

Consultation on streamlining the CMA's approach to issuing directions

Response from the Competition and
Markets Authority

11 May 2023



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Revised guidance on the CMA's approach to issuing directions

Response to Consultation

Introduction and summary

1. The CMA published [Markets and Merger remedies: Guidance on reporting, investigation and enforcement of potential breaches](#) on 29 January 2021 (the 'Current Guidance'), following a public consultation held in 2020. This was the first time that the CMA had issued public guidance about its approach to the enforcement of its undertakings and orders in this area.
2. The Current Guidance explained the CMA's existing practice in this area, providing greater transparency for those within the scope of final merger and market undertakings and orders and their advisers and representatives. The CMA has now developed over two years' experience of carrying out enforcement activities and engaging with parties under investigation. The Current Guidance has been helpful for both the CMA and parties subject to orders and undertakings in explaining the CMA's approach and how it uses the specific enforcement tools currently available to it, in relation to the issuing of directions. However, the approach set out in the Current Guidance has in practice proven duplicative, as it involves the CMA consulting with parties twice in relatively quick succession. The CMA therefore explored how to amend its Current Guidance and practices in this area.
3. The CMA commenced [a consultation which ran from 8 December 2022 to 23 December 2022](#) (the 'Consultation') on proposed changes to its Current Guidance, in which the CMA had proposed combining both the consultations in its process for issuing directions, to reduce the administrative burden on both parties and the CMA.
4. The CMA received three responses to the Consultation.¹ This document summarises the comments received in response to the proposed changes to its Current Guidance, and the CMA's views thereon. It does not seek to address every point raised. Non-confidential versions of all submissions are available on the consultation page.

¹ The list of respondents is set out at the end of this document.

5. The CMA published its final revised version of the Current Guidance ('the Revised Guidance') on 11 May 2023 and it took effect on that date. This document should be read in conjunction with the Revised Guidance.

Issues raised by the Consultation and our response

6. The CMA received three responses to the Consultation, all of which were from retail banks: HSBC, Barclays and Lloyds Banking Group. All respondents noted concerns in relation to the CMA amending its Current Guidance. Respondents expressed concerns regarding four main aspects of the CMA's proposed change: a perceived risk to procedural fairness; the circumstances within which the CMA may retain the two-stage consultation process; the perceived efficiencies created by the CMA's proposals; and the minimum timeframe afforded for parties to provide representations. We address each of these comments in turn below.

Procedural fairness of the proposed new process

Respondents' views

7. All respondents highlighted concerns regarding the impact that the CMA's proposed changes may have on procedural fairness. In particular, it was stated that combining both consultation stages into one would reduce the effectiveness of a key step in the process; the opportunity to assess the CMA's 'minded to' decision. Those respondents stated that the CMA's proposals would reduce the ability of an impacted party to provide meaningful representations on that decision, which could subsequently lead the CMA to reach a less informed and potentially less proportionate conclusion regarding the issuing of directions. One respondent also stated that the likelihood of confirmation bias, regarding the CMA's 'minded to' decision, could increase as a result of the proposed changes. Another respondent encouraged the CMA to ensure that there was constructive engagement with relevant parties prior to it notifying those parties of its 'minded to' decision.

The CMA's views

8. Parties which are informed that the CMA is minded to issue directions will still be afforded an opportunity to provide representations on both the appropriateness and proportionality of that provisional decision, as well as the opportunity to put forward any new information which they believe is important in reaching that decision. Parties' ability to do so will be unchanged under the CMA's proposals.

9. The CMA has found that parties have sometimes struggled to provide comments on the principle of having directions imposed on them, particularly where they have been unaware of the nature of the proposed directions, as without knowing the details of what is proposed they can find it difficult to assess issues such as the proportionality of imposing directions. In combining these two steps of the process (ie providing parties with the opportunity to give feedback on whether it would be appropriate to issue directions and the substance of draft directions), we consider that those parties will be able to make fully informed representations on the impact of the CMA's intention to issue directions. As outlined in the Consultation Document, parties will retain the ability to engage in a meaningful consultation before the CMA makes a final decision to issue directions, both on the principle of their issue and the detail of what may be imposed.
10. We do not see that allowing for more effective feedback from parties is likely to create or increase any risk of confirmation bias. Parties will also continue to have the opportunity to engage effectively and constructively with the CMA, and to submit any information believed to be relevant to the CMA's consideration, prior to the CMA reaching a 'minded to' decision.
11. Having carefully considered the respondents' views on this point, the CMA does not believe that any amendments to its proposals are required.

Guidance regarding the continued use of the two-stage process

Respondents' view

12. Two respondents stated that the circumstances under which the CMA may retain the two-stage consultation process were unclear, with one respondent believing that further guidance was necessary in providing legal certainty to parties.

The CMA's views

13. As outlined in the Consultation Document, the CMA acknowledges that there may be situations in which it is appropriate to retain the two-stage process. This could be, for example, where the CMA needs to act swiftly to inform a party subject to an order or undertakings that it is minded to issue directions before it is in a position to prepare a set of draft directions for consultation.
14. The CMA does not believe it would be possible at this stage to detail the circumstances in which it is likely to implement a two-stage process, acknowledging that there are a number of factors which could potentially influence this decision, including the circumstances set out in the Consultation Document. The CMA does not wish to limit the additional flexibility provided by

the Revised Guidance, for both the CMA and impacted parties, before it has had an opportunity to assess how this amended process works in practice. Consequently, the CMA does not believe that any amendments to its proposals are required in this area at this stage, although the CMA will keep this matter under review in light of emerging experience.

Efficiency gains

Respondents' views

15. Two respondents questioned the efficiency gains that may be achieved by the CMA's proposals. It was noted by one respondent that the potential adverse impacts on due process were not justified by the perceived efficiency gains. Another respondent believed that the CMA had not clarified why the current process was particularly problematic, nor how efficiencies would be achieved through the proposals.
16. One respondent stated that the proposed changes could lead to inefficiencies in the process. The respondent envisaged a situation where directions are ultimately not issued, but have been drafted and considered by both the CMA and the relevant party regardless.

The CMA's views

17. For the reasons set out above, the CMA does not consider that the changes proposed will affect the procedural fairness of its decisions or consultations with parties, as parties will be able to make the same representations to the CMA, as is the case currently.
18. The CMA's experience to date has shown the two-stage process to be duplicative, with parties wishing to understand what requirements may be imposed on them before properly assessing the appropriateness and proportionality of both those requirements and the CMA's broader decision to issue directions. The CMA believes that the Revised Guidance not only delivers efficiency savings for the CMA and all parties in aggregate, but also provides greater clarity for parties during the process.
19. The possibility for directions to be drafted only for the CMA to reverse its decision at a later date is noted. However, based on its experience to date of operating the two stage process, the CMA considers that the broader efficiency gains expected to be achieved through the Revised Guidance are likely to outweigh any potential for inefficiencies in some cases presented by this scenario. Therefore, having carefully considered the respondents' views on this point, the CMA does not consider any changes to be necessary to its proposal.

Minimum timeframe for making representations

Respondents' views

20. All respondents expressed concern that the CMA's proposals potentially reduced the time available to parties to provide representations on both the CMA's 'minded to' decision and any draft directions. Respondents noted that the two-stage process provides a minimum of four weeks (two weeks per stage) to consider both elements, whereas the proposed text within the Consultation Document provided parties with a minimum of two weeks. Respondents stated that this could reduce the ability of parties to consider, and provide meaningful representations on, any 'minded to' decision and draft directions. Two respondents urged the CMA to provide a minimum period of four (working) weeks to allow sufficient time for parties to consider and respond to the CMA.

The CMA's views

21. Based on its experience to date, the CMA considers that a minimum period of two weeks within which to consider the CMA's 'minded to' decision and associated draft directions should be adequate for most parties in straight-forward cases. It should also be noted that, while the two-week timeframe provided by the CMA's proposals is a minimum period, this would not preclude the CMA from providing additional time to parties should it believe that the complexities of a case or circumstances make it appropriate to do so.
22. In response, the CMA has amended the text within the Revised Guidance to provide more clarity over the timescales and the minimum period, as well as the potential for a longer consultation period where appropriate.

Appendix A: List of respondents to the Consultation

- HSBC
- Barclays
- Lloyds Banking Group