

# Interim measures in merger investigations

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# 1. Introduction

## About this guidance

- 1.1 This guidance is intended for merging parties and for legal advisers advising on a transaction where interim measures may be relevant. It should be read in conjunction with [Mergers: Guidance on the CMA's Jurisdiction and Procedure \(CMA2 revised\)](#). Where there is any difference in emphasis or detail between this guidance and other Competition and Markets Authority (**CMA**) guidance, the most recently published guidance takes precedence.
- 1.2 This guidance reflects experience gained since the current system was introduced in April 2014, in particular, recent enforcement action. It replaces CMA60 (*Guidance on initial enforcement orders and derogations in merger investigations*) and those portions of CMA2 [revised](#) which dealt with interim measures.

## What are Interim Measures?

- 1.3 When the 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 which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action.<sup>1</sup> Pre-emptive action is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. The word 'might' means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited.
- 1.4 Measures to prevent or unwind 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 merging parties or agreed:

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<sup>1</sup> There is no exhaustive list of the kinds of conduct that may amount to pre-emptive action. Depending on the nature of the business, pre-emptive action might include actions such as closing or selling sites; selling or failing to maintain equipment; degrading service levels; failing to retain key employees; integrating IT systems; failing to compete at arm's length for tenders; integrating customer-facing functions; weakening the independence of brands; discontinuing competing products; or exchanging confidential commercially sensitive information. See sections 72(8) and 80(10) of the Act.

- (a) an initial enforcement order (**IEO**),<sup>2</sup> which is imposed at phase 1. IEOs can include orders to unwind pre-emptive action which has or may have been taken;<sup>3</sup>
- (b) an interim order (**IO**),<sup>4</sup> which is imposed at phase 2 and replaces any IEO imposed in phase 1.<sup>5</sup> IOs can include orders to unwind pre-emptive action which has or may have been taken;<sup>6</sup> or
- (c) interim undertakings,<sup>7</sup> which are agreed with the merging parties at phase 2 (typically after provisional findings in relation to an anticipated merger) and which replace any IEO imposed in phase 1.

## The importance of complying with Interim Measures

- 1.5 The United Kingdom (**UK**) is unusual in having a voluntary, non-suspensory merger filing regime. Unlike most other jurisdictions, it allows merging parties to self-assess whether to complete a merger without first seeking clearance. The benefit of this approach is that it gives merging parties greater flexibility and reduces regulatory obstacles to those mergers which are clearly unproblematic.
- 1.6 However, the purpose of merger control is to regulate in advance the impact of mergers on the competitive structure of markets.<sup>8</sup> If the CMA decides that a merger does require scrutiny, it is essential to the functioning of the UK's voluntary, non-suspensory merger regime that Interim Measures to preserve the pre-merger competitive structure of markets should be effective.<sup>9</sup> The CMA's ability to impose Interim Measures on merging parties, and to impose penalties where these have not been complied with, are the necessary corollary of having a voluntary regime.

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<sup>2</sup> 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.

<sup>3</sup> Sections 72(3A) and 72(3B) of the Act.

<sup>4</sup> Section 81 of the Act.

<sup>5</sup> The IEO ceases to be in force under section 72(6) of the Act when the CMA makes an IO under section 81 of the Act.

<sup>6</sup> Section 81(2A) of the Act.

<sup>7</sup> Section 80 of the Act.

<sup>8</sup> See the discussion of this issue in *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)* [2015] UKSC 75 at paragraph 4.

<sup>9</sup> The need for robust Interim Measures was recognised in the *Enterprise and Regulatory Reform Act 2013*, which significantly strengthened the CMA's powers in this regard.

- 1.7 If the CMA has decided to investigate, it is critical that any business which has been acquired continues, during the CMA's investigation, to compete independently with the acquiring business and is maintained as a going concern. This is to ensure that the viability and competitive capability of each of the merging parties is not undermined pending the outcome of the CMA's investigation, as this would risk prejudicing the ability of the CMA to achieve an effective remedy if it were to find that the merger gives rise to a substantial lessening of competition (**SLC**). The emphasis of Interim Measures on preserving the viability and competitive capability of the acquired business reflects the extensive experience of the CMA and its predecessor bodies in operating the UK regime, including the results of evaluations of past merger remedies.<sup>10</sup>
- 1.8 The CMA will act proportionately in imposing Interim Measures, whilst having regard to the necessity of preventing pre-emptive action which might prejudice the outcome of a reference or impede the taking of any appropriate remedial action. What is necessary to achieve this in each case is judged on the basis of the facts available to the CMA at any given time. As the CMA's understanding and analysis evolves in a particular case it may be prepared to relax some of the requirements of the Interim Measures, for example, through derogations, variations or lifting the Interim Measures entirely.<sup>11</sup> Equally, the CMA will, if necessary, impose further requirements as its understanding and analysis evolves.
- 1.9 However, merging parties should expect all requests for derogations or other relaxation of Interim Measures to be scrutinised carefully. For the reasons set out above, the CMA will err on the side of caution in deciding whether specific provisions in Interim Measures are still required.
- 1.10 The CMA's role in regulating merger activity, and its ability to do so effectively, is a matter of public importance<sup>12</sup> and the CMA takes merging parties'

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<sup>10</sup> See [Merger Remedy Evaluations](#) (CMA109) at paragraph 5.4: "*The case studies have demonstrated both the costs of putting in place inadequate interim measures and the benefits of putting in place effective interim measures. They have also illustrated how the UK competition agencies have learnt over time how to put in place stronger interim measures so as to allow effective remedies to be implemented if needed later on.*"

<sup>11</sup> Interim Measures are only likely to be lifted entirely if the CMA is confident that the merger does not require remedial action.

<sup>12</sup> *Electro Rent Corporation v CMA* [2019] CAT 4 at paragraphs 120, 200, 201 and 206. The Court stated: "[200] It is a matter of public importance that the merger control process, and the duties that it creates, are strictly, and conscientiously, observed...[201] We do not regard it as a mitigating factor that Electro Rent considered that there were good commercial reasons for terminating the Lease or that termination would make the UK business more attractive to purchasers who did not want the Lease. That was not a judgement for Electro Rent to make and, in any event, was not relevant to the issue of whether the consent of the CMA was required. [206] ... it is of the utmost importance that interim orders be scrupulously complied with, and that a party should not itself form judgments or reach decisions that are properly for the CMA."

compliance with their obligations under Interim Measures very seriously. Where the CMA considers that a person has, without reasonable excuse, failed to comply with Interim Measures, it may impose a penalty of such fixed amount as it considers appropriate, which shall not exceed 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by the person on whom the penalty is imposed.<sup>13</sup> The CMA will make full use of this power to deter activity which undermines the effectiveness of Interim Measures.

- 1.11 It is therefore of the utmost importance that merging parties take steps to understand fully their compliance obligations (including seeking legal advice as needed) and consider carefully the consequences of any action which may be in breach of Interim Measures.

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<sup>13</sup> Section 94A of the Act. For further information on enforcement see section 7 of this document.

## 2. Timing and implementation of Interim Measures

### Timing for imposing Interim Measures

- 2.1 Interim Measures may be imposed at any time during the CMA's review, including:
- (a) before the completion of the merger, to take effect immediately (see the discussion of Interim Measures in anticipated mergers in paragraphs 2.15 to 2.22 below);
  - (b) before the completion of the merger, to take effect on completion (see the discussion of Interim Measures conditional on completion in paragraphs 2.23 to 2.24 below); or
  - (c) on or after completion of the merger, to take effect immediately (see the discussion of Interim Measures in completed mergers in paragraphs 2.25 to 2.28 below).
- 2.2 If a merger has been notified to the CMA then Interim Measures are likely to be put in place upon the completion of the merger (and, in some circumstances, in advance of completion). If the CMA investigates a completed merger which has not been notified to it, it is likely to impose an IEO very shortly after sending an initial enquiry letter.
- 2.3 Where the CMA has reasonable grounds for suspecting that pre-emptive action has been, or may have been, taken before any IEO or IO is imposed,<sup>14</sup> the CMA may order the persons concerned to restore the position to what it would have been had the pre-emptive action not been taken, or to otherwise mitigate its effects. (An IEO or IO with such an effect is referred to as an **Unwinding Order**).<sup>15</sup> The circumstances in which the CMA may consider this to be necessary are described in section 5 below.
- 2.4 At phase 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

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<sup>14</sup> Pre-emptive action is defined at 1.3 above.

<sup>15</sup> This is done under section 72(3B) of the Act at phase 1 and under section 81(2A) of the Act at phase 2.



are in progress or in contemplation which, if carried into effect, will result in two or more enterprises ceasing to be distinct.<sup>16</sup>

- 2.5 At phase 1 the CMA may impose an IEO to prevent pre-emptive action (or reverse it) but may subsequently grant a derogation giving consent to the merging parties to undertake certain actions that would otherwise be prohibited by the IEO. 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 merging parties.
- 2.6 Once a reference to phase 2 has been made, the IEO remains in force unless the CMA decides to impose an IO or accept an interim undertaking. In addition, statutory restrictions prevent merging parties from taking certain actions after a merger has been referred to phase 2 (see also paragraph 2.27).<sup>17</sup> At phase 2, an IO can be imposed or an interim undertaking can be accepted even if no IEO was imposed in phase 1.
- 2.7 During the course of its investigation, the CMA may also take additional steps, where appropriate, to prevent pre-emptive action, including issuing directions pursuant to the IEO or IO to ensure compliance with the Interim Measures, or accepting interim undertakings (typically after provisional findings in relation to an anticipated merger<sup>18</sup>).
- 2.8 The CMA keeps Interim Measures under review throughout the course of an investigation. Additional measures may replace, amend or supplement measures already in place at any stage of the process.<sup>19</sup>
- 2.9 IEOs, IOs and interim undertakings continue in force, subject to subsequent variation, release or revocation by the CMA,<sup>20</sup> until the final determination of the investigation (see section 6).<sup>21</sup>

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<sup>16</sup> 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.

<sup>17</sup> Sections 77 and 78 of the Act.

<sup>18</sup> See, for example, [Reckitt/KY](#) (2015); [Celesio/Sainsbury's Pharmacy Business](#) (2016); [Ladbroke's/Coral](#) (2016).

<sup>19</sup> Sections 72(6)(a)(i), 80(7) and 81(7) of the Act.

<sup>20</sup> Sections 72(4), 80(5) and 81(5) of the Act.

<sup>21</sup> Sections 72(6)(a), 72(6)(b), 80(8) and 81(8) of the Act. Final determination of an investigation occurs when the CMA decides not to refer, accepts undertakings in lieu of reference, (phase 1 outcomes) accepts final undertakings, makes a final order or, in the absence of a SLC finding, on publication of the final report (phase 2 outcomes).

## To whom do the Interim Measures apply?

2.10 ~~In a completed merger,~~ Interim Measures will usually be imposed on both the business that is the direct acquirer ~~and,~~ the acquiring business's ultimate UK parent company. ~~In the case of an anticipated merger, they will usually also be imposed on both,~~ the target business, and the target business's ultimate UK parent.<sup>22</sup> Where the acquiring or target business's ultimate parent company is an overseas company the Interim Measures will, ~~to the extent appropriate,~~ typically also be imposed on the overseas parent. The above will ensure that the target business is appropriately maintained and, if relevant, that no changes are made to the acquiring business if it is possible that it might form the basis of a divestment remedy package.<sup>23</sup>

## Ensuring a smooth process

- 2.11 If Interim Measures are in place, any person concerned who is subject to an order or undertaking should inform the CMA of any planned or past action which might constitute pre-emptive action. Failure to do so may lead the CMA to take action to ensure compliance with the Interim Measures, including (as applicable) issuing an Unwinding Order or formal directions; requiring the appointment of a monitoring trustee or a hold separate manager (see section 4);<sup>24</sup> or imposing a fine (see section 7).
- 2.12 Even where Interim Measures are not in place, the CMA suggests that parties to a merger which is under investigation should keep the CMA informed of planned actions which may be pre-emptive to avoid the disruption of an Unwinding Order.
- 2.13 In both completed and anticipated mergers, the CMA will request the merging parties to provide the CMA with the information relevant to their obligations under the Interim Measures, including but not limited to: (i) details of any actions taken before the Interim Measures came into force which would have been prohibited if the Interim Measures had been in force prior to such actions; (ii) plans for integration of the target business; (iii) the management

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<sup>22</sup> Where the acquirer or the target, or an entity with control over the acquirer or the target, is an investment vehicle, the Interim Measures may be imposed on both the investment vehicle and on the company responsible for overseeing and managing the investment vehicle. Where a private individual(s), rather than a legal entity, has ultimate control over the acquirer or the target, the Interim Measures will typically be imposed on such individual(s). See, for example, Bellis Acquisition Company 3 Limited/Asda Group Limited (2020).

<sup>23</sup> See, for example, [Cesio/Sainsbury's Pharmacy Business](#) (2015), [Euro Car Parts/Andrew Page](#) (2016) and [Motor Fuel Group \(MFG\)/MRH](#) (2018).

<sup>24</sup> Examples of other possible measures include requiring non-disclosure agreements or logs of communications between merging parties.

of information exchanges and appropriate safeguards; and (iv) planned and actual communications with employees and third parties about the merger.

Where pre-emptive action has, or may have, taken place before Interim Measures come into force, the CMA may consider it appropriate to use its powers to issue an Unwinding Order to reverse or mitigate the effect of such action. The circumstances in which the CMA may consider this to be appropriate are described in section 5 below.

2.14 Interim Measures generally require that the target business should be carried on separately, and at arm's length, from the acquiring business. Therefore, if Interim Measures are imposed ~~on~~ a completed merger, the merging parties should immediately consider whether the arrangements they have in place are sufficient to meet this requirement ~~and~~.

2.15 Interim Measures also require each merging party to ~~take any steps~~ all necessary steps to ensure its own compliance. In completed cases, the acquirer is normally additionally responsible for taking all necessary steps to ensure compliance by the target. The CMA recognises that merging parties' ability to take steps to ensure compliance is affected by the hold separate provisions contained within Interim Measures and may also be constrained by the extent to which they have a controlling interest (within the meaning of the Enterprise Act 2002) in the other merging party (so, in practice, the nature of the obligations on an acquiring business is likely to differ to that on a target business). Subject to those factors, the CMA considers that merging parties are able to comply with the Interim Measures, both sets of obligations, for example by relying on legal advisers to handle any relevant confidential information, as appropriate.

2.16 The obligations contained within Interim Measures are of vital importance to the functioning of the UK's voluntary regime. Accordingly, the CMA considers that merging parties should take a risk-based approach to the design and implementation of any steps taken to ensure compliance with Interim Measures; this involves undertaking a thorough review of each area of the merging parties' respective businesses in order to identify any risks for compliance. The CMA expects that following such an approach should enable merging parties to ensure that any steps taken are appropriately tailored to their respective businesses. The CMA generally considers that the following steps are likely to be, as a minimum, necessary to ensure effective compliance with Interim Measures:

(a) Tailored guidance and staff training: Building on their initial risk assessment process, the merging parties should undertake activities designed to assist affected staff to understand the key relevant aspects of the applicable Interim Measures and what they individually are required to

do to ensure compliance. This should include the provision of tailored guidance to all members of staff, management and the board and additional training for any person operating in higher risk areas.

(b) Internal communications: Compliance measures should be reviewed periodically to ensure that they are still adequate, for example, prior to submitting compliance statements. In particular, it reinforced by periodic internal written communications from management and (where applicable) the board which reiterate the importance of compliance. The CMA considers that the nature of the information contained within such communications is complex and is therefore likely to be best conveyed in writing, so that staff have a clear record to refer back to.

(c) Governance structures: The merging parties should establish clear internal governance structures to oversee compliance with Interim Measures, involving management and the Board, as applicable.

(a)(d) Delegations of authority, where appropriate: The acquirer must ensure that it is clear to the person managing the target business while the Interim Measures are in effect what they can and should do without reference to the acquirer.<sup>25</sup> While it is for the merging parties to decide how to achieve compliance, the simplest way to achieve clarity is The CMA considers that this can be achieved most effectively through a written delegation of authority. For information from the acquirer (see further paragraphs 3.32 to 3.36 on the restrictions on the target business which may be acceptable to the CMA see paragraphs 3.32 to 3.36. In addition, merging parties should ensure that all affected staff understand the Interim Measures and what they individually are required to do to ensure compliance.).<sup>24</sup>

(e) Ongoing oversight and reporting mechanisms. In order to ensure that compliance activities remain adequate, the merging parties should put in place internal processes to review those activities periodically, for example, prior to submitting compliance statements. Those processes should involve reporting into any governance structures established for the purpose of ensuring compliance with the Interim Measures.

2.17 Upon imposing Interim Measures (or before taking a decision to impose Interim Measures in the context of an anticipated transaction), the CMA will seek to obtain information from the merging parties relevant to their obligations under the Interim Measures (see paragraph 2.13). In that context,

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<sup>25</sup> See the penalty notice issued to Ausurus and EMR (2018).

the CMA may engage with merging parties on whether their proposed approach to compliance is sensible and may if appropriate provide an indication where such proposals raise significant concerns. The CMA will not, however, be able to pre-emptively give assurances that a particular approach to compliance will be sufficient for the purposes of the Interim Measures. Ultimately, it is for the merging parties to decide how to achieve compliance.

## Interim Measures in anticipated mergers

### ***When will Interim Measures be imposed prior to completion?***

[2.142.18](#) The risk of pre-emptive action in an anticipated merger is generally much lower than in a completed merger. Accordingly, the circumstances in which the CMA might consider that Interim Measures need to take effect before a merger completes (referred to as an anticipated IEO or IO) are relatively rare.<sup>26</sup>

[2.152.19](#) In contrast, mergers which are to complete during the CMA's investigation are more likely to be subjected to Interim Measures conditional on completion and are considered below at paragraphs 2.23 to 2.24.

[2.162.20](#) To assess whether Interim Measures are appropriate in cases which are not expected to complete during the CMA's investigation, the CMA may request the merging parties to an anticipated merger to provide the CMA with the relevant transaction documents (either in draft or final form) and the details of any actions which the merging parties have taken, or are planning to take prior to completion.

[2.172.21](#) The CMA might consider Interim Measures necessary in relation to an anticipated merger where the steps which the parties are taking, or are about to take, would be prohibited if the standard template Interim Measures were in force. For example, where the merging parties have begun jointly to conduct commercial negotiations with customers or suppliers; or have otherwise affected the way in which one or both of the merging parties engage with, or are perceived by, customers or suppliers.

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<sup>26</sup> See, for example, [Linery/Ulster Farm](#) (2015), [Mole Valley Farmers/Countrywide Farmers](#) (2018), [Castle Water/Invicta Water](#) (2018), [Lakeland Dairies/LacPatrick Dairies](#) (2018), [CareTech/Cambian](#) (2018) and [Aer Lingus/Cityjet](#) (2018). Most of these transactions completed after the IEO was put in place but before the CMA had concluded its investigation.

## ***When might Interim Measures affect completion?***

[2.182.22](#) At phase 1, 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 completion would necessarily result in pre-emptive action).<sup>27</sup> In other words, at phase 1, the CMA is typically concerned with limiting integration (maintaining pre-merger competitive conditions and ensuring the continued effective operation of the acquiring and target businesses) rather than preventing completion.

[2.192.23](#) 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 pending final determination of the reference.<sup>28</sup> In practice, given this statutory restriction and the fact that the reference test has been met, the CMA is unlikely to consent to the completion of an anticipated transaction during phase 2 proceedings. In some cases,<sup>29</sup> the CMA may be willing to consent to completion where this is necessary to allow the transaction to complete at a global level, subject to Interim Measures and sufficient safeguards (likely to include hold separate arrangements and a monitoring trustee) being put in place in order to prevent pre-emptive action.

[2.202.24](#) If the CMA is concerned that an anticipated merger may complete during the CMA's phase 2 investigation and that this could prejudice the reference and/or its ability to remedy any SLC resulting from the merger, the CMA may prevent completion of the merger pending final determination of the reference.<sup>30</sup> This may be the case where there is no Interim Measure or statutory prohibition which would preclude completion, for example, because

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<sup>27</sup> This might be the case, for example, where: (a) the act of completion would directly lead to the loss of key staff or management or operational capability (eg through the loss of customer or supplier contracts) for the target 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; (b) the act of completion would result in significant changes to the acquiring or target businesses, which would be difficult or costly to reverse, eg the loss of regulatory licences.

<sup>28</sup> 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 the target business's shares, 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 business. Separate provisions apply where references are made on public interest grounds (see paragraphs 7 and 8 of Schedule 7 to the Act).

<sup>29</sup> See, for example, [Iron Mountain/Recall](#) (2015).

<sup>30</sup> 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](#) (2014), the CMA accepted undertakings from both merging 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.

the transaction relates to the acquisition of assets rather than further shares in the target business or because of the exceptions to which the bar on transfer of shares is subject.

[2.242.25](#) If, in relation to an anticipated merger, the CMA finds a SLC at phase 2, this may lead to a need for further Interim Measures (for example, the appointment of a monitoring trustee to oversee a divestiture process: see section 4 below).

## Interim Measures conditional on completion

[2.222.26](#) In cases where an anticipated merger is expected to complete during the CMA's investigation, but the CMA considers that the need for Interim Measures would arise only once completion has taken place, the CMA is likely to issue Interim Measures in advance of completion, but with the operative provisions only taking effect upon completion.<sup>31</sup>

[2.232.27](#) In such cases the merging parties should keep the CMA apprised of their plans for completion and initiate early discussions in relation to the Interim Measures and any necessary derogations. This will enable the CMA to minimise the inconvenience to the merging parties resulting from Interim Measures by considering, and if appropriate granting, derogations prior to completion.

## Interim Measures in completed mergers

[2.242.28](#) Interim Measures serve a particularly important function where the merger is completed before it is examined by the CMA.<sup>32</sup>

[2.252.29](#) At phase 1, an IEO has a precautionary purpose, and the CMA would therefore normally impose an IEO in completed merger cases which it is investigating, regardless of the level of control acquired (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<sup>33</sup> or there are self-

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<sup>31</sup> For example, [Tobii/Smartbox](#) (2018), (IEO imposed on 28 September 2018 and took effect on completion of the merger on 1 October 2018); [PayPal/iZettle](#) (2018-2019) (IEO imposed on 19 September 2018 and took effect on completion of the merger on 20 September 2018); and [Global/Semper Veritas](#) (2018-2019) (IEO imposed on 14 November 2018 to take effect on completion).

<sup>32</sup> *Electro Rent Corporation v CMA* [2019] CAT 4 at paragraph 120.

<sup>33</sup> 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



evidently no competition concerns.<sup>34</sup> Merging parties who believe that they might satisfy the criteria for either of these exceptions are encouraged to discuss this with the CMA prior to completing their transaction.

[2.262.30](#) At phase 2, during the course of an inquiry into a completed merger, the Act prohibits the merging parties from taking any further steps to integrate without the CMA's consent, where no Interim Measures have been put in place.<sup>35</sup> This statutory restriction in relation to completed mergers prevents the merging 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-emptive action which falls outside the remit of these statutory restrictions,<sup>36</sup> the CMA will normally seek Interim Measures in relation to completed mergers at phase 2 to supplement the prohibitions set out in the Act.

[2.272.31](#) An IEO or IO is an order and can therefore be imposed without negotiation with the merging parties (see paragraph 2.4).<sup>37</sup> An IEO or IO in a completed merger will take effect as soon as the order is made.<sup>38</sup>

## Form of Interim Measure and 'tailored' Interim Measures

[2.282.32](#) 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](#), which will be updated from time to time. Discussions over the scope of the IEO in completed mergers will therefore almost always take the form of derogations (which the CMA may grant simultaneously with the IEO or after the IEO is imposed) rather than amendments to the standard form IEO. This approach is intended to ensure

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is very rare; however, it might be the case, for example, where the target business 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.

<sup>34</sup> 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 apply where the CMA has initiated an investigation on its own initiative through its mergers intelligence function.

<sup>35</sup> Section 77 of the Act.

<sup>36</sup> For example, the acquiring business may have significant incentives to run down or neglect the business or assets of one of the merging businesses (usually the target business), or to extract know-how and other commercially sensitive information from the target business in order to reduce its competitive capability should divestiture be required.

<sup>37</sup> As noted in footnote 2, 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.

<sup>38</sup> For this reason, the CMA will, where possible, provide merging parties (or their advisers) with advance notice of the imposition of an IEO or IO. The CMA generally seeks to avoid unnecessary inconvenience to the merging parties but will impose an order without notice if it considers it necessary to prevent pre-emptive action.



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.

2.292.33 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, provided that the merging parties have engaged with the CMA on such derogations on a timely basis.<sup>39</sup> Given the importance of speed, 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 or IO may be imposed without prior discussion of possible derogations. The CMA therefore encourages the merging parties to provide fully specified, reasoned and evidenced submissions to facilitate early discussions if the merging parties consider it necessary to have derogations in place on completion.

2.302.34 Where the CMA is investigating 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).<sup>40</sup> The CMA will consider taking this approach where, on the facts of the case, this is likely to optimise procedural efficiency (for example, because it would minimise the number of derogation requests that may be required to be considered) and avoid unnecessary disruption to the merging parties' businesses.<sup>41</sup>

2.312.35 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 standard form IEO is designed to prevent do not arise; and/or (b) the provisions of the standard form IEO may lead to undesirable consequences.

2.322.36 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

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<sup>39</sup> For example, if no IT systems have been acquired, the CMA may derogate from the provisions prohibiting the integration of IT systems.

<sup>40</sup> 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.

<sup>41</sup> See, for example, [Arriva Rail North/Northern rail franchise](#) (2016) and [Aer Lingus/Cityjet](#) (2018).

reach such a view where sufficient time and information are available.<sup>42</sup> As explained in paragraph 2.29, a standard form IEO with relevant derogations is likely to be the appropriate approach in nearly all cases.

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<sup>42</sup> 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 form 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 merging parties are subject to other sources of regulation or governance that make particular provisions of the standard form IEO unnecessary). It may therefore be difficult for the CMA to make an informed decision on complex derogation requests early on in its investigation and a decision on such requests may be deferred until an understanding of the above factors has been developed.

## 3. Derogations

### Requesting a derogation

- 3.1 The CMA may (on written 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.<sup>43</sup> Derogations will not be given retrospectively to approve actions that have already occurred and that may be in breach of Interim Measures, nor does the giving of a derogation preclude the CMA from taking action against any steps that were in breach of the Interim Measures prior to the derogation having been granted.
- 3.2 Merging parties should engage early with the CMA to discuss potential derogation requests that are considered urgent and necessary by the merging parties. Derogations are more likely to be granted if requests are fully specified, reasoned and supported by relevant evidence, including, for example:<sup>44</sup>
- (a) a full and detailed explanation of the action the merging party wishes to take. For example, terms such as ‘integration planning’ should be explained fully in terms of what business functions any integration planning will cover; what types of information would be shared (and with whom);
  - (b) the relevant provisions of the Interim Measures against which the derogation request is made;
  - (c) why the derogation request is being made<sup>45</sup> - the purpose of the derogation should be as detailed and clear as possible;
  - (d) why the action proposed does not amount to pre-emptive action;<sup>46</sup>

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<sup>43</sup> Sections 72(3C), 80(2B) and 81(2B) of the Act.

<sup>44</sup> See also paragraph 3.63.

<sup>45</sup> For example, this might be to safeguard the viability and competitive capability of the target 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 or to the acquiring business’s plans for the target business are unlikely to be granted.

<sup>46</sup> Sections 72(8) and 80(10) of the Act define pre-emptive action as action which **might** prejudice the reference concerned or impede the taking of any action which may be justified by the CMA’s decisions on a reference.

- (e) a full description of any proposed safeguards<sup>47</sup> (eg non-disclosure agreements or limits on the actions that the merging parties can take under the derogation) to ensure that the action proposed does not create any risk of pre-emptive action;
- (f) why the action proposed would not be difficult or costly to reverse;
- (g) whether the derogation request is urgent (and if so, how urgent it is and why it is strictly necessary to safeguard the viability and competitive capability of the target business in advance of the CMA's decision on the merger);
- (h) proposed draft text for the derogation consent letter based on the CMA's standard [derogation request template](#) (as amended from time to time), which is available on the CMA's website; and
- (i) any other information which may assist the CMA in considering the request. More detail is provided in the sections below regarding additional information that may be required based on the type of derogation request being sought.

3.3 Merging parties should note that the information provided to support a derogation request may also be used in the substantive analysis of the merger (including at phase 2 if the merger 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.<sup>48</sup> For further information on compliance and enforcement see section 7 of this document.

3.4 All derogations will be given in writing and published on the case page. Prior to publishing such a notice of consent, the CMA will provide the merging parties seeking consent with a reasonable opportunity (at least one working

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<sup>47</sup> In this regard, the large volume of derogation consent letters previously issued by the CMA, which are available (in non-confidential form) on the CMA's website, provide a useful source of the types of safeguards the CMA may require.

<sup>48</sup> Parties requesting a derogation will be required 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.

day) to revert with any requests for business secrets to be redacted from the published version of the document.

- 3.5 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, and which are sufficiently evidenced). The involvement of a monitoring trustee (see section 4) may enable the CMA to grant more complex derogation requests, as well as speed up the CMA's decision on whether to grant derogation requests.
- 3.6 Where possible, it is preferable for merging parties to collate derogations sought within a single comprehensive written request. A drip-feed of multiple derogation requests can unnecessarily hamper the CMA's investigation. This may ultimately cause a delay in lifting the Interim Measures completely (see section 6).
- 3.7 When considering whether a derogation should be requested, merging parties should note that it is of the utmost importance that Interim Measures be scrupulously complied with, and that a merging party should not itself form judgements or reach decisions that are properly for the CMA.<sup>49</sup> ~~Pre-emptive action is a broad concept. It concerns conduct which might prejudice the reference or which might impede action justified by the CMA's ultimate decision. The word 'might' means that it is the possibility of prejudice to the reference or an impediment to justified action which is prohibited.~~ Interim Measures catch more than just actual prejudice or impediments, which is why the onus is on the addressee of the Interim Measure to seek consent from the CMA if their conduct creates the possibility of prejudice or an impediment.<sup>50</sup>
- 3.8 Merging parties that are subject to Interim Measures may 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 the 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. For further information on revocation see section 6 of this document.

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<sup>49</sup> *Electro Rent Corporation v CMA* [2019] CAT at 206. See also *Intercontinental Exchange Inc v CMA and Nasdaq Stockholm AB* [2017] CAT 6 at paragraph 223.

<sup>50</sup> *Intercontinental Exchange Inc v CMA and Nasdaq Stockholm AB* [2017] CAT 6 at paragraph 220. See also *Electro Rent Corporation v CMA* [2019] CAT 4 at paragraph 200 and *Stericycle International LLC v Competition Commission* [2006] CAT 21 at 128-129.

## **Exchange of information between merging parties prior to Interim Measures being imposed**

- 3.9 Acquiring parties have a legitimate need to conduct due diligence on potential acquisition targets prior to completing a merger. When merging parties exchange information prior to the imposition of Interim Measures, it is incumbent on them (assisted by their legal advisers) to self-assess and ensure that they are complying with any relevant laws, in particular Chapter 1 of the Competition Act 1998 (**CA98**) and Article 101 of the Treaty on the Functioning of the European Union (**TFEU**).
- 3.10 Where information which is confidential, proprietary or otherwise commercially sensitive is shared between the merging parties (for example, for the purposes of due diligence) prior to Interim Measures coming into force and the exchange has the potential to impact competition, then safeguards are likely to include:
- (a) taking steps to ensure that such information is fully ring-fenced (with appropriate IT firewalls in place and physical ring-fencing measures where needed); and
  - (b) restricting information to internal and/or external “clean teams” and requiring all individuals who had access to such information to enter into non-disclosure agreements.
- 3.11 If the recipient of the information wishes to continue to access it following the imposition of the Interim Measures, the parties, together with their legal advisers, should immediately re-assess the safeguards which have been put in place to ensure that the information flow is compliant with the Interim Measures, as explained in paragraphs 3.12 to 3.18.

## **Exchange of information between merging parties during Interim Measures**

- 3.12 As mentioned at paragraph 3.9 above, prior to the imposition of Interim Measures, merging parties have a legal duty to self-assess whether information exchanges are compliant with relevant laws, in particular the CA98 and the TFEU. The requirements of Interim Measures are in addition to these statutory requirements.
- 3.13 Interim Measures aim to preserve the stand-alone viability and competitive capability of each of the merging businesses, and therefore prohibit pre-

emptive action.<sup>51</sup> Once Interim Measures are in place it is incumbent on the merging parties, assisted by their legal advisers, to assess whether information exchange might amount to pre-emptive action, and apply for a derogation if it might.

3.14 Records should be kept of communications between the merging parties. The CMA may check that, in self-assessing, the merging parties have taken appropriate steps to control the information flow. If it does so, it will expect to see that measures to avoid pre-emptive action, such as those mentioned in paragraphs 3.15 to 3.18, have been carefully considered.

3.15 The following are examples of what the merging parties, assisted by their legal advisers, should consider if confidential or proprietary information is to be exchanged between the merging parties; Interim Measures are in place; and there is a competitive nexus between the parties (for example, where the merging parties are actual or potential competitors or upstream and downstream of one another):

(a) the purpose of exchanging confidential or proprietary information and why it is **strictly necessary** for this exchange to take place;

(b) the types of information which need to be shared (and the frequency with which this information needs to be shared) with reasons for believing that this information is **strictly limited** to that which is necessary to achieve the purpose. Where the purpose relates to compliance with external obligations, the precise wording of the relevant provisions of the external obligation should be carefully considered; and

(c) the safeguards (procedural or otherwise) that need to be put in place to ensure that any confidential or proprietary information is only shared to the extent **strictly necessary**.

3.16 Procedural safeguards, which should be clearly set out in writing, may, for example include:

(a) the information should be disclosed only to a set of named individuals (whose roles and functions should also be recorded). The CMA expects the merging parties to limit the recipients of the information to those with a **strict need** to receive that information. In particular, the merging parties should ensure that commercially sensitive information is not shared with, or used by, staff who have any control or influence over commercial

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<sup>51</sup> Sections 72(8) and 80(10) of the Act define pre-emptive action as action which **might** prejudice the reference concerned or impede the taking of any action which may be justified by the CMA's decisions on a reference.

strategy or decision-making (unless **strictly necessary**).<sup>52</sup> Any information shared with individuals with control or influence over commercial decision-making or commercial activities for the acquiring business (such as members of the acquiring business's senior management) should be sufficiently aggregated in nature to ensure that it is not commercially sensitive;

- (b) any individual in receipt of such information should enter into a non-disclosure agreement that: (i) prevents them from sharing the information with any individual who does not **strictly require** access to the information for this purpose; (ii) **strictly limits** the uses to which the information may be put; and (iii) remains in place until the Interim Measures are revoked or the merger is cleared; and
- (c) robust physical and IT firewalls should be put in place to prevent unauthorised individuals from accessing the disclosed information.

The CMA may request a copy of documents setting out the safeguards which were put in place before information was exchanged.

3.17 Where financial information is to be shared while Interim Measures are in place, the merging parties should create a reporting template detailing any information that is to be shared. While it is for the merging parties to self-assess, exchange of financial information is unlikely to be appropriate if it goes beyond:

- (a) consolidated profit and loss account information which is limited to historic consolidated revenues and historic consolidated earnings before interest, tax, depreciation and amortisation (EBITDA); and
- (b) historic and high-level consolidated balance sheets and cash flow information (eg which does not reveal a granular breakdown of capital expenditure).

3.18 In particular, while Interim Measures are in place it is unlikely to be appropriate to share the target business' consolidated gross margins; prices or margins of specific products or services; revenues or margins of individual retail or business units; granular cost data (or any information that would enable the acquiring business to deduce such granular data); or management commentary on the financial information. The CMA may request a copy of the

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<sup>52</sup> It may therefore be necessary for reporting lines within the merging parties to be adjusted. See, for example, [VTech/LeapFrog](#) (2016-2017).



reporting template to check that, in self-assessing, the merging parties have limited the exchange of financial information to what is appropriate.

## Integration which has completed prior to Interim Measures coming into force

- 3.19 The standard form Interim Measure requires the merging parties to disclose to the CMA any integration actions that occurred, or were completed, prior to the Interim Measure coming into force.<sup>53</sup> Integration that has already occurred or was completed prior to the Interim Measures coming into force will not be in breach of the Interim Measures.
- 3.20 If the merging parties enter into an obligation or take a decision before the Interim Measures take effect, but the obligation will be performed or the decision implemented, or continue to be implemented, after the Interim Measures have come into force, then the merging parties should make full disclosure of the situation to the CMA and seek a derogation if any further or continuing action might breach the Interim Measures.
- 3.21 The CMA has the power to issue an Unwinding Order to require integration to be unwound if it judges it necessary to preserve the CMA's ability to pursue its investigation and/or to implement effective remedies (see section 5).

## Actions taken in the ordinary course of business

- 3.22 The standard form Interim Measures allow, without the need for a derogation, action taken in the 'ordinary course of business' and define this as matters connected to the day-to-day supply of goods and/or services by each of the merging parties. It does not include matters involving significant changes to their respective organisational structure or to the post-merger integration of the merging parties or the whole or parts of their businesses.<sup>54</sup> By way of example, while the scope of 'ordinary course of business' will vary case-by-case, the CMA would generally not regard the termination of a significant ~~head~~-lease, major redundancy plans, or sales of assets that might impair either business's ability to compete independently as falling within the definition of 'ordinary course of business'.<sup>55</sup> Whilst a given course of action

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<sup>53</sup> Paragraph 4 of the standard form IEO.

<sup>54</sup> *Electro Rent Corporation v CMA* [2019] CAT at 127: 'In our view, simply as a matter of the language of the definition, a reasonable person reading the definition "matters connected to the day-to-day supply of goods and/or services by the ... Electro Rent Corporation business" would have concluded, at the very least, that it was possible that the proper view was that the definition was restricted to Electro Rent's trading operations and did not extend to the disposal of its only UK premises'.

<sup>55</sup> See the penalty notices in the [Electro Rent](#) and [Vanilla Group](#) cases.

may be in the best interests of a business, this does not mean it will fall within the meaning of ordinary course of business as defined in the Interim Measures.<sup>56</sup>

- 3.23 If merging parties are uncertain as to whether an action falls within this definition they should consult the CMA.<sup>57</sup>

### **Derogations generally granted by the CMA in previous cases**

- 3.24 The CMA will take into account the particular circumstances of the case when assessing the risks of pre-emptive action, and therefore the derogations granted by the CMA in previous cases may not apply across all future cases. The CMA has generally granted derogation requests (where sufficiently specified, reasoned, and evidenced) in relation to:

- (a) the provision of certain essential services by the acquiring business to the target business;
- (b) the delegation of authority for the target business which clearly set out the limited circumstances in which the acquiring business can take decisions over certain commercial or operational actions proposed by the target business; and
- (c) access for the acquiring firm to certain financial information from the target business for the purpose of financial oversight.

- 3.25 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 essential services by the acquiring business to the target business***

- 3.26 Derogation requests are commonly received for the provision of certain essential services by the acquiring business to the target business, for example, the provision of back-office support, or the acquiring business granting the target business access to its group credit facilities or insurance coverage.

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<sup>56</sup> *Electro Rent Corporation v CMA* [2019] CAT at 128.

<sup>57</sup> *Electro Rent Corporation v CMA* [2019] CAT at 138: “The decision as to whether [terminating the lease] would promote the divestment was not his to make... We accept the CMA’s submission that, even if Mr Brown believed that serving the Break Notice would promote *Electro Rent’s* commercial interests, he should have consulted the CMA and sought a derogation from the Interim Order.” See also *Intercontinental Exchange v CMA* [2017] CAT 6 at 221-223.

- 3.27 The potential provision of back-office support by the acquiring business to the target business 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 viability and competitive capability of the target business, the CMA may, in appropriate circumstances, allow the provision of some forms of administrative support to the target business by the acquiring business.
- 3.28 Within this context, the CMA is likely to pay particular consideration to the relevance to the target business's commercial activity of the back-office functions that the acquiring business proposes to provide. It will also consider the impact that the provision of such functions by the acquiring business might have on the potential transfer of all or parts of the target business if remedies were ultimately required.
- 3.29 A derogation in relation to back-office support to be provided by the acquirer is unlikely to be granted where the target business 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 acquiring business ultimately intends to use its own back-office functions to support the target business) or where a transitional services arrangement enables the target business to continue using the vendor's back-office functions. Where transitional services arrangements with the vendor are coming to an end, the CMA expects the merging parties first to explore the possibility of an extension of the transitional services arrangements before any derogation requests are considered. In situations where the merging parties plan to terminate some, or all, of the transitional services arrangements with the vendor early, the CMA would expect the merging parties to explain in detail the reasons for the early termination and why the target business cannot outsource such arrangements to a third-party provider that is independent of the acquiring business.
- 3.30 In previous cases, the CMA has granted derogation requests (where sufficiently specified, reasoned, and evidenced) in relation to certain essential services including the provision of:
- (a) payroll, HR, and other back-office functions;<sup>58</sup>

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<sup>58</sup> See, for example, [Euro Car Parts/Andrew Page](#) (2016-2018) and [Tayto Group/The Real Pork Crackling Company](#) (2018).

- (b) access to the acquiring business's group credit arrangements or funding;<sup>59</sup>
- (c) access to the acquirer's group insurance coverage to the target business;<sup>60</sup> and
- (d) legal services.<sup>61</sup>

3.31 By contrast, the CMA is unlikely to grant derogations in relation to the integration of IT systems, customer-facing functions such as sales and marketing, or R&D and technological support (eg software development and design), which are typically likely to have a material impact on the commercial activity of the target business and the development, manufacture, and sale of the target business's products or services.

### ***Delegations of authority for the target business***

3.32 In the context of a completed transaction, the CMA understands that, in some cases, the acquiring business may wish to exercise some oversight over the commercial activity of the target business in order ensure that the target business is being maintained as a going concern.<sup>62</sup>

3.33 In such cases, the CMA is willing to consider whether, in specified circumstances, it is appropriate to require the target business to seek approval from the acquiring business for a proposed course of action. Actions in relation to which a requirement for the acquirer's approval may be appropriate include:

- (a) approval of capital expenditure and operating expenditure, which had not been budgeted for in the target business's pre-merger business plan and/or above a certain financial threshold;
- (b) entering into customer/supplier contracts above a certain financial threshold;

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<sup>59</sup> See, for example, [PayPal/iZettle](#) (2018-2019), [Valeo Foods/Tangerine Confectionery](#) (2018), [CareTech Holdings/Cambian Group](#) (2018-2019), [Rentokil Initial/MPCL](#) (2018-2019), [Tobii/Smartbox](#) (2018-2019) and [Global Radio Services/Semper Veritas \(Exterion\)](#) (2018-2019).

<sup>60</sup> See, for example, [PayPal/iZettle](#) (2018-2019) and [CareTech Holdings/Cambian Group](#) (2018-2019).

<sup>61</sup> See, for example, [Interserve/Initial Facilities](#) merger inquiry (2014). 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 business by the acquiring business.

<sup>62</sup> See, for example, [CareTech Holdings/Cambian Group](#) (2018-2019), [Rentokil Initial/MPCL](#) (2018-2019), [Tobii/Smartbox](#) (2018-2019) and [Global Radio Services/Semper Veritas \(Exterion\)](#) (2018-2019).

- (c) approval of expenses of the Managing Director of the target business; and
- (d) entering into contracts with uncapped liability.

3.34 The merging parties must demonstrate, to the satisfaction of the CMA, that the proposed terms of the delegation of authority to the management of the target business do not significantly restrict the ability of the target business to operate independently from the acquiring business, or to pursue its pre-merger business plan.<sup>63</sup> In deciding on the appropriateness of the delegated authority levels, the merging parties should consider how frequently the delegated authority levels would be reached. The CMA is unlikely to accept a delegation of authority which requires the target business to approach the acquiring business for approval of a proposed expenditure or course of action on a regular basis.

3.35 The merging parties need to consider who within the acquiring business is the most appropriate person to be consulted by the target business on such matters. The merging parties should ensure that the person exercising such oversight of the target business does not have a commercial or strategic role at the acquiring business.

3.36 In addition, the CMA would also seek to ensure that the following safeguards are in place:

- (a) the information shared with the selected individual at the acquiring business is no more than is **strictly necessary** to allow the individual to reach a view on the specific matter at hand and should not include any commercially sensitive information;
- (b) the selected individual at the acquiring business must not consult with any other individual at the acquiring business in taking decisions on the specific matters where the target business's level of delegated authority has been exceeded;
- (c) the CMA may, at its discretion, also request to be provided with a summary of the information shared with the selected individual at the acquiring business after a request for approval has been submitted by the target business;

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<sup>63</sup> In technology sectors, competitive capability can depend on ongoing R&D expenditure and activity and the need to maintain a pipeline of new products to replace obsolete products.

- (d) the CMA is notified of any proposed veto and the reasons for this in advance of any such veto being exercised; and
- (e) the selected individual at the acquiring business who is to be consulted under the delegation of authority will be required to sign a non-disclosure agreement in a form agreed by the CMA.

### ***Provision to the acquiring business of certain financial information relating to the target business***

- 3.37 The CMA recognises that, in the context of a completed transaction,<sup>64</sup> there may be a need for the acquiring business to maintain high-level financial oversight of the target business in order to preserve its ongoing viability and competitive capability pending completion of the CMA's merger review process. The CMA may be willing to consider derogation requests from the merging parties for such limited purposes.<sup>65</sup>
- 3.38 The CMA is unlikely to grant derogations which require the target business to provide more than the financial information mentioned in paragraph 3.17, on the basis that such information should be considered sufficient for the limited purposes of financial oversight.
- 3.39 In the event that the merging parties consider that access to further, more granular financial information is strictly necessary, the merging parties should provide the CMA with compelling reasons (see also paragraph 3.18).

### **Guidance on more complex derogations**

- 3.40 The CMA may consider granting more complex derogations which concern:
- (a) parts of one merging party's business that are not engaged in activities related to the other merging party's business;
  - (b) parts of the merging parties' businesses that have no relevance to their relevant activities in the UK; or

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<sup>64</sup> In rare circumstances, the CMA may be willing to consider whether it would be appropriate for such financial oversight to be afforded to the acquiring business in the context of an anticipated merger, subject to strict safeguards being in place.

<sup>65</sup> See, for example, [CareTech Holdings/Cambian Group](#) (2018-2019), [Rentokil Initial/MPCL](#) (2018-2019), [Global Radio Services/Semper Veritas \(Exterion\)](#) (2018-2019) and [Core Assets Group/Partnership in Children's Services](#) (2019).

(c) the replacement of key staff or substantive changes to the merging parties' organisational or management structures.

3.41 Derogation requests that have the effect of excluding from the scope of any Interim Measure any part of the target business, generally carry higher risks of pre-emptive action. This is because:

(a) the overlapping and non-overlapping (or the UK and non-UK) parts of the target business may have complex operational and financial links and share certain assets. These may be difficult to separate comprehensively; and

(b) it would be difficult to reverse the effects of such derogations if it became necessary to do so as part of any effective divestment remedy.

3.42 Possible justifications for such derogations, and the safeguards that may be required to be put in place to support them, are described further below.

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

3.43 In some cases, the CMA may be willing to grant derogations where it is clear that certain parts of the target business's activities are not related to those of the acquiring business. A derogation on this basis will only be granted where the CMA is able to establish clearly 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.

3.44 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 or competitive capability of the 'related' business (which will remain subject to the Interim Measure) is not dependent on 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, nor do staff have dual responsibilities in respect of both the 'related' and 'non-related' businesses;

- (c) the tangible and intangible assets (including intellectual property rights) of the 'related' business, are not also used by the 'non-related' business;
- (d) there are no customers and/or supplier contracts/relationships which are common to both the 'related' and 'non-related' businesses;
- (e) the provision of back-office support functions (eg accounting, legal, HR, procurement) to the 'related' and 'non-related' businesses does not give rise to a risk that commercially-sensitive, confidential or proprietary information of the 'related' business can flow back to the 'non-related' business;
- (f) the 'related' and 'non-related' businesses operate on separate IT systems or that shared IT systems are otherwise capable of being effectively ring-fenced; and
- (g) 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.

3.45 In certain 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 acquiring business holds an interest are not active in (and could not enter) any markets relevant to the target business.<sup>66</sup>
- (b) *Non-overlapping sites*: for example, where the CMA is conducting a local area analysis (eg in a retail merger case) and there are no wider (eg national) effects, it may be possible, as the CMA's investigation develops, to grant derogations exempting specific non-overlapping sites.<sup>67</sup>
- (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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<sup>66</sup> See, for example, [Harman/Bang & Olufsen](#) (2015) and [Immediate Media Company Bristol/Future Publishing](#) (2014-2015).

<sup>67</sup> See, for example, [MRH \(GB\)/Esso Petroleum](#) (2015-2016) and [Pure Gym/LA Fitness](#) (2014).



that are active only in relation to products/services in which the CMA has been able to dismiss possible competition concerns.<sup>68</sup>

- 3.46 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. As mentioned in paragraph 3.43, the CMA is likely to be particularly cautious about granting these types of derogations at the earlier stages of its investigation.
- 3.47 Where integration is permitted in relation to only part of the merging parties' business, the Interim Measures will generally prevent staff from the parts of the business that remain subject to the Interim Measures from contacting former colleagues who are no longer subject to the Interim Measures. Such contacts should also be subject to procedural safeguards (such as those described in paragraphs 3.15 to 3.16 above).
- 3.48 Merging parties requesting derogations on this basis should be able to show (supported by relevant evidence) why such contacts are strictly necessary (eg to fulfil existing customer agreements or maintain existing customer relationships). Such contacts should also be subject to procedural safeguards (such as those described in paragraph 3.15 to 3.16 above).

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

- 3.49 The CMA may consider granting 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.<sup>69</sup>
- 3.50 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 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 business's products in the UK. The relevant employees were also required to

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<sup>68</sup> See, for example, [Hain Frozen Foods/Orchard House Foods](#) (2016).

<sup>69</sup> See, for example, [ProStrakan/Archimedes Pharma](#) (2014) and [VTech/LeapFrog](#) (2016-2017).

enter into non-disclosure agreements in order to prevent the dissemination of commercially sensitive information to any non-authorized employees.

- 3.51 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.
- 3.52 In practice, therefore, it will be more straightforward to obtain derogations in relation to the non-UK aspects of the merging parties' businesses when the CMA's investigation is at a more advanced stage. It may then be clearer that these businesses have no material connection to the functioning of their respective UK businesses (see also paragraph 6.3).
- 3.53 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 (along the lines described in paragraph 3.44 above).
- 3.54 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.
- 3.55 The CMA will need to consider carefully whether it is appropriate to grant derogations in respect of non-UK businesses where the UK and non-UK businesses operate under common intellectual property rights and know-how, or share other important resources or personnel. The CMA is likely to take a cautious approach, particularly at the initial stages of its investigation.
- 3.56 Where a derogation has been granted to exclude the non-UK business of the target business from the scope of the Interim Measures, and the non-UK business of the target business has been integrated with the acquiring business, the guidance on access to key staff in paragraphs 3.47 to 3.48 applies.

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

- 3.57 In general, the operation and management of the target business under Interim Measures should be entirely separate from that of the acquiring

business. Steps should be taken to retain key staff in the target business during the course of the CMA's investigation and the management and organisational structure of the target business should not be subject to material change. What constitutes key staff or material change may depend on the nature of the business in question. If in doubt, this should be discussed with the CMA.

- 3.58 In exceptional cases, the CMA may, however, be willing to consider derogations allowing the replacement of key staff at the target business by staff from the acquiring business, for example, if certain of the target business's key staff have left on, or after, completion of the merger. The merging parties will need to demonstrate, to the satisfaction of the CMA, that there are no other reasonable options available to the merging parties (such as recruitment on the open market, temporary consultancy arrangements or secondments from other parts of the target business). The CMA may also be prepared to consider substantive changes to the merging parties' organisational or management structures, where these are strictly necessary for the effective running of the target business during the CMA's investigation.<sup>70</sup> The CMA is unlikely to grant derogations where such changes are not time-critical or otherwise are not strictly needed to safeguard the viability and competitive capability of the target business.
- 3.59 The replacement of the target business's employees by staff that previously worked at the acquiring business could lead to the disclosure of confidential information or the coordination of commercial conduct.<sup>71</sup> Accordingly, the CMA would expect this to happen only where strictly 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 affected key staff of the target business;
  - (b) why these key staff intend to leave, or have left, the target business;
  - (c) what steps have been taken to encourage all key staff to remain with the target business;

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<sup>70</sup> Changes to organisational structure or management responsibilities that are not substantive are not prohibited by the standard form IEO.

<sup>71</sup> Even when the replacement staff have no contact with the acquiring business while the Interim Measures are in force, they know the general commercial conduct of the acquiring business, and may wish to return to the acquiring business should the transaction not go ahead.

- (d) why it is not possible to replace these key staff (or otherwise carry out their functions) with other staff from within the target business; and
  - (e) why it is not possible to replace these key staff (or otherwise carry out their functions) with individuals who do not currently work for the acquiring business.
- 3.60 The replacement of target business key 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 non-disclosure agreements signed by the replacement staff, which may, for example, explicitly forbid contact with the acquiring business's staff during the CMA's review and confirm that these staff no longer have access to the acquiring business's IT systems. The CMA is unlikely to accept the transfer of staff from the acquiring business to fulfil a key commercial function at the target business.
- 3.61 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 business'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.
- 3.62 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. Merging parties requesting derogations on this basis should therefore be able to show (supported by relevant evidence) why these specific organisational or management changes are strictly necessary.

### **Derogation requests that are unlikely to be granted by the CMA**

- 3.63 The CMA will typically not grant a derogation request unless it can be shown that the proposed derogation is:
- (a) strictly necessary to safeguard the viability and competitive capability of the target business; (where relevant);
  - (b) both urgent and necessary in advance of the CMA's decision on the merger; and
  - (c) clearly unlikely to have any impact on the CMA's ability to achieve effective remedies.

- 3.64 The fact that integration could subsequently be unwound should a divestment remedy be required, 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 acquiring business could impact negatively on competition between the merging parties if the merger were to be ultimately prohibited and could undermine potential remedies if remedies were found to be necessary.
- 3.65 The CMA would be likely, in most cases, to reject derogation requests in relation to:
- (a) the appointment of any staff of the acquiring business to board or management positions of the target business (see paragraphs 3.59 to 3.60 and section 4 below on hold separate managers);
  - (b) granting the acquiring business any observer rights at board meetings of the target business;
  - (c) the acquiring business having any influence over the commercial policy of the target business (subject to any derogations granted by the CMA concerning delegation of authorities (see also paragraphs 3.32 to 3.36));
  - (d) the transfer of sales or other customer-facing functions from the target business to the acquiring business;
  - (e) the acquiring business bidding or negotiating on behalf of the target business;
  - (f) any action that would likely have the effect of undermining the independence and separate operation of the target business from the acquiring business from the perspective of customers, eg joint-branding, joint-marketing or references to the target business's activities and locations on the acquiring business's website and/or marketing materials;
  - (g) the acquiring business and the target business amending any existing commercial agreements between them or entering into new agreements;
  - (h) the acquiring business having access to detailed strategic, operational and financial information, or any other commercially sensitive information, relating to the target business (including but not limited to information about contracts, detailed revenue, cost and profit margin information, customers, suppliers, products and services etc);

- (i) the acquiring business and the target business dealing jointly with customers or suppliers;<sup>72</sup>
- (j) the discontinuation of overlapping products and services;
- (k) the closure of overlapping business functions; and
- (l) any action during the CMA's investigation that is intended to extract or accelerate the realisation of any revenue, cost or other synergies which is not strictly necessary to safeguard the viability and competitive capability of the target business (for example, restructuring to achieve tax savings would not be considered strictly necessary in this context).

3.66 As noted throughout this section, 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 strict necessity of measures to safeguard the viability and competitive capability of the target business. Where the CMA cannot clearly ascertain the impact of a proposed derogation or the CMA's ability to achieve effective remedies is uncertain, the CMA is likely either to not grant the derogation or defer the granting of that derogation until such time as its impact can be clearly determined.

3.67 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 acquiring business to exercise direct control over the commercial policy of the target business or to appoint an independent manager to run that business (see section 4 below on hold separate managers). The CMA is likely to require intense monitoring in such circumstances (eg through a monitoring trustee) and may require explanations of any material actions taken (eg where expenditure requests are denied).

3.68 In such circumstances, the CMA may also be willing to grant derogation requests of the type set out in paragraph 3.65 above.

3.69 Merging parties requesting derogations on this basis will be required to demonstrate to the satisfaction of the CMA (supported by relevant evidence) that the measures requested are strictly necessary to safeguard the viability

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<sup>72</sup> By way of exception, the CMA may grant derogations permitting the target business to benefit from the acquiring business's back-office arrangements (eg in relation to insurance and credit arrangements) where these arrangements are not transferring with the target business.

and competitive capability 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 strict safeguards and conditions (eg to ensure that commercially sensitive information is not disclosed more widely than is strictly necessary, and along the lines described in paragraphs 3.15 to 3.18).

## 4. Monitoring trustees and hold separate managers

### Monitoring trustee

- 4.1 A monitoring trustee may be required by the CMA, in order to monitor and report on the merging parties' compliance with the Interim Measures (including Unwinding Orders). The involvement of a monitoring trustee may also assist the CMA in considering more complex derogation requests, as well as speed up the CMA's decisions on whether to grant derogation requests.
- 4.2 A monitoring trustee's role will usually be to assess, in its first report, and report on:
- (a) the extent of integration (and confirm to the CMA that this is consistent with the representations made by the merging parties in their submission to the CMA at the start of the phase 1 investigation) and to make recommendations as to how to mitigate the risk of pre-emptive action; and
  - (b) the extent of compliance with any the Interim Measures and the adequacy of existing Interim Measures.
- 4.3 Thereafter, the monitoring trustee will be tasked with monitoring compliance with the Interim Measures and assisting the CMA with the consideration of derogation requests. Merging parties may consult the monitoring trustee about derogation requests, but should note that derogations can only be granted by the CMA, and will always be granted in writing (see paragraph 3.4).
- 4.4 In the event that the CMA requires a remedy involving 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 remedy decision and with any Interim Measures.
- 4.5 At phase 1, the CMA may consider it necessary to appoint a monitoring trustee where, based on the CMA's risk assessment, one or more of the risk factors in paragraph 4.6 apply<sup>73</sup> in particular, but not only, where the CMA is concerned about the ability or willingness of the merging parties to comply fully with the IEO. The CMA will routinely consider whether any of these considerations apply both at the beginning of phase 1 and when a decision is

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<sup>73</sup> See, for example, [Rentokil Initial/MPCL](#) (2018-2019), [Tobii/Smartbox](#) (2018-2019), [Nicholls/DCC](#) ((2018) and [Global Radio/GMG](#) (2013), and, in relation to overseeing phase 1 divestitures following undertakings in lieu of reference, the OFT directions in [Nakano/Premier Foods](#) (2012); [Rexel UK/Wilts Wholesale Electrical](#) (2012); and [Vue Entertainment/Apollo Cinemas](#) (2012).



taken that the case raises more material or complex competition issues and therefore requires an issues meeting. In addition to considering the need for a monitoring trustee at these points in its investigation the CMA may appoint a monitoring trustee at any point in the investigation if a significant risk of pre-emptive action is identified.

- 4.6 At phase 2, the CMA will normally require a monitoring trustee to be appointed in completed mergers unless merging parties can provide compelling evidence as to 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) concerns that there may have been a breach or 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 target 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 target business is absent and/or strong incentives exist for the senior management of the target business to operate the target business on behalf of the acquiring business.

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

## **Procedure for appointment of a monitoring trustee**

- 4.7 The CMA will inform the merging parties of its intention, or provisional decision, to require them to appoint a monitoring trustee. The CMA will offer the merging parties typically no more than 24 hours to comment on the proposed appointment of a monitoring trustee. If, having considered any submissions from the merging parties concerning the appointment of a monitoring trustee, the CMA decides to require the merging parties to appoint a monitoring trustee, the CMA will notify the merging parties of its final decision to require them to appoint a monitoring trustee by sending a letter containing draft directions and a roster of monitoring trustees who, to the knowledge of the CMA, currently provide monitoring trustee services. The merging parties will be given a short period to comment on the draft wording

of the 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 currently provide monitoring trustee services.<sup>74</sup> The roster is supplied to merging parties at 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. The roster provided by the CMA is not a list of monitoring trustees who have been pre-approved by the CMA, and therefore any monitoring trustee nominated by the merging parties will need to be approved separately by the CMA following an interview process to assess its suitability.
- 4.9 Merging parties will typically be given two working days from the date of the final directions to nominate a monitoring trustee who meets the suitability criteria set out in paragraph 4.10 (and a second monitoring trustee in reserve should the CMA not approve the merging parties' first nomination) with their proposed terms of appointment and a further three 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. The CMA reserves the right to select a monitoring trustee of its own choosing and require its appointment by the merging parties if a suitable monitoring trustee cannot be found within five working days of the date of the final directions.
- 4.10 Before approving the monitoring trustee, the CMA will typically conduct an interview with each nominated monitoring trustee to discuss its suitability for the appointment. When nominating a monitoring trustee to the CMA, merging parties and/or the nominated monitoring trustee should demonstrate the suitability of the monitoring trustee by providing evidence on:
- (a) the independence of the monitoring trustee firm (and its affiliates if applicable) from the merging parties;
  - (b) the relevant experience and qualifications of individuals within the monitoring trustee team who will be engaged on the case;
  - (c) the monitoring trustee's capacity to take on the appointment for the entire duration of the CMA's investigation (including any possible remedies process); and

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<sup>74</sup> The CMA will periodically seek to update and expand the roster and meet with potential candidates.

- (d) the process followed, and checks carried out, by the monitoring trustee to confirm whether there are any actual or perceived conflicts of interest arising from the appointment of the monitoring trustee.
- 4.11 During the five working-day period described in paragraph 4.9, the CMA will consider the nomination of the monitoring trustee by the merging parties and will approve the appointment if the monitoring trustee meets the suitability criteria set out in paragraph 4.10, and a satisfactory draft mandate has been provided, including suitable arrangements for remuneration. The merging parties are required to keep the CMA closely informed should the timelines for the appointment of the monitoring trustee (as set out in the final directions) prove problematic. The appointment of a monitoring trustee is at the expense of the acquiring party.
- 4.12 The monitoring trustee is required to keep the CMA informed should it become aware of any developments or changes to the circumstances of the monitoring trustee that may have the effect of the monitoring trustee failing to meet the suitability criteria set out in paragraph 4.10 above.

### **Hold separate manager**

- 4.13 The CMA may require the appointment of a hold separate manager with executive powers, in order to operate the target business separately from the acquiring business and in line with the Interim Measures for the duration of the investigation. The hold separate manager's role is a day-to-day management role in the target business, reporting to the CMA rather than the acquiring firm. This role is distinct from that of a monitoring trustee.<sup>75</sup>
- 4.14 The CMA will consider the need for the appointment of a hold separate manager, inter alia, at the start of phase 1; following the decision on whether the case requires an issues meeting; and, following the CMA's decision to accept undertakings in lieu of reference, to oversee a divestiture. It will also consider the need for a hold separate manager at the outset of a phase 2 investigation and review the issue throughout the phase 2 investigation. As is the case for a monitoring trustee, the appointment of a hold separate manager is at the expense of the acquiring business.
- 4.15 Hold separate managers can be either an internal or external appointee. Where appropriate, the CMA will require appointment of a hold separate

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<sup>75</sup> See [Trinity Mirror / Northern & Shell Media Group](#) (2018) for an example of the appointment of a hold separate manager in phase 1.

manager external to the merging parties.<sup>76</sup> 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 target business.<sup>77</sup> 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 acquiring business, the CMA may require an undertaking that he or she will not return to the acquiring business if the merger is prohibited, or if a divestment of the target business is later required, that the hold separate manager would transfer with the divestment business.

## **Procedure for appointment of a hold separate manager**

- 4.16 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 target business. The CMA will issue directions requiring the appointment of a hold separate manager where appropriate.
- 4.17 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. Prior to appointment, the CMA will need to approve any candidate proposed by the merging parties, including the terms of the candidate's appointment. Depending on the circumstances of the case, the CMA may consider it appropriate to require the appointment of a hold separate manager according to the same process and timing as applies to the appointment of a monitoring trustee in paragraph 4.9 above.

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<sup>76</sup> 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).

<sup>77</sup> For example, [VTech/Leapfrog](#) (2016-2017), 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).

## 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 prior to the Interim Measures coming into force.<sup>78</sup> This will be assessed on a case-by-case basis, where the CMA reasonably suspects that action has, or may have, been taken which constitutes pre-emptive action. If Interim Measures are breached the CMA may order the person responsible to unwind the breach in addition to imposing a penalty.
- 5.2 Pre-emptive action can extend beyond the integration of business functions and systems. It can also include the merging parties entering into arrangements or agreements in anticipation of the merger; closer collaboration between the merging parties; or actions that might undermine the independent competitive capabilities of either business.
- 5.3 Unwinding may be undertaken voluntarily following discussion with the CMA, pursuant to an Unwinding Order, or pursuant to directions under Interim Measures to ensure their compliance.
- 5.4 The CMA would typically expect to use its unwinding powers at both phase 1 and phase 2 in cases if, based on the CMA's own risk assessment one or more of the following factors applies:
- (a) The integration affects the way in which the parties compete with each other or with third parties, or their ability to compete. For example, this may be the case if:
    - (i) the merging parties have discontinued some of their pre-merger products or services in anticipation or as a result of the merger; or
    - (ii) the merging parties are engaging in joint-branding (eg on their websites or communications to customers or suppliers); or
    - (iii) the merging parties' customer call centres and sales teams share common contact details;
    - (iv) the integration affects the way in which customers and suppliers engage with, or perceive the independence of, the merging parties; or

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<sup>78</sup> Pursuant to sections 72(3B), 80(2A) or 81(2A) of the Act.

- (b) if the risk of pre-emptive action significantly increases if immediate unwinding action is not taken.

5.5 Examples of measures to unwind integration that have been required in the past include requiring:

- (a) by way of an Unwinding Order, the reversal of actions to discontinue products and development projects, and the termination of an agreement entered into between the merging parties prior to completion of the transaction;<sup>79</sup>
- (b) reversal of any re-branding of the target business's assets with the acquiring business's branding (eg changing the livery of buses);
- (c) the destruction of, or retention by a third party (eg legal advisers) of, confidential information relating to the target business (eg customer lists) that had passed to, or was accessible by, the acquiring business;
- (d) the reversal of changes to an organisation's structure, for example, by requiring:
  - (i) representatives from the acquiring business not to attend the target business's board meetings, or
  - (ii) departed key staff to be replaced (eg a Finance Director) or a hold separate manager to be appointed to manage the target business;
- (e) the separation of functions or decision-making processes, which have previously been integrated (eg sales forces or production lines); and
- (f) the retraction of regulatory requests (eg bus route registrations and de-registrations).

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<sup>79</sup> Pursuant to section 81(2A) of the Act, the CMA issued an Unwinding Order in [Tobii/Smartbox](#) (2018-2019) at phase 2. The merging parties were ordered to unwind an agreement under which Smartbox acted as a reseller of Tobii products in the UK and Ireland. The Unwinding Order obliged Smartbox to stop accepting new orders under the reseller agreement (and eventually terminate this agreement), to restart its development projects and to restart supplying its discontinued products.

## **6. Timing for revoking Interim Measures and granting derogations**

- 6.1 During the course of the CMA's investigation, the CMA may release merging parties from some, or all, of their obligations under the Interim Measures. This will be done 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, and the derogation does not undermine the CMA's ability to impose effective remedies. 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 inquiry might subsequently find to be problematic, and therefore the CMA is likely to take a cautious approach. Merging parties may be required to provide additional evidence at this stage, along the lines described in paragraph 3.44 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

### Compliance

- 7.1 To help ensure compliance with Interim Measures, the CMA will normally require the Chief Executive Officers (or other persons agreed by the CMA) of each of the acquiring and target businesses subject to Interim Measures to provide a compliance statement separately certifying the compliance of the acquiring business and the target business with the Interim Measures on a fortnightly basis.<sup>80</sup> 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 If the Interim Measures impose an obligation on the acquiring business to ensure that the target business is complying with the Interim Measures, then the acquiring business is not absolved of this responsibility by the fact that the person in charge of the target business is also supplying a compliance statement.
- 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 target business (or 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 Merging parties subject to Interim Measures should ensure the retention of documents relating to compliance, including re-visiting their document retention policies and practices in light of the Interim Measures. Deletion of evidence relevant to compliance may be viewed as aggravating any breach which occurs.<sup>81</sup>

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<sup>80</sup> The matters set out in the template compliance statement are a starting point for discussion between the CMA and the relevant merging party or parties. The template will be adapted to meet specific requirements on a case-by-case basis. Where the acquirer or the target, or an entity with control over the acquirer or the target, is an investment vehicle, the CMA will normally also require the Chief Executive Officers (or other persons agreed by the CMA) of the company responsible for overseeing and managing the investment vehicle to provide a compliance statement separately certifying compliance with the Interim Measures on a fortnightly basis. Where a private individual(s), rather than a specific legal entity, has ultimate control over the acquirer or the target, they will normally be required to provide a compliance statement separately certifying compliance with the Interim Measures on a fortnightly basis.

<sup>81</sup> Penalty decision in relation to [Vanilla Group](#) at paragraphs 160-161.



## Potential consequences of failing to comply

- 7.5 The CMA takes the merging parties' compliance with their obligations under Interim Measures very seriously. With this in mind, 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.<sup>82</sup> Breach of this provision can result in fines, imprisonment for a term not exceeding two years, or both.
- 7.6 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. To date the penalties imposed have been significantly less than the 5% cap.<sup>83</sup> However, given the importance of Interim Measures to the functioning of the regime, the CMA will not hesitate to make full use of its fining powers. The CMA will therefore impose proportionately larger penalties in future cases should this prove necessary in the interests of deterrence.

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<sup>82</sup> Section 117 of the Act.

<sup>83</sup> Section 94A of the Act. The CMA has imposed a number of penalties under this provision. These include penalties imposed on [Electro Rent](#) (£100,000 penalty imposed on 11 June 2018; upheld by the CAT on 11 February 2019 in [Electro Rent Corporation v CMA](#) [2019] CAT 4; a further £200,000 penalty imposed on 12 February 2019); [European Metal Recycling](#) (£300,000 penalty imposed on 20 December 2018); and [Vanilla Group](#) (£120,000 penalty imposed on 7 March 2019).