

Merger and Market remedies – guidance on reporting, investigation and enforcement of potential breaches

Draft for consultation

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1. Introduction

- 1.1 This guidance covers the Competition and Markets Authority's (CMA's) approach to actual or potential breaches of final undertakings and orders put in place to address concerns identified in merger, monopoly and market investigations. either under the Enterprise Act 2002 (EA02)¹ or under the previous legislation, the Fair Trading Act 1973.
- 1.2 This guidance does not cover initial and interim undertakings or orders in relation to mergers.² Accordingly, unless otherwise specified, the terms undertaking or order in this guidance should be read as referring to final undertakings and orders imposed at the end of CMA investigations as well as undertakings in lieu of reference.
- 1.3 Taking action to address breaches of undertakings and orders is important for the CMA to deliver the outcomes of its markets and mergers work. Breaches of undertakings and orders can mean that benefits for customers from the CMA's work are not being realised, rivalry is reduced and that markets are not working as well they otherwise would.
- 1.4 The CMA will apply this guidance flexibly, which means that the CMA will have regard to the guidance when it deals with potential and actual breaches of final undertakings and orders, but that, when the facts of an individual case reasonably justify it, the CMA may take a different approach.
- 1.5 This document is not a definitive statement of, or a substitute for, the law itself and should not be relied upon as an alternative to seeking appropriate legal advice.
- 1.6 This guidance sets out the CMA's practice as at 1 September 2020. Please refer to www.gov.uk/cma to ensure you have the latest version of this guidance as it may be revised from time to time to reflect changes in practices or the law and the CMA's developing experience.
- 1.7 You may find it useful to read this guidance alongside other documents published by the CMA, including *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders, CMA11*.

¹ As amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13).

² such as undertakings under section 80 (covering interim undertakings) or orders under section 72 (initial enforcement orders) or section 81 (interim orders).

2. The CMA's approach to breaches of undertakings and orders

The CMA's statutory role

- 2.1 Undertakings and orders are the primary means by which remedies are implemented following the final determination of merger and market investigation references under the EA02, as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13). Under the EA02, undertakings are accepted, or orders imposed by the CMA,³ except in certain public interest cases where the Secretary of State is responsible for accepting undertakings or imposing orders.^{4,5}
- 2.2 The CMA has a statutory duty to keep under review undertakings and orders made under the EA02.⁶ Sections 92 and 162 of the EA02 provide that the CMA shall, in particular, from time to time, consider whether an enforcement undertaking or order has been or is being complied with.⁷

Compliance with remedies

- 2.3 The CMA's undertakings and orders are designed during the course of an investigation to remedy identified competition problems effectively, by placing reasonable and achievable obligations on specific firms, within an appropriate timeframe. They are subject to extensive consultation prior to introduction. As a consequence, the CMA expects all firms that have agreed undertakings or that are within the scope of its orders to be compliant with these at all times from their introduction and throughout the time they remain in force.
- 2.4 Where firms breach the CMA's undertakings and orders, this can be the result of:

³ Under the EA02, the CMA may accept undertakings or impose orders (sections 82 and 84 of the EA02 (mergers) and sections 159 and 161 of the EA02 (markets)), and, where the conditions for a reference are met, the CMA may accept binding undertakings (UIL) as an alternative to making a reference (section 73 of the EA02 (mergers) and section 154 of the EA02 (markets)).

⁴ Sections 55 and 66 and Schedule 7 of the EA02 (mergers) and sections 139, 147 and 159 of the EA02 (markets).

⁵ The CMA will be obtaining the option of agreeing with the European Commission that the CMA will monitor and enforce certain EU merger and anti-trust remedies within the UK. The CMA expects to issue separate guidance on this matter in due course.

⁶ The CMA has a corresponding duty under the previous legislation, the Fair Trading Act 1973.

⁷ Specifically sections 92(2)(a) and 162(2)(a) of the EA02. and Schedule 24 of the EA02

- (a) a firm that did not properly implement a remedy when it first came into force;
- (b) the existing practices of a firm are not robust enough or it has failed to dedicate sufficient resource and expertise to ensure it can provide ongoing compliance; or
- (c) a firm has deliberately chosen not to comply with its obligations.

2.5 As noted above, taking action to address breaches of undertakings and orders is an important way in which the CMA delivers the outcomes of its markets and mergers work. Breaches of undertakings and orders can mean that benefits for customers from the CMA's work are not being realised, rivalry is reduced and that markets are not working as well they otherwise would.

What constitutes a breach?

2.6 The CMA considers a breach of an undertaking or an order to be any instance in which a firm fails to comply with any obligation which is required in an undertaking or order, regardless of any effect on competition or customers. The CMA considers such failures to represent breaches irrespective of how they occurred, whether deliberate, accidental or through ignorance of the obligations. Section 4 of this guidance addresses how the CMA considers a range of factors in determining whether and if so what enforcement action to take in response to a specific breach.

3. Monitoring, reporting, investigation and transparency of breaches

Monitoring compliance

- 3.1 The CMA has an internal team responsible for monitoring and enforcing compliance with its orders and undertakings. In some instances, the CMA also has monitoring trustees or other appointed bodies that have specific responsibilities in relation to specific orders and undertakings, while overall responsibility for compliance remains with the CMA. Such trustees and organisations are normally put in place for the more complex behavioural orders and undertakings. Some orders and undertakings impose compliance reporting requirements on parties, while in other cases, the CMA proactively seeks information and monitors compliance.

Reporting breaches of remedies to the CMA

- 3.2 The CMA finds out about breaches of its undertakings and orders through a variety of routes, including:
- (a) its proactive monitoring of individual firms and markets;
 - (b) the investigations of firms carried out by the CMA under a variety of tools;⁸
 - (c) liaison with sector regulators and industry or other representative bodies;
 - (d) third-parties, including individual consumers and firms or whistle-blowers, assessing and reporting on the compliance of others;
 - (e) compliance reports submitted to the CMA by firms; and
 - (f) self-assessments of compliance carried out at other times by firms.
- 3.3 It is important for the CMA to find out about all breaches of its undertakings and orders as soon as possible, irrespective of whether such breaches are considered material. This is because such early notification allows for breaches to be resolved more quickly to the benefit of customers. This also facilitates the efficient use of investigative resource both in the CMA and the

⁸ Including, Competition Act 1998 investigations, merger investigations, market studies, market investigations and investigations of previous breaches of orders and undertakings under the Enterprise Act 2002, and consumer protection investigations under the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Rights Act 2015.

firm concerned. Consequently, the CMA encourages firms to report to the CMA all breaches of its undertakings and orders as soon as these are discovered, irrespective of any timescales for reporting that may be contained in individual undertakings and orders.

- 3.4 Where firms become aware that they either will or may breach a set of undertakings or an order in the near future, the CMA expects them to contact it as soon as they are aware of this possibility, to explain the circumstances surrounding this and to explore with the CMA what actions can be taken at the time to mitigate both the duration and the effects of such potential breaches. This contact should be with the CMA's monitoring and enforcement team (remediesmonitoringteam@cma.gov.uk).
- 3.5 While the exact details the CMA will need to know about breaches will depend on the individual circumstances of a particular breach, the following information should be provided to the CMA with all reports of breaches:
- (a) a description of the relevant provision(s) of the Order or undertakings to which the breach relates;
 - (b) a full description of the breach itself, including whether, and if so how, it might have an impact on relevant third parties, and consumers;
 - (c) how the breach occurred and how and when it was discovered;
 - (d) the duration of the breach and whether it is ongoing;
 - (e) the size and significance of the breach, both for the firm and for third parties and consumers;
 - (f) details of whether any third parties are involved, including suppliers, systems providers and other contracted parties; and
 - (g) whether any relevant regulators have been informed (for breaches in regulated sectors).

Investigations of breaches

- 3.6 The CMA's approach to an investigation into breaches of its undertakings and orders will depend on the nature and severity of the breach. The CMA may use information-gathering powers contained in particular undertakings and orders, or broader information-gathering powers, such as section 109 EA02 notices for mergers, section 174 EA02 notices for markets, or use of the CMA's general function in section 5 EA02 to obtain, compile and keep under review information about matters relating to the carrying out of its functions.

- 3.7 Certain breaches of the CMA's undertakings and orders could also represent a breach of the CMA's broader jurisdictions, including competition and consumer protection legislation. Where the CMA considers this to be the case, the CMA will select the most appropriate legal tool or tools under which to conduct its investigation, based on the circumstances of the breach concerned, and the enforcement mechanisms available to deliver redress to customers.
- 3.8 The CMA notes that firms providing information to it have an obligation to provide truthful, complete and accurate information. It is an offence under section 117 of the Enterprise Act 2002 to provide materially false or misleading information to the CMA if you know that it is false or misleading or are reckless as to whether it is false or misleading.

Public register of breaches of undertakings and orders

- 3.9 The CMA has several public registers displayed on its website, as well as a range of ways in which it can achieve public censure.
- 3.10 The CMA provides information on current markets and mergers orders and undertakings on its [register of orders and undertakings](#). It has recently introduced a [register of time-expired merger remedies](#) (i.e. those where the remedy itself included an end-date for the obligations to come into effect automatically).
- 3.11 On 1 April 2020, the CMA announced that it would begin publication of information about all material breaches of its undertakings and orders. This Register will be updated quarterly.⁹ The objective in publishing this register is to provide transparency about the firms that breach the CMA's undertakings and orders and the frequency and nature of such breaches. It will also provide a description of any enforcement work carried out in respect of the breach.
- 3.12 Each potential breach the CMA becomes aware of will be investigated and the CMA will reach a decision on the basis of the information available to it on whether a particular issue represents a breach. The CMA's decision and its reasoning will be communicated to the firm responsible.
- 3.13 In considering whether a breach should appear on the register, the CMA will form a view as to whether the breach in question is material. Breaches which are less likely to be found to be material are those which the CMA determines as having had no substantive effect on customers, consumers or competition

⁹ This [register](#) was updated most recently on 8 July 2020.

(and which did not have the potential to have such an effect), and were of a very short duration with clear confirmation that they have ceased and will not recur. For example, some remedies impose information requirements on all customers, and while a failure to meet such obligations would generally be material, this might not be the case where a breach occurred for a very small group of customers (less than 50) for whom the information had been superseded (due to actions they had taken such as cancelling a policy etc). Another example would be the very slightly late delivery of a reporting obligation to the CMA. Where only a few days late, such a delay may have limited impact. Due to the nature of this definition, the CMA considers that, in practice, few breaches will be found not to be material.

- 3.14 As noted above, all breaches and potential breaches should be reported to the CMA, and it is for the CMA to determine whether an issue represents a breach and whether it considers that to be material.
- 3.15 The CMA will record the following information about material breaches in its public register once a decision has been reached on whether an issue represents a material breach:
- (a) the order or undertakings breached;
 - (b) the firm that breached the remedy;
 - (c) a short description of the breach including whether it is a breach of administrative, reporting or substantive obligations;
 - (d) the duration of the breach;
 - (e) when the breach was notified to the CMA;
 - (f) any action taken by the firm to address the breach and to put things right for consumers (such as through providing refunds to compensate for any loss or damage); and
 - (g) action taken by the CMA in response, whether formal or informal.
- 3.16 The CMA will publish information about breaches on its register once its investigations have been completed

4. Enforcement against breaches of remedies

- 4.1 Some breaches of the CMA's undertakings and orders show that either a firm has failed at some point in the past, or is currently failing properly to implement a remedy, while others can demonstrate that ongoing processes and procedures are inadequate to deliver compliance reliably since a remedy came into force. Consequently, the CMA may wish to take enforcement action following a breach to bring about compliance in a timely manner and to reduce the likelihood of further breaches taking place.
- 4.2 In assessing the nature of a breach, and considering the possible enforcement action, the CMA will take a case-by-case approach, taking into account all relevant circumstances. This may often include:
- (a) **significance** – including considering the magnitude of the breach in terms of cost or value and the number of suppliers, customers or consumers affected, as well as the duration of the breach;
 - (b) **the actions taken by the firm in reporting to the CMA and addressing the breach** including whether the firm has reported the breach to the CMA in a timely and complete manner. Other relevant factors here include whether it has decided itself to take proactive steps to stop the breach (in advance of any indication that the CMA intends to take specific action), and the extent to which a firm has taken appropriate steps to remediate any detriment suffered by customers, and improve its procedures sufficiently to prevent further breaches;
 - (c) **recidivism and previous conduct** – including an assessment of the nature of any previous breaches, and whether a business is already subject to a heightened compliance regime resulting from previous breaches;
 - (d) **the need for the CMA to take action to address the breach** – including whether a breach is ongoing, and what, if any, action the CMA needs to take action to bring a breach to an end, or to put in place improved and more substantial controls on a firm to seek to prevent further breaches; and
 - (e) **contextual factors, such as the status and age of the undertaking or order** – where an order or undertakings are new and in the process of being implemented, this might lead to different action being taken compared to when an order or undertakings have been in force continuously for a number of months or years and firms will be expected to be more familiar with the obligations. For older cases, we will give

consideration to how the relevant market has evolved since the undertakings or order were put in place.

- 4.3 The CMA's action typically falls into one of the two categories considered below:

Informal actions

- 4.4 Informal action describes a response to a breach that does not engage the CMA's direct enforcement powers. This can include the CMA agreeing actions with firms to end a breach and to improve practices and processes in the future. In these cases, the CMA can decide to publish a letter to businesses on its website which provides detail on the nature of the breach and acknowledges any action taken by a business to put things right. This is so that customers and any interested stakeholders are made aware. The CMA will also enter details on the Register of Breaches about these breaches in all material cases. For those breaches too small to warrant publication of a letter, details of these breaches will be published on the Register of Breaches.
- 4.5 While the CMA will generally consider issuing directions in response to all significant breaches of its remedies, it may decide that informal action is sufficient to address its concerns regarding remedying the breach and providing for future compliance. While not always the case, this is more likely for breaches where the following are true:
- (a) this is the first occasion that the firm has breached the remedy concerned;
 - (b) the breach is of limited scale and scope;
 - (c) the breach has limited practical impact on suppliers, customers and consumers;
 - (d) details of the breach were passed in full to the CMA as soon as was practical in the circumstances;
 - (e) the breach has been brought to an end by the firm concerned taking steps on a voluntary basis, considered as sufficient by the CMA, to resolve the root cause of the breach; and
 - (f) the firm has committed, on a voluntary basis, to take all steps, considered as sufficient and appropriate by the CMA, to prevent future breaches.

Formal enforcement action

- 4.6 To ensure compliance with its undertakings and orders, the CMA has formal enforcement tools available to ensure firms take all actions the CMA considers necessary for the firms to become compliant. These tools are used for more significant breaches, such as:
- (a) more significant breaches in terms of scale and scope and numbers of customers affected;
 - (b) larger magnitude of impact on individual customers or consumers;
 - (c) ongoing breaches, and those still subject to investigation by the firm concerned and the CMA, and where the necessary steps to remedy the breach and prevent future problems were not identified, volunteered by the firm responsible, agreed or taken; and
 - (d) issues of recidivism and ongoing compliance problems;
 - (e) where the CMA has concerns that a firm is not capable of, or willing to, take all the necessary steps voluntarily to prevent further breaches.
- 4.7 The use of the CMA's formal enforcement tools can lead ultimately to contempt of court proceedings. Consequently, firms which persistently fail to comply with the relevant undertakings or order could face a fine, or imprisonment of up to two years (or both).

Issuing directions

- 4.8 The first tool the CMA uses in its process of undertaking formal enforcement action (which can lead to contempt of court proceedings) is the issuing of directions to a firm.
- 4.9 In its directions, the CMA can require a firm to take steps to bring to an end a breach of an order or undertakings, as well as to improve its practices and procedures to prevent similar problems arising in the future. The CMA can also impose additional, generally more onerous, compliance and reporting obligations to allow for more detailed monitoring activities.¹⁰

¹⁰ See section 87 of the EA02.

Potential content of directions

4.10 The directions that the CMA issues to a firm will be specific to the firm and the particular breach. However, there are a number of types of directions which are commonly used, sometimes individually and at other times in combination with each other and other relevant obligations. The list of types of directions below is not exhaustive and does not constrain the CMA from considering different directions where they are considered appropriate to a particular breach by a particular business. The main categories of directions include:

- (a) **ending a breach** – where a breach is ongoing, the CMA may find it necessary to direct the firm concerned to take specific steps to end the breach within a certain timeframe;
- (b) **changes to policies, processes and procedures to prevent further breaches** – depending on the cause of a breach, the CMA may consider it necessary to direct a firm to make specific changes to its policies, processes and procedures (including staff training where appropriate) to avoid further breaches in the future;
- (c) **auditing internal processes and procedures** – where a number of policies, processes and procedures may have contributed to a breach, or where these are complex, the CMA may consider it necessary for the firm to procure a business independent of the firm to carry out either a one-off or a regular audit of all its processes and procedures that are involved in achieving compliance with an order or undertaking;
- (d) **enhanced compliance measures or new/additional reporting requirements** – in response to a firm breaching a remedy, the CMA may consider it appropriate to introduce compliance monitoring if this were not provided before the breach to understand the specific actions taken by firms to become compliant, or to introduce, or increase the frequency of any compliance reporting where already required by the remedy concerned. This can provide the CMA with valuable visibility of actions taken within the firm and the likelihood of further breaches; and
- (e) **requiring a firm to inform affected customers about a breach** – where a breach affects a firm's customers, the CMA may direct that firm to provide certain inform to its customers that were affected including informing them of their rights to refunds and / or redress from the firm.

CMA process for issuing directions

- 4.11 When the CMA believes it has all the information required to make a provisional decision, the CMA will generally expect to follow the following steps:
- (a) the CMA writes 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;
 - (b) the CMA allows the firm concerned at least two weeks to provide any representations on whether the issuing of directions is appropriate and proportionate in the case;
 - (c) the CMA considers any representations provided and where it continues to consider it appropriate to issue directions, the CMA provides the firm concerned with the draft directions that it intends to issue and seeks an action plan detailing the timescales within which the tasks directed will be undertaken;
 - (d) the CMA allows the firm concerned a reasonable period of time (normally 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;
 - (e) the CMA considers any representations on the draft directions, and reaches a final decision on whether to issue directions and, where appropriate, determines the exact directions to be issued; and
 - (f) the CMA issues 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.
- 4.12 At the time the CMA issues directions to parties, it is normal practice for the CMA to take a number of steps to highlight the breach and its enforcement action publicly. This helps to inform affected customers and potential customers of a business of the breach and the action taken. While the CMA will inform parties of its intended actions in publicising breaches and enforcement action, the choice of materials, the approach, and their content is not part of the consultation described above.

Enforcing directions through the courts

- 4.13 If firms fail to comply with the CMA's directions, the CMA can enforce these directly through the courts. If a firm were to ignore a court order the CMA could pursue contempt of court proceedings. Contempt of court is the offence of disobeying or ignoring a court order, resulting in a fine, or imprisonment of up to two years (or both).

Alternative routes of enforcement

- 4.14 The CMA has a number of investigative tools and powers at its disposal, and in a limited number of cases, such powers could be applicable to addressing breaches of our remedies. For each breach of a remedy, the CMA will determine which powers are most appropriate to be used to achieve the desired outcomes.