BARCLAYS

**Non-confidential version**

**6 November 2020**

# Competition and Markets Authority Consultation

## *Merger and Market remedies –*

## *Guidance on reporting, investigation and enforcement of potential breaches*

### Introduction

Barclays is subject to a number of CMA market investigation remedies and we welcome the opportunity to comment on this consultation and the CMA's draft guidance of 30 September 2020. We are supportive of the CMA's approach to remedies issues being codified and clarified where possible. We have limited our comments below to issues relating to market investigation remedies.

### Importance of market context of remedies

When considering the approach to market investigation remedies, and particularly compliance and enforcement, it is important to consider the context in which those remedies first came about. For example, the SME banking market of 2002 is very different indeed to that of 2020, and inevitably this means the 2002 remedies are in many ways "showing their age".[1]

The CMA states that for older cases it will consider how the market has evolved since the remedy was put in place.[2] It would be helpful to understand further how the CMA will now take this into account in future cases. In addition to keeping remedies under review by considering whether they are being complied with (s.162(2)(a) of the Enterprise Act 2002),[3] we would be grateful if the CMA could also set out the circumstances in which under s.162(2)(c) it will consider whether such remedies are no longer appropriate and need to be varied or revoked. We consider this is an important step for the CMA to take in its assessment, particularly in relation to long-standing remedies or markets that have changed considerably since introduction of the remedy, or where a particular remedy has been superseded by a new regulation or transfer of responsibility to a different regulator.[4]

---

[1] For example, the definition of "SME" as set out in the SME Undertakings (turnover of up to £25m) is now far removed from what lenders consider to be SMEs and as a blunt threshold does not take into account the increased sophistication of, and wider range of banking options open to, many parts of the customer base. Similarly, the Undertakings do not, and could not have, foreseen the development of complex new products and corporate structures that may be captured by the bundling restriction as originally written (e.g. SPVs that are used in high net worth contexts). This will necessarily result in over-application of the rules that is disproportionate to the harm that the original 2002 bundling prohibition was seeking to address.

[2] Paragraph 4.2(e) of the draft guidance

[3] Paragraph 2.2 of the draft guidance

[4] By way of example, when the CMA conducted its consultation on the revocation of Part 6 of the Retail Banking Market Investigation Order 2017 ("**RBMI Order**") due to the FCA overdraft regime coming into force, the CMA declined at that time to consider other Parts of the RBMI Order that would also become near-superfluous as a result of the FCA's changes, such as certain aspects relating to the "maximum monthly charge".

**Clarity of obligations under CMA remedies**

The draft guidance refers to the placing of "*reasonable and achievable obligations on specific firms, within an appropriate timeframe*".[5] However, in our experience this has not always been the case. By way of example in two particularly significant market investigations:

- The details of the Open Banking remedy (Part 2 of the RBMI Order) have developed considerably over time. New versions of the Agreed Timetable and Project Plan have been approved by the CMA (in 2017, 2018 and 2020), with the status of a number of items changing from "optional" to "mandatory", and a number of new items being added, or the scope of existing items changing - sometimes with far-reaching implications for those subject to the remedy in terms of cost, complexity and duration.

- On a more routine but still important level, the PPI Market Investigation Order 2011 ("**PPI Order**") includes a requirement for compliance reports to be submitted by 6 April each year even though the reporting year only finishes on 31 March. The timeframe set out in the PPI Order is therefore too short. While the CMA has been sympathetic to this point, it notes each year that it does not have the power to make any formal changes to the Order.

Therefore, Barclays would encourage the CMA to:

i. be as specific as it can in the drafting of future remedies, in particular in circumstances where the implementation of these remedies is being overseen by a third party and where even a slight delay in reporting is apparently construed as a material breach;
ii. give further consideration in its assessment of potential breaches and suitable enforcement action to the context in which the remedy was imposed, including the appropriateness of drawing conclusions and taking enforcement action in relation to matters that could not have been foreseen at the time of imposition of the remedy, or in circumstances where remedies have been left open to interpretation; and
iii. bear in mind the fact that the parties subject to a market investigation remedy will not have been found to have committed any wrongdoing, and that any remedies imposed (including their administrative and cost burden over time) should remain commensurate to any harm that was identified by the CMA.

**Reasons for non-compliance**

We understand the CMA's position to be that neither the reason for breach of a remedy, nor its effect on competition or customers, is relevant to the question of whether a breach has occurred.[6] However, there is a broad spectrum of possible relevant circumstances here (as suggested above), and we would strongly urge the CMA to take a more nuanced approach to its findings in respect of breach, materiality and enforcement. In particular, we consider that the reasons for a possible breach as set out in paragraph 2.4 of the draft guidance are not exhaustive, and that some breaches could come about while trying to ensure the best possible outcomes for customers, or even to comply with other regulatory requirements. The sense of "fault" in paragraph 2.4 therefore appears to us to be too black and white.

[5] Paragraph 2.3
[6] Paragraph 2.6 of the draft guidance

**Materiality, informal action and public register of breaches**

The CMA's draft guidance states that "*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 (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.*".[7] The CMA goes on to provide two specific examples: "*where a breach occurred for a very small group of customers (less than 50)*" and "*the very slightly late delivery of a reporting obligation to the CMA*".

It would be useful if the CMA could provide further detail on its views with respect to materiality and the impact this has on any enforcement action proposed by the CMA. For example:

- the basis for assuming that most breaches will be material and the circumstances under which some breaches but not others will be treated as material;
- what would constitute a "*very short duration*";
- why the CMA considers that a ceiling of 50 customers is appropriate, and whether this limit might vary depending on other relevant factors, for example the level of precision of the obligations or the lack of material financial impact;
- whether a relative measure would be more appropriate, for example if 95% of customers remain unaffected then the breach may not be regarded as material;
- whether the assessment of materiality is the same for all remedies or whether specific rules on materiality and reporting obligations should be set out for each remedy, to the extent that they are not already clear from the face of the Order or Undertaking;
- the impact of extraordinary circumstances and how the CMA will ensure that its reporting obligations and assessment of materiality are carried out with regards to external factors;
- the circumstances in which the late delivery of a reporting obligation would be considered any form of breach (particularly in light of the comments on reporting obligations below);
- how the CMA will assess the substantive effect on customers, consumers or competition; and
- the criteria by which the CMA measures breaches to be "*too small to warrant publication of a letter*"[8] and the rationale for these breaches still being included on the public register.

[7] Paragraph 3.13
[8] Paragraph 4.4 of the draft guidance

**Directions**

In addition to setting out the process it will follow when imposing Directions,[9] we would welcome further clarity from the CMA in relation to the process for bringing Directions to an end once all the requirements of those Directions have been complied with. In light of the considerable administrative, financial and reputational burdens which can result from being subject to Directions, and as a matter of due process, it is important that the obligations on the parties are articulated plainly from the outset, so that it is clear to all parties when the requirements of those Directions have been satisfied.

We note the CMA has in recent years more frequently required those parties subject to Directions to engage external auditors to monitor compliance. Given how very significant the additional financial impact of such a requirement can be, we would suggest that it would be appropriate for the CMA apply a high materiality threshold to such requirements. Again, this is particularly important in the context of remedies that have been left open to interpretation.

**Reporting**

We note that the CMA encourages parties to report breaches "*as soon as these are discovered, irrespective of any timescale for reporting that may be contained in individual undertakings and orders*" and that "*Where firms become aware that they either will or may breach … in the near future… to contact it as soon as they are aware of this possibility*".[10] It is not clear to us whether the CMA is seeking to amend the existing reporting deadlines set out in Orders such as the RBMI Order,[11] contained separately in Directions, or subsequently varied, particularly in circumstances where the CMA does not consider it has sufficient discretion in respect of other elements of those remedies.

In addition, we note that due to the wide-ranging nature of the remedies imposed by the CMA, as well as the complexity of some of the issues, it may not always be immediately clear whether there is a breach of the requirements, and it can take time to establish the relevant facts and undertake the necessary legal analysis. We would appreciate further clarity from the CMA as to whether it considers it has the power to request parties to report possible rather than actual breaches and, if so, the circumstances in which this would be appropriate.

[9] Paragraph 4.11 of the draft guidance
[10] Paragraphs 3.3 and 3.4 of the draft guidance
[11] Article 56.2 "*If a Provider is aware that it is not compliant with any part of this Order, it must report this non-compliance to the CMA within 14 days of becoming aware that it is not compliant*"