

ENTERPRISE ACT 2002

NOTICE OF THE INTRODUCTION OF A PUBLIC REGISTER OF BREACHES OF THE COMPETITION AND MARKETS AUTHORITY'S MARKETS AND MERGERS REMEDIES

Background

1. Under the Enterprise Act 2002 ('the Act') the CMA may in mergers and markets accept final undertakings ('Undertakings') or impose final orders ('Orders'), pursuant to sections 82 and 84 of the Act (in mergers under part 3 of the Act), and sections 159 and 161 of the Act (in markets under part 4 of the Act). In instances where the conditions for a reference are met, the CMA may instead of making such a reference accept from parties undertakings in lieu of reference ('UIL'), pursuant to section 73 of the Act (in mergers) and section 154 of the Act (in markets). Any person to whom such an Undertaking or Order relates shall have a duty to comply with it.
2. The CMA is under a statutory duty to keep under review Undertakings and Orders under the Act. In particular, sections 92 and 162 of the Act provide that the CMA shall from time to time consider whether an Undertaking or Order is being complied with. The CMA will investigate suspected breaches of Orders or Undertakings, but may deal with those breaches in different ways, depending on their materiality.
3. An Order or Undertakings may authorise the person making that Order or accepting Undertakings to give directions ('Directions'). When conducting formal enforcement action following the breach of an Order, the CMA will consider the issuing of Directions. Pursuant to section 87 of the Act, Directions may include the taking of action or refraining from certain action.
4. As part of its ongoing review of Orders and Undertakings, the CMA currently publishes a register of Directions issued to businesses who have breached Orders and Undertakings in such a way that the CMA considers formal enforcement action is required. The CMA also publishes a list of letters in relation to breaches which are serious, but where formal enforcement action has not been required.
5. At present the CMA does not, however, publish breaches which have resulted in action other than the issuing of Directions or the publication of a letter of

breach. These breaches, which are normally less harmful than those requiring the issuing of Directions or a public letter but which can nonetheless be significant, have until now been investigated and dealt with through private correspondence. The CMA is now proposing that these breaches should also be publicly reported in the interests of increased transparency.

The CMA's approach to transparency

6. The CMA's policy is to be as transparent about its work as possible:

"Transparency is important for a number of reasons. Transparency is a means of achieving due process and ensuring that parties directly involved in a case are treated fairly. It also enables other interested persons to engage effectively with the CMA and to contribute to its work. Ensuring due process for those directly involved in the CMA's work and effectively engaging with other interested persons in turn improves the effectiveness and efficiency of the CMA's work, and the quality and robustness of its decision-making".¹
7. The CMA is also mindful of its responsibility under various statutory duties to avoid publication of any information that may be confidential to any person or business, unless permitted otherwise.

Register of breaches

8. The CMA is today announcing that it will publish a register of all significant breaches of our Market and Merger remedies. We consider this will have the following benefits:
 - It will act as an added deterrent to breaching CMA's Orders and Undertakings
 - It will inform customers, including business customers, as to which businesses have breached which Orders and Undertakings and how, allowing them to take this into account when deciding on who to purchase goods and services from
 - It will provide a clearer picture of the significant amount of work the CMA does in uncovering breaches and putting things right for consumers.
9. The Register will include a summary of all significant breaches. We will summarise breaches that result in Directions, and will maintain the [register of Directions](#) in its current form. We will summarise breaches that result in public letters, and will maintain the [list of public letters](#) in its current form. For the first

¹ [Transparency and disclosure: Statement of the CMA's policy and approach](#), para 2.3.

time, a summary of other significant breaches that do not result in either Directions or a public letter will also be publicly recorded.

10. The process for recording these breaches will be as follows: at the conclusion of an investigation the CMA will write to the party or parties that has or have breached the Undertaking or Order with the wording it proposes to enter onto the Register. The relevant party or parties will have at least 5 working days to provide comments, which the CMA will consider before updating the Register. While the CMA will consider all the party's comments carefully, it may not accept them all, for instance if it thinks the party is seeking to redact essential information.
11. The CMA will only record significant breaches in the Register. What is 'significant' will vary according to the individual circumstances of the breach, but is likely to include:
 - direct or indirect financial loss suffered by consumers, small businesses etc
 - the potential for direct or indirect financial loss to be suffered
 - Breaches which might cause a customer to take a different decision than what they otherwise might have taken.
12. The Register will take the form of a table which summarises the key facts of each breach:
 - The name of the party or parties that has breached the Order or Undertaking
 - The Undertaking or Order that has been breached
 - A summary of the breach. This will include a summary of the facts of the breach and of the effect of the breach. This may include the number of customers affected and the value of any detriment suffered by those customers. However, there may also be other types of breaches, such as misleading information being published on a website.
 - The duration of the breach.
 - The date the breach was notified to the CMA.
 - The action taken by the business to put things right, including refunds where necessary.
 - The action taken by the CMA.

Next steps

13. The Register will be published for the first time on 1 July 2020 on the CMA's website and will be updated quarterly. We will now start to record breaches notified to the CMA, regardless of when the breach itself occurred. Similarly, any ongoing breach which was first notified to the CMA before this date will not be added to the Register.

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