

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

29 January 2021

CMA136

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Contents

	<i>Page</i>
1. Consultation on draft guidance	2

1. Consultation on draft guidance

Introduction

- 1.1 The CMA consulted on draft guidance concerning the reporting, investigation, and enforcement of breaches of its markets and merger undertakings and orders from 30 September 2020 until 30 October 2020. Four substantive responses were received, and these have been considered in detail. This document sets out the areas in which responses were received and the action the CMA has taken in finalising its guidance in these areas.
- 1.2 The final guidance has now been published on the CMA's website, and in addition to this document and to assist with the transparency of this process, the CMA has also published non-confidential versions of the responses received.

Consultation responses

- 1.3 This section categorises the specific comments received during the consultation and provides the CMA's response to these comments and where appropriate, the action taken in respect of the finalised guidance.

Definition of breaches and how material breaches are assessed

- 1.4 There was a desire among respondents for the CMA to be clearer on the definition of breaches of its orders and undertakings, with one noting that the definition was very broad, while others noted that what constitutes a breach will differ across different remedies. Comments were also received concerning the definition of material breaches, with support for clarifying this description or making it a relative rather than an absolute threshold, for example in comparison to the size of a market. One respondent also sought changes to the classification of reasons for breaches arising to reflect cases where the firm responsible for compliance was not ultimately the cause of the breach.
- 1.5 In response, we have clarified that the final guidance document only provides guidance on what the CMA will consider as a breach. It is not practical for the CMA to provide guidance on how this will apply to each undertaking or order, but instead, the guidance provides broad principles that the CMA will use to determine whether actions represent a breach of an individual undertaking or order. The definition is deliberately broad to ensure it encompasses the full range of the CMA's orders and undertakings.

- 1.6 In relation to the description of a material breach, we have clarified in the finalised document that this description is based on a number of criteria, not just the absolute number of customers affected and that each individual breach will be assessed for its materiality, as circumstances will differ from case to case. We do not consider it appropriate to apply a relative threshold to this description, as the CMA's intention is only to exempt breaches which are small on an absolute basis, and therefore imposing a relative threshold would undermine this principle. We have also removed the statement concerning the proportion of breaches that may or may not be material, accepting that this should be determined by the breaches which arise in future. We have also clarified the wording around responsibility for breaches and the types of breaches that may take place to ensure these capture the full range of types of breaches.

Reporting obligations in guidance and individual remedies

- 1.7 The draft guidance contained a request for those firms that provided undertakings, or were within the scope of orders, to provide information on breaches as soon as this becomes available. During consultation several comments were raised about the consistency of this with specific individual orders and undertakings which impose a different regime for reporting breaches. In addition, some respondents noted that broader information was being sought and questioned the status of the guidance and whether this was changing the legal obligations already in place in some orders and undertakings. In addition, others raised questions about reporting potential breaches, and when firms could provide the information that the CMA was seeking to receive about new breaches.
- 1.8 In response, the CMA has clarified that the final guidance document has the status of guidance and consequently, it does not alter the legal obligations imposed by individual orders and undertakings. The CMA is fully aware of the differing reporting requirements in certain orders and undertakings, however the guidance now requests that firms report breaches when they become aware of them, rather than waiting and reporting them at various dates as may be required in specific orders and undertakings. Timely reporting allows for more efficient remedial action where the CMA can liaise with the firm concerned to ensure the action taken is appropriate and that further action is not then necessary later. This should benefit both firms, consumers and the CMA, with breaches resolved more quickly.
- 1.9 The CMA has taken account of the comments received and has changed its approach to the reporting of potential breaches given the nature of the concerns raised on this point and the difficulties in defining potential breaches

with sufficient rigour while not imposing a disproportionate burden on firms. The CMA has also clarified that the information it seeks in relation to breaches may not all be available at the first point that a breach is uncovered, and therefore, firms may provide this as and when it becomes available.

Interaction of enforcement work with reviews of remedies

- 1.10 Two respondents raised comments relating to the CMA's reviews of undertakings and orders, a process which is covered by existing guidance: [CMA 11, Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders](#). One respondent sought to understand when reviews will be carried out and what that means for enforcement across different remedies, while another respondent noted that the review process can be slow and sought an alternative method by which businesses could be exempted from requirements, or responsibilities waived.
- 1.11 The CMA has clarified that remedy reviews are carried out where the CMA considers there to be a reasonable prospect of finding at least one material change of circumstance that would lead the particular order or undertaking to be found to be no longer appropriate, and where that may lead to the order or undertaking being varied, or released/revoked. The CMA carries out reviews on both a proactive basis, including using information obtained during its monitoring and enforcement work, but also on a reactive basis, considering evidence provided by those affected by its orders and undertakings.
- 1.12 Outside of the formal review process, the CMA continues to monitor and enforce the orders and undertakings that remain in force. The circumstances in which the CMA will consider enforcement action are set out separately in the section exploring this subject.

Clarity over enforcement action

- 1.13 There were a range of comments received in relation to the CMA's guidance on its enforcement activity. These included queries around when the CMA would carry out enforcement activity and when it would not, and whether particular firms or remedies may be exempted from such enforcement (including for older remedies where the market had changed and cases where the remedy was not delivering the changes sought), and the interaction of the potential for enforcement activity with the CMA's prioritisation principles. In relation to directions, one comment sought additional guidance on the duration of directions. There were two comments relating to court action, one seeking to know more about when this could take place and another seeking to understand how to challenge the CMA's decisions in this area.

- 1.14 The CMA has made amendments to the guidance to clarify the existing position that not all breaches of orders and undertakings will lead to enforcement action. However, the CMA does consider it both necessary and appropriate to have the possibility of carrying out enforcement action across all of the orders and undertakings that are in force, so it does not consider it appropriate to limit the situations when enforcement action would be taken in the ways that respondents suggested.
- 1.15 The guidance has been amended to include further information about the expected duration of directions, including those that may be expected to remain while a particular order or undertakings remain in force, and those which are time or event limited and may expire once particular actions have been completed.
- 1.16 Like much of the work the CMA carries out, monitoring and enforcement activities are subject to the CMA's prioritisation principles, which ensure that the CMA's resources are directed appropriately. The finalised guidance has been clarified in this regard.
- 1.17 The guidance concerning directions already indicates the situations in which the CMA may take further action through the courts where directions are breached. While more general issues of recidivism can also be determinative, these are considered on a case by case basis, so it is not possible to provide further guidance on this point at present. Further information has also been added to the guidance regarding the ways in which the decisions of the CMA could be challenged by the firms affected.

Process and timings for enforcement action

- 1.18 There were several comments on the process and timings set out in the guidance for enforcement action. One respondent noted that where the firm did not notify the breach to the CMA, the first correspondence with the CMA should not be in relation to enforcement. Another noted that in complex cases firms may need more than two weeks to respond. One also noted that consultations should include any third parties that are also involved in breach as well as the firm bound by the order or undertakings. Finally, one sought to limit any references in press releases to previous conduct.
- 1.19 The CMA has clarified that its practice is to contact firms and seek information in advance of any contact in relation to potential enforcement. The CMA guidance had already envisaged that more than two weeks may be needed in some cases, and the wording in this area has been clarified, as the CMA is aware that the work involved in assessing breaches and enforcement activity

will vary dependent on the scale and complexity of the issues involved among other factors.

- 1.20 In relation to third parties and their role, the CMA has provided additional guidance to explain its approach in this area. Concerning publication and press releases referring to breaches, the CMA considers it important for it to retain flexibility over how best to describe the conduct of particular firms, as this forms an important part of the reasoning for considering enforcement action, therefore the CMA is not content to have its public statements limited in the way envisaged.