RPC case histories guidance on competition assessments

Summary and key points

Regulatory measures that affect a market where goods and services are provided by private or public sector organisations may also impact on competition. Good practice and better regulation framework (BRF) guidance is that the IA on the regulatory proposal should include an assessment of impacts on competition. In doing so, the Treasury Green Book and BRF guidance indicate that departments should proportionately consider completing the CMA's "competition assessment checklist" to assess the likelihood and significance of impacts on competition.

While it is not a requirement for departments to formally complete the CMA checklist within an IA, the framework and this RPC guidance document encourage a proportionate assessment of competition impacts. We hope that departments will find this guidance useful and that application of the CMA checklist, in particular, will allow departments to strengthen their competition assessments in a proportionate manner. The document is aimed primarily at IA practitioners and, therefore, mainly analysts. The intention of the document is to encourage deeper/wider thinking on competition and more assessment of competition effects, as a matter of course, in IAs.

The CMA checklist includes four questions for departments to consider in order to identify if their measure may have resulting impacts on competition. There is likely to be a significant impact on competition if the measure:

1. Directly or indirectly limits the number or range of suppliers;
2. Limits the ability of suppliers to compete;
3. Limits the incentives for suppliers to compete; or
4. Limits the information and/or choices available to consumers.

Where significant competition impacts are identified, a more detailed competition assessment might be appropriate, using the CMA's in-depth competition checklist.

Based upon a review of cases since January 2019, this guidance provides examples of departmental assessments in relation to each of the CMA checklist questions. These examples are across a range of policy areas and types of intervention, including TV advertising, domestic energy markets and financial services. This guidance also covers where a BIT-exclusion may be applicable for pro-competition measures. Finally, an example provided by the CMA is presented which was considered by them to be a particularly detailed competition assessment within an IA.

Introduction

The Competition and Markets Authority (CMA) published its report *Regulation and Competition* in January 2020.[1] The report recommended the RPC to develop case studies of good practice in assessing competition impacts in regulatory impact assessments. This document addresses this recommendation and provides guidance to departments on producing assessments of competition assessments within IAs. It should be noted that this guidance and case studies are in relation to impact assessments produced under the better regulation framework for previous parliaments and the interim better regulation framework for the present parliament (starting December 2019).

The guidance does not reflect any changes to broader government guidance and adds no new framework rules or RPC scrutiny requirements. It is aimed at clarifying expectations around the application of existing rules/guidance, providing additional information on what the RPC looks for in its scrutiny in this area. The focus of the guidance is on dynamic market impact of a regulation on competition. These impacts will generally be wider, consequential impacts of a regulation and not affect

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857024/Regulation_and_Competition_report_-_web_version.pdf

the equivalent net direct cost to business calculations. In these terms, the quality of the department's assessment of competition impacts is unlikely to affect the RPC's rating of an IA at final stage.

The RPC will be considering whether a department's assessment of competition impacts within an IA is proportionate. This document does not set out any absolute requirements; nor does it expect departments to produce competition assessments to the same standard as, say, the CMA would. The objective of the document is to encourage departments to assess competition impacts in terms of such market dynamics, where this is appropriate and to a level proportionate to the expected impacts of the measures.

Departments will wish to take account of any significant competition impacts as part of their assessment of impacts on small and micro businesses. For example, a measure disproportionately affecting small businesses could have a detrimental impact on competition, such as by placing barriers to market entry and growth. More generally, departments will wish to consider any connection between competition assessments and other parts of the IA, such as the assessment of impacts on trade and investment.

It should also be noted that 'pro-competition' does not necessarily mean 'pro-small business'. There will be instances where the interests of small businesses will not necessarily align with greater competition (e.g. liberalisation of Sunday trading). Competition and, for example, barriers to entry can cut both ways; reducing barriers to entry could better enable larger businesses to enter and crowd out smaller businesses.

This document has three Sections:

- **Existing guidance:** A description and link to existing material for assessing competition impacts and where a pro-competition measures may qualify for a BIT exclusion.
- **Review of types of cases that are likely to involve significant competition impacts:** The RPC has reviewed cases since January 2019 to identify the type of cases that are likely to involve significant competition impacts. We identified which of the CMA checklist questions they address and further categorised these cases into the following types of measures:
  - Banning/restricting products/marketing/consumer eligibility;
  - Price or charges regulation;
  - Trade agreements and immigration measures;
  - National security measures;
  - Extension of regulation into new areas;
  - Licensing requirements;
  - Employment rights;
  - Product labelling requirements;
  - Measures implementing (at least in part) CMA recommendations; and
  - Regulator assessments (mainly FCA measures on financial consumer protection).
- **A particularly good example of a competition assessment suggested by the CMA:** Which provides a strong application of its guidance/checklist.

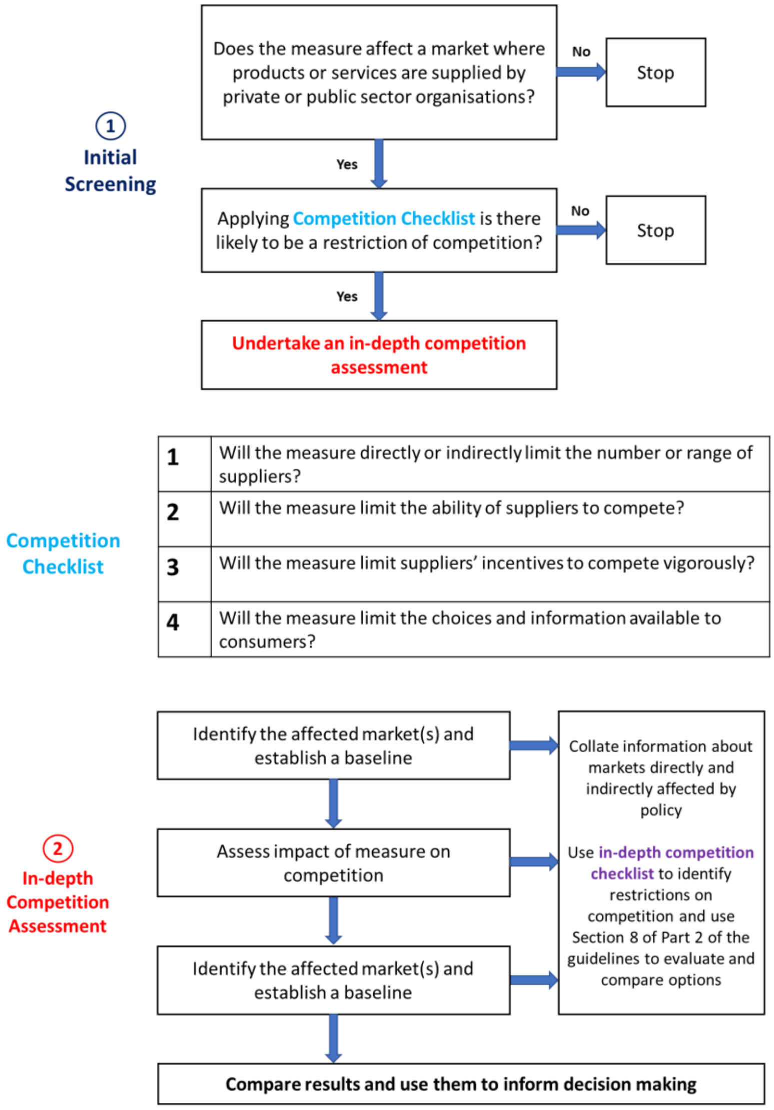
The document seeks to identify areas of good practice within these and ultimately provide an indication of the RPC's expectation for a good assessment of competition impacts within IAs.

1) Existing guidance

Assessing competition impacts:

The CMA provides guidance for policymakers for how to identify markets in which competition might be affected by new policies or spending proposals.[2] This guidance is cited by both the Treasury Green Book[3] and the Better Regulation Framework interim guidance, including IA template.[4] Part 1 of the CMA guidance provides an overview and summarises the process in a flow chart:

Figure 1: CMA guidance for competition assessments



2 https://www.gov.uk/government/publications/competition-impact-assessment-guidelines-for-policymakers

3 "*If competition effects resulting from a proposal are deemed likely during consideration at the long-listing stage (Chapter 4), further in-depth assessment of these impacts should be undertaken and incorporated into any Social CBA or Social CEA. Guidance on quantifying competition effects can be found at the CMA webpages*" (page 47). The list of green book supplementary guidance also includes '*Completing competition assessments in impact assessments*', a document produced by the OfT in 2007.

4 "*Measures that affect a market where products and services are provided by private / public sector organisations may also affect competition. Departments should review and consider completing the Competition and Market Authority's (CMA) 'competition assessment checklist' to assess the likelihood of impacts on competition and consider mitigations or alternative options…*" Better Regulation Framework interim guidance, paragraph 1.2.15. The evidence base in the IA template includes the following under 'wider impacts': "*How will the intervention affect markets where products or services are supplied by private or public organisations? Where impacts are likely to affect competition, Departments should consider completing the Competition and Market Authority's (CMA) "competition assessment checklist" to supplement their analysis.*"

A key feature of the CMA's approach is its two-stage nature: an initial screening and, if this reveals a likely restriction of competition, a second more in-depth assessment. Such a two-stage method is a proportionate way of approaching the assessment of potential competition impacts of regulation. Presented below is the CMA's 'in-depth competition checklist'. This cross-references to areas of the more detailed 'Part 2 guidelines' CMA competition assessment document[5]. The sub questions presented in the in-depth checklist are intended to help departments consider how competition may be impacted, rather than there being a requirement to answer them all. It should be emphasised that the RPC considers that the sub-questions will typically be prompts to help departments think about possible impacts, not necessarily answer and work through fully.

Figure 2: CMA in-depth competition assessment checklist

CMA's in-depth competition checklist	Reference for further information in the CMA's Competition impact assessment Part 2: guidelines
Q1a: will the measure directly limit the number or range of suppliers by: • Awarding exclusive rights to supply? • Purchasing, franchising or licencing from a single supplier or a restricted group of suppliers? • Introducing a licensing scheme that places a fixed limit on the number of suppliers? • Introducing a licencing scheme that controls quality?	See Chapter 3 of Part 2 guidelines. Examples to help you consider whether this issue applies to your proposal: • Commercial Use of Public Information (CUPI) market study, page 12, Part 2 • Taxi Licences, page 15, Part 2 • Licensing scheme for will writers, page 17, Part 2
Q1b: will the measure indirectly limit the number or range of suppliers by: • Significantly raising the costs of current suppliers, causing them to leave the market? • Significantly raising the costs of new suppliers relative to existing suppliers? • Significantly raising the costs of some current suppliers relative to other current suppliers?	See Chapter 3 of Part 2 guidelines. Examples to help you consider whether this issue applies to your proposal: • Grandfathering taxi slots at a train station, page 19 • Competitive neutrality in the higher education sector, page 21
Q2: will the measure limit the ability of suppliers to compete by: • Controlling or substantially influencing the price a supplier may charge? • Controlling or substantially influencing the characteristics of the products supplied? • Limiting the sales channels a supplier can use, or the geographic area in which a supplier can operate? • Substantially restricting the ability of suppliers to advertise their products? • Introducing restrictions on production processes or how suppliers are governed?	See Chapter 4 of Part 2 guidelines. Examples to help you consider whether this issue applies to your proposal: • Price controls in Greece, page 23 • Price caps in the payday lending sector, page 24-25 • Regulating the quality of bottled water, page 26 • US motor vehicle manufacturers, page 28
Q3: will the measure limit suppliers' incentives to compete vigorously by: • Incentivising suppliers to coordinate activities over which they would ordinarily compete?	See Chapter 5 of Part 2 guidelines. Examples to help you consider whether this issue applies to your proposal: • Risks created by policies that encourage information sharing, page 32

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/460787/Competition_impact_assessment_Part_2_-_guidelines.pdf

Q4: will the measure limit the choices and information available to consumers by: • Limiting the ability of consumers to decide from whom they purchase? • Changing the information available to consumers but not improving their ability to make informed decisions? • Increasing the cost of changing supplier?	See Chapter 6 of Part 2 guidelines.

This also aligns with the OECD's Competition Assessment Toolkit[6], which utilises the same four questions to identify competition impacts. The Operational Manual (vol. 3 of the toolkit), includes legislative examples of each of the sub-questions in the OECD checklist, which may be of use to departments. A copy of the checklist can be found at annex 1.

While under better regulation framework rules, the RPC has not been able to red-rate on the basis of assessment of competition impacts, the framework requires a proportionate consideration of wider impacts, such as those on competition, to inform decision-making. This is something the RPC will comment on, as appropriate.

Pro-competition measures and BIT exclusion:

Under the framework for the 2017-19 parliament, 'pro-competition' measures were excluded from the BIT, which potentially provides for regulatory provisions that are "*intended to deliver – or to replicate – better competition-based outcomes in markets characterised by market power*" to be non-qualifying against the BIT. The Better Regulation Framework guidance lists four criteria to satisfy the exclusion:

i) The measure is expected to increase, either directly or indirectly, the number or range of sustainable suppliers; to strengthen the ability to compete; or to increase suppliers' incentives to compete vigorously;
ii) The net impact of the measure is expected to be an increase in competition and the overall result is to improve competition;
iii) Promoting competition is a core purpose of the measure; and
iv) It is reasonable to expect a net social benefit from the measure.

Departments will normally need to provide an assessment within the IA to show that the measure meets all four criteria for the measure to be classified as non-qualifying under this exclusion. The exception is for measures specifically implementing CMA Orders on competition (that result in net burdens on business), which were automatically considered as pro-competitive without the need to satisfy the four tests. Departments and regulators implementing CMA recommendations that address Adverse Effects on Competition were required to provide a proportionate explanation for how the four tests are met. The CMA case for action may be used as evidence. Where pro-competition measures are based upon proposals by the CMA, there might, therefore, be little in the IA itself on how they satisfy the four tests. However, departments and regulators are also required to explain how any discretionary action they propose in response to a CMA recommendation is considered to be pro-competitive.

[6] OECD Competition Assessment Toolkit Vol. 1, 2 and 3. The OECD present their competition assessment checklist in a single figure, which departments may also find useful to refer to.

Departments providing an unsatisfactory assessment against these tests and, as a consequence, presently incorrectly classifying their measure as non-qualifying, would potentially be subject to an RPC initial review notice, or at least a withholding of confirmation that the measure is non-qualifying/validation of EANDCB.

2) Review of types of cases that are likely to involve significant competition impacts

In this Section, we provide examples of cases reviewed by the RPC since January 2019 that involve significant competition impacts. Case studies include numbers 1-4 in the bottom right to signify which of the CMA checklist questions have been addressed, with the question addressed in the most detail shown in green. The table below summarises which checklist questions have been considered in each case. The question addressed in the most detail shown in green.

Figure 3: List of cases by CMA checklist question addressed

Case Type	Question 1	Question 2	Question 3	Question 4
RPC-DHSC-4332(1) Restricting volume promotions for HFSS products	✓	✓	✓	
TV advertising of HFSS (food and drink that are high in fat, salt and sugar) products and similar protection for children viewing adverts online - introducing a 21:00-05:30 watershed, DCMS	✓	✓	✓	
RPC-DHSC-4302 Ending the Sale of Energy Drinks to Children	✓	✓	✓	
RPC-4137(2)-DCMS Gaming machines and social responsibility measures		✓		✓
RPC13-HMT-1984 Amendment to the Financial Services (Banking Reform) Act - restricting charges for high-cost short-term credit	✓	✓	✓	
RPC-4212 (BEIS) and 4358 (Ofgem) Domestic gas and electricity default tariff cap			✓	✓
RPC-3339(1)-BEIS - Teaching excellence framework	✓	✓	✓	
RPC-4328(1)-DIT: Impact assessment of the EU-Vietnam Free Trade Agreement (EVFTA) on the UK		✓		✓
Proposal to introduce a regulatory framework for online harms, DCMS	✓			
National Security and Investment, BEIS	✓			
One-sided flexibility, BEIS		✓		

Measures that ban or restrict products, marketing or consumer eligibility

There are measures that are introduced in pursuit of objectives, such as human health or welfare, that could potentially have significant impacts on competition. For example, measures aimed at reducing childhood obesity through restrictions on advertising or sales promotion within stores are likely to affect competition between suppliers, retailers and make it more difficult for a business to enter the market or increase its market share.

RPC-DHSC-4332(1) Restricting volume promotions for HFSS products (consultation stage)

The Department for Health and Social Care's (DHSC) IA considered policy proposals intended to ensure that shopping environments do not encourage excess consumption of high fat, sugar and salt (HFSS) products. Price promotions, especially volume offers, had been found to cause consumption of HFSS products above and beyond what would be expected as part of a normal response to pricing changes. The preferred option at consultation was a ban on volume offers for HFSS products included in Public Health England's sugar and calorie reduction programme. The Department provisionally estimated an equivalent annual net direct cost to business of £11.7 million and net present value of £2,940 million.

The Department acknowledges the effect on competition in their 'competition test' within the IA, stating: *"Volume promotions are a method of competition, which will be restricted under this proposal, but we believe firms will adapt to compete on absolute price level instead."* (page 62). It was noted by the RPC that the Department should consider further the effect of the regulations reducing competition between retailers and manufacturers of HFSS goods and the potential of pushing up prices. In this case, competition was relevant in assessing the overall impacts of the policy, as the restriction on volume promotions would have a direct impact on the incumbent firms' ability to compete and potential entrants to the market. Therefore, it was appropriate for the department to consider the wider implications of competition effects, which was achieved through following the competition checklist.

The Department utilises the CMA checklist format to structure its competition assessment and explicitly addresses the first three questions. Whilst a more substantive explanation to the possible direct limitations to suppliers would have been useful, the department provides a thorough discussion of the possibility of indirectly limiting supply, focusing on potential barriers to entry created by penetration pricing strategies. The Department does not explicitly address the fourth checklist question on consumer choice, however this is implicit, to an extent, in the policy design.

1 2 3

TV advertising of HFSS (food and drink that are high in fat, salt and sugar) products and similar protection for children viewing adverts online - introducing a 21:00-05:30 watershed (consultation stage impact assessment)
The Department for Culture, Media and Sports' (DCMS) IA concerned proposals to create a watershed between the hours of 2100-0530 in which HFSS products can be advertised on television. The policy aims to influence children's consumption behaviour, by reducing the amount of advertising that they see for HFSS products on television and online.

The Department conducted a relatively detailed 'competition test' within the IA. This noted that the proposal is likely to incur high costs to broadcasters and online platforms, while allowing less restricted forms of advertising to continue marketing HFSS, thus providing these with a competitive advantage. The Department also considered the disproportionate impact on suppliers whose revenue is mainly derived from HFSS products, providing a competitive advantage to those selling non-HFSS products. In summary, as this measure was a ban on the supply of advertising, competition impacts were relevant as it directly limited the ability of suppliers to compete, whilst also altering the information available to consumers. Hence, a more detailed discussion surrounding competition impacts was relevant to the analysis informing the policy decision.

The Department similarly uses the CMA checklist structure; however, the IA does not explicitly address the fourth CMA question, although it is implicit in the policy design. The competition assessment strongly addresses the second question on the supplier's ability to compete and this more detailed discussion enabled the Department to identify the impact on new entrants, specific media channels and the resulting competitive advantages.

1 2 3

RPC-DHSC-4302 Ending the Sale of Energy Drinks to Children (final stage impact assessment)
The proposal is to ban the sales of energy drinks to children under the age of 16, including sales from vending machines. The policy aims to mitigate the potential negative effects associated with the excessive consumption of energy drinks by children. While this restriction had been voluntarily adopted by a portion of the market, this measure would "level the playing field".

Following the RPC's initial review, the Department considered the 'competition test' in more detail and the RPC identified potential for further improvement, such as considering that displacement may also occur between different retail channels (e.g. corner shops, supermarkets and vending machines) with competitive and structural implications. As this measure was directly banning the sale of a product, it would have an impact on the structure of the market, and therefore it was important for the Department to consider to assess this in terms of competition. This was relevant to the analysis of the policy, given how the fundamental change to the market could have wider impacts on suppliers and consumers.

The Department found a link between lower-income families and an increased level of consumption of energy drinks. An option of restricting the sale of energy drinks in areas with a lower average disposable income was considered, however, consultation highlighted that this would hamper competition in these areas and brought in equity issues.

The RPC also advised the Department to seek further evidence to support the premise that operators may simply replace energy drinks in vending machines with soft drinks due to their lack of prevalence (2 out of 40 slots on average), instead of introducing age verification methods on the machines. Failure to consider this when implementing vending machine requires would have resulted in restricting the available markets energy drink provides could sell in.

The Department uses the CMA checklist structure, and whilst the response to the first question on whether the policy directly/indirectly limits the number of suppliers is limited, the second question on the ability of suppliers to compete is answered thoroughly. The competition assessment is particularly strong here, segmenting the response for both manufacturers and retailers.

1 2 3

There have been measures introduced in recent years directly aimed at restricting economic activity or shrinking the market to reduce individual/societal harm.

RPC-4137(2)-DCMS Gaming machines and social responsibility measures
This measure principally reduces the maximum stake on B2 gaming machines (otherwise known as fixed odd betting terminals). This category of gambling machines has the highest maximum stake. The Department argues that government intervention is needed to strike

the right balance between socially responsible growth of the gambling industry, and the protection of consumers and wider communities. The ultimate policy aim is to reduce gambling related harm. This measure follows other legislation which takes a behavioural approach to addressing problem gambling.

The Department noted that this regulation would have a significant effect on the industry. The impact on competition was *"considered through the lens of substitution"* (paragraph 38, page 34), i.e. what products would the consumer turn to in the absence of fixed odds gambling machines. The Department considers casinos and online gambling but concluded that neither are direct substitutes for the B2 machines, and will require significant behavioural changes from the consumer. Fixed odds gambling machines are extremely fast-paced and allow the individual to lose large amounts of money in a short space of time, whereas casinos and online gambling do not allow for such quick transactions. As a result, it is stated that 'the fundamental nature of B2 gaming may be altered by the proposed regulatory intervention.' In this case, the competition impacts were particularly relevant to the assessment of the policy, as the measure directly restricted the economic activity from the machines. This could have led to a direct effect on the suppliers and consumers of the B2 machines, and therefore change the competitive structure of that market. It was therefore important for the Department to assess the scale of this potential impact relative to the overall impact of the policy.

In focusing on the substitution effect of consumers, the Department addresses the fourth checklist question on consumer choice. In doing so, the competition assessment broadly discusses the ability of various suppliers to compete, through online means for example, but does not go further to consider how this may affect the overall range of suppliers. Use of the checklist format would have been useful to more clearly explain how the four questions are covered.

2 4

Going further back, there was a measure to cap what debtors would pay under 'payday loans'.

RPC13-HMT-1984 Amendment to the Financial Services (Banking Reform) Act - restricting charges for high-cost short-term credit
HM Treasury identified that that borrowers within the high-cost short term credit market are not price sensitive, due largely to the fact many face a lack of alternative options or are prioritising other factors over price in borrowing decisions. Furthermore, firms are incentivised to take advantage of the borrowers' lack of choice and price insensitivity, and as a result can place disproportionately large interest rates on the short term loans.

As a result, Government legislates to require the FCA to use its existing powers to introduce a cap on the costs of high-cost short-term credit. The Department proposed that it was likely that many firms would exit the market as many of the firms rely on repeated borrowing. This could therefore impact on competition as it restricts the number and range of suppliers in the market.

The Department conducted a short competition assessment in the latter stages of the IA. *'The intended consequence of the policy is that the impact should be felt by those firms that provide credit at high cost to borrowers (particularly where these high costs are associated with unaffordable lending) or that rely on multiple rollovers or defaults for maintaining profitability. Evidence from international comparisons suggests that a number of firms may exit the market altogether.'* (paragraph 68, page 19).

In the event, the measure resulted in a shrinkage of the market of well over 90 percent. By 2019, there were only an estimated xx businesses left in the market.

It was relevant for the Department assess the impacts on competition, and it allowed them to conclude that efficient firms, lending responsibly and at lower cost would be less impacted by the cap. The Department does not use the checklist template, but nonetheless broadly addresses the first three of the checklist questions. Further, the competition assessment does not consider the fourth question on consumer choice, although it is implicit.

1 2 3

Price/charges regulation

There are other measures that are introduced in pursuit of consumer welfare and/or equity that can be expected to have significant impacts on competition. Measures placing restrictions on what businesses can charge consumers are perhaps the most obvious. These will clearly have significant potential effects on competition by restricting price competition between firms and potentially discouraging market entry.

RPC-4212 (BEIS) and 4358 (Ofgem) Domestic gas and electricity default tariff cap (final stage IAs and BIT assessments)
The Domestic Gas and Electricity (Tariff Cap) Act 2018 created a new duty for Ofgem to design and implement a temporary cap on domestic standard variable and default gas and electricity tariffs ('the default tariff cap'). This was introduced after a CMA investigation into the energy market found that energy prices were much higher than they would be under a perfectly competitive market. However, the CMA recommended prices caps only for the most vulnerable users (implemented in April 2017 for customers on prepayment meters

and extended in February 2018 for customers who receive the Warm Homes Discount). Therefore, whilst the Department relies largely on references to the CMA to support its rationale for intervention and overall assessment of consumer detriment, it could not simply reference out to CMA analysis in support of its preferred option. The Department's argument for extending the cap to all households appeared to be mainly based upon equity rather than economic efficiency. In this case, it was therefore relevant for the Department to identify the scope of any detrimental effects on competition, in order to compare with the equity impact.

The Department's IA described a number of possible wider or consequential impacts/risks of the proposal, including a reduction in competition in the short term, as the gains from actively switching deals would decrease, weakening incentives for customers to switch. This was also expected to lead to reduced use of price comparison websites. The Department presented a small and micro business assessment (SaMBA), which argues that, on average, the smallest suppliers will be less affected than others as they tend to set lower SVTs but acknowledges that some small suppliers may be adversely affected, depending on the details of their business models.

Ofgem has subsequently produced BIT assessments for the chosen level of the cap, monetising the direct cost to business (mainly lost profit but also familiarisation and administrative costs). There is no framework requirement for regulators to include anything on other impacts in such assessments – the focus of such assessments is purely EANDCB validation. Nevertheless, the Ofgem BIT assessment references its detailed wider economic analysis supporting the level of the cap. This includes indirect impacts, such as those resulting from possible supplier responses to the measure, and wider impacts, such as on the environment and competition. The latter includes an assessment that price competition will be "*...at a reduced level when compared to the baseline scenario*". (paragraph 6.30, page 94). Furthermore, Ofgem states that "*The cap could encourage suppliers to innovate more rapidly to remain competitive, and encourage the entry of firms with innovative new business models. But it could also reduce incentives to enter the market because of reduced opportunities to earn above normal profits."* (paragraph 6.50, page 97).

The Department most specifically addresses the third checklist question relating to possible impacts on supplier's incentives to compete. There is some discussion on the behaviour of consumers, which partly address the fourth checklist question, however this could have been made clearer.

3 4

RPC-3339(1)-BEIS - Teaching excellence framework (final stage IA)
A cap of £9,000 for university tuition fees had been in place since 2012. By 2016 this had been eroded to around £8,500 in real terms. There was also an unintended consequence in that the large majority of higher education institutions were charging at or just under the cap.

For higher education institutions (HEIs) that can demonstrate high quality teaching, the Government proposed to introduce the Teaching Excellence Framework (TEF), which would allow institutions to increase their fee caps in line with inflation. This is intended to inform students about the quality of teaching at different HEIs and incentivise these institutions to deliver excellent teaching.

The Department proposed that by having an incentive to increase their fees and therefore revenue, universities would begin to compete with each other to deliver a higher standard of teaching. The Department provided a fairly comprehensive discussion around the benefits of competition within a market. *'Competitive pressure in a sector drives the suppliers (HE providers in this case), to make their offer more attractive to the students, either through reducing prices, improving the offer, or both'.* (paragraph 27, page 68).

It was relevant for the Department to consider the impacts on competition, as introducing a fee cap which changes in line with inflation would have a resulting effect on demand and supply in the market for higher education. In order for the Department to effectively analyse the extent of this impact on the policy outcome, they identified how this may reduce barriers to entry, therefore increasingly the supply of higher education providers, increase their incentives to compete and lead to better information available to inform potential students.

In the detailed version of the IA, the Department addressed three of the four checklist questions; however, this was not the case for the summary version. Whilst an explicit response to the fourth question was not provided, the Department does provide a discussion of the increased information available to inform student choices on page 28 of the IA.

1 2 3

Trade agreements and immigration measures

Regulations giving effect to trade agreements are likely to affect competition by providing for greater access to UK markets to overseas companies. Measures affecting UK businesses' ability to recruit workers from overseas are also likely to have differential impacts on UK businesses, for example affecting businesses whose 'employment models' rely more upon importing labour.

RPC-4328(1)-DIT: Impact assessment of the EU-Vietnam Free Trade Agreement (EVFTA) on the UK (final stage IA)
The EU-Vietnam FTA (EVFTA) was intended to eliminate most tariffs between the EU and Vietnam and to reduce the non-tariff barriers that businesses face in the trade of goods and services. The Department expected the FTA to increase bilateral trade and economic growth, with the UK supporting Vietnam's integration into the global economy and in return Vietnamese trade increasing the welfare of

UK households by lowering the price of certain goods. EVFTA includes provisions for public procurement, services, investment, intellectual property rights, regulatory issues, technical barriers to trade, and sustainable development.

The Department expects the EVFTA to increase UK business productivity through increased competition but also noted that this could lead to declining profits for less competitive UK firms. This higher level of competition was also the basis for many of the FTA's benefits. With greater levels of competition, the Department argued that there would be: higher quality final goods and services produced, lower prices of imported final goods and services and lower prices of final goods and services produced with imported inputs. The result of these being consumer welfare increasing by £290 million per annum in the long run.

The Department does however note in the long run that some UK firms may be forced to exit domestic markets as a result of increased competition, leading to a reduction in consumer choice. As such, it was relevant for the Department to assess competition, given the potential effect on domestic producers who would now be exposed to more international competitors. The RPC opinion commented in detail on competition effects:

"*The lowering of tariff and non-tariff barriers may have structural effects throughout the value chain. While the short-run effect may be to increase domestic-market competition between UK and Vietnamese firms, in the medium term this can lead to exit of uncompetitive UK firms and ultimately to a more concentrated market than at present. The resulting concentrated UK market may be dominated by Vietnamese firms or even by UK firms, if the Vietnamese competitors serve only as 'kingmakers' to drive domestic competitors out of business before succumbing themselves. Conversely, some of this adverse impact may be offset by increases in the competitiveness of UK firms (both small and large) selling into Vietnamese markets, with similar medium-to-long run structural and competition impacts. The IA would benefit from a description of these indirect impacts, even though they cannot easily be quantified with the tools available*."

The RPC also noted that the SaMBA would benefit from sectoral analysis to indicate whether SMBs could be disproportionally affected by increased competition from Vietnamese firms.

The Department does not use the checklist format in its competition assessment, but broadly addresses the second and fourth questions. Indirect consideration is given for the ability of suppliers to compete, through innovation and the incentives for suppliers to compete, but a more specific account would have been useful.

2 4

Extension of regulation into new areas

Proposal to introduce a regulatory framework for online harms (consultation stage IA)
Assessing competition was relevant in this case as the Department identified this new measure could disproportionately impact smaller firms, create barriers to entry, and reduce the number and range of suppliers in the market. The RPC noted that section 7 of the IA stated that the proposals may impact competition in the market and offered suggestions for the final stage IA. This included:

- providing a full assessment of the impacts of the proposal on competition and consider whether compliance costs could create a barrier to entry, leading to further monopolisation of an already concentrated market.

- assessing the competition impacts of requiring companies to share technologies to combat online harm including co-developed and individually developed solutions, and how this work in relation to protection of intellectual property rights.

The Department does not use the checklist format, and indirectly addresses the ability of suppliers to compete through potential barriers to entry. It does not consider the latter three checklist questions in significant detail. Considering the aforementioned potential competition effects would enhance the IA and potentially further help inform the policy decision.

1

National security

Measures might be introduced to restrict business freedom or investment from overseas on the grounds of national security. By restricting who can supply essential goods and services, these measures can have significant impacts on competition.

National Security and Investment (BEIS, consultation stage IA)
Under the proposed reforms the Government would legislate so that it could scrutinise more circumstances where acquisitions of control over entities or assets may raise national security risks. Assessing competition was relevant in this case as the introduction of further scrutiny into foreign direct investment could impact on the number and range of suppliers.

As such, the IA addressed the risk that the proposal might deter legitimate foreign direct investment (FDI) into the UK (page 41 and annex). In doing so, it commissioned external research on the sources of capital for companies from the UK national infrastructure sectors. The Department's assessment suggests the risk might be low but, as a key area of uncertainty, the RPC recommended that the Department should make use of consultation to gather further views and evidence on this.

The Department does not use the competition checklist format; however, it suggests the measure will only impact a small number of firms and, therefore, not generate cause for concern over competition. Use of the format would have been welcome, making identification of how the Department has fully considered the impacts of competition more straightforward.

1

RPC-3792-BEIS Downstream Oil Supply Resilience Bill (final stage IA)
The proposal aimed to improve the resilience of the downstream fuel supply market, including the power to conduct 'control tests' on new buyers of downstream oil sector infrastructure, to ensure that they are financially sound and operationally capable and being able to direct individual companies in extreme circumstances.

The IA provided a descriptive assessment of possible impacts on market competition (section 6.7, pages 28-29). This Department noted that the 'resilience direction' is a backstop power to address extreme circumstances, and if the Government intend to use the power, they would have to demonstrate that any direction is fair, reasonable, proportionate, and does not result in undue impacts on market competition. The RPC opinion noted that the IA would benefit from setting out how it would make these assessments. The RPC also opinion noted that the Department had provided a strong SAMBA in terms of consideration of exemption and quantitative assessment of impact on small and micro businesses, demonstrating that impacts do not disproportionately fall on small businesses.

The Department does not use the checklist format and, therefore, it is difficult to identify where the questions have been addressed. Competition impacts were relevant in this case because of a potential impact on suppliers.

Employment rights

Measures aimed at protecting or improving workers' employment rights could have impacts on the market and competition, particularly if they affect smaller businesses disproportionately.

One-sided flexibility (BEIS, consultation stage IA)
The proposal seeks to address the issue of 'one-sided flexibility' where some employers misuse their labour market power and flexibility to transfer risk to workers. This imbalance between employer and workers can result in some workers having hours changed or cancelled at short notice. The IA considers two options: introduce a right to reasonable notice of work schedules and introduce a right to compensation. The proposal may affect suppliers' costs and potentially affect competition in the market.

The Department provides a well-structured and detailed assessment of costs for a consultation stage IA. The IA could be improved by further discussion of potential spillover and labour market equilibrium effects, such as whether the loss in flexibility may reduce employment levels innovation, and consideration of potential impacts on businesses to react in an agile and innovative way. The Department helpfully identified that 'one-sided flexibility' appears more prevalent in larger businesses. However, the issue of whether the proposals could disproportionately affect small and microbusinesses could be examined further for final stage.

The Department does not use the checklist structure, but broadly considers the ability of suppliers to compete, as a result of no longer facing potentially unfair competition resulting from the abuse of labour standards. No significant considerations were made for the other questions.

2

Measures implementing (at least in part) CMA recommendations ('Pro-competition' measures)

Reform of energy code governance (BEIS, consultation stage IA)
Industry codes in the energy sector underpin the operation of GB's gas and electricity markets by collating and standardising the technical standards and commercial requirements applicable to all participants. In 2016 the Competition and Markets Authority (CMA) concluded that the current system of code governance had created a material burden on the industry and is a barrier to pro-competitive change, which could potentially undermine firms' incentive and ability to innovate. The aim of the government's proposals is to ensure that the energy code governance system promotes competition and keeps pace with technical/commercial developments in energy markets.

The Department considered the proposal to fall into the "pro-competition" exclusion category of the better regulation framework and, therefore, non-qualifying against the business impact target. The Department helpfully provided an assessment against the four tests set out in the better regulation framework. The IA would be improved by including further justification of how the options satisfy the framework requirements for pro-competitive measures, in particular by:

- Providing further explanation of the nature and extent of the CMA recommendation (for example, whether it is a 'remedy');
- Describe how far the Department's proposal is in line with the CMA's recommendations; and
- Address the wording of the four tests more directly (for example, whether it can be expected to increase the number of suppliers).

Heat Networks Future Market Framework (BEIS, consultation stage IA)

Heat networks are a system of insulated pipes that connect multiple buildings or a single multi-tenanted building to a heat source. The Competition & Market Authority (CMA) has set out a number of recommendations for the regulation of heat networks. The Government's preferred option addresses the recommendations of the CMA and defines extra rights and powers to be given to heat networks.

The Department's IA drew on evidence from the CMA's market study and its recommendations. This case is relevant as the Department provided a good explanation for why it is going beyond the CMA's recommendations by providing extra rights and powers for heat network operators (HNOs), which would give opportunities to reduce costs to business, therefore benefitting market competition.

There is only one departmental measure above *de minimis* listed in BRE's BIT reports as meeting the pro-competition exclusion since 2017: *Changes to bus market legislation - bus franchising and partnership improvements for inclusion in the Buses Bill.* This was listed in the 2017-18 report (see box below). A number of regulators have, however, reported activity under the pro-competition exclusion, including the FCA, Ofgem, Ofcom, CMA, CAA, Ofwat and the Payment Systems Regulator.

RPC-DFT-3544(1) Buses Bill – franchising and partnership improvements – secondary legislation
The proposals for this bill provided additional partnership options and franchising powers to local transport authorities, with the aim of encouraging the operation of more effective local bus markets. This case is relevant since within the IA itself, the Department provided answers to each of the four questions in the pro-competition exclusion test., which resulted in the large majority of the impact of the proposal deemed pro-competition, with an NQRP EANDCB of £37 million. The Department's assessment was that franchising will strengthen the ability of a range of operators to compete, through removing barriers to entry of the incumbents' anti-competitive practice and that the introduction of a tendering and contracting process would lead to a more effective competition process.

Regulator assessments

Regulators are only required to conduct BIT assessments, rather than IAs, and an assessment of wider impacts are not required. As noted above, regulators also produce NQRP summary statements and can list any measures they consider fall under the pro-competition exclusion in these statements. These can be submitted to the RPC for assurance. Where regulators are responsible for implementing a departmental requirement, the department would normally have been responsible for previously submitting an IA to the RPC, subject to framework requirements (see energy tariff cap measure above for how BEIS submitted an IA, followed by a BIT assessment from Ofgem).

RPC-HMT-FCA-4372: Rent-to-own: Extended warranties (BIT assessment)
A rent-to-own (RTO) company offers household items, e.g., washing machines and televisions, to consumers under a hire-purchase agreement. RTO firms also sell extended warranties at the point of sale. The FCA's BIT assessment describes how RTO businesses have a significant point of sale advantage which reduces competition in the market. The proposal included a number of measures, including banning the sale of extended warranties at the point of sale.

BIT assessments are intended to include information only relevant to EANDCB validation and would not, therefore, usually include an assessment of competition impacts. However, this case is relevant as the BIT assessment provided a link to the consultation document, which contains a thorough and well-evidenced cost-benefit analysis. The RPC EANDCB validation statement suggested that the assessment would benefit from presenting discussion of competition, including impacts on businesses resulting from any resultant changes in market structure.

It should also be noted that, although regulator BIT assessments are unlikely to include a detailed assessment of competition impacts (as their purpose of the assessment is solely EANDCB validation), the regulator is likely to have previously conducted a detailed analysis of the measure (for example, a cost benefit analysis). Ideally, the BIT assessment will include a link or reference to this document. For example, as noted above, Ofgem included a detailed assessment of impacts on competition (and innovation) in its main analysis of the impact of the measure.[7]

Competition and innovation

[7] https://www.ofgem.gov.uk/system/files/docs/2018/11/appendix_11_-_final_impact_assessment.pdf See section 6, pages 90-104.

Whilst there are several factors that are common to potentially encouraging greater competition and greater innovation, there are also circumstances where competition may drive out innovation. Impact assessments should not necessarily take competition as an end in itself but rather as a tool for delivering policy outcomes, and this is what the evidence/analysis should focus on.

3) Particularly good example of a competition assessment in an IA

In producing this guidance, the RPC liaised with the CMA[8] and asked the CMA whether it could suggest any examples of good competition assessments in IAs. The CMA suggested the case below as providing a particularly good application of its guidance/checklist. This was in an IA produced for the Scottish Government and was not, therefore, within the scope of RPC scrutiny. It should be emphasised that the RPC is not suggesting that it would expect this level of detailed analysis; in most cases a less-detailed level of analysis would be proportionate. However, it may be useful as an example where departments have a significant policy measure and expect competition impacts to be particularly important. Given the depth of the analysis produced, we have decided to separate the responses to each of the checklist questions.

A Deposit Return Scheme for Scotland. Final Business Regulatory Impact Assessment.[9]

In September 2017, the Scottish Government announced in the Programme for Government that it would move to implement a deposit returns scheme (DRS) for Scotland single-use drinks containers. Following consultation, a system was designed to meet Scotland's specific aims of increasing recycling rates to 70% by 2025 and reducing littering. It was proposed that placing a financial value on selected single-use drinks containers, the DRS will encourage consumers to return them for recycling, encouraging wider behavioural change and maximising economic, societal and environmental benefits for Scotland. The final scheme design enables consumers to take single-use containers back to any retailer covered by the scheme, in return for a 20p deposit.

The competition assessment states that DRS was not expected to have a material effect on competition, and no significant restrictions on suppliers in the Scottish market were expected. Further, the obligations placed on producers and retailers were not expected to have disproportionate impacts on any particular market participants. The flexibility of the scheme was argued to mitigate any potential impact on smaller producers and retailers, including *"the fraud-prevention measures to be adopted by producers and alternative collection mechanism for smaller retailers"* (page 32). The assessment also considers the potential for fraudulent activity, with non-DRS containers being transferred from England to Scotland in order to obtain deposits. It was deemed that the relatively low levels of population with easy access to the English market and the low costs to the consumer of the deposits paid, would ensure these impacts are minimal. Considering the potential impact across borders, given the introduction of differing regulations between administration, was a useful additional to the competition assessment.

The assessment considers all four elements of the CMA checklist in detail, following the checklist structure. However, before doing so, the markets affected directly and indirectly are identified, which provides useful context and scope for the rest of the competition assessment. Markets directly affected included drinks retailers and wholesalers to the Scottish market and producers and importers for the Scottish market. Markets indirectly affected included bottling, labelling and packing, packaging, glass, plastic, aluminium and steel production.

Question 1a: Will the measure directly limit the number or range of suppliers?

No direct competition impacts were anticipated. Research by Zero Waste Scotland suggested the Scottish drinks market is competitive and DRS would not award limited exclusive rights to supply the market or introduce a licensing scheme restricting the number of suppliers. Conversely, it was identified that any incentives improving the quality of materials within the DRS, would not constitute a direct restriction on participation in the market.

Question 1b: Will the measure indirectly limit the number or range of suppliers?

This question was answered by firstly addressing the impacts by producers and retailers, and then by types of potential costs incurred. Potential cost types for producers discussed in the assessment included barriers to entry, producer fees, higher first year costs, changes to packaging processes and administrative costs. Cost types identified for retailers included retailers using reverse vending machine method, retailers using manual collection and return, level of handling fee, online retailers, retailers operating close to border between Scotland and England, familiarisation costs, communication costs and impacts on the hospitality sector. Across all these costs, little or no significant

[8] For the avoidance of doubt, the present guidance is, however, RPC-only and not joint guidance with the CMA.

[9] https://www.gov.scot/publications/deposit-return-scheme-scotland-full-business-regulatory-impact-assessment/pages/7/

competition impacts were found. Departments may find it useful to look at the analysis for each of these impacts, where it may apply to their own policy.

Question 2: Will the measure limit the ability of suppliers to compete?

No significant impacts were anticipated given the overall low-price impacts associated with the scheme once returns were accounted for. Nonetheless, the assessment considers how the volume of containers, quality of products, impact on choice of materials used in drinks packaging, sales channels, geographical areas of supply, advertising of products and restrictions on products processes and governance of suppliers may limit the ability of suppliers to compete. This section uses sensitivity analysis to consider potential impact on suppliers at three different real consumer cost scenarios (0.5p, 1p and 1.5p). This leads to the conclusion of little to no impact on supplier's competitive abilities. Whilst this analysis is particularly strong due to significant quantification, we recognise this is not always proportional for departments, and therefore accept a qualitative discussion of these issues may be enough to address this question.

Question 3: Will the measure limit suppliers' incentives to compete vigorously?

No competition impact was anticipated on suppliers' incentives, and it was argued *"the introduction of DRS should not incentivise suppliers to coordinate activities over which they would ordinally compete"* (Page 53). The assessments states that the Scottish drinks market is a competitive one, where products are sufficiently differentiated, with a range of producers and retailers. This qualitative response may at first not appear as comprehensive as the prior response but given the competition assessment has already provided a quantified overview of the Scottish drinks market structure, this response did not require further justification.

Question 4: Will the measure limit the choices and information available to consumers?

The assessment considered the limit of consumers ability to decide from whom they purchase, possible limits to information available to consumers and costs of changing supplier and anticipated no significant competition impacts. Whilst there is no quantification, the qualitative response addressing all parts of the checklist question in sufficient detail. This demonstrates a more feasible level of depth for departments to consider as part of their analysis, where there may not be the resources to fully quantify all potential impacts.

Annex 1: OECD Competition Assessment Checklist

The OECD present their competition assessment checklist in a single figure, as below:

COMPETITION ASSESSMENT CHECKLIST

Competition assessment should be conducted if a legal provision has any of the following effects:

A Limits the number or range of suppliers

This is likely to be the case if the provision:

- ☐ **A1** Grants exclusive rights for a supplier to provide goods or services
- ☐ **A2** Establishes a license, permit or authorisation process as a requirement of operation
- ☐ **A3** Limits the ability of some suppliers to provide a good or service
- ☐ **A4** Significantly raises cost of entry or exit by a supplier
- ☐ **A5** Creates a geographical barrier for companies to supply goods, services or labour, or invest capital

B Limits the ability of suppliers to compete

This is likely to be the case if the provision:

- ☐ **B1** Limits sellers' ability to set prices for goods or services
- ☐ **B2** Limits freedom of suppliers to advertise or market their goods or services
- ☐ **B3** Sets standards for product quality that provide an advantage to some suppliers over others, or are above the level that some well-informed customers would choose
- ☐ **B4** Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants)

C Reduces the incentive of suppliers to compete

This may be the case if the provision:

- ☐ **C1** Creates a self-regulatory or co-regulatory regime
- ☐ **C2** Requires or encourages information on supplier outputs, prices, sales or costs to be published
- ☐ **C3** Exempts the activity of a particular industry, or group of suppliers, from the operation of general competition law

D Limits the choices and information available to customers

This may be the case if the provision:

- ☐ **D1** Limits the ability of consumers to decide from whom they purchase
- ☐ **D2** Reduces mobility of customers between suppliers of goods or services by increasing the explicit or implicit costs of changing suppliers
- ☐ **D3** Fundamentally changes information required by buyers to shop effectively