to compliance due to the inherent information asymmetries which mean that, at the early stage when compliance processes are initially considered, the merging parties are best-placed to assess the ability of a compliance process to ensure compliance.

Chapter 7: compliance statements and enforcement

Summary of responses

2.9 Respondents made the following comments and suggestions to this section of the guidance, which is aimed at helping businesses understand the process of certifying compliance with interim measures and the potential consequences of failing to comply.

(a) The CMA should expressly allow senior officers other than the CEO to sign compliance statements and, in order to minimise administrative burden, should accept a single compliance statement from each party.

The CMA's Views

2.10 The CMA's response to the points above is as follows (paragraph references are to the Final Revised Guidance or the Final Revised Template IEO, as applicable):

(a) The CMA considers that paragraph 7.1 adequately covers these concerns.

Template Initial Enforcement Order

Summary of responses

2.11 Respondents made the following comments and suggestions to the Draft Revised Template IEO, which sets out the actions which, based on the CMA's experience, are inherently the most likely to give rise to concerns about pre-emptive action:

(a) There is an inconsistency between the Draft Revised Guidance and the Draft Revised Template IEO. Paragraph 2.10 of the Draft Revised Guidance refers to Interim Measures 'typically' being imposed whereas the preamble to the Draft Revised Template IEO refers to this being done 'to the extent appropriate'. The former wording is preferable.

(b) Any exchange of information between merging parties in completed mergers relating to compliance with Interim Measures should fall outside the scope of the Interim Measures, otherwise it is not clear how acquirers will be able to engage with the target in order to identify the relevant risks and to adopt the necessary compliance measures, without breaching the Interim Measures. While discussions on compliance can largely be carried out by external counsel they require some input from individuals with appropriate expertise.

(c) The inclusion of an 'all necessary steps' requirement within the Draft Revised Template IEO is an inappropriate standard as it amounts to strict liability and should therefore be qualified to include only the steps which are 'reasonable in the circumstances'.

(d) The CMA should clarify the scale of change the CMA is interested in preventing in the context of paragraph 5(c) of the Draft Revised Template IEO, given the lack of further explanation in the guidance. Deleting the word 'substantial' without further qualification means the scope of the changes captured is inappropriately wide.

(e) The CMA should define 'key staff' within the Draft Revised Template IEO order more precisely, to make clear that this only includes board members or staff at the executive level. Many merging parties out of an abundance of caution interpret the current definition as including middle-management.

(f) The CMA should not delete the exception within paragraph 5(l) of the Draft Revised Template IEO permitting the exchange of information strictly within the ordinary course of business for the purpose of the completion of any merger control proceedings in relation to the transaction.

The CMA's Views

2.12 The CMA's response to the points above is as follows (paragraph references are to the Final Revised Guidance or the Final Revised Template IEO, as applicable):

(a) The language of the Final Revised Template IEO has been made consistent with the Final Revised Guidance.

(b) The CMA considers that the merging parties can generally rely on their external counsel to discuss compliance with Interim Measures. To the extent individuals with expertise are required to discuss such matters, the merging parties' external counsel can ensure this is done in a way compliant with the Interim Measures and that does not involve the exchange of confidential information. The CMA further notes that information exchange that is strictly necessary and in the ordinary course of business (including, for example, compliance with regulatory obligations such as Interim Measures) would be permitted under the Final Revised Template IEO.

(c) The CMA does not agree that the inclusion of a requirement to take 'all necessary steps' to ensure compliance amounts to a strict liability standard (or is otherwise inappropriate). The CMA notes, in particular, that it is subject to a general duty to act proportionately and that any assessment of the adequacy of steps taken to ensure compliance will take into account the specific facts and circumstances of the case at issue. The CMA notes, in addition, that the CMA may only impose penalties where there is no reasonable excuse for a failure to comply with interim measures.

(d) The CMA has amended the text of paragraph 5(c) by inserting the word 'significant' to replace 'substantial', thereby aligning this provision with the

definition of the ‘ordinary course of business’ within the Final Revised Template IEO.

(e) What constitutes key staff or a material change may depend on the nature of the business in question. 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.

(f) The CMA has re-instated the exception within paragraph 5(l) relating to the completion of any merger control proceedings relating to the transaction.

Annex A: The questions on which we consulted

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

2.13 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.

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

2.15 Do you have any suggestions for additional or revised content that you would find helpful?

2.16 Do you agree with the policies set out in the guidance? In particular, we invite comments on the following points:

(a) To whom do the Interim Measures apply (paragraph 2.10); and

(b) Ensuring a smooth process (paragraphs 2.11-2.17).

2.17 Do you have any other comments on the draft guidance or draft template initial enforcement order?

Annex B: List of respondents to the consultation on the draft guidance

1. Baker McKenzie LLP
2. European Competition Lawyers Forum
3. Freshfields Bruckhaus Deringer LLP
4. Herbert Smith Freehills LLP
5. Nothhelfer Consulting Partnerschaft
6. Slaughter and May