Organisation for Economic Co-operation and Development

DAF/COMP/WD(2018)93

Unclassified

English - Or. English

14 November 2018

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Suspensory Effects of Merger Notifications and Gun Jumping - Note by the United Kingdom

27 November 2018

This document reproduces a written contribution from the United Kingdom submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03439582

United Kingdom

1. Executive Summary

1. The UK merger control regime has been voluntary from its inception. This means merging parties are not under any obligation to notify a transaction to the UK Competition and Markets Authority (CMA). Where a merger is voluntarily notified to the CMA, or the CMA decides to open an investigation on its own initiative, there is no automatic standstill obligation preventing the merging parties from closing or implementing the merger.

2. When the CMA is investigating a merger, it has the ability to take steps to prevent or unwind pre-emptive action by the merging parties, i.e. action that might prejudice the outcome of the CMA's investigation or impede the taking of any remedial action that might ultimately be appropriate. The CMA has the ability to do this by imposing interim measures on the merging parties. These powers were recently strengthened by the UK Government in 2014.

3. Interim measures require that the merging parties do not – except with the CMA's express prior consent – carry out further integration beyond that which has already taken place. Broadly speaking, this replicates the standstill obligation typically used in mandatory merger control regimes, with the main difference being that pre-existing integration is not usually covered by an interim measure. While interim measures are almost always imposed by the CMA where a merger has completed, they are used in anticipated mergers only in relatively rare cases, such as where the CMA has concerns about the merging parties taking pre-emptive action that is difficult or costly to reverse prior to completion.

4. Once an interim measure is in place, broadly the same restrictions apply as in a suspensory regime, including in relation to integration, information exchange and preserving the value of the target business. The CMA assesses any actions taken (or requested) by the merging parties using similar principles to competition authorities that have a standstill obligation (such as the European Union).

5. The CMA recognises that, in some cases, certain actions falling within the scope of an interim measure may need to take place, for example in order to maintain the viability of the target business. To ensure that an interim measure does not lead to a disproportionate burden, the CMA may (on application by the merging parties) grant a derogation, which provides consent to the merging parties to undertake certain actions that would otherwise be prohibited by the interim measure. Therefore, an important dynamic of the UK merger control regime is that merging parties will engage closely with the regulator, first in relation to the imposition of interim measures and then, subsequently, when seeking any derogations. There is, in practice, often close engagement between the CMA and the merging parties in relation to the conduct of the merging parties prior to completion of a merger investigation.

6. The CMA considers that it is important to monitor the compliance of interim measures to ensure that they are effectively preventing pre-emptive action and to deter breaches by merging parties. Merging parties are required to provide periodic compliance statements to the CMA. Where considered necessary, the CMA can increase its monitoring by appointing an external monitoring trustee to monitor and report on compliance with the interim measures and/or appointing an internal or external hold separate manager to operate

the target business separately from the acquirer. In terms of enforcement, the CMA can impose a fine on a party for failing to comply with an interim measure (and has recently done so for the first time).

2. The UK's voluntary merger control regime

7. The UK merger control regime was first put on a statutory footing in 1965 through the Monopolies and Mergers Act 1965. The modern system of UK merger control, which consolidated the competition-based test as the substantive tool for assessing mergers, came into force on 20 June 2003 through the Enterprise Act 2002.

8. Since its inception, the UK merger control regime has remained voluntary. If a transaction meets the relevant jurisdictional thresholds under the UK regime,[1] the CMA is able to investigate the transaction. While merging parties can choose to notify a transaction to the CMA, merging parties are not under any obligation to notify a transaction to the CMA, even if the CMA has jurisdiction to review the merger under its jurisdictional thresholds.

9. Given the voluntary nature of the merger control regime, the CMA is under a statutory duty to track merger activity to determine whether any unnotified mergers may give rise to a substantial lessening of competition within any market in the UK. In order to fulfil this duty, the CMA has a mergers intelligence function, with dedicated staff responsible for monitoring non-notified merger activity and liaising with other competition authorities. The mergers intelligence staff review different sources of information on mergers and present potential candidates for investigation to the Mergers Intelligence Committee, which meets weekly and is chaired by a Director of Mergers who oversees the CMA's merger intelligence function. The Mergers Intelligence Committee decides whether to call in a transaction for review (i.e. open a Phase 1 merger investigation)[2] or to take no further action at that stage.[3] To help make this determination, the CMA can ask the merging parties (and third parties) to provide further information.

10. The UK Government has consulted on the model of the UK merger control regime twice in the last twenty years: (i) in 1999-2000 in the lead up to the introduction of the modern system of UK merger control through the Enterprise Act 2002; and (ii) in 2011-

[1] The CMA has jurisdictional thresholds based on the turnover of the target business in the UK or the share of supply of the combined entity, which is set out in the Enterprise Act 2002.

[2] The CMA will decide to investigate a non-notified merger 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 test for reference to an in-depth Phase 2 investigation is whether it is or may be the case that the merger has resulted, or may be expected to result, in a substantial lessening of competition within any market in the UK. The threshold for opening a Phase 1 investigation is therefore lower than the threshold for referring a merger to an in-depth Phase 2 investigation.

[3] If the CMA decides not to open a Phase 1 investigation immediately, this does not preclude it asking further questions at a later stage (e.g. if further information comes to light). The CMA may open an investigation at any point until the expiry of the four-month statutory period set out in the Enterprise Act 2002. The four-month statutory period commences when two or more enterprises have ceased to be distinct and that fact becomes public or is drawn to the attention of the CMA.

2012 in the lead up to the establishment of the CMA.[4] On both occasions, the UK Government considered whether a mandatory merger control regime (or a hybrid system) should be introduced in the UK. These consultations highlighted that there were benefits and drawbacks of having a voluntary regime:

1. The consultations identified that the main benefits of a voluntary regime are: (i) greater proportionality, as transactions that do not raise competition issues are not subject to an unnecessary review simply because they meet jurisdictional thresholds; and (ii) providing companies with the flexibility to complete transactions quickly if considered preferable due to their particular circumstances.
2. The consultations also identified certain drawbacks with having a voluntary regime, such as: (i) the increased risk that some "anti-competitive" mergers could escape review; and (ii) the difficulties and potential inefficiencies of attempting to unwind a completed merger (after the merging companies have integrated) if the merger is subsequently found to be problematic by the CMA.

11. Both consultations found that the UK's voluntary merger control regime had generally worked well to date and the majority of respondents strongly favoured retaining a voluntary regime. The UK Government therefore decided to retain the voluntary regime on both occasions. Following the 2011-2012 consultation, the UK Government decided to strengthen the UK merger control regime (and attempt to address some of the drawbacks of a voluntary regime) by introducing new powers to enable the CMA to impose interim measures during a merger investigation.

12. The CMA's ability to impose interim measures is discussed in further detail below. It is an important means through which the CMA is able to address the risks, which arise within all merger control regimes (whether mandatory or voluntary), around actions being taken by merging parties, prior to obtaining clearance, that could prejudice the outcome of the investigation or impede the ability of the regulator to take effective remedial action.

3. Interim measures

13. Whether a merger is voluntarily notified to the CMA or the CMA decides to open an investigation on its own initiative, there is no automatic standstill obligation preventing the merging parties from closing or implementing the merger during the CMA's merger investigation. After a merger has been referred to an in-depth Phase 2 investigation, statutory restrictions prevent merging parties from taking certain actions, such as acquiring shares in the target company.[5]

14. However, the CMA has the ability (under the Enterprise Act 2002) to take steps – known as "interim measures" – to prevent or unwind pre-emptive action. Pre-emptive action is action that might prejudice the outcome of the CMA's investigation or impede the taking of any remedial action that might ultimately be appropriate. In this respect, the

[4] The CMA took over many of the functions of its predecessors, namely the Competition Commission and Office of Fair Trading, on 1 April 2014.

[5] These restrictions under the Enterprise Act 2002 include: (i) in the case of anticipated mergers, a restriction on the acquisition of shares in the target company; and (ii) in the case of completed mergers, restrictions on the completion of any further matters in connection with the merger arrangements or transferring ownership or control of the target company.

CMA's ability to adopt interim measures has a similar purpose to the suspensory effect of merger notifications in many mandatory merger control regimes (such as the European Union).

15. The UK's Competition Appeal Tribunal (**CAT**) has noted that – in order to give full effect to the legitimate precautionary purpose of an interim measure – pre-emptive action should be interpreted broadly to cover conduct which *might* prejudice the CMA's investigation or *might* impede any remedial action justified by the CMA's ultimate decision (and therefore captures more than just *actual* prejudice or impediments).[6] In this respect, the CAT highlighted that – where an interim measure is in place – the onus is on merging parties to seek consent from the CMA if their conduct creates the *possibility* of prejudicing the outcome of the CMA's investigation or impeding the taking of any remedial action that might ultimately be appropriate.

16. Prior to April 2014, the ability of the CMA's predecessors to adopt interim measures was more limited. The Office of Fair Trading (OFT) could at Phase 1 of a completed merger investigation request "initial undertakings" from the merging parties to prevent pre-emptive action. These were negotiated with the OFT and, in practice, took time to negotiate. The Competition Commission (CC) at Phase 2 was able to either adopt any undertakings agreed with the OFT or make its own interim order to prevent pre-emptive action in both completed and (less frequently) in anticipated mergers. As noted above, the UK Government decided to strengthen enforcement within the context of the UK's voluntary merger control regime, enhancing the CMA's ability to impose interim measures on merging parties at Phase 1 without negotiation. This development was intended to reduce some of the risks to the CMA (and to the merging parties) that arise around the possibility of having to unwind a transaction, while retaining the benefits of a voluntary regime.

17. Since April 2014, interim measures to prevent pre-emptive action can take three main forms, depending on the stage of the CMA's investigation and whether they are imposed on, or agreed with, the merging parties:

- an initial enforcement order (IEO), which is imposed by the CMA on the merging parties at Phase 1 (including in pre-notification);
- interim undertakings, which are agreed between the CMA and the merging parties at Phase 2; or
- an interim order (IO), which is imposed by the CMA on the merging parties at Phase 2 where no IEO was imposed at Phase 1 or where it is necessary to vary the terms of the IEO imposed at Phase 1.

18. IEOs, interim undertakings and IOs continue in force, subject to subsequent variation, release or revocation by the CMA, until the final determination of the CMA's merger investigation.

19. The CMA has published detailed guidance on its approach to interim measures to assist merging parties to reflect experience gained since the current system was introduced

[6] Competition Appeal Tribunal, *Intercontinental Exchange, Inc. v. Competition and Markets Authority*, 6 March 2017, [2017] CAT 6, paragraph 220.

in April 2014.[7] This guidance provides clarification to merging parties in relation to the circumstances in which interim measures will typically be required, the form that an interim measure will typically take, the types of derogations that the CMA is likely (or unlikely) to grant, and the timing for imposing and revoking interim measures and granting derogations. The CMA has also recently completed a consultation process for new draft guidance on interim measures (which will shortly replace the existing guidance).[8]

3.1. When are interim measures used?

20. The need for interim measures depends on the circumstances of the case, including, in particular, whether the merger has completed or remains anticipated.

21. For completed mergers, the risk of the merging parties taking pre-emptive action is generally much higher, particularly where the merging parties have already started post-merger integration.

22. Given this higher risk of pre-emptive action, the range of forms that such pre-emptive action could take and the information asymmetry between the merging parties and the CMA at the preliminary stages of merger investigations, the CMA normally imposes an IEO at Phase 1 suspending (and/or preventing further) integration in completed merger cases. For example, the CMA imposed an IEO in every investigation of a completed merger in 2017/18.[9] The CMA expects that the only exception to this approach would be cases in which the CMA has been provided with clear evidence demonstrating that there is no risk of pre-emptive action (e.g. the target business is active in a highly regulated sector where the other regulatory approvals to integrate would take several months to obtain).

23. Given the need to impose an IEO quickly for completed mergers and to provide factual and legal certainty to merging parties around the initial scope of an IEO, any IEO imposed will almost always take the form of the standard IEO template available on the CMA's website.[10] Discussions over the scope of the IEO will therefore typically take the form of derogations (granted simultaneously with the IEO or after the IEO is imposed) rather than amendments to the standard form IEO. Further details around the CMA's derogations process is provided in Section 4 below.

24. For anticipated mergers, the risk of pre-emptive action in an anticipated merger is generally much lower than in a completed merger. The CMA would therefore expect to impose an IEO only in those (relatively rare) cases that raise concerns about pre-emptive

[7] See: (i) *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), January 2014, Annex C; and (ii) *Guidance on initial enforcement orders and derogations in merger investigations* (CMA60), September 2017.

[8] See: *https://www.gov.uk/government/consultations/interim-measures*.

[9] This relates to all merger investigations where the Phase 1 decision (i.e. to clear the merger, to accept undertakings in lieu of reference to a Phase 2 investigation or to refer the merger to a Phase 2 investigation) was made between 1 April 2017 and 31 March 2018.

[10] See: *https://www.gov.uk/government/publications/initial-enforcement-order-template*.

action taking place prior to completion that is difficult or costly to reverse. For example, the CMA imposed an IEO in only two out of 38 anticipated mergers in 2017/18.[11]

25. The CMA looks at a range of factors when considering whether an anticipated merger raises concerns about pre-emptive action including, for example, whether: (i) commercially sensitive information is being exchanged between the merging parties (except where such exchange is objectively necessary for the purposes of commercial due diligence and is subject to appropriate limits and confidentiality obligations on recipients of the information); (ii) the merging parties intend to, or are already, integrating their businesses prior to completion; (iii) the merging parties have begun jointly to conduct commercial negotiations with customers or suppliers; and/or (iv) the seller of the target business intends to make changes to its business that could weaken the target business (e.g. due to changes to its financing arrangements).

26. An example of an anticipated merger where the CMA imposed an IEO was the *Linergy / Ulster Farms* merger investigation in 2015.[12] The merging parties had sought to merge a few years previously, abandoned the transaction when it was referred for an in-depth Phase 2 investigation, and had then in the intervening period (i.e. before seeking to merge again) taken business decisions to remove overlaps between the merging parties. In this context, the CMA imposed an IEO to prevent further pre-emptive action by the merging parties.

27. Where the CMA does impose an IEO for an anticipated merger, this will typically *not* prevent completion of the transaction from taking place, unless there are strong reasons to believe that completion will occur prior to the end of the Phase 1 merger investigation and there are unusual circumstances which could mean that the act of completion itself would constitute pre-emptive action (e.g. the act of completion would automatically lead to the loss of key staff or management capability for the target business). In other words, during (and in advance of) the CMA's Phase 1 investigation, the CMA is typically concerned with limiting integration (i.e. maintaining pre-merger competitive conditions and ensuring that the CMA is able to implement an effective remedy if necessary) rather than preventing completion itself.

28. In general, the CMA considers that it is important to act quickly when it comes to imposing interim measures. Where a transaction comes to the CMA's attention (whether because it is notified voluntarily by the merging parties or called in for investigation by the Mergers Intelligence Committee), it will usually not be clear to what extent integration between the merging parties is taking place. This means that, in practice, there is little time for engagement with the merging parties on whether an IEO is necessary and what form the IEO should take. Therefore, the CMA aims to impose an IEO as early as possible (i.e. as soon as a merger is notified by the merging parties or called in for investigation by the Mergers Intelligence Committee).

[11] The two merger investigations were: (i) ME/6714/17, Anticipated acquisition by Mole Valley Farmers Limited of the retail business of Countrywide Farmers plc, 21 February 2018; and (ii) ME/6677/17, Anticipated acquisition by Tesco plc of Booker Group plc, 12 July 2017.

[12] ME/6514/15, Acquisition by Linergy Limited of Ulster Farm By-Products Limited, 17 July 2015. The CMA imposed an IEO prior to the completion of the transaction. The transaction subsequently completed during pre-notification with the CMA.

3.2. What is covered by an interim measure?

29. Interim measures require that the merging parties do not – except with the CMA's express prior consent – carry out further integration beyond that which has already taken place at the time of the interim measure commencing into force. Broadly speaking, this replicates the standstill obligation used in many mandatory merger control regimes (including the European Union's merger control regime). The main difference to the standstill obligation is that pre-existing integration is not covered, unless the CMA decides to unwind pre-existing integration (as discussed below). Therefore, integration that has already occurred prior to the interim measure coming into force is not a breach of the interim measure.

30. Interim measures prevent the merging parties from undertaking much of the same conduct that is prevented by the standstill obligation in many mandatory merger control regimes. For example, under the standard form IEO, the merging parties are prohibited from taking any actions which *might*: (i) lead to the integration of the target business with the acquirer business; (ii) transfer the ownership or control of the acquirer business or the target business (or any of their subsidiaries); or (iii) otherwise impair the ability of the target business or the acquirer business to compete independently in any markets affected by the transaction. This includes:

- carrying out the target business separately from the acquirer business (including maintaining any separate sales or brand identity);
- maintaining the target business and the acquirer business as a going concern and ensuring sufficient resources are made available for the development of the target business and the acquirer business on the basis of their respective pre-merger business plans;
- maintaining and preserving all of the assets of the target business and the acquirer business;
- making no substantive changes to the organisational structure, management responsibilities and key staff of the target business and the acquirer business;
- not integrating the information technology of the target and acquirer businesses;
- operating the customer and supplier lists of the target business and the acquirer business separately and not conducting any negotiations together (or on behalf of one another); and
- not sharing any business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature between the target business and acquirer business, except where strictly necessary in the ordinary course of business (for example, where required for compliance with external regulatory and/or accounting obligations or for due diligence, integration planning or the completion of any merger control proceedings relating to the transaction).

31. Therefore, once an interim measure is in place, broadly the same restrictions apply as in a suspensory regime, including in relation to integration, information exchange and preserving the value of the target business. The CMA assesses these issues using similar principles to competition authorities that have a standstill obligation (such as the European Union). Two common issues which arise during the CMA's review of a merger are: (i) the

exchange of competitively sensitive information between the merging parties; and (ii) the management of the target business.

3.3. Exchange of competitively sensitive information between the merging parties

32. Irrespective of whether an interim measure is in place, prior to the completion of a merger (i.e. for *anticipated* mergers), the CMA can investigate the illegitimate exchange of competitively sensitive information between merging parties as an agreement or concerted practice which prevents, restricts or distorts competition (under Article 101 of the Treaty of the Functioning of the European Union (TFEU) or Chapter 1 of the Competition Act 1998). The CMA has a dedicated Competition Enforcement Directorate that is responsible for investigating suspected competition law infringements, including infringements of Article 101 of the TFEU and Chapter 1 of the Competition Act 1998.

33. Where an interim measure is in place, merging parties are typically prohibited from disclosing commercially sensitive information to each other.[13] The illegitimate exchange of commercially sensitive information is therefore also liable to give rise to a breach of an interim measure.

34. Interim measures imposed by the CMA typically make clear that commercially sensitive information can be shared between merging parties "*where strictly necessary in the ordinary course of business*" (for example, where required for due diligence, integration planning or compliance with regulatory or accounting obligations).[14] The CMA therefore expects merging parties to be able to "self-assess" to some degree whether exchanges of commercially sensitive information are permitted under an interim measure. The CMA's guidance makes it clear that – as part of this self-assessment – merging parties should consider the recipients of the information and the types of information being shared, as well as whether any safeguards are appropriate (e.g. non-disclosure agreements, "clean teams", and physical and IT firewalls).

3.4. Management of the target business

35. The CMA recognises that there is a balance to be struck in relation to the management of the target business prior to the conclusion of the merger investigation. . It is generally accepted that acquirers should be able to protect their financial interests and preserve the value of the target business during the merger review process, for example by having a veto right over specific conduct of the target business (such as the target business disposing of material assets, undertaking non-ordinary capital expenditure and altering its constitutional documents). However, the CMA considers that any provisions must be limited and cannot amount to the acquirer exercising control of the day-to-day operations of the target business or being able to influence the target company's ordinary course of business.

36. The CMA's voluntary regime and use of interim measures mean that there can be a slightly different dynamic between the CMA and merging parties in this context

[13] See paragraph 5(l) of the CMA's template IEO at *https://www.gov.uk/government/publications/initial-enforcement-order-template*.

[14] See paragraph 5(l) of the CMA's template IEO at *https://www.gov.uk/government/publications/initial-enforcement-order-template*.

(compared to other merger control regimes).[15] Where an interim measure is in place, certain actions that an acquirer may want to take in relation to the management of the target business may not be permitted (particularly where such actions mean the target business is not being carried out separately from the acquirer's business). The CMA therefore envisages that merging parties will engage with the CMA and seek a derogation from the interim measure where the acquirer considers it necessary to have some degree of oversight over the management of the target business (see Section 4 below for further information on the CMA's derogation process). This means that, in some cases, there can be regular interactions between the CMA and the merging parties in relation to what actions the acquirer can and cannot take over the management of the target business. The interim measure sets out generally and specifically what actions the acquirer is required to take and is not able to take without the CMA's prior written consent. The acquirer is therefore required by the interim measure to inform the CMA when any actions are proposed to be taken by the acquirer over the management of the target business which conflict with the requirements of the interim measure (e.g. when the acquirer intends to exercise veto rights or dispose of assets). This allows the CMA to assess whether a derogation should be granted.

3.5. Unwinding integration

37. The CMA also has the ability to unwind integration that has already occurred. The use of these powers is assessed on a case-by-case basis. In general, the CMA would expect to use these powers at Phase 1 only in cases where the risks of such integration prejudicing the CMA's investigation and/or impeding it from taking appropriate remedial action are particularly acute. The CMA has not yet used its powers to unwind integration.

4. Derogations

38. An important dynamic of the UK's voluntary merger control regime (and lack of a standstill obligation) is that merging parties will engage closely with the regulator, first in relation to the imposition of interim measures and then, subsequently, when seeking consent to take any actions that would otherwise breach any interim measures in place.

39. The CMA recognises that, in some cases, certain actions falling within the scope of an interim measure may need to take place, for example, in order to maintain the viability of the target business or in relation to business areas of the parties where there are self-evidently no competition concerns. To ensure that an interim measure does not adversely affect either the target business or the acquirer business, the CMA may (on application by the parties) grant derogations, which provide consent to the merging parties to undertake certain actions that would otherwise be prohibited by the interim measure.

40. Derogation requests are more likely to be granted if the merging parties are able to demonstrate that allowing the derogation would not create a risk of pre-emptive action that would be costly or difficult to reverse and/or is necessary for the effective continuation of the target business. As such, the CMA will typically not grant a derogation request unless it can be shown that the proposed derogation is: (i) unlikely to have any impact on the

[15] The CMA is more likely to impose an IEO in anticipated mergers where the acquirer is able to, or is taking actions to, exercise a significant degree of control over the operations of the target business (for example, through extensive veto mechanisms over the conduct of the target business).

CMA's ability to achieve effective remedies; and/or (ii) is necessary to safeguard the viability of the target business. The CMA is therefore unlikely to grant a derogation request that is simply intended to facilitate the integration of the merging parties' activities.

41. The CMA encourages a close dialogue and requires derogation requests to be sufficiently specified, reasoned and supported with evidence. To assist merging parties, the CMA has published guidance on how derogation requests should be raised with the CMA, as well as examples of derogations that are likely to be granted or rejected by the CMA (although this will be inevitably case-specific):

1. Examples of derogations likely to be granted by the CMA include: (i) the provision of back-office support services by the acquirer to the target business (subject to the merging parties implementing suitable safeguards to restrict the flow of commercially sensitive information to specified individuals); (ii) the exclusion from the scope of the interim measure of parts of one party's business that are not engaged in activities that are related to the other party's business; and (iii) the exclusion from the scope of the interim measure of parts of either party's business that have no relevance to the merging parties' relevant activities in the UK.
2. Examples of derogations not likely to be granted by the CMA include: (i) the acquirer assuming control of (or material influence over) the commercial policy of the target business; (ii) the transfer of sales functions from the target business to the acquirer; (iii) the acquirer bidding or negotiating on behalf of the target business (or the merging parties dealing jointly with customers or suppliers); (iv) the acquirer having access to detailed strategic, operational and financial information, or any other commercially sensitive information, relating to the target business; and (v) the closure of overlapping business functions.

42. The CMA's ability to grant derogations provides a degree of flexibility for merging parties. For example, the CMA may grant more extensive derogations allowing the acquirer to exercise direct control over the commercial policy of the target business in exceptional circumstances (e.g. where the target business is in severe financial difficulty and direct control by the acquirer is required to safeguard the viability of the target business).

43. In practice, this means that there is often a significant degree of engagement between the CMA and the merging parties in relation to the conduct of the merging parties prior to conclusion of the merger investigation (particularly for completed mergers), with merging parties also arguably undertaking less self-assessment on the lawfulness of contemplated conduct compared to merger review processes where there is a standstill obligation. For example, in 2017/18,[16] the CMA granted derogations in approximately 85% of mergers where an interim measure was in place, which illustrates that some form of engagement is typical in the vast majority of cases.

44. The CMA has a dedicated Remedies, Business and Financial Analysis (RBFA) team. Across the full spectrum of the CMA's activities (including merger investigations), the RBFA team is involved in developing remedies and undertaking business and financial analysis for the assessment of cases. In light of this expertise, the RBFA team is also involved in assessing the need to impose interim measures (including the risk of pre-emptive action), assessing whether to grant any derogations requested by the merging

[16] This relates to all merger investigations where the Phase 1 decision (i.e. to clear the merger, to accept undertakings in lieu of reference to a Phase 2 investigation or to refer the merger to a Phase 2 investigation) was made between 1 April 2017 and 31 March 2018.

parties, and monitoring compliance with interim measures (including liaising closely with any monitoring trustee and/or hold separate manager, as explained in Section 5 below).

5. Compliance and enforcement

45. The CMA considers that it is important to monitor the compliance of interim measures to ensure that they are effectively preventing pre-emptive action and to deter breaches by merging parties.

46. In most cases where interim measures are imposed, merging parties are required to provide periodic compliance statements (usually every 2 weeks) to the CMA which are signed by the CEO (or an equivalent person) and confirm compliance with the interim measures. Of relevance to the individual signing the compliance statement, it is a criminal offence recklessly or knowingly to supply to the CMA information which is false or misleading in any material respect (which can result in fines, imprisonment for a term not exceeding two years, or both).

47. Where considered necessary, the CMA can step up its monitoring by appointing a monitoring trustee and/or a hold separate manager:

- A monitoring trustee may be required by the CMA in order to monitor and report on compliance with the interim measures. A monitoring trustee's role will usually be initially to assess the extent of integration and to make recommendations as to how to mitigate the risk of pre-emptive action, and thereafter to monitor compliance with the interim measures and assist with the consideration of derogation requests. A monitoring trustee will be an external appointee. At Phase 1, the appointment of a monitoring trustee is relatively rare, although the CMA may consider it necessary if there are certain "risk factors", such as: (i) substantial integration of the target and acquirer businesses prior to implementation of the interim measures; (ii) prior breaches of interim measures by the merging parties; and/or (iii) a risk of deterioration of the target business (e.g. loss of key customers or key staff). Given the length of a Phase 2 investigation, the CMA will usually require a monitoring trustee to be appointed for completed mergers at Phase 2, unless the merging parties can provide compelling evidence as to why there is little risk of pre-emptive action and/or there are no "risk factors".
- A hold separate manager with executive powers may be required by the CMA in order to operate the target business separately from the acquirer and in line with the interim measures for the duration of the investigation. An example of when a hold separate manager may be necessary is where the pre-merger senior management of the target business is absent and/or strong incentives exist for pre-merger senior management of the target business to operate the target business on behalf of the acquirer. Hold separate managers can either be an internal or external appointee – in making this decision, the CMA will consider the relative experience and suitability of existing employees, the independence of existing employees, and the complexity of the hold separate requirements.

48. In terms of enforcement, where a merging party is failing to comply with an interim measure, the CMA can issue directions to the merging party requiring it to take specified steps, or refrain from specified action, for the purposes of complying with the interim measure. The CMA can also impose a fine on a party of up to 5% of its turnover (both in and outside of the UK) for failing to comply with an interim measure without reasonable

excuse. Since the current system was introduced in April 2014, the CMA has imposed a fine in one case for failing to comply with an interim order imposed during a Phase 2 investigation.[17] In addition, the CMA can bring civil proceedings to enforce interim measures (e.g. if it considers that a fine will not be sufficient to ensure that the failure to comply with the interim measure will not prejudice remedial action that may ultimately be appropriate), although it does not generally expect to do so.

49. The CMA has published guidance on its powers to impose administrative penalties, including fines on persons that fail to comply with interim measures.[18] When reaching decisions regarding enforcement action, the CMA has regard to this guidance, although it applies the guidance flexibly according to the circumstances of the case. The guidance sets out the factors that the CMA will consider when deciding whether to impose a fine, as well as aggravating and mitigating factors that impact the level of any fine.

50. In addition to enforcement by the CMA, any person affected by a breach of an interim measure may bring an action in court where the person has sustained loss or damage as a result of the breach.

[17] In relation to the CMA's investigation of the completed acquisition by Electro Rent Corporation of Test Equipment Asset Management Limited and Microlease, Inc., the CMA imposed a fine of £100,000 on Electro Rent Corporation for failing to comply with the requirements of an interim order without reasonable excuse. Electro Rent Corporation has lodged an appeal before the CAT against the decision of the CMA to impose this fine. The appeal has been heard and judgment is pending.

[18] See: *Administrative penalties: statement of policy on the CMA's approach* (CMA4), January 2014.