

Funerals market investigation

Remedy options for regulating the price of crematoria services

20 February 2020

This is one of a series of consultative working papers which will be published during the course of the investigation. This paper should be read alongside the [Issues Statement](#) published on 8 April 2019 and other working papers published.

These papers do not form the inquiry group's provisional decision report. The group is carrying forward its information-gathering and analysis work and will proceed to prepare its

provisional decision report, which is currently scheduled for publication in April/May 2020, taking into consideration responses to the consultation on the Issues Statement and responses to the working papers as well as other submissions made to us.

Parties wishing to comment on this paper should send their comments to Funerals@cma.gov.uk by 19 March 2020.

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The Competition and Markets Authority has excluded from this published version of the working paper information which the inquiry group considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure).
The omissions are indicated by [✂].

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Executive summary

1. In our [Issues Statement](#) we said that we would consider the potential for pricing remedies in the context of the funeral director and crematoria sectors. This working paper summarises our current thinking on remedy options for regulating the price of crematoria services, should we consider that to be required. In this working paper we set out the framework the CMA uses for its consideration of remedies and provide further detail on the aims and overall approach to price control remedy options. We have also set out in more detail some key design considerations for any potential price regulation for crematoria services.
2. The key areas we have been exploring in terms of any potential price control remedy are as follows. We are considering which operators a price control remedy could apply to. The price control could apply to all crematoria operators or a sub-set. Our current thinking is that it should apply to all operators. However, we are mindful of the fact that local authorities have a cost recovery obligation.
3. We are exploring the scope of products and services covered by any price control. Price controls can be applied to the prices of individual products/ services or to combinations or packages of different products/services. Given that crematoria services are a relatively homogenous 'product', our current thinking is that we would identify a commonly purchased combination of cremation services and apply a maximum price to this 'benchmark package'. Therefore, in this paper we set out our current thinking on the different elements of this package and ask for views on what elements should be included or excluded (for example, should the costs associated with scattering ashes or providing webcasting during the service in the chapel be covered) and whether, and if so how, they should be specified (for example what the length of the chapel slot should be).
4. We are considering how prices could be set and updated if a maximum price was to be implemented. We are considering two main approaches: setting a cap on the price of a cremation using pricing information from the sector (subsequently updated by reference to an index such as the Consumer Price Index) and setting a cap on the price of a cremation based on crematoria costs and allowing for a 'fair' profit margin. Should a price cap be needed, our current thinking is that basing the initial level of the cap on pricing information from the sector would be an appropriate way forward. If we were to implement a remedy for regulating the price of crematoria services, we would need to decide at what level to set the initial price cap, and how it should be updated.

5. In this working paper we discuss considerations relating to the benchmarks we could use and how they could be set (for example at national, regional or individual crematoria levels). Decisions on these specific points are contingent on and intrinsically linked to decisions on the basis of the price cap and its coverage in terms of operators. They are not covered in this paper.
6. We also explain how any crematoria price regulation might interact with any price regulation relating to funeral director services. Our current thinking is to include a requirement that the cost of the benchmark cremation package would need to be passed through by funeral directors at the price charged by the crematorium (ie at the level of the price cap or lower). This would ensure that the benefits of price regulation of cremation services would be passed onto consumers. This approach would require us to design and set up separate price control remedies for crematoria and for funeral director services. The responsibility for ensuring compliance with the crematoria services cap would rest with crematoria operators.
7. We consider the possible risks and unintended consequences on the sector of the remedies discussed in this working paper and how to test them.
8. Finally, this working paper sets out how any price control remedy might be implemented, monitored and enforced and by whom. Our current thinking is that if a regulator was set up to regulate quality remedies for the sector then it could also, in due course, manage, monitor and enforce any price control remedies. In the meantime, the CMA would use its own powers to set up and implement a price control remedy for crematoria services if such a control was found to be needed.
9. We have set out a range of questions for stakeholders at the end of this working paper and we welcome responses to these questions and views on any of the issues raised in this paper.

Introduction and overview

10. This working paper considers the option of implementing price controls to remedy any consumer detriment arising from any AECs that we may identify in relation to the services provided by crematoria operators.
11. The CMA's general preference is to deal comprehensively with the cause or causes of the AECs wherever possible and by remedies which may

significantly increase competitive pressures in a market.¹ However, our approach to remedies in any given case will reflect both the scope for increasing competition to the extent necessary to tackle the underlying concerns, as well as the degree and nature of any detrimental effect on consumers. Detrimental effects may be in the form of higher prices, lower quality, less choice of goods or services, or less innovation.²

12. The bereaved face uniquely challenging emotional and practical circumstances in making choices about funerals. In practice, many consumers may have no, or only limited, choice of crematoria. Given the intrinsic nature of the competition problems that our current analysis is pointing towards in relation to the supply of crematoria services, this paper considers options for regulating the level of cremation fees. Price control remedies seek to directly control or restrict market outcomes, to constrain firms' ability to exercise market power and thereby limit any possible detrimental effects on customers.
13. The purpose of this working paper is to outline our current thinking and includes some suggestions on the possible design and implementation of a price control remedy applying to crematoria operators. Our current thinking, and the suggestions in this working paper, are without prejudice to the outcome of our assessment on whether there are any AECs in relation to the services provided by crematoria and any detrimental effects on customers resulting from those AECs.
14. The consideration of possible price control remedies for funeral directors is not covered in this paper. We are distinguishing between remedies that may be needed in relation to crematoria and those that may be needed in relation to funeral directors, given the potential distinction between the characteristics of each market and the different AECs we may find. We have considered possible price control remedies for funeral director services in a separate working paper.³
15. This working paper sets out:
 - a) The framework that the CMA applies in considering remedies in market investigations (paragraphs 17-28).
 - b) The possible aims and overall approach taken to price control remedy options for crematoria (paragraphs 29-37).

¹ CC3, paragraph 330.

² CC3, paragraph 326.

³ Working Paper: Remedy options for regulating the price of funeral director services at the point of need.

- c) Key design considerations for regulating the price of crematoria services (paragraphs 38-89).
 - d) An initial consideration of how price control remedy options might be implemented, monitored and enforced (paragraphs 90-108).
 - e) Invitation to comment on this proposed remedy (paragraph 109-113).
16. We welcome views on the evidence, analysis and our current thinking on options for regulating the prices of crematoria services, as set out in this working paper.

Framework for consideration of remedies

17. If we find that there is any adverse effect(s) on competition (AEC), we are required to decide the following questions:⁴
- a) whether we should take action for the purpose of remedying, mitigating or preventing the AEC or any detrimental effect(s) on customers so far as it has resulted from, or may be expected to result from, the AEC;
 - b) whether we should recommend the taking of action by others for those purposes; and
 - c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
18. A detrimental effect on customers is defined as one taking the form of:⁵
- a) Higher prices, lower quality or less choice of goods and services in any market in the UK (whether or not in the market to which the feature or features concerned related); or
 - b) Less innovation in relation to such goods or services.
19. When deciding whether any remedial action should be taken and, if so, what action should be taken, the Enterprise Act 2002 requires the CMA 'in particular to have regard to the need to achieve as comprehensive a solution

⁴ [Enterprise Act 2002](#), section 134(4).

⁵ [Enterprise Act 2002](#), section 134(5).

as is reasonable and practicable' to the AEC and any detrimental effects on customers so far as resulting from the AEC.⁶

20. The CMA will consider how comprehensively possible remedy options address the AEC and/or its detrimental effects and whether they are effective and proportionate.⁷ The CMA may also have regard, in accordance with the Enterprise Act 2002, to any relevant customer benefits (RCBs) of the market feature or features giving rise to the AEC or AECs.⁸
21. The CMA's preference is to deal comprehensively with the cause or causes of the AECs wherever possible, and by this means significantly increase competitive pressures in a market within a reasonable period of time. While generally preferring to address the causes of the AEC, the CMA will consider introducing measures which mitigate the harm to customers created by competition problems, for example if other measures are not available, or as an interim solution while other measures take effect.⁹
22. The CMA will assess the extent to which different remedy options are likely to be effective in achieving their aims, including their practicability.¹⁰ The effect of any remedy is always uncertain to some degree.
23. Assessing the effectiveness and practicability of any remedy may involve the consideration of several dimensions.¹¹ First, a remedy should be capable of effective implementation, monitoring and enforcement. Secondly, the timescale over which a remedy is likely to have effect will be considered. Thirdly, remedies may need to take into account existing laws and regulations. Fourthly, where more than one measure could be introduced as part of a remedy package, the CMA will consider the way the measures are expected to interact with each other.
24. The CMA in considering the reasonableness of different remedy options will have regard to their proportionality.¹² The CMA's assessment of proportionality will depend on the particular facts and circumstances of a case. In making an assessment of proportionality, we will be guided by the following principles. A proportionate remedy is one that:
 - a) Is effective in achieving its legitimate aim;

⁶ Enterprise Act 2002, s 134(6).

⁷ CC3, paragraph 329.

⁸ Enterprise Act 2002, s134(7); CC3 (Revised) paragraph 329.

⁹ CC3, paragraphs 330 and 333.

¹⁰ More detail on how the CMA may assess effectiveness is in CC3 from paragraph 334.

¹¹ CC3, paragraphs 335 - 341.

¹² More detail on how the CMA may assess proportionality is in CC3 from paragraph 342.

Aims and overall approach to price control remedy options

29. In the event that the CMA finds an AEC and any resultant or expected detrimental effects on customers in relation to crematoria services, we consider it likely that the primary aim of price control remedy options as being to provide either or both of:
- a) An initial intervention to ‘reset’ the prices of more expensive operators to closer to competitive levels; and
 - b) an ongoing restriction on price increases, so that prices remain closer to a competitive level.
30. In developing our thinking regarding the potential for price regulation in this sector, we have taken into account various information including the responses we received to the Statement of issues¹⁸ and evidence provided during hearings and roundtables¹⁹ on this subject.
31. This has informed our thinking, in particular with regard to design choices for any potential price control remedy and also in our assessment of the risks and mitigation of unintended distortions to market outcomes (paragraphs 83-86).
32. We are considering whether to introduce the possibility of price regulation as an ongoing market intervention, for example by recommending to government to establish a regulatory framework, including for the setting and enforcement of a price cap. Our current thinking is that any price cap overseen by the CMA should be introduced on a time-limited basis as a transitional measure, for example until a new regulator is put in place. This is also the case for funeral directors.
33. There are a variety of options and approaches to regulating prices. The high-level options identified in the Statement of Issues²⁰ included:
- a) Cost orientation condition: require firms to set prices which reflect the costs incurred in providing the service, through imposition of a cost orientation obligation.
 - b) Profit margin/rate of return allowance: establish a fair profit margin and/or rate of return on invested capital.

¹⁸ [Responses to the issues statement](#)

¹⁹ [Hearing and roundtable summaries](#)

²⁰ Paragraph 127, Funeral directors and Crematoria services market investigation, [Statement of issues](#).

- c) Safeguard cap on essential services: enforcement of a ceiling on the allowable price for the essential elements of a cremation i.e. on those services which all customers require when they purchase a cremation. All customers purchasing a cremation would pay a price at, or below, the safeguard cap level for these essential services.
 - d) Safeguard cap on a specific package: a price ceiling for a particular, discrete package would be established. All suppliers would have to give customers purchasing a funeral or cremation the option of choosing this package and paying at, or below, the safeguard cap level.
34. The crematoria services sector has different characteristics to the funeral director services sector. Some aspects of the crematoria services sector (for example there is a much smaller number of operators and less product differentiation) make a price control remedy more straightforward to design. Other factors, such as the potential infrastructure and land investment required to establish a crematorium, may make it more difficult to assess what the price would be in a well-functioning market.
35. In summary, and for the reasons set out in the rest of this paper, our current thinking is that any regulation of prices of crematoria services, should we consider that it to be required:
- a) Would likely apply to all crematoria operators in the United Kingdom (UK) (paragraphs 45-47);
 - b) would likely apply to a benchmark cremation package (paragraphs 48-63);
 - c) could be set either:
 - i. as a safeguard cap on a national level for a standard cremation, or,
 - ii. using a cost-based, rate of return approach at a more disaggregated level (company-wide or individual crematoria) (paragraphs 64-78);
 - d) would be accompanied by a recommendation to government for the establishment of a new regulator which would eventually assume responsibility for any price regulation (paragraphs 90-103).
36. Should price regulation be needed, our current thinking is that basing the initial level of the cap on pricing information from the sector (on a national level) would be an appropriate way forward for any price cap initially set by the CMA. A price-based approach would help to address quickly the detriment observed in terms of the prices charged to customers and would be a practical solution which could be more easily implemented than a cost-based

approach. This could also include consideration of limited exceptions (for example for new entrants or for crematoria in areas with high land values). If the monitoring and enforcement, as well as the setting of future price controls were to transition to a sector regulator, it may be appropriate to move from basing this on pricing data to basing it on cost data in due course. This would be for any future regulator to assess and decide upon.

37. We would welcome views on the issues and options we have set out in this paper. We would also welcome other proposals or comments on any relevant issues which we have not addressed in this working paper.

Key design considerations

38. Remedies which control outcomes, such as price controls, need to specify the products or services that are subject to control and the basis for the level of the price that is set.²¹
39. There are a variety of ways in which a price control that constrains the price of a standard 'benchmark' package for a cremation can be specified. We are considering the following issues related to the design of this remedy option:
- a) Which providers of crematoria services should be subject to any price regulation;
 - b) which of the services or products provided by crematoria should be included within the scope of any price cap;
 - c) how any price cap measures should be determined and updated;
 - d) how any crematoria price cap might interact with a funeral director price cap;
 - e) how the price cap could be designed to mitigate any unintended distortions to market outcomes that may arise from the introduction of price regulation; and
 - f) how to test the options we are considering.

²¹ Paragraph 87, Annex B, [CC3](#) Guidelines for market investigations: Their role, procedures, assessment and remedies.

Which providers should be subject to price regulation

40. When designing a price control remedy, we need to decide which providers it would, or would not, apply to. Relevant considerations concern whether to include all crematoria operators, or only a subset of operators, and, if so, the basis for identifying the subset.
41. Our thinking is primarily focused on any consumer detriment arising from any AECs. In so doing, we must ensure that any price control remedy would be effective and proportionate (as outlined in paragraph 24).

Demand and supply-side factors affecting the scope of any AEC findings

42. We have considered a range of supply-side factors:
 - Our research has shown that the provision of crematoria services tends to be concentrated. 84% of crematoria in the UK do not have a competitor within a 20-minute cortege drive time and 50% do not have an alternative within a 30-minute cortege drive time.²²
 - Our analysis of entry indicates that local authority crematoria do not respond to entry in terms of the prices they set. On average, private crematoria that have experienced entry tend to increase rather than decrease their fees.²³
 - Our research has indicated that market entry tends to be costly (there are high initial sunk costs required to enter).²⁴ We are mindful of the impact of any price control remedy on potential future market entry.
43. We have also considered the potential impact of demand-side factors. The circumstances facing the bereaved in making choices about cremation services are uniquely challenging both emotionally and practically. Price/quality differentials seem to have a very limited impact on the choice of crematoria which tends to be driven more by factors such as family preference and distance to the crematoria.

²² [Crematoria: Background and market structure working paper](#), paragraph 24.

²³ [Crematoria: Evidence on competition between crematoria working paper](#), paragraph 9.

²⁴ [Crematoria: Background and market structure working paper](#), paragraphs 60-70.

Market outcomes - prices and profitability

44. In real terms, average local authority and private cremation fees have increased by 37% and 48% respectively between 2008 and 2018.²⁵ There are also large differentials between the prices charged by different operators offering similar services. While there is evidence of sustained price increases across the whole sector, we have also been looking at whether this has been reflected in profits above the competitive level. We have published a working paper alongside this one on our profitability analysis of crematoria.²⁶
45. Our current view is that the characteristics of the sector detailed above that have allowed crematoria operators to set prices at above the competitive level and to increase prices over the period of our analysis could remain in future. The concerns in relation to the crematoria sector that our analysis to date is pointing to mean that our current thinking is that any price control remedy would apply to all crematoria operators. The extent to which individual crematoria would be impacted by a price ceiling would depend on the level of the ceiling and their individual pricing. However, all crematoria operators would be required to comply with the price ceiling.
46. Where local authorities charge for the provision of crematoria services, they must do so on a cost recovery basis.²⁷ Our expectation is that these rules would continue to apply, and we would expect local authorities to follow them. Any price cap would not supersede this obligation. We are mindful that local authorities may benefit from additional guidance on how their cost recovery obligations should be interpreted and implemented and would welcome thoughts on this.

Our current thinking regarding coverage

47. We would welcome views on our current thinking that any price regulation in the form of a maximum price would apply to all crematoria operators in the same way.

Scope of products and services covered by price regulation

48. Price controls can be applied to the prices of individual products/services or to combinations or packages of different products/services. We have considered

²⁵ [Crematoria: Outcomes working paper](#), paragraph 16.

²⁶ Working Paper: Crematoria: Profitability analysis.

²⁷ Further details of our current understanding of these cost recovery obligations are provided in the Appendix A to this paper.

the possibility of a detailed form of price regulation which would apply to the individual prices of all the products and services which are provided by crematoria. However, we are currently disinclined to pursue this approach on the basis that a remedy focused on a package of cremation products and services is likely to be more practical to implement, monitor and enforce and to be a more proportionate approach. It would also allow easier interaction with any funeral director price control remedy (see paragraph 79) and provide greater clarity and transparency for consumers.

49. If we were to design a price control remedy for crematoria, whether based on prices or costs, one option would be to define a benchmark 'product' as considered with the funeral director price control remedy. Cremation services are a relatively homogenous 'product' and as such our current thinking is that we would identify a commonly purchased combination of cremation services and set a maximum price for this benchmark package, which all providers who are subject to the price control regulation would be required to offer.
50. In selecting the benchmark package, we would aim to pick a combination of products and services that covered a large proportion of sales of crematoria services so as to help address the maximum amount of consumer detriment.
51. Crematoria services currently on offer tend to be of three types:
 - Standard fee services are those services charged at the full fee, normally during peak hours.
 - Non-standard fee services are charged at a reduced fee and tend to take place at off-peak hours (for example, 9am or 9:30am services).
 - Unattended fee services are also referred to as 'direct cremations' and are cremations without a service.
52. Only 8% of cremations in 2018 were non-standard cremations.²⁸ Our current preference would be to set a package for a standard fee service given it would cover approximately 92% of the market for cremations. As such we would be addressing the majority of cases where consumer detriment might occur. In addition, we would expect that the introduction of a maximum price for standard fee services would put downward competitive pressure on non-standard services and direct cremations, as firms seek to maximise utilisation and maintain a price differential.

²⁸ [Crematoria: background and market structure](#), paragraph 7. This figure includes reduced fee services, attended and unattended direct cremations and other types of cremations (for example, child cremations).

53. Our current thinking is that we would set a maximum price for a benchmark package which all operators who are subject to the price control regulation would be required to offer. Crematoria operators would be required to set their price for this regulated benchmark product at or below the level of the maximum price. This would not preclude crematoria from offering the same package at a lower, 'off-peak' price at times when they had additional capacity.
54. In order to determine what the constituent elements of a benchmark cremation package could be, we have used evidence from existing publicly available cremation package data and evidence provided by trade associations, funeral directors and crematoria. We currently think that a benchmark package offered directly by the crematoria and subject to a maximum price could consist of:
- All back of house services;
 - use of the chapel (we discuss variants relating to this later in this section);
 - medical referee fees (where applicable);
 - environmental surcharges;
 - use of music facilities; and
 - a container for the ashes if being removed from the crematorium
55. There are two elements of a cremation cost that can sometimes apply and which in some cases the crematoria operator does not have control over. These are the medical referee fees and some environmental surcharges. These are not always applicable. For example, environmental surcharges are only applicable at crematoria without abatement technology fitted and the medical referee fees were abolished in Scotland in 2015.
56. We could include these in the benchmark package when they arise and require these to be passed on at cost by crematoria operators. We could alternatively exclude them from the benchmark package (while still imposing a requirement on crematoria operators to pass them on at cost). The final outcome for consumers would be the same in terms of cost but the cremation prices they see would be different. Excluding these fees from the package would make it more feasible to have a uniform cap across the UK as some of these third party fees can vary in price and are not applicable everywhere. Alternatively, including them would give a better indication of the overall cost of the cremation (as they are not optional when applicable). Our current thinking is that, to the extent that variations in these charges go beyond a

nominal value, we would exclude them from the benchmark package in order to have a more comparable product. We welcome views on these alternative approaches.

57. Ashes can be taken away after the cremation by the family or can be scattered or interred at the crematorium. Most crematoria operators include the cost of a container for removing the ashes as standard and most people will remove the ashes from the crematorium.²⁹ Our current thinking is that this cost should be included in the benchmark package. Most crematoria also offer the option of scattering the ashes on their grounds. Whether or not there is a charge for that varies across crematoria. Our current thinking is that we would not include the charge for scattering of ashes in a benchmark package as this would be an additional service that crematoria could offer for a fee or for free and that customers could add-on to any price of the benchmark package.
58. There are a variety of optional extras (for example, webcasting, organist, visual tributes) offered by many crematoria. Our current view is that optional extras would not be included in any standard product but consumers would be able to add these on. Alternatively, some extras could be made part of the benchmark package. We welcome views on which services might be appropriate for inclusion.
59. In considering the approach of a benchmark package, we are mindful of the requirements of some customers for customisation and would aim to ensure that crematoria operators retain the incentives to innovate, differentiate, and offer a full range of products and services to customers.
60. In order to meet the demands for customisation, customers would need to be able to add-on, amend or remove products or services. In this situation, it would need to be clear to customers that a customised package would no longer be the price-regulated package subject to a maximum price (ie if it contained extra services, for example, webcasting, then the price could exceed the specified price cap to reflect the cost of these extra products/services). Help for consumers in deciding whether to choose these extra services could be provided by the “independent platform” comparison tool that we are considering as part of our measures to enhance information transparency.³⁰

²⁹ The FBCA estimates that for around three-quarters of those cremated their ashes will be collected by family members and taken from the crematorium and placed elsewhere. [Market Study Report, paragraph 5.6.](#)

³⁰ The independent platform is discussed in the [Information and transparency remedies working paper.](#)

61. Any future revision of a regulated benchmark package will need to consider how the most common product evolves, for instance if webcasting becomes the norm.
62. In coming to a final decision on the slot length to be included as part of a 'benchmark' package we would weigh up a number of factors including, the potential for a longer duration slot length given available capacity and the impact that this might have on waiting times for friends and family of the deceased. However, the inclusion of a defined slot length within a benchmark package would not preclude a crematorium operator from offering longer or shorter slot lengths as variants alongside the benchmark package.

Our current thinking regarding products and services included in the benchmark package

63. We welcome views on the approach to defining the scope of products and services included in the benchmark package, in particular:
 - a) Are there any products or services which are not currently included in the suggested benchmark package which should be included? What is the evidence to support this view?
 - b) Are there any products or services which have been included in the suggested benchmark package which should not be included? What is the evidence to support this view?
 - c) What is your view on time-based restrictions relating to the benchmark package, for example the length of the chapel slot?

How the price cap could be determined and updated

64. We are considering various options for determining the level of any price regulation from the options set out in the Statement of Issues.³¹ We are considering two main approaches: setting a maximum price for a cremation using pricing information from the sector and setting a maximum price for a cremation based on crematoria costs and allowing for a "fair" profit margin.

Using a pricing information approach

65. We are considering whether, and if so how, we could set a maximum price for a cremation based on pricing information from the sector. Using pricing data has many advantages, as it is easily available and comparable as the

³¹ Paragraph 127, Funeral directors and crematoria services market investigation, [Statement of issues](#).

standard product is relatively homogenous. A price ceiling based on sector prices would be able to protect consumers from the highest prices. Protecting consumers from future price increases could also be managed via indexed increases in the level of the cap. From an implementation point of view, the assessment of the cap level, and management of future increases, is likely to be less complex than a cost-based option.

66. A risk is that the regulated maximum price could be seen as validating a particular price level and could become a focal point for the rest of the market. Lower priced crematoria could increase their prices to the level of the cap. This risk might be mitigated by the fact that local authorities have a cost recovery obligation and as such would be limited in their ability to converge to the cap. Depending on the level and geographic scope of the cap, a price-based option could also risk impacting disproportionately on higher cost areas and consequently discourage future market entry in those higher cost areas (if for instance it was a uniform national cap). There may be pricing differences on a geographic level given the potential for differences in land and operational costs (for example, wages).

Using a rate of return approach

67. A second option would be to base any cap on the costs faced by crematoria providers, including an allowance for a fair return. Given there are 184 operators operating 303 crematoria in the UK, as at 1 September 2019,³² this would be more feasible from a data perspective than for funeral directors where the number of operators runs into the thousands. We have gathered information on the costs of individual crematoria. A potential advantage of this approach is that it could better take into consideration local cost differences.
68. To undertake such an approach we would however need to be able to assess the land values for each crematorium (as this is a significant element of the cost-base). We would also need to be mindful of the risk of companies over-inflating costs and consumers facing higher prices due to inefficient investment. This approach would not only require far more significant and detailed scrutiny of company costs in terms of monitoring and compliance than with the pricing option but would also require individual costs to be assessed over the period in which the price cap is in place. We would also be making the assumption that the crematoria individual costs are efficient.
69. There are a number of variants related to the design of a cost-based cap that we could consider. Any cost-based cap could be carried out on a crematorium

³² [Crematoria: Background and market structure working paper](#), paragraph 14.

by crematorium basis or it could be applied by crematoria operator. The latter approach would provide private operators with more flexibility on issues such as recovery of common costs. Another design option would be to give all companies a set rate of return that they apply to their cost base. This would require scrutiny and accounting checks after implementation but would not require a full assessment of their costs ahead of implementation (assuming they were operating efficiently).

70. Should a price control be needed, our current thinking is that basing the initial level of the cap on pricing information from the sector would be an appropriate way forward for any CMA initiated cap. If the monitoring and enforcement, as well as the setting of future price controls, were to transition to a sector regulator it may be appropriate to move from basing this on pricing data to basing it on cost data in due course. This may be for any future regulator to assess and decide on.

Determining the initial level and updating the maximum price

71. We are examining evidence and the data we have collected to assess what could form the basis for setting an initial maximum price for a benchmark package. There is a limited number of crematoria in the market (184 operators operating 303 crematoria as at 1 September 2019)³³ and we have good quality pricing data available. Cost data is more mixed and we are still analysing the land value information we have gathered (as discussed in the Crematoria profitability analysis working paper).
72. There are many benchmarks we could use to set the initial level of the price cap (for example, benchmarking against a specific “efficient” company, using median prices for a particular geographic area etc) and the appropriateness of each will depend on the approach used for setting it and the geographic scope of the price control remedy.
73. We will also need to consider whether, and how, the level of the price cap should change over its duration. The process of competition usually enables market participants to adapt to changes in a market. However, where a price control remedy has been imposed, we need to ensure that we incorporate the scope for change and necessary adjustments during the remedy design process. For example, this may involve indexing prices to a general inflation measure (e.g. the consumer prices index CPI).

³³ [Crematoria: Background and market structure working paper](#), paragraph 14.

Geographic scope

74. There are a number of variants related to the design of a cap that we would need to consider. The cap could be a uniform national cap or could allow for differences or uplifts to take into account regional differences in land or operational costs (for example, a separate cap for London or one or more of the nations).
75. There are two main considerations in relation to the geographic scope of a price control remedy that we are mindful of:
- a) Whether the requirement to have a maximum price should apply across the UK or whether it should apply for example at a regional or devolved nation level. The basis for the approach could be determined by reference to any evidence of differences in detrimental effects for customers and/or AECs and other factors such as any differences in the regulatory regimes of the devolved administrations.
 - b) Whether the level of the maximum price should be set at a national or regional level. We are analysing the cost data we have collected to assess whether there is evidence that costs significantly vary based on the geographic location of the crematorium. A more disaggregated approach may be appropriate where we have evidence of significant differences in the cost base or pricing of providers across the UK. We will keep this issue under review as our analysis of the market continues.
76. While many of the factors that may be affecting competition appear likely to affect all parts of the UK, the CMA is mindful of the devolution of powers to Scotland, Wales and Northern Ireland and will actively engage with each of the devolved administrations in developing its remedies. In making recommendations to the Scottish Government, the CMA will take account of the Burial and Cremation (Scotland) Act 2016 and consider how any price control regulation should interact with the requirements of that Act.
77. In considering whether the level of a price cap should be set at a regional or national level, we would take into account the risk that unintended market distortions may arise due to variation in the level of a price cap across the UK, particularly at the border of geographic areas or regions with different price caps. In addition, we will consider the impact on the effectiveness of compliance, monitoring and enforcement for both the CMA and/or a new regulator and funeral directors.

Our current thinking on how a maximum price can be determined and updated

78. We welcome views on how the maximum price could be determined and reviewed, in particular:
- a) Do you consider that using pricing information from the sector is a sensible approach for designing a price cap for crematoria? Do you think a rate of return approach would be more appropriate in this sector?
 - b) Do you have any views on the design variants we have outlined above (for example, whether the price level of any price regulated package should be set as one price across the UK, whether we should make allowances for certain higher cost areas such as London or whether any cost base should be assessed on a crematoria by crematoria basis or otherwise)?
 - c) Do you have any suggestions as to the criteria we should use to set the benchmark for the initial level of the price cap?
 - d) Do you have any views on how the Burial and Cremation (Scotland) Act 2016 should interact with any price regulation implemented by the CMA, or a new regulator?

Interactions with any funeral director services price control remedy

79. We have also today published a Working Paper on remedy options for regulating the price of funeral director services at point of need. We will consider possible interactions between any funeral director services price control remedy and any crematoria services price control remedy. Approximately 99% of consumers who purchase a cremation do so via their funeral director. Any maximum price for a cremation package will as a consequence generally be “seen” by consumers as a disbursement. Disbursements are third party costs passed onto customers by funeral directors.
80. There are two options available to us in managing the interactions between the two potential price caps:
- a) We could cap the maximum disbursement allowed to be passed through for the benchmark cremation package (funeral directors would still have an incentive to negotiate a lower price with crematoria but would be able to keep all or part the difference), or
 - b) we could specify that the cost of the benchmark cremation package would need to be passed through at the price charged by the crematorium (in

which case any price reductions negotiated by funeral directors would be passed on to consumers, but the funeral directors may have less of an incentive to negotiate).

81. Our current thinking is to include a requirement that the cost of the benchmark cremation package would need to be passed through at the price charged by the crematorium (ie the price cap or lower) and would be reflected in any funeral package price including a benchmark cremation package.
82. We expect to design and set up two separate price control remedies, one for cremations and one for funeral services so the responsibility for ensuring compliance with the cremation package cap would not rest with funeral directors.

Designing price regulation to mitigate any unintended consequences to market outcomes

83. There are a number of potential unintended distortions to market outcomes, to be considered when evaluating price controls as a remedy option. For example:
 - a) Price controls can directly override market signals which may result in distortion risks, such as a reduced incentive for participants to compete or reduced incentives to invest in refurbishment of, for instance, the crematoria grounds.
 - b) Circumvention risk could occur if the price control creates incentives for providers to make changes to other products/services (including a reduction in quality) which are not subject to the price control.
 - c) Increased compliance costs or (perceived) complex regulation could lead to the exit of some market participants. This may have adverse effects on competition or distort the market in an unintended way.
 - d) Specification risks could arise if the price control cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance. Markets which are particularly subject to change may be prone to specification risk.
84. The likelihood of occurrence and significance of the consequences of such risks would be considered and managed through the design process and consultation process concerning any proposed remedies. We have considered the following points:

- a) Market distortion risks (paragraph 83.a), for example that operators are unable to earn a normal rate of profit which may result in higher barriers to entry or market exit can be addressed by assessing the level of a price cap in consideration to costs and/or profitability. We will need to consider that there may be risks with regards to quality depending on the price control regulation design. Depending on the design of the price control that there may be on the one hand disincentives to invest in improvements in quality (for example, on capital expenditure such as refurbishing the grounds or chapel or on operating expenditure such as operating hours) if we cap prices. Any regulator would likely consider the need for minimum quality standards in crematoria if this risk materialised. On the other hand, there is a risk that operators over-inflate costs and there is an unintended incentive for overinvestments if we use a cost-based approach. This risk could be managed via scrutiny of crematoria cost submissions by any potential regulator. Both these risks will need to be considered when narrowing down detailed design.
- b) In order to address the risks of circumvention (paragraph 83.b), we would consider possible ways in which an operator's incentives might be affected and undermine the intended impact of delivering better outcomes for customers. For example, increasing the costs of optional extras. Given the low number of options and potential low uptake of these, we believe there is a low risk of impact on consumers. The transparency remedies and the "independent platform" comparison tool under consideration could help to mitigate any risks of increasing the price of optional extras.³⁴
85. We will also weigh up the potential risk of a price cap distorting the sector, for instance if it becomes a focal point. Depending on how the maximum price is seen by operators and customers, there is a risk that operators currently pricing below the cap, increase their prices to meet it if the cap is seen as an "appropriate" regulated price. This is a risk we would need to consider in more detail when setting the level of a cap which will need to be assessed in conjunction with the level of detriment that it will address (ie from bringing prices down) and the potential new detriment arising from it (ie the potential for prices to rise).
86. As well as managing the risks of unintended consequences, we will also have regard to the benefits that may arise from the intended consequences of lower prices to consumers as well as the scale and impact of any AEC and resulting customer detriment we may identify.

³⁴ [Information and transparency remedies](#) working paper, paragraphs 36-56.

Road testing the design of any price control remedy

87. Testing interventions with consumers and refining the remedy design can boost effectiveness and provides an initial assessment of whether a price control remedy might meet its objectives (paragraph 29).
88. A robust consumer testing process can be used to consider the detailed design and implementation process and how these may affect the performance of a price control remedy. This may be conducted with groups of individual consumers and/or with consumer interest groups.
89. We are considering which areas of a crematoria services price control design might lend themselves to testing and will set up an appropriate consumer testing process to provide insight in advance of our final report.

Remedy implementation, monitoring and enforcement

90. When taking remedial action, the CMA may act itself through exercising its order-making powers against, or through accepting undertakings from, any appropriate person. Alternatively, or in addition, the CMA may recommend that remedial action should be taken by others, such as government, regulators and public authorities.^{35,36}
91. The CMA will think carefully about the practicality of different approaches to remedy implementation, including how any remedies will be monitored and enforced. In considering the introduction of possible price controls we shall consider a range of issues including the following:
 - a) Whether price controls should be introduced by the CMA, or by the government through setting up a regulator;
 - b) if the CMA takes action itself, whether this would be best done by means of accepting undertakings or making an Order;
 - c) whether to allow time for any required compliance measures to be undertaken before any remedy commencement date;
 - d) what processes (e.g. compliance obligations) should be put in place to ensure effective monitoring and enforcement;
 - e) implementation costs;

³⁵ Such recommendations do not bind the person to whom they are addressed, although the UK Government has said that it will respond to any recommendation made to it within 90 days of publication of the CMA's final report.

³⁶ CC3, paragraph 327.

f) timelines and possible end date or event for the termination of an Order.

Who is best placed to operate any price control regime

92. Our working paper on [Quality Regulation Remedies](#) considers the establishment of a new regulator, to monitor and enforce quality standards. Our current thinking is that any new regulator would also be given responsibility for the setting, monitoring and enforcement of any price regulation for crematoria operators.
93. However, we are also mindful of the need to achieve a timely solution to address any AECs and/or detrimental effects on customers that we may find, and of obtaining the Parliamentary time that would be needed to establish a regulator on a statutory basis. We are therefore considering whether to put in place a framework for a price control using the CMA's powers, pending the introduction of a long-term regulatory solution to the extent that a price control is required beyond that period.
94. The CMA can make an Order under the Enterprise Act 2002 on any person, including a local authority where it is appropriate to do so. Our current thinking is that, any price control would initially be included within an Order made by the CMA.
95. We do not think that the implementation of a price control remedy through the use of undertakings is likely to be appropriate due to the impracticality of negotiating and securing undertakings from potentially a large number of crematoria operators to whom the remedy may apply. An Order also has the advantage that it would apply consistently to all the crematoria within scope.
96. The requirements of the Order would be applicable to all crematoria within the scope of the price control measure. If our analysis leads us to a price control that is applicable to only a few operators in the sector, we would impose any Order on a more limited set of operators.
97. We envisage that such an Order is likely to be accompanied by a recommendation to government to establish a regulatory body to assume responsibility in the longer-term for the oversight, monitoring and enforcement of the various measures introduced by the CMA, including any price cap, service quality, licensing, inspection and transparency measures.
98. There are various practicalities we may need to consider regarding the initial design of the price cap if this was the case. In particular the ongoing monitoring and maintenance of a cost-based price cap would be significant and in the absence of a regulator that role would fall to the CMA.

99. A simpler price-based cap would still involve costs for the CMA but depending on design could be more practicable to implement and monitor but would not rule out a more individualised cost-based cap in future if a regulator was appointed.
100. The main advantage of using the CMA's powers and not relying solely on making a recommendation to government is that this will enable a more timely implementation of any price control remedies, rather than awaiting the establishment of a new regulatory body. In addition, the CMA could rely on its monitoring and enforcement experience to establish processes to implement a price control remedy in the short-term.
101. We would also consider whether an external body funded by the industry – similar to a Monitoring Trustee - should be appointed to support the CMA and to provide additional resource during the implementation period.
102. The transition process between the CMA and a new regulatory body and also the interaction between any short and longer-term regulations needs to be carefully considered and detailed.
103. In considering potential recommendations, the CMA is mindful of the devolution of powers to Scotland, Wales and Northern Ireland. The CMA will engage with each of the devolved administrations as well as the UK Government in developing its remedies. In making recommendations to the Scottish Government, the CMA will take into account the emergence of the distinct legislative and regulatory context in Scotland, which has resulted from the 2016 Act.

Effective monitoring and enforcement

104. An effective remedy should be capable of effective implementation, monitoring and enforcement. The operation and implications of the remedy need to be clear to the persons to whom it is directed and also to other interested persons (including consumers and other businesses that may be affected by the remedy).
105. There are a number of enforcement and monitoring issues to be considered during the design process, including:
 - a) Should reporting requirements be the same for all providers?
 - b) Designing an effective communication strategy to ensure that consumers, crematoria and relevant third parties understand their rights and responsibilities under remedies which the CMA imposes or recommends. We will also consider how to ensure that a price-controlled package is

sufficiently promoted and visible to consumers and what obligations crematoria operators should have in this regard.

Implementation costs

106. The introduction of a price control remedy may result in implementation costs, ongoing compliance and monitoring costs.³⁷ In addition, there are monitoring and enforcement costs for the CMA and government. We are considering if a new regulator is established, how this would be funded in addition to other new regulatory costs for the CMA, government or other third parties. This could be through general taxation, a levy on crematoria or a licence fee (if a licensing scheme is introduced).³⁸ We shall consider these costs during our assessment of effectiveness and proportionality.

Timing and end date for Order/undertakings

107. Remedies are designed to have ongoing effects on business conduct throughout the period they are in force, and the duration of these measures is a material consideration.³⁹ As set out in the aims (paragraph 29) it is intended that a price control remedy should provide an ongoing restriction on future, above inflation, price increases, in addition to remedying any present detrimental effects on customers. Therefore, any price regulation should remain in force for an appropriate period.

108. Our current thinking, as discussed in paragraph 93, is that any price cap should be initially introduced and implemented by the CMA. It is intended that responsibility would then transition to the proposed new regulator. We consider that the Order would have a defined end date and would remain in effect for a period of for example, between 5 and 7 years.

Invitation to comment on this proposed remedy

109. We would welcome views on the proposals outlined in this working paper and any other comments on the proposed price control remedy.

110. We would welcome views on our current thinking that any price regulation in the form of a maximum price would apply to all crematoria operators in the same way.

³⁷ Paragraph 352 (b), [CC3 \(Revised\)](#) - Guidelines for market investigations.

³⁸ [Quality regulation remedies working paper](#).

³⁹ Paragraph 45, [CC3 \(Revised\)](#).

111. We would also welcome responses on the approach to defining the scope of products and services included in the benchmark package, in particular:
- a) Are there any products or services which are not currently included in the suggested benchmark package which should be included? What is the evidence to support this view?
 - b) Are there any products or services which have been included in the suggested benchmark package which should not be included? What is the evidence to support this view?
 - c) What is your view on time-based restrictions relating to the benchmark package, for example the length of the chapel slot?
112. We welcome views on how the price cap measures could be determined and reviewed, in particular:
- d) Do you consider that using pricing information from the sector is a sensible approach for designing a price cap for crematoria? Do you think a rate of return approach would be more appropriate in this sector?
 - e) Do you have any views on the design variants we have outlined (for example, whether the price level of any price regulated package should be set as one price across the UK, whether we should make allowances for certain higher cost areas such as London or whether any cost base should be done on a crematoria by crematoria basis or otherwise)?
 - f) Do you have any suggestions as to the criteria we should use to set the benchmark for the initial level of the price cap?
 - g) Do you have any views on how the Burial and Cremation (Scotland) Act 2016 should interact with any price regulation implemented by the CMA, or a new regulator?
113. We are also interested in responses to the following questions relating to implementation, monitoring and enforcement of the price control:
- h) What is your assessment of whether the option of setting a maximum price for a benchmark package of products/services (paragraph 49) is capable of effective;
 - implementation?
 - monitoring?
 - enforcement?

- i)* Do you think that compliance reporting requirements to the CMA or a regulator, should be the same for all crematoria?
- j)* Do you have any views or suggestions on designing and implementing an effective communication strategy to ensure that consumers, crematoria and relevant third parties understand their rights and responsibilities if price regulation is introduced? In addition, how could we ensure that a benchmark package is sufficiently promoted and visible to consumers (paragraph 105.b)?
- k)* What preparation would be required and how long do you think crematoria might require to prepare for the implementation of any price control regulation?
- l)* What would be the likely costs of implementation, monitoring and enforcement for crematoria?
- m)* Do you consider an initial duration of 5 to 7 years is an appropriate period for the implementation of a price control remedy and achievement of its aims (paragraph 108)?
- n)* Do you consider there to be other risks or options for mitigation which we have not considered (paragraphs 83-86)?

Please provide any other comments or questions.

Appendix A

Local authority powers to provide and charge for crematoria services

1. This appendix sets out an overview of our current understanding of the powers of a local authority to provide and charge for crematoria services in each of the devolved nations. The appendix also considers the power of a local authority to provide crematoria services for a commercial purpose.

Introduction

2. The services provided by local authorities fall into two broad categories:
 - (a) Services which they are under a duty to provide; and
 - (b) Discretionary services: i.e. those services which they have the power – but not an obligation - to provide.
3. The provision of crematoria services falls within the category of discretionary services provided by a local authority.
4. A local authority needs an express or general power to both provide a discretionary service and to impose fees or charges for such services.⁴⁰ We understand the legislation enabling local authorities to offer crematoria services gives an express power to charge for some services, and a general power to charge for other services, as set out below.

Crematoria Services

5. We understand that local authorities provide a range of ‘Crematoria Services’, including:
 - (a) Services and functions directly related to the cremation process, including maintenance of the necessary equipment and building;
 - (b) Services relating to the cremation service, including the provision of a chapel, AV services and the buildings occupied by those attending the service; and

⁴⁰ See for example, *Baroness Wenlock v River Dee Co* (1885) 10 App. Cas. 354 at 362; *Att-Gen v. Great Eastern Railway Co* (1880) 5 App. Cas. 473 at 478.

- (c) Services provided after the cremation and cremation service, including the provision of non-standard urns; memorials, gardens of remembrance etc.

The General Provision of Crematoria Services in England and Wales

6. We understand that, as further set out below, the power for local authorities to provide and charge for Crematoria Services can be found in a combination of:
 - (a) the Cremation Act 1902 (CA02);
 - (b) the Local Government Act 1972 (LGA72); and
 - (c) the Local Government Act 2003 (LGA03).
7. The CA02 provides an express power to provide and charge for at least some Crematoria Services, as follows:
 - (a) an express power (under section 4) to burial authorities⁴¹ for the provision and maintenance of crematoria (defined under section 2 as “any building fitted with appliances for the purposes of burning human remains and shall include everything incidental or ancillary thereto”).
 - (b) an express power (under section 9) for burial authorities to ‘demand payment of charges or fees for the burning of human remains in any crematorium provided by them’.
 - (c) an express power (under section 12) to fix a fee ‘in respect of a burial service before, at or after cremation’.
8. While the CA02 provides an express power to charge a fee in relation to at least some Crematoria Services, it does not provide any guidance on the level or nature of the fees that may be charged. We understand that, in the absence of clear terms showing the intention of Parliament to confer general revenue-raising powers on a local authority through the relevant charges, the charge should be set by reference to the purpose of the applicable legislation. Accordingly, the courts have determined that where a local authority is authorised to charge for the provision of a particular service or services, the local authority should charge such fees as they reasonably consider will cover the total cost of providing the relevant service(s).⁴²

⁴¹ Each local authority is a burial authority pursuant to s214 LGA72.

⁴² *R v Manchester City Council ex parte King* [1991] 89 LGR 696.

9. Under s111 LGA72, a local authority shall have the power to ‘do anything... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions’⁴³ but ‘shall not by virtue of this section raise money’.⁴⁴
10. It seems to us that to the extent Crematoria Services do not fall within the scope of the powers set out in the CA02, then a local authority could provide such services under s111 LGA72.
11. Under section 93(1) LGA03 provides that a local authority may (subject to any express prohibition) charge a person for the provision of a service that they do not otherwise have the power to charge for provided that (i) the local authority is authorised but not required to provide that service; and (ii) the charge is imposed on a person who has agreed to that service being provided. We understand that this provides a power for a local authority to charge for Crematoria Services provided under s111 LGA72.
12. Section 93 LGA03 also sets out the basis on which any charges imposed under that section should be made. Section 93(3) provides that the power under s93(1) LGA03 is ‘subject to a duty to secure that, taking one financial year with another, the income from charges under that subsection does not exceed the costs of provision’. Section 93(4) states that the duty under subsection (3) applies separately in relation to each kind of service.
13. In light of the above, we understand that, although a local authority may charge for any Crematoria Services it provides, such charges should be set with a view to recovering the costs of providing those Crematoria Services⁴⁵ and not with a view to raising funds to support other services it provides (including, for example, the wider range of funeral-related services⁴⁶ it may offer).

The General Provision of Crematoria Services in Northern Ireland

14. We understand that there is no material difference between the position set out in relation to England and Wales, and the position in Northern Ireland, as further set out below.

⁴³ Subsection 1.

⁴⁴ Subsection 3.

⁴⁵ Which we understand may include an element of a local authority’s more general costs (e.g. HR, IT, finance etc.) insofar as they properly relate to the provision of Crematoria Services.

⁴⁶ Such as the provision and maintenance of cemeteries and closed churchyards; the provision of public health funerals (under section 46(1) of the Public Health (Control of Disease) Act 1984), funeral director services, bereavement advice services, coroner services and the provision of mortuary services.

15. The Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 (the 'LGNI85') sets out a general power for a council to provide crematoria and to fix the charge or fee 'for or in connection with cremations in any crematorium provided by it'.
16. The LGNI85 does not provide any further guidance in relation to how such charges should be calculated. However, we understand that, as is the case in England and Wales, the general constitutional rule, that the powers of a local authority are confined to the terms of their relevant authorisations, would apply. Accordingly, in the absence of a clear legislative intention to confer general revenue-raising powers on a Northern Ireland council, we understand that the discretion to charge can only be exercised having regard to the purpose of the relevant legislation. In light of the caselaw in England and Wales, we do not consider the LGNI85 is likely to confer a general revenue raising power. Consequently, our understanding is that a council must not set charges under the LGNI85 with a view to making a profit, but instead should charge such fees as they reasonably consider will cover the total cost of providing the relevant services.
17. To the extent any Crematoria Services are not provided under the LGNI85, then we understand they are likely to be provided under the Local Government (Northern Ireland) Act 2014 (the 'LGNI14'). Under section 79 of the LGNI14 a council has the power 'do anything that individuals generally may do' including the power to do it for a charge provided that (i) the council is authorised but not required to provide that service; (ii) the council would not otherwise have the power to charge for that service; and (iii) the charge is imposed on a person who has agreed to the that service being provided.
18. As is the case in respect of the equivalent powers in England and Wales, the power to charge under section 79 LGNI14 is also subject to a duty in section 81(3) to secure that, taking one financial year with another, the income from such charges does not exceed the costs of provision. Further, section 81(4) states that the duty under subsection (3) applies separately in relation to each kind of service.

The General Provision of Crematoria Services in Scotland

19. In Scotland, the legislative position has recently changed. With effect from 4 April 2019, the CA02 was repealed⁴⁷ and replaced by the Burial and Cremation (Scotland) Act 2016 (BCSA16), an Act of the Scottish Parliament.

⁴⁷ Prior to 4 April 2019, the CMA understands there was no material difference between the position in Scotland and the position in England and Wales, as set out above.

20. Section 46 of the BCSA16 provides a local authority with the power to provide a crematorium (being a building fitted with equipment for the carrying out of cremations and includes land (other than a burial ground) pertaining to such a building).
21. To the extent that any Crematoria Services are not provided under section 46 BCSA16, then we understand they would be provided under section 69 Local Government (Scotland) Act 1973 (LGSA73) which provides a local authority with the power to 'do anything... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'.
22. Under section 63 of the BCSA16, a local authority has the power to charge 'as it thinks fit' for cremations carried out in the crematorium and for other services it provides relating to cremation.
23. We understand that section 63 BCSA16 is likely to be broad enough to permit a local authority in Scotland to charge for all Crematoria Services they provide, whether under the BCSA16 or the LGSA73.
24. We note that, on its face, section 63 BCSA16 would appear to provide a local authority with a broad discretion with regards to setting the level of any fees and charges for any Crematoria Services it provides. However, we understand the same general constitutional rule that applies elsewhere in the UK (namely that the powers of a local authority are confined to the terms of their relevant authorisations) would also apply in Scotland. Accordingly, in the absence of a clear legislative intention to confer general revenue-raising powers on a local authority in Scotland, we understand that the discretion to charge can only be exercised having regard to the relevant purpose of the legislation, namely here, the provision of 'cremations carried out in the crematorium and for other services it provides relating to cremation'.
25. In light of the caselaw of in England and Wales, we do not consider the BCSA16 is likely to confer a general revenue raising power. Consequently, our understanding is that a local authority must not set charges with a view to making a profit, but instead should charge such fees as they reasonably consider will cover the total cost of providing the relevant services.
26. We, therefore, understand there is no material difference between the ability of a local authority in England, Wales or Scotland to provide and charge for Crematoria Services.

The Provision of Crematoria Services for a Commercial Purpose

England and Wales

27. Under section 95 LGA03, local authorities have the power⁴⁸ to provide a discretionary service for a commercial purpose, providing the following conditions are satisfied:
- (a) Such power must be exercised through a separate trading company;
 - (b) The local authority must prepare and approve (in accordance with normal public law requirements⁴⁹) a business case in support of using the power before exercising the power to trade;
 - (c) The local authority must also recover the costs of any accommodation, goods, services, staff or anything else it supplies to a company to facilitate the exercise of the power to trade.
28. We understand a local authority in England also has an equivalent power to provide discretionary services for a commercial purpose under section 4 of the Localism Act 2011.
29. We understand that both the Localism Act 2011 (in relation to England) and s95 LGA03 (in relation to both England and Wales) would enable a local authority to provide Crematoria Services for a commercial purpose, enabling them to provide those services at a profit (despite the cost recovery obligations set out above that would generally apply).

Scotland and Northern Ireland

30. We are not aware of any similar provisions that enable a local authority in Scotland or a council in Northern Ireland to provide discretionary services (including Crematoria Services) for a commercial purpose i.e. at a profit.

⁴⁸ In relation to England, through the Local Government (Best Value Authorities)(Power to Trade)(England) Order 2009/2393, and in relation to Wales through the Local Government (Best Value Authorities)(Power to Trade)(Wales) Order 2006/979.

⁴⁹ Including compliance with their own procedural rules, Wednesbury principles of reasonableness, proper purposes and fiduciary duty.