

Market Studies and Market Investigations: Supplemental guidance on the CMA's approach

Summary of responses to the consultation

© Crown copyright 2014

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, Richmond, Surrey, TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Any enquiries regarding this publication should be sent to us at: Policy, Precedent and Procedures Unit, Competition and Markets Authority, Victoria House, 37 Southampton Row, London, WC1B 4AD or by email to guidance@cma.gsi.gov.uk.

This publication is also available at: www.gov.uk/cma.

Contents

	<i>Page</i>
1 Introduction and summary	1
2 Coverage of changes introduced by the ERRA13	5
3 Key issues	7
4 Format of the Guidance and list of documents for adoption.....	19
 ANNEXE	 22
A. List of respondents to the Consultation on the Draft Guidance.....	23

1 INTRODUCTION AND SUMMARY

Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) establishes the Competition and Markets Authority (CMA) as the UK's competition and consumer authority. The CMA will take on the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT). The CMA was established on 1 October 2013 and will gain its full functions and powers on 1 April 2014, when the OFT and CC will be abolished. The CMA will be a single centre of expertise in UK markets focusing on public competition and consumer enforcement, guidance, advocacy and leadership for the UK. Its primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA will have a range of statutory powers to address problems in markets. These include the ability under the Enterprise Act 2002 (EA02) (as amended by the ERRA13) to conduct market studies and market investigations to assess particular markets in which there are suspected competition problems and to take such remedial action which the CMA may specify.
- 1.3 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. The draft *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach* (CMA3con) (Draft Guidance) was one of a number of draft guidance documents published for public consultation on 15 July 2013.¹ The consultation (Consultation) on these documents closed on 6 September 2013.

Summary of key changes to the markets regime covered by the Draft Guidance

- 1.4 The Draft Guidance explained the main changes introduced by the ERRA13 to market studies and market investigations conducted under the EA02.
- 1.5 The Draft Guidance was intended to supplement detailed pre-existing guidance on the markets regime, notably:
 - *Market studies: Guidance on the OFT approach (OFT519)*

¹ These documents are available at www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-1

- *Market investigation references* (OFT511), and
- *Guidelines for market investigations* (CC3 (revised)).

1.6 The key changes introduced to the markets regime by the ERA13 and covered by the Consultation included:

- changes to the requirements for commencing a market study
- the introduction of a statutory time limit within which market studies, and remedies implementation must be completed and changes to the existing time limit for completion of a market investigation
- changes to the powers of investigation available to the CMA in relation to market studies and an alignment of the sanctions for non-compliance throughout the markets process (including market studies, market investigations and remedies implementation)
- the ability of the CMA to make a cross-market reference
- the ability of the Secretary of State to require the CMA to investigate public interest issues alongside competition issues during a market investigation
- an extension in the scope of the CMA's order-making powers following an adverse finding, and
- the ability of the CMA to prevent and reverse any pre-emptive action (by accepting interim undertakings or making an interim order) that might impede the taking of final action in relation to a market investigation.

1.7 Taking account of the revised statutory powers and procedural requirements set out above, the Draft Guidance outlined:

- the legal framework that applies to market studies and market investigations, including the roles of the CMA, the Secretary of State, and sectoral regulators
- the governance and decision making structure of the CMA, and
- the key procedural aspects of market studies and market investigations.

Purpose of this document

1.8 The consultation document accompanying the Draft Guidance (Consultation Document) set out a series of specific questions on which views of

respondents were sought. This document sets out a summary of the responses received to each of those questions and the CMA's views on those responses.

Responses to the Consultation

- 1.9 Fourteen written consultation responses relating to the Draft Guidance were received.² The Draft Guidance was also discussed at a launch event for the CMA draft guidance on 24 July 2013 attended by members of the legal, economic, academic and business communities. Additional comments on the Consultation were received during road shows held with certain external stakeholder groups in August and September 2013.³

Consultation questions

- 1.10 The table below sets out the questions on which the Consultation Document sought views, and in which chapter of this document the responses are summarised.

	Question	Chapter
1.	Do you consider that the Draft Guidance covers the main changes that are introduced by the ERR13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?	2 (and 3)
2.	Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?	4
3.	Do you agree with the list in Annexe B of the Draft Guidance of existing markets-related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?	4

² Annexe A lists the 14 organisations that provided responses relating to the Draft Guidance. The vast majority of these responses were from law firms and their professional associations.

³ Road shows were held with the City of London Law Society (CLLS), Joint Working Party of the Bars and Law Societies of the UK (JWP), ICC UK and the In House Competition Lawyers' Association (ICLA).

4.	Do you consider that the Draft Guidance is user friendly in terms of its content and language?	4
5.	Do you have any other comments on the Draft Guidance?	3

- 1.11 This document should be read in conjunction with the Consultation Document. It is not intended to be a comprehensive record of all views expressed by respondents: copies of all responses received are available on www.gov.uk/cma. Nor is this Summary of Responses a definitive statement of the CMA's policy or procedures in relation to the CMA's conduct of market studies and market investigations. Parties seeking guidance on the CMA's approach and procedures should refer to the final published version of *Market Studies and Market Investigations: Supplemental guidance on the CMA's approach (CMA3) (Guidance)* together with existing OFT/CC markets regime guidance adopted by the CMA Board, also available on www.gov.uk/cma.

2 COVERAGE OF CHANGES INTRODUCED BY THE ERRA13

Question 1: Do you consider that the Draft Guidance covers the main changes that are introduced by the ERRA13 to the CMA's conduct of market studies and market investigations? If not, what aspects do you think are missing?

- 2.1 Respondents' views were sought on the Draft Guidance's coverage of changes introduced by the ERRA13 in respect of the CMA's conduct of market studies and market investigations.
- 2.2 This chapter focuses on what, if any, of the changes introduced by the ERRA13 were considered by respondents to be missing from the Draft Guidance. In some instances there was overlap in responses to questions 1 and 5, and where this is the case, the issues raised and the CMA's response to these are addressed in chapter 3.

Summary of responses

- 2.3 The majority of respondents considered that the Draft Guidance covered and provided a useful overview of the main changes that were introduced by the ERRA13 to the CMA's conduct of market studies and market investigations.
- 2.4 A few respondents provided some suggested drafting changes or additions to specific sections (or paragraphs) in the Guidance notably in respect of the pre-market investigation reference phase and public interest cases. These were mainly technical/legal in nature and included:
- information on cases where the CMA can make a market investigation reference (MIR) without having published a market study notice under section 130A of the EA02 (that is, where the CMA instead uses the consultation process set out in section 169 of the EA02)
 - further detail on the statutory timetable under section 131B(3) of the EA02 (that is, the circumstances when the CMA decides not to make a MIR and no representations have been made to the CMA that a reference should be made)
 - further detail on public interest intervention notices including: the expiry of the CMA's deadline for publishing a market study report ending the possibility of the Secretary of State issuing an intervention notice, but that in such circumstances the ministerial power to make a reference remains; what happens if an intervention notice is in force but the CMA does not propose to make a reference; and the possibility that the

Secretary of State can (having consulted the CMA if necessary) vary a restricted or full public interest reference, and

- noting the possibility of interim measures being relaxed with consent, so that parties appreciate the possibility of negotiating on interim measures.

2.5 There were also a number of policy issues where clarification of the CMA's proposed approach to implementing changes introduced by the ERA13 was requested. These are covered in chapter 3.

The CMA's views

2.6 The Guidance has been amended in response to the majority of these suggestions and now includes the additional points of detail suggested by respondents, particularly in relation to public interest references, either in the main text or in the footnotes.

2.7 Reflecting further on the level of detail included about public interest cases in the Draft Guidance and existing CC and OFT guidance documents, the CMA has also expanded the section in the Guidance titled 'Cases raising public interest considerations' to cover restricted public interest references. These additions follow what was already in the Draft Guidance for full public interest references, that is, they explain the questions to be decided by the CMA and the reporting procedure following a restricted public interest reference. See paragraphs 3.8 to 3.19 of the Guidance.

2.8 The CMA has sought to provide potential users with useful guidance and strike the right balance between clarity and detail. It recognises that in doing so, it has not included detail of all possible outcomes of pre-launch, market studies and public interest cases.

3 KEY ISSUES

Question 5: Do you have any other comments on the Draft Guidance?

- 3.1 Respondents' views to the question on 'other comments' (and in some cases to question 1 on whether the guidance covers all the changes introduced by the ERRA13) addressed a wide range of issues, which have been broken down section-by-section and set out below.

Other work carried out under section 5 of the EA02

- 3.2 The introductory section of the Draft Guidance, at paragraphs 1.8 to 1.12, provided a short summary of work, other than market studies, carried out by the CMA under section 5 of the EA02 (generally referred to by respondents as the 'pre-market study phase'). The section titled 'Other work carried out under section 5 of the EA02' recognised that the CMA carries out a range of other work under its general review function in section 5 of the EA02. The section titled 'Preliminary work leading to a market study' briefly set out the preliminary work/steps that will generally be taken prior to the launch of a market study.

Summary of responses

- 3.3 Numerous respondents commented on the CMA's proposed approach to the 'pre-market study phase'.
- 3.4 Several respondents expressed concerns that general review work or preparatory investigations (including calls for information) – which are not subject to statutory timetables – will be used to sidestep the statutory timetable introduced to create an 'additional' phase to market studies.
- 3.5 Some respondents argued that the risk of a backdoor extension to the length of the markets regime will create uncertainty, thereby undermining Parliament's stated objectives for introducing statutory timeframes in the first place. A number of respondents requested that the timeframe of any pre-market study phase is clearly defined and proportionate, with one respondent arguing that an upper limit of three to four months would be reasonable in most cases.
- 3.6 Several respondents thought that the Guidance should provide more detail on how this 'phase' will be conducted, for example to clarify: that the CMA has no formal investigatory powers at this stage; how the CMA will engage with

stakeholders; the type of information that will be requested and how such information will be used.

- 3.7 Two respondents objected to the pre-market study phase being used to develop possible theories of harm or to make an impact estimation plan, arguing that this risked pre-judging outcomes.

The CMA's views

- 3.8 The CMA acknowledges the Government's objective to streamline the markets regime (by introducing new statutory time limits) and is mindful that the pre-market study phase should not undermine this.⁴ The CMA is also mindful of the potential benefit to stakeholders from engaging with the CMA prior to any market study launch and notes that such engagement is entirely voluntary.
- 3.9 The CMA has therefore decided to commit to providing stakeholders, with whom it engages in this pre-market study phase, information on the scope and purpose of the work on which it engages with them and providing them with an indicative timetable of the next steps in the work. This policy approach is now reflected in the Guidance (see paragraphs 1.8 to 1.10).
- 3.10 The CMA agrees that discipline imposed by timescales is generally desirable and will therefore look to complete any pre-market study phase work involving stakeholders within six months.
- 3.11 The CMA will monitor closely the time taken by any pre-market study phase as it gains experience of conducting cases under the new markets regime, having regard, in particular, to the Government's objective to improve speed and predictability for business. The Guidance also contains a recognition, which was set out in the Draft Guidance, that the statutory time limits for completing market studies are the upper time limits and the CMA aims to complete them in shorter time.
- 3.12 Additionally, the Guidance has been amended to clarify that the CMA does not have compulsory information gathering powers until it has issued a market study notice.

⁴ See the Government's response to consultation (March 2012): www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf

- 3.13 The description of the exercise of the CMA's functions under section 5 of the EA02 has also been refined to provide greater clarity and to cross-refer to relevant other guidance (notably *Market studies: guidance on the OFT approach* (OFT 519)).

Case team transition

- 3.14 The Draft Guidance (at paragraph 1.22) explicitly recognised in the case of MIRs (made by the CMA) that some operational staff would normally carry over from the market study case team to the larger market investigation case team in order to avoid unnecessary duplication and to facilitate an efficient end-to-end markets process.

Summary of responses

- 3.15 Several respondents requested clarity around phase transition generally. Over half of those who responded sought specific assurances about the measures that the CMA will take to avoid confirmation bias/ensure a 'fresh pair' of eyes at the MIR stage.
- 3.16 Some respondents put forward recommendations as to the checks and balances that the CMA should implement to ensure independence in decision-making between Phase 1 (market study) and Phase 2 (market investigation). One such recommendation was that senior/influential team members (such as the lead economist) should be replaced at Phase 2 and other staff positions should be judged on a case-by-case basis. Another suggestion was that only one team member should transfer from Phase 1 to Phase 2, as this would be sufficient for the purposes of retaining knowledge and ensuring continuity.

The CMA's views

- 3.17 The CMA considers that the clear separation of decision making responsibility between Phase 1 and Phase 2 of a CMA market investigation, with a group of CMA panel members appointed on referral to take the final Phase 2 decision, is, of itself, sufficient to protect against risks of confirmation bias. The CMA does not consider that this is compromised by the transfer of some of the Phase 1 case team into the larger Phase 2 case team (which will in all cases involve some new members). Moreover, it believes that such a transfer can generate significant efficiencies that will benefit both the CMA and the parties to the investigation.
- 3.18 The CMA notes the concerns expressed by respondents regarding the transfer of staff on a case. However, given in particular the significant variety

in the nature, size, complexity and investigative focus of markets cases that may be referred to Phase 2, the CMA considers that such efficiency benefits are best achieved by a flexible, case-by-case approach to whether any – and if so which – Phase 1 case team members could usefully transfer to the Phase 2 team. The CMA has therefore retained the approach set out in the Draft Guidance.

- 3.19 The CMA has adopted an equivalent approach to that above in relation to the transfer of staff between the phases of its mergers work.
- 3.20 The Guidance has been amended to clarify that the CMA anticipates the same approach to case team transition to be adopted for situations where a market investigation reference has been made by a sectoral regulator. This follows the CMA's consultation on the Draft Concurrence Guidance.⁵ The details of these arrangements will be determined on a case-by-case basis.

The CMA's approach to conducting market studies and market investigations with new statutory deadlines

- 3.21 The Draft Guidance outlined the roles of the CMA, the Secretary of State and the sectoral regulators with concurrent powers, the governance and decision making structure that apply to market studies and market investigations and key procedural aspects. It also stated that guidance on the conduct of market studies is contained in *Market studies: Guidance on the OFT approach* (OFT519) and for market investigations in *Guidelines for market investigations* (CC3 (revised)), which will remain applicable after 1 April 2014, subject to the changes set out in the ERRA13 and explained in the Draft Guidance.

Summary of responses

- 3.22 Several respondents suggested that the Guidance should highlight (in the body of the text and not in footnotes) and/or clarify:
- that statutory time limits for market studies do not apply to cases involving super complaints, and

⁵ See *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (CMA10con). This draft guidance provided (at paragraph 3.6) that the Memoranda of Understanding between the CMA and each of the sectoral regulators is likely to cover the exchange of staff between the CMA and the sectoral regulator for the purpose of enhancing the effective application and enforcement of competition law and other legal powers as appropriate.

- the circumstances where a MIR may be made without the need for a market study (for example, following a super-complaint).
- 3.23 One respondent noted that the Draft Guidance appears (in paragraph 1.23) to contemplate that the CMA Board may decide not to consult stakeholders on a MIR proposal, which would represent a departure from current OFT practice, and sought clarity on this statement. Another respondent considered that the Guidance should include further detail on consultation with parties prior to decision-making by the CMA Board or the market reference group.
- 3.24 A number of respondents considered that the CMA should publish a detailed breakdown of the steps involved in Phase 1 and Phase 2, including key deadlines and time periods for consultation (on, for example, notice of a proposed decision on a possible MIR).
- 3.25 Several respondents requested more guidance on the 'balance' of work/analysis that will be undertaken at the market study and market investigation phases (for example, whether a reduction in the Phase 2 timeframe will result in more econometric, survey or other work being undertaken in Phase 1).
- 3.26 A couple of respondents commented on the timeframes involved in Phase 2, requesting:
- a commitment in the Guidance that the CMA will complete a market investigation as soon as possible within the statutory deadline to minimise burdens on business, and
 - more detail on when the 18-month statutory time limit of a market investigation is likely to be extended.

The CMA's views

- 3.27 The Guidance has been amended to clarify that a market study is not a prerequisite to a MIR and that references may be made on matters which have not been the subject of a market study notice,⁶ provided the statutory reference thresholds are satisfied and the CMA has consulted in accordance with section 169 of the EA02.⁷ The CMA has also responded to the request

⁶ For example, following a super-complaint under section 11 of the EA02, the CMA may make a market investigation reference.

⁷ Further information on the reference process and application of the reference test is contained in *Market investigation references* (OFT511).

for clarification of the circumstances in which the CMA will consult in connection with a possible market investigation reference.

- 3.28 The CMA acknowledges the suggestion that more detailed guidance be provided about the processes to be followed and analysis employed in the market study and market investigations phases. However, in the absence of experience of conducting market studies and investigations with the new statutory timeframes, the CMA considers it particularly important to retain flexibility in the early stages of these reforms.
- 3.29 Since the Consultation closed, the CMA Board has adopted:
- the OFT's existing guidelines on market studies (OFT519) and market investigation references (OFT511). It is noted that these guidance documents do contain information on the market study process, including consultation, and
 - the CC's existing guidelines on market investigations (CC3 (revised)). It is noted that this guidance already sets out the main stages of the market investigation process on the basis of an 18-month statutory time limit.

Investigatory powers for market studies

Summary of responses

- 3.30 A few respondents commented on the CMA's use of its statutory information gathering powers, proposing that the Guidance should:
- refer to such powers being used proportionately and reasonably and state explicitly that information requests will be specific, proportionate and relevant to minimise burdening parties
 - provide more detail on when the CMA will invoke its statutory information gathering powers (for example, only if information is provided late or incomplete), and
 - highlight associated procedural safeguards (for example, that parties aggrieved by the imposition, nature or amount of financial penalties for failure to comply with any requirement of a notice issued by the CMA may appeal to the Competition Appeal Tribunal (CAT)).

The CMA's views

- 3.31 The CMA agrees that it will need to be fair and reasonable in its request for information and the deadlines it sets for parties to respond to such requests. The CMA has reviewed the relevant paragraphs and amended and added to them in light of these comments. Paragraph 57 in *Guidelines for market investigations* (CC3 (revised)) contains similar information in respect of the CMA's approach to use of its investigatory powers in market investigations.
- 3.32 In practice the form of engagement with parties and the use of the statutory information gathering powers will differ depending on the individual circumstances. For example, they may be used at a party's request, to ensure relevant information is not destroyed or to ensure that the CMA is able to meet its obligations according to the statutory timeframe prescribed by Parliament.
- 3.33 Guidance on the CMA's approach to imposing financial penalties for failure to comply with investigatory requirements is set out in the *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4). Paragraph 2.15 of the Guidance contains a cross-reference to this document.

Cross-market references

- 3.34 The ERRA13 gave the CMA a new power to make a cross market reference, that is, to refer a specific feature or combination of features (where the feature(s) are types of conduct rather than structural) which exist in more than one market for goods and services in the UK without also having to refer the whole of the market concerned. The Draft Guidance (at paragraphs 2.30 to 2.36 and 3.16 to 3.19) explained these changes.

Summary of responses

- 3.35 A few respondents requested detailed guidance on the handling of cross-market cases, including what evidence 'triggers' such a reference and what additional procedural safeguards the CMA will put in place to ensure that the views of a multitude of market participants are taken into account in a now shortened market investigation timeframe.
- 3.36 A couple of respondents queried how remedies in such cases will be approached, particularly if different remedies may be appropriate in different markets.

The CMA's views

- 3.37 The CMA notes the requests for more detail on how it will handle cross market references but has decided to retain the level of detail provided in the Draft Guidance. The CMA's position is due, in particular, to the fact that the CMA has not yet conducted a cross market reference. The CMA therefore considers it important to retain flexibility prior to gaining experience of conducting such investigations.
- 3.38 In relation to the approach to remedies in cross market references, the CMA considers that the existing principles underlying the types and design of remedies, as set out in *Guidelines for market investigations* (CC3 (revised)),⁸ are likely to be similar in cross market references. It is the practical implementation of remedies in cross market references that are likely to differ most from ordinary market references⁹ and will vary considerably from case to case. For these reasons, the CMA does not believe it is sensible to include any further information on remedies in cross market references in the Guidance at this point in time.

Cases raising public interest considerations

- 3.39 The ERRA13 gave the Secretary of State the power to request the CMA to consider public interest issues alongside competition issues in market investigations, similar to the power that exists in the merger regime. The Draft Guidance (at paragraphs 2.17 to 2.29 and 3.8 to 3.15) explained these changes.

Summary of responses

- 3.40 Two respondents requested more detail on the factors that will determine whether a restricted or full public interest reference is made. It was also suggested that if restricted public interest references will be more likely in practice than full public interest references, this should be explicitly stated in the Guidance.
- 3.41 A number of respondents requested detailed guidance on how full public interest references will work in practice. This included, for example the CMA's proposed process and modes of analysis in undertaking such a review, the factors that the CMA will take into account, including the balancing approach

⁸ See, in particular, Part 4 and Annex B of CC3 (revised).

⁹ As defined in section 131(6)(b) of the EA02.

to be undertaken by the CMA pursuant to sections 141A(8) and (9) of the EA02, the CMA's approach to addressing relevant customer benefits under section 141(A)10 of the EA02, and whether the Secretary of State may decide not to follow the recommendations of the CMA.

- 3.42 One respondent recommended that the Guidance include an indication of the likely timescale within which the Secretary of State will consider and issue its reference decision, and what information such a decision will include.
- 3.43 There were also calls for more detail on the role of any public interest expert, including: the specific aspects upon which the expert will advise, how the expert will work alongside case teams and the CMA panel, the extent to which the CMA will have regard to the expert's advice, the expert's role in decision-making throughout the market investigation, parties' access to the expert (for example, whether written submissions can be made directly to the expert and whether the expert will attend hearings), and whether there is a right to challenge the expert's appointment.

The CMA's views

- 3.44 The CMA notes that guidance on some of the issues raised by respondents (for example on the factors determining whether a restricted or full public interest reference is made and the remit of public interest expert) are issues for the Secretary of State and are not matters on which the CMA can give guidance. The CMA has drawn these matters to the Government's attention.
- 3.45 The Guidance has, however, been amended to reflect some of the technical points of detail mentioned in paragraph 3.41 above.
- 3.46 The CMA also acknowledges the request for more detail about processes but has decided to retain the approach in the Draft Guidance. The CMA notes that no public interest intervention in a market investigation has yet been made. The CMA therefore considers it important to retain flexibility prior to gaining experience of such investigations (particularly one where the Secretary of State appoints a public interest expert).

Implementation of remedies

- 3.47 Chapter 4 of the Draft Guidance explained the changes introduced by the ERA13 to the remedies implementation stage.

Summary of responses

- 3.48 A few respondents requested more detail on these changes, including:

- clarifying, by adding examples, the circumstances when the six-month period for remedies implementation may be extended by a further four months, and when the CMA may exercise the power to prevent pre-emptive action (interim measures powers)
- how the statutory time limits will be affected in the event of an appeal of a market investigation decision, and
- when the Secretary of State rather than the CMA would operate the undertakings/orders/interim measures powers.

3.49 A couple of respondents sought guidance on the factors that will determine whether the CMA thinks that a monitoring trustee will be required to oversee the implementation of remedies, and the role/powers of any such trustee.

The CMA's views

3.50 In relation to the time limit for remedies implementation, the CMA is able to extend the statutory deadline when that becomes necessary. There can be many different circumstances in which the power to extend the timetable might be used and the legislation is intended to provide flexibility. The types of cases where the CMA might expect to require an extension are those where the remedies themselves are complex, or cases in which issues are raised during the consultation process which require additional public consultation. These examples are not intended to be exhaustive – particularly given the need for flexibility – but indicate the types of circumstances that might necessitate an extension.

3.51 The process to be followed in the event of an appeal to the CAT will depend upon the circumstances and will therefore be considered on a case-by-case basis. Subject to any directions made by the CAT the CMA will, when considering the process to be followed, consider the circumstances of the remittal. It will also have regard to the statutory time limits that applied to its inquiry to which the challenged CMA decision related. A statement to this effect has been added to the Guidance (at paragraph 4.9).

3.52 The CMA notes also that in the Government's 2011 consultation *A Competition Regime for Growth: A Consultation on Options for Reform*, the Government consulted on a reform to clarify that, in the event that the CAT gives a judgment which overturns the whole or part of a CMA decision in markets cases, the remittal will be conducted by the CMA applying the statutory provisions that applied during its initial (pre-remittal) inquiry, subject

to any specific directions given by the CAT in its judgment.¹⁰ In its response to consultation the Government said it saw the advantage of clarifying the position in this area but did not see this reform as a high priority at the time (see *Growth, Competition and the Competition Regime* March 2012¹¹).

3.53 In relation to the other matters raised by respondents:

- the Secretary of State, rather than the CMA, would operate the undertakings/orders/interim measures powers in relation to restricted public interest references and full public interest references. The Guidance has been amended to clarify this position,
- the use of monitoring trustees in divestiture remedies is covered in paragraph 26 of Annex B to *Guidelines for market investigations* (CC3 (revised)) and the CMA expects to take a similar approach.

Transitional arrangements

3.54 Chapter 5 of the Draft Guidance provided guidance on the main transitional arrangements associated with the changes to the markets regimes made by the ERA13.

Summary of responses

3.55 Two respondents commented specifically on the transitional arrangements. One respondent thought they were sensible and in particular, welcomed the proposal that the new investigatory powers will not apply to market studies that are ongoing as at 1 April 2014. Another respondent suggested this chapter be placed in a separate document to ensure that the guidance relating to the markets regime does not contain sections which will become irrelevant at a point in the near future.

The CMA's views

3.56 In light of the support from respondents for the proposed transitional arrangements, the CMA considers it appropriate to retain these. It falls to the Department for Business, Innovation & Skills (BIS) to make the transitional provisions by secondary legislation, and BIS intends to do so early in 2014.

¹⁰ Available here: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf

¹¹ Available here: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf

- 3.57 OFT and/or CC case teams will explain to parties to markets cases that will be ongoing on 1 April 2014 how these transitional arrangements will apply in the parties' case.
- 3.58 In relation to the location of the transitional arrangements, the overview of the CMA's proposed approach in chapter 5 of the Draft Guidance has been moved into a separate document (*Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14)) along with transitional arrangements related to other CMA functions and published on www.gov.uk/cma.

4 FORMAT OF THE GUIDANCE AND LIST OF DOCUMENTS FOR ADOPTION

- 4.1 Respondents' views were requested on a range of issues relating to the format and language of the Draft Guidance, and the list of existing OFT/CC markets guidance documents proposed for CMA Board adoption.

Question 2: Do you consider that the Draft Guidance will facilitate your understanding of the markets regime when read in conjunction with the existing guidance documents?

- 4.2 Respondents were asked for their views on the extent to which the Draft Guidance – intended to supplement existing OFT/CC guidance documents on the markets regime – improved their understanding of the 'new' or 'enhanced' markets regime.

Summary of responses

- 4.3 One respondent strongly supported the CMA's approach of providing supplemental guidance to explain the changes introduced by the ERRA13 rather than producing consolidated guidance to replace existing markets regime guidance. Another respondent was similarly supportive of the approach taken, provided the CMA looked to adopt a consolidated guidance document in the medium to long term.
- 4.4 There were, however, requests for the CMA to consolidate the Draft Guidance with the three main existing guidance documents (OFT 511, OFT 519, CC3 (revised)). Respondents who made this request felt that a consolidated document would be more helpful and user-friendly for businesses and their advisors.
- 4.5 One respondent recommended that the CMA publish clear 'warning notices' on www.gov.uk/cma or in the body of the existing OFT/CC guidance to alert users to the fact that it should be read in conjunction with the Guidance and/or that Annexe A should be prominently displayed on www.gov.uk/cma. It was also suggested that the Guidance include more cross references to existing OFT and CC guidance.

The CMA's views

- 4.6 In light of the fact that the legislative changes to the markets regime are relatively self-contained with limited read-across to the existing guidance it was decided to prepare supplementary guidance. As explained elsewhere in

this response, when the changes involved new powers and functions, the CMA wishes to develop experience and expertise before providing detailed guidance.

- 4.7 The CMA acknowledges that three main pre-existing pieces of markets guidance referred to in paragraph 4.4 are very different from one another in tone, content and age. *Guidelines for market investigations* (CC3 (revised)), which focuses on economic and financial analysis, was updated in 2013 and flagged the ERRA13 reforms. The other guidance is much older. The task of consolidation and updating will be significant. The CMA acknowledges that the majority of respondents would like consolidated markets guidance and sees benefits to this approach. The CMA therefore proposes to review the suite of guidance on market studies and market investigations after 1 April 2014 as part of its rolling guidance program.
- 4.8 The CMA has, however, taken on board the request for the Guidance to include more cross-references to the three main pre-existing pieces of market guidance and has therefore added to the Guidance in appropriate places where it considered helpful to do so.

Question 3: Do you agree with the list in Annexe B of the Draft Guidance of existing markets related OFT and CC guidance documents proposed to be put to the CMA Board for adoption by the CMA?

- 4.9 Respondents' views were sought on the draft list of existing OFT and CC markets guidance, which would be put forward to the CMA Board for adoption (Annexe B of the Draft Guidance). The draft list also identified existing OFT and CC guidance that would be replaced or become obsolete. A separate consultation on the full list of existing OFT and CC guidance documents proposed to be adopted by the CMA Board (*Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance* (CMA12con)) was held between 17 September 2013 and 11 November 2013.

Summary of responses

- 4.10 Of those who commented, the large majority of respondents agreed with the list in Annexe B of the Draft Guidance, with only a few respondents proposing some additions and/or replacements.

The CMA's views

4.11 The CMA considered the suggestions to make changes to the list of guidance in Annexe B of the Draft Guidance.¹² The CMA has decided to make two changes to this list:

- *Practice on consultation on proposed decisions in relation to market investigation references* (OFT1308) has been added to the list and to record that this document will become obsolete,¹³
- Annexe B of the Draft Guidance proposed that the *CC Rules of Procedure for merger reference groups, market reference groups and special reference groups* (CC1) would be put to the CMA Board for adoption. However, the CMA considers it would be helpful to make some minor revisions to CC1 to reflect recent changes to legislation and current CC practice. It therefore proposes to conduct a short consultation, prior to April 2014, on the minor revisions it proposes to the rules in CC1.

4.12 Given respondents' broad agreement with the list in Annexe B of the Draft Guidance the CMA has chosen not to make any additional amendments to that list. The guidance documents in Annexe B of the Guidance (and identified in the column 'Adopted by the CMA Board') have now been adopted by the CMA Board.

4.13 The CMA is mindful of the need to minimise risks of confusion arising from the continued existence of guidance which does not take account of the creation of the CMA or the other changes to the markets regime introduced by the ERA13. The CMA will therefore seek, when making such documents available on www.gov.uk/cma, to state clearly the basis on which those documents should be read (including adding 'health warnings' to those documents where appropriate).

¹² Note: The responses to the consultation on the *Proposed approach to the treatment of existing Office of Fair Trading and Competition Commission guidance* (CMA12con) have also been taken into account in determining the documents adopted by the CMA Board listed in Annexe B of the Guidance.

¹³ OFT1308 will become obsolete because the legislation has changed to make clear that there is no requirement to consult on all non-MIR decisions (see sections 131A(1) and 169(a)(i) of the EA02 (as amended by the ERA13)).

Question 4: Do you consider that the Draft Guidance is user friendly in terms of its content and language?

4.14 The CMA sought views on how user-friendly the Draft Guidance is in terms of content and language.

Summary of responses

4.15 All respondents who commented on this question considered the Draft Guidance to be well-written, informative and user friendly (subject to the views or comments set out above that it may be more user friendly to have one consolidated markets regime document rather than supplemental guidance). Two respondents stressed the usefulness of Annexes A and B.

4.16 A couple of respondents suggested that a more comprehensive flow-chart and/or illustrative timetable should be included in the Guidance, demonstrating how the end-to-end markets process will operate from start to finish, including possible public intervention notices and remedies implementation, and the likely timescales involved.

The CMA's views

4.17 The CMA has noted the many positive responses received. The CMA has given careful consideration to all comments and suggestions made (including those on drafting) and sought to accommodate in the Guidance those that it considered appropriate.

4.18 In relation to the points raised in paragraph 4.16, please also see the CMA's response in paragraphs 3.27 to 3.29 above.

A. List of respondents to the Consultation on the Draft Guidance

- Allen & Overy LLP
- Ashurst LLP
- Baker & McKenzie LLP
- Berwin Leighton Paisner
- City of London Law Society
- Clifford Chance LLP
- Dickson Minto W.S.
- EDF Energy
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- Hogan Lovells LLP
- Joint Working Party of the Law Societies and Bar Councils of the United Kingdom
- National Federation of Retail Newspapers
- Simmons & Simmons LLP