

Consultation on streamlining the CMA's approach to issuing directions

This concerns the enforcement of market
and merger undertakings and orders

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1. The CMA's current guidance and practice

- 1.1 Ensuring effective compliance with markets and merger orders and undertakings from the businesses that are subject to them is a key part of the CMA's mission. These remedies, and compliance with them, play a vital role in delivering the changes across markets that the CMA wishes to see when intervening in markets, and which help deliver the benefits of competition for people, businesses and the whole economy.
- 1.2 The CMA expects all businesses and individuals subject to these orders and undertakings to be compliant with them at all times, and treats any breaches of these orders and undertakings seriously, using the full range of powers currently available to it.
- 1.3 To help businesses subject to the CMA's market and merger orders and undertakings understand how the CMA investigates breaches and enforces compliance with these orders and undertakings, the CMA published [guidance](#)¹ on 29 January 2021, following public consultation. This was the first time that the CMA had issued public guidance about its approach to enforcement of its undertakings and orders in this area.
- 1.4 The guidance set out the CMA's existing practice in this area in relation to its current powers, providing greater transparency for parties within the scope of final merger and market undertakings and orders and their advisers and representatives.
- 1.5 The CMA has now had just under two years' experience of applying the guidance when carrying out enforcement activities and engaging with parties under investigation. The guidance has been helpful for both the CMA and parties subject to orders and undertakings in explaining the CMA's approach and how it uses the specific enforcement tools currently available to it, in relation to the issuing of directions. However, the approach set out in the guidance has in practice proven duplicative, as it involves the CMA consulting with these parties twice in relatively quick succession. The CMA is now exploring how to improve its guidance and practice in this area.
- 1.6 Updating the guidance to remove this source of duplication will enable the CMA to act with greater agility and pace when enforcing compliance with orders and undertakings. This increased flexibility will deliver benefits for competition, consumers and compliant businesses, as breaches can be

¹ [Markets and Merger remedies: Guidance on reporting, investigation and enforcement of potential breaches.](#)

brought to an end more swiftly, reducing their adverse impact and increasing the efficiency of the CMA in carrying out enforcement action.

2. Proposed change to the process to issue directions

- 2.1 At present, the CMA's published guidance envisages seeking views from parties on two specific points in the process.
- (a) The first is where the CMA is minded to issue directions and writes to the party affected to inform it of this, and to seek representations on the principle of imposing directions in that particular circumstance.
 - (b) The second follows the consideration of the first representations, and where the CMA is still minded to issue directions, it shares the text of the draft directions with the party affected and seeks representations on the specific requirements in the draft directions.
- 2.2 We consider that this is a duplicative approach, as stakeholders are asked for representations twice in the process at separate stages. We consider that these representations could be combined into one stage without prejudicing the CMA's decision-making process as this two-stage approach was created when the CMA was less familiar with the process of issuing directions, and given its experience, the CMA is content that procedural fairness can be achieved through a one stage process. Stakeholders can provide exactly the same representations in a single stage process to that in the two-stage process. Moreover, stakeholders would still be able to influence the CMA's decisions regarding directions, both on the principle and detail of what may be imposed.
- 2.3 The CMA proposes to amend its guidance to combine these two consultations, and consequently, in situations where the CMA is minded to issue directions to a party, it will inform the party and provide it with draft directions and seeks representations on both of these at the same time.
- 2.4 While the above process should result in efficiencies both for parties and the CMA in the majority of situations, the CMA acknowledges that there may be some circumstances in which a two stage consultation process may be necessary,² and therefore it proposes to also retain the option of separating these two consultations.
- 2.5 The CMA therefore proposes to alter the text of its guidance to provide for both of these options.

² For example, there may be circumstances in which the CMA needs act swiftly to inform a party subject to an Order or Undertakings that it is minded to issue directions before it is in a position to prepare a set of draft Directions for consultation.

3. Proposed new guidance

3.1 The CMA proposes that paragraph 4.14 of its current published guidance which is repeated below should be replaced with the following new text:

Current text

When the CMA believes it has all the information required to make a provisional decision, the CMA will generally expect to follow these steps:

- the CMA will write to the firm concerned, noting that it is minded to issue directions, on the basis of the information available from its investigation into the breach;
- the CMA will allow the firm concerned at least two weeks to provide any representations on whether the issuing of directions as an approach is appropriate and proportionate;
- the CMA will consider any representations provided and where it continues to consider it appropriate to issue directions, the CMA will provide the firm concerned with the draft directions that it intends to issue and seek an action plan detailing the timescales within which the tasks directed will be undertaken;
- the CMA will allow the firm concerned a reasonable period of time (a minimum of two weeks) to provide any representations on the specific requirements in the draft directions. The firm may also put forward any new information which is relevant to whether directions are appropriate or not;
- the CMA will consider any representations on the draft directions, and will reach a final decision on whether to issue directions and, where appropriate, will determine the exact directions to be issued; and
- the CMA will issue directions to the firm concerned, publishing the action plan and records this information on its public register of directions, the register of breaches, and relevant webpage for the order or undertakings concerned.

Proposed new text

When the CMA believes it has all the information required to make a provisional decision, the CMA expects to follow these steps:

- *the CMA will write to the party concerned, noting that it is minded to issue directions, on the basis of the information available from its investigation into the breach*
- *where draft directions are available, these will be provided to the party at the same time as communicating its provisional decision to issue directions. The CMA may also seek a proposed action plan detailing the timescales within which the tasks directed will be undertaken*

- *the CMA will allow the party concerned a reasonable period of time (a minimum of two weeks unless urgent action is required to address the breach) to provide representations that cover the decision that it is minded to issue directions and the specific requirements in the draft directions. The party may also put forward any new information which is relevant to whether or not directions are appropriate*
- *where directions are provided to a party subsequently to the communication that the CMA is minded to issue directions, a further reasonable period of time will be allowed for the party to provide representations on the draft directions*
- *the CMA will consider all representations and will reach a final decision and, where appropriate, will determine the exact directions to be issued*
- *the CMA will issue directions to the firm concerned, publishing the action plan and recording this information on its public register of directions, the register of breaches, and relevant webpage for the order or undertakings concerned*

4. Consultation

- 4.1 The CMA is now consulting on this proposed change to the process to issue directions to parties within the scope of the CMA's market and merger undertakings and orders.
- 4.2 To respond to this consultation, please email the CMA at: remediesmonitoringteam@cma.gov.uk and mark your response '*Consultation on changes to guidance on issuing directions*'.

Deadline for consultation responses

- 4.3 All consultation responses are to be received at the CMA by 17:00 on 23 December 2022.