

Consultation response

Updated guidance on CMA's approach to market investigations

Response to CMA's consultation on market investigations

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Introduction

Which? welcomes the opportunity to respond to the Competition and Market Authority's (CMA) proposed changes to the guidance on its approach to Market Investigations. Which? engaged extensively with the CMA during its energy and retail banking market investigations, and our comments draw on our experience of those investigations and from other market review processes that we have engaged in, both with the CMA and other regulators.

Summary

We welcome the changes set out in proposal (A) and in particular the earlier consideration of remedies, which is necessary for more effective market investigation processes.

There are both potential risks and benefits to part (ii) of proposal (B). While the CMA Board providing a steer for the panel on the scope of a market investigation could be useful, it is possible that such a steer would in practice carry undue influence over the eventual scope compared to the Panel's own view, and indeed responses from external parties.

One way to mitigate this could be to allow the Board to submit an advisory note as a response to the issues statement rather than provide a steer at the outset.

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?

We welcome these proposed changes, particularly the earlier consideration of remedies. When taken together, we would expect that reducing the number of set-piece publications while introducing earlier hearings and other interactions could have a desirable impact on the effectiveness of the process.

The earlier consideration of remedies

We consider that the earlier consideration of remedies is necessary to improve the effectiveness of market investigations. It is one thing for market investigations to identify ways in which consumers are being, or are likely to be, harmed – whether directly or indirectly - by competition problems; it is another - often more difficult - task to identify, develop and implement effective remedies.

Developing effective remedies takes time and significant effort and market investigation processes have often been unsuccessful by doing too little, too late, on the design of remedies. This can result in consumers being harmed in one or both of two ways:

- Poorly designed remedies may be selected, which are ineffective and/or generate other unwanted side-effects;
- Material sources of harm to consumers may simply be left unaddressed, in some cases for fear of making poorly designed interventions (in a context where the time available for detailed assessment has run out).

We urged the CMA in both the energy and retail banking market investigations to start its consideration of remedies at an early stage. There was little doubt from the outset, in our view, that remedy development would throw up some complex and challenging questions in both inquiries, and so early remedy consideration was going to be key.

The standard argument against early consideration of remedies is that the Phase II process needs to provide a fresh look at the question of whether there is indeed a problem to be addressed, and if so what it is.

While providing a fresh look is indeed an important function, questions of prioritisation and proportionality need to be considered in the light of the CMA's duty to seek as comprehensive a solution as is reasonable and practicable to any detrimental effects on customers that result from competition problems it identifies. Where addressing problems is likely to result in complex remedy questions there is a need to allow the time and effort for this. We believe that arguments against doing so look particularly weak in contexts where – as in energy and retail banking – there has already been substantial prior review of the relevant issues.

We welcome the proposed move to considering remedies from the Issues statement stage. We do not consider this would raise any material pre-judgement risks. 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. This is important, as it can have a significant impact on what is feasible in the available time.

In our view, this was highly relevant in the retail banking inquiry. In particular, at the provisional findings stage the CMA had taken the view - in its notice of possible remedies - that it was minded not to consider controls on outcomes, including on the level of overdraft charges, any further. The extent of harm to overdraft users had been clearly identified at that stage with the CMA itself noting that banks earn around 14% of their revenue, circa £1.2 billion, from so-called 'unauthorised' overdraft usage. However, all of the possible remedies identified by the CMA related to switching. As we noted in our response, given that the overall picture painted by the CMA's inquiry had remained that customers who are heavy overdraft

users are very unlikely, or unable, to switch, remedies that focus only on the switching process could not reasonably be expected to address the detriment these customers face. More was plainly needed.

We welcomed the fact that the CMA developed its thinking to some extent in the light of our and others' submissions, and introduced some prompt and control measures aimed at assisting existing customers with account usage when customers might breach an overdraft limit. However, the CMA's ability to adequately assess potential controls on overdraft charges was hindered by decisions it had made much earlier in the inquiry in terms of where to direct its assessment efforts. In particular, the investigation did not provide an assessment of revenues and costs by customer type of the kind that might have allowed more detailed consideration of, for example, the extent to which different levels of overdraft charges might be justified by cost differences associated with default risk. The CMA had also chosen to give little attention to how the availability and usage of arranged and unarranged overdrafts fit within the broader context of sources of 'emergency funds'.

Having made these earlier choices, the assessment of options for controlling the levels of overdraft charges was limited to largely unexplored references to concerns over the potential for unintended consequences. Thus, notwithstanding the very lengthy nature of the overall inquiry, little analytical effort was devoted to this consideration of remedies. In our view, considering remedies earlier in the process would have given a much better chance of the necessarily limited resources associated with an market investigation being better targeted on what is likely to be most important for delivering better consumer outcomes.

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?

Part (i) of this proposal could result in useful preparatory work being undertaken. To the extent that market study work necessarily provides consideration of where concerns are most significant and how they might be addressed, this may not in practice imply significant changes.

However, there are both potential risks and benefits to part (ii) of this proposal. On the one hand a steer from the Board could help to avoid duplication of work by the CMA, which could generate useful efficiencies in the market investigation process.

On the other, it is possible that such a steer would in practice carry undue influence over the eventual scope compared to the Panel's own view, and indeed responses to the issues statement from external parties. One way to mitigate this could be to allow the Board to submit an advisory note as a response to the issues statement rather than a steer at the outset of a market investigation; or the steer could be limited to issues of duplication, rather than content.

Whatever the CMA's decision on advisory steers, there may be merit in considering in due course the effectiveness of the panel system in relation to market investigations at all - since the role is much broader than for example in merger assessments or regulatory appeals. The extent to which the outcomes of market investigations are likely to be dependent on the specific make up of a panel raise questions over the adequacy of the arrangements, for example.



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?

We have provided comments on potential benefits and risks associated with each part of the two proposals above.

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.

We do not have any comments on the updated text beyond our comments made in response to Question 4.2 regarding the desirability of proposal B (ii).

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