

**Response to the CMA's Working Papers published on 20 February 2020**  
**Memoria Ltd**

**1. Executive summary**

- The CMA's assertion that crematoria are making excessive profits is generally flawed and **it does not apply to Memoria**. Memoria has material concerns over the CMA's profitability analysis of crematoria, and its ability to fairly and accurately capture the sector and Memoria's circumstances. However, even on the basis of the CMA's analysis, [✂]. In fact, contrary to the CMA's assertion, evidence suggests that [✂]. As such, it is entirely ineffective and unreasonable (by way of being disproportionate) to impose any remedy for excessive profitability on Memoria, [✂].
- The CMA has made no effort to examine the underlying data to identify a link between the alleged "excessive profitability" it has found at some crematoria and failures of competition. As such, the CMA has forgone any chance of finding appropriate remedies for any consequent AEC. Memoria believes that the alleged excessive profits found are **not linked to pricing**, but to high utilisation for certain crematoria using written down assets in highly populated areas where planning restrictions shield them from rival entry. As such, by proposing to cap prices, the CMA has devised remedy proposals which are underpinned by a fundamental misunderstanding of the issues and are thus ineffective, disproportionate, and destructive of relative consumer benefits.
- The CMA's conclusion that cremation services are a "homogenous 'product'" is erroneous, unsupported, and disregards the myriad of evidence provided to the contrary. Memoria believes that the **only** homogenous aspect of the service offered is the actual cremation of the deceased. Everything else is characterised by important quality differentials. By contrast, the CMA has based its proposal for price regulation on its mistaken assumption that all crematoria offer a single homogenous product, rendering the remedy's foundation entirely erroneous. In doing so, the CMA has devised a one-size-fits-all price regulation which is both ineffective and disproportionate. Further it would disincentivise investment in both existing and new sites, pushing the cremation sector back into the vicious cycle of underinvestment, poor quality, and artificially low prices of the 1970s-1990s, with the associated destruction of relevant consumer benefits.
- The CMA's proposal for the creation of a Benchmark Product subject to a price cap is dangerous and would be completely ineffective. As proposed, the Benchmark Product could conceivably take three main forms:
  - (i) a basic price-regulated package existing alongside other standard cremation products, which would be completely ineffective as consumers who would keep buying more appealing non-regulated products;
  - (ii) a comprehensive price-regulated package with a high price cap, which would risk becoming an upward price magnet for the vast majority of cremations, and also risk being too expensive to achieve enough uptake to be an effective remedy; and
  - (iii) a comprehensive price-regulated package with a low price, which might just achieve enough uptake to seem a beguiling remedy, but which would also inevitably price most non-regulated products out of the market, limiting revenues and making investment untenable, with the assured destruction of relevant consumer benefits (i.e. choice, quality and future investment).

As such, all price-capped Benchmark Product options are ineffective, and/or disproportionate; and/or destructive of relative consumer benefits. Regardless, any type of price-capped Benchmark Product would be entirely ineffective at mitigating the alleged excessive profitability, as its underlying causes are **not related to pricing**.

- Memoria does not believe that the CMA can credibly maintain that a pricing-data-based maximum price could be designed to allow operators to achieve a "fair" profit margin. Such a cap would always be blind to variations in quality (and associated capital investments) and would not take rising operational costs and

increased cost of capital into account. Additionally, such a price cap would have a chilling effect on investment for any new site by limiting the return on investment given the high costs of entry. It would also deter investment in existing crematoria, as this could only be recouped through higher volumes rather than price increases. Moreover, it would be entirely ineffective at mitigating any excessive profitability whose underlying causes are **not related to pricing**. Further, it would be disproportionate, and destructive of relative consumer benefits by stifling competition, quality differentiation, and innovation.

- The CMA believes that an independent-regulator-led price cap based on rate of return might be a valid way to “square the circle” in the long term. This ignores the practical difficulties and large ongoing costs required to successfully administer this type of regulation for both the regulator and the industry, which may result in underinvestment in facilities. Further, it might affect the prices paid by families for cremation services as the cost of regulation is passed on to customers, causing a significant destruction of relative consumer benefit. Finally, if the proposed regulator were to not accurately conduct its analysis, it would generate material distortions in the market.
- In light of the above, it is paramount that the CMA reconsider its erroneous assessment and analysis and, if required, design a remedy for any AEC found that would really foster competition, entry, quality, differentiation and innovation.

## 2. Overview

This paper contains the response of Memoria Ltd (“**Memoria**”) to the CMA Working Papers published as part of its Funerals Market Investigation on 20 February 2020.

Specifically, this response addresses the issues that Memoria has identified in the (i) *Crematoria profitability analysis*; (ii) *Cost of capital analysis*; and (iii) *Remedy options for regulating the price of crematoria services* (collectively, the “**Working Papers**”).

The Working Papers suggest that all crematoria offer customers a single homogenous product offering at the same level of quality, which families purchase with no regard to quality differences between one crematorium and another, where location is potentially the only differentiator.

Memoria does not recognise this representation of the cremation sector. The cremation product market is anything but homogenous. It consists of a diverse offering, where the actual cremation of the deceased is the only constant element amid important variables of service type, quality of site and of service offering. As a result of this fundamental error in understanding the cremation market, the CMA has arrived at a remedy that will always be a square peg in a round hole. The CMA’s proposal is neither effective nor proportionate, and it is ultimately destructive of consumer benefits.

Memoria acknowledges that the CMA has not yet found any adverse effect on competition (“**AEC**”) in the cremation market. However, Memoria notes that the Working Papers expressly refer to excessive profits being made by crematoria as the primary detriment to competition that the CMA has found thus far.<sup>1</sup> Therefore, for the purpose of this response to the Working Papers, Memoria will refer to the alleged existence of “excessive profits” as the “**Provisional AEC**”.

The Enterprise Act 2002 stipulates that if the CMA finds an AEC during a Market Investigation, it is required to consider the imposition or recommendation of remedies.<sup>2</sup> Further, in making its decision, s 138(4) Enterprise Act 2002 requires the CMA to:

“have regard to the need to achieve as **comprehensive a solution** as is **reasonable** and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as

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<sup>1</sup> CMA, *Remedy options for regulating the price of crematoria services*, para 45.

<sup>2</sup> Enterprise Act 2002, s 138(2).

resulting from the adverse effect on competition.” (emphasis added)

To fulfil this requirement, the CMA should consider possible comprehensive remedy options to address the AEC, their detrimental effects, and whether they are (i) effective and (ii) reasonable by being proportionate.<sup>3</sup>

In evaluating the effectiveness of potential remedies, the CMA should consider the risks associated with different remedy options and should favour remedies that have a higher likelihood of achieving their intended effect of remedying the Provisional AEC.<sup>4</sup> Such remedies should be capable of effective implementation, monitoring and enforcement.<sup>5</sup> As such, behavioural remedies (e.g. a price cap) are deemed to have a reduced effect and are likely to constrain beneficial aspects of competitive rivalry.<sup>6</sup>

In considering the reasonableness of different remedy options, the CMA will have regard to their proportionality. A remedy will be considered disproportionate if it is ineffective with respect to its aim, or if its ‘costs’ are disproportionately large in comparison with the AEC at which it is aimed.<sup>7</sup> Therefore, a proportionate remedy is one that:

- (a) is effective in achieving its legitimate aim;
- (b) is no more onerous than needed to achieve its aim;
- (c) is the least onerous if there is a choice between several effective measures; and
- (d) does not produce disadvantages which are disproportionate to the aim.<sup>8</sup>

In this response, Memoria will outline how the price-cap remedy proposed by the CMA is neither a comprehensive solution to the Provisional AEC, nor is it reasonable.

In this paper, Memoria will also show that the CMA has:

- largely ignored the underlying causes of the Provisional AEC in its profitability analysis;
- misrepresented the crematoria product market as one that is “homogenous”;
- erroneously devised an ineffective price-regulation remedy as a result;
- ignored the disproportionately onerous consequences on the market that such remedy would cause; and
- ignored the disproportionately destructive consequences on consumer benefits that such remedy would cause.

Finally, the paper will discuss the high cost and risk of consumer detriment associated with the CMA’s rate of return regulation remedy proposal.

Overall, this response will demonstrate that the CMA’s entire remedy proposal is (i) ineffective; (ii) disproportionate; and (iii) destructive of relevant consumer benefits.

### **3. The CMA’s Provisional AEC is erroneous, both in general and for Memoria specifically**

#### **a) The CMA’s profitability analysis** [✂]

Memoria has asked Charles Rivers Associates (“CRA”) to review and comment on the CMA’s profitability analysis in *Crematoria profitability analysis* (the “**Profitability Paper**”); and *Cost of capital analysis*. The results of this review are provided in Appendix 1 to this response, whereas as summary of CRA’s main findings is provided in

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<sup>3</sup> CC, *Guidelines for market investigations: Their role, procedures, assessment and remedies* (CC3 Revised) para 329.

<sup>4</sup> CMA, *Market Studies and Market Investigations: Supplemental guidance on the CMA’s approach* (CMA 3) para 4.16.

<sup>5</sup> *ibid*, para 4.17.

<sup>6</sup> *ibid*

<sup>7</sup> *Tesco plc v Competition Commission* [2009] CAT 6 (4 March 2009) para 131.

<sup>8</sup> CC, *Guidelines for market investigations: Their role, procedures, assessment and remedies* (CC3 Revised) para 344; as originally set out in *Tesco plc v Competition Commission* [2009] CAT 6 (4 March 2009) para 137; and later cited by *Barclays Bank plc and others v Competition Commission* [2009] CAT 27 (16 October 2009) para 20, and *BAA Limited v Competition Commission and Ryanair Limited* [2012] CAT 3 (1 February 2012) para 20(2).

this section 3(a).

CRA has material concerns over the details of the analysis and, particularly:

- the depreciation of Memoria's buildings over 100 years, rather than a 50-year life;
- the valuation of older land purchases, which (although not directly relevant to Memoria) is likely to result in the profitability of some crematoria and operators being misrepresented relative to others, due to the very crude approach taken to applying a single land value to all older sites outside the M25;
- the use of an 8% WACC based on comparators that are much larger than Memoria, with access to cheaper capital, and often not focused on the cremation sector alone; and
- [REDACTED].

Even on basis of the CMA's analysis, the estimated Memoria profitability over the relevant period is [REDACTED].

The CMA is correct to note that Memoria's profitability [REDACTED]. This reflects that, in the first few years of the analysis, the majority of Memoria's sites were new [REDACTED] (with Memoria starting with one site in 2014, and opening 5 more between 2014 and 2015). Since then, only a single new site has opened each year, [REDACTED].

Memoria notes that the CMA appears to believe that [REDACTED].<sup>9</sup> In fact, CRA believes [REDACTED], as set out in Appendix 1 to this response. [REDACTED].<sup>10</sup>

**b) The CMA's disregard for the underlying causes of excessive profitability is a manifest error**

In defining the Provisional AEC, the CMA has made no effort to examine the underlying data to identify a link between the supposedly "excessive profits" it has found at certain crematoria (or for certain providers) in the Profitability Paper, and any particular failures of competition. In failing to do so, the CMA has foregone any chance of finding and devising an appropriate remedy or remedies to the Provisional AEC. In Memoria's view, the underlying causes of the Provisional AEC are generally entirely related to high utilisation figures for crematoria using written down assets in highly populated areas, whether urbanised or green belt (where planning restrictions effectively protect them from entry). By contrast, Memoria provides excellent quality and value for money wherever it operates and it is simply [REDACTED].

In reality, as explained by Memoria in previous submissions (including its response to the CMA's working papers published on 30 January 2020), volume and utilisation are absolutely critical to the profitability of crematoria (and their viability).<sup>11</sup> [REDACTED]. Equally, crematoria in highly populated areas with no competition that are doing thousands of cremations per annum (in some cases, well over 3,000 cremations p.a.) are likely to be highly profitable, particularly if they are also underinvested (as is often the case).

The very existence of such a situation is due to the difficulty of obtaining planning permission to locate a new crematorium in an area that is already "served" (however poor or oversubscribed that service may be). These crematoria are not necessarily charging very high prices relative to the national average. Nonetheless, they are charging more than required to cover costs, and more than their often low standards of service would allow them to, if families had another viable alternative. As such, these sites will inevitably tend to produce the vicious cycle of underinvestment and poor quality that Memoria has pledged to consign to the past.

Any detriment to competition that the CMA might find will neither be addressed nor mitigated by a remedy that is underpinned by a fundamental misunderstanding of the causes of any hypothetical Provisional AEC. Therefore, the CMA should make it its absolute priority to investigate and understand the drivers of the supposed excessive profits that lie at the heart of the Provisional AEC. As Memoria sets out in section 4 of this response, failing to undertake this critical stage of the analysis would result in remedy proposals that are both

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<sup>9</sup> [REDACTED].

<sup>10</sup> Section 3 of Appendix 1 to this response; and the Confidential Annex to Appendix 1.

<sup>11</sup> Memoria's response to the CMA's Working Papers of 30 Jan 2020, para 4(a)(iii).

(i) ineffective at mitigating the Provisional AEC, and (ii) entirely destructive of relative consumer benefits.

c) The CMA's conclusion that cremation services are homogenous is erroneous

Memoria has throughout this process rejected the CMA's erroneous characterisation of cremation services as a "homogenous 'product'."<sup>12</sup> The CMA has made this assertion without any further discussion or reference to the myriad of evidence to the contrary, when it is clear that the **only** homogenous aspect is the actual cremation of the deceased – nothing else. Further, the CMA has based its entire proposal for a price-regulation remedy for crematoria on this assumption, rendering its proposal's foundation entirely erroneous.

Memoria has already submitted primary evidence to the CMA, including its response to the CMA's working papers published on 30 January 2020, that shows the vast differential of quality and product offerings on the cremation market. The CMA is not able to simply ignore such diversity by considering all offers equal and "homogenous" without having substantive evidence to that effect. Such evidence is lacking entirely in the CMA's analysis.

To the contrary, the evidence that is before the CMA shows that crematoria vary in the quality of service that they offer, and that families do value quality and choice. The CMA's own consumer survey indicates that quality, in one form or another, is a fundamental factor for families when choosing a crematorium, and when recommending a crematorium to someone.<sup>13</sup> Further, the evidence indicates that the increasing differentiation in cremation products, which Memoria has led the way in offering (e.g. increased time slots; off-peak discounts; Low Cost Funerals; and Direct Cremations), provides a really valuable choice to consumers, who should have the right to choose a service that is right for them.<sup>14</sup>

Standard slot lengths offered by crematoria have increased considerably in recent years.<sup>15</sup> This reflects an increasing number of families who want to choose whether to undertake a full memorial service together with the cremation or hold a separate service in church earlier in the day. It also reflects the increasing emphasis that many customers place on having a private event, without crossing paths with other grieving families using the same facilities before and after their service.<sup>16</sup>

Further, as evidenced in previous submissions, the increasing differentiation of the offer made to families with "non-standard" cremation products has added a significant amount of choice for customers, who are now able to find the best way to remember their loved ones in a way that reflects their own personal circumstances and consumer preferences.<sup>17</sup>

- the discounting of early slots has provided a clear and valuable choice for consumers who are willing to accept less popular times of the day;<sup>18</sup>
- Low Cost Funerals have allowed Memoria customers to arrange an entire funeral, including an attended service, at a price significantly below those associated with the services of a funeral director;<sup>19</sup> and
- Direct Cremations have allowed families to opt to celebrate the life of their loved one somewhere different than the crematorium, or not at all, and pay a smaller price for a cremation that is carried out at off-peak times, possibly unattended, and not necessarily at a local facility.<sup>20</sup>

The only element of the cremation market that Memoria absolutely accepts as homogenous is the actual cremation of the deceased, whereas everything else is characterised by important quality differences.

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<sup>12</sup> CMA, *Remedy options for regulating the price of crematoria services*, paras 3, 49 and 65.

<sup>13</sup> CMA Funerals Market Investigation, *Consumer survey results*, paras 96 and 97, and tables 25 and 28; Memoria's response to the CMA's Working Papers of 30 Jan 2020, para 4(a)(i).

<sup>14</sup> Memoria's response to the CMA's Working Papers of 30 Jan 2020, para 4(a)(ii) and (b).

<sup>15</sup> *ibid*, Figure 1.

<sup>16</sup> *ibid*, para 4(a)(ii).

<sup>17</sup> *ibid*, para 4(b).

<sup>18</sup> *ibid*, para 4(b)(i).

<sup>19</sup> *ibid*, para 4(b)(ii).

<sup>20</sup> *ibid*, para 4(b)(iii).

Therefore, the only “homogenous product” present on the cremation market is the unattended Direct Cremation, a “non-standard” product, which the CMA has explicitly excluded from the remedy.<sup>21</sup> In fact, the more a product is different from an unattended Direct Cremation, the more variables of quality will play a fundamental role in shaping the type of product that a crematorium offers to its consumer. Further, even when two products offered by different crematoria are similar in type, the quality of such offering will always vary greatly between sites.

This shows that, beyond unattended Direct Cremations, crematoria across Great Britain neither offer a “homogenous product”, nor is there any homogeneity in the level of quality provided. The CMA may be under a mistaken impression, due to the very small sample of crematoria that it visited, and the fact that operators would have prepared for the visit and would not have shown off their poorer facilities.

[REDACTED], which proves the non-homogenous nature of the market both in terms of product type and level of quality. The fact that [REDACTED], clearly shows that crematoria offerings are differentiated and that diverse offerings and quality play a fundamental factor in families’ choice of crematorium.<sup>22</sup> To claim anything else puts assertion over and above the primary evidence [REDACTED].

This view is consistent with the CMA’s own evidence, whereby some local authorities that have experienced entry have told the CMA that it made them consider their offer and pushed them to make service improvements by comparing their facilities to those offered by the new entrants.<sup>23</sup> It is also consistent with Memoria’s previously submitted evidence showing several instances of rivals increasing their slot lengths after Memoria’s entry.<sup>24</sup>

Memoria has explained to the CMA on numerous occasions the growing importance of innovative services in the changing landscape of the cremation sector, and the increasing presence and need for a differentiated, quality-based offering. Memoria has found no trace of that evidence in the Working Papers. Memoria has also submitted how both local authority and private providers increasingly look to improve their offering to meet these needs.<sup>25</sup> This factually supports the conclusion that there is customer demand for diverse products and higher quality. Otherwise these providers would be acting irrationally in making such investments and changes to their offer.

Memoria has already submitted to the CMA how it has analysed the Google reviews available for its own crematoria and those of its local rivals in each area.<sup>26</sup> The reviews clearly show how quality is particularly important for Memoria, but also that it is an important consideration for customers in general. The large majority of reviews mentions good quality (particularly for Memoria for whom this is true 83% of the time, but also for rivals for whom quality is mentioned 65% of the time). There is also a significant number of cases where customers mention poor quality (16% of entries across all rivals, though only 5% of entries for Memoria).<sup>27</sup>

This evidence highlights how, despite all the investments and improvements made to crematoria in recent years, there are still areas in need of improvement. Depending on where families live, the level of quality and diversity of crematoria offering that is available to them, varies significantly. This has resulted in a “postcode lottery” of crematoria quality based on local entry, which is the exact opposite of a “homogenous product” that the CMA seeks to describe.<sup>28</sup> This is further evidenced by the many local news stories that Memoria has previously collated and submitted to the CMA highlighting the stark quality differentials across the country.<sup>29</sup> Again, there

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<sup>21</sup> CMA, *Remedy options for regulating the price of crematoria services*, 51-52.

<sup>22</sup> Memoria’s response to the CMA’s Working Papers of 30 Jan 2020, para 4(b)(iii).

<sup>23</sup> *ibid*, para 3(c)(ii) and Appendix 1; CMA Funerals Market Investigation, *Crematoria: evidence on competition between crematoria*, para 113 and Footnote 100.

<sup>24</sup> Memoria’s response to the CMA’s Working Papers of 30 Jan 2020, para 4(b)(iii).

<sup>25</sup> *ibid*, para 4(a)(ii) and Appendix 5.

<sup>26</sup> *ibid*, Appendix 3.

<sup>27</sup> *ibid*, Table 4.

<sup>28</sup> *ibid*, Appendices 1 and 2.

<sup>29</sup> *ibid*, Appendix 2.

is no trace of that evidence in the working papers.

The current patchwork of quality levels can result in long waiting times or poor facilities, which are often reason for operators to invest in new crematoria or in refurbishing old sites. Therefore, if the offering across the country really is to be levelled to allegedly benefit consumers, it is of critical importance to allow competition to develop and investment to continue and not be stifled. Memoria has already explained to the CMA how forecasts for the UK's death and cremation rates suggest that simply building new crematoria may not be sufficient to ensure that supply meets future demand.<sup>30</sup> Investment and innovation by existing sites will also be crucial, as it is capable of yielding quicker results.

The CMA must address the errors in its analysis and stop ignoring the importance of quality in the evidence before it. The CMA must stop simply characterising the cremation market as a "homogenous 'product'" both in relation to the Provisional AEC, and when designing any remedy. Its current erroneous analysis, and the resulting one-size-fits-all price regulation proposal would cause a wholesale destruction of relevant consumer benefits, as operators would be disincentivised to continue investing in existing sites, and disincentivised to invest in new crematoria.

On its current path, the CMA risks pushing the cremation sector back into the vicious cycle of underinvestment, poor quality, and artificially low prices of the 1970s-1990s with the associated loss of relevant consumer benefits.

#### **4. The CMA's proposed price-regulation remedy is (i) ineffective; (ii) disproportionate; and (iii) destructive of relevant customer benefits**

In this section 4, Memoria addresses the tensions created by the CMA's proposed remedy. Memoria stresses that, in doing so, it does not accept the Provisional AEC, nor does it believe that the proposed CMA remedies can ever be effective, as they do not address the underlying features and causes.

In *Remedy options for regulating the price of crematoria services* (the "**Remedies Paper**") the CMA has set out its intention to focus its proposed price regulation on a package of cremation products. The CMA has defined this package as comprising a commonly purchased combination of cremation services (the "**Benchmark Product**").<sup>31</sup>

The CMA believes that the Benchmark Product should include:

- all back of house services;
- the use of a chapel (with variants);
- medical referee fees (not applicable in Scotland);
- environmental surcharges (where applicable);
- use of music facilities; and
- a container for the ashes.<sup>32</sup>

The CMA has said that it wants the Benchmark Product to be based on standard fee services (i.e. peak hours); which excludes "non-standard" offerings such as off-peak hours and Direct Cremations. The CMA has said that it prefers the Benchmark Product to be devised as a package for a standard fee "given it would cover approximately 92% of the market for cremations."<sup>33</sup>

Further, while all operators would have to offer the Benchmark Product, the CMA maintains that this would not preclude crematoria from offering other products.<sup>34</sup> In fact, the CMA helpfully confirms that any add-on or

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<sup>30</sup> *ibid*, Appendix 1 para 1(a).

<sup>31</sup> CMA, *Remedy options for regulating the price of crematoria services*, paras 48-49.

<sup>32</sup> *ibid*, para 54.

<sup>33</sup> *ibid*, paras 51-52.

<sup>34</sup> *ibid*, para 53.

removal of services from the Benchmark Product would cause it to fall outside price regulation, with prices allowed to exceed the cap as a result.<sup>35</sup> This at least assumes that there would be competition outside of the benchmark product.

Finally, Memoria notes that the CMA has not yet decided whether a defined time slot length should be included in the Benchmark Product and that, in any case, such inclusion would not preclude operators from offering longer or shorter slots as chargeable extras.<sup>36</sup> Equally, the CMA has not yet concluded which services should be excluded from the Benchmark Product (though it is inclined to leave out extras such as webcasting; organist; visual tributes; etc.).<sup>37</sup>

Memoria believes that the CMA's current proposal for the Benchmark Product contains a dangerous and unresolved tension between the CMA's contention that it would be a basic benchmark package, sold alongside a varied and large non-regulated offering of cremation services, and its stated preference for it to be aimed at 92% of the cremation market. Memoria strongly believes the two characteristics are irreconcilable and the CMA cannot have it both ways.

If the CMA truly desires to create a basic price-regulated benchmark package that can exist alongside a diverse offering of non-price-regulated services, thus affording consumers the freedom to choose what is best for them, the Benchmark Product should only include:

- all back of the house services;
- a 30-minute time slot;
- basic use of the chapel with no extras;
- medical referee fees (not applicable in Scotland);
- environmental surcharges (where applicable);
- a basic temporary container for ashes transportation (e.g. a biodegradable box).

However, such a basic product could never appeal to 92% of the market, or even a simple majority of it. That is because, contrary to the CMA's contention, cremation services are not a "homogenous 'product'" and often the family will require a more bespoke service reflecting their particular preferences. In section 3(c) of this response (*above*), and in several previous submissions as part of this Funerals Market Investigation, Memoria has explained ad nauseam to the CMA that different crematoria operators offer different variants of cremation services and that there are vast differentials in quality. In light of this lack of homogeneity, and in Memoria's experience, most families would move away from a standardised basic package offered by all crematoria, and would opt to purchase personalised services to celebrate the life of their loved one in a manner that is both appropriate and reflective of their circumstances, personal tastes and preferences. There is nothing wrong with that.

However, for that reason, a Benchmark Product consisting of a basic regulated package would be entirely ineffective at mitigating any Provisional AEC, regardless of the underlying causes, as most consumers would want to keep buying non-regulated standard and "non-standard" cremation services. The practical effect is that very few customers would buy the Benchmark Product.

For the Benchmark Product to be able to mitigate any Provisional AEC, it would therefore have to be comprehensive enough to appeal to the vast majority of consumers. To do so, it would have to include many services and extras to make it attractive in the UK's non-homogenous cremation market (e.g. include at least a 45-minute slot, if not a 1-hour slot; and several elements of personalisation such as music, visual tributes, etc.). If a more attractive Benchmark Product were to be created, the level at which its price is capped would ultimately determine the effects it would have on the market:

- (a) a high-price cap would risk becoming a price magnet for the vast majority of cremations, regardless of quality; whereas
- (b) a low-price cap would entirely extinguish the crematoria's non-regulated standard product offerings.

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<sup>35</sup> *ibid*, para 60.

<sup>36</sup> *ibid*, para 62.

<sup>37</sup> *ibid*, para 58.



As with its basic version (*above*), a comprehensive Benchmark Product with a high price cap would not be priced competitively enough to be attractive to consumers, and therefore fail to reach the level of popularity needed to be able to mitigate the Provisional AEC. In fact, most consumers would keep buying non-regulated standard and “non-standard” cremation services, which operators would offer for a cheaper price. As such, the introduction of this remedy would be inconsequential to the market and ineffective in remedying any Provisional AEC.

A comprehensive Benchmark Product with a high price cap would also risk becoming a price magnet toward which all (regulated and unregulated) cremation service prices may converge. The CMA itself has identified the risk of the regulated maximum price becoming a focal point for the market, encouraging lower priced crematoria to increase their prices to the level of the cap.<sup>38</sup> The CMA’s assertion that local authorities’ cost-recovery obligation would mitigate this risk by limiting their ability to raise prices is simply not credible. The CMA’s own profitability analysis shows that local authorities are already breaking their cost-recovery obligation and, in any case, private operators are not bound by the same restraints.<sup>39</sup> Therefore, not only would a high-price-cap comprehensive Benchmark Product be an ineffective remedy, it would also be destructive of relevant consumer benefits and lead to higher prices.

Conversely, a comprehensive Benchmark Product with a low-price cap could potentially appeal to the vast majority of consumers, who would therefore see little reason to purchase any other cremation product. As such it might seem a beguiling remedy to the CMA to mitigate any Provisional AEC. However, it would inevitably eliminate the vast majority of other non-regulated standard cremation services, with the assured destruction of relevant consumer benefits and current and future investment.

Memoria urges the CMA to recognise that a low-price-cap comprehensive Benchmark Product would leave little space for non-regulated standard offerings to compete on the market. In fact, these would be squeezed between the remedy, covering up to 92% of the market, and the ever growing “non-standard” cremation products (currently assessed by the CMA at 8%).<sup>40</sup> Therefore, the market share of non-regulated standard offerings would be eroded from two fronts, only to be reduced to a puny amount or be extinguished entirely. Contrary to what the CMA might think, that is not a desirable outcome.

It would have disastrous consequences for the cremation market, as crematoria would *de facto* be prevented from selling any product that is priced higher than the Benchmark Product (as “non-standard” offerings would have to be cheaper by definition). This would seriously impact operators’ future revenues and have a chilling effect on investment both in new crematoria and in the refurbishment of existing sites. Ultimately, the sector would fall back into the vicious cycle of underinvestment, poor quality, and artificially low prices of the 1970s-1990s with all the associated losses of relevant consumer benefits.

It is Memoria’s belief that the CMA’s assertion that the proposed Benchmark Product would compete alongside non-regulated standard cremation products, including extras and add-ons, is both erroneous and unrealistic. If the CMA created a Benchmark Product that could exist alongside a varied and thriving non-regulated standard cremation product offering, it would simply not attract enough uptake to be effective in mitigating any Provisional AEC. Conversely, if the CMA were to devise a Benchmark Product with enough uptake to be effective in mitigating any Provisional AEC, then it would risk extinguishing all other forms of non-regulated standard cremation offerings to the ultimate detriment of consumers.

Thus far, in setting out how different variants of the Benchmark Product would be an ineffectual and/or destructive of relative consumer benefits, this section 4 has had to take the CMA’s profitability analysis at face value and assume a consequential Provisional AEC. However, as argued in section 3(b) of this response (*above*), Memoria strongly believes that the CMA has erred in not identifying the underlying causes of some crematoria’s

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<sup>38</sup> *ibid*, para 66.

<sup>39</sup> *ibid*

<sup>40</sup> *ibid*, para 52; and CMA Funerals Market Investigation, *Crematoria: background and market structure*, para 7; Memoria has provided the CMA with a wealth of evidence showing that “non-standard” cremation products are growing in popularity among consumers, including in Memoria’s response to the CMA’s Working Papers of 30 Jan 2020, para 4(b)(iii).

excessive profitability. In doing so, it asked itself the wrong questions and misled itself in reaching the erroneous conclusion that price regulation is an effective and appropriate remedy. Memoria rejects this and submits that any form of price regulation is any entirely inappropriate to mitigate any Provisional AEC.

Memoria's own view is that excessive profits (where they exist) are likely to be primarily driven by high utilisation and low land valuation, and not consumer prices.<sup>41</sup> Therefore, any price remedy such as the Benchmark Product would be ineffective at mitigating any Provisional AEC and its causes. Even if it were popular enough to take over the entire standard cremation product market, it would be to the detriment of quality, choice and consumer benefits.

Finally, the Remedies Paper states that the CMA's current thinking sees price regulation applying to all crematoria operators, regardless of whether such firms are contributing to any Provisional AEC (or not, in Memoria's case).<sup>42</sup> Memoria finds both this position and the resulting remedy erroneous, unreasonable and verging on the irrational. The CMA's own profitability analysis has shown that Memoria is not currently part of the Provisional AEC, as defined.<sup>43</sup> Additionally, Memoria has submitted evidence in section 3(a) of this response (*above*) showing that [REDACTED]. On the facts, there is no basis for the CMA's assertion.

In light of the above considerations, Memoria would like to point to the following:

**a) The remedy should not apply to Memoria** [REDACTED]

As set out in sections 3(a) and (b) of this response (*above*), the CMA has not found any quality concerns or [REDACTED]. In fact, the evidence shows that Memoria's profits ([REDACTED]) are constrained by its rivals. Further, it is clear that the price and quality of Memoria's services are designed in response to rivals' competitive pressure, and that Memoria's presence in the market also drives rivals' competitive responses.<sup>44</sup>

This reflects the fact that Memoria provides a high-quality service at competitive prices leading to significant consumer benefits in areas that were previously poorly served. Memoria's level of profitability ([REDACTED]) is incompatible with the CMA's assertion that crematoria profits are not constrained by competition. In fact, had Memoria's profits not been responding to competitive constraints, the CMA [REDACTED]. The CMA's conclusion that competition does not constrain crematoria profits is therefore factually erroneous in relation to Memoria; "Firm D"; and several local authority crematoria.<sup>45</sup> The CMA does not address this contradiction in the Working Papers, nor does it address why competition appears to constrain some crematoria providers more than others.

In light of the above analysis, and particularly the fact that that Memoria is [REDACTED], it can be concluded that Memoria is not contributing to any Provisional AEC that the CMA has identified for the cremation market. As such, it would be entirely ineffective, disproportionate (thus unreasonable), and inappropriate to impose a price-regulation remedy on Memoria which is aimed at mitigating a detriment to competition **that Memoria** [REDACTED]. To the contrary, by investing to provide an alternative choice in areas that were previously underserved, Memoria provides important customer benefits and will continue to do so in the future, subject to regulatory constraints.

**b) The CMA's proposed price regulation will have a substantial cost for the industry**

The CMA's current remedy proposals to mitigate the Provisional AEC envisages a two-step approach consisting of:

- an interim pricing-data-based regulated maximum price for the Benchmark Product, imposed immediately and administered by the CMA; and

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<sup>41</sup> Section 3(b) and Appendix 1 of this response.

<sup>42</sup> CMA, *Remedy options for regulating the price of crematoria services*, para 45.

<sup>43</sup> Section 3(b) and Appendix 1 of this response.

<sup>44</sup> Memoria's response to the CMA's Working Papers of 30 Jan 2020, Appendix 5.

<sup>45</sup> Memoria assumes that "Firm D" is LCC (CMA, *Crematoria profitability analysis*, paras 154 and 155).

- a recommendation to government for the creation of a permanent independent regulator of funeral directors and crematoria, which would take over price regulation of the Benchmark Product from the CMA, and potentially change its basis from price data to cost data.

Memoria strongly believes that neither a pricing-data-based cap nor a cost-data-based cap is a suitable remedy, as they both carry significant risks, costs and detriments that are likely to outweigh any benefit. As a result, Memoria urges the CMA to focus on finding a more appropriate and targeted remedy to the Provisional AEC, rather than imposing one that is poorly devised, and likely to have serious repercussions on the industry to the detriment of consumers.

*i) The pricing-data-based price cap (i.e. the CMA-monitored interim remedy)*

[REDACTED], a price cap based on pricing data that is binding on Memoria will seriously risk undermining its business model, [REDACTED].

Memoria does not believe that the CMA can credibly maintain that such a price cap could be designed to allow operators to achieve a “fair” profit margin, because it will not recognise variations in quality, and it does not take rising costs, including increased cost of capital into account.<sup>46</sup> Memoria has already provided evidence to the CMA that [REDACTED].<sup>47</sup> Further, Memoria has already explained to the CMA how a price-capped Benchmark Product successfully covering 92% of the market would have disastrous effects on revenues, as it would *de facto* prevent crematoria operators from selling other products at a higher price, potentially extinguishing all forms of non-regulated standard cremation products as a result (as discussed in Section 4 of this response, *above*).

Looking at the broader cremation industry, this type of regulation would have a chilling effect on investment for any new site, as the price cap would limit the likelihood of a viable return on investment given the high level of capex required to be sunk in land, buildings and equipment. The CMA itself has identified how a price-data-based cap could impact disproportionately on higher cost areas and discourage future market entry there – and those are the areas that arguably are most in need of entry.<sup>48</sup> As the Remedies Paper has failed to provide any justification or mitigation for taking such risk, the CMA should be mindful of it when devising a remedy for any Provisional AEC.

Additionally, a price cap would also deter any investment in existing sites by crematoria operators because such investment could not be rewarded through price increases. Therefore, returns could only be achieved through the generation of higher volumes. This would inevitably push operators to engage in a “race to the bottom” on quality by ceasing to improve existing sites and increasing the number of cremations per crematorium. The CMA itself has identified how a price-data-based cap could result in reduced incentives for operators to compete on quality and invest in refurbishments.<sup>49</sup> The CMA should again be aware of this risk when devising a remedy for the Provisional AEC. If products are assumed to be “homogeneous” in setting a regulatory cap, the market will inevitably “level down” until that is indeed the case. Such results would be restrictive of customer choice and ultimately destructive of relevant consumer benefit.

Memoria has already explained to the CMA how artificially low prices, such as those that could result from its currently-proposed remedy, would send the sector back to the vicious cycle of underinvestment and low quality of the 1970s-1990s.<sup>50</sup> If the Benchmark Product was to be very popular and grow to take over more than 50% of cremation product sales (and potentially reach 92% of the market, which is the CMA’s stated preference), crematoria will be *de facto* unable to charge more for non-regulated standard products, due to their lack of differentiation. Equally, “non-standard” products would have to be cheaper by definition. This would make it very difficult for crematoria such as Memoria’s, which are located outside major population centres and therefore need to differentiate themselves in order to draw in viable levels of demand, to achieve a viable return

<sup>46</sup> CMA, *Remedy options for regulating the price of crematoria services*, para 64.

<sup>47</sup> See Memoria’s response to the CMA’s RF1 of May 2019, Schedule 1, Annex B, Questions 8 and 10 (and their Appendices); and Appendix 1 to this response.

<sup>48</sup> CMA, *Remedy options for regulating the price of crematoria services*, paras 65-66.

<sup>49</sup> *ibid*, para 83(a).

<sup>50</sup> Memoria’s response to the CMA’s Working Papers of 30 Jan 2020, para 5, and Appendix 1 para 1.

on investment. As a result, operators would not want to invest to build or improve sites with extensive grounds, or attractive and well-furnished buildings.

Memoria has also explained to the CMA how forecasts for the UK death and cremation rates suggest the need for expanding existing crematoria and building new ones, if supply is to meet future demand.<sup>51</sup> The proposed remedy would stifle investment in new sites and expanding existing ones, which would lead to an increased gap between demand and supply in the future.

Moreover, by forcing a capped price for the Benchmark Product, the CMA will inevitably push the cremation sector away from product differentiation and diversification. This fundamentally goes against the direction in which the cremation sector has been traveling over the past 3-5 years, driven by consumer preference. In identifying and defining a regulated package as the “Benchmark” of cremation packages, the CMA risks validating such product offering as a focal point for the rest of the market. Crematoria operators looking to increase volumes to recoup their investment, to the detriment of quality, will be incentivised to discontinue much of their offering to focus exclusively on the Benchmark Product, and possibly differentiated lower quality alternatives.

In light of these considerations, it is evident that the CMA has erred in disregarding the risk of quality suppression as a consequence of its proposed remedy. As explained above this is caused by the fact that the CMA erred in relying in its characterisation of the crematoria sector as providing a “homogenous ‘product’”, which is factually incorrect. In section 3(c) of this response and in previous submissions (including Memoria’s response to the CMA’s Working Papers of 30 January 2020), Memoria has provided overwhelming evidence that the cremation market consists of varied and diverse product offerings with different levels of quality, which the CMA has disregarded. Furthermore, Memoria’s evidence shows that, while such diversity has already benefitted consumers, more (not less) innovation and quality diversification is needed across all crematoria in the market to avoid consumers being faced with a “postcode lottery” of quality.

Therefore, Memoria urges the CMA to reconsider its erroneous assessment and analysis and, if required, design a remedy for the Provisional AEC that would really foster competition, entry, quality, differentiation and innovation.

Finally, the CMA has failed to address how its proposed price-regulation remedy would fit with local authorities’ cost-recovery obligation. Memoria notes that the CMA has stated it expects this obligation to continue to apply and exist alongside price regulation.<sup>52</sup> Memoria strongly believes the two are incompatible as, e.g., a price cap can prevent local authority crematoria from recovering costs when volumes drop by raising prices. Further, the CMA has not explained how this should happen, and has instead asked the industry to submit its “thoughts” on how local authorities’ obligations should be interpreted and implemented.<sup>53</sup> This is simply not good enough and suggests that the CMA itself does not believe it has reached a satisfactory position on this issue, making its assertion that the cost-recovery obligation could and should continue to apply to local authorities in a price-regulated market entirely speculative, unsupported and unconvincing.

It is clear from the fundamental economics of running a crematorium that, as the rate of utilisation of crematoria in (mainly) urbanised areas rises, local authorities that have little or no competition and rely on run down (largely written-off) assets are able to go beyond simple cost recovery and achieve excessively high profits through much higher utilisation.<sup>54</sup> This is the Provisional AEC that the CMA has found and, as such, it is the consequence of high volumes and low costs, and specifically **not high prices**. The CMA urgently needs to address this error of assessment and look at the underlying causes and evidence. Imposing a price cap would not mitigate the Provisional AEC as it does not address its root causes. As such, a price cap would be inconsequential and ineffective at mitigating the detriment to competition, as those excessively profitable local authority crematoria would enable them to continue contributing to any Provisional AEC in breach of their cost-recovery obligation.

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<sup>51</sup> *ibid*, Appendix 1 para 1(a).

<sup>52</sup> CMA, *Remedy options for regulating the price of crematoria services*, para 46.

<sup>53</sup> *ibid*

<sup>54</sup> Section 3(b) of this response.

*ii) The rate of return regulation (i.e. the permanent remedy and the external regulator)*

The CMA has persuaded itself that, in the medium term, rate of return regulation might be a valid way to “square the circle” and remedy the Provisional AEC. Such a remedy could presumably allow low-volume high-quality rural sites like Memoria’s to earn a return on their investment, thus filling gaps in service for customers in these rural areas as well as offering greater choice for families in local centres of population. It would also constrain the profitability of those largely urban sites with a low (depreciated/underinvested) asset base and very high volumes and, thus, very high profits (absent regulation).

However, in reality this route is fraught with difficulty.

If we compare the characteristics and size of the UK crematorium market to the complexity of the regulatory task involved, it can be seen that the proposal is simply impractical. The UK crematoria market has revenues of only around £350m per annum, and the entire funerals sector around has revenues of around £2bn per annum.<sup>55</sup> The sector is characterised by a large number of separate suppliers. In fact, as the 26 private and local authority crematoria operators included in the CMA’s profitability analysis covers only 118 of the 300 crematoria in the UK, the total number of operators is likely to be over 200.

This compares to other regulated sectors, which tend to be much larger in value (e.g., UK customers spend around £55bn on energy each year) and are characterised by a much smaller number of incumbent/regulated suppliers.

Specifically, regulation of this type would mean a substantial upfront effort in appropriately measuring the regulatory asset base (“RAB”) of each of these operators, in turn requiring a site by site analysis for all 300+ crematoria. In fact, the regulator would face significant challenges in undertaking a meaningful land valuation estimate for each of the 300+ sites nationally, as a single point estimate per acre (such as the type assumed in the CMA’s analysis) would clearly not be appropriate as a basis for rate of return regulation. The difficulties that the CMA has faced thus far (e.g. being unable to obtain meaningful land value estimates despite nearly a year having passed since the investigation was launched) illustrate the types of difficulties that the regulator will face in undertaking a much more granular and complete exercise.

The regulator would also face large ongoing costs, reflecting substantial ongoing efforts in:

- updating those RAB figures appropriately over time to reflect capital expenditure on buildings (including major capital projects on existing buildings; new buildings; new cremator and mercury abatement expenditures; fixtures and fittings, software and other capex – as well as judging the circumstances under which such capex was necessary, and therefore whether to allow it into the RAB); and
- tracking appropriate costs and revenues over time, particularly if these need to be split between regulated and non-regulated activities for certain suppliers, or between activities that are differently regulated (e.g. cremations and burials, memorialisation, funeral directing activities, etc.).

Particularly given that the regulated businesses will be relatively small (with many relying primarily on private owners and/or bank finance, or otherwise financially constrained), it is quite possible to imagine financial constraints between regulatory review periods resulting in underinvestment in facilities.

It is therefore clear that the regulator itself would therefore have very material operating costs, even before the costs to the sector of providing the information required is taken into account. The challenges of this exercise should not be underestimated, especially considering that the CMA has found that many operators did not even record Cost of Goods Sold in relation to crematorium services separately from overheads in the normal course of operations.<sup>56</sup>

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<sup>55</sup> CMA, *Final Report* of 28 March 2019; cremation revenues based on 465,000 cremations carried out in 2017 (para 2.12) and an average fee of £737 – giving a total revenue of around £343m.

<sup>56</sup> CMA, *Crematoria profitability analysis*, para 101; in which this issue appears to apply particularly to local authorities.

Before proposing that such a regulator should be set up, the CMA would need to estimate the operating costs of the regulator (which it has failed to do) and the costs that would be imposed on crematorium operators as a result (which it has also failed to do). Equally, the CMA would need to estimate how this might affect the prices paid by families for cremation services. Memoria fears that these costs would be passed on to families, making up a material part of the fees charged by crematoria, and causing significant destruction of relevant consumer benefits.

Moreover, if the proposed regulator were not to accurately conduct its ongoing analysis (e.g., if costs were cut by applying broad brush assumptions in relation to cost of land; the value of buildings; cost of capital; or operating costs), then the resulting rate of return regulation would be likely to generate material distortions in market incentives to the detriment of consumers.

### *iii) Alternative remedy proposals*

As shown in section 3(b) of this response (*above*), Memoria believes that the alleged excessive profitability that the CMA has found for some crematoria is ultimately related to utilisation levels of those sites, which are generally located in highly populated areas subject to binding planning restrictions (whether urbanised or green belt). As such, the Provisional AEC is not at all related to price.

Memoria's business model and its success are evidence that, where operators are able to enter and compete, the quality of crematoria offerings can be significantly improved while maintaining reasonable and competitive prices [§]. This suggests that barriers to entry and lack of competition in areas boasting an excessively profitable crematorium should be the main focus of any suitable remedy against the Provisional AEC, if this is to be effective and reasonable.

Therefore, the CMA should consider remedy proposals aimed at relaxing planning restrictions on brownfield sites to facilitate entry in those highly populated areas. This would promote local competition, ultimately raising quality levels, moderating prices, and removing the underlying causes of excessive profitability.

## **5. Concluding comments on the Working Papers**

Based on the facts and analysis presented above, Memoria has significant and well-grounded reasons to believe that the CMA's analysis of profitability and cost of capital laid out in the Working Papers is fundamentally flawed. As a result, the CMA has devised remedy proposals which are underpinned by a fundamental misunderstanding of the issues and are thus ineffective, unreasonable (by way of being disproportionate), and destructive of relative consumer benefits.

Chiefly, Memoria believes that the CMA:

- has erred in its profitability and cost of capital analysis, reaching conclusions that do not capture the cremation sector, and especially Memoria's specific circumstances, fairly or accurately;
- [§] and, as a result, has ineffectively and unreasonably suggested that a remedy to mitigate alleged "excessive profitability" is to apply [§];
- has made no effort to examine the underlying causes of the alleged "excessive profitability" it has found for some crematoria, which led it to devise a remedy proposal underpinned by a fundamental misunderstanding of the issues;
- has erred in its conclusion that that all crematoria offer a "homogenous 'product'", ignoring all evidence to the contrary, which led it to devise a one-size-fits-all price regulation remedy that would disincentivise investment in both existing and new crematoria;
- has proposed the creation of a Benchmark Product subject to a price cap which is in all its possible configurations disproportionate and/or destructive of relative consumer benefits; and always ineffective at mitigating the alleged "excessive profitability", as its causes are **not related to pricing**;

- has erroneously maintained that an interim price cap based on pricing data could be designed to allow operators to achieve a “fair” profit margin, whereas such a cap would stifle investment as it is blind to quality, rising operational costs, and increased cost of capital, and would also prove ineffective at mitigating the alleged “excessive profitability”, as its causes are **not related to pricing**;
- has erroneously supposed that a price cap based on rate of return administered by an independent regulator might be a valid future permanent remedy ignoring the practical difficulties, large ongoing costs, and risks associated with such a scheme for both the industry and consumers.

As already submitted in Memoria’s response to the working papers of 30 January 2020, the CMA has approached its analysis with the presumption that price regulation is the only solution, and then framed the problems to match that solution in a self-serving way. The Working Papers of 20 February 2020 have further confirmed this to Memoria.

Conversely the CMA must recognise that, in reality, existing competition has delivered significant consumer benefits in recent years. These include, capacity, quality, and a wider choice of services at different price points (including lower prices). Therefore, the CMA must consider that there is scope for competition to be encouraged to deliver more benefits through market mechanism, rather than replacing it with regulated prices. In doing so, it is paramount that the CMA reconsiders its erroneous assessment and analysis and, if required, design a remedy for any AEC (if found) that would really foster competition, entry, quality, differentiation and innovation.

Once more, Memoria urges the CMA to consider the risks of **excessive and/or poorly devised regulation to restrict prices without taking account of quality differentials or the critical need for further investment in the sector**. This would have a chilling effect on efficient investment and cause a failure to maintain the improvement in both capacity and quality levels seen in recent years, which will need to continue in the future. In such a scenario there is a risk that the sector would regress to the vicious cycle of underinvestment, poor quality, and low prices of the 1970s-1990s with the associated loss of relevant consumer benefits.

19 March 2020