

Guidance on initial enforcement orders and derogations in merger investigations

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1. Introduction

- 1.1 This guidance is intended for merging parties and legal advisers advising on a transaction in relation to which an initial enforcement order (IEO) has been or may be imposed under section 72 of the Enterprise Act 2002 (the Act).
- 1.2 Where imposed, an IEO prevents merging parties from taking ‘pre-emptive action’ (ie action that might prejudice the outcome of the reference and/or impede the Competition and Markets Authority (CMA) from taking any appropriate remedial action that might be justified by the CMA’s decision on the reference). The CMA may subsequently (on application of the parties) grant a derogation, giving consent to the parties to undertake certain actions that would otherwise be prohibited by the IEO.
- 1.3 The need for an IEO (and the extent to which derogations might be granted) depends on the circumstances of the case. The CMA will balance the need to guard against pre-emptive action against the burdens that IEOs can place on the merging parties.
- 1.4 This guidance, which reflects experience gained since the current system was introduced in April 2014, is intended to provide further clarification in relation to the circumstances in which an IEO will typically be imposed, the form that an IEO will typically take, the types of derogations that the CMA is likely (or unlikely) to grant, and the timing for imposing and revoking IEOs and granting derogations.
- 1.5 The guidance should be read in conjunction with paragraphs 7.28 to 7.31 and Annex C to [Mergers: Guidance on the CMA’s Jurisdiction and Procedure](#) (CMA2). Together with the guidance provided in CMA2, this guidance is intended to set out how and when IEOs are normally used by the CMA (and when derogations to IEOs might be granted). Where there is any difference in emphasis or detail between this guidance and other CMA guidance, the most recently published guidance should take precedence.

2. The use of initial enforcement orders

- 2.1 Under section 72 of the Act, an IEO can be made as soon as the CMA has reasonable grounds for suspecting that it is, or may be, the case that two or more enterprises have ceased to be distinct, or that arrangements are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct.¹
- 2.2 There are penalties for failing to comply with an IEO. Where the CMA considers that, without reasonable excuse, an IEO has not been complied with, it may impose a penalty of a fixed amount it considers appropriate, which shall not exceed 5% of the worldwide turnover of the addressee of the IEO.²

The use of initial enforcement orders in anticipated mergers

- 2.3 As explained in paragraphs C.5 to C.10 of CMA2, the CMA will only exceptionally impose an IEO in relation to a merger which has not yet completed. This is because the circumstances in which the CMA might consider that an IEO is necessary in relation to an anticipated merger (examples of which are provided in paragraph C.9 of CMA2) are,³ in practice, relatively rare.⁴
- 2.4 Where the CMA does impose an IEO in relation to an anticipated merger, this will typically not prevent completion of the transaction from taking place (unless there are unusual circumstances which could mean that the act of completion itself would constitute pre-emptive action).⁵ In other words, during (and in advance of) the CMA's phase 1 investigation, the CMA is typically concerned with limiting integration (maintaining pre-merger competitive

¹ Following the amendments to the Act which took effect in April 2014, the CMA no longer has the power to negotiate initial undertakings during the phase 1 process (the CMA retains the ability to negotiate interim undertakings under section 80 of the Act following a reference to phase 2). Accordingly, while the OFT previously agreed initial undertakings with merging parties, IEOs may now be imposed without negotiation. The CMA is also no longer required to establish that the transaction gives rise to a relevant merger situation, or that the merging parties are contemplating pre-emptive action, or that there are preliminary indications of competition concerns, before imposing an IEO.

² Section 94A of the Act.

³ As explained in paragraph 9 of CMA2, situations in which the CMA might consider an interim order necessary at phase 1 (or subsequently at phase 2) in relation to an anticipated merger include, but are not limited to, cases where: commercially sensitive information is being exchanged between merger parties, except where objectively necessary for the purposes of commercial due diligence and subject to appropriate limits and confidentiality obligations on recipients of the information; the parties intend to, or are already, integrating their businesses; the merger parties have begun to conduct jointly commercial negotiations with customers or suppliers; and key staff have begun to leave the target business or are likely to do so (in which case, the interim order would typically be addressed to the target business).

⁴ See, for example, [Linergy/Ulster Farm](#) merger inquiry.

⁵ This might be the case, for example, where the act of completion would directly lead to the loss of key staff or management capability for the acquired business. This is more likely to occur in an asset acquisition than where a functioning business is being acquired.

conditions and ensuring that the CMA is able to implement an effective remedy if necessary) rather than preventing completion itself.

- 2.5 In some cases, an anticipated merger may complete during the CMA's phase 1 investigation (where an IEO that would preclude completion is not in place). Merging parties should keep the CMA apprised of their plans for completion. In most cases, the CMA would expect to impose an IEO when the merger completes but, in some circumstances, may issue an IEO in advance of completion. Such an IEO may be fully effective immediately (but would typically not, as explained above, prevent completion from taking place) or the operative provisions may only take effect upon completion.

The use of initial enforcement orders in completed mergers

- 2.6 The Act does not require merging parties to obtain the CMA's approval before completing and implementing a transaction (unlike merger control regimes with mandatory suspensory obligations). However, as the CMA retains the power to intervene post-completion (in particular by imposing an IEO, putting in place other interim measures, or unwinding integration) merging parties may choose to risk such intervention by proceeding without waiting for a CMA decision.⁶
- 2.7 As explained in paragraphs C.11 and C.15 of CMA2, the CMA would normally expect to impose an IEO in completed merger cases. The only exceptions to this approach are likely to arise where the CMA has been provided with compelling evidence that demonstrates that there is no risk of pre-emptive action or there are self-evidently no competition concerns. Given the timing constraints that arise in relation to the imposition of an IEO post-completion (considered further below), merging parties who consider that they might satisfy either of these exceptions are encouraged to discuss this with the CMA prior to completing a transaction.
- 2.8 The CMA may consider that there is no risk of pre-emptive action where there are factual circumstances that would prevent any integration of the merging parties' businesses for the likely duration of the CMA's investigation. This might be the case, for example, where the target is active in a highly regulated sector in which the regulatory approvals required to make any material changes to the operation of the business would take many months to obtain.

⁶ The CMA retains the power to intervene until the expiry of the four-month time period within which it has the ability to refer the initial acquisition.

- 2.9 The CMA may consider that a transaction self-evidently raises no competition concerns where it is clear that the reference test will not be met. This exception is unlikely to be met where the CMA has initiated an investigation on its own initiative through its mergers intelligence function (which will have, by definition, reached the preliminary conclusion that there is a reasonable chance that the reference test will be met).
- 2.10 An IEO is ultimately an order and can therefore be imposed without negotiation with the merging parties.⁷ An IEO in a completed merger will take effect as soon as the order is made.⁸ Where practicable, the CMA will consider submissions on derogations from the merging parties before imposing an IEO, and merging parties are encouraged to engage with the CMA as early as possible for this purpose. Where the merging parties have clearly demonstrated that some of the provisions of the template are not relevant to a specific merger, the CMA will publish a derogation for those provisions simultaneously with the IEO.⁹ Given the timing constraints that arise, however, the CMA is unlikely to be able to engage in detailed discussions on proposed derogations at this point. Accordingly, where the CMA is unable to establish that a derogation is justified (eg because there is insufficient time available to review the merging parties' submissions or because insufficient information has been provided to support the derogations requested), an IEO may be imposed without discussion of possible derogations.
- 2.11 Where substantial integration has already taken place before the IEO is imposed, the CMA may consider it necessary to use its powers to unwind this integration. The circumstances in which the CMA may consider this to be necessary are described in paragraphs C.37 and C.38 of CMA2.¹⁰
- 2.12 The CMA may also put in place other interim measures beyond those set out in the template IEO. For example, where the management of the target has already left the business, the CMA may require the appointment of a hold separate manager to operate the target on an arm's length basis. Similarly, if there are relatively high risks of pre-emptive action or concerns about

⁷ As noted above, prior to the amendments to the Act that took effect in April 2014, the OFT agreed initial undertakings with merging parties.

⁸ For this reason, the CMA will, where possible, provide merging parties (or their advisers) with advance notice of the imposition of an IEO.

⁹ For example, if no IT systems have been acquired, the CMA may derogate from the provisions prohibiting the integration of IT systems.

¹⁰ As explained in paragraphs C.37 and C.38 of CMA2, the circumstances in which this may be necessary will be assessed on a case-by-case basis. The CMA would typically 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 taking appropriate remedial action are particularly acute. Given the longer duration of a phase 2 inquiry, and the fact that a merger referred to phase 2 raises a realistic prospect of competition concerns, the CMA may be more likely, where the circumstances of the case require, to use its unwinding power at phase 2 than at phase 1.

compliance with the IEO, the CMA may require the appointment of a monitoring trustee. The process for putting in place further interim measures is described in paragraphs C.25 to C.36 of CMA2.

The form of initial enforcement orders

- 2.13 Given the need to impose an IEO quickly in completed mergers, any IEO imposed in these circumstances will almost always take the form of the standard [template available on the CMA's website](#). Discussions over the scope of the IEO in completed mergers will therefore almost always take the form of derogations (granted simultaneously with the IEO or after the IEO is imposed) rather than amendments to the standard form IEO. This approach is intended to ensure that effective IEOs can be put in place as quickly as possible and to provide greater factual and legal certainty around the initial scope of an IEO.
- 2.14 Where the CMA has been notified of an anticipated merger and the merging parties begin discussions early with the CMA about the transaction completing, the CMA may consider creating a 'tailored' IEO (rather than granting derogations to a standard form IEO).¹¹ The CMA will consider taking this approach where, on the facts of the case, this is likely to optimise procedural efficiency (eg because it would minimise the number of derogation requests that may require to be considered) and avoid unnecessary disruption to the merging parties' businesses.¹²
- 2.15 This may be the case where the CMA is able to conclude in advance of imposing an IEO that: (a) certain of the risks of pre-emptive action that the template IEO is designed to prevent do not arise; and/or (b) the provisions of the template IEO may lead to unnecessary unintended consequences.
- 2.16 As is the case for all material variations to the standard form IEO (whether through derogations or a tailored IEO) the CMA will only be able to reach such a view where sufficient time and information are available.¹³
- 2.17 In any case, as explained above, a standard form IEO with relevant derogations is likely to be a more appropriate approach in nearly all cases.

¹¹ In most cases, the CMA would expect this to be an abridged version of the standard form IEO, although the exclusion of particular provisions of the IEO, or the circumstances of the case, may require additional conditions (not included in the standard form IEO) to be added.

¹² See, for example, [Arriva Rail North/Northern rail franchise](#) merger inquiry.

¹³ Depending on the nature of the variation requested, the CMA may require a well-developed understanding of the merging parties, the product and geographic markets affected by the merger, the potential substantive issues, the likely practical consequences of the standard IEO and/or any additional other factors that may be relevant to an assessment of the risk of pre-emptive action (including, in particular, whether the parties are subject to other sources of regulation or governance that make particular provisions of the standard form IEO unnecessary).

3. The granting of derogations

Requesting a derogation

- 3.1 As noted above, the CMA may (on application by the merging parties) grant a derogation, giving consent to the merging parties to undertake certain actions that would otherwise be prohibited by the IEO. The procedure that should be followed where derogation requests are made is described in paragraphs C.19 to C.23 of CMA2.
- 3.2 As noted in that guidance, the CMA will be best able to deal efficiently with derogation requests where these are fully reasoned and supported by relevant evidence. Where possible, merging parties should also provide proposed text for the consent letter granting the derogation that would be issued by the CMA.¹⁴ A [template derogation request](#) to accompany this guidance is also available on the CMA's website.
- 3.3 As the guidance provided in CMA2 makes clear, the CMA is only able to grant a derogation where the request is sufficiently specified, reasoned, and evidenced. Where the CMA's fact-finding remains at an early stage (ie particularly within phase 1), the CMA is likely to adopt a cautious approach to granting derogations (typically granting narrow derogations that are closely calibrated to the justifications provided by the merging parties).
- 3.4 As a general matter, derogation requests should be raised with the CMA as early in the process as possible. It is typically advisable for merging parties to collate derogations sought within a single comprehensive request. This will ensure that the IEO, combined with those derogations granted by the CMA, provides a clear framework within which the merging parties can operate while the CMA's investigation is ongoing. By contrast, a drip-feed of multiple derogation requests, in particular during the CMA's formal investigation, can unnecessarily delay the CMA's internal state of play meeting at phase 1, and therefore, in most cases, delay lifting the IEO completely (as described further in paragraph 4.3).
- 3.5 For this reason, merging parties should consider whether the requested derogation is essential (in particular to maintain the viability of the acquired business) rather than a non-essential request intended to facilitate the eventual integration of the merging parties' business.

¹⁴ In this regard, the large volume of consent letters previously issued by the CMA, which are available (in non-confidential form) on the CMA's website, provide a useful source of precedent for merging parties.

The provision of confidential or proprietary information by the target to the acquirer in the 'ordinary course of business'

- 3.6 The standard template IEO makes clear that the passing of confidential or proprietary information from the target to the acquirer is not prohibited where 'strictly necessary in the ordinary course of business (including, 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) [...]'.¹⁵
- 3.7 In some previous cases, merging parties, acting on a cautious basis, have sought derogations for the disclosure of such information (which the CMA has, on occasion, granted). The CMA notes, however, that passing this kind of information for this purpose should not require a derogation and therefore encourages merging parties to apply for a derogation only if the information flow envisaged would exceed what is strictly necessary for this purpose.
- 3.8 The CMA notes that this exception applies not only where passing confidential or proprietary information is required to comply with external obligations (such as 'external regulatory and/or accounting obligations') but also where this is strictly necessary for internal purposes relating to the ordinary course of business (subject, in both cases, to the limitations and safeguards described further below).
- 3.9 For example, merging parties may be involved in arrangements that are not related to the merger (eg joint contracts/consortia which pre-date the merger). The CMA notes that information shared pursuant to such arrangements should already be limited to what is permitted under Chapter I of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union. As noted above, the CMA considers that the legitimate passing of information pursuant to such arrangements should not require a derogation.
- 3.10 Acquirers also commonly wish to have access to certain information for legitimate transaction execution purposes (eg for due diligence, integration planning or the completion of any merger control proceedings relating to the transaction). The CMA considers that passing this kind of information should not require a derogation where the information shared is limited to what is strictly necessary for this purpose and appropriate safeguards are put in

¹⁵ See [initial enforcement order template](#). An updated version of this template has been issued to accompany this guidance. The previous version of the template referred only to 'compliance with external regulatory and/or accounting obligations' as an example of the circumstances in which the passing of confidential or proprietary information from the target to the acquirer is not prohibited.

place.¹⁶ The CMA has therefore revised its standard form IEO template to make clear that the passing of confidential or proprietary information from the target to the acquirer is not prohibited for legitimate transaction planning purposes.¹⁷

- 3.11 In all of the circumstances described above, the CMA expects merging parties to be able to ‘self-assess’ whether the passing of confidential or proprietary information for either of these purposes is permitted by the IEO. To this end, merging parties should consider: (a) the recipients of the information; and (b) the type of information being shared. In particular, merging parties should ensure that any commercially sensitive information is not shared with or used by staff involved in the acquirer’s commercial decision-making.¹⁸
- 3.12 In principle, only a limited set of individuals within the acquirer should have access to any information transferred for these purposes. Where possible, individuals that receive this information should be limited to staff who do not have any control or influence over commercial decision-making (eg staff in the acquirer’s accounting/finance department and/or who are subject to part of ‘clean team’ arrangements).
- 3.13 Where individuals with control or influence over commercial decision-making for the acquirer (such as members of the acquirer’s senior management) are intended to be included within the recipients of such information, the type of information that is permitted to be disclosed is limited. In particular, any information shared with these individuals should be sufficiently aggregated in nature to ensure that it is not commercially sensitive. In most cases, the information disclosed should therefore not include the prices or margins of specific products or services or the revenues or margins of individual retail or business units (or any information that would enable the acquirer to deduce this kind of granular data).
- 3.14 The disclosure of such information should be subject to a number of procedural safeguards, including that:¹⁹

¹⁶ See, for example, [Harman/Bang & Olufsen](#) merger inquiry, [Coopervision \(UK\) Holdings/Sauflon Pharmaceuticals](#) merger inquiry, [ProStrakan/Archimedes Pharma](#) merger inquiry, [Hammerson/Grand Central](#) merger inquiry, [Novomatic/Talarius](#) merger inquiry.

¹⁷ Paragraph 5(l) of the template IEO.

¹⁸ It may therefore be necessary for reporting lines within the merging parties to be adjusted in order to ensure that such information disclosure can take place within the terms of the IEO. See, for example, [VTech/LeapFrog](#) merger inquiry.

¹⁹ The detailed aspects of such arrangements (eg the wording of non-disclosure agreements) may require to be reviewed in advance and approved by the CMA.

- (a) the information should be disclosed only to a set of named individuals (whose roles and functions should also be recorded);
- (b) any individual in receipt of such information should enter into an appropriate non-disclosure agreement that prevents them from sharing the information with any individual who does not require access to the information for this purpose;²⁰
- (c) appropriate physical and IT firewalls should be put in place to prevent unauthorised individuals from accessing the disclosed information; and
- (d) detailed records should be kept of all communications between the merging parties for this purpose.

Derogations that are likely to be granted by the CMA

- 3.15 In previous cases, the CMA has granted derogation requests (where sufficiently specified, reasoned, and evidenced) in relation to:
- (a) the provision of back-office support services by the acquirer to the target;
 - (b) the exclusion from the scope of the IEO of parts of one party's business that are not engaged in activities that are related to the other party's business;
 - (c) the exclusion from the scope of the IEO of parts of either party's business that have no relevance to the merging parties' relevant activities in the UK;
 - (d) the replacement of specified key staff at the target or substantive changes to the merging parties' organisational or management structures; and
 - (e) continued access to key staff members where integration is staggered.
- 3.16 Possible justifications for such derogations, and the safeguards that may be required to be put in place to support them, are described further below.

Provision of back-office support services by the acquirer to the target

- 3.17 The potential provision of back-office support by the acquirer to the target immediately pre-completion often arises within the context of asset

²⁰ Such agreements should limit the purposes for which the information can be used and require that any information disclosed should be returned or destroyed in the event that the merger is prohibited or that parts of the target business to which the information relates are divested as a result of remedies offered by the merging parties.

transactions where support functions, such as IT systems, are not part of the sale. In order to ensure the continuity and viability of the target business, the CMA may, in appropriate circumstances, allow the provision of some forms of administrative support to the target by the acquirer.

- 3.18 Within this context, the CMA is likely to pay particular consideration to the relevance of the back-office functions that the acquirer proposes to provide to the target's commercial strategy, as well as the impact that the provision of such functions by the acquirer might have on the potential transfer of all or parts of the target business if remedies were ultimately required.
- 3.19 Such a derogation is unlikely to be granted by the CMA where the target will continue to have access to its pre-existing back-office support functions. This may be the case, for example, where back-office functions form part of the target business transferred by the vendor (even if the acquirer ultimately intends to use its own back-office functions to support the target) or where a transitional services arrangement enables the target to continue using the vendor's back-office functions.
- 3.20 In previous cases, the CMA has granted derogation requests (where sufficiently specified, reasoned, and evidenced) in relation to back-office functions including:
- (a) the integration of the target's email or other IT systems with those of the acquirer (subject to firewall arrangements that would restrict access to any information transferred to employees of the target business);²¹
 - (b) the provision of payroll, HR, or accounting functions to the target by the acquirer;²²
 - (c) the provision of legal services to the target by the acquirer;²³ and
 - (d) the assignment of the target's existing supplier contracts to the acquirer (subject to these contracts being separately identified and remaining capable of being transferred should remedies involving those contracts be necessary).²⁴
- 3.21 By contrast, the CMA is unlikely to grant derogations in relation to functions such as R&D or technological support (eg software development and design),

²¹ See, for example, [Harman/Bang & Olufsen](#) merger inquiry.

²² See, for example, [Euro Car Parts/Andrew Page](#) merger inquiry.

²³ See, for example, [Interserve/Initial Facilities](#) merger inquiry (the consent in this case was granted in relation to initial undertakings, rather than a derogation from an IEO, but nevertheless provides an example of the circumstances in which the CMA may consent to the provision of legal services to the target by the acquirer).

²⁴ See, for example, [Henry Schein/Plandent](#) merger inquiry.

which are typically likely to have a material impact on the development, manufacture, and sale of the target's products or services.

Parts of one party's business that are not engaged in activities related to the other party's business

- 3.22 In some cases, the CMA may be willing to grant derogations where it is clear that certain parts of the target's activities are not related to those of the acquirer. A derogation on this basis will only be granted where the CMA is able to clearly establish that this will not impede the CMA from taking any appropriate remedial action that might be required. For this reason, the CMA is likely to be particularly cautious about granting derogations on this basis at the earlier stages of its investigation where the full scope of the merging parties' activities may not yet have been fully analysed.
- 3.23 Merging parties requesting derogations on this basis will be required to delineate clearly the parts of the merging parties' businesses that respectively do, and do not, engage in activities related to each other. Derogation requests should therefore include clear descriptions of all relevant businesses, along with their functions and reporting lines. To this end, merging parties should be able to show, in particular, that:
- (a) the viability of the 'related' business (which will remain subject to the IEO) is not dependent on the viability of the 'non-related' business (for which a derogation is sought);
 - (b) staff from the 'related' business do not interact with staff from the 'non-related' business; and
 - (c) there are, in practice, no other material links between the 'related' business and the 'non-related' business including, for example, that the services provided by these businesses are not purchased together by customers.
- 3.24 In previous cases, the CMA has granted derogation requests (where sufficiently specified, reasoned, and evidenced) in relation to:
- (a) Non-overlapping businesses: for example, where an investment company (or other multi-product company) has holdings in businesses active across multiple industries, it may be clear at a relatively early stage of the case that many of the businesses in which the acquirer holds an interest

are not active in (and could not enter) any markets relevant to the target business.²⁵

(b) Non-overlapping sites: for example, where the CMA is conducting a local area analysis (eg in a retail merger case), it may be possible, as the CMA's investigation develops, to grant derogations exempting specific non-overlapping sites.²⁶

(c) Non-overlapping products: for example, as the CMA's investigation develops, it may be possible to grant derogations exempting businesses that are active only in relation to products/services in which the CMA has been able to dismiss possible competition concerns.²⁷

3.25 While the examples described above relate to circumstances in which there is no horizontal overlap between the merging parties, the CMA will also take any potential vertical relationships between the merging parties' activities into account when assessing whether derogations can be granted on this basis.

Parts of the merging parties' businesses that have no relevance to their relevant activities in the UK

3.26 The CMA will typically be willing to grant derogations that will facilitate the integration of the non-UK aspects of the merging parties' businesses unless the continued separation of these businesses is necessary to guard against pre-emptive action.²⁸

3.27 For example, the CMA has previously consented to a derogation that enabled identified employees in a target's UK business to be involved in certain activities, which were generally prohibited by the IEO, in relation to markets outside the UK. The derogation was granted subject to the condition that their involvement in these activities should not have any impact on the development, manufacture, distribution and/or sale of the target's products in the UK. The relevant employees were also required to enter into non-disclosure agreements in order to prevent the dissemination of commercially sensitive information to any non-authorized employees.

3.28 Again, the CMA is likely to be particularly cautious about granting derogations on this basis at the earlier stages of its investigation where the merging

²⁵ See, for example, [Harman/Bang & Olufsen](#) merger inquiry and [Immediate Media Company Bristol/Future Publishing](#) merger inquiry.

²⁶ See, for example, [MRH \(GB\)/Esso Petroleum](#) merger inquiry and [Pure Gym/LA Fitness](#) merger inquiry.

²⁷ See, for example, [Hain Frozen Foods/Orchard House Foods](#) merger inquiry.

²⁸ See, for example, [ProStrakan/Archimedes Pharma](#) merger inquiry and [VTech/LeapFrog](#) merger inquiry.

parties' activities (and, in particular, the links between their UK and non-UK activities) have not yet been fully analysed.

- 3.29 In practice, therefore, it will be most straightforward to obtain derogations in relation to the non-UK aspects of the merging parties' businesses where it is clear that these businesses have no material connection to the functioning of their respective UK businesses.
- 3.30 Merging parties requesting derogations on this basis will be required to delineate clearly the parts of the merging parties' businesses that respectively do, and do not, engage in activities relating to the UK. Derogation requests should therefore include clear descriptions of all relevant businesses, along with their functions and reporting lines (as described in paragraph 3.23 above).
- 3.31 As the CMA's investigation develops, it may be possible to grant derogations in relation to non-UK aspects of the merging parties' businesses that do have some connection to their UK businesses. It may, in particular, be possible to grant derogations in relation to non-UK businesses that are active only in relation to products/services in which the CMA has been able to dismiss competition concerns or non-UK businesses that would not form part of any remedial action that might be justified by the CMA's decision on the reference.

Replacement of key staff or substantive changes to the merging parties' organisational or management structures

- 3.32 In general, the CMA will expect the operation and management of the target company under an IEO to be held entirely separate from that of the acquirer, that steps would be taken to retain key staff in the target during the course of the CMA's investigation and that the management and organisational structure of the target would not be subject to material change.
- 3.33 In some cases, the CMA may, however, be willing to consider derogations allowing the replacement of key staff at the target by staff from the acquirer, where, for example, certain of the target's key employees have left on or after completion of the merger. The CMA may also be prepared to consider substantive changes to the merging parties' organisational or management structures, where these are necessary for the effective running of the target during the CMA's investigation.²⁹

²⁹ Changes to organisational structure or management responsibilities that are not substantive are not prohibited by the template IEO.

- 3.34 The replacement of the target's employees by staff that previously worked at the acquirer could lead to the disclosure of confidential information and/or the coordination of commercial conduct.³⁰ Accordingly, the CMA would expect this to happen only where absolutely necessary (ie where all other reasonable options have been explored). Merging parties requesting derogations on this basis should therefore be able to show (supported by relevant evidence):
- (a) the role and responsibilities of the specific key employees of the target company;
 - (b) why these employees intend to leave, or have left, the target company;³¹
 - (c) why it is not possible to replace these employees (or otherwise carry out their functions) with other staff within the target business; and
 - (d) why it is not possible to replace these employees (or otherwise carry out their functions) with individuals who do not currently work for the acquirer.
- 3.35 The replacement of target staff in this way is likely to be subject to a number of safeguards. Depending on the circumstances of the case, the safeguards required are likely to include appropriate confidentiality agreements signed by the replacement staff, which may, for example, explicitly forbid contact with the acquirer's staff during the CMA's review and confirm that these staff no longer have access to the acquirer's IT systems.
- 3.36 The CMA may also be willing to grant derogations allowing other changes to the organisational structure of, or the management responsibilities within, the merging parties' businesses. This might be the case, for example, where certain of the target's management have left on or after completion of the merger and the remaining management of the target business decides that the most effective way of carrying out certain of their functions would be to reallocate them to other members of the management team.
- 3.37 Changes to the organisational and management structure of the merging parties could have a material impact on the CMA's ability to achieve effective remedies. Accordingly, the CMA would expect this to happen only where absolutely necessary. Merging parties requesting derogations on this basis

³⁰ Even when the replacement staff have no contact with the acquirer while the IEO is in force, they know the general commercial conduct of the acquirer, and may wish to return to the acquirer should the transaction not go ahead.

³¹ In some cases, the CMA may also require merging parties to take (or show evidence that they took) all reasonable steps to encourage all key staff to remain with the target company.

should therefore again be able to show (supported by relevant evidence) why these specific organisational or management changes are necessary.

Continued access to key staff members where integration is staggered

- 3.38 In some cases, integration in relation to certain parts of the merging parties' businesses may take place (eg where the CMA has granted derogations that facilitate the integration of the non-UK aspects of the merging parties' businesses) where other parts of their business remain subject to an IEO. In such circumstances, the template IEO prevents staff from the parts of the business that remain subject to the IEO from contacting former staff of the target business who are now employed by the acquirer/merged entity.
- 3.39 The CMA may be willing to grant derogations to enable staff from the parts of the business that remain subject to the IEO to contact key staff members who are now employed by the acquirer/merged entity where necessary to maintain the viability of the target business.
- 3.40 Merging parties requesting derogations on this basis should be able to show (supported by relevant evidence) why such contacts are necessary (eg to fulfil existing customer agreements or maintain existing customer relationships). Such contacts should also be subject to a number of procedural safeguards (such as those described in paragraph 3.14 above).

Derogation requests that are unlikely to be granted by the CMA

- 3.41 The CMA will typically not grant a derogation request unless it can be shown that the proposed derogation is: (a) unlikely to have any impact on the CMA's ability to achieve effective remedies; and/or (b) is necessary to safeguard the viability of the target business.
- 3.42 The fact that integration could subsequently be unwound is not, by itself, sufficient to justify a derogation. This is primarily because of the risk that information obtained and/or actions taken by the acquirer could impact negatively on the nature of competition between the merging parties if the merger were to be ultimately prohibited or remedies were necessary.
- 3.43 To this end, the CMA would be likely, in most cases, to decline derogation requests in relation to:
- (a) the acquirer assuming control of (or material influence over) the commercial policy of the target business;
 - (b) the transfer of sales functions from the target company to the acquirer;

- (c) the acquirer bidding or negotiating on behalf of the target;
- (d) the acquirer and the target amending any existing commercial agreements between them or entering into new agreements;
- (e) the acquirer having access to detailed strategic, operational and financial information, or any other commercially sensitive information, relating to the target (such as information about contracts, detailed cost information, customers etc);
- (f) the acquirer and the target dealing jointly with customers or suppliers;³² and
- (g) the closure of overlapping business functions.

3.44 As noted above, the CMA's decision on a derogation request will be guided not only by the impact that the proposed derogation could have on the CMA's ability to achieve effective remedies but also by the necessity of measures to safeguard the viability of the target business.

3.45 Accordingly, in some circumstances (eg where the target business is in severe financial difficulty or where, in the case of an acquisition of assets or parts of business, the target business cannot operate as a going concern on a stand-alone basis), the CMA may permit the acquirer to exercise direct control over the commercial policy of the target or to appoint an independent manager to run that business. The CMA is likely to require a high degree of monitoring in such circumstances (eg through a monitoring trustee) and may require explanations of any material actions taken (eg where expenditure requests are denied).

3.46 In such circumstances, the CMA may also be willing to grant derogation requests of the type set out in paragraph 3.43 above.

3.47 Merging parties requesting derogations on this basis will be required to show (supported by relevant evidence) that the measures requested are strictly necessary to ensure the viability of the target business. Merging parties should also consider whether there are any alternative measures available that could achieve this objective with a less significant potential impact on competition. Any derogations granted are likely to be subject to appropriate safeguards (eg to ensure that commercially sensitive information is not disclosed more widely than strictly necessary).

³² By way of exception, the CMA may grant derogations permitting the target to benefit from the acquirer's supply arrangements (eg in relation to insurance, fuel or maintenance) where these arrangements are not transferring with the target.

4. Timing for imposing and revoking initial enforcement orders and granting derogations

- 4.1 As explained in paragraph C.11 of CMA2, the CMA will typically impose an IEO in a completed merger as soon as possible after the merger comes to its attention. As explained above, the CMA will, where possible, grant any appropriate derogations from the IEO to take effect at the same time as the IEO itself to minimise disruption to the merging parties' businesses.
- 4.2 Through the course of the CMA's investigation, the CMA will release merging parties from some or all of the obligations incumbent in the IEO as early as is appropriate in the circumstances of the case.
- 4.3 Where, following the internal state of play meeting at phase 1, the CMA has reached the provisional view (subject to any subsequent evidence or assessment to the contrary) that the merger does not give rise to competition concerns, the CMA will typically be willing to revoke the IEO in full.
- 4.4 Similarly, as soon as the CMA reaches the provisional view (subject to any subsequent evidence to the contrary) that only part of the merger is potentially of concern, either at phase 1 or phase 2, a derogation may be granted in relation to the parts of the merger that are no longer of concern. Merging parties may be required to provide additional evidence at this stage, along the lines described in paragraph 3.23 above, to establish that the parts of the target business that do not raise concerns can be clearly delineated from those that remain under investigation.
- 4.5 Where a merger is referred for a phase 2 investigation, the IEO remains in place unless revoked or replaced by an interim undertaking under section 80 of the Act or an interim order under section 81 of the Act (this might be the case, for example, where the Group appointed to conduct the phase 2 investigation has concerns about the scope of the pre-existing measures in light of the issues that the Group is investigating).
- 4.6 During the course of a phase 2 inquiry into an anticipated merger, the Act prevents the merging parties (or associated persons) from acquiring any interest in shares in a company to which the reference relates without the CMA's consent.³³ In practice, the CMA is unlikely to consent to the completion of an anticipated transaction during phase 2 proceedings. In some cases,³⁴ the CMA may be willing to consent to completion where this is necessary to

³³ Section 78(2) of the Act.

³⁴ See, for example, [Iron Mountain/Recall](#) merger inquiry.

allow the transaction to complete at a global level, so long as sufficient safeguards (likely to include hold separate arrangements and a monitoring trustee) are put in place in order to prevent pre-emptive action.

- 4.7 Derogations from the IEO for parts of the business about which the CMA is no longer concerned may also be granted during the phase 2 proceedings (eg following the publication of the provisional findings).

5. Compliance statements

- 5.1 The CMA's standard template IEO states that the 'Chief Executive Officer' (CEO) of each of the merging parties, or other persons 'as agreed with the CMA,' will be required to sign off on the periodic statements to the CMA that confirm compliance with an IEO.
- 5.2 The CMA is likely to agree to a person other than the CEO (such as an alternative director or the General Counsel) signing the compliance statement where that individual has the actual authority to bind the company and holds sufficient knowledge of the company's business operations.