

# Guidance on initial enforcement orders and derogations in merger investigations

Consultation document

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# 1. About the consultation

## Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft guidance in relation to the use of initial enforcement orders (IEOs) and the derogations that might be granted to IEOs.
- 1.2 This guidance, which reflects experience gained since the current system was introduced in April 2014, is intended to provide further clarification in relation to the circumstances in which an IEO will typically be imposed, the form that an IEO will typically take, the types of derogations that the CMA will typically grant (or not), and the timing for imposing and revoking IEOs and granting derogations.

## Scope of the consultation

- 1.3 The scope of this consultation covers the CMA's draft guidance in relation to the use of IEOs and derogations.
- 1.4 The guidance should be read in conjunction with paragraphs 7.28 to 7.31 and Annex C to [Mergers: Guidance on the CMA's Jurisdiction and Procedure \(CMA2\)](#). Together with the guidance provided in CMA2, this guidance is intended to set out how and when IEOs are normally used by the CMA (and when derogations to IEOs might be granted).
- 1.5 Where there is any difference in emphasis or detail between this updated guidance and other guidance produced or adopted by the CMA, the most recently published guidance will take precedence.

## Background

### Context

- 1.6 The CMA is a non-ministerial department formed on 1 April 2014. It is the UK's primary competition and consumer authority which took over a number of functions formerly performed by the Office of Fair Trading and those of the Competition Commission. The CMA works to promote competition for the benefit of consumers, both within and outside the UK, to make markets work well for consumers, businesses and the economy.
- 1.7 The CMA has responsibility for review of mergers under the Enterprise Act 2002 (the Act). Pursuant to section 72 of the Act, the CMA may, before it has reached its decision on whether to make a reference in an anticipated or

completed merger, make an IEO in order to prevent or unwind ‘pre-emptive action’ (ie action that might prejudice the outcome of the reference and/or impede the CMA from taking any appropriate remedial action that might be required). The CMA may subsequently (on application of the parties) grant a derogation, giving consent to the parties to undertake certain actions that would otherwise be prohibited by the IEO.

- 1.8 The need for an IEO (and the extent to which derogations might be granted) depends on the circumstances of the case. The CMA will balance the need to guard against pre-emptive action against the burdens that IEOs can place on the merging parties.
- 1.9 In paragraphs 7.28 to 7.31 and Annex C to CMA2, the CMA has described its powers to prevent and unwind pre-emptive action using IEOs, and provided further information in relation to the content and timing of IEOs, the circumstances in which they may be made, and how the CMA will handle requests from merging parties for derogations from specific provisions in an IEO.

### ***The draft guidance***

- 1.10 The CMA is proposing to introduce additional guidance to supplement and clarify the guidance in CMA2, reflecting experience gained since the current system was introduced in April 2014.
- 1.11 This guidance is intended for merging parties and legal advisers advising on a transaction in relation to which an IEO has been or may be imposed. It is particularly intended to help merging parties and legal advisers to consider whether a derogation request is necessary, whether a derogation request is likely to be granted, and what information is likely to be required to support a derogation request. In broad terms, the guidance covers:
  - (a) **The use of IEOs:** including additional guidance in relation to the circumstances in which the CMA will typically impose an IEO in anticipated and completed mergers, and the form that an IEO is likely to take.
  - (b) **The granting of derogations:** including additional guidance in relation to the process by which derogations will be granted, actions that are not considered to require a derogation, derogations that are likely to be granted by the CMA (where sufficiently specified, reasoned, and evidenced), and derogations that are unlikely to be granted by the CMA (absent exceptional circumstances).

- (c) **Timing for imposing and revoking IEOs and granting derogations:** including additional guidance in relation to when the CMA would expect to impose IEOs in anticipated and completed mergers, when merging parties might expect to be released from some or all of the obligations incumbent in the IEO, when an IEO might be released in full, and the practice that is likely to be followed where a merger is referred for a phase 2 investigation.

## **Consultation process**

- 1.12 We are publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments. We would welcome your comments on the content of the draft guidance and, in particular, to the questions raised in Chapter 2 of this document. We want to ensure that the guidance is clear, comprehensive and useful for its intended users.

### ***How to respond***

- 1.13 We are seeking the views of interested parties, particularly merging parties and legal advisers that have been involved in transactions in relation to which IEOs have been imposed and derogations have been requested. Please respond to as many of the questions as you are able to and, where relevant, please support your answers with any evidence or examples you may have. We encourage you to respond to the consultation in writing (by email or alternatively by letter) using the contact details provided in paragraph 1.16 below.
- 1.14 When responding to this consultation please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 1.15 In pursuance of our policy of openness and transparency, we will publish non-confidential versions of responses on our webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication on our webpages which omits that material and which explains why you regard it as sensitive at the same time.

## ***Duration***

- 1.16 The consultation will run for three weeks, from **Wednesday 22 March 2017 to 5pm on Wednesday 12 April 2017**. Responses should be submitted by post or email, and should be sent to:

Tobe Nwaogu  
Competition and Markets Authority  
Victoria House  
37 Southampton Row  
London WC1B 4AD

Email: [tobe.nwaogu@cma.gsi.gov.uk](mailto:tobe.nwaogu@cma.gsi.gov.uk)

## ***Compliance with government consultation principles***

- 1.17 In consulting, the CMA has taken into account the government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders. Full details can be found on [GOV.UK](http://GOV.UK).

## ***Data use statement for responses***

- 1.18 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business.
- 1.19 Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.
- 1.20 If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

### ***After the consultation***

- 1.21 After the consultation, we will publish a final version of the guidance and a summary of the responses received that fall within the scope of the consultation. As noted above, we propose to publish non-confidential versions of the responses received. These documents will be available on our webpages and respondents will be notified when they are available.

## 2. Questions for consideration

- 2.1 As noted in paragraph 1.11 above, the guidance is primarily intended to provide greater clarity about the circumstances in which an IEO will be imposed, what form it is likely to take, and what the CMA's approach is likely to be to certain types of derogation that have been commonly sought in previous cases.
- 2.2 To that end, the CMA would encourage stakeholders to particularly consider the following questions:
- (a) Does the guidance generally provide sufficient information in relation to the CMA's practice in relation to IEOs and derogations (in particular as concerns process and timing)? Are there any aspects of the CMA's practice on which further information would be useful?
  - (b) Are there any other significant examples of derogations that stakeholders consider should typically be granted by the CMA where sufficiently specified, reasoned, and evidenced?
  - (c) Are there other specific actions that arise commonly in practice in relation to which further guidance on the CMA's likely approach would be useful?
  - (d) Do merging parties and their legal advisers consider themselves able to 'self-assess' in relation to contemplated actions that should not require a derogation? If not, what additional information would be useful to help merging parties and their legal advisers make this kind of assessment?
- 2.3 The CMA would also welcome the views of stakeholders on any other aspects of the guidance.