

The CMA's decision to review the Credit Cards (Merchant Acquisition) Order 1990

Introduction

The Competition and Markets Authority (CMA) has decided to conduct a review of whether the Credit Cards (Merchant Acquisition) Order 1990¹ is no longer appropriate due to a material change of circumstances having occurred and needs to be varied, superseded or revoked.

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 this order 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, and in particular on whether there has indeed been a material change of circumstances which would mean the order should be varied, superseded or revoked.

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

¹ [Credit Cards \(Merchant Acquisition\) Order 1990](#)

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

³ See the [case page](#).

Background

The Credit Cards (Merchant Acquisition) Order 1990 was put in place to address competition and other public interest concerns as found following an investigation by the Monopolies and Mergers Commission (MMC). The report which described the concerns which led to the establishment of this remedy is the 1989 report entitled 'Credit Card Services – A report on the supply of credit card services in the United Kingdom'.⁴

The CMA has a statutory duty under sections 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- undertakings are no longer appropriate and need to be varied, superseded or released; or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 orders 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 undertaking the following:

- 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 Undertakings given by Metal Box plc on 22 February 1972, and amended on 16 October 1980 and 5 June 1992.⁶
- Also on 14 July 2015, the CMA announced a call for information 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 nine banks in relation to small and

⁴ MMC (August 1989), [Credit Card Services – A report on the supply of credit card services in the United Kingdom](#)

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

⁶ See the [Metal Box case page](#).

⁷ See the [Invitation to Comment](#).

medium-sized enterprise (SME) banking undertakings in 2002 and 2003⁸ and has 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 Monopolies and Mergers Commission 1989 report and the provisions of the Order

The MMC’s 1989 report entitled ‘Credit Card Services – A report on the supply of credit card services in the United Kingdom’¹¹ looked at a range of issues across credit services markets. With respect to the merchant acquisition market, it found that there was a ‘lack of competition in merchant acquisition and that obstacles to further competition should be removed’.¹² These obstacles were in the form of ‘restrictive rules’ which prevented or delayed prospective companies from becoming merchant acquirers. These rules were considered restrictive as companies had first to be accepted as card issuers, then to undergo an examination of whether their card-issuing plans were credible, and even then only enter into merchant acquisition once they had made progress in meeting card-issuing targets.¹³

The Credit Cards (Merchant Acquisition) Order 1990 sought to address these problems. It essentially¹⁴ prevents payment card organisations from the following actions: firstly, making any agreement that prevents card issuers from acting as merchant acquirers; and secondly, requiring payment card issuers to issue a certain number of payment cards before they can become a merchant acquirer; or lastly,

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

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 MMC (August 1989), [Credit Card Services – A report on the supply of credit card services in the United Kingdom](#).

¹² MMC (August 1989), [Credit Card Services – A report on the supply of credit card services in the United Kingdom](#), p162, paragraph 7.104.

¹³ MMC (August 1989), [Credit Card Services – A report on the supply of credit card services in the United Kingdom](#), p162, paragraph 7.105.

¹⁴ For a full account of the Undertakings, refer to the [Credit Cards \(Merchant Acquisition\) Order 1990](#).

withholding any service from a payment card issuer that would normally be needed for the company to act as a merchant acquirer. The intention was therefore to allow entry and competition in the merchant acquisition market.

Decision to review the Credit Cards (Merchant Acquisition) Order 1990

The CMA has decided the Credit Cards (Merchant Acquisition) Order 1990 is a remedy worthy of review and is a high priority relative to other potential reviews at this stage due to the length of time it has been in place, and because of significant regulatory and market developments in payment card markets.¹⁵ Consequently, we consider that there have been a number of developments that may lead to a realistic prospect of finding a material change in circumstances relevant to the order since it was established.

These developments are described in turn below:

- **Legislative changes** – significant new legislation relating to the payment and merchant acquisition markets has been introduced since 1990, which it is possible may supersede the Order. A key piece of legislation here is the 2007 Payment Services Directive, as implemented in the UK by the 2009 payment Services Regulations 2009.
- **Changes to the relevant markets** – the Order applies primarily to the merchant acquisition and card payment markets in the UK, which appear to have changed in certain respects since 1990. This includes the presence of a significant merchant acquirers that no longer have card issuing businesses in the UK, a change the Order was intended to facilitate by removing restrictions applying to card issuers and other organisations that had the potential to enter. In addition, the CMA is aware of a number of technological developments concerning payment cards. These market-based changes may constitute a material change in circumstances.
- **Changes to the regulatory landscape** – in April 2015, the Payment Systems Regulator became fully operational with significant powers relevant to a number of payment systems in the UK. These include direct regulatory powers and also concurrent powers in relation to the

¹⁵ The CMA is aware of these potential changes partly due to recent CMA work on credit card markets, including the Competition Act 1998 case [Interchange fees – MasterCard and Visa](#) which closed in May 2015 due to the introduction of the European Interchange Fee Regulation mentioned in the [CMA Prioritisation Principles](#), April 2014. The CMA also published in March 2015 a [decision on an application for interim measures under section 35 of the Competition Act 1998 made by Worldpay](#).

Competition Act 1998 prohibitions on anti-competitive behaviour, and the Enterprise Act 2002. This new approach to regulation of payment systems may constitute a material change in circumstances.

The CMA has had regard to its prioritisation principles¹⁶ in deciding whether to commence a review of the Order. The CMA considers that reviewing these two remedies would be 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 that may be either of limited relevance or may impose unnecessary burdens on businesses. Varying or revoking this remedy would mean the CMA would not need periodically to revert to the businesses affected by the order to seek information regarding compliance with and the suitability of the Order. 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 **5pm, Friday 14 August**.

The process the CMA follows during a review of an existing remedy is outlined on the CMA's website.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 \(CMA 11\)](#).