

EUROPEAN COMPETITION LAWYERS FORUM

**RESPONSE TO THE CMA'S PUBLIC CONSULTATION
ON INTERIM MEASURES IN MERGER INVESTIGATIONS**

5 May 2021

INTRODUCTION

1. The European Competition Lawyers Forum (the “**ECLF**”)¹ is grateful for the opportunity to respond to the public consultation conducted by the Competition and Markets Authority (“**CMA**”) in relation to interim measures (“**IMs**”) in merger investigations.²
2. We welcome the CMA’s decision to update its guidance. We are concerned, however, that the proposed changes do not address the main problems with the IMs regime in UK merger investigations. In short, some aspects of the current guidance and practice are not working well and should be adjusted. At present, the interim measures procedure imposes disproportionate obligations on both businesses and the CMA – obligations that extend beyond those that would arise under a suspensory regime or Chapter I of the Competition Act.
3. The burdens imposed by the current regime are particularly problematic because Parliament has deliberately enacted a voluntary, non-suspensory system of merger control in the UK. By doing so, it intended to reduce regulatory obligations and promote flexibility and proportionality. As the CMA has explained, the non-suspensory nature of the UK’s regime is intended to “*give parties greater flexibility*” and “*reduc[e] regulatory obstacles to those mergers which are clearly unproblematic.*”³ Despite consulting on the issue twice in the last twenty years, the Government has decided not to introduce a suspensory regime in the UK, specifically noting that the benefit of a non-suspensory regime is that it promotes “*proportionality*” and “*flexibility*”.⁴
4. But the current operation of the IMs regime, however, does not always serve those goals. In the experience of the ECLF Working Group, managing the IEO process can often be more burdensome than the substantive review of the merger. This can involve setting up dedicated teams at both affected businesses and law firms that work almost full-time on IMs compliance. This burden is disproportionate to the objective of guarding against pre-emptive action that the regime is ostensibly designed to protect against.
5. We believe that the IM regime in principle can strike the right balance of allowing the CMA to perform its functions while retaining the benefits of a voluntary regime. Aspects of the current guidance and practice, however, ought to be adjusted to ensure that those benefits continue to be achieved in practice.

¹ The ECLF is a group of leading practitioners in competition law from firms across the European Union and the UK. This response does not purport to reflect the views of all ECLF members or of their law firms (or their clients). It has been compiled by a working group of ECLF members, as listed at **Annex 1**. While the response has been circulated within the Working Group for comments, its contents do not necessarily reflect the views of all individual members of the Working Group.

² Unless expressly stated otherwise, defined terms used in this response have the same meaning as in the documents issued by the CMA in connection with its consultation exercise.

³ “*Interim measures in merger investigations*” (28 June 2019) (CMA108), paragraph 1.5. This wording is retained in the Draft Revised Guidance, also at para. 1.5.

⁴ Suspensory Effects of Merger Notifications and Gun Jumping - Note by the United Kingdom to the OECD, 27 November 2018.

6. In our comments, we have addressed the CMA's questions set out in the consultation document. We also include some constructive suggestions for a more comprehensive review of the regime. We believe that reducing the burdens of the current process will benefit both businesses and the CMA, allowing parties, advisors, and case teams to focus on substantive issues that matter. We hope these comments are useful and we are ready to discuss any of the matters raised in this response.

CMA 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

7. The Draft Revised Guidance imposes additional, wide-ranging obligations on merging parties. In many instances adequate explanation is not provided as to what reasonable and proportionate steps merging parties might be expected to adopt to ensure effective compliance with these new obligations.
8. This is a significant omission. It contributes to legal uncertainty and risk. It adds to the administrative burden borne by all affected stakeholders; in the absence of clear and comprehensive guidance there is a high likelihood that merging parties will need to submit additional queries (and derogation requests) to the CMA. Greater clarity in the Draft Revised Guidance would be to the benefit of merging parties, their advisors and, importantly, the CMA itself.

Addressees of Interim Measures in completed mergers

9. Amendments made to paragraph 2.10 of the Draft Revised Guidance, specifying to whom IMs may be addressed, introduce ambiguities that should be rectified.
10. As revised, paragraph 2.10 indicates that IMs may be imposed in completed mergers on a target business and the "*target business's ultimate parent company*" (whether based in the UK or overseas).
11. It is important to clarify, for acquisitions of full control, that references in this context are to any relevant parent company (or "topco") within the acquired target group. The Draft Revised Guidance should not be misconstrued as suggesting that IMs in a completed acquisition of control should be addressed to the seller.⁵

⁵ In the case of completed acquisitions of non-controlling minority interests, we recognise that there may be reasons to impose IMs on the seller.

12. While in anticipated mergers there may be legitimate reasons to impose IMs on a seller, in a completed merger the imposition of IMs on a seller appears to us to serve no purpose. In a completed acquisition of control, the target will be operated autonomously by its own management (potentially under delegated authority from the acquirer). The seller relinquishes legal ownership and control of the target at the time of completion.
13. The imposition of IMs on the seller would also appear to be at odds with the position taken elsewhere in the Draft Revised Guidance in respect of completed mergers, with the CMA asserting that an acquirer is normally additionally responsible for taking steps to ensure compliance by the target business (at paragraph 2.15).
14. Necessary amendments or clarifications should be made to the Draft Revised Guidance (and the Draft Revised IEO Template) to eliminate any misapprehension concerning the position of the seller post-completion.

Extra-territorial application of Interim Measures

15. Proposed revisions to paragraph 2.10 indicate that IMs will "*typically*" also be addressed to ultimate parent companies when based overseas.
16. The ECLF is of the view that in many instances the CMA's proposed approach would be disproportionate, imposing unduly onerous obligations on merging parties without necessarily securing any clear practical benefit.
17. The expansive jurisdictional reach of the UK merger control regime, extending to mergers and acquisitions with a very limited UK nexus, exacerbates our concern. This is the result of the CMA's broad interpretation of the share of supply test, as set out in relevant revised guidance,⁶ and demonstrated in cases such as *Sabre / Farelogix*⁷ and *Roche / Spark*⁸ (both anticipated acquisitions subject to IEOs at Phase 1, in which the relevant target businesses generated no UK revenues).
18. The Draft Revised Guidance raises the unwelcome prospect that multinational companies, potentially with numerous business divisions based outside the UK that make limited or no supplies to the UK, may, in effect, be subject to prolonged operational paralysis through the imposition by the CMA of IMs that affect without discrimination all of that company's worldwide business activities.⁹
19. In such circumstances we would urge the CMA to act pragmatically and exercise sound judgment. It should use IMs only where appropriate and in a proportionate manner; in many

⁶ "Mergers: Guidance on the CMA's jurisdiction and procedure" (December 2020) (CMA2revised), at paragraphs 4.62 and 4.63.

⁷ Anticipated acquisition by Sabre Holdings Corporation of Farelogix Inc., Final Report dated 9 April 2020.

⁸ Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc. (10 February 2020).

⁹ We note that these issues, and the extra-territorial applications of IMs more generally, are in dispute in ongoing litigation between the CMA and Facebook, Inc. (*Facebook Inc. & Anr v CMA* [2020] CAT 23 and Cases C3/2021/0167 and C3/2021/0168 currently before the Court of Appeal).

instances the risk of pre-emptive action may be low while the cost to business may be high. The harm caused by the disproportionate use of IMs against overseas businesses is all the more significant at a time when the UK is seeking to attract inward investment and foster ever closer relations with the international business community.

20. In this regard there is a material divergence between proposed amendments to the Draft Revised Guidance and the Draft Revised Template IEO. The Draft Revised Guidance notes that IMs will "*typically*" be imposed on an ultimate overseas parent whereas the Draft Revised Template IEO states IMs will be addressed to an ultimate overseas parent only "*to the extent appropriate*".
21. For reasons set out above, the approach outlined in the Draft Revised Template IEO is preferable. The ECLF recommends that the language in the Draft Revised Guidance is modified accordingly. Guidance should be issued as to the exceptional circumstances in which the CMA expects it will be "*appropriate*" to impose IMs on an ultimate overseas parent.
22. If, contrary to the ECLF's recommendations, the CMA is resolved to apply IMs without due discrimination to all international businesses in the generality of completed mergers, then it is critical that derogations should be granted by the CMA as a matter of urgency, and at the earliest possible opportunity during its inquiries, so as to exclude from the scope of IMs appropriate non-UK businesses of the merging parties. To assist in this regard, the Draft Revised Guidance should specify the information merging parties must provide to make relevant derogation requests and explain that the CMA will act quickly to address such derogation requests.

Acquirer is normally additionally responsible for taking all necessary steps to ensure compliance by target

23. As revised, paragraph 2.15 specifies that in completed cases the acquirer is "*normally additionally responsible for taking all necessary steps to ensure compliance by the target*". In paragraph 2.16 the CMA elaborates on what actions are deemed necessary to achieve compliance. It is explained that "*merging parties should take a risk-based approach to the design and implementation of any steps taken to ensure compliance*". This is envisaged to entail a "*thorough review of each area of the merging parties' respective businesses in order to identify any risks for compliance*".
24. We support the general principle that IMs should, wherever practicable, take account of risks particular to an affected business (with compliance measures adopted which are commensurate to such risks).
25. In practice, however, the restrictions imposed by IMs appear to wholly or substantially deprive an acquirer of the ability to engage with or direct a target to identify relevant risks

and take appropriate compliance steps (or else verify that such steps have been taken). It seems that the acquirer is placed in an invidious situation where it may be held accountable for target compliance but at the same time risks breaching IMs if it takes reasonable steps to encourage or confirm compliance by the target.

26. By way of example, the Draft Revised IEO Template prohibits the exchange between the merging parties of a wide variety of information that would appear relevant for the purpose of developing risk-based, tailored compliance steps. The Draft Revised IEO Template does expressly permit information to be exchanged between merging parties under paragraph 5(l) where "*strictly necessary in the ordinary course of business*" (including complying with external regulatory obligations). It is not clear whether this would apply to information relating exclusively to the design and implementation of compliance steps. We further note that the categories of information that merging parties are permitted to exchange in the ordinary course of business pursuant to paragraph 5(l) has been narrowed, with the removal of the reference to "*the completion of any merger control proceedings in relation to the transaction*". This category of information has been deleted without explanation from the Draft Revised IEO Template. If this deletion is attributable to the fact that information concerning completion of merger control proceedings is not deemed to constitute a business secret or information otherwise of a confidential or proprietary nature, and is therefore outside the scope of the IEO, then this would be reasonable. If the CMA is instead suggesting that the acquirer and target cannot communicate about completion of merger control proceedings then this would be troubling and inappropriate.
27. Given the attribution to the acquirer of responsibility for target compliance steps, the CMA should either state clearly that communications limited exclusively to compliance with IMs fall outside the scope of IMs or else provide guidance on the scope of permissible discussions, including circumstances where derogation requests may be required.
28. The CMA acknowledges the substantial difficulties faced by an acquirer as a result of IMs, noting "*merging parties' ability to take steps to ensure compliance is affected by the hold separate provisions within Interim Measures*" (paragraph 2.16). The CMA also notes briefly that the ability of an acquirer to ensure target compliance "*may also be constrained by the extent to which they have a controlling interest*" (*idem*).
29. These observations are not a substitute for detailed guidance. For instance, it is not clear what responsibilities are to be imposed on an acquirer that obtains only material influence over a target business. Similarly, it is not clear how merging parties are to identify which business areas are high risk, and therefore develop appropriately tailored compliance measures, if areas of overlap are in dispute or not obvious, especially at the very outset of a merger investigation.
30. The CMA appears to suggest that many of the difficulties outlined above might be overcome through use of legal advisors to handle relevant confidential information. We do not agree.

The ability of legal advisors to offer meaningful advice in this context may be compromised if they cannot communicate confidential information that is indispensable to the acquirer when considering compliance steps. This is especially the case given that the CMA emphasises the requirement for tailored compliance measures based on a thorough review of relevant business activities.

31. In addition to the high-level points above, we have a number of observations concerning the specific compliance steps identified by the CMA in its proposed amendments.
 - 31.1. **Requirement for tailored guidance and staff training.** The Draft Revised Guidance does not make clear which staff should receive guidance and training. For instance, at paragraph 2.16(a) it is indicated that training should "*assist affected staff*", be given to "*all members of staff*", and also that "*additional training*" be given to staff in "*higher risk areas*". No guidance is offered on the identification of staff that requires training (or, indeed, additional training). Given the proposal to impose IMs more regularly on overseas parents, it is unfortunate that no guidance is given as to relevance of staff location either. For example, if a major multinational investment fund with tens of thousands of staff worldwide is subject to an IM, it would be unreasonable and disproportionate to expect it to provide compliance training to "*all members of staff*"— the vast majority of whom could not conceivably be affected by the merger, meaning that there would be no risk of pre-emptive action.
 - 31.2. In addition, there is no guidance as to the minimum elements that should be included in training. The ECLF acknowledges that training requirements will vary substantially from case-to-case, particularly given the emphasis on risk-based, tailored compliance steps. A detailed or prescriptive list of training elements could be inappropriate and counter-productive. At present, however, the CMA offers no guidance, which makes it difficult for businesses to understand what the CMA would consider adequate
 - 31.3. **Internal communications.** The Draft Revised Guidance indicates that the information to be provided in internal communications "*is complex and is therefore likely to be best conveyed in writing*" (paragraph 2.16(b)). We note, however, that the CMA offers no guidance as to what complex information might be included in internal communications. As with compliance training, the contents of communications will vary significantly on a case-by-case basis, and indeed through the duration of a merger inquiry, but some basic guidance as to the CMA's expectations would be useful.
 - 31.4. At a minimum, the Draft Revised Guidance should clarify whether it is permissible for merging parties to liaise to ensure consistency of internal communications (it is assumed such communications would not fall within the scope of IMs). In addition,

we recommend that the CMA signal in the Draft Revised Guidance its willingness to engage, on request, with merging parties to discuss the content of internal communications.

- 31.5. **Governance structures, delegations of authority and internal reporting mechanisms.** It is unclear to us how these and other obligations in the Draft Revised Guidance would apply in the context of an asset acquisition. As above, we would recommend including explanation in the Draft Revised Guidance to clarify that exchanges of information between merging parties in completed mergers with regards to governance structures and internal oversight and reporting mechanisms would fall outside the scope of IMs. Such exchanges raise no obvious risks of pre-emptive action but could maximise the prospects of effective compliance.
32. Finally, we note that the CMA has emphasised in the Draft Revised Guidance that it “*will not ... be able to pre-emptively give assurances that a particular approach to compliance will be sufficient for the purposes of the Interim Measures*” (paragraph 2.17). Given that merging parties are required to self-assess compliance risks it is all the more important that the CMA issues clear and comprehensive guidance. It is only with the benefit of such guidance that merging parties will be able to make informed assessments of risks and take appropriate compliance measures.
- 2.2 Is the draft guidance sufficiently comprehensive? Does it have any significant omissions?**
33. As noted in response to Question 2.1, insufficient guidance has generally been provided in relation to new obligations imposed under the Draft Revised Guidance (and related amendments to the Draft Revised Template IEO).
34. Considered more broadly, the Draft Revised Guidance does not discriminate adequately between differing types of relevant merger situations (i.e., compliance steps that may be undertaken in the context of a share acquisition are markedly different from those that can practically be implemented in many asset acquisitions; the risk and nature of pre-emptive action is likely to differ materially as between acquisitions of de jure or de fact control and material influence).¹⁰
35. The Draft Revised Guidance also offers no additional or updated explanation as to when IMs might be appropriate in anticipated mergers. While it is suggested by the CMA that

¹⁰ For example, and in contrast to a share acquisition, the target in an asset acquisition may lack appropriate management or staff to whom authority could be delegated and who could oversee the compliance steps envisaged in paragraph 2.16 of the Draft Revised Guidance; there may be no pre-merger business plans relating specifically to the acquired assets; there may be an urgent need for back-office and other support functions to be provided by the acquirer if the assets are to be maintained as a going concern. There may also be no appropriate legal entity in the target business against which the IEO could be addressed.

anticipated mergers will only rarely be subject to IEOs at Phase 1,¹¹ in practice from 2018/19 to 1 March 2021 roughly 15% of all IEOs imposed by CMA in Phase 1 related to anticipated mergers. Given the discretionary nature of the UK merger control regime and the significant increase in intervention by the CMA in recent years, additional explanation on the use of IMs in relation to anticipated mergers seems to us absolutely necessary.

36. At a much broader level, since the publication of the CMA's prior guidance in 2019 there have been two seminal events: Brexit and COVID-19. Both have a bearing, either directly or indirectly, on the use of IMs, yet neither is discussed in the Draft Revised Guidance.
- 36.1. Changes to the UK merger control regime following Brexit are relevant. First, the CMA has estimated that Brexit may be expected to result in a 40-50% increase in its merger caseload, leading to heightened resourcing pressures on the agency.¹² The IM regime places significant administrative demands on all stakeholders; we recognise that the management of IMs by the CMA is an exceedingly burdensome task. The simplification of the IM regime, including the provision of clearer, more comprehensive guidance, could help to conserve CMA resources.
- 36.2. Second, Brexit has raised the prospect that some anticipated mergers will undergo parallel review by the CMA and the European Commission. Completion of mergers falling within the scope of the EU Merger Regulation¹³ is suspended pending approval. The application of the mandatory standstill obligation under Article 7 EUMR should eliminate any risk of pre-emptive action in connection with anticipated mergers subject to parallel review by the European Commission and the CMA (assuming alignment in terms of applicable review periods, with such alignment generally in the interests of merging parties, the CMA and the European Commission). Accordingly, it is recommended that the Draft Revised Guidance clarify that IMs will not be imposed in relation to anticipated mergers that are subject to parallel review under the EUMR.
- 36.3. The impact of COVID-19 has at least two dimensions that merit consideration.
- 36.4. First, the adverse economic effect of COVID-19 is ongoing and remains acute (and the eventual withdrawal of UK Government financial support to businesses is likely to temporarily exacerbate these economic effects while also boosting opportunistic acquisition activity). We note that the CMA has a high degree of discretion when applying and enforcing IMs and has used this discretion when dealing with merging parties faced with severe difficulties as a result of COVID-19. This is commendable. However, the broad margin of discretion afforded to the CMA

¹¹ See, for instance, paragraph 2.18 of the Draft Revised Guidance.

¹² "The CMA and its place in a changing world", speech by Andrea Coscelli on 4 February 2017. See also "Competition and Markets Authority Annual Plan 2021/22" (March 2021) (CMA137), page 2.

¹³ Council Regulation (EC) No 139/2004 of January 2004 on the control of concentrations between undertakings ("EUMR").

diminishes legal certainty and COVID-19 has raised many novel compliance issues (e.g., the Current and Revised Template IEOs contain obligations to make available sufficient resources to target businesses in accordance with pre-merger plans (paragraph 5(b)); pre-merger plans may require significant adaption in response to the ongoing economic disruption caused by COVID-19). For understandable reasons these issues were not explored in the high-level guidance issued by the CMA in April 2020, describing merger control policy during the COVID-19 pandemic.¹⁴ The publication of new guidance presents a welcome opportunity for the CMA to address practical issues relating to compliance with IMs during COVID-19, but this is missing from the Draft Revised Guidance.

- 36.5. Second, since the outbreak in the UK of COVID-19 the CMA has been required to consider a substantially increased volume of derogation requests and respond to such requests on an expedited basis. No learning from this experience features in the Draft Revised Guidance. At a minimum, the Draft Revised Guidance should offer some explanation as to how requests have been dealt with by the CMA in these exceptional circumstances, to assist businesses subject to IMs that must at the same time contend with the operational and economic challenges presented by COVID-19.

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

37. There are aspects of the Draft Revised IEO Template, which require additional guidance.
- 37.1. **Paragraph 5(l).** The CMA should provide detailed explanation (including examples) as to the types of information that may pass between merging parties in the "*ordinary course of business*" for the purpose of paragraph 5(l) of the Draft Revised Template IEO.
- 37.2. At paragraph 26 we noted the deletion of information relating to the completion of merger control proceedings as a category of information that could be exchanged in the ordinary course of business. We recommend the reversal of this amendment or clear explanation as to the reasoning for the deletion.
- 37.3. More generally, guidance is required as to the types of information deemed by the CMA to be necessary to comply with external regulatory or accounting obligations or for the purpose of due diligence or integration planning. The CMA has considerable experience of considering these categories of information, which feature in paragraph 5(l) of the Current Template IEO; the benefit of that experience should be shared in the Draft Revised Guidance.

¹⁴ "*Merger assessments during the coronavirus (COVID-19) pandemic*" (22 April 2020).

- 37.4. **Paragraph 5(c).** The word "substantive" has been deleted from paragraph 5(c), which prohibits changes to the organisational structure of, or management responsibilities within, affected businesses, unless arising in the ordinary course of business. This deletion makes a burdensome obligation even more onerous. No explanation is provided in relation to this amendment, or how paragraph 5(c) should now be construed. Guidance is required in this regard, particularly in relation to the interpretation of "ordinary course of business" in this context.
- 37.5. We note that in practice, given the uncertainty as to the scope of paragraph 5(c), merging parties commonly seek derogations out of an excess of caution, including when employees are moved to new positions within an acquirer. These derogations are published and may be commented on in trade press. In certain sectors (e.g., software, gaming, insurance broking) this information is highly sensitive; publicising internal restructuring to other market participants may have an adverse effect on competition (i.e., internal reallocation of staff could signal a strategic initiative or important change of commercial focus).
38. The other key area where additional guidance should be provided is in relation to derogations. The ECLF would welcome further and more detailed explanation in the Draft Revised Guidance as to the types of derogation requests that are generally granted by the CMA. The list of commonly granted derogations at paragraph 3.24 should be expanded to take account of the CMA's practical experience since 2019.
39. Further and more detailed guidance is required since as a practical matter it is very difficult to draw lessons from the CMA's decisional practice. Published derogation decisions are subject to extensive redactions. They are published and stored by reference to the underlying merger inquiry. As a starting point, the CMA should publish and maintain a comprehensive register of the derogations it has granted. To the extent possible, this register should be organised thematically (i.e., by reference to the nature of the derogation) or be capable of being searched on this basis or through use of key words. We suspect that this would also benefit CMA case teams that have to assess derogation requests.
40. Merging parties would also benefit from more detailed guidance as to the information to be included in derogation requests. This cannot be identified satisfactorily by reference to published derogation decisions given the extent of redactions. We recommend that the CMA provides elaboration in the Draft Revised Guidance as to the information and evidence typically required in relation to those derogations it commonly grants (as identified at paragraph 3.24). Consideration should also be given as to whether individual derogation templates could be developed in relation to the most commonly granted derogation requests. This would expedite proceedings, eliminating the need for iterative submissions and discussions of evidence and information, diminishing the administrative burden on all parties.

2.4 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).**

41. Please see comments above. We discuss the addressees of IMs at paragraphs 8 to 13 above. As to ensuring a smooth process, we are concerned that the Draft Revised Guidance adds burdens to an already burdensome process.

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

42. The CMA has now had to consult on its IMs procedures three times in the last six years. The system is not working as well as it should for the CMA, businesses, or their advisors. It imposes significant burdens on all parties, often going beyond the substantive assessment of the merger itself. We believe that there is the opportunity for a more substantial reset on how the CMA imposes and enforces IMs, to create a system that works better for all participants.

43. The current system should be put in context of the voluntary, non-suspensory system of merger control that Parliament initially enacted in 1965 and has endorsed in the period since then. The UK Government has consulted on the model of the UK merger control regime twice in the last twenty years: in 1999-2000 in the lead up to the introduction of the Enterprise Act 2002; and in 2011-2012, in the lead up to the establishment of the CMA. On both occasions, the Government considered whether a mandatory, non-suspensory merger control regime should be introduced.

44. Following consultation, the Government has declined to make such a change. Rather, it maintained the voluntary, non-suspensory system of merger control in the UK because it considered that doing so created public policy benefits. In particular, as the CMA has explained, the non-suspensory nature of the UK's regime is intended to "give parties greater flexibility" and "*reduc[e] regulatory obstacles to those mergers which are clearly unproblematic.*"¹⁵ The CMA has likewise explained in a paper to the OECD that the benefits of a non-suspensory regime are that it promotes "*proportionality*" and "*flexibility*".¹⁶ In 2012, the UK Government stressed the proportionality of the voluntary regime and its more limited burden on business (compared to a mandatory regime).¹⁷

¹⁵ "*Interim measures in merger investigations*" (28 June 2019) (CMA108). This wording is retained in the Draft Revised Guidance, also at paragraph 1.5.

¹⁶ *Suspensory Effects of Merger Notifications and Gun Jumping - Note by the United Kingdom to the OECD*, 27 November 2018.

¹⁷ Department for Business, Innovation & Skills, *Growth, competition and the competition regime, government response to consultation, March 2012*, paras. 5.3 et seq ("*mandatory notification would increase costs to both business and the CMA*")

45. Under the current system, however, the IEO process imposes obligations on parties that go beyond compliance measures required in a mandatory, suspensory regime (e.g., the need to pre-clear any sharing of information or the precise nature of information with the CMA prior to sharing). This, in turn, is exacerbated by the additional obligations set out in the Draft Revised Guidance. We are therefore concerned that the current system undermines the essential benefits of and policy reasons for the non-suspensory regime that Parliament intentionally enacted.
46. In short, the current system – and the Draft Revised Guidance – imposes an administrative burden on parties that is disproportionate to the objective of guarding against pre-emptive action that might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. Currently, the UK system does not have the flexibility of voluntary regimes like Australia and New Zealand that do operate as truly non-suspensory regimes. Nor does it provide the legal certainty that would exist from a mandatory, suspensory regime with clearly-defined jurisdictional thresholds.
47. We believe that the IM system in principle can strike the right balance of allowing the CMA to perform its functions while retaining the benefits of a voluntary regime. Aspects of the current guidance and practice, however, ought to be adjusted to ensure that those benefits continue to be achieved in practice. We have the following suggestions to how the system could be improved:
 - 47.1. First, the CMA should not impose a template and identical IEO to every type of merger situation. Mergers and the businesses affected by them are different. The purchase of a non-controlling minority stake in a large corporation that is not a competitor is different to the full legal acquisition of a small tech start-up by a rival. But the wide-ranging obligations imposed by the IEO are identical to all cases, which is inconsistent with the regime's goals of flexibility and proportionality. It is true that parties can seek derogations from the IEO, but this is time-consuming and laborious for all concerned (there are cases where parties have had to seek derogations on around 50 grounds just within Phase 1). In our view, it would be better to spend some more time at the beginning of the process setting a tailored IEO that is specific to the situation at issue.
 - 47.2. Second, the CMA should consider whether an IEO is truly necessary, even for completed mergers. When the UK Government consulted in 2012 on amendments to the regime, the Government rejected that IMs should be imposed on a mandatory basis. Instead, the Government stressed that "having a discretionary power will enable the CMA to decide when to apply the power, thus making it more targeted and increasing its effectiveness."¹⁸ Under the current regime, however, there does not appear to be a decision whether to apply an IEO: it will be

¹⁸ Department for Business, Innovation & Skills, Growth, competition and the competition regime, government response to consultation, March 2012, paragraph 5.9.

implemented as a matter of course for all completed mergers and for mergers that complete during the Phase 1 review. We recommend that the CMA take a step back and decide, based on the facts, whether there is actually any material risk of immediate and irreversible pre-emptive action such than an IEO – with all the burdens it involves – is necessary.

- 47.3. Third, during the IEO and derogation back-and-forth, the CMA could provide more meaningful feedback as to actions that it considers would be outside the scope of the IEO (because, for example, they are in the ordinary course of business). Under the current system, to avoid legal uncertainty and possible fines, companies can feel obligated to “over derogate” by requesting derogations for activities that might not fall within the IEO. If the CMA were to engage in greater dialogue that could help companies avoid such derogations and thereby reduce burdens for the CMA and business. This process could be facilitated by creating a searchable database of derogations, organised by theme, as discussed at paragraphs 37 to 39 above.
- 47.4. Fourth, in general the ECLF’s experience is that the CMA seeks to deal with derogations as efficiently as possible. There are cases, however, where even when derogations are submitted as urgent (and described and evidenced as such), the CMA processing time can be quite slow (for example, because the derogation needs sign off from senior CMA staff). It would be useful if the CMA could indicate target timing for its internal decision-making processes relating to IEOs and derogations to ensure a timely and consistent process, including for cases when it calls in a transaction and imposes an IEO. This would help manage the administrative burden on parties caused by the IEO/derogation process.
- 47.5. Fifth, in our experience, the large majority of derogations concern the same matters and these derogations tend to be granted (e.g., delegations of authority, provision of back-end services). An option to improve the derogation process would be for the CMA to set out a template for these standard derogations that the merger parties could implement upon notifying to the CMA, without the need for CMA approval (akin to a “safe harbour” or “block exemption” for the type of actions that are not considered likely to give rise to the risk of pre-emptive action). The current process could be reserved for non-standard derogations that are deemed to carry more risks for the CMA’s merger review.

ANNEX 1
MEMBERS OF THE ECLF WORKING GROUP

- **British Institute of International and Comparative Law:** Dr Liza Lovdahl Gormsen
- **Cleary Gottlieb:** Henry Mostyn **(Co-chair)**
- **Herbert Smith Freehills:** Daniel Vowden **(Co-chair)**
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- **Squire Patton Boggs:** Francesco Liberatore
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