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]

The use of initial enforcement orders in anticipated mergers

2.2 As explained in paragraphs C.5 to C.10 of CMA2, the CMA will not usually impose an IEO in relation to a merger which has not yet completed. 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,[2] in practice, relatively rare.[3]

2.3 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).[4] In other words, the CMA is typically concerned with limiting integration (maintaining pre-merger competitive conditions and ensuring that the CMA is able to implement an effective remedy if necessary) rather than preventing completion itself.

2.4 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 appraised 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

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[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] 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).

[3] See, for example, Linergy/Ulster Farm merger inquiry.

[4] 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.

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

2.5 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 choose to risk such intervention by proceeding without waiting for a CMA decision.

2.6 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.

2.7 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.

2.8 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).

2.9 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.

2.10 An IEO is ultimately an order and can therefore be imposed without negotiation with the merging parties.[5] An IEO in a completed merger will take effect as soon as the order is made. 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.[6] 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.[7]

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 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.

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

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

[7] 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.

2.13 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 exceptionally consider creating a 'tailored' IEO (rather than granting derogations to a standard form IEO).[8] 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.[9]

2.14 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.

2.15 As is the case for all material variations to the standard form IEO (whether through derogations or a tailored IEO) the CMA will only able to reach such a view where sufficient time and information are available.[10]

2.16 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.

[8] 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.
[9] See, for example, Arriva Rail North/Northern rail franchise merger inquiry.
[10] In particular, the CMA is likely to 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.[11]

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.

[11] 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.

Derogations that are likely to be granted by the CMA where sufficiently specified, reasoned, and evidenced

3.6 In previous cases, the CMA has granted derogation requests (where sufficiently specified, reasoned, and evidenced) in relation to:

(a) the provision of financial information by the target to the acquirer for legitimate transaction execution purposes;

(b) the provision of back-office support services by the acquirer to the target;

(c) 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;

(d) 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; and

(e) the replacement of specified key staff at the target or changes to the merging parties' organisational or management structures.

3.7 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 certain financial information for legitimate transaction execution purposes

3.8 The standard form IEO template 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 (for example where required for compliance with external regulatory and/or accounting obligations) […].'[12]

3.9 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.

[12] See initial enforcement order template.

3.10 This exception must, however, be strictly construed. Only information that is strictly necessary for compliance with specific obligations of this type can be disclosed, and such information can only be shared with the individuals who strictly require the information in order to ensure compliance with those obligations.[13] 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.[14] Detailed records should also be kept of all communications between the merging parties for this purpose (which may be requested by the CMA in order to verify that this exception is being applied correctly in practice).

3.11 An acquirer may also wish to have access to certain information for legitimate transaction execution purposes (eg for due diligence or integration planning). The CMA may grant a derogation where the information to be shared is strictly limited to what is necessary for a legitimate purpose and appropriate safeguards are put in place (in particular to ensure that such information is not shared with and used by staff involved in the acquirer's commercial decision-making). [15]

3.12 In practice, this means that there are likely to be restrictions around the type of information that can be disclosed, with any derogation likely to be limited to the disclosure of information that is sufficiently aggregated in nature. In particular, in most cases, the information disclosed should 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).

3.13 Merging parties should also expect that only a limited set of individuals within the acquirer will be permitted to have access to such information. Where possible, individuals that receive this information should be limited to staff in the acquirer's accounting/finance department (on the basis that these staff do not have any control or influence over commercial decision-making). Where merging parties request that individuals with control or influence over commercial decision-making for the acquirer (such as members of the acquirer's senior management) should be included within the recipients of

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[13] 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 strictly require the information for this purpose.
[14] See, for example, VTech/LeapFrog merger inquiry.
[15] 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.

such information, the type of information that will be permitted to be disclosed is likely to be particularly limited.

3.14 The disclosure of such information is also likely to be subject to a number of procedural safeguards, including that:[16]

(a) the information may be disclosed only to named individuals (whose roles and functions have been described to the CMA) approved by the CMA in advance;

(b) all individuals who have access to such information may be required to sign appropriate non-disclosure agreements;[17]

(c) the CMA may require to see all information that is proposed to be disclosed in advance (and/or to review in advance a template for the type of reporting envisaged);

(d) detailed records may be required to be kept of all communications between the merging parties for this purpose; and

(e) appropriate physical and IT firewalls may be required to be put in place to prevent unauthorised individuals from accessing the disclosed information.

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

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

3.16 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.

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[16] The detailed aspects of such arrangements (eg the wording of non-disclosure agreements) will typically be reviewed in advance and approved by the CMA.
[17] 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.

3.17 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.

3.18 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);[18]

(b) the provision of payroll, HR, or accounting functions to the target by the acquirer;[19]

(c) the provision of legal services to the target by the acquirer;[20] 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).[21]

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

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

3.20 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

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[18] See, for example, Harman/Bang & Olufsen merger inquiry.
[19] See, for example, Euro Car Parts/Andrew Page merger inquiry.
[20] 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).
[21] See, for example, Henry Schein/Plandent merger inquiry.

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.

3.21 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.

3.22 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.[22]

(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.[23]

(c) Non-overlapping products: for example, as the CMA's investigation develops, it may be possible to grant derogations exempting businesses

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[22] See, for example, Harman/Bang & Olufsen merger inquiry and Immediate Media Company Bristol/Future Publishing merger inquiry.
[23] See, for example, MRH (GB)/Esso Petroleum merger inquiry and Pure Gym/LA Fitness merger inquiry.

that are active only in relation to products/services in which the CMA has been able to dismiss possible competition concerns.[24]

3.23 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 acquirer's and target's business that have no relevance to the merging parties' relevant activities in the UK

3.24 Similarly, the CMA may, in some cases, grant derogations that will facilitate the integration of the non-UK aspects of the merging parties' businesses so long as safeguards are applied to ensure that this would not impact on the functioning of their respective UK businesses.[25]

3.25 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-authorised employees.

3.26 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 3.21 above).

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

3.27 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

[24] See, for example, Hain Frozen Foods/Orchard House Foods merger inquiry.
[25] See, for example, ProStrakan/Archimedes Pharma merger inquiry and VTech/LeapFrog merger inquiry.

the CMA's investigation and that the management and organisational structure of the target would not be subject to material change.

3.28 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 changes to the merging parties' organisational or management structures, where these are strictly necessary for the effective running of the target during the CMA's investigation.

3.29 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.[26] 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;[27]

(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.

3.30 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.

3.31 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

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[26] 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.
[27] In some cases, the CMA may also require merging parties to provide (or show evidence that they provided) suitable incentives in order to retain remaining key staff.

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.

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

Derogation requests that are unlikely to be granted by the CMA

3.33 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 acquired business.

3.34 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.

3.35 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;[28]

(b) the transfer of sales functions for 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

[28] In exceptional circumstances, the CMA may permit the acquirer to exercise some degree of influence over the commercial policy of the target. 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).

the target (such as information about contracts, detailed cost information, customers etc);

(f) the acquirer and the target dealing jointly with customers or suppliers; and

(g) the closure of overlapping business functions.

3.36 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. Accordingly, in exceptional 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 be willing to grant derogation requests of the type set out in paragraph 3.29 above.

3.37 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).

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, in an anticipated case 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 may 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 3.21 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.[29] In practice, the CMA is unlikely to consent to the completion of an anticipated transaction during phase 2 proceedings. By exception,[30] the

[29] Section 78(2) of the Act.
[30] See, for example, Iron Mountain/Recall merger inquiry.

CMA may be willing to consent to completion where this is necessary to 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).