

The CMA's decision to review the Undertakings given by Metal Box plc on 22 February 1972, and amended on 16 October 1980 and 5 June 1992

Introduction

The Competition and Markets Authority (CMA) has decided to conduct a review of whether the Undertakings given by Metal Box plc on 22 February 1972, and amended on 16 October 1980 and 5 June 1992,¹ are no longer appropriate due to a material change of circumstances having occurred and need to be varied, superseded or removed.

This decision follows the CMA's commitment, set out in its 2015/16 Annual Plan,² to commence a systematic review of existing merger, market and monopoly remedies, which may lead to the removal of measures that are no longer necessary and/ or may be restricting or distorting competition.

Given the CMA's view that there may be a realistic prospect of finding a change of circumstances, the CMA considers there are significant administrative efficiencies for parties and for the CMA which justify the CMA conducting the review of these undertakings without having consulted publicly as to whether such a review should take place.

We are launching an Invitation to Comment as part of this review, to which we welcome responses by **5pm, Friday 14 August**. We welcome comments and evidence on any of the material in this decision document, and in particular on whether there has indeed been a material change of circumstances which would mean the undertakings should be varied, superseded or removed.

For a wider timeline for this review, and contact details for the submission of comments, please refer to the dedicated case page.³

¹ [Undertakings given by Metal Box plc on 22 February 1972, and amended on 16 October 1980 and 5 June 1992](#). The Undertakings are now attached to Crown Packaging UK PLC, the successor to Metal Box plc, registered under the same company number at Companies House, number 178090.

² See [CMA annual plan 2015/16](#), paragraph 4.12 and 4.17.

³ See the [case page](#).

Background

The Undertakings given by Metal Box plc on 22 February 1972, and amended on 16 October 1980 and 5 June 1992, were put in place to address competition and other public interest concerns arising in markets investigated by the Monopolies Commission. The concerns that led to the establishment of this remedy are described in the 1970 report entitled 'Metal Containers – A report on the supply of metal containers'.⁴

The CMA has a statutory duty under section 88(4) and 88 (5) of the Fair Trading Act 1973, as preserved in Schedule 24 to the Enterprise Act 2002, to keep under review undertakings and orders. From time to time, the CMA must consider whether, by reason of any change of circumstances:

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

Responsibility for deciding on variation or termination of these undertakings lies with the CMA under the jurisdiction of the Enterprise Act 2002.

This review forms part of the commitment in the CMA's Annual Plan to commence a systematic review of existing merger, market and monopoly remedies, mentioned above, in addition to which, the CMA is taking a number of steps:

- On 26 March 2015, the CMA announced its decision to review 76 merger undertakings given before 1 January 2005.⁵
- On 14 July 2015, the CMA announced its decision to review the Credit Cards (Merchant Acquisition) Order 1990.⁶
- Also on 14 July 2015, the CMA announced an Invitation to Comment on whether to review 13 further monopoly remedies put in place before 1 January 2005 which have not been reviewed recently.⁷

The CMA is also currently reviewing, alongside its Retail banking market investigation, behavioural undertakings given by 9 banks in relation to small and medium-sized enterprise (SME) banking undertakings in 2002 and 2003⁸ and has

⁴ Monopolies Commission (July 1970), [Metal Containers – A report on the supply of metal containers](#).

⁵ For further information, see CMA (26 March 2015), [Review of structural merger undertakings given before 1 January 2005](#).

⁶ See the [Credit Cards case page](#).

⁷ See the [Invitation to Comment](#).

⁸ Further information can be found on the [SME banking undertakings review](#) case page.

also consulted on whether to review the Northern Ireland PCA Banking Market Investigation Order 2008.⁹

The CMA is also consulting on updated guidance on the use of ‘sunset clauses’ in market investigations. Sunset clauses act as a time limit on measures introduced by the CMA by specifying a date or event after which they will no longer apply. The proposed guidance includes a clearer commitment to considering the use of such time-limited remedies in future investigations, as well as providing guidance on how the CMA will approach that consideration. This consultation document also proposes that, if the CMA introduces a new remedy without a sunset clause or if the sunset clause substantially exceeds ten years, then the CMA would normally expect to initiate a review of whether a remedy remains appropriate within no more than ten years of the remedy coming into force.¹⁰

The 1970 Monopolies Commission report and the undertakings in their current form

The 1970 Monopolies Commission report 'Metal Containers – A report on the supply of metal containers'¹¹ found that in the area of metal containers used primarily for food cans, beverages and aerosols,¹² one company, the Metal Box Company Limited, had a powerful position, with 77% of UK sales of metal containers in the year to March 1969, and within this a 95% share of sales of open top cans. The report found that overall Metal Box ‘[met] the demands of the market and is an efficient and low cost producer’, and on the whole was compelled by the market ‘to act fairly’.¹³ However, the report also found that a number of the company’s practices had led to restrictions on competition and made a number of recommendations to address these.¹⁴ These led to the giving of undertakings in 1972, which were reviewed and adapted in 1980 and 1992, but were not entirely removed.

The Undertakings in their present form essentially¹⁵ require GMB Foodcan plc, the successor to Metal Box plc, not to sign agreements which tie the supply of GMB Foodcan’s closing machines to purchase or use of GMB’s Foodcan’s open top cans, or tie the charges for these machines to the volume of open top cans

⁹ CMA (20 May 2015), [Northern Ireland PCA Banking Market Investigation Order 2008 Consultation](#).

¹⁰ For further information, see CMA (May 2015), [Updated guidance on ‘sunset clauses’ in market investigation remedies - Consultation document](#).

¹¹ Monopolies Commission (July 1970), [Metal Containers – A report on the supply of metal containers](#).

¹² The original reference was given as ‘tin cans, metal boxes, and other metal containers (including aerosols*) intended for use in the packaging of fluids in quantities of 14 lbs or less’. Monopolies Commission (July 1970), [Metal Containers – A report on the supply of metal containers](#), p1.

¹³ Monopolies Commission (July 1970), [Metal Containers – A report on the supply of metal containers](#), p106, paragraph 325.

¹⁴ Monopolies Commission (July 1970), [Metal Containers – A report on the supply of metal containers](#), p108, paragraph 330.

¹⁵ For a full account of the Undertakings, refer to the [Undertakings given by Metal Box plc on 22 February 1972, and amended on 16 October 1980 and 5 June 1992](#).

purchased from GMB Foodcan plc or from its rivals, and prevent GMB Foodcan plc from charging prices below cost for their closing machines.

The Undertakings also prevent GMB Foodcan plc from signing exclusive agreements or offering particular loyalty discounts to customers purchasing open top cans or aerosols that are intended to require a customer to purchase all or a certain amount of their supply from GMB Foodcan plc, or base the price upon the customer purchasing all or a specified amount of their supply from GMB Foodcan plc. The Undertakings also prevent the price at which aerosols are sold depending significantly on the purchase of aerosol valves from GMB Foodcan plc.

Finally the Undertakings impose a duty for GMB Foodcan plc to provide to the Director General of Fair Trading (now the CMA) such information relating to their business as he may from time to time require.

Decision to review the Undertakings given by Metal Box plc on 22 February 1972, and amended on 16 October 1980 and 5 June 1992

The CMA has decided the Undertakings given by Metal Box plc on 22 February 1972, and amended on 16 October 1980 and 5 June 1992, are a remedy worthy of review and a high priority relative to other potential reviews at this stage. This is due to the length of time this remedy has been in place, and since it was last reviewed, and because the CMA considers there may have been developments which may lead to a realistic prospect of finding a material change in circumstances since the undertakings were given.

These developments are described in turn below:

- The structure of competition and number of competitors may have changed in some or all of the relevant markets.
- New products which may be substitutes for the products covered by the undertakings could have become available.
- The product range of the company that provided the undertakings may be different to that at the time of the undertakings, in that some products covered by the undertakings may no longer be offered for sale.
- The geographic scope of the relevant markets may be broader.

The CMA has also had regard to its prioritisation principles¹⁶ in deciding to commence a review of these undertakings. The CMA considers that reviewing this remedy is in line with its objectives and strategy on the basis that it reflects the CMA's statutory duty, and the commitment set out in CMA's 2015/16 Annual Plan to 'ensure current merger and market remedies are still fit for purpose, carrying out a project to take stock of the current suite of market and merger remedies'.

The CMA considers there are likely to be indirect benefits for consumer welfare by varying or releasing, if appropriate to do so, constraints on the business community in the UK, which may be either of limited relevance or may impose unnecessary burdens on businesses. Varying or releasing this remedy would mean the CMA would not need periodically to revert to the businesses affected by the undertakings to seek information regarding compliance with and the suitability of the undertakings. Moreover, the termination of this remedy, in the event it is found to be no longer needed, would enable the CMA to focus its monitoring and enforcement resources on remedies that continue to benefit UK consumers.

Undertaking the review

As well as publishing this decision, the CMA will be informing relevant parties directly of this decision to commence a review, and seeking information necessary for the carrying out of this review. To this end, we are launching an Invitation to Comment, to which we welcome responses by **Friday 14 August, 5pm**.

The process the CMA follows during a review of an existing remedy is outlined on the CMA's webpages.¹⁷

¹⁶ CMA (April 2014), [CMA Prioritisation Principles](#).

¹⁷ CMA (January 2014), [Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders \(CMA 11\)](#).