Updated guidance on the CMA's approach to market investigations

Consultation response

5 July 2017
CMA61resp

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1. Introduction

1.1 On 6 March 2017, the Competition and Markets Authority (CMA) launched a consultation on proposals to reform our approach to undertaking market investigations (MIs).[1] As part of this consultation, the CMA proposed two key changes to the way we undertake MIs in the future. These are to:

(A) streamline the MI process by assessing potential remedies at an earlier stage; reducing the number of formal consultations around set-piece publications; and introducing earlier, more flexible interactions with parties; and

(B) strengthen synergies between market studies (MSs) and MIs while maintaining independence of decision-making, and clarify the relationship between the Board in its role of referring markets for investigation, and the Group who are the independent decision-makers for that investigation.

1.2 We received 25 submissions in response from legal advisers, businesses, regulators or government, and consumer groups. The list of respondents is at Appendix B, and non-confidential versions of all submissions are available on the consultation page. This document also takes into account the comments made at our stakeholder roundtable event,[2] a summary of which can also be found on the consultation page.

1.3 This document summarises the key comments made in submissions from respondents and our response to them. It then sets out the changes we have made to the guidance, following the consultation, to implement our reforms. It also gives our reasons where we have not made changes following respondents' comments.

Consultation questions for consideration

1.4 The consultation document set out five questions for consideration:

(a) Do you agree with the proposed changes to MIs set out under proposal (A) (streamlining the MI process)? If not please explain why and whether there are any alternative changes that would achieve the stated aims set out in paragraphs 1.10 and 1.11 [of the consultation document]?

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[1] Updated guidance on the CMA's approach to market investigations: Consultation document, 6 March 2017.
[2] The CMA's roundtable event was held on 29 March 2017 and was attended by professionals within the competition community, including legal and economic advisors, in-house counsel, other regulators, businesses and consumer groups.

(b) Do you agree with the proposed changes set out under proposal (B) (strengthening synergies between market studies and market investigations, and clarifying the relationship between the Board and the Group in relation to the scope of MIs)? If not please explain why and whether there are any alternative changes that would achieve the stated aims set out in paragraphs 1.10 and 1.11 [of the consultation document]?

(c) What do you consider to be the potential benefits arising from the changes? Are there any possible risks arising from the proposals, and how could these be mitigated?

(d) Is the updated text of the guidance sufficiently clear and does it adequately reflect the proposed changes? If there are particular aspects of the amended text where you feel greater clarity is necessary, please be specific about the aspects concerned and the changes you would propose to improve them.

(e) Do you have any other comments about the proposed changes and the resulting amendments to the guidance?

1.5 In the next section we summarise the main points raised in relation to these questions and our response to them.

2. Issues raised by the consultation and our response

2.1 The CMA has carefully considered the views raised during the consultation, and we wish to thank those stakeholders who attended our roundtable event and/or made a submission. While the broad direction of travel of our proposals is largely unchanged, the consultation responses were very valuable in identifying specific areas where further thought or clarification was required to ensure the successful implementation of the reforms. Where necessary, we have used this document to explain our proposals further.

Question 4.1: Do you agree with the proposed changes to MIs set out under proposal (A) (streamlining the MI process)? If not please explain why and whether there are any alternative changes that would achieve the stated aims set out in paragraphs 1.10 and 1.11?

2.2 This section considers the three elements of proposal A separately, namely: the earlier consideration of remedies; reducing the number of set-piece formal consultations; and increasing the opportunities for early engagement with parties.

Earlier consideration of remedies

2.3 In our consultation document, we proposed considering possible remedies at the outset of an MI alongside our assessment of potential competition problems. In practice this would mean including some consideration of potential remedies in the initial Issues Statement.

2.4 Our provisional view was that this would enable more time to be spent considering potential remedies, helping to ensure that the right outcomes are reached at the end of the investigation in the event that the Group finds an adverse effect on competition (AEC), and would give parties greater opportunities than they have had in the past to engage with and scrutinise potential remedy options.

2.5 We received a wide range views on this proposal, and these views broadly fall into three categories:

(a) Supportive of early consideration of remedies and our proposals.

(b) Supportive in principle of earlier consideration of remedies but not from the outset.

(c) Opposed to any consideration of remedies at an earlier stage in the process.

2.6 We briefly summarise the key views of stakeholders in each of these categories before responding to the issues raised.

(a) Supportive of early consideration of remedies and our proposals

2.7 A number of responses (in particular those from parties to previous investigations, regulators and consumer groups) welcomed this element of our proposals. Within these responses, there was support for the view that more time should be allowed for the consideration and design of complex remedies, and that doing so would give a greater opportunity for parties to engage with and aid the remedy development process. This would enable a more holistic approach to remedies, rather than their consideration in isolation much later in the process.

2.8 One submission did not think that considering potential remedies from the Issues Statement would raise any material pre-judgement risks, and noted:

> as the consultation document highlights, the panel would need to make a distinct finding in relation to the existence or otherwise of any adverse effects on competition. In practice, the early consideration of remedy questions could be highly beneficial to the assessment work that is undertaken, as the potential significance of particular bits of analysis to subsequent remedy assessment – if required – can be taken into account.[3]

(b) Supportive in principle of earlier consideration of remedies, but not from the outset of an MI

2.9 Several respondents (largely law firms) supported the principle of earlier remedies consideration, but felt that doing so at the beginning of the MI as part of the Issues Statement was too early. They agreed that it would be beneficial to allow more time for development and consultation, although they shared some of the concerns expressed by those opposing earlier consideration of remedies (see paragraphs 2.10 to 2.12 below). These parties proposed a number of alternatives:

- Starting consultation on possible remedies no earlier than month 3 of the MI, or month 6 in more complex MIs.
- Starting consultation on possible remedies between months 6–8, to allow some additional time for development and consultation than currently, but

[3] Which? response.

some time prior to this for the Group to initially explore the nature of any AECs.

- Allowing early remedies discussions between the parties and the CMA but keeping these confidential, to prevent media speculation on premature remedies that could be detrimental to parties and the market.

- Encouraging early engagement with parties on remedies 'without prejudice' to the AEC, either on an individual voluntary basis or where there was consensus among parties that this would be appropriate.

- Using working papers to share any relevant remedies analysis undertaken by the CMA and/or provide an indication of the direction on remedies prior to the CMA making its provisional decision.

- That early consideration of remedies was only appropriate in certain cases, for example where undertakings in lieu (UiLs) of a market investigation reference had been offered.

(c) Opposed to any consideration of remedies earlier

2.10 Several respondents (largely, law firms plus two parties to previous inquiries) were opposed to any earlier consideration of remedies. There were concerns that it would create a risk of confirmation bias and prejudgment of the AEC findings. There was also some concern that the Group might formulate an AEC to fit the remedy, ie 'retrofit' the AEC to its preferred remedies. It might also lead to remedies being developed that were based on the findings from the MS (rather than the AEC findings), thereby inappropriately placing too much reliance on the earlier MS findings. Some argued that remedies must follow an AEC finding, and that to consider them simultaneously would be discarding the order of process laid out in statute.[4] It was noted that the test for introducing remedies is whether there is an AEC and if so whether it requires remedial action, and therefore one party submitted that considering remedies and AECs simultaneously would distort the basis on which remedies can be implemented. One submission noted that the CMA's observation that 'no remedy can be imposed without a fully reasoned AEC'[5] had no rebutting force.[6]

2.11 Some respondents also considered that it would result in an increased burden on businesses and reduced scrutiny of the AEC, as parties would prioritise

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[4] The Enterprise Act 2002 (EA02), as amended by the Enterprise and Regulatory Reform Act 2013 (ERRA13).
[5] Consultation document, paragraph 2.7.
[6] City of London Law Society Competition Law Committee response.

their (limited) resources in order to focus on remedies. Some also felt it would be inefficient and a waste of resources for the CMA and parties, because some remedies considered at an early stage may then later be ruled out as inappropriate or irrelevant.

2.12 Respondents also noted: the potential for decision paralysis and a chilling effect on investment as a result of media attention on possible remedies; the greater risk of mismatch between any remedies imposed and the AEC identified, for example certain remedies may emerge as a 'consensus' solution when they may not be effective or proportionate to a specific AEC or AECs; that the proposal runs contrary to the procedural rights of parties and contravenes the basic principle of a presumption of innocence; incumbents and larger parties would inadvertently benefit as they could influence the remedies at an earlier stage; and that it could be difficult to persuade the public that remedies are not needed if discussion on potential remedies is in the public domain from the start.

CMA response

2.13 The CMA has considered the comments made by respondents. Overall, the purpose of these changes is to enable the CMA to begin discussions with parties on both the possible competition issues in the market and the potential remedies that may address these issues at the start of our MIs. In previous MIs, some parties have wanted to engage earlier on remedies and this change will enable us to have these early discussions.

2.14 However, we stress that the MI will not start with any presumption of 'guilt', a concern raised by some. Any consideration of possible remedies is hypothetical at the beginning of the MI (in the same way that the theories of harm in the Issues Statement do not represent conclusions but are simply hypotheses to investigate) and the adoption of any remedy is dependent on finding one or more AECs. The early consideration of remedies therefore involves no presumption that the Group (as a new independent set of decision-makers) will find AECs and/or that remedies will be needed.

2.15 We do not agree that it is inappropriate to consider potential remedies before having found an AEC or that the legislation requires a sequential approach to considering the two issues. The CMA only has the power to remedy if we have found an AEC; however, that does not mean it has to finalise its views on the AEC before considering potential remedies. A Notice of Possible Remedies has always been published alongside the provisional findings on AECs, and in any case remedies are unavoidably considered before any AEC finding has been made because the Final Report represents the CMA's decision on both issues. In this regard, the main difference proposed by the

consultation document is that parties will now have the opportunity to give their views to the CMA at an earlier stage rather than wait for the Notice of Possible Remedies. Furthermore, thinking about the way that markets might work better can often provide practical insights into the nature of possible problems in the current market.

2.16 However, as noted in our consultation document, we recognise that there may be cases where there is a greater need to understand the issues in more depth before we spend further time and effort developing relevant remedies in more detail. The approach taken in each case will depend on the specifics of the investigation, such as the work that has gone before it, and the nature of the issues and potential remedies being considered. For example, in cases where parties have offered UiLs in the MS, it is likely that thinking on potential remedies and potential design of remedies will be more advanced. There may also be cases where the existence of certain features of the market which adversely affect competition is widely recognised and where it would be beneficial to start more detailed work on potential remedies at an earlier point in the MI.

2.17 In a similar vein, some concerns were expressed that early consideration of remedies will increase the risk of confirmation bias or prejudgment. However, Group decisions will continue to distinguish between AECs and remedies and Groups will still need to make decisions first on the AEC and features of the market, before making their decision on any remedies, should an AEC be found. The Group's reasoning would continue to remain subject to detailed scrutiny, including rights of appeal where parties consider the Group has failed to discharge its statutory obligations. Furthermore, the fundamental safeguard built into the markets regime is the fact that the Group is a new set of decision-makers (who have not been involved in or taken any decisions during the MS or on the question of whether to make a reference) who will therefore bring a 'fresh pair of eyes' on both the issues and potential remedies to be explored in the MI.

2.18 A number of respondents noted that our thinking on remedies is likely to develop after the Issues Statement and it may be helpful or in some cases necessary to consult on this before we publish our Provisional Decision Report, containing our provisional decision on remedies. We recognise that our initial thinking is likely to evolve and that it may be beneficial to include updated thinking and analysis relating to remedies in working papers, as was suggested by respondents to the consultation.

2.19 We are not persuaded by the suggestion that we should only ever start considering remedies from, for example, month 3 at the earliest. Potential remedies are currently considered as part of the MS and the decision to make

a reference, and therefore it makes sense to build on this and ask for views at the outset of the MI on both issues and potential remedies. It also ensures that our consideration of the issues and remedies are more closely integrated from the start of the MI, so we can ensure that we undertake complementary analysis and target our resources most efficiently. However, as noted above, we may share and consult on more developed remedies thinking as the case progresses through working papers.

2.20 We recognise that early consideration of remedies involves some risk that remedy options will be developed that will not ultimately be required, which has the potential for inefficiency. However, we believe that this risk can be effectively managed.

2.21 First, as noted above (in paragraph 2.15), in many cases, considering potential remedies can help the Group to develop its thinking on how competition currently operates and what a well-functioning market would look like in the particular markets that are the subject of the investigation. Thus, early work on potential remedies (whether they are/are not ultimately required) can be helpful in identifying and describing the nature of any competition issues that give rise to AECs. Further, we note that in some cases, there may be a particularly close relationship between the identification of the problem and the formulation of the remedy (for example, where a particular regulation is found to inhibit competition, and the potential remedy is to repeal the regulation) and that in such cases, the risk of inefficiency is minimised.

2.22 Second, in most cases the CMA is unlikely to start detailed work developing or designing a wide range of different potential remedies at an early stage. We will need to tailor our approach as to when and how much work we do on remedies and at what point, depending on the specifics of the case, the engagement we have with parties and how the investigation develops, to ensure that we mitigate the risk of wasting resources on remedies in areas that we may not pursue further, as some have suggested. We also recognise that work on some types of possible remedies (notably those that may be expected to take a long time to develop and test) may need to start earlier in the MI than others.

2.23 We recognise that some respondents expressed concerns about the increased burden that early consideration of remedies may place on parties (particularly those who are smaller and/or less well resourced) as they will need to provide evidence relating to potential remedies at the same time as the AEC. We are mindful of the potential burdens that our MIs can place on parties and we are continually looking at ways to minimise the impact as far as possible. For example, our other measures seek to remove a number of the burdensome set-piece formal consultations to reduce the burden on

parties. However, we do not consider that the overall burden on parties will increase significantly as a result of earlier discussion and consideration of remedies. The measures as a whole will assist the CMA in completing MIs faster than we have previously, which is expected to reduce the burden on businesses (and the uncertainty they face while the outcome of the MI is unknown).

Reducing the number of formal consultations

2.24 Our consultation document[7] proposed reducing the number of formal consultations on set-piece publications, by:

(a) retaining the Issues Statement, but including a consideration of possible remedies within it;

(b) not publishing an Updated Issues Statement (UIS); and

(c) replacing the Provisional Findings and Provisional Decision on Remedies with a single Provisional Decision Report, which would contain the provisional decision on both AECs and remedies.

Our provisional view was that these changes would improve the efficiency and effectiveness of the MI process, improving timeliness and reducing burdens on both the CMA and parties, while giving parties adequate opportunities to scrutinise and challenge analysis and be appropriately consulted on the Group's provisional decisions.

2.25 All the submissions received supported the principle of reducing the number of formal consultations, although some respondents suggested alternative approaches to achieving this. Respondents agreed that, given the time constraints, our proposals represented a sensible step that would save resources for both the CMA and parties, although there was also a general recognition that it was still critical for parties to have visibility of, and a proper opportunity to comment on, the CMA's analysis and reasoning.

2.26 There were mixed views regarding the removal of the UIS. Many respondents recognised that the UIS creates additional burdens and is often repetitive of the Issues Statement, and therefore welcomed its removal. Others saw the benefit of the UIS in giving parties an indication of the CMA's evolving thinking, and in particular of any theories of harm that are no longer under consideration. It was suggested that if the UIS were removed, the CMA would need to find alternative ways of communicating this. One respondent instead

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[7] Paragraphs 2.9–2.11.

suggested publishing a later Issues Statement (rather than at the outset) once initial evidence had been gathered, which contained more detail and was more akin to the current UIS.[8]

2.27 Many respondents noted that the proposed changes would place greater importance on the working papers as an alternative mechanism to share and test the CMA's analysis. Therefore, they argued that the CMA should be clear about its timetable for publication and give as much notice as possible to allow parties to plan, particularly where there might be ad hoc consultations. Ensuring continued transparency and equal treatment between parties was also cited as important, with one respondent suggesting that 'if informal meetings/procedures are conduced [sic], it will be important to institute measures to ensure all stakeholders become aware of the outcome of more informal processes'.[9]

2.28 There were some concerns raised about the combining of the Provisional Findings and Provisional Decision on Remedies documents into a single Provisional Decision Report. A few respondents raised similar concerns to those given in opposition to the earlier consideration of remedies (see paragraphs 2.10 to 2.12), for example the increased risk of confirmation bias and the impact on the rights of defence of parties. Some noted the burden on parties to respond, and one noted in particular that allowing only 21 days to respond to the Provisional Decision Report (when there was currently a minimum of 21 days for Provisional Findings and a further 21 days for the Provisional Decision on Remedies), would be insufficient.[10]

CMA response

2.29 The CMA recognises the need for parties to have adequate opportunities to scrutinise our analysis. Indeed, input from parties throughout the MI process is vital to ensuring that MIs are fair, reach the right conclusions and produce robust, evidence-based outcomes.

2.30 We note the views regarding the removal of the UIS and that this was one of the main areas where some concerns were raised. We recognise that the UIS can be used to provide an indication of our initial thinking on the overarching narrative, and can also be used to indicate where we are minded not to pursue certain lines of analysis or theories of harm. We will continue to share our analysis and aspects of our thinking with parties through, for example, working papers. We agree with respondents that working papers will be an

[8] Ashurst LLP response.
[9] Simmons & Simmons LLP response.
[10] Charles Russell Speechlys LLP response.

important mechanism to share and test evidence, analysis and our preliminary thinking. As well as providing underpinning analysis for scrutiny, working papers are likely in most cases to set out how this analysis relates to the theories of harm and hypotheses set out in the Issues Statement. This will help parties to understand the analysis in the context of our overarching assessment.

2.31 However, the primary mechanism for sharing provisional overall thinking on the investigation will be through the Provisional Decision Report. The Provisional Decision Report is provisional and we will continue to take into account any further comments or evidence we receive that would lead us to review the basis for provisional decisions within the Provisional Decision Report. In many cases Groups have revised or supplemented their provisional decisions at the final report stage and the revised process will fully allow for this.

2.32 We also note that the CMA will maintain the flexibility to consult or engage with parties at other points where this is helpful or necessary, outside the fixed consultation points during the MI. As noted in the consultation document, there may, for example, be cases where the Group considers there is benefit in consulting on discontinuing certain areas of investigation or particular theories of harm before the Provisional Decision Report. The CMA recognises that we will need to continue to ensure that we maintain a fair and transparent approach with parties. This will need to be taken into consideration when deciding how to interact with parties and what to publish or share with parties between the fixed formal consultations of the Issues Statement and the Provisional Decision Report.

2.33 We note the views expressed regarding the Issues Statement, particularly the suggestion that we publish a later, more developed Issues Statement. We consider that it is beneficial to publish an Issues Statement at a relatively early point in the MI to mark the start of phase 2 and to clearly set out the issues the Group will be considering and the potential remedies at the start of the MI. Doing so will provide parties with an early opportunity to respond to that and set out their thinking on the issues and remedies for us to explore and discuss in early hearings and meetings with stakeholders.

2.34 We do not propose to replace the Issues Statement with the UIS, as suggested by a few respondents. We believe it is important that the Group, as independent decision-makers for MIs, have the opportunity to signal to parties the hypotheses they wish to explore at the beginning of the investigation, as this provides important context for subsequent interactions with parties. Further, the UIS is significantly more time-consuming and burdensome for both parties and the CMA than the Issues Statement. As already mentioned,

we will continue to share or publish our analysis through other means (for example working papers) prior to the Provisional Decision Report.

2.35 With regard to the suggestion that we extend the time allowed to respond to the combined Provisional Decision Report, we note there is a requirement that we must consult on our provisional findings for a minimum of 21 days.[11] However, the Group has the discretion to increase this period depending on the specifics of the case. In allowing time for consultation, we would expect the Group to seek to ensure that parties have a reasonable amount of time to respond, within the constraints of the shorter statutory timetables for MIs. In taking a decision, the Group will take into account the length and nature of the documents that are the subject of the consultation and the opportunities that parties have already had to scrutinise analysis.

Increasing the opportunities for early engagement with parties

2.36 Our consultation document[12] proposed increasing the opportunities for parties to input into our analysis and inform decision-making at an earlier stage in the MI. This would be via:

- earlier hearings with parties (replacing those that currently take place in advance of Provisional Findings publication);
- using multi-party hearings where feasible;
- consulting on the approach to analysis through greater use of roundtables;
- sequential sharing of analysis using confidentiality rings or disclosure rooms; and
- publishing working papers.

Our provisional view was that this would allow for greater interaction with parties at an early stage, when such interactions are best able to inform thinking.

2.37 All the submissions supported the principle of increasing the opportunities for early engagement, although some raised concerns about specific elements of the changes.

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[11] Rule 11.5 in CMA rules of procedure for merger, market and special reference groups, CMA17, November 2015.
[12] Paragraphs 2.12–2.14.

2.38 Overall, respondents welcomed earlier engagement between parties and the CMA to discuss the issues and recognised the potential for procedural efficiencies, particularly around engagement on methodologies and the approach to analysis. Some noted that earlier hearings would allow parties an opportunity to explain their views and present evidence to the Group before the Group's thinking has developed. This in turn should result in a better-informed approach to identifying and exploring the issues in markets. Several respondents also suggested that it would be beneficial if these early hearings were more informal in terms of a dialogue between the parties and the Group. There was also support among most respondents for the increased use of confidentiality rings over disclosure rooms, where appropriate, as these would result in efficiency gains for the CMA and parties.[13]

2.39 However, some respondents expressed concern at moving the hearings to such an early stage in the investigation, and argued they should instead happen once the Group's thinking is more advanced, such as after the publication of working papers, or once the CMA and parties have had adequate time to consider the AECs. Some respondents were also concerned that these hearings may become focused on remedies and that there needed to be sufficient time to also discuss the AEC. A number of respondents also expressed concern about the use of multi-party hearings if they were to replace bilateral hearings, believing them to be ineffective as parties are unlikely to speak freely due to confidentiality concerns.

CMA response

2.40 The CMA values engagement with and contributions from parties during MIs and that is why we are introducing changes to ensure we can make the most of this input and engagement.

2.41 We note the view expressed that the first hearings should remain later in the MI. We consider that by moving the hearings earlier in our investigation, it will allow parties a greater opportunity to feed into the CMA's early thinking. The response hearings after the Provisional Decision Report will still provide an opportunity for parties and the CMA to meet and discuss the overall provisional findings on both the AEC as well as remedies and will be focused on testing the parties' evidence or views on the analysis the CMA has undertaken. As noted in paragraph 2.35 above, the Group will ensure that

[13] We note that Npower does not support the use of confidentiality rings, believing there to be a very high risk factor for leaking information and/or the wrongful release of working papers.

sufficient time will be given to consider both the issues and remedies in the early hearings and later set of response hearings.

2.42 We recognise that parties value earlier and more open engagement with the CMA,[14] and this is consistent with the direction of our changes. We also note the suggestions from some respondents that the initial hearings should be more informal and that, more generally, there should be more opportunities for interactive discussions with the CMA, and particularly greater access to the Group. In MIs, the key hearings would generally be led by the Group. In general, CMA staff lead analytical discussions and roundtables, although members may also attend. The approach to staff and members attending or chairing meetings will be at the discretion of the Group and parties will be informed as appropriate.

2.43 For clarity, we agree that informal meetings, site visits and roundtables (for example on analysis and methodology) are likely to be more interactive due to the nature of those types of engagement (for example, there may well be an exchange of views on analytical methodologies). However, hearings are an opportunity for the CMA to ask questions about the issues in the market, evidence or parties' views. In the interests of ensuring fair and equal treatment of all parties, it would not be appropriate for the Group to share its emerging views on the case at such hearings.

2.44 We agree that multi-party hearings are not always appropriate, and we are not envisaging that they would replace all bilateral hearings. The use of multi-party hearings would depend on the specifics of the case, and would be at the Group's discretion to use if they felt it would be beneficial and appropriate. Parties would, of course, be free to make representations if they thought multi-party hearings were inappropriate in a particular case (for example, due to concerns around the confidentiality of information). We note, in this regard, that even if multi-party hearings are used, there are other ways for parties to communicate confidential information to the CMA (for example, written communications or short face-to-face hearings if required or desired by the parties, in addition to the multi-party hearing; both of these approaches have been used in previous MIs).

2.45 Generally, there is broad support for the greater use of confidentiality rings instead of disclosure rooms, as this is less resource intensive and burdensome for both parties and the CMA. However, we note the concern

[14] For example, in the recent CMA survey of stakeholders 2016–2017, when asked what the CMA could have done to improve its involvement with stakeholders, the most popular response from stakeholders involved in MIs was that they would have preferred more interaction/face-to-face meetings. Support was also expressed for earlier planning and engagement with parties at the CMA roundtable on disclosure.

raised by one party about the disclosure of data via confidentiality rings. The decision on the appropriate approach to use to share data (confidentiality rings and/or disclosure rooms) will depend on the nature and sensitivity of the data being disclosed, and will be taken on a case-by-case basis.[15]

[15] The CMA held a stakeholder roundtable on 7 November 2016 to discuss the current and possible future use of confidentiality rings and disclosure rooms to disclose relevant information in our investigations. The CMA also has standard templates and rules for the operation of confidentiality rings and disclosure rooms.

The CMA's position on Proposal A having considered the consultation responses

Earlier remedies:

- We will include consideration of possible remedies alongside issues in the Issues Statement on a hypothetical basis.
- This is likely to need to be supplemented by more detail, so some material or underlying analysis relating to remedies could be included in working papers.
- It will be at the Group's discretion, on a case-by-case approach, as to when we undertake more detailed work (such as the design and analysis) on remedies

Reducing the number of formal consultations:

- We will continue to publish the Issues Statement at an early point in the MI, and remove the requirement to publish a UIS.
- We will publish a combined Provisional Decision Report, covering AECs and any remedies.
- We will continue to have the option to publish or consult outside these points, for example to indicate where we are minded not to pursue lines of inquiry.
- We recognise that working papers will be important to share analysis and initial thinking, and parties will also have the opportunity to see and comment on our overall narrative through the Provisional Decision Report.

Earlier engagement with parties:

- We will hold early hearings with parties, as well as response hearings.
- Multi-party hearings may be suitable in some circumstances but will be used at the Group's discretion on a case-by-case approach.
- We will consult on our approach to analysis, for example by using roundtables.
- We will look to share our analysis sequentially, where possible using confidentiality rings, depending on the nature and sensitivity of the data being disclosed.
- We will publish working papers, which may take different forms.
- We recognise there will be more discussion-based engagement on methodology and analysis, but provisional views will be set out and communicated to all parties through the Provisional Decision Report.

Question 4.2: Do you agree with the proposed changes set out under proposal (B) (strengthening synergies between market studies and market investigations, and clarifying the relationship between the Board and the Group in relation to the scope of MIs)? If not please explain why and whether there are any alternative changes that would achieve the stated aims set out in paragraphs 1.10 and 1.11?

2.46 This section considers the two elements of this proposal, namely strengthening synergies between MSs and MIs and clarifying the relationship between the Board and the Group.

Strengthening synergies between MSs and MIs

2.47 To ensure a smooth and efficient handover between an MS and an MI, the consultation document proposed that work be undertaken in the latter stages of the MS to explore narrowing the scope of the MI, to prepare and scope potential analysis and to consider potential remedies. A preparatory MI team would also begin preparing for the reference by understanding the nature of the market and the work that has been undertaken. Our provisional view was that this would maximise the synergies from the creation of the CMA as a single competition authority, by ensuring a smoother and more efficient transition between MSs and MIs.

2.48 There was strong support for strengthening synergies between MSs and MIs. In particular, there was broad support for narrowing the scope of issues for consideration in an MI in the latter stages of the MS. Respondents acknowledged that this would mean a better focus at the start of the MI, which would save time and resources, ensure the MI is manageable to deliver and reduce duplication. It was suggested that doing so would enable the CMA to front-load some of the analysis at the beginning of the MI, on account of the enhanced information-gathering powers available during MSs. One party even suggested that:

> all of the (inaccurately described) 'off-the-shelf' information requirements which typically arrives shortly after the decision to refer, be completed at an appropriate juncture in the lead up to a MI but prior to commencements of the timetable under ERRA13. This would front-load some of the collection of evidence and potentially free up some of the timetable for the phase 2 team to deal with the issues.[16]

[16] Santander UK plc response.

2.49 One respondent requested the CMA publish further guidance on how the Group could expand the scope if it wished without acting *ultra vires.*[17] Another respondent noted that 'as well as "clear the air" reviews, regulators may also seek more targeted reviews, and it is helpful that the CMA acknowledges that there may be different types of review needed.'[18]

2.50 One respondent disagreed with the proposal that the Issues Statement should draw mainly from the MS work, but considered instead that the Issues Statement should be published later once the Group has refined its own views on scope. This respondent also felt it is inappropriate for the MS to be used to shape the MI remedies discussion.[19] A few respondents raised similar concerns about the early consideration of potential remedies as those set out in paragraphs 2.10 to 2.12.

2.51 There was broad support for the proposal for a better transition between the MS and MI, such as forming a preparatory team. Respondents acknowledged the benefits of ensuring a smooth handover to avoid duplication and save time. However, a few respondents felt that the preparatory team should not include any staff currently working on the MS, although they may join the MI team once launched. They also felt that there should not be any interaction between potential Group members and the MS team to protect against confirmation bias. One respondent suggested that the preparatory team should not be formed until the Board has agreed the MS report and made the reference decision, which could be several days before the MS report is published.[20]

CMA response

2.52 We recognise and agree with the comments made by the majority of respondents in support of our proposals to maximise synergies between MSs and MIs.

2.53 In relation to some concerns over the independence of the Group in relation to the scope of MIs, although the scoping work at phase 1 would be taken into account by the Group (as part of the advisory steer – see paragraph 2.58), the Group is not restricted or formally limited by that work (other than via the Terms of Reference). The Group ultimately decides on the scope of an MI and can broaden or narrow the issues as it sees fit, as is currently the case. We are not persuaded that further guidance is necessary, as the Group would not

[17] Freshfields Bruckhaus Deringer LLP response.
[18] Ofwat response.
[19] Ashurst LLP response.
[20] Cleary Gottlieb Steen & Hamilton LLP.

be acting *ultra vires* by expanding or narrowing the scope within the bounds of the Terms of Reference.

2.54 With regard to the concern that considering remedies at the MS stage is premature, this is already required as part of the assessment for whether the threshold for a reference is met. However, it is only typically a preliminary consideration of potentially suitable remedies, unless UiLs are offered. It is therefore sensible that the MI remedies work builds on what has been done during the MS.

2.55 We agree that it is important to maintain the independence of decision-making between the MS and the MI, and this is something our proposals maintain. Undertaking preparatory work for a potential MI will simply mean the Group is better able to 'hit the ground running', which is particularly important given the shorter statutory timetable and desire for greater efficiency. It will also help minimise any duplication of work and evidence gathering, as it means the preparatory MI team will be able to assess the information and evidence received during the MS and take that fully into account when considering what (if any) additional data or evidence is required. We note that part of the rationale for creating a single competition authority was to avoid duplication and bring about greater efficiencies in markets work.[21]

2.56 Involving members before the reference arrives means they can also be up to speed with the case, the nature of the market and the work done in the MS, so that the MI can start more swiftly and efficiently. As respondents noted, it also ensures that greater time is spent considering the issues once the MI is underway. The revised guidance is clear that preparatory work is undertaken on a contingency basis before the final decision on whether or not to make a reference is made by the Board. The Group will not be involved in any of the scoping discussions or decisions in the MS, to ensure that the independence between phase 1 and 2 is maintained.

2.57 We agree that some transfer of staff between the CMA-led MS and MI can also help to enable a smoother transition and avoid unnecessary duplication, where appropriate and feasible. We note the statement on transfer of staff in the CMA's guidance: 'At operational (staff) level, in order to avoid unnecessary duplication and to facilitate an efficient end-to-end markets process, the CMA would normally expect to have a degree of case team

[21] See Enterprise and Regulatory Reform Bill, Bill 7 of 2012-13, Research Paper 12/33, 7 June 2012, pp31&32, which cites as one of the intended benefits of the creation of the CMA 'a more streamlined approach in decision making, through strong oversight of the end-to-end case management process'.

continuity by retaining at least some of the market study case team to work on the larger market investigation case team when a matter is referred.'[22]

Clarifying the relationship between the Board and the Group

2.58 Our consultation document proposed that the Board could issue an advisory steer on scope at the start of the MI, setting out the Board's expectations regarding the scope of the MI and issues to be addressed following the work undertaken by the MS. The Group would be expected to take the steer on scope into account but it would not be legally binding. Our provisional view was that this would enable an end-to-end approach to our markets work and reduce the amount of duplication, by allowing the Board to take more explicit account of the work undertaken in an MS.

2.59 There were mixed views about the advisory steer, which broadly fall into three categories:

(a) Supportive of an advisory steer.

(b) Supportive in principle but with some concerns.

(c) Opposed to an advisory steer.

(a) Supportive of an advisory steer

2.60 Many respondents could see value in the advisory steer, which would make better use of the work done during the MS, encourage efficiencies and avoid duplication. One respondent noted that the proposals 'strike a suitable balance between utilising the experience of the MS while maintaining the Group's independence.'[23] One respondent said that it was sensible to have a steer but it should also include an assessment of the potential workload that may be required.[24]

2.61 Several respondents felt parties should have the opportunity to comment on the steer before it is finalised.

(b) Supportive in principle but with some concerns

2.62 Several respondents did not object to an advisory steer, but expressed some uncertainties over whether it was necessary and whether there may be

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[22] Market studies and market investigations: supplemental guidance on the CMA's approach, CMA3, paragraph 1.22.
[23] Simmons & Simmons LLP response.
[24] SSE plc response.

alternative ways of achieving its aims. Some were unconvinced of the need for a separate steer, and thought that it should be incorporated within the Terms of Reference or the MS report.

2.63 One respondent was supportive of the steer, but argued that its non-binding nature may reduce its effectiveness as a mechanism to limit the scope of MIs. This respondent also noted their submission to the (then) Department for Business, Innovation and Skills' consultation in 2016 on reforming the competition regime, in which they advocated a statutory amendment allowing MI references to specify the 'features' of the market in the same way that is possible for cross-market references.[25]

2.64 Some respondents also emphasised that the advisory steer should not constrain the Group and its independence. One respondent was supportive of the steer, provided it does not constrain the MI to specific issues and allows for the investigation of broader issues where appropriate.[26] Another respondent felt the 'expectation' on the Group to take the steer into account 'gives rise to a risk of the independence between the two decision makers being lost to some degree.'[27] Another respondent suggested allowing the Board to submit an advisory note as a response to the Issues Statement rather than at the outset of the MI, to reduce the risk of undue influence over the Group.[28]

2.65 There were mixed views about whether the steer should be limited to cases where the CMA has carried out the MS. Some argued it should not, and that it would be unusual to have different procedural steps for references originating from the CMA and sectoral regulators. One respondent called for: 'the development of a statement of 'best practice' to be agreed by all regulators for MI references; an understanding that concurrent regulators will consult the CMA Board when developing MI references; and a review and (if found necessary) a strengthening of concurrency procedures around MI references.'[29]

2.66 Others argued the steer should not apply to other regulators, to allow the CMA to be unconstrained by the MS findings (where it is unlikely to have been involved in shaping the MS) and to fully maintain the CMA's impartiality.

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[25] Clifford Chance LLP response.
[26] EDF Energy response.
[27] Pinsent Masons LLP response.
[28] Which? Response.
[29] City of London Law Society Competition Law Committee response.

(c) Opposed to an advisory steer

2.67 Concerns were raised that the steer risks diluting or compromising the independence of the Group, and could imply the Board has influence over the running and outcome of the MI. There were also concerns that the advantage of the 'fresh pair of eyes' would be lost. One respondent observed that the steer 'risks duplication, as the CMA Board is already required to approve MIs (and by implication, its scope).'[30] Another respondent felt the steer would cause confusion and served no purpose – the CMA's views on scope should instead be contained within the MS report so they are presented in a single document.[31]

2.68 Another respondent argued the steer was unnecessary because the Board can already tightly define the Terms of Reference to the '"description of the goods and services" to which the suspicion of a prevention, restriction or distortion of competition relates. Such a description might be quite specific and – notably – does not need to correspond to an entire product or service market.'[32]

CMA response

2.69 In response to the concerns that the advisory steer would undermine the independence of the Group, we would reiterate that independence between phase 1 and phase 2 decision-making remains central to the fairness and robustness of the markets regime and these proposals safeguard this independence. The steer is advisory and not legally binding, although we would expect Groups to take it into account by factoring it into their initial thinking on scope. The Group will still be able to look more broadly or narrowly (within the Terms of Reference) if they consider that to be appropriate, as a result of their fresh view of the market, and/or having considered responses from parties or having undertaken further work or analysis. Ultimately, decisions on the scope of the MI will continue to be made by the Group. The Board will not be involved in any decisions on scope or substance during the MI.

2.70 Nevertheless, we continue to believe there is value in introducing the option for the Board to issue an advisory steer to the Group on the scope of the MI. We believe it will help maximise the potential synergies between MSs and MIs carried out by the CMA and reduce the risk of unnecessary duplication, by allowing the Board to take more explicit account of the work undertaken in an MS in setting out its views on the appropriate scope of an MI. We therefore

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[30] Freshfields Bruckhaus Deringer LLP response.
[31] Cleary Gottlieb Steen & Hamilton LLP response.
[32] Ashurst LLP response.

consider that these changes are consistent with the creation in ERRA13 of the CMA as a single competition authority, a key rationale for which was to avoid duplication and to bring about greater efficiencies in markets work, while preserving the independence of decision-making between MSs and MIs which remains central to the regime.

2.71 In terms of the form any steer should take, it would be appended to the MS report and so would form part of the MS decision. It would be separate from the Terms of Reference, which set out the legal bounds of the MI. It would draw only on the findings and work set out in the MS decision and is simply intended to provide additional clarity over the views (if any) of the Board on the expected scope of the MI, including issues to be addressed or issues that it considers do not require further consideration, based on the previous work undertaken.

2.72 We note that the Terms of Reference restrict scope in some ways (by limiting the description of goods or services), but any advisory steer could supplement this by, for example, advising the Group to focus on certain issues. We also note the suggestions that any steer on scope could be indicated via the MS report instead. Our view is that a separate advisory steer provides a clearer means of articulating the Board's views on scope than embedding this within the MS report.

2.73 Some respondents argued that parties should have the opportunity to comment on the steer before it is finalised. Parties are free to submit their views on the steer to the Group at the start of the MI (and indeed throughout the MI) if they wish to do so. Further, the Group's initial views on the scope and issues to be considered (having taken account of the steer) will be set out in the Issues Statement and parties may wish to respond to these views in their response to the Issues Statement. Therefore we do not consider that it is necessary to build in any additional consultations into the process.

2.74 In relation to whether the steer should apply to the concurrent regulators, it is of course open to other regulators to include a steer in their report or otherwise identify a more focused set of issues it considers the MI might explore.

The CMA's position on Proposal B having considered the consultation responses

Advisory steer:

- The Board will have the option to publish an advisory steer as a tool to ensure that any expectations on the scope of an MI are clearly laid out. The Group will be expected to take this into consideration, but it will not be legally binding.
- The steer will be an annex to the CMA MS final report, alongside (but separate to) the Terms of Reference.
- It is open to other regulators to identify a more focused set of issues when making a reference if they wish.

Scoping:

- Decisions on scope for the MI will still lie with the Group (within the Terms of Reference).
- The Issues Statement will identify the areas it initially proposes to explore, and parties will have an opportunity to comment on the scope of issues at this point.

Better transition between phase 1 and 2:

- The CMA will continue to look at how we can facilitate a smoother transition including setting up a preparatory team, so the MI team are up to speed on the issues and the work done in the MS and have a better understanding of the market.

Question 4.3: What do you consider to be the potential benefits arising from the changes? Are there any possible risks arising from the proposals, and how could these be mitigated?

2.75 Most respondents noted the potential benefits and risks from the proposals as part of their answers to questions 4.1 and 4.2. These comments have therefore been captured in the summaries above. Some respondents noted specific points, which are set out below.

Benefits

2.76 Respondents noted that the proposals could make the MI process more efficient and streamlined, particularly in the first four to six months, and also provide for greater interaction between stakeholders and the CMA. The changes should also help the CMA complete MIs within the 18-month statutory deadline and allow for more effective, proportionate and workable remedies.

2.77 Another benefit identified would be to capitalise on the synergies between the phase 1 and 2 processes and enable the Group to focus for longer on the issues and remedies through reducing the number of set-piece consultations.[33]

Risks

2.78 Two respondents felt the risks stem from the proposal to consider remedies from the outset of the MI, which could jeopardise any net improvement to the process and could undermine the two-stage process if it is perceived that the Group has made up its mind on remedies at the start of the MI.[34]

2.79 Another respondent noted that it was unclear whether the changes will make the MI process any less burdensome or disruptive for parties.[35] Another respondent believed that the proposals would be likely to undermine the quality of the CMA's findings and could have unintended consequences for customers and competition.[36]

CMA response

2.80 We agree with the benefits identified.

2.81 With regard to the risks identified regarding the earlier consideration of remedies, we refer to our comments in paragraphs 2.13 to 2.23 above. The CMA is mindful of the burden placed on parties during an MI, and we believe that reducing the number of publications will help to do this. We do not agree that the proposals will undermine the quality of our findings; the intention behind the proposals is to allow more time for the evaluation, development and testing of remedies, which we believe will lead to effective and practical interventions in markets based on robust analysis.

Question 4.4: Is the updated text of the guidance sufficiently clear and does it adequately reflect the proposed changes? If there are particular aspects of the amended text where you feel greater clarity is necessary, please be specific about the aspects concerned and the changes you would propose to improve them.

2.82 Many respondents noted changes to the guidance that would be necessary as a result of alternatives they advocated to our proposals, for example because

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[33] Slaughter and May LLP response.
[34] Dentons UKMEA LLP and Slaughter and May LLP responses.
[35] Eversheds Sutherland LLP response.
[36] SSE plc response.

they disagreed fully or partially with our proposals on earlier consideration of remedies or the advisory steer. We have not included here those changes where we intend to proceed with the proposals in the consultation document.

2.83 Some other changes were proposed, with any additional text suggested shown in bold below:

- Paragraphs 14 to 16: Clarify how the CMA intends the handover process to work in cases where the MI reference comes from a concurrent regulator.[37]

- Paragraph 25: The updated guidance states that the CMA may publish summaries and transcripts of hearings, whereas the current guidance states transcripts will not be published. This change is not mentioned in the consultation document. To allow for frank discussions, the CMA must consider if it is appropriate for full transcripts to be published.[38]

- After paragraph 30: Recommend a separate subheading on 'working papers' with a proposed timeframe for the publication of the CMA's developing thinking.[39]

- Paragraph 39: 'The report will, if it confirms the finding of an AEC, contain **a fully reasoned explanation of the AEC finding and** sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies by the CMA.'[40]

CMA response

2.84 We have added some text in the guidance to clarify how the handover process will work where the reference comes from a concurrent regulator.

2.85 We have clarified the situations in which a hearing transcript may be published, noting that this would be as deemed appropriate by the Group.

2.86 We are not minded to include a timetable for the publication of working papers. We note that an indication of timing is already given in the table at paragraph 6, and it will be for the Group to decide the publication and timing of working papers, of which the parties will be notified via the administrative timetable.

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[37] Slaughter and May LLP response.
[38] Eversheds Sutherland LLP response.
[39] Addleshaw Goddard LLP response.
[40] Addleshaw Goddard LLP response.

2.87 We have clarified the content of the Final Report.

Question 4.5: Do you have any other comments about the proposed changes and the resulting amendments to the guidance?

2.88 A number of respondents made reference to the fact that the Energy and Retail Banking MIs recently conducted were large complex markets and therefore were not typical MIs. As a result, they argued the CMA should not make wide changes to its MI processes based on the experiences of these two MIs.

2.89 One respondent cautioned that the benefits of flexibility and truncation should be balanced against unintentional adverse impacts, such as conflict or prejudice in exercising discretion in process and procedure. It noted that timelines and deadlines presented to companies have not always been mirrored by those set or met by the CMA.[41]

2.90 One respondent suggested a more extensive debate on improving the efficiency of the MI process by '(a) greater attention to scope and realistic timescales; (b) a more parsimonious and targeted approach to evidence and data; and (c) better treatment of risk and uncertainty.'[42]

2.91 The Scottish Government requested that its new power to act with the Secretary of State to request the CMA to carry out an MI be reflected in the updated guidance.[43]

CMA response

2.92 We announced in our Annual Plan for 2016/17 that we would review the way in which we conduct MIs, and there were two drivers for that. The first was the revised regime introduced by the ERRA13, which has required us to consider how to streamline our processes so they can be completed in substantially less time, and to bring about synergies from being a single competition authority. The second driver was our broader duty as a public authority to work efficiently and effectively and to make best use of the resources at our disposal.

2.93 In relation to the comment that we should not place undue weight on the experience of the Energy and Retail Banking MIs, we note that in several respects – notably the broad scope of issues under investigation and the size

[41] Law Society of Scotland response.
[42] SSE plc response.
[43] Under the Scotland Act 2016.

of the markets referred – these were exceptional investigations. However, we have based our views not solely on these recent experiences, but on our experience of conducting 18 MIs over the past 13 years, as well as on feed-back from a variety of sources,[44] including the current consultation process.

2.94 We note the comments about balancing the benefits of flexibility with adverse impacts. The CMA recognises that it has a duty to ensure that we maintain a fair and transparent approach with parties, and the Group will take this into consideration when deciding how to interact with parties and what to publish or share with parties.

2.95 With regard to deadlines and timescales, the CMA is mindful of the burden on parties. We would expect the Group to take into account the length and nature of the decisions being taken so that parties have a reasonable amount of time to respond, while also bearing in mind the shorter statutory timetables for MIs.

2.96 The Scottish Government's new power is out of the scope of this consultation, which is focused on the processes for conducting MIs. However, we see merit in amending our guidance at the same time as making the changes as a result of this consultation, to reflect this new power. The changes will be inserted into CMA3.

[44] As noted in the consultation document, paragraph 1.11, these sources include 'a recent survey undertaken by the CMA; a roundtable on disclosure hosted by the CMA; and published responses to the government consultation on refinements to the competition regime.'

Appendix A: updated guidance

The following text will replace paragraphs 50 to 87 of CC3 and will be inserted after paragraph 3.23 in CMA3:

Market investigation procedures

1. The following paragraphs provide an overview of the procedures for a market investigation and replace the relevant paragraphs of the *Guidelines for market investigations* (CC3 (revised)) as outlined in Annex B. In practice some aspects of the procedures used in a particular case may vary from those set out below. This is inevitable because no two market investigations are alike in all respects. The sectors under investigation can range in size from small, highly specialised industries to large-scale multi-faceted sectors. Some references can encompass both upstream and downstream markets.[45] Moreover, the numbers of parties with an interest in the investigation may vary from a few to several hundred.

Managing investigations with a large number of parties

2. All providers of the goods or services in a market under investigation are potentially main parties to an investigation. However, the degree of each party's engagement with the CMA may vary, particularly where there are substantial numbers of main parties. The CMA may need more information and evidence from some than from others. Some firms may choose to engage more with the CMA than others. Differences in communication by the CMA with different main parties may consequently reflect the different levels of party engagement.

3. In addition, there will be parties which are not providers of the goods or services in the market but which may be materially affected by the investigation (including super-complainants, customers and consumer groups, upstream suppliers, and trade and professional bodies). Levels of engagement with these parties will also vary. For example, the CMA may seek information from some of them, while others may volunteer information and views to the CMA.

4. The CMA makes extensive use in market investigations of its website to communicate or to make disclosures, enabling any number of parties to follow the progress of an investigation (as far as possible the CMA alerts parties when relevant material is posted). While the detail of its processes might vary, the CMA will ensure that its procedures are fair and give parties the opportunity to participate appropriately in an investigation.

[45] An upstream firm provides raw materials or manufactures inputs for processing and/or distribution by a downstream firm.

Timescales

5. The EA02, as amended by the ERRA13, requires the CMA to publish its report on a market investigation within 18 months of the reference.[46] There is scope to extend the investigation by up to a further six months if the CMA considers there are special reasons for doing so.[47]

6. The timescales for the different stages of a market investigation will be decided by the Group on a case-by-case basis. The following timetable shows the stages of a typical 18-month investigation. In practice, some of the stages may overlap and developments in the investigation, for example a revision of the Provisional Decision Report and a consequent need for additional consultations, may require adjustments to the timings and procedures.

[46] Section 137(1) of the Act.
[47] Section 137(2A) of the Act. See also paragraphs 3.5–3.7

Stage of process	Timing within 18-month investigation
Reference	Pre-reference sharing of appropriate information with the CMA by the CMA market study team/the referring body
'First day letter'/initial information requests Publication of initial Issues Statement (setting out theories of harm and inviting views on possible remedies) Initial submissions from main and third parties	Months 1–2
Site visits and hearings	Month 3
Further interaction with parties and consultation on analysis: eg roundtables, confidentiality rings, disclosure rooms, working papers	Months 2–11
Final deadline for all parties' submissions before the Provisional Decision Report	Month 11
Publication of Provisional Decision Report on the AEC and remedies (if needed)	**Month 12**
Consideration of responses to Provisional Decision Report Response hearings with parties	Months 12–16
Final deadline for all parties' submissions before Final Report	Month 16
Publication of Final Report	**Month 18**

7. The CMA draws up and publishes an administrative timetable at an early stage in the investigation. A draft is sent to main parties for comment. The administrative timetable is updated as necessary during the investigation.

Information provision and disclosure

8. While the time taken to conclude a market investigation depends on several factors, including the complexity of the investigation and the number of parties involved, a key factor is the timely provision of information to the CMA. The CMA aims to be reasonable in its requests for information and the deadlines it sets for parties to respond to such requests. It expects parties to meet the timescales set. The CMA is empowered to require information and the attendance of witnesses and may impose financial penalties under section 174A of the EA02 for failures to comply without reasonable excuse.[48] Failure to comply includes failures to answer questions asked by the CMA, failures to produce documents required by the CMA, or failures to provide adequate or accurate information in response to any requirement imposed (including the deadline) on a person under section 174 of EA02. The provision of false or misleading information to the CMA is a criminal offence, regardless of whether that information has been provided voluntarily or in response to a statutory notice.[49]

9. In pursuing its aim to conduct investigations in a fair and transparent manner, the CMA discloses its key documents, mainly by publishing them (in particular an Issues Statement, key results from its analysis, a Provisional Decision Report and Final Report). Typically, it also publishes a large amount of other documentation, for example non-confidential versions of key submissions from parties, including their submissions on the Issues Statement, the Provisional Decision Report and responses to other publications, key submissions of third parties, details of points arising in hearings, survey reports and some working papers.

10. Part 9 of the EA02 provides for the protection of confidential information relating to individuals and businesses.[50] But the CMA may disclose information under certain circumstances and having taken into account the considerations specified in the EA02.[51]

11. Where issues arise as to the confidentiality of some information in the CMA's possession that underlies a decision or a piece of analysis, but the CMA nevertheless considers that disclosure of some sort is necessary to allow a party to comment on it, the CMA may decide on some form of limited disclosure.[52]

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[48] See also paragraphs 2.13–2.15 where the same provisions are discussed in relation to market studies.
[49] For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see Administrative Penalties: Statement of policy on the CMA's approach (CMA4).
[50] Part 9 of the Act, in particular section 245, provides that a person commits an offence if he or she discloses or uses specified information unless in the circumstances permitted by the Act or the information is already in the public domain in the circumstances described by section 237(3).
[51] Section 244.
[52] For example, to enable disclosure of some data used in its analysis, the CMA might set up a disclosure room or confidentiality ring in which the parties' external legal and economic advisers can review it. Rules relating to access, use and non-disclosure are applied and participants are required to sign undertakings that they will comply with the restrictions. See the CMA's guidance and templates for confidentiality rings and disclosure rooms.

12. For further details on the statutory provisions relating to the information obtained during the course of an investigation and to its disclosure, see the Chairman's guidance on disclosure (CC7 Revised) and the CMA's guidance on transparency and disclosure (CMA6).

D. The main stages of an investigation

13. The following paragraphs describe the main stages of a market investigation and outline the key interactions which the CMA has with parties and their advisers in the course of a typical investigation. However, market investigations vary significantly and the CMA may adapt its procedures to take account of the particular circumstances of an investigation.

Handover between a market study and a market investigation

14. Where the CMA (as opposed to one of the other referring bodies) undertakes the market study, the CMA's market study team considers the appropriate scope of the market investigation following consultation on a possible reference. It will also consider whether remedies are potentially available as part of its decision to make the market investigation reference (and sometimes also in the context of an offer of undertakings in lieu of a reference from the parties).[53]

15. To ensure an efficient handover, the CMA begins preparatory work on a market investigation on a contingency basis before the final decision on whether or not to make a reference is taken. This will include consideration of the further information-gathering and analysis likely to be required in the market investigation. A preparatory market investigation team of staff and members is normally established to prepare for the reference and they receive briefings on the work undertaken in the market study and the key concerns underpinning any anticipated reference.

16. In addition to drafting the formal terms of reference for the market investigation, the CMA Board may append an advisory steer to the reference decision setting out its expectations regarding the scope of the market investigation and the issues that could be the focus of the investigation. The Inquiry Group would be expected to take this into account. However the Inquiry Group will continue, as required by the legislation, to make its statutory decisions independently of the CMA Board.

17. Where another referring body undertakes the market study, the CMA's preparatory market investigation team will seek to engage with the referring body to share information and analysis and understand the key concerns underpinning any anticipated reference.

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[53] See OFT511, paragraphs 2.20–2.26 and 2.30–2.31.

Information-gathering

18. Once the market investigation reference has been made, the CMA formally launches its investigation with a 'first day letter' to key main parties. The letter includes information on the terms of the reference, the statutory deadline for the CMA's report, relevant guidance material, the key CMA staff working on the investigation, and the next steps to be taken. The first day letter also takes forward the information-gathering process by requesting specified information.

19. At an early stage, informal meetings are held between the staff team and selected main parties (and, where relevant, with other parties such as the super-complainant). Such meetings usually cover the procedures to be adopted for the conduct of the investigation, and seek information and views on the market. In addition, the CMA holds 'data meetings' as early as possible with appropriate main parties to discuss the organisation and availability of technical data. There may be subsequent staff meetings as the investigation progresses—see, for example, paragraph 30.

20. A detailed market and financial questionnaire is next sent to the main parties; and, in many cases, other information is collected from a wider range of parties. The information-gathering will be informed by the developing 'theories of harm'. When practicable, parties are consulted on questionnaires to facilitate efficient collection of useful and consistent information, whilst as far as possible minimising the burden to business.

21. The CMA may decide to conduct one or more surveys as part of the information-gathering process.[54] If the decision is taken to conduct a survey, relevant parties are consulted on the draft survey design and content. In some cases, so as to construct the sample for questioning, parties may be required to provide contact details for some or all of their customers or suppliers.

22. In many cases, the CMA organises early site visits to several parties. These are designed to be helpful to both the CMA and the parties involved. A site visit offers a chance for the Inquiry Group members and staff to gain a greater understanding of the party's business by visiting key facilities and meeting key operational staff. A party receiving a site visit is encouraged to organise a short presentation, and take some questions, on its business so as to explain its nature and the market context in which it is operating. In some cases, a site visit may be combined with a hearing.

- *Issues Statement*

23. An Issues Statement is published by the CMA at an early stage in the investigation process. This generally discusses the theories of harm framing the analysis the CMA intends to pursue, as well as welcoming views on potential remedies. Where the CMA conducted the market study, the Issues

[54] The survey results will usually be disclosed through publication (accompanied by an explanation of the methodology) but there may be instances when it is inappropriate to publish the whole report. The Inquiry Group will consider whether other information relating to the survey should be disclosed, for example cross-tabulations of the survey results.

Statement is likely to be a short document that cross refers to the market study report and (if applicable) the Board's advisory steer. Parties are invited to provide submissions commenting on the issues and possible remedies set out in the statement.

- *Hearings*

24. The Inquiry Group holds a round of hearings with parties (individually or multi-party where appropriate) at an early stage in the investigation. The primary purpose of these hearings is to enable the CMA to understand the market, discuss the parties' submissions, and discuss the issues and possible remedies with the parties. They also provide an opportunity for the parties to explain their views in person directly to the decision-makers as their thinking is developing. The CMA aims to ensure that hearings are held with a range of parties. However, decisions on which main and third parties to invite to hearings, and the format and sequencing of any hearings, rest with the CMA.

25. Although the format of hearings varies, parties are normally given an opportunity to make brief opening and/or closing statements, and should expect to respond to the CMA's questions. A transcript of the hearing will be taken and will be sent to the relevant party for checking. Additionally, staff-led hearings (sometimes via teleconferencing) are conducted with some parties not attending hearings with the Inquiry Group, including some main parties when there are large numbers of them. Some members of the Inquiry Group may also participate. Transcripts or written notes are taken and sent to the relevant party for checking.

26. A summary of the key points raised at a hearing may be prepared by the CMA or a transcript may be published, as deemed appropriate by the Inquiry Group. The parties involved are given the opportunity to comment on both content and confidentiality before these are published. The party is also invited to follow up in correspondence any issue raised during the hearing.

Assessment

27. Using the information gathered and the theories of harm postulated, the CMA progresses the competition assessment. The issues addressed will be diverse, covering the many aspects raised by the investigation: for example, background on the market, the operation of the market or the performance of parties, market definition and assessments of the relevant competition issues set out in the Issues Statement. The CMA will also consider possible remedies at the same time as assessing the problems, and provisional decisions on both are included in the Provisional Decision Report. In practice this means the CMA will consider and discuss potential remedies alongside working on understanding what features of the market give rise to adverse effects. The consideration of possible remedies is always contingent on an AEC finding having been reached.

28. The staff and the Inquiry Group work together on these issues, and many internal working papers/presentations are typically prepared on the various aspects of the investigation. Generally, internal documents are not disclosed.

29. The Inquiry Group's provisional analysis is included in the Provisional Decision Report (see paragraph 34). However, the Inquiry Group will disclose key elements of its analysis before publication of the Provisional Decision Report through, for example, the use of confidentiality rings where appropriate or disclosure rooms, and/or it may disclose some of the working papers, or parts of working papers, often through publication.[55]

30. On occasions, specific pieces of technical analysis merit discussion between a party and the CMA on the methodology used and, possibly, the results found. The CMA arranges meetings or roundtables with one or more parties for this purpose. These are generally attended by CMA staff (together, on occasion, with members of the Inquiry Group), the party and its technical advisers.

31. The administrative timetable will include a deadline for the receipt of all parties' responses and submissions for consideration by the Inquiry Group in forming its provisional decision.

- *Put-back*

32. The CMA may also send ('put back') text to parties for the purpose of enabling them to:

(a) verify the factual correctness of certain content (usually information supplied by them); and

(b) identify any confidential material, prior to publication; parties are asked to provide reasons for any requests for excisions of the material from published documents.

33. The put-back process is separate from disclosure of the CMA's developing thinking.

- *Provisional Decision Report*

34. When the Inquiry Group has provisionally formed a view on whether or not there are features of the market(s) that give rise to an AEC, its provisional findings will be published in the Provisional Decision Report, and a public consultation on them will be held.

35. If an AEC has provisionally been found, the Provisional Decision Report will also contain the CMA's provisional decision on remedies. The Provisional Decision Report will contain details of remedies the CMA has identified as addressing the AEC effectively, and may also outline details of remedies the CMA considers unlikely to be effective and the reasons why it has reached this provisional decision.

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[55] See CC7 (Revised), paragraphs 7.1–7.3. Disclosed working papers provide a snapshot of the issues, analysis and views that are relevant at the time of disclosure and may change.

36. As set out in the Rules, the time allowed for the consultation will be no less than 21 days and the CMA applies some flexibility in setting reasonable deadlines case by case in light of the relevant circumstances.

- *Response hearings*

37. Once the CMA has published the Provisional Decision Report, response hearings (individually or multi-party where appropriate) will take place with main parties and potentially with key third parties. At a response hearing, parties will be given the opportunity to comment orally on the provisional decision on the AEC and remedies, and the CMA may seek clarification of particular points made in written submissions or at the hearing. Transcripts, or alternatively notes, of response hearings will be taken and, in most cases, summaries prepared and both will be processed in a similar way to those relating to hearings held earlier in the investigation (see paragraphs 23 to 25).

38. Having considered the responses from parties, the CMA may undertake additional consultations with parties as required. If further consultation is not needed, the CMA will proceed to publishing its final decision on the AEC and remedies in its Final Report.

39. Separately, a deadline will have been set in the administrative timetable for the receipt of all parties' responses and submissions for consideration by the Inquiry Group ahead of reaching its final decision.

- *Final Report*

40. The CMA will publish its final decision on the competition question and (if necessary) remedies together with supporting reasons and information in a Final Report.[56] The report will, if it confirms the finding of an AEC, contain an explanation of the AEC finding and sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies by the CMA.

41. Parties may, during the two months following the notification of the CMA's Final Report, lodge an appeal with the Competition Appeal Tribunal (CAT) against the decisions. If a judgment of the CAT upholds an aspect of an appeal, this could lead to the investigation or a part of it being remitted to the CMA for reconsideration.[57] Appeals against CAT judgments can, if allowed, go forward to the Court of Appeal or, in Scotland, the Court of Session and, ultimately, to the Supreme Court.

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[56] Section 136.
[57] For example, following appeals against CC decisions, the CAT ordered the CC to reconsider parts of the remedies packages in the Final Reports on Groceries (April 2008) and Payment Protection Insurance (PPI) (January 2009). These aspects were, respectively, the competition test applied to grocery retail planning applications and the inclusion of a prohibition of the issuing of PPI at the point of sale.

Appendix B: List of respondents

Consultation responses were received from the following:

- Addleshaw Goddard LLP
- Ashurst LLP
- Baker McKenzie
- Berwin Leighton Paisner LLP
- Charles Russell Speechlys LLP
- Citizens Advice (telephone call)
- City of London Law Society Competition Law Committee
- Cleary Gottlieb Steen & Hamilton LLP
- Clifford Chance
- Dentons UKMEA LLP
- EDF Energy
- Eversheds Sutherland (International) LLP
- First Utility
- Freshfields Bruckhaus Deringer LLP
- Law Society of Scotland
- Linklaters
- Npower
- Ofwat
- Pinsent Masons LLP
- Santander UK plc
- Scottish Government
- Simmons & Simmons LLP
- Slaughter and May
- SSE plc
- Which?