COMPETITION AND MARKETS AUTHORITY

CONSULTATION ON
STREAMLINING THE CMA'S APPROACH TO ISSUING DIRECTIONS
8 DECEMBER 2022

Non-confidential response on behalf of Barclays Bank UK plc ("**Barclays**")

12 January 2023

Summary

1. Barclays is subject to a number of market investigation undertakings and orders[1] and welcomes the opportunity to comment on this CMA consultation about amendments to the process by which directions are issued. We have limited our observations to enforcement relating to market investigation remedies, where we believe we can add the most value given our experience in this field.

2. The CMA is proposing to change its current two-stage process - in which the CMA issues a letter that confirms it is "minded to" issue directions, which may then be followed by draft directions - into one step, to achieve efficiency gains.

3. Barclays has significant reservations about the specific changes that the CMA proposes in this consultation, which should not be viewed in isolation, and would strongly encourage the CMA to reconsider proceeding on this basis. Instead, the CMA should consider carefully whether now is the right time to introduce specific amendments to one particular aspect of its process for imposing directions, including assessing whether it has reflected in sufficient detail on either the outcomes of previous reviews and recommendations (namely the reviews by Kirstin Baker and Alison White) or its experience of imposing directions in specific cases, including Open Banking.

4. If the purpose of this consultation is to increase efficiency in the overall process of issuing directions, then a piecemeal approach would not be the most effective way of achieving that goal. In any case, any such changes must ensure that the rights of defence are safeguarded.

5. Our submission will accordingly cover our comments on (1) the procedural aspects of the changes the CMA proposes; (2) the language that is used to effect those changes; and (3) broader considerations around the issuing of directions that the CMA should focus on, if it proceeds to make any changes to the process at this stage.

Detailed comments

Part 1: the current consultation – the proposed changes to process

6. The CMA is seeking to truncate the process by which directions are imposed for breaches of final Orders/Undertakings.

7. The CMA does not make clear why having a two-stage process for the issuing of directions is especially problematic or that any time/efficiency savings would be significant, relative to the duration of the overall process. Breaches of such remedies will in the vast majority of cases be historic/backwards looking and in practice such discussions between the CMA and parties tend to have a timeline of a number of months. The time that the CMA is looking to save in respect of one aspect of enforcement is unlikely to be material when compared against this timeline, and firms' rights to due process must be retained**.** The CMA has not put forward examples of instances where the new guidance would have led to a better overall outcome.

[1] The 2002 SME Banking Behavioural Undertakings, the PPI Market Investigation Order 2011 and the Retail Banking Market Investigation Order 2017

8. The CMA envisages that there could be instances where the "minded to" letter is accompanied by draft directions and that this could then lead to time savings. It is our view that, in contrast, this is more likely to lead to inefficiencies being introduced into the process, which may cancel out any savings.

    i. Where a recipient receives a "minded to" letter together with draft directions, the CMA confirms that "*stakeholders would still be able to influence the CMA's decisions regarding directions, both on the principle and detail of what may be imposed*". If the CMA goes on to conclude that directions should not be imposed after all, any time and resource that the CMA has spent on developing its draft directions, or that the recipient spends commenting on the proposed text, will have been wasted. This inefficiency may more than cancel out any time savings associated with attempting to streamline the process in this manner.

    ii. The current guidance avoids this inefficiency, as a party may respond to a "minded to" letter and persuade the CMA that directions are not in fact an appropriate or proportionate step.

    iii. The existing two-stage process accordingly safeguards against this potentially inefficient use of resources, both for the CMA and the relevant firm. Overall, we consider that the CMA has not put forward a persuasive argument in favour of the new single stage process.

9. Barclays also considers that the proposed changes conflate two important, and separate, legal processes into one engagement with the CMA, which should not be considered duplicative and which would reduce existing procedural rights. The advantage of having a separate "minded to" stage is that the recipient can have an in-principle discussion with the CMA about the need to issue directions and whether that is a proportionate response to the CMA's breach finding. This "pause for thought" is an important procedural step both for the CMA and for recipients and, as noted above, may well result in the CMA deciding not to proceed with issuing directions at all. This opportunity for a separate, in-principle discussion with the CMA should not be lost.

10. Barclays disagrees with the CMA notion that "*procedural fairness can be achieved through a one stage process*". The "minded to" stage is clearly separate to the draft directions stage, and this separation has important procedural benefits for the recipient of the directions, so the distinction between the stages should be maintained. The importance of these as distinct stages is borne out in the evidence to which we have access (see further below).

Part 2: the current consultation – the new language

11. The proposed language introduces uncertainty on timing and the process that the CMA will follow, both where the "minded to" letter is accompanied by draft directions and where it is not. The CMA neither explains its rationale for the new language here, nor why it has chosen to step away from the clarity that the current process offers on this point. More specifically:

    i. Where a "minded to" letter is accompanied by draft directions, a recipient may under the proposed wording have as little as two weeks (or even less) to make both procedural and substantive representations to the CMA. In contrast, the current guidance offers clear guarantees on timing – and the recipient will have a total of at least 4 weeks to make

representations on process and substance. The proposed wording therefore inherently reduces the scope of the existing process, and procedural rights of recipients are accordingly lost - without clear and objective justification from the CMA.

ii. Where a "minded to" letter is not accompanied by draft directions, the proposed wording mentions that "*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 does not give any guidance on how long "*a further reasonable period*" might be, leading to additional procedural uncertainty, nor does it explain why it has departed from the existing guidance that offers that in these cases "*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*".

12. The current wording refers to recipients of a "minded to" decision being able to provide submissions on whether imposing directions is a *proportionate* and *appropriate* measure for the CMA to take, whereas the proposed wording is silent on this point. It is however essential for the CMA to consider the proportionality and appropriateness of imposing directions, in line with the statutory requirements. This is particularly important given the willingness of the CMA in recent years to impose far-reaching, costly and/or long-term obligations - including the appointment of external auditors - when issuing directions.

Part 3: Further areas of consideration for the CMA

13. As we have submitted to the CMA previously, it is essential for the CMA to assess and reflect on its past approach to enforcement of market investigation remedies, ensuring that the lessons of the past have been learned and that any new guidance put forward by the CMA takes these as well as the views of relevant parties into account. Before making any changes to its current process relating to the imposition of directions or enforcement of market investigation remedies more generally, the CMA must therefore consider (i) existing recommendations relating to market investigation remedies flowing from independent reviews and (ii) its previous experience in enforcing such remedies.

14. In particular, we are concerned that the CMA proposes to make any changes to its approach to imposing or enforcing market investigation remedies without reflecting on and referring to its experience over the last five years in relation to Open Banking (Part 2 of the RBMI Order), in light of the significant number of directions that were imposed by the CMA over that period, as well as the findings (including some criticism) of the two independent reviews and the many submissions from stakeholders relating to process and fairness and the exercise of the CMA's enforcement powers. The CMA says that it has deliberately drafted the wording of that part of the Order broadly, and it has accorded itself a wide degree of latitude in its interpretation;[2] therefore it is even more important that parties have sufficient safeguards giving them the opportunity to defend themselves from decisions and interpretations of the CMA with which they disagree or

[2] See for example Baker Report "*the principles-based approach of the Order left significant scope for interpretation which gave rise to the potential for differing views to be taken. Equally, a number of issues were not fully considered at the design stage or revisited as the project developed*" (paragraph 44).

which they consider disproportionate, including sufficient time to allow parties to seek external legal advice where necessary.

Existing guidance/recommendations

15. The CMA must consider carefully and in detail the findings of the Alison White report[3] and the Kirstin Baker report[4] and demonstrate to stakeholders that any changes to its approach to market investigation remedies - including enforcement - will incorporate the findings and recommendations of those reviews, and preserve procedural rights for the parties subject to such remedies.

16. The Baker Report in particular made a number of recommendations to the CMA as well as containing further observations on the CMA's practice in relation to market investigation remedies. We would expect the CMA to take these findings and recommendations into account in any changes to its approach to market investigation remedies, including the imposition of directions. It is therefore concerning that the CMA has not sought to address the issues raised in the Baker Report in the present consultation, in contrast to its previous position.[5]

17. Specific examples of issues that we think need to be addressed by the CMA before it makes any changes to its current process or guidance for market investigation remedy monitoring or enforcement include are set out below, but we would welcome a broader statement from the CMA as to how it proposes to take these recommendations forward.[6]

    i. As part of Recommendation 2 (*Create processes and governance for CMA Board and Executive oversight of the implementation of remedies*) the report states "*The CMA should consider whether an overview of all of the existing Markets guidance is required in order to consolidate and clarify the position for external stakeholders. It may be useful to include specific guidance on the implementation of complex remedies in any future revisions of external guidance.*"[7] It is not clear to us why, before taking forward this recommendation, the CMA has chosen merely to truncate the time allocated to firms to exercise their rights.

    ii. Recommendation 1 is for the CMA to "*Build more effective Board oversight and risk management of the end-to-end strategy for complex remedies*". Complex remedies are defined as "*remedies which have some or all of the following aspects: complexity, behavioural in nature, long-running, open-ended delivery, involving significant resource or risk implications for the CMA and with the potential to develop over time*".[8] This definition would evidently cover all the Orders and Undertakings to which Barclays is subject. The Baker Report noted that "*Formal engagement with the CMA at more senior levels would have helped anticipate and overcome some of the challenges which surfaced during the*

[3] *"Investigation of Open Banking Limited - Independent report by Alison White"* published on 1 October 2021.
[4] *"Open Banking Lessons Learned Review - Report by Kirstin Baker CBE"* published on 27 May 2022.
[5] See CMA press release 1 October 2021: "*CMA Chair Jonathan Scott said… The CMA has a responsibility to learn lessons from the failings identified in the governance of the OBIE. I am therefore today announcing a review of the lessons to be learned for our approach to designing, implementing and monitoring remedies in market investigations.*" and 27 May 2022 "*CMA commits to implementing the recommendations in full*".
[6] Even when these recommendations are perhaps aimed more at future remedies, the CMA should consider clarifying the relevant issues for existing remedies, particularly long standing or controversial ones.
[7] Paragraph 106
[8] Paragraph 99

OBIE implementation stage",[9] but yet there does not seem to have been any consideration given in the proposed amendments to how reducing the time for the directions procedure would enable this senior engagement within the CMA, or whether a shortened process can be considered appropriate in the case of such complex remedies.

iii. Recommendation 3 incudes a question as to whether there are "*suitable checks and balances, governance mechanisms and processes in place for the overall delivery phase including in relation to both the CMA and key stakeholders? For example, this may also include processes for interpretation of aspects of the order/undertakings during delivery where appropriate*".[10] We would suggest that the need for further checks and balances should not result in the current process for enforcement (which necessarily involves an element of interpretation) being truncated.

iv. Recommendation 5 states that "*For any complex remedies, the Final Report and/or the Order/Undertakings should set out a process for review at key stages to assess whether the existing arrangements are still working and are appropriate*".[11] In the case of existing remedies which will not benefit from this recommendation, the CMA should consider whether potential breach findings and plans to impose directions could instead be more appropriately addressed by the CMA considering whether that particular remedy remains necessary, or whether there is an issue in the CMA's interpretation.

v. As part of Recommendation 6 the Report stated that "*It should also be clear to external stakeholders who the relevant decision makers are at the remedies delivery stage.*[12] It is particularly important for parties to understand who the relevant decision maker is where such decision makers are interpreting broadly drafted obligations and/or there have been changes in personnel due to conflicts or other issues.

18. It is our view that it would be much more efficient for the CMA to, in the first place, consider how to properly implement the recommendations from the Baker Report more generally, and only then consider any changes to the mechanism by which remedies are enforced.

Additional factors that should be taken into account in any changes to CMA directions process

19. We welcome the CMA's stated intention to improve its guidance and practice in relation to market investigation remedies. We have set out below a number of issues that Barclays has encountered in relation to the process of issuing of directions over the last five years or so, and which we would request the CMA take into account in any revision of its current process or guidance. These issues do not in our view point to any duplication in the existing process which would justify a shortening of the timescales, but rather indicate a need for the CMA to take a more careful and proportionate approach to the directions process, which may necessitate more time for all parties rather than less.

[9] Paragraph 57
[10] Paragraph 109(a)
[11] Paragraph 116
[12] Paragraph 122

20. The extent to which these issues are well known within the CMA and/or indicative of the CMA's practice in relation to directions as a whole is not clear to us, but we would of course be willing to provide further information to the CMA or discuss these issues further.

Liaising with parties about breach before issuing the "minded to" decision

21. The CMA's current guidance states "*Before proposing any enforcement action in relation to a breach, the CMA will ensure that the firm involved is aware of the breach and has had an opportunity to liaise with the CMA over this*". Firms therefore have a legitimate expectation that the CMA will set out explicitly and in detail, well in advance of the "minded to" decision stage, the particulars of any remedy that it considers a firm has breached and the rationale for its view, to enable firms to make submissions and to give them the opportunity to address specific concerns (including in ways that might be more efficient than through enforcement) before the CMA proceeds with a minded to decision.

22. The existing guidance, in essence, reflects a three-stage process: in stage 1, the CMA liaises with the relevant party and may conclude that a breach has occurred. In stage 2, the CMA then provides detail of its decision on whether the breach warrants enforcement action, including through directions (the "minded to" decision). In stage 3, the CMA then issues draft directions.

23. Rather than seeking to truncate stages 2 and 3 of the process, we feel strongly that the current three-stage engagement model is a much better way to approach enforcement. If the CMA engages substantively with a relevant party in the first phase, then efficiencies will be gained later on in the process, as challenges will already have been explored. Ensuring that engagement in the first phase (including communication that the CMA regards an issue as a breach or potential breach) would enable the CMA to move more efficiently to the second and third phase of the process, without affecting recipients' procedural rights. The CMA should not seek to abridge the stage 2/3 process in isolation from stage 1.

Content of directions (including requirements for revocation)

24. Sufficient time needs to be provided in the process for both firms and the CMA to be satisfied that the obligations contained in the draft directions, and particularly the requirements that need to be met in order for the directions to be lifted, are clear and will not give rise to future disagreements. Any attempt to constrain the time taken for exchange of views between the CMA and relevant firms on the wording of directions may have a knock on impact on the efficiency of later stages in the process.

25. To address this issue, we would accordingly recommend that:

    i. the CMA should consider carefully the wording of any draft directions (particularly if compliance with such is to be determined even in part by a third party)

    ii. recipients must be provided with sufficient time to consider whether the directions as drafted provide them with legal certainty (about compliance and revocation) and to challenge the CMA if they consider the CMA has exceeded its powers or gone beyond the scope of the remedy or the AEC. This becomes even more important when the directions

constrain commercial activity which is not in breach of the market investigation remedy, as was the case for the equivalent directions imposed on some of our competitors.[13]

iii. even once the CMA has decided in principle that directions are needed, it is imperative that it keeps an open, forward-looking mind as to the need for and proportionality of the content of those directions. Our experience demonstrates that this is particularly the case when the CMA is imposing directions at the same time on different firms, where the context of the breach and/or need for directions is not necessarily the same.

26. Any attempt to bring efficiency into the process in the way suggested by the CMA in the consultation may therefore be vastly outweighed by a lack of efficiency and impact on both CMA and firm resource later in the process.

Use of threat of directions and/or breach finding to change commercial approach of parties

27. To the extent that the CMA considers it has the ability to continue using its powers in this way, it must clarify its guidance and ensure that it provides sufficient time during the directions phase for the parties to put their case forward and take external legal advice where necessary.

Multiple directions for different parties

28. The CMA has to date issued directions in relation to Open Banking in two large tranches relating to only two distinct issues: the Open Banking launch date,[14] and "app to app" functionality.[15] If there are further occasions on which the CMA considers issuing directions to different parties at the same time in respect of the same or similar fact pattern, this should indicate that the CMA should consider whether alternative action is more appropriate, proportionate or in the best interests of consumers, or perhaps that something has gone wrong in the CMA's application of the remedy or approach to enforcement.

29. In any case, the CMA must ensure that parties are treated fairly, both by not having exactly the same requirements imposed on them where this is disproportionate, and by not being obliged to meet different requirements and/or timescales where there is no justification for differential treatment.

Use of directions to appoint third party monitor

30. Further consideration should be given to the appropriateness of the CMA requiring parties subject to market investigation remedies to instruct a third party monitor (via the imposition of directions) in the case of a breach finding, and CMA guidance should be updated accordingly.

31. Given the significant impact that such a mandated appointment of a monitor may have from a costs and resourcing perspective, it is imperative that parties are provided with sufficient time and opportunity to submit representations on whether such an appointment is necessary and

[13] Bank of Ireland, HSBC and Nationwide received directions stating that they were not permitted to launch their own Open Banking aggregation offering while they remained under the 2017 Directions.
[14] One set of 6 directions, all issued on 19 December 2017, was addressed to each of RBS, HSBC, Barclays, Santander, Bank of Ireland and Nationwide, covering the timelines for the delivery of PCA and BCA data sets.
[15] A second set of 5 directions, all issued on 1 April 2019, was addressed to each of Bank of Ireland, Danske Bank, HSBC, Lloyds and Santander, covering "app to app" functionality.

proportionate, and on its scope and duration. In consequence, it would be more efficient to engage on this point at the "minded to" stage rather than at the draft directions stage.

Sharing of correspondence relating to possible directions directly with relevant parties

32. We would welcome further clarity from the CMA on this point in any updated guidance.

Conclusion

33. In conclusion, Barclays considers that it is not clear there is a specific need for the current process to be amended as proposed in the consultation– and we are concerned that the proposed changes may well result in increased inefficiency as well as erosion of recipients' existing procedural rights.

34. We would urge the CMA to consider the enforcement of remedies more holistically, rather than focus on one specific element of the directions process. In this regard, implementing the recommendations flowing from the Baker Report and reflecting on the practice over the last few years is an essential first step.

35. We would be happy to discuss the above points with the CMA, if helpful.