

MERGER AND MARKET REMEDIES

Variation and termination of
merger and market
final undertakings and orders

DRAFT POLICY STATEMENT

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FOREWORD

This guidance covers the Gibraltar Competition and Markets Authority (the "GCMA") approach to the variation and termination of merger and market final undertakings and orders.

Undertakings and orders are the primary means by which remedies are implemented following the determination of merger and market investigation references under the Competition Act 2020. Undertakings are accepted or orders imposed by the GCMA, except in certain public interest cases where the Minister for Business is responsible for accepting undertakings or imposing orders.

The GCMA will apply this guidance flexibly. This means that the GCMA will have regard to the guidance when it deals with reviews of undertakings and orders but that, when the facts of an individual case reasonably justify it, the GCMA may adopt a different approach.

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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) "Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders", Competition and Markets Authority, CMA 11¹.

¹ "Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders", Competition and Markets Authority, CMA 11, January 2015
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/453150/CM_A11_Remedies_Guidance_revised_August_2015.pdf>, accessed 25/09/2023.

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 the variation and termination of merger and market final undertakings and orders². It does not cover variation or termination of initial and interim undertakings or orders, such as undertakings under section 137 or orders under section 127 or 138 of the Act. Accordingly, unless otherwise specified, the term "undertaking or order" in this guidance should be read as referring only to final undertakings and orders.

The Minister for Business is also responsible for varying or terminating undertakings or orders given following public interest cases³. This guidance does not relate to the process by which the GCMA provides advice to the Minister for Business in these instances⁴.

The GCMA will apply this guidance flexibly. This means that the GCMA will have regard to the guidance when it deals with reviews of undertakings and orders but that, when the facts of an individual case reasonably justify it, the GCMA may adopt 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 the variation and termination of merger and market 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 Variation and termination has been used as shorthand throughout this document. The statutory language in sections 149(2) and 236(2) of the Competition Act 2020 refers to the release, variation or superseding of undertakings and the variation or revocation of orders.

³ Sections 233 and 235 of the Competition Act 2020.

⁴ Sections 149(3) and 236(3) of the Competition Act 2020.

3. THE GCMA'S STATUTORY ROLE

Undertakings and orders are the primary means by which remedies are implemented following the determination of merger and market investigation references under the Act. Under the Act, undertakings are accepted or orders imposed by the GCMA⁵, except in certain public interest cases where the Minister for Business is responsible for accepting undertakings or imposing orders⁶.

The GCMA has a statutory duty⁷ to keep under review undertakings and orders made under the Act. From time to time, the GCMA must consider whether, by reason of any change of circumstances:

- undertakings are no longer appropriate and need to be varied, superseded or released; and
- an order is no longer appropriate and needs to be varied or revoked.

SUBSTANTIVE TEST IN CONSIDERING VARIATION AND TERMINATION OF UNDERTAKINGS AND ORDERS

In considering variation and termination of undertakings and orders, either upon request from a party or under the GCMA's own initiative, the GCMA will consider whether there has been a change of circumstances. If there has, the GCMA will then consider what action, if any, should be taken.

The precise nature of the GCMA's consideration of any change of circumstances will depend entirely on the individual circumstances affecting a particular undertaking or order. However, the change of circumstances must be such that the undertaking or order is 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 either variation or termination.

Types of circumstances that may lead to variation or termination include:

- undertakings or orders that have time-expired or clearly become obsolete;
- undertakings or orders that are affected by new legislation; and
- undertakings or orders that are affected by changes in market conditions.

⁵ 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 as an alternative to making a reference (section 128 (mergers) and section 228 (markets)).

⁶ Sections 114 and 126 and Schedule 7 (mergers) and sections 205, 219 and 233 (markets) of the Competition Act 2020.

⁷ Under sections 149(1), (2) and (3) and 236(1), (2) and (3) of the Competition Act 2020.

The complexity of analysis required in a review varies significantly depending on the change of circumstances identified and the characteristics of the market. In some cases, detailed investigation may be required in order to evaluate whether there has been a change of circumstances and, if so, what, if any, changes to undertakings or an order may be justified.

4. REVIEWS OF UNDERTAKINGS AND ORDERS

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

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

INITIAL SCREENING

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 orders, or other interested parties; or

(ii) by the GCMA on its own initiative.

REQUESTS FROM PARTIES

Parties may request that undertakings or orders be varied or terminated by reason of a change of circumstances. Any submission making such a request should set out clearly and with supporting evidence:

- what the change of circumstances is;
- how and why this makes it appropriate to vary or terminate the undertakings or order;
- the possible consequences for consumers and businesses impacted by the remedy⁸;
- why a review of the order and undertakings meets the GCMA's published prioritisation principles; and
- whether the request is being raised in order to avoid a breach of the undertakings or order⁹.

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.

⁸ 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.

⁹ Where the possible change of circumstances is such that it would lead to a breach of the undertakings or order, the GCMA will consider it as quickly as possible. However, parties can assist the GCMA by giving it notice of such changes of circumstances in good time and thereby avoid being placed in potential breach.

Parties should provide both a confidential and a non-confidential version of their submission. The GCMA will typically, upon receipt of a request for a review, issue an invitation to comment by publishing information about the request for review. The GCMA will typically invite interested parties to comment on the request for review and to submit any relevant evidence¹⁰. The consultation period for the invitation to comment will typically be three weeks.

The form of publication 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 GCMA is considering whether to conduct a review. In exceptional circumstances, publication of an invitation to comment may not occur if, for example, the GCMA believes that the claimed change of circumstances, in and of itself, constitutes specified information which needs to be excluded from disclosure¹¹.

THE GCMA'S OWN-INITIATIVE ACTIVITY

The GCMA is also able to begin a review on its own initiative, without any person having made a request. In practice, the GCMA is likely to do so when, based on its own intelligence, it has identified possible changes of circumstances analogous to those referred to above, or where the GCMA has recommended a timeframe for review in the report in which the remedy was originally determined.

If the GCMA is intending to conduct a review on its own initiative it will typically issue an invitation to comment to all parties affected by the undertakings or order, asking for their views as to whether such a review should take place and to submit any relevant evidence. As noted above, the form of publication will depend on the circumstances of the case and the consultation period will typically be three weeks.

DECIDING WHETHER TO CONDUCT A REVIEW

The GCMA 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 GCMA should conduct an own-initiative review. The GCMA will then decide whether a review should take place at a particular point in time.

In deciding whether to conduct a review, the GCMA will act in accordance with its published prioritisation principles. This may mean that the GCMA will choose not to conduct a review within time frames recommended by it in which the remedy was originally determined. Factors relevant in deciding whether to conduct a review will include whether there is a realistic prospect of finding a change of circumstances.

If the GCMA decides not to proceed with a review, it will inform the relevant parties that a review will not take place. If particular parties made a request for a review, the GCMA will typically set out briefly its reasons for not conducting a review. This decision will typically be

¹⁰ 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 GCMA review; and in order to ensure an effective public consultation and to establish whether such a public consultation can take place, the GCMA may choose to 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.

¹¹ See Part 8 of the Competition Act 2020.

published, although the GCMA will have due regard to its obligation not to disclose certain specified information, as set out in Part 8 of the Act.

If, on the other hand, the GCMA decides to undertake a review, it will inform relevant parties as soon as practicable of its intention to commence a review. At the same time, or as soon as practicable thereafter, the GCMA will also provide them with the following information:

- a brief description of the case, the relevant legislation, the industry sector concerned and the GCMA's reasons for commencing a review. The level of information may vary according to the circumstances of the case;
- an indicative timetable showing the anticipated dates of key milestones; and
- the contact details for the main GCMA contacts for the case including specifying the first point of contact for general queries and submission of information.

The GCMA will review from time to time the information submitted and consider whether it is appropriate to update the information provided to the parties directly involved or the published information.

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 GCMA will liaise with the relevant sectoral regulator as appropriate. In other cases, for example, when reviewing merger undertakings or orders, the relevant sectoral regulator may make a submission to the GCMA setting out its views and any supporting evidence on the possible variation or termination.

THE PROCESS FOR A REVIEW

TIMESCALE

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

Where appropriate, the GCMA may publish an administrative timetable that will assist in providing an indication of the expected time frame for the review. The administrative timetable may set out the key stages of the review, including what documents the GCMA expects to publish and when. The administrative timetable may be revised during the course of the review.

THE GCMA'S ASSESSMENT

As part of the GCMA's assessment, it will first consider whether the initial submissions from all relevant parties are sufficient to allow it to reach a provisional decision:

- if the GCMA considers that relevant parties have had sufficient opportunity to make their case and the initial submissions indicate a clear change of circumstances and clear-cut grounds for variation or termination, 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 GCMA will seek to deal with these as swiftly as possible;

- if the GCMA 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.

Where the GCMA 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 complex reviews¹², the GCMA may consider it necessary to hold a hearing with relevant parties.

The timing and manner of engagement with relevant parties will vary depending on the type of work involved in any given review. The GCMA will have regard to the need to ensure due process for both parties directly involved and other interested persons. The GCMA will also have regard to the need to conduct reviews effectively and efficiently, and the need to reach properly reasoned decisions.

Where the GCMA wishes to test some of its initial thinking on the review, the GCMA may decide to disclose working papers or sections of working papers to parties for comment. The GCMA 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 sharing information will be primarily to comment on factual accuracy and commercial sensitivity.

KEY STAGES OF THE GCMA'S DECISION-MAKING PROCESS

The GCMA's decision-making process will typically comprise the following three key stages:

- a provisional decision;
- a final decision, and, as necessary;
- implementation notices and documents – a Notice of intention to vary or terminate and/or a Notice of variation or termination.

PROVISIONAL DECISION

Before reaching a final decision, the GCMA will make a provisional decision on which it will consult. Where appropriate, the provisional decision will be published on the Authority's

¹² For example, where there are changes in market conditions which require detailed analysis or where the change of circumstances suggests a range of possible variations for the undertakings or order.

website. 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 be no less than 14 days.

The GCMA's provisional decision will state what decision the GCMA proposes to take and the reasons underpinning it. It will also address the question of whether there has been a change of circumstances. If the GCMA is proposing a variation to the terms of the undertaking or order, at the time of publishing the provisional findings 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.

The GCMA 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 competition problem and its adverse effects in light of the change of circumstances provisionally identified. The GCMA will normally set out a time limit within which any proposed variations must be submitted.

Usually, the GCMA will form a provisional decision on the substance of the necessary variation at the same time as the change of circumstances 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.

In some reviews, the case for termination or the precise nature of the appropriate variation may be sufficiently clear at the time of making the provisional decision that the GCMA may be in a position to draft the text of revised undertakings or a revised order at the same time as its provisional decision. The GCMA may therefore decide to set out its provisional decision and reasoning as part of 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 Act.

FINAL DECISION

The GCMA 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.

If the final decision is that there has been no change of circumstances, or that the change of circumstances is not sufficient to warrant any variation or termination, the existing undertakings or order remain in force and continue to bind the parties.

If the final decision is that there has been a change of circumstances and that variation or termination is appropriate, at the same time as the GCMA's final decision or as soon as possible thereafter, the GCMA will give notice of its intention to vary or terminate the undertakings or order (unless the process has already been commenced). Such notice shall be given in accordance with the procedural requirements set out in Schedule 10 to the Act. 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 days¹³.

¹³ Schedule 10, paragraph 7(2) of the Competition Act 2020.

The GCMA 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 GCMA 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.

In the absence of any representations, or in the event that the GCMA decides on consideration of representations made not to amend materially the revised undertakings or order, it will proceed with accepting revised undertakings or making a revised order by issuing a Notice of variation. Similarly, in the absence of any representations to a Notice of intention to terminate the undertakings or order, the GCMA will proceed with releasing parties from the undertakings or revoking the order by issuing a Notice of release or Notice of revocation.

CONCLUSION OF A REVIEW

The GCMA's review concludes either once a final decision has been made that there is no change of circumstances or once the undertakings or order have been varied or terminated.

When the GCMA gives notice of varying or terminating undertakings or an order, it will make any appropriate amendment to its published register of orders and undertakings. The GCMA 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 GCMA UNDERTAKINGS OR ORDERS

There may be cases in which undertakings or orders are time-expired or have lapsed as the result of a predetermined event, or where they have been superseded by new GCMA undertakings or orders. For example:

- where undertakings or an order contain within them a time period for their application which has ended or where undertakings or orders contain an expiry date which has passed;
- where undertakings or an order specify that they will expire upon a certain event happening; or
- where they are superseded by new undertakings or a new order resulting from a new GCMA inquiry.

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 GCMA 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.

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