

MERGER AND MARKET REMEDIES

Reporting, Investigation and
Enforcement of
potential breaches

DRAFT POLICY STATEMENT

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FOREWORD

This guidance covers the Gibraltar Competition and Markets Authority's (the "GCMA") approach to actual or potential breaches of final undertakings and orders put in place to address concerns identified in merger and market investigations under the Competition Act 2020.

Undertakings and orders are the primary means by which remedies are implemented following the final determination of merger and market investigation references.

Taking action to address breaches of undertakings and orders is important for the GCMA to deliver the outcomes of its markets and mergers work. Breaches of undertakings and orders can mean that benefits for customers from the GCMA's work are not being realised, rivalry is reduced and that markets are not working as well as they otherwise would.

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1. ACKNOWLEDGEMENTS

Where appropriate, the Gibraltar Competition and Markets Authority will seek to ensure that locally published guidance notes are consistent with those published by fellow competition authorities in other jurisdictions.

As well as reflecting the existing competition standards and practices in Gibraltar, parts of this document reflect and/or incorporate the guidance from the UK's Competition and Markets Authority.

The following document was used in the drafting of these guidelines:

(a) "Merger and Market remedies – guidance on reporting, investigation and enforcement of potential breaches", Competition and Markets Authority, CMA 136 revised¹.

¹ "Merger and Market remedies – guidance on reporting, investigation and enforcement of potential breaches", Competition and Markets Authority, CMA 136 revised, 11/05/2023
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1155599/Breaches_of_remedies_.pdf>, accessed 25/09/23.

2. INTRODUCTION

The Gibraltar Regulatory Authority (the "Authority") is designated as the competent authority for the promotion and enforcement of competition law in Gibraltar. Pursuant to such designation, the Authority must discharge all the functions, duties and obligations in accordance with the Competition Act 2020 (the "Act"), acting in its capacity as the **Gibraltar Competition and Markets Authority (the "GCMA")**.

This guidance covers the GCMA's approach to actual or potential breaches of final undertakings and orders put in place to address concerns identified in merger and market investigations under the Act.

This guidance does not cover initial and interim undertakings or orders in relation to mergers². 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 GCMA investigations as well as undertakings in lieu of reference.

Taking action to address breaches of undertakings and orders is important for the GCMA to deliver the outcomes of its markets and mergers work. Breaches of undertakings and orders can mean that benefits for customers from the GCMA's work are not being realised, rivalry is reduced and that markets are not working as well as they otherwise would.

The GCMA will apply this guidance flexibly, which means that the GCMA 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 GCMA may take a different approach.

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.

It is important that the GCMA continually adapts its approach to actual or potential breaches of final undertakings and orders to ensure that it is fulfilling its statutory duty in light of a dynamic and evolving economy. It therefore reserves the right to amend these guidelines from time to time in line with regulatory experience gained and expertise acquired.

² Such as undertakings under section 137 (interim undertakings) or order under section 127 (initial enforcement orders) or section 138 (interim orders) of the Competition Act 2020.

3. THE GCMA'S APPROACH

STATUTORY ROLE

Undertakings and orders are the primary means by which remedies are implemented following the final determination of merger and market investigation references under the Act. Under the Act, undertakings are accepted, or orders imposed by the GCMA³, except in certain public interest cases where the Minister responsible for Business is responsible for accepting undertakings or imposing orders⁴.

The GCMA has a statutory duty to keep under review undertakings and orders made under the Act. Sections 149 and 236 of the Act provide that the GCMA shall, in particular, from time to time, consider whether an enforcement undertaking or order has been or is being complied with⁵. In addition, and as part of the same statutory duty, the GCMA considers whether undertakings and orders remain appropriate, and whether they should be varied or released/revoked.

COMPLIANCE WITH REMEDIES

The GCMA's undertakings and orders are designed during the course of an investigation to remedy identified competition problems, by placing effective and proportionate obligations on specific firms, within an appropriate timeframe. They are also subject to consultation prior to introduction. Consequently, the GCMA 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.

Where firms breach the GCMA's undertakings and orders, this can be the result of, for example:

- (a) conduct whereby a firm did not directly intend to breach undertakings or an order, but:
 - (i) did not properly implement a remedy when it first came into force and so has never achieved compliance; or
 - (ii) although it implemented the remedy initially, the existing practices of the firm are not sufficiently robust or it has failed to dedicate sufficient resource and expertise to ensure it can provide ongoing compliance with the undertakings or order (either in isolation or as part of its wider regulatory obligations);
- (b) the firm being unaware of the legal obligations on it; or

³ Under the Competition Act 2020, the GCMA may accept undertakings or impose orders, sections 139 and 141 (mergers) and sections 233 and 235 (markets) and, where the conditions for a reference are met, the GCMA may accept binding undertakings (UIL) as an alternative to making a reference, section 128 (mergers) and section 228 (markets).

⁴ See sections 114 and 126 and schedule 7 (mergers) and sections 219, 220, 233 and 235 (markets) of the Competition Act 2020.

⁵ Specifically, sections 149(2)(a), 236(2)(a) of the Competition Act 2020.

(c) the firm deliberately choosing not to comply with its legal obligations.

WHAT CONSTITUTES A BREACH?

The GCMA 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 GCMA considers such failures to represent breaches irrespective of how they occurred, including whether deliberate, accidental or through ignorance of the obligations.

Section 5 of this guidance addresses the GCMA's response to specific breaches, including how the GCMA considers a range of factors in determining on a case-by-case basis whether, and if so, what enforcement action to take in response to a specific breach.

4. MONITORING, REPORTING, INVESTIGATION AND TRANSPARENCY OF BREACHES

MONITORING COMPLIANCE

The GCMA is responsible for monitoring and enforcing compliance with its orders and undertakings. Some orders and undertakings impose compliance reporting requirements on parties, while in other cases the GCMA proactively seeks information and monitors compliance.

REPORTING BREACHES OF REMEDIES

The GCMA can find 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 GCMA under a variety of tools⁶;
- (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 GCMA by firms; and
- (f) self-assessments of compliance carried out at other times by firms.

It is important for the GCMA to find out about all breaches of its undertakings and orders as soon as reasonably possible, irrespective of whether such breaches are considered material. This is because such early notification allows for the GCMA to work with the firm concerned on actions to end the breach quickly and effectively and to understand whether specific enforcement action is necessary to end the breach. This facilitates the efficient use of investigative resource both in the GCMA and the firm concerned.

The GCMA may eventually establish a portfolio of market and merger undertakings and orders that have varying types of legal obligations in relation to reporting breaches, with some imposing specific deadlines on firms for reporting breaches, while others requiring firms to report on an annual basis about breaches.

When concluded, these legal obligations will remain in place and take precedence over this guidance document. However, in this guidance, the GCMA encourages all firms to report to the GCMA 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. As described above, this will allow the GCMA and the firm concerned to work together, in a timely and efficient manner to assess the scale of the breach, and what action is necessary in response, including potential enforcement action.

⁶ Such as merger investigations, market investigations and market studies.

If a firm is aware of a breach and takes action to remedy the breach without informing the GCMA at the time, there is a risk that the GCMA may not be content with the action taken, leading to costly changes in approach and an increased likelihood of formal enforcement action to address the breach.

Where a firm becomes aware that it will breach a set of undertakings or an order in the near future, the GCMA would also encourage the firm to contact the GCMA as soon as it is aware of this possibility, to explain the circumstances surrounding this and to explore with the GCMA what actions the firm can take to mitigate the duration and the effects of the breach.

While the exact details the GCMA will need to know about a breach will depend on the individual circumstances of a particular breach, the GCMA would expect to receive the following information with all reports of breaches, while 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 GCMA:

- (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 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

The GCMA's approach to an investigation into breaches of its undertakings and orders will depend on the nature and severity of the breach. The GCMA may use information-gathering powers contained in particular clauses of undertakings and orders, or broader information-gathering powers, such as section 168 notices for mergers, section 248 notices for markets, or use of the GCMA's general function in section 69 of the Act to obtain, compile and keep under review information about matters relating to the carrying out of its functions.

The GCMA notes that firms providing information to it have an obligation to provide truthful, complete and accurate information. It is an offence under section 179 of the Act to knowingly or recklessly provide information to the GCMA that is false or misleading in a material respect. The GCMA also notes that failure to comply with a requirement of a notice issued under section 168 or 248 of the Act without reasonable excuse can lead to the imposition of a penalty⁷.

⁷ As set out in section 173 or 252 of the Competition Act 2020.

PUBLIC REGISTER OF BREACHES OF UNDERTAKINGS AND ORDERS

The GCMA has a duty to compile and maintain a register on current markets and mergers orders and undertakings on its register of orders and undertakings. The register generally seeks to promote transparency in relation to identified breaches of undertakings and orders, and the action the GCMA is taking.

Each potential breach the GCMA becomes aware of will be investigated and the GCMA 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. The register will be published on the Authority's website as soon as it becomes active.

MATERIAL BREACHES

In considering whether a breach should appear on the register, the GCMA will form a view as to whether the breach in question is material on a case-by-case basis. Breaches which are less likely to be found to be material are those which the GCMA 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 which were also of a very short duration with clear confirmation that they have ceased and will not recur.

For example, some orders and undertakings 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 and specifically in a situation where the information had already been superseded (due to actions they had taken such as cancelling a policy etc).

Another example could be the slightly late delivery of a reporting obligation to the GCMA. Where only a few days late, such a delay may have limited impact on compliance and the work of the GCMA. The intention of this definition is to ensure that those bound by orders and undertakings are not devoting resource unnecessarily to exploring very small breaches with no substantive impact on customers, and for the GCMA to ensure it focuses its monitoring and enforcement resources on material breaches.

As noted above, all breaches and potential breaches should be reported to the GCMA, and it is for the GCMA to determine whether an issue represents a breach and whether it considers that to be material.

The GCMA 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 GCMA;

(f) any action taken by the firm to address the breach and consumer concerns (such as through providing refunds to compensate for any loss or damage); and

(g) action taken by the GCMA in response, whether formal or informal.

Prior to publishing details of a breach on the register of breaches, the GCMA will notify the relevant firm of its decision to make an entry on the register and provide such of its reasoning as the GCMA considers appropriate in the circumstances. Where the GCMA has decided that enforcement action is appropriate in relation to such a breach, the GCMA 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.

5. ENFORCEMENT AGAINST BREACHES OF REMEDIES

In relation to some identified breaches, the GCMA may decide, as part of its statutory duty explained above, that it is appropriate to take enforcement action. For example, this may occur where a breach is ongoing or where although a breach has been remedied, existing processes and procedures are inadequate to ensure ongoing compliance.

Before proposing any enforcement action in relation to a breach, the GCMA will ensure that the firm involved is aware of the breach and has had an opportunity to liaise with the GCMA over this.

In assessing the nature of a breach, and considering the possible enforcement action, the GCMA will take a case-by-case approach, taking into account all relevant circumstances. This may include:

(a) **significance** – including the magnitude of the breach in terms of cost or value, the harm caused, 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 GCMA and addressing the breach** – including whether the firm has reported the breach to the GCMA 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 GCMA intends to take specific action), and the extent to which a firm has taken appropriate steps to remedy 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 GCMA to take action to address the breach** – including whether a breach is ongoing, and what, if any, action the GCMA needs to take to bring the 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 and where firms have some legitimate uncertainty over their exact obligations, 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 whether, and if so how, the relevant market has evolved since the undertakings or order were put in place, to ensure that our proposed enforcement remains proportionate.

The GCMA's action typically falls into one of the two categories considered below.

INFORMAL ACTIONS

Informal action describes a response to a breach where the GCMA is not engaging its formal enforcement powers (such as issuing directions). This can include the GCMA agreeing actions with firms to end a breach and to improve practices and processes in the future. In these cases, the GCMA may 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 of the action taken. Irrespective of whether or not the GCMA decides to publish a letter, any material breaches will be recorded in the register of breaches as set out above.

While the GCMA will take a case-by-case approach, taking into account all relevant circumstances, informal action 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 GCMA 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 GCMA, 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 GCMA, to prevent future breaches.

THE PROCESS FOR INFORMAL ENFORCEMENT

The process for issuing public letters involves the GCMA engaging with the firm concerned as follows:

- (a) Having understood the nature and extent of the breach, if the GCMA reaches a provisional view that certain informal action would be appropriate, the GCMA will write to the firm concerned to explain this provisional view and the reasons for it. The GCMA shall explain the action it proposes to take and attach any draft public letter where appropriate. The firm will then have typically two weeks (and possibly more in complex cases) to provide any representations it wishes to provide to the GCMA on both the principle and the substance of the action the GCMA is proposing.
- (b) The GCMA will consider the representations received on both the principle and the substance before reaching a final view on the appropriate action. The GCMA will then communicate this to the firm concerned, and will continue to liaise with the firm over the timing of any public announcements where relevant.

FORMAL ENFORCEMENT ACTION

To ensure compliance with its undertakings and orders, the GCMA has formal enforcement tools available to ensure firms take all actions the GCMA considers necessary for the firms to become compliant. These tools are used for more significant breaches, such as those:

- (a) which may have a significant impact in terms of scale, harm caused, scope or the number of customers affected;
- (b) which may have a significant impact on individual customers or consumers;
- (c) which are ongoing, including those still being explored by the firm concerned, or where the necessary steps to remedy the breach and prevent future breaches were not identified, volunteered, agreed or taken by the firm responsible;
- (d) which raise issues of recidivism and ongoing compliance problems; or
- (e) where the GCMA has concerns that a firm is not capable of, or willing to, take all the necessary steps voluntarily to prevent further breaches.

The use of the GCMA's formal enforcement tools can result in the GCMA seeking an order from the court requiring a firm to remedy a breach. For breaches where formal enforcement powers are considered necessary, the GCMA can either:

- (a) Apply to a court to seek compliance with the original enforcement order or undertakings;
- or
- (b) Issue directions to the firm concerned.

The GCMA will determine which form of formal action to take based on the individual circumstances of the case, including the nature of the breach. Both seeking compliance directly through court or issuing directions can lead ultimately to contempt of court proceedings.

In its directions, the GCMA can require a firm to take specific 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 GCMA can also impose additional, generally more onerous, compliance and reporting obligations to allow for more detailed monitoring activities⁸.

The directions that the GCMA 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 with other relevant obligations. The list of types of directions below is not exhaustive and does not constrain the GCMA from considering different directions where they are considered appropriate to a particular breach by a particular business.

The main categories of directions include:

⁸ See section 144 of the Competition Act 2020.

(a) **ending a breach** – where a breach is ongoing, the GCMA 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 GCMA 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 for example where these are complex, the GCMA 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 relevant to 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 GCMA 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 ensure and/or maintain compliance. Alternatively, where compliance monitoring was already required by the remedy concerned, the GCMA may introduce new reporting obligations or increase the frequency of any existing compliance reporting. This can provide the GCMA 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 GCMA may direct that firm to provide certain information to its customers that were affected including informing them of their rights to refunds and/or redress from the firm.

When the GCMA believes it has all the information required to make a provisional decision, the GCMA expects to follow these steps:

(a) the GCMA will write to the party concerned, noting that it is minded to issue directions, on the basis of the information available from its investigation into the breach;

(b) where draft directions are available, these will be provided to the party at the same time as communicating its provisional decision to issue directions. The GCMA may also seek a proposed action plan detailing the timescales within which the tasks directed will be undertaken;

(c) the GCMA will allow the party concerned a reasonable period of time to provide representations that cover the decision that it is minded to issue directions and the specific requirements in the draft directions. The party may also put forward any new information which is relevant to whether or not directions are appropriate. The appropriate time period for representations will be determined by the GCMA with regard to the nature and complexities of the issues concerned. Other than in exceptional cases where the GCMA considers there to be substantial additional risks from failing to act quickly, the party concerned will have a minimum of two weeks to provide representations;

(d) where directions are provided to a party subsequently to the communication that the GCMA is minded to issue directions, a further reasonable period of time will be allowed for the party to provide representations on the draft directions;

(e) the GCMA will consider all representations and will reach a final decision and, where appropriate, will determine the exact directions to be issued; and

(f) the GCMA will issue directions to the firm concerned and publish any information it deems relevant⁹.

At the time the GCMA issues directions to parties, it is normal practice for the GCMA to take a number of steps to highlight the breach and any enforcement action publicly. This helps to inform affected customers and potential customers of a business of the breach and the action taken. While the GCMA 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.

The directions issued by the GCMA will be considered on a case-by-case basis, and in some instances these directions may place an ongoing restriction on businesses for the duration of the order or undertakings to which they refer. This means that such directions will be expected to remain in place until such time as the parties are released from their commitments by the variation or revocation/release of the underlying undertakings or order.

In other cases, the directions given by the GCMA may be to carry out a one-off, time-limited or event-limited activity and once this has been completed the directions may have no ongoing obligation or value.

For both ongoing and time/event limited directions, it is open to the parties bound by these to apply to the GCMA for the directions to be varied or terminated (in whole or in part). Any submission making such a request should set out clearly and with supporting evidence matters such as:

(a) why it is appropriate to vary or terminate the directions in the way suggested. For time-limited and event-limited instances, this will normally involve demonstrating that the obligations have been completed;

(b) the possible consequences for consumers and businesses impacted by the remedy;

(c) why a review of the order and undertakings meets the GCMA's published prioritisation; and

(d) whether the request is being raised in order to avoid a breach of the undertakings or order.

It is open to parties to approach the GCMA prior to submitting a request in order to discuss what sort of evidence would be expected to be included in any request.

In relation to some breaches, the firm responsible for compliance may rely, in part, on one or more third parties to deliver certain actions to ensure it remains compliant. The GCMA's role in enforcing compliance with its undertakings and orders involves the GCMA taking specific action against the firm that either gave undertakings or is within the scope of the specific order.

⁹ This may entail publishing the action plan and recording the information on its public register of breaches of undertakings and orders, amongst others.

The GCMA will expect the firm concerned to liaise with any third parties involved during the decision-making process for both informal and formal action, so that the views of these third parties can be understood by the GCMA before a final decision is reached. The GCMA will also expect the firm to ensure that such third parties take the necessary steps in order for the relevant firm to comply with either informal or formal enforcement action taken by the GCMA.

While the GCMA is able to determine the enforcement action it considers to be necessary and proportionate to end a breach and prevent similar problems arising in the future, firms that wish to challenge the GCMA's approach can do so:

(a) by making representations during the opportunities provided for in the process described above for informal or formal enforcement. This is the most efficient way in which firms can ensure their representations are considered by the GCMA; or

(b) by seeking a judicial review of a relevant decision by the GCMA¹⁰.

The GCMA has a number of investigative and legislative tools and powers at its disposal. For each breach, the GCMA will determine which powers are most appropriate to be used to achieve the desired outcomes.

¹⁰ Section 182 (Mergers) and 256 (Markets) of the Competition Act 2020.

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