

Interim measures in merger investigations

Draft for consultation

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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 interim measures may be relevant. It should be read in conjunction with [Mergers: Guidance on the CMA's Jurisdiction and Procedure \(CMA2\)](#). Where there is any difference in emphasis or detail between this guidance and other CMA guidance, the most recently published guidance takes precedence.
- 1.2 When the Competition and Markets Authority (**CMA**) is investigating a merger, the Enterprise Act 2002 (the **Act**) enables it to take steps to prevent or unwind pre-emptive action. Pre-emptive action is action that might prejudice the outcome of a reference or impede the taking of any appropriate remedial action.¹
- 1.3 Measures to prevent pre-emptive action can take three forms (collectively referred to as **Interim Measures** for the purposes of this guidance), depending on the stage of the investigation and whether they are imposed on the parties or agreed:
- (a) an initial enforcement order (**IEO**)², which is imposed at phase 1;
 - (b) interim undertakings, which are agreed with the merging parties at phase 2;³ and/or
 - (c) an interim order (**IO**)⁴ which is imposed at phase 2.
- 1.4 The need for Interim Measures will depend on the circumstances of the case, including, in particular, whether the merger has been completed, will be completed during the course of the CMA's investigation, or remains anticipated.
- 1.5 At phase 1 the CMA may impose an IEO to prevent or unwind pre-emptive action and 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. The need for an IEO, and the

¹ Depending on the nature of the business, pre-emptive action might include actions such as closing or selling sites, failing to maintain equipment, degrading service levels, failing to retain key employees, failing to compete at arm's length for tenders, or exchanging confidential commercially sensitive information.

² Section 72 of the Act. Following the amendments to the Act which took effect in April 2014 (including repeal of section 71 of the Act), the CMA no longer has the power to negotiate initial undertakings during the phase 1 process. Accordingly, while the OFT previously agreed initial undertakings with merging parties, IEOs may now be imposed without negotiation.

³ Section 80 of the Act.

⁴ Section 81 of the Act.

extent to which derogations might be granted, depend 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 merging parties.

- 1.6 Any IEO imposed at phase 1 remains in force on reference to phase 2. In addition, statutory restrictions prevent merging parties from taking certain actions after a merger has been referred to phase 2.⁵ The CMA may also take additional steps at phase 2, where appropriate, to prevent or unwind pre-emptive action, either by accepting interim undertakings, making an IO or issuing directions pursuant to the IEO imposed at phase 1.
- 1.7 Like IEOs, interim undertakings and IOs continue in force, subject to subsequent variation, release or revocation by the CMA,⁶ until the final determination of the investigation.⁷
- 1.8 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 Interim Measures will typically be required, the form that an Interim Measure will typically take, the types of derogations that the CMA is likely (or unlikely) to grant, and the timing for imposing and revoking Interim Measures and granting derogations. It replaces the previous version of CMA60 (*Guidance on initial enforcement orders and derogations in merger investigations*) and those portions of CMA2 which dealt with interim measures.

⁵ Sections 77 and 78 of the Act.

⁶ Sections 72(4), 80(5) and 81(5) of the Act. The CMA can also replace the initial undertakings or IO with a different type of measure, as envisaged in sections 72(6)(a)(i), 80(7) and 81(7) of the Act.

⁷ Sections 72(6)(a), 80(8) and 81(8) of the Act. Final determination of an investigation occurs on acceptance of final undertakings or the making of a final order or, in the absence of a substantial lessening of competition finding, on publication of the final report at the end of phase 2.

2. The use of Interim Measures

- 2.1 Interim Measures may be imposed at any time during the CMA's review. In practice, in order to ensure that Interim Measures are effective, they are likely to be put in place upon the completion of a merger (and, in some circumstances, in advance of completion).
- 2.2 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.⁸ The CMA can impose an IO or accept an interim undertaking if a reference has been made but is not finally determined.
- 2.3 There are penalties for failing to comply with an Interim Measure. Where the CMA considers that a person has, without reasonable excuse, failed to comply with an Interim Measure, it may impose a penalty of such fixed amount as it considers appropriate, which shall not exceed 5% of the total worldwide turnover of the enterprises owned or controlled by the person on whom it is imposed.⁹

The use of Interim Measures in anticipated mergers

- 2.4 The CMA will only exceptionally impose an IEO in relation to a merger which has not yet completed because the risk of pre-emptive action in an anticipated merger is generally much lower than in a completed merger. The circumstances in which the CMA might consider that an IEO is necessary in relation to an anticipated merger are, in practice, relatively rare.¹⁰
- 2.5 Situations in which the CMA might consider Interim Measures necessary in relation to an anticipated merger include, but are not limited to, cases where:
- (a) commercially sensitive information is being exchanged between merging parties, except where objectively necessary for the purposes of

⁸ 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 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.

⁹ Section 94A of the Act.

¹⁰ See, for example, [Linergy/Ulster Farm](#) and [Mole Valley Farmers Limited/Countrywide Farmers PLC](#).

commercial due diligence and subject to appropriate limits and confidentiality obligations on recipients of the information;

- (b) the merging parties intend to, or are already, integrating their businesses;
- (c) the merging parties have begun jointly to conduct commercial negotiations with customers or suppliers, or have otherwise jointly affected the way in which one or both of the merging parties engages with customers or suppliers;
- (d) key staff have begun to leave the target business or are likely to do so;
- (e) the merging parties intend to make material changes to their business operations (eg by closing stores in areas in which competition concerns may arise);
- (f) the seller of the target business intends to make changes to its business that could weaken the target business (eg because of changes to the basis of its financing arrangements); or
- (g) the merger is part of a wider transaction and completion has taken place in other jurisdictions (which may alter the incentives of the parties to maintain appropriate separation or preservation of the business in relation to the UK aspects of the transaction).

2.6 Interim Measures will usually be addressed to the acquiring party. In the case of an anticipated merger, IEOs and IOs may be addressed to the acquirer, the target and/or the seller of the target, depending on the circumstances of the case. This will ensure that the target business is appropriately maintained and, if relevant, that no changes are made to the acquirer's business if it is possible that it might form the basis of a remedy package.¹¹

2.7 If, in relation to an anticipated merger, the CMA finds a substantial lessening of competition (**SLC**) at phase 2, this may lead to a need for further Interim Measures (eg the appointment of a trustee to oversee a divestiture process: see section 4 below).

2.8 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

¹¹ See, for example, [Celesio/Sainsbury's Pharmacy Business](#).

completion itself would constitute pre-emptive action).¹² In other words, at phase 1, 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.

- 2.9 During a phase 2 investigation 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.¹³ This statutory restriction on dealing for anticipated mergers prevents the transfer of shares (absent the CMA's consent) pending the final determination of the reference.¹⁴ In practice, the CMA is unlikely to consent to the completion of an anticipated transaction during phase 2 proceedings. In some cases,¹⁵ the 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.
- 2.10 As this restriction relates only to the transfer of shares, and is subject to certain exceptions, the CMA may consider it necessary to put Interim Measures in place to prevent completion during a phase 2 investigation into an anticipated merger. This is particularly likely to be the case where the merger involves a transfer of assets rather than a transfer of shares.

The use of Interim Measures in anticipated mergers which are expected to complete during the course of the CMA's investigation

- 2.11 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). In such cases, the CMA will generally impose an IEO. The IEO is likely to be issued in advance of completion, but with the operative provisions only

¹² 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, which could be preserved through a post-completion IEO.

¹³ Sections 77 and 78 of the Act impose statutory restrictions on certain actions following a reference where no Interim Measures are in place. These include, in the case of anticipated mergers (as noted above), a restriction on the acquisition of shares in the target company, and, in the case of completed mergers, restrictions on the completion of any further matters in connection with the merger arrangements, or transferring ownership or control of the target company. Separate provisions apply where references are made on public interest grounds (see paragraphs 7 and 8 of Schedule 7 to the Act).

¹⁴ Section 78(2) of the Act.

¹⁵ See, for example, [Iron Mountain/Recall](#).

taking effect upon completion (and so is not classified by the CMA as an anticipated IEO). A similar approach may be adopted in phase 2.

- 2.12 As these situations arise during the course of the CMA's investigation, the merging parties should work with the CMA to get the IEO/undertakings/order, and any necessary derogations, in place in plenty of time prior to completion.
- 2.13 If the CMA is concerned that an anticipated merger may complete during the CMA's phase 2 investigation (where there is no IEO or statutory prohibition which would preclude completion), and that this could prejudice its ability to remedy any SLC resulting from the merger, the CMA may prevent completion of the merger pending final determination of the reference.¹⁶
- 2.14 Merging parties should keep the CMA apprised of their plans for completion so that the CMA can be adequately prepared.
- 2.15 Failure to inform the CMA of intended actions which may have a pre-emptive effect may lead the CMA to make an unwinding order. The CMA will also consider imposing a monitoring trustee if this appears necessary to ensure that it has the information it needs to preserve its ability to remedy an SLC.

The use of Interim Measures in completed mergers

- 2.16 At phase 1, 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). Merging parties may choose to risk such intervention by proceeding without waiting for a CMA decision, but should bear in mind that the CMA retains the power to intervene post-completion.¹⁷
- 2.17 At phase 2, during the course of an inquiry into a completed merger, the Act prohibits the merged parties from taking any further steps to integrate without the CMA's consent, where no Interim Measures have been put in place.¹⁸ This statutory restriction in relation to completed mergers prevents the parties from 'completing any outstanding matters' or 'making further arrangements' in connection with the merger and from transferring the ownership or control of any enterprise to which the reference relates. Given the potential for pre-

¹⁶ This is most likely to occur following a provisional finding or final report that the merger in question may be expected to result in an SLC. For example, in [Reckitt Benckiser/K-Y](#), the CMA accepted undertakings from both parties following the publication of its phase 2 report, which prevented completion taking place prior to final undertakings being accepted by the CMA to remedy the SLC identified.

¹⁷ 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.

¹⁸ Section 77 of the Act.

emptive action which falls outside the remit of these statutory restrictions,¹⁹ the CMA will normally seek Interim Measures in relation to completed mergers at phase 2 to supplement the prohibitions set out in the Act.

Imposing an Initial Enforcement Order or Interim Order in completed mergers

- 2.18 An IEO has a precautionary purpose, and the CMA would therefore normally impose an IEO at phase 1 in completed merger cases (given the immediate risk of pre-emptive action). 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. Merging parties who believe that they might satisfy either of these exceptions are encouraged to discuss this with the CMA prior to completing their transaction.
- 2.19 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 duration of the CMA's investigation. This is very rare; however, it 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 will take many months to obtain.
- 2.20 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.
- 2.21 An IEO or IO is an order and can therefore be imposed without negotiation with the merging parties (see paragraph 2.2).²⁰ An IEO or IO in a completed merger will take effect as soon as the order is made.²¹
- 2.22 Where substantial integration has already taken place before an IEO or IO is imposed, the CMA may consider it necessary to use its powers to unwind this

¹⁹ For example, the acquirer may have significant incentives to run down or neglect the business or assets of the acquired business, or to extract know-how and other commercially sensitive information from the acquired business in order to reduce its competitive capability should divestiture be required.

²⁰ As noted above, prior to the amendments to the Act that took effect in April 2014, the OFT agreed initial undertakings with merging parties, but the CMA no longer has this power at phase 1.

²¹ For this reason, the CMA will, where possible, provide merging parties (or their advisers) with advance notice of the imposition of an IEO.

integration. The circumstances in which the CMA may consider this to be necessary are described in section 5 below.²²

- 2.23 The CMA may also impose other Interim Measures. If there are relatively high risks of pre-emptive action or concerns about co-operation or compliance with the Interim Measures, the CMA may require the appointment of a monitoring trustee (see section 4 below). Alternatively, 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.

Form of Initial Enforcement Order or Interim Order

- 2.24 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.
- 2.25 In completed merger cases, where practicable, the CMA will consider submissions on derogations from the merging parties before imposing an IEO or IO, 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 are not relevant to a specific merger, the CMA will publish a derogation for those provisions simultaneously with the IEO or IO.²³ Given the importance of speed, the CMA is unlikely to be able to engage in detailed discussions on proposed derogations at this point so, 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 or IO may be imposed without discussion of possible derogations.

²² As explained in section 5, 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.

²³ For example, if no IT systems have been acquired, the CMA may derogate from the provisions prohibiting the integration of IT systems.

- 2.26 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).²⁴ 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.²⁵
- 2.27 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.
- 2.28 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.²⁶ As explained above, a standard form IEO with relevant derogations is likely to be the appropriate approach in nearly all cases.

²⁴ 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.

²⁵ See, for example, [Arriva Rail North/Northern rail franchise](#) merger inquiry.

²⁶ 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. 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 Interim Measures.²⁷ Derogations will be granted to avoid a disproportionate burden by allowing actions falling within the scope of the Interim Measures which need to take place, in particular where necessary to maintain the viability of the acquired business. Derogations will not be given to retrospectively approve actions that have already occurred and that may have been in breach of Interim Measures.
- 3.2 Derogation requests are more likely to be granted if merging parties are able to demonstrate that allowing the derogation would not create a risk of pre-emptive action that would be costly or difficult to reverse and/or is necessary for the effective continuation of the acquired business.
- 3.3 Merging parties can help the CMA to deal efficiently with derogation requests by ensuring that requests are fully reasoned and supported by relevant evidence, including, for example:
- (a) an explanation of the derogation request and a full description of the action the party wishes to take and in respect of which the request is made;
 - (b) why the derogation request is being made;²⁸
 - (c) why the action proposed creates no risk of pre-emptive action that is difficult or costly to reverse;
 - (d) whether the derogation request is urgent (and if so, how urgent it is and why it is necessary in advance of the CMA's decision on the merger); and
 - (e) any other information which the party considers may assist the CMA in considering the request.
- 3.4 Merging parties should note that the information provided to support a derogation request may also be used in the substantive analysis of the

²⁷ Sections 72(3C), 80(2B) and 81(2B) of the Act.

²⁸ For example, this might be to safeguard the viability of the acquired business, which would otherwise be at significant risk, to ensure the effective operation of the Interim Measures as a whole, or to meet a regulatory, statutory or other obligation. Requests that relate solely to bringing forward merger synergies are unlikely to be granted.

transaction (including at phase 2 if the transaction is referred). Furthermore, it is a criminal offence under section 117 of the Act for a person recklessly or knowingly to supply to the CMA information which is false or misleading in any material respect.²⁹

- 3.5 Merging parties are entitled to re-submit a derogation request that has previously been denied where circumstances have changed such that the action proposed no longer creates a risk of pre-emptive action that is difficult or costly to reverse, or where parties become able to provide further evidence, not available at the time of their original request.
- 3.6 Any derogation granted from the Interim Measures will be published on the case page. Prior to publishing such a notice of consent, the CMA will provide the parties seeking consent with a reasonable opportunity (at least one working day) to revert with any requests for business secrets to be redacted from the published version of the document.
- 3.7 Where possible, merging parties should provide the CMA with proposed text for the consent letter granting the derogation.³⁰ A [template derogation request](#) is available on the CMA's website.
- 3.8 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).
- 3.9 As a general matter, derogation requests should be raised with the CMA as early in the process as possible. It is typically advisable for merger parties to collate derogations sought within a single comprehensive request. This will ensure that the Interim Measures, combined with those derogations granted by the CMA, provide a clear framework within which the merger 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

²⁹ Parties requesting a derogation should be prepared to sign a declaration in the following form:

I declare that, to the best of my knowledge and belief, the information given in this request is true, correct, and complete in all material respects. I understand that: It is a criminal offence under section 117 of the Enterprise Act 2002 (Act) for a person recklessly or knowingly to supply to the CMA information which is false or misleading in any material respect. This includes supplying such information to another person knowing that the information is to be used for the purpose of supplying information to the CMA; The information provided may be used in the substantive analysis of this transaction. In the event that the merger is referred for a Phase 2 investigation, information provided to the CMA during the course of the Phase 1 investigation will also be used for the Phase 2 investigation; In accordance with section 100(1) of the Act the CMA may make a reference after the expiry of the statutory deadline if information provided is in any material respect incomplete, false or misleading.

³⁰ 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.

investigation, can unnecessarily delay the CMA's investigation. This may ultimately cause a delay in lifting the Interim Measures completely (see section 6). 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 merged business.

- 3.10 Merging parties may also make submissions to the CMA setting out reasons why there is no longer a risk of pre-emptive action. The CMA will then consider whether it would be appropriate to vary, revoke or release Interim Measures. Given the precautionary purpose of Interim Measures, the CMA would expect to vary, revoke or release Interim Measures only where it has seen compelling evidence that the risk of pre-emptive action no longer arises.

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

- 3.11 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) [...]'.³¹
- 3.12 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.
- 3.13 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). For example, merging parties may be involved in arrangements that are not related to the merger (eg joint contracts/consortia which pre-date the

³¹ See [initial enforcement order template](#). An updated version of this template was issued to accompany the CMA's new guidance on Initial Enforcement Orders in September 2017. 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.

merger). 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.

- 3.14 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 provided that appropriate safeguards are put in place.³² 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.³³
- 3.15 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 or other Interim Measures. 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.³⁴
- 3.16 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).
- 3.17 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

³² 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.

³³ Paragraph 5(l) of the template IEO.

³⁴ 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.

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).

3.18 The disclosure of such information should be subject to a number of procedural safeguards, including that:³⁵

- (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;³⁶
- (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

3.19 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 Interim Measures 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 Interim Measures of parts of either party's business that have no relevance to the merging parties' relevant activities in the UK;

³⁵ 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.

³⁶ 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.

- (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.
- 3.20 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

- 3.21 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.
- 3.22 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.
- 3.23 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.
- 3.24 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);³⁷
 - (b) the provision of payroll, HR, or accounting functions to the target by the acquirer;³⁸

³⁷ See, for example, [Harman/Bang & Olufsen](#) merger inquiry.

³⁸ See, for example, [Euro Car Parts/Andrew Page](#) merger inquiry.

- (c) the provision of legal services to the target by the acquirer;³⁹ 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).⁴⁰

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

3.26 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.

3.27 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 Interim Measure) 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

³⁹ 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).

⁴⁰ See, for example, [Henry Schein/Plandent](#) merger inquiry.

services provided by these businesses are not purchased together by customers.

- 3.28 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.⁴¹
 - (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.⁴²
 - (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.⁴³
- 3.29 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

- 3.30 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.⁴⁴
- 3.31 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 Interim Measure, in relation

⁴¹ See, for example, [Harman/Bang & Olufsen](#) merger inquiry and [Immediate Media Company Bristol/Future Publishing](#) merger inquiry.

⁴² See, for example, [MRH \(GB\)/Esso Petroleum](#) merger inquiry and [Pure Gym/LA Fitness](#) merger inquiry.

⁴³ See, for example, [Hain Frozen Foods/Orchard House Foods](#) merger inquiry.

⁴⁴ See, for example, [ProStrakan/Archimedes Pharma](#) merger inquiry and [VTech/LeapFrog](#) merger inquiry.

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.

- 3.32 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 parties' activities (and, in particular, the links between their UK and non-UK activities) have not yet been fully analysed.
- 3.33 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.
- 3.34 Merging parties requesting derogations on this basis will be required to delineate clearly the parts of their 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 3.27 above).
- 3.35 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

- 3.36 In general, the CMA will expect the operation and management of the target company under Interim Measures 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.
- 3.37 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.⁴⁵

3.38 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.⁴⁶ 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 roles and responsibilities of the specific key employees of the target company;
- (b) why these employees intend to leave, or have left, the target company;⁴⁷
- (c) why it is not possible to replace these employees (or otherwise carry out their functions) with other staff from 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.

3.39 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.

3.40 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.

⁴⁵ Changes to organisational structure or management responsibilities that are not substantive are not prohibited by the template IEO.

⁴⁶ Even when the replacement staff have no contact with the acquirer while the Interim Measures are 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.

⁴⁷ 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.

- 3.41 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.

Continued access to key staff members where integration is staggered

- 3.42 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 Interim Measures. In such circumstances, the Interim Measures will generally prevent staff from the parts of the business that remain subject to the Interim Measures from contacting former staff of the target business who are now employed by the acquirer/merged entity.⁴⁸
- 3.43 The CMA may be willing to grant derogations to enable staff from the parts of the business that remain subject to the Interim Measures to contact key staff members who are now employed by the acquirer/merged entity where necessary to maintain the viability of the target business.
- 3.44 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 3.18 above).

Derogation requests that are unlikely to be granted by the CMA

- 3.45 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.
- 3.46 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

⁴⁸ This prohibition is set out in the template IEO.

negatively on competition between the merging parties if the merger were to be ultimately prohibited or remedies were necessary.

3.47 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;⁴⁹ and
- (g) the closure of overlapping business functions.

3.48 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.

3.49 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).

⁴⁹ 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.

- 3.50 In such circumstances, the CMA may also be willing to grant derogation requests of the type set out in paragraph 3.47 above.
- 3.51 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. Monitoring trustees and hold separate managers

- 4.1 A monitoring trustee may be required by the CMA, in order to monitor and report on compliance with the Interim Measures. A monitoring trustee's role will usually be to assess, in its first report, the extent of integration and to make recommendations as to how to mitigate the risk of pre-emptive action. If appointed at phase 2, the monitoring trustee will also be required to report on the extent of compliance with any phase 1 IEO and the adequacy of existing Interim Measures. Thereafter, the monitoring trustee will be tasked with monitoring compliance with the Interim Measures and assisting with the consideration of derogation requests. In the event that the CMA requires a divestiture, the monitoring trustee's role may be expanded to ensure that any divestiture process is carried out in compliance with the CMA's decision in its final report and with the Interim Measures.
- 4.2 A hold separate manager with executive powers may be required by the CMA, in order to operate the acquired business separately from the acquirer and in line with the Interim Measures for the duration of the investigation. The hold separate manager's role is a day-to-day operational role in the acquired business. This role is distinct from that of a monitoring trustee.
- 4.3 The CMA will normally consider the need for the appointment of a hold separate manager and/or a monitoring trustee both during a phase 1 investigation (including following a UIL decision where the CMA needs to oversee a divestiture) and at the outset of a phase 2 investigation. It will also review the issue throughout the phase 2 investigation. The appointment of a hold separate manager and/or a monitoring trustee will be at the expense of the acquiring party.
- 4.4 At phase 1, the CMA may consider it necessary to appoint a monitoring trustee where one or more of the risk factors in paragraph 4.5 apply and where the merger raises prima facie competition concerns.⁵⁰
- 4.5 At phase 2, the CMA will usually require a monitoring trustee to be appointed in completed mergers unless parties can provide compelling evidence as to

⁵⁰ See, for example, the Global Radio/GMG merger investigation (2013), and, in relation to overseeing phase 1 divestitures following UILs, the OFT directions in respect of: the completed acquisition by Nakano of the vinegar and pickles businesses of Premier Foods Group Limited (9 October 2012); the completed acquisition by Rexel UK Limited of certain assets of Wilts Wholesale Electrical Company Limited (7 November 2012); and the completed acquisition by Vue Entertainment International Limited of Apollo Cinemas Limited (4 September 2012). See [Trinity Mirror / Northern & Shell Media Group](#) (2018) for an example of the appointment of a hold separate manager in phase 1.

why there is little risk of pre-emptive action and/or that none of the risk factors below are present:

- (a) substantial integration of the two businesses prior to implementation of the Interim Measures;
- (b) breaches of the Interim Measures;
- (c) a need for further or continued integration of the business throughout the CMA's investigation, subject to the necessary consents from the CMA, for example if the acquired business is not a stand-alone business;
- (d) a risk of deterioration of the business, for example through loss of key customers or members of staff; and/or
- (e) the pre-merger senior management of the acquired business is absent and/or strong incentives exist for the senior management of the acquired business to operate the acquired business on behalf of the acquirer.

This last risk factor, in particular, will suggest the need for the appointment of a hold separate manager.

- 4.6 Hold separate managers can be either an internal or external appointee. Where appropriate, the CMA will require appointment of a hold separate manager external to the parties.⁵¹ In other cases, it may not be necessary to require an external hold separate manager, but the CMA may require existing employees of the merged entities to act independently in key managerial roles in the acquired business.⁵² The factors the CMA will consider when weighing up the choice between an external or internal hold separate manager are: the relative experience and suitability of existing employees; the independence of existing employees; and the complexity of the hold separate requirements. Typically, if a suitable internal hold separate manager is available, the CMA will seek to appoint this manager before exploring external options. However, the CMA will expect to be satisfied that the hold separate manager is sufficiently independent. For example, if the hold separate manager is employed by the acquirer, the CMA may require an undertaking that he or she will not return to the acquirer if the merger is prohibited.

⁵¹ For example, in the Competition Commission's merger investigations into Stericycle International LLC/Sterile Technologies Group Limited (2006), Clifford Kent Holdings Limited/Deans Food Group Limited (2007) and Stagecoach Group plc/Preston Bus Limited (2009).

⁵² For example, in the CMA's investigation of VTech/Leapfrog, and the Competition Commission's merger investigations into Booker Group plc/Makro Holding Limited (2013), Capita Group plc/IBS OPENSystems plc (2009) and Stagecoach Group plc/Eastbourne Buses Limited (2009).

Procedure for appointment of a monitoring trustee

- 4.7 The CMA will notify the merging parties of its decision to require them to appoint a monitoring trustee by sending a letter containing draft directions. The merging parties will be given a short period to comment on the draft directions (typically no more than 24 hours) before they are finalised and published on the case page.
- 4.8 The CMA maintains a roster of monitoring trustees with whom it has either worked in the past or who would be suitable for similar assignments in the future.⁵³ The roster is supplied to merging parties on request or at around the same time as the letter requiring a monitoring trustee to be appointed. Merging parties are, however, entitled to nominate a monitoring trustee that is not on the roster.
- 4.9 Merging parties are typically given two working days to nominate a suitable monitoring trustee and five working days to appoint a monitoring trustee on terms approved by the CMA, although this timeframe may be altered depending on the facts of the case. When nominating a monitoring trustee to the CMA, merging parties and/or the nominated monitoring trustee should provide evidence on the independence of the monitoring trustee from the merging parties and the relevant experience and qualifications of the monitoring trustee.
- 4.10 The CMA will consider the nomination provided by the merging parties and will approve the appointment if the monitoring trustee is independent and suitably qualified and a satisfactory draft mandate has been provided, including suitable arrangements for remuneration.

Procedure for appointment of a hold separate manager

- 4.11 The procedure for appointment of a hold separate manager will vary depending on the circumstances of the case and, in particular, the existing management arrangements at the acquired business. The CMA will usually invite the merging parties to put forward candidates for the role of hold separate manager, but may also, or instead, look for candidates itself. The CMA will need to approve any candidate proposed by the merging parties prior to appointment.

⁵³ The CMA will periodically seek to expand the roster and meet with potential candidates.

5. Unwinding integration

- 5.1 In certain circumstances, the CMA may consider it necessary to use its powers to unwind integration that has already occurred.⁵⁴ This will be assessed on a case-by-case basis and may include integration which took place following a derogation if it subsequently transpires that the action taken by the parties pursuant to the derogation exceeded what was contemplated by the derogation. 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 appropriate remedial action are particularly acute. Given, in particular, the longer duration of a phase 2 investigation, and the fact that any merger referred to phase 2 raises a realistic prospect of competition concerns, the CMA may be more likely, if the circumstances of the case require, to use its unwinding powers at phase 2 than at phase 1.
- 5.2 Examples of measures to unwind integration that have been required in the past include requiring:
- (a) reversal of any re-branding of the target's assets with the acquirer's branding (eg changing the livery of buses);
 - (b) destruction of, or retention by a third party (eg legal advisers) of, confidential information relating to the acquired business (eg customer lists) that has passed to, or is accessible by, the acquirer;
 - (c) reversal of changes to an organisation's structure, either by requiring departed key staff to be replaced (eg a Finance Director) or a hold separate manager to be appointed to manage the acquired business;
 - (d) separation of functions or decision-making processes, which have previously been integrated (eg sales forces or production lines); and
 - (e) retraction of regulatory requests (eg bus route registrations and de-registrations).
- 5.3 Integration that has already occurred prior to the Interim Measures coming into effect, and any unavoidable consequential effects of this integration, will not be in breach of the Interim Measures.⁵⁵ Nevertheless, the CMA has the

⁵⁴ Pursuant to sections 72(3B), 80(2A) or 81(2A) of the Act.

⁵⁵ The CMA does not consider such unavoidable consequential effects of integration to include situations where parties could, rather than continuing with an existing integrated practice, instead operate such practices separately with the resources available at the acquired party (for example, separate negotiations instead of joint negotiations).

power to order such integration to be subsequently unwound if it judges it necessary to preserve the CMA's ability to pursue its investigation and/or to implement effective remedies.

6. Timing for revoking initial enforcement orders and granting derogations

- 6.1 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.
- 6.2 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.
- 6.3 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 provided also that they are unrelated to the potentiality problematic areas. At phase 1 the CMA will be mindful of the need not to prejudice a potential reference by releasing from the IEO parts of the merger which a phase 2 enquiry might subsequently find to be problematic. Merging parties may be required to provide additional evidence at this stage, along the lines described in paragraph 3.27 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.

7. Compliance statements and enforcement

- 7.1 To help ensure compliance with Interim Measures, the CMA will normally require the Chief Executive Officers (or equivalent or other persons agreed by the CMA) of the businesses subject to Interim Measures to provide a compliance statement.⁵⁶ 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 enterprise and holds sufficient knowledge of its operations.
- 7.2 The compliance statement will typically need to be provided fortnightly at phase 1 and monthly at phase 2.
- 7.3 In addition, the CMA may require further information or a further statement of compliance to be provided on an ad hoc or periodic basis. In certain circumstances, the CMA may also require a representative of the acquired enterprise to prepare a periodic report to the CMA, in such form as may be directed by the CMA, for the purpose of monitoring compliance with any Interim Measures.
- 7.4 The person signing the compliance statement should note that it is a criminal offence recklessly or knowingly to supply to the CMA information which is false or misleading in any material respect.⁵⁷ Breach of this provision can result in fines, imprisonment for a term not exceeding two years, or both.
- 7.5 In addition, failure to comply with Interim Measures without reasonable excuse may result in the CMA imposing a penalty of up to 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom the penalty is imposed.⁵⁸

⁵⁶ The matters set out in the template compliance statement are a starting point for discussion between the CMA and the relevant party or parties. The template will be adapted to meet specific requirements on a case-by-case basis.

⁵⁷ Section 117 of the Act.

⁵⁸ Section 94A of the Act.