

Response to Competition and Markets Authority

***Consultation document: Guidance on initial enforcement orders
and derogations in merger investigations***

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This response represents the views of law firm Allen & Overy LLP on the Competition and Markets Authority (CMA) Draft for consultation *Guidance on initial enforcement orders and derogations in merger investigations* dated 22 March 2017 (the **Draft Guidance**).

We confirm that this response does not contain any confidential information and we are happy for it to be published on the CMA's website.

1. 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?

1.1 The Draft Guidance provides welcome additional insight into the CMA's practice in relation to IEOs that usefully builds on the current guidance as set out in *Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2)*. We have the following suggestions to improve the Draft Guidance further.

1.2 Paragraphs 2.6 to 2.8 of the Draft Guidance provide clarification on when the CMA may make an exception to its approach of normally imposing an IEO in completed merger cases. We would value the inclusion of references to any completed merger cases where an IEO has not been imposed or has been imposed in a reduced, tailored form (as indicated at paragraph 22(e) of the CMA's review of the use of the merger notice and initial enforcement orders dated 21 March 2016 (the **Review**).

1.3 Paragraphs 2.9 to 2.16 of the Draft Guidance primarily deal with the form of IEOs, first in relation to completed mergers and then in relation to anticipated mergers. However they fall within a section of the Draft Guidance that otherwise deals with the circumstances in which the CMA will typically impose an IEO in completed mergers. To aid clarity, we think that paragraphs 2.9 to 2.16 should be placed in a separate section with its own heading.

1.4 Paragraph 2.12 of the Draft Guidance relates to further interim measures, beyond those set out in the template IEO, such as the appointment of monitoring trustees and hold separate managers. It refers to paragraphs C.25 to C.36 of CMA2 for further information on the process for putting in place additional interim measures. We would value the inclusion of references to any merger cases where such interim measures have been required since the January 2014 publication of CMA2, as well as an indication of their likelihood in practice. In addition, we consider that it may be useful for the CMA to develop template clauses for such interim measures.

1.5 We note that paragraph 2.13 of the Draft Guidance states that the CMA may "exceptionally" consider a 'tailored' IEO whereas paragraph C.6 of CMA2 states that the CMA would "normally" expect to use tailored interim orders. This inconsistency has the potential to cause confusion, in particular because paragraph 2.13 (as detailed above at 1.3) currently falls within a section of the Draft Guidance that on its face deals with completed mergers.

2. Are there any other significant examples of derogations that stakeholders consider should typically be granted by the CMA where sufficiently specified, reasoned, and evidenced?

2.1 Section 3 of the Draft Guidance on the granting of derogations is extremely helpful as it fills a large gap in the interim measures guidance in CMA2 and provides much greater certainty as to the derogations that the CMA is likely to grant. In particular, we value the references to example merger cases since, whilst all derogations are published, they are not grouped in categories for future ease of use by merging parties. We consider that it would also be useful if the CMA developed template texts for the main types of derogations, especially those which form standard derogation requests.

3. **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?**
4. **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?**
 - 4.1 It is generally clear whether contemplated actions fall within or outside the restrictions of the IEO (or benefit from a derogation). In cases of uncertainty, we would typically seek informal guidance from the CMA on an *ad hoc* basis. If the CMA has received queries across multiple transactions seeking clarification of particular provisions or particular categories of contemplated actions, we would suggest that the CMA sets out its standard position in the final version of its guidance document.
5. **The CMA would also welcome the views of stakeholders on any other aspects of the guidance.**
 - 5.1 For completeness, we suggest that the Draft Guidance refers (for example at paragraph 1.5) to paragraphs 11.8 to 11.19 (interim measures) of CMA2.
 - 5.2 Paragraph 3.36 of the Draft Guidance should cross-refer to the derogation requests set out in paragraph 3.35 (rather than paragraph 3.29).