



# **CHAPTER 1 AND 2 PROHIBITIONS, MERGERS AND MARKET INVESTIGATIONS**

Public Consultation

22<sup>nd</sup> January 2024

CP 02/24

# FOREWORD

*The Gibraltar Competition and Markets Authority (the "GCMA") is consulting on a series of guidance documents and statements of policy in relation to agreements between undertakings, the assessment of dominance, mergers and market investigations.*

*In accordance with the Competition Act 2020, the GCMA has a legal obligation to prepare and publish guidance on its powers and responsibilities regarding different areas of competition law. It also has a duty to consult on these documents.*

*This consultation shall remain open until Friday 29<sup>th</sup> March 2024.*

# CONTENTS

1. INTRODUCTION.....	1
2. CONSULTATION PROCESS.....	3
3. CONSULTATION QUESTIONS.....	6

# 1. 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")**.

The GCMA's primary responsibilities are to **promote competition, protect consumers and safeguard the economy of Gibraltar**. It is founded on the principle that competition provides the best incentive for businesses to become more efficient, innovative and flexible in order to operate in the long-term interests of consumers. In turn, one of the fundamental requirements for the efficient operation of markets is that consumers are well informed and able to act in their own self-interest to purchase goods and services that best meet their needs and budgets.

In accordance with the Act, the GCMA has a duty to provide public awareness on the ways in which competition may benefit consumers and the economy of Gibraltar. Issuing information and advice to the relevant Government Minister or any public authority, also forms part of its role. Furthermore, the GCMA has a legal obligation to prepare and publish guidance material and statements of policy ("Guidelines") on its responsibilities and use of its powers regarding agreements between undertakings, the assessment of dominance, mergers and market investigations amongst others.

Before publication or revision of the Guidelines, the GCMA is required to consult with any such persons it considers appropriate<sup>1</sup>. These persons may include, but are not limited to, other regulatory authorities, legal practitioners, business associations, individual businesses and their customers, and the general public. Additionally, some Guidelines also require consultation with the Minister for Business, however these are not the subject of this consultation.

This consultation deals with seven Guidelines which the GCMA intends to publish. The draft Guidelines are contained in separate documents and should be read in conjunction with this consultation.

These are:

- (a) The Chapter 1 Prohibition;
- (b) The Chapter 2 Prohibition;
- (c) Merger Assessment Guidelines;
- (d) Merger Remedies Notice;
- (e) Market Investigation References;
- (f) Merger and Market Remedies – Reporting, Investigation and Enforcement of potential breaches; and

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<sup>1</sup> See sections 61, 165, 178 and 245 of the Competition Act 2020.

(g) Merger and Market Remedies – Variation and Termination of Merger and Market final undertakings and orders.

## 2. CONSULTATION PROCESS

The seven draft Guidelines which the GCMA is consulting on, are listed and summarised below. Each summary provides a snapshot of what each document consists of and will help you decide if you wish to contribute to the consultation process. Interested stakeholders are requested to read the draft Guidelines provided under separate cover<sup>2</sup> and answer the questions under each relevant section<sup>3</sup>. It is important that the questions are answered clearly with as much information as possible. The GCMA will take the utmost account of all the comments received and these will help formulate its conclusions in relation to the Guidelines. Once finalised, these will be published on the Authority's website and will help inform undertakings, their customers and the general public on these areas of competition law.

### SUMMARY OF DRAFT GUIDELINES

#### THE CHAPTER 1 PROHIBITION

The Chapter 1 prohibition (section 3 of the Act) concerns **agreements between undertakings, decisions by associations of undertakings or concerted practices** ("agreements") which may affect trade within Gibraltar and have as their object or effect the prevention, restriction or distortion of competition within Gibraltar. These agreements are prohibited unless they are exempt. The guidelines set out the scope of the legal provisions, provide examples of anti-competitive agreements, explain the conditions for exemption and the GCMA's enforcement powers.

#### THE CHAPTER 2 PROHIBITION

The Chapter 2 prohibition (section 10 of the Act) explains that any conduct on the part of one or more undertakings which amounts to the **abuse of a dominant position** in a market is prohibited if it may affect trade within Gibraltar. Some examples of conduct which may constitute an abuse include, but are not limited to, the following: applying dissimilar conditions to equivalent transactions with other trading parties, limiting production or markets to the prejudice of consumers and directly or indirectly imposing unfair trading conditions. Exemptions also apply to the Chapter 2 prohibition.

#### MERGER ASSESSMENT GUIDELINES

This document provides advice and information about the making and consideration of **merger references** under section 74 (completed mergers) and 85 (anticipated mergers) of the Act and the way in which relevant customer benefits may affect the taking of enforcement action by the GCMA. They are designed to provide general information and advice to companies and their advisers on the procedures used by the GCMA in operating the merger control regime set out in the Act.

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<sup>2</sup> These will also be available on the GRA's website.

<sup>3</sup> Please see section 3 below.

## **MERGER REMEDIES NOTICE**

The Merger Remedies Notice specifies the information and documents to be submitted by the merger parties for the purpose of offering **undertakings in lieu of reference ("UIL")**, pursuant to section 128 of the Act. The information requested allows the GCMA to examine whether the proposed UILs offered by the merger parties (or a modified version of them) might be acceptable to remedy, mitigate or prevent in a clear-cut manner the substantial lessening of competition identified by the GCMA in its decision pursuant to section 74 or 85 of the Act.

## **MARKET INVESTIGATION REFERENCES**

Under section 191 of the Act, the GCMA may make a **market investigation reference** to its Chair for the constitution of a group where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in Gibraltar for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in Gibraltar. This guidance document provides advice and information about the making and consideration of market investigation references and the way in which relevant customer benefits may affect the taking of enforcement action by the GCMA.

## **MERGER AND MARKET REMEDIES - REPORTING, INVESTIGATION AND ENFORCEMENT OF POTENTIAL BREACHES**

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

## **MERGER AND MARKET REMEDIES - VARIATION AND TERMINATION OF MERGER AND MARKET FINAL UNDERTAKINGS AND ORDERS**

This policy statement covers the GCMA's 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 final determination of merger and market investigation references under the Act. The GCMA has a statutory duty under sections 149 and 236 of the Act to keep under review undertakings and orders; and from time to time must consider whether, by reason of any change of circumstances, undertakings are no longer appropriate and need to be varied, superseded or released and if an order is no longer appropriate and needs to be varied or revoked.

The GCMA looks forward to establishing close connections with industry and informing and educating the general public in a positive and constructive manner. We encourage all parties concerned to participate in this consultation, as the challenges of steering competition policy in a small jurisdiction can be considerable and the opportunities available to make a difference reinforce the need for open exchanges of information and dialogue to realise these benefits.

The GCMA invites all interested parties to provide comments on the questions set out in this public consultation (see section 3 below). The deadline for submission of comments is **Friday 29<sup>th</sup> March 2024**. However, if you require additional time, please contact the GCMA on the email below and any requests made by Friday 15<sup>th</sup> March 2024 will be considered on a case-by-case basis.

In order to promote further openness and transparency, the GCMA will publish the names of all respondents and a summary of their responses on the Authority's website. Please note that this is subject to confidentiality. Respondents are asked to clearly identify material which is to be treated as confidential.

Please submit your comments via email to **competition@gra.gi**.



# 3. CONSULTATION QUESTIONS

Please find below a list of questions specific to each draft guideline being consulted upon. Each question can be found under the relevant section and title of each document. The consultation questions must therefore be read in conjunction with the Guidelines they refer to.

## **THE CHAPTER 1 PROHIBITION**

### **Section 3. Anti-Competitive Agreements**

Q1. Do you agree with the GCMA's assessment of anti-competitive agreements? If not, please explain why.

### **Section 4. Examples of Anti-Competitive Agreements**

Q2. Has the GCMA provided accurate examples of anti-competitive agreements? If not, please explain why and feel free to suggest some examples of your own.

### **Section 5. The Legal Exception Regime**

Q3. In your view, is the GCMA's explanation of the legal exception regime correct? If not, please explain why.

### **Section 6. Enforcement Action**

Q4. Do you agree with the GCMA's assessment of its enforcement powers? If not, please explain why.

### **General comments**

Q5. Do you have any additional comments in relation to the Chapter 1 prohibition guidelines?

## **THE CHAPTER 2 PROHIBITION**

### **Section 3. Abuse of a Dominant Position (provisions)**

Q1. Do you agree with the provisions as set out in this section? If not, please explain why.

### **Section 4. Dominance**

Q2. Do you agree with the GCMA's approach to market definition and dominance? If not, please explain why.

### **Section 5. Abuse**

Q3. In your view, is the GCMA's understanding of the concept of abuse correct? If not, please explain why.

## **General comments**

Q4. Do you have any additional comments in relation to the Chapter 2 prohibition guidelines?

## **MERGER ASSESSMENT GUIDELINES**

### **Section 3. Merger Review Process**

Q1. Do you agree with the GCMA's assessment of the merger review process? If not, please explain why.

### **Section 4. Phase 1 Investigation Process**

Q2. The GCMA has set out the manner in which it intends to handle phase 1 investigations. Do you agree with the GCMA's procedures? If not, please explain why and feel free to suggest any alternative approach.

### **Section 5. Phase 2 Investigation Process**

Q3. The GCMA has set out the manner in which it intends to handle phase 2 investigations. Do you agree with the GCMA's procedures? If not, please explain why and feel free to suggest any alternative approach.

### **Section 6. Relevant Merger Situations**

Q4. In your view, is the GCMA's explanation of relevant merger situations correct? If not, please explain why.

### **Section 7. Public Interest Cases**

Q5. Do you agree with the GCMA's assessment of public interest interventions? If not, please explain why.

### **Section 8. Merger Fees**

Q6. In your view, is the GCMA's explanation of merger fees adequate? If not, please explain why.

## **General comments**

Q7. Do you have any additional comments in relation to the merger assessment guidelines?

## **MERGER REMEDIES NOTICE**

Q1. Do you agree with the process of merger parties offering undertakings in lieu of reference?

Q2. Is the information requested in the Merger Remedies Notice adequate and appropriate? If not, please feel free to suggest any alternative approach.

Q3. Do you have any additional comments in relation to the Merger Remedies Notice?

## **MARKET INVESTIGATION REFERENCES**

### **Section 3. When to make a Reference**

Q1. Is the GCMA's understanding and approach towards market investigation references acceptable? If not, please explain why.

### **Section 4. Powers and Procedures**

Q2. Do you agree with the GCMA's interpretation of its powers and procedures? If not, please explain why.

### **Section 5. Prevention of Competition**

Q3. Is the GCMA's assessment of the prevention of competition satisfactory? If not, please explain why.

### **Section 6. Structural features of a Market**

Q4. Do you agree with the GCMA's description of the structural features of a market? If not, please explain why.

### **Section 7. Firms' Conduct**

Q5. In your view, is the GCMA's explanation of firms' conduct adequate? If not, please explain why.

### **Section 8. Conduct of Customers**

Q6. Do you agree with the GCMA's assessment of the conduct of customers? If not, please explain why.

### **Section 9. Ministerial involvement**

Q7. Is the GCMA's interpretation of the Minister's involvement correct? If not, please explain why.

### **Section 10. Remedies**

Q8. Do you agree with the GCMA's position on remedies?

### **General comments**

Q9. Do you have any additional comments in relation to the Market Investigation References guidelines?

## **MERGER AND MARKET REMEDIES – REPORTING, INVESTIGATION AND ENFORCEMENT OF POTENTIAL BREACHES**

### **Section 3. The GCMA’s Approach**

Q1. Do you agree with the GCMA’s procedures to accept undertakings, impose orders and review both undertakings and orders? If not, please explain why.

### **Section 4. Monitoring, Reporting, Investigation and Transparency of Breaches**

Q2. Are the GCMA’s methods for monitoring, reporting, investigation and transparency of breaches adequate? If not, please explain why.

### **Section 5. Enforcement against Breaches of Remedies**

Q3. Do you agree with the GCMA’s enforcement process? If not, please explain why.

### **General comments**

Q4. Do you have any additional comments in relation to the Merger and Market Remedies – Reporting, Investigation and Enforcement of potential breaches guidelines?

## **MERGER AND MARKET REMEDIES – VARIATION AND TERMINATION OF MERGER AND MARKET FINAL UNDERTAKINGS AND ORDERS**

### **Section 3. The GCMA’s Statutory Role**

Q1. Do you agree with the GCMA’s interpretation of its statutory role and its test to consider the variation and termination of undertakings and orders? If not, please explain why.

### **Section 4. Reviews of Undertakings and Orders**

Q2. Are the GCMA’s procedures for reviewing undertakings and orders appropriate? If not, please explain why.

### **General comments**

Q3. Do you have any additional comments in relation to the Merger and Market Remedies – Variation and Termination of Merger and Market final undertakings and orders guidelines?

## CONTACT US

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