

Remedies

**[Draft] Guidance on the CMA's
approach to monitoring
compliance with, and the
variation, supersession and
termination of merger,
monopoly and market
undertakings and orders**

CMA11

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1. Introduction

- 1.1 This guidance covers the Competition and Markets Authority's (CMA) approach to the following activities in relation to merger, monopoly and market undertakings and orders:
- (a) monitoring compliance with and investigating breaches of remedies; and
 - (b) review, variation, superseding and termination of remedies.
- 1.2 This guidance does not cover initial and interim undertakings or orders, such as undertakings under section 80 or orders under section 72 or 81 of the Enterprise Act 2002 (EA02).¹ Accordingly, unless otherwise specified, the term 'undertaking' or 'order' in this guidance should be read as referring to final undertakings and orders as well as undertakings in lieu of reference.
- 1.3 In a small number of instances, the CMA retains a duty to advise the Secretary of State on orders and undertakings made under the Fair Trading Act 1973 (FTA73) which have not been transferred from the Secretary of State to the CMA by statutory instrument. The Secretary of State is also responsible for varying, superseding or terminating undertakings or orders given following public interest cases.² This guidance does not relate to the process by which the CMA provides advice to the Secretary of State in these instances.³
- 1.4 The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when it deals with the above matters, but that, when the facts of an individual case reasonably justify it, the CMA may adopt 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 of [INSERT ADOPTION DATE]. 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 best practice or the law and our developing experience.

¹ In the case of mergers, guidance for variation of initial and interim undertakings or orders is available in [Interim measures in merger investigations \(CMA108\)](#).

² Sections 159 and 161 of the EA02.

³ Sections 92(3) and 162(3) of the EA02.

- 1.7 You may find it useful to read this document alongside other documents published by the CMA or adopted by its Board, including Mergers - the CMA's jurisdiction and procedure (CMA2), Merger remedies (CMA87), [Market Guidance (CMA3)(a), (b), & (c)], and [Administrative Penalties: Statement of Policy on the CMA's Approach (CMA4)].

2. The CMA's Statutory Role

- 2.1 Undertakings and orders are the primary means by which remedies are implemented following the determination of merger and market investigation references under the EA02. Under the EA02,⁴ undertakings are accepted or orders imposed by the CMA,⁵ except in certain public interest cases where the Secretary of State is responsible for accepting undertakings or imposing orders.⁶
- 2.2 The CMA has a statutory duty to keep under review undertakings and orders made under the EA02. In summary, Sections 92 and 162 of the EA02 provide that the CMA shall consider whether an undertaking or order has been or is being complied with.⁷
- 2.3 Moreover, and from time to time, the CMA must consider whether, by reason of any change of circumstances:
- (a) undertakings are no longer appropriate and need to be varied, superseded or released, and
 - (b) an order is no longer appropriate and needs to be varied or revoked.
- 2.4 The CMA has a further duty,⁸ that applies for a period of up to 10 years from a market investigation report, to keep under review the effectiveness of remedies implemented following that report, and if they are ineffective take action to update them.⁹
- 2.5 Responsibility for deciding on variation, superseding or termination of undertakings and orders lies with the CMA in respect of all but a very limited number of undertakings and orders (see paragraph 1.3).

⁴ Prior to the EA02, under the FTA73, the Secretary of State accepted undertakings or imposed orders to remedy the adverse effects identified during a merger and monopoly reference

⁵ 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 as an alternative to making a reference (section 73 of the EA02 (mergers) and section 154 of the EA02 (markets)).

⁶ Sections 55 and 66 and Schedule 7 of the EA02 (mergers) and sections 139, 147 and 159 of the EA02 (markets).

⁷ Specifically sections 92(2)(a) and 162(2)(a) of the EA02, and Schedule 24 of the EA02 in relation to remedies made under the previous legislation, the FTA73.

⁸ Section 162A of the EA02.

⁹ Where the Secretary of State has made, and is responsible for the undertakings or order, in a public interest case, the CMA's duty is to advise the Secretary of State.

3. Monitoring compliance with CMA orders and undertakings

Compliance with undertakings and orders

- 3.1 The CMA's undertakings and orders are designed to remedy identified competition problems by placing effective and proportionate obligations on specific firms, within an appropriate timeframe. They are subject to consultation prior to introduction. Firms subject to CMA undertakings and orders are required to comply with these at all times from their introduction and throughout the time they remain in force.
- 3.2 Where firms breach the CMA's undertakings and orders, this can be the result of a variety of factors, for example:
- (a) the firm choosing not to comply with its legal obligations.
 - (b) the firm being unaware of the legal obligations on it; or
 - (c) conduct whereby a firm did not directly intend to breach undertakings or an order, but:
 - (i) did not properly implement undertakings or an order when it first came into force and so has never achieved compliance; or
 - (ii) although it implemented the undertakings or order initially, the practices of the firm were not sufficiently robust or it failed to dedicate sufficient resource and expertise to ensure ongoing compliance with the undertakings or order (either in isolation or as part of its wider regulatory obligations).
- 3.3 Taking action to address breaches of undertakings and orders – whatever their cause - 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 competition in relevant markets is not working as well it otherwise would.

What constitutes a breach

- 3.4 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, including whether deliberate, accidental or through ignorance of the obligations.¹⁰

Monitoring compliance

3.5 The CMA is responsible for monitoring and enforcing compliance with its orders and undertakings.¹¹ 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.¹² Such trustees and organisations are normally put in place for more complex behavioural orders and undertakings, and they can also be used to oversee structural changes as well. Some orders and undertakings impose compliance reporting requirements on parties. In addition, the CMA proactively seeks information and monitors compliance.

Reporting breaches of remedies to the CMA

3.6 The CMA may find out about breaches of its undertakings and orders through a variety of routes, including:

- (a) proactive monitoring of individual firms and markets;
- (b) investigations of firms carried out by the CMA under a variety of tools;¹³
- (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.

¹⁰ Whether the CMA can impose a penalty for a particular breach will depend on whether the firm responsible has a reasonable excuse, see [*Administrative Penalties: Statement for Policy on the CMA's Approach (CMA4)*].

¹¹ Sections 92 and 162 of the EA02 *Duty of the CMA to monitor undertakings and orders*. See also Schedule 24 of the EA02 for provision in respect of the remaining FTA73 remedies.

¹² For example, the Private Healthcare Market Investigation Order 2014 involves the appointment by the CMA of an Information Organisation to provide information for patients on hospitals and consultants, while the CMA has used divestment and / or monitoring trustees in a range of cases.

¹³ Including, competition and consumer investigations, DMU investigations, merger investigations, market studies, market investigations and investigations of previous breaches of orders and undertakings under the EA02.

- 3.7 The CMA's portfolio of market and merger undertakings and orders have varying types of legal obligation in relation to reporting breaches, with some imposing specific deadlines on firms for reporting breaches, while others require firms to report on an annual basis about breaches.
- 3.8 These legal obligations will remain in place and take precedence over this guidance document. However, the CMA encourages all firms to report to the CMA all breaches of its undertakings and orders as soon as these are discovered, even where a full account of the details is not yet available. Such cooperation enables a timely and efficient assessment of the scale of the breach, and what action may be necessary in response, including potential enforcement action. This facilitates the efficient use of investigative resource both in the CMA and the firm concerned. The CMA's approach in this respect is described in [Annex 3 *Civil Proceedings and Other Non-Penalty Enforcement Action in Respect of Breaches of Remedy Requirements, to Administrative Penalties: Statement of Policy on the CMA's Approach* (CMA4).]
- 3.9 If a firm is aware of a breach and takes action to remedy the breach without informing the CMA at the time, there is a risk that the CMA may not be satisfied with the action taken, and this may lead to the firm having to take separate and additional action to satisfy the CMA at additional cost. The CMA will take into account the action and reporting of information on breaches when it determines the appropriate enforcement action.¹⁴
- 3.10 Where a firm becomes aware that it will breach a set of undertakings or an order in the near future, the CMA would also encourage the firm to contact the CMA as soon as it is aware of this possibility, to explain the circumstances surrounding this and to explore with the CMA what actions the firm can take to mitigate the duration and the effects of the breach.
- 3.11 All contact in relation to breaches of the CMA's orders and undertakings covered by this guidance should be with the CMA's remedies monitoring and enforcement team (remediesmonitoringteam@cma.gov.uk).¹⁵
- 3.12 While the exact details the CMA will need to know about a breach will depend on the individual circumstances of a particular breach, the CMA would expect to receive the following information with all reports of breaches, while

¹⁴ See [CMA4: Administrative Penalties: Statement for Policy on the CMA's Approach, for details of the factors the CMA considers in enforcement in relation to breaches of undertakings and orders].

¹⁵ To facilitate prompt handling of correspondence, parties contacting the CMA via this address should include a reference to the relevant undertaking / order in the email title.

recognising that all aspects of this list may not be available at the point at which a breach is first identified and notified to the CMA:

- (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 and likely harm caused, 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 of undertakings and orders

- 3.13 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 clauses of 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.
- 3.14 Certain breaches of the CMA's undertakings and orders could also represent a breach of other laws which the CMA is tasked with enforcing, including competition or consumer protection legislation. Where the CMA considers this to be the case, the CMA will prioritise the most appropriate tool or tools under which to conduct its investigation, based on the circumstances of the breach concerned, including, where appropriate, the enforcement mechanisms available to deliver redress to consumers.
- 3.15 Those providing information to the CMA have an obligation to provide truthful, complete and accurate information. It is an offence under sections 117 and 180 of the EA02 to knowingly or recklessly provide information to the CMA that is false or misleading in a material respect. Further the CMA may impose

a penalty of up to 1% of worldwide turnover (or 5% of daily turnover) on a firm and £30,00 and £15,000 for an individual, where it considers that information supplied is false or misleading in a material respect (without reasonable excuse (section 110 and 174A of the EA02). The CMA also notes that failure to comply with a requirement of a notice issued under s109 or s174 EA02 without reasonable excuse can lead to the imposition of a penalty.¹⁶

Public register of breaches of undertakings and orders

- 3.16 The CMA has several public registers displayed on its website and generally seeks to promote transparency in relation to identified breaches of undertakings and orders, and the action the CMA is taking.
- 3.17 The CMA provides information on current market and merger orders and undertakings on its [register of orders and undertakings](#). It also has a [register of time-expired merger remedies](#) (i.e. those where the undertakings or order itself included an automatic end-date for the obligations, or has otherwise expired).
- 3.18 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 is updated quarterly.
- 3.19 The CMA will reach a decision, on the basis of the information available to it, on whether a particular issue represents a breach and, if so, whether it should appear on the register.

Materiality of breaches

3.20 The materiality of any breach will be assessed in context and will depend upon the circumstances of the case, the nature of the market, the nature of the breach and the actual or potential impact of the breach, both in terms of its substantive impact and also its impact on the CMA's ability to carry out its statutory functions. In deciding whether a breach is material, the factors that the CMA will consider are likely to include:

- (a) the actual or potential substantive effect (if any) on customers and / or the competitive process;

¹⁶ As set out in Section 111 or Section 174D of the Enterprise Act 2002. More information on the imposition of penalties may be found in [CMA4 *Administrative Penalties: Statement of Policy on the CMA's Approach.*]

- (b) the impact (if any) on the CMA's ability to carry out its functions, particularly in relation to remedy monitoring and enforcement;
 - (c) the duration of the breach and how quickly it was reported and rectified; and
 - (d) the extent, if any, of any exacerbating factors, such as the extent of previous non-compliance by the party concerned or the extent to which a remedy and its requirements are well-established.
- 3.21 The intention of these considerations is to help CMA to focus its monitoring and enforcement resources on material breaches. However, as noted in paragraph 3.3 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 is material such that it is recorded in the public register.
- 3.22 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 undertakings or order
 - (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.
- 3.23 Prior to publishing details of a breach on the register of breaches, the CMA will notify the relevant firm of its decision to make an entry on the register and provide such of its reasoning as the CMA considers appropriate in the circumstances.
- 3.24 Where the CMA has decided that enforcement action is appropriate in relation to such a breach, the CMA would normally expect the register of breaches to be updated when details of the enforcement action are published or, if sooner, when any enforcement action has been completed.

Enforcement in relation to breaches of undertakings and orders

- 3.25 The CMA's approach to enforcement action (including the imposition of penalties) in relation to breaches of the orders and undertakings described above is set out in the CMA's guidance document [CMA4: Administrative Penalties: Statement for Policy on the CMA's Approach].

4. Variation, superseding and termination of undertakings and orders

Introduction

- 4.1 The CMA has the duty arising from sections 92, 162, and 162A of the EA02 to keep under review undertakings or orders, and may make changes:
- (a) where the CMA considers by reason of a change of circumstance a merger¹⁷ or market¹⁸ undertaking or order may no longer be appropriate; or
 - (b) where the CMA concludes that a market undertaking or order has been ineffective.¹⁹
- 4.2 In either of these situations, the review is the process the CMA uses to determine whether the undertaking or order in question needs to be varied, superseded or released/revoked.
- 4.3 The following sections set out the CMA's approach to both types of review.

Reviews considering changes of circumstance

- 4.4 In considering variation, superseding and release or revocation of undertakings and orders, either upon request from a party or under the CMA's own initiative,²⁰ the CMA will consider whether there has been one or more changes of circumstance. If there has, the CMA will then consider what action, if any, should be taken.
- 4.5 The precise nature of the CMA's consideration of any changes of circumstance will depend entirely on the individual circumstances affecting a particular undertaking or order. However, the change of circumstance must be of sufficient magnitude, relevance and importance that the undertaking or order becomes no longer appropriate in dealing with the competition problem and/or adverse effects which it was designed to remedy, if it is to lead to

¹⁷ Section 92(2)&(4) to the EA02.

¹⁸ Section 162(2)&(4) to the EA02.

¹⁹ Section 162A(4)&(5) to the EA02.

²⁰ Chapter 5 of this guidance document sets out the circumstances in which the CMA may launch a review and the process for such reviews.

either variation, supersession, release or revocation. For example, changes of circumstance have in the past included the following:

- (a) products or services being either changed in nature or no longer offered by firms;²¹
- (b) changes in consumer tastes and preferences over consumption of particular products or services;²²
- (c) changes in market and broader industry supply conditions or structure that may affect the conditions of competition and the need for a particular undertaking or order;²³ or
- (d) a range of legislative changes including superseding requirements of an undertaking or order in other legislation or regulatory controls, as well as other changes to legislation that may affect the application of an order or undertaking.²⁴

4.6 Experience of reviews of undertakings and orders to date suggests that the complexity of analysis required in a review varies significantly depending on the changes of circumstance identified and the characteristics of the market. In some cases, detailed investigation may be required in order to evaluate whether or not there has been a change of circumstance (and, if so, what, if any, changes to undertakings or an order may be justified), while in others, the changes of circumstance and the action necessary may be clear and straightforward to determine.

Reviews of the effectiveness of orders and undertakings

4.7 When assessing the effectiveness of market undertakings and orders,²⁵ either upon request from a party or under the CMA's own initiative,²⁶ the CMA will consider:

- (a) whether it will have jurisdiction to amend the undertaking or order if found ineffective; that jurisdiction applies within 10 years from publishing the

²¹ For example, the [review of Littlewoods Organisation plc / Freemans plc](#).

²² For example, the review of [Thomas Cook Group Ltd/Interpayment Services Ltd](#).

²³ For example, the [review of undertakings given by British Sky Broadcasting](#).

²⁴ For example, the [review of the Retail Banking Order 2017](#).

²⁵ As set out in Section 162A to the EA02.

²⁶ Chapter 5 of this guidance document sets out the circumstances in which the CMA may launch a review and the process for such reviews.

final report, with a further requirement that the CMA last took relevant action no less than 2 years ago;²⁷ and

(b) whether an undertaking or order has been ineffective in delivering the action, or actions, as decided on in the final report to remedy, mitigate or prevent the adverse effect on competition (AEC) or any detrimental effect on customers (hereafter included in AEC), within the timeframe that was anticipated.

4.8 The CMA applies its published prioritisation principles in deciding whether to open a review, and before committing resources to opening review will consider if there is a realistic prospect of finding that an order or undertaking is ineffective such that it is appropriate to vary it.

4.9 When implementing the remedies in its final report, the CMA exercises a discretion whether to make, or accept, provision for remedies in a single instrument, or to make provision across a number of orders and undertakings (for example where there are a number of distinct remedies, or a mix of undertakings and orders are being made). However, where the CMA uses a single instrument for a number of distinct remedies, that does not prevent it from reviewing the effectiveness of those on a remedy-by-remedy basis. In appropriate cases, the CMA may therefore prioritise a review of the effectiveness of part of an undertaking or order.²⁸ Where that part is found ineffective the CMA may make changes to just that part.

Ineffective undertakings and orders

4.10 The CMA considers that ineffective undertakings and orders may be those where, for example, the undertaking or order has:

(a) been circumvented or not implemented by the party concerned, such that it has had little or no impact on the relevant party and the market concerned;

²⁷ Section 162A(4) to the EA02. The effect of this is the CMA may vary a remedy within the period of 10 years of final report, but may not vary a remedy (under this power) for either; a) two years from first making an order or accepting an undertaking, or b) two years from when it last amended it using this effectiveness power. However, the CMA separately retains the s.162 EA02 power to change a remedy where the change of circumstance power described in paragraphs 4.4 to 4.6 is applicable.

²⁸ When implementing the remedies in the final report, the CMA has a discretion whether to make or accept a number of orders and undertakings (for example where there are a number of distinct remedies), or making that provision in a single larger instrument. Where the CMA has adopted the latter drafting approach, the fact it has made provision for multiple remedies in a single instrument does not prevent it from reviewing the effectiveness of those remedies on a remedy-by-remedy basis where appropriate.

- (b) been implemented by the party concerned, but has had little or no impact when considered against the purpose and objective of the applicable part of the undertaking or order;
 - (c) led to substantial unintended consequences, which have undermined the purpose and objective of the applicable part of the undertaking or order;
 - (d) had a substantially lesser effect than expected, which has been insufficient to deliver the scale of change sought in the market when considered against the purpose and objective of the applicable part of the undertaking or order; or
 - (e) had a substantially slower effect than that planned, such that the benefits have not been realised in the timeframe anticipated.
- 4.11 The above causes of ineffectiveness are non-exhaustive examples, and more than one cause of ineffectiveness may apply to an order or undertaking.
- 4.12 Where an order or undertaking is found to be ineffective, the CMA will consider whether it is appropriate to make a variation to ensure it is more effective to achieve the action, or actions, decided on in the final report to remedy, mitigate or prevent the relevant AEC.
- 4.13 If the CMA considers that a variation is appropriate, in order to decide what variation to make, the CMA will consider alternative remedy options considered in the final report, alongside other options from its own analysis and any options put forward by parties and other stakeholders, informed by the evidence of ineffectiveness.²⁹
- 4.14 In its market investigations the CMA chooses the most proportionate remedy that it considers effective to remedy, mitigate or prevent a particular AEC. Given this, if as part of a review of effectiveness, the CMA's chosen remedy has been found to have been ineffective, the variation proposed by the CMA may, in some cases, involve the imposition of an expanded or supplemental remedy to effectively address the AEC in the final report. This choice of new, and potentially expanded or supplemental provision, will be informed by the ineffectiveness of the originally selected remedy to resolve that AEC.
- 4.15 The complexity of analysis required in a review of effectiveness will vary significantly depending on factors such as the nature of the ineffectiveness identified, the age of the order or undertaking and the nature and

²⁹ The CMA must make the change it has decided to make within six months of publishing its decision, section 162A(6) to the EA02.

characteristics of the market. As with reviews concerning change of circumstance, in some cases, detailed investigation may be required in order to evaluate whether an order or undertaking has been ineffective and, if so, what, if any, alternatives may be imposed to address the failure to remedy the adverse effect identified in the most proportionate manner possible.

5. Process for reviews of undertakings and orders

5.1 This section sets out the process for reviews of undertakings and orders. It sets out:

- (a) initial screening, including the ways in which a review may be initiated, and deciding whether to conduct a review
- (b) the process for a review, including: timescale, the CMA's assessment, the key stages of the CMA's decision-making process, and the conclusion of a review, and
- (c) the procedure for dealing with undertakings or orders that are time expired, lapsed or superseded by new CMA undertakings or orders.

Initial screening

The ways in which a review may be initiated

5.2 There are two ways in which a review may be initiated – (i) at the request of parties who have given undertakings or who are subject to an order, or other interested parties; or (ii) by the CMA on its own initiative.

Requests from parties

5.3 Parties may request that undertakings or orders be varied, superseded or terminated by reason of a change of circumstance. For a market undertaking or order, within 10 years of report, parties may also request that it is varied, superseded or terminated on the basis that it is ineffective.

5.4 Any submission making such a request for a review concerning a change of circumstance should set out clearly and with supporting evidence:

- (a) what the change of circumstance is
- (b) how and why this makes it appropriate to vary, supersede or terminate the undertakings or order
- (c) the possible consequences for consumers and businesses impacted by the undertakings or order³⁰

³⁰ Where the request is made by other interested parties (that is, those not subject to the undertakings or order), they should explain their interest in the undertakings or order.

- (d) why a review of the order and undertakings meets the CMA's published prioritisation principles, and
 - (e) whether the request is related, at least in part, to a failure, or anticipated failure, to comply with the undertakings or order.³¹
- 5.5 Any submission making such a request for a review concerning the ineffectiveness of undertakings or an order should set out clearly and with supporting evidence:
 - (a) the reason for the intervention being ineffective in addressing the relevant AEC from the final report of the investigation, including whether certain actions have or have not occurred;
 - (b) the implications of the failure for competition, businesses and consumers;
 - (c) why a review of the order and undertakings meets the CMA's published prioritisation principles; and
 - (d) whether the request is related to a failure to comply with the undertakings or order.
- 5.6 It is open to parties to approach the CMA prior to submitting a request in order to discuss what sort of evidence would be expected to be included in any particular request.
- 5.7 Parties should provide both a confidential and a non-confidential version of their submission.
- 5.8 The CMA may upon receipt of a request for a review, issue an invitation to comment by publishing information about the request for review. Where it does so, the CMA will invite public comment on the request for review.³² The consultation period for the invitation to comment will typically be around three weeks. The form of publication, duration of the period of public comment and extent of detail will depend on the circumstances of the case. This could range from publication of the non-confidential elements of the submission itself, to a statement confirming that the CMA is considering whether to

³¹ Where the possible change of circumstance is such that it would lead to a breach of the undertakings or order, the CMA may be able to prioritise considering it as quickly as possible. However, parties can assist the CMA by giving it notice of such changes of circumstance in good time and thereby avoid being placed in potential breach.

³² Where the request for a review has been made by other interested parties (that is, those not subject to the undertakings or order) or the review is an own-initiative CMA review, and in order to ensure an effective public consultation and to establish whether such a public consultation can take place, the CMA will normally consult informally with those directly affected by the undertakings or order prior to the public consultation. This informal consultation is likely to be a short period of no more than two weeks.

conduct a review. In some cases, publication of an invitation to comment may not occur if, for example, the CMA believes that the request and the evidence provided gives it sufficient information to reach a decision without the need for consultation, or where the request and evidence surrounding this constitutes specified information which would need to be excluded from disclosure.³³

The CMA's own-initiative activity

- 5.9 The CMA is also able to begin a review on its own initiative, without any person having made a request. In practice, the CMA may do so when, based on its own intelligence, it has identified a possible change of circumstance analogous to those referred to in paragraph 4.5 above, or where it has evidence that an order or undertaking may be ineffective, or where the report in which the undertakings or order were originally determined recommended a timeframe for review of effectiveness or considering changes in circumstance.
- 5.10 If the CMA is intending to conduct a review on its own initiative it may issue an invitation to comment concerning the undertakings or order, asking for views as to whether such a review should take place and to submit any relevant evidence. The consultation period will typically be around three weeks.

Deciding whether to conduct a review

- 5.11 The CMA will assess the request for a review and the responses to any consultation on the request, or the responses to a consultation on whether the CMA should conduct an own-initiative review. The CMA will then decide whether a review should take place at a particular point in time.
- 5.12 In deciding whether to conduct a review, the CMA will act in accordance with its published prioritisation principles. This may mean that the CMA will choose not to conduct a review within time frames recommended in the report in which the undertakings or order were originally determined. Factors relevant in deciding whether to conduct a review will include whether there is a realistic prospect of finding a change of circumstance, or of establishing that an order or undertaking is ineffective.
- 5.13 If the CMA decides not to proceed with a review, it will inform the relevant parties that a review will not take place and may set out briefly its reasons for not conducting a review at that time. This decision may be published,

³³ See Part 9 of the EA02.

although the CMA will have due regard to its obligation not to disclose specified information, as set out in Part 9 of the EA02.

Decisions during a remedy review

- 5.14 The CMA has a discretion in whom to appoint as decision maker for most remedy reviews.³⁴ The CMA either appoints a ‘Remedy Group’ drawn from the CMA panel,³⁵ or appoints an appropriate senior CMA member of staff or members of staff, to conduct the review. The parties will be informed of the relevant decision maker when the review is launched.
- 5.15 The CMA will take a case-by-case approach to appointing decision makers. For substantive remedy reviews that are intended to consider material changes to the substance of the obligations in the remedy, whether through a potential change of circumstance or an examination of whether an obligation is ineffective, and which may affect competition in markets, it may decide to appoint a Remedy Group from the CMA panel.³⁶ Where the changes to be considered are of a more administrative nature, such as amending a remedy to ensure it is consistent with wider regulatory reform, or to make amendments to reporting requirements to ensure continued effective monitoring and administration, the CMA may decide that it is appropriate for a particular review to be decided upon by one or more senior members of staff.
- 5.16 The CMA will publish its decision to launch a review. Shortly thereafter, the CMA will also publish information about the review including:
- (a) a brief description of the case, the relevant legislation, the industry sector concerned and the CMA’s reasons for commencing a review. The level of information may vary according to the circumstances of the case

³⁴ This is because by when a review of a Phase 2 remedy is launched, the original CMA Group will generally have ceased to exist and so the decision reverts to the CMA Board to be delegated as appropriate (s.34C(1)(c)&(3)(e) and s.133A(1)(g)&(2)(c) EA02). The exception are a small number of remaining undertakings and orders made under the FTA73, where responsibility for their review has been passed from the Secretary of State to the CMA, and the legislation prescribes the appointment of a CMA Group, see Schedule 24 to EA02.

³⁵ For more information on delegation to Remedy Groups, see the published [Case and Policy Committee terms of reference](#). The Remedy Group is a sub-committee of the Case and Policy Committee, accountable to the CMA Board. The Remedy Group will follow broadly the same approach to its decision making as other groups of panel members.

³⁶ Examples where the CMA has appointed a senior member of staff to conduct a substantive review include a review of a Phase 1 merger remedy prioritised soon after it was accepted. The CMA appointed the Phase 1 decision maker, who was already familiar with the case, as review decision maker. The CMA expects there will be other situations where a senior member of staff or members of staff are well placed to conduct a review and so may be appointed as decision maker.

- (b) an indicative timetable showing the anticipated dates of key milestones (see paragraph 5.18 below), and
- (c) the contact details for the main CMA contacts for the case including specifying the first point of contact for general queries and submission of information.

- 5.17 The CMA will generally place a review opening announcement on www.gov.uk/cma announcing its decision to commence a review (except where to do so would prejudice the case or would otherwise be inappropriate). At the same time as or following the public announcement, the CMA will also publish, as soon as reasonably practicable, the information referred to in paragraph 5.16.³⁷
- 5.18 The CMA will keep up to date the information provided to the parties and published about the review and its progress.
- 5.19 Where undertakings or orders under review relate to a regulated sector, and especially where a sectoral regulator has a role in monitoring compliance with the undertakings or order, the CMA will liaise with the relevant sectoral regulator as appropriate.³⁸ In other cases, for example, when reviewing merger undertakings or orders the relevant sectoral regulator may make a submission to the CMA setting out its views and any supporting evidence on the consideration of a change of circumstance, whether undertakings or an order is ineffective, or the options in relation to variation or termination.³⁹

The process for a review

Timescales for change of circumstance reviews

- 5.20 Once the decision maker(s) for a review have been appointed, they will decide upon an appropriate timetable for the review. The CMA will endeavour to conduct its review as efficiently as possible. However, the time taken to conduct a review will vary depending on the complexity of the issues involved,

³⁷ There may be a delay between the public announcement and the publication of the information if, for example, the group or decision maker has not yet been appointed.

³⁸ The CMA's approach to the disclosure of specified information to other public authorities, including sectoral regulators, is explained in more detail in chapter 6 of Transparency and disclosure: Statement of the CMA's policy and approach (CMA6)

³⁹ The CMA's approach to information received from sectoral regulators is set out at paragraphs 6.20 and 6.21 of the Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973 (April 2013, CC7 (revised)).

the available resources at the time and the extent to which parties engage in a timely manner.

- 5.21 The CMA will publish on www.gov.uk/cma an administrative timetable for the review that will assist in providing an indication of the expected time frame for the review. The administrative timetable will set out the key stages of the review, including what documents the CMA expects to publish and when. The administrative timetable may be revised during the course of the review.

The CMA's assessment

- 5.22 As part of the CMA's assessment it will first consider whether the initial submissions from all relevant parties are sufficient to allow it to reach a provisional decision:
- (a) if the CMA considers that relevant parties have had sufficient opportunity to make their case and the initial submissions indicate clear cut grounds for variation, supersession, release or revocation, it will provisionally decide whether the undertakings or order should be varied or terminated and, if so, how. This approach is likely to be used in only the most straightforward of cases, such as where no material concerns have been expressed by third parties in response to the invitation to comment. Where variations are minor or urgent, the CMA will seek to deal with these as swiftly as possible,
 - (b) if the CMA considers that further information and/or analysis is necessary before it can reach a provisional decision, it will consider what steps should be undertaken and how the further information and/or analysis required affects the timetable for the review. This approach is likely to be required in most reviews.
- 5.23 Where the CMA has identified the need for further information and/or analysis, it may invite or request submissions from those parties subject to the undertakings or order and/or interested third parties, including those that have not responded to any initial invitation to comment. In certain circumstances, particularly for complex reviews,⁴⁰ the CMA may consider it necessary to hold a hearing with relevant parties.

⁴⁰ For example, where there are changes in market conditions which require detailed analysis; where the change of circumstances suggests a range of possible variations for the undertakings or order; or where establishing whether an intervention is effective or ineffective requires significant and detailed analysis.

- 5.24 The timing and manner of engagement with relevant parties will vary depending on the type of work involved in any given review. The CMA will have regard to the need to ensure due process for both parties directly involved and other interested persons. The CMA will also have regard to the need to conduct reviews effectively and efficiently, and the need to reach properly reasoned decisions.
- 5.25 Where the CMA wishes to test some of its initial thinking on the review, the CMA may decide to disclose working papers or sections of working papers to parties for comment. The CMA will take a flexible approach to sharing its developing thinking and/or evidence with parties directly involved and other interested persons, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of the review. In most cases, however, the process of putting back materials to parties will be primarily to comment on factual accuracy and commercial sensitivity.
- 5.26 When considering what documents may be disclosed during the course of a review, the CMA will have regard to [CMA6 Transparency and disclosure – statement of CMA’s policy and approach].

Key stages of the CMA’s decision-making process

Provisional decision

- 5.27 Before reaching a final decision, the CMA will make a provisional decision on which it will consult publicly. The provisional decision will be published on www.gov.uk/cma. The consultation period will depend on the circumstances of the case but will typically be 21 days from the date of the provisional decision and will generally be no less than 14 days. This may be increased in situations where the CMA is also consulting on a proposed change in accordance with Schedule 10 EA02.
- 5.28 The CMA’s provisional decision will address the question of whether there has been a change of circumstance or, for reviews considering whether remedies are ineffective, the provisional decision will address whether the remedy or part of it has been found ineffective. If the CMA is proposing a variation to the terms of the undertaking or order at the time of publishing the provisional decision it will also seek views on the nature and scope of the proposed variation either as part of the provisional decision or in a separate notice of possible variation.
- 5.29 The CMA will consider variations proposed by parties (if any) as well as its own proposals. Parties will be expected to explain how their proposed variations will effectively address the original competition problem and the

adverse effects, either in light of any change of circumstance provisionally identified, or the finding of ineffectiveness. The CMA will normally set out a time limit within which any proposed variations must be submitted.

- 5.30 Usually the CMA will reach a provisional decision on the substance of the necessary variation at the same time as the change of circumstances and/or decision on ineffectiveness and will seek views on the proposed variation prior to consulting on the text of revised undertakings or a revised order. In these cases, the provisional decision will therefore also contain sufficient detail on the nature and scope of any proposed variations (if variation is appropriate) to provide a firm basis for subsequent implementation.
- 5.31 In some reviews, the case for termination, superseding or the precise nature of the appropriate variation may be sufficiently clear at the time of making the provisional decision that the CMA may draft the text of revised undertakings or a revised order at the same time as its provisional decision. The CMA may therefore decide to set out its provisional decision and reasoning including a notice of intention to vary or terminate the undertakings or order. Such a notice will be given in accordance with the procedural requirements set out in Schedule 10 to the EA02.
- 5.32 At the time of consultation on the provisional decision, the precise nature of the proposed variation may not have been decided upon. For example, there may be some circumstances in which the party or parties subject to the undertakings or order have not engaged in discussion of possible variations prior to the publication of the CMA's provisional decision.⁴¹ In these circumstances, the CMA may consider it appropriate to consult on a range of possible variations. In order to do so, the CMA's provisional decision will include a notice of possible variations.

Final decision

- 5.33 The CMA will consider all submissions received during the consultation period before reaching a final decision. The final decision and the reasons for it will be published.
- 5.34 The undertaking or order in question will remain in place if the final decision is any of the following:

⁴¹ This might be because the question of whether or not there is a change of circumstance, or whether an intervention is ineffective is not clear cut and hence the CMA will need to reach a view on that first before engaging in discussions on possible changes.

- (a) the CMA has identified no change of circumstance;
- (b) the CMA finds that obligations in the undertakings or order are not ineffective;
- (c) the CMA finds that the change of circumstance or finding of ineffectiveness is not a matter that warrants any variation, supersession or termination; or
- (d) where following a change of circumstance or finding of ineffectiveness there are no suitable changes that could be made.

Documents relating to implementation of any variation, supersession, release or revocation

- 5.35 If the final decision is that there has been a change of circumstance and that variation or termination is appropriate, at the same time as the CMA's final decision or as soon as possible thereafter the CMA will give notice of its intention to vary or terminate the undertakings or order (unless the process has already been commenced).⁴² Such notice shall be given in accordance with the procedural requirements set out in Schedule 10 to the EA02. Changes to undertakings will be consulted upon for at least 15 days and changes to an order will be consulted upon for at least 30 days.⁴³
- 5.36 The CMA will have regard to any representations made in response to the notice and may make modifications to the proposed revised undertakings or order as a result. If the CMA considers that any representation necessitates material change to the proposed revised undertakings or order, it will give notice of the proposed modifications with a further consultation period of no less than seven days.
- 5.37 In the absence of any representations to a Notice to vary the undertakings or order or in the event that the CMA decides, on consideration of representations made, not to amend materially the revised undertakings or order, it will proceed with accepting and publishing revised undertakings or making a revised order by publishing a variation order.
- 5.38 Similarly, in the absence of any representations to a Notice of intention to terminate the undertakings or order or in the event that the CMA decides, on consideration of representations made, to terminate the undertakings or order,

⁴² Where the CMA has decided in its final decision that a change to an in-scope market undertaking or order is appropriate, the CMA must make that change within six months of publishing that decision.

⁴³ Schedule 10, paragraph 7(2) of the EA02.

the CMA will proceed with releasing parties from the undertakings by notifying those parties of the release or, in the case of orders publishing a revocation order, and updating its public register of remedies accordingly.

Conclusion of a review

- 5.39 The CMA's review concludes either once a final decision has been made that there are no changes to be made to the undertakings or order, or once the undertakings or order have been varied or terminated.⁴⁴
- 5.40 When the CMA publishes a notice of varying or terminating undertakings or an order, it will make any appropriate amendment to its published register of orders and undertakings. The CMA is responsible for monitoring and enforcing any undertakings and orders that remain in force, except where specifically indicated otherwise.

Procedure where undertakings or orders are time-expired, lapsed or superseded by new CMA undertakings or orders

- 5.41 There will be cases in which undertakings or orders are time-expired or have lapsed. This may be as the result of a predetermined event having taken place or where a specified timescale has elapsed, or where they have been superseded by new CMA undertakings or orders. For example:
- (a) where undertakings or an order contain within them a time period for the application for the substantive elements of the remedy which has ended or where undertakings or orders contain an overall expiry date which has passed;
 - (b) where undertakings or an order specify that they will expire upon a certain event happening; or
 - (c) where it is clear cut that the substantive obligations have been superseded by new undertakings or a new order resulting from a new CMA inquiry.

⁴⁴ A review may also be concluded if a new market investigation reference is made under section 131 of the EA02 by the CMA Board, or by the Secretary of State (sections 132 and 140A of the EA02), or by a sectoral regulator, which relates to the existing undertakings or order under review. In these exceptional circumstances, the CMA will notify relevant parties that this action is being taken and publish the fact the review is concluding on www.gov.uk/cma. The existing undertakings or order remain in force and continue to bind the parties unless or until such time as varied or terminated following the market investigation.

- 5.42 In the case of such time-expired, lapsed or superseded undertakings or orders, there is no requirement for further investigation or consultation, as the undertakings or orders will already have time-expired, lapsed or been superseded. In such circumstances, the CMA will remove the undertakings or orders from its register of orders and undertakings, notify the parties subject to the undertakings or order, and publish a notice that the order or undertakings have been removed.
- 5.43 Some of the CMA's remedies contain a specified time period or event beyond which they cease to have practical effect, but do not provide for the remedy itself to automatically terminate when that is fulfilled. In order to make most effective use of its limited resources, the CMA exercises its discretion not to carry out a remedy review process in relation to such remedies. The CMA will discharge its duty under Schedule 10 of the Enterprise Act 2002 by publishing a Notice of its intention to release such remedies and to consult on that notice for a minimum of 15 days (in the case of undertakings) or 30 days (in the case of Orders).