

**NON-CONFIDENTIAL VERSION**

**Competition & Market Authority  
Funerals Market Investigation Provisional Decision Report**

**Central England Co-operative Feedback**

**September 2020**

We thank the CMA for the opportunity to respond to its Provisional Decision Report on Funerals. We are generally of the view that the remedies package proposed contains initiatives that will be helpful for consumers, such as those aimed at greater transparency with respect to pricing. We are also strongly of the view that the case has not been made for price controls in this industry and we welcome the CMA's decision not to impose them at this time.

Having said this, we do not believe that the reporting obligation proposed is either appropriate, proportionate or sufficiently thought through to address the harm that has provisionally been identified to exist. In particular, for the reasons set out below, we believe the CMA does not have the power to impose a reporting obligation as this does not address the harm alleged to exist.

Further, we are strongly opposed to the initiation of another market investigation of this industry. Not only would this be expensive, again, in terms of costs and time, but it would run up against the same problem as this one has, namely, the need for this industry to have the resources and flexibility to be able to respond to another pandemic, at any time and without warning.

The following are our comments on the Provisional Report in more detail. We would have appreciated more time to absorb the full impact of the near 500-page Report. Our ability to comment in greater detail has been compromised by the CMA's unexpected decision to accelerate the investigation timetable and allow only a very short consultation period.

**1. Evidence is insufficient to justify price controls, as alleged or, indeed, other remedies**

We disagree with the assertion that all funerals are over-charged to the tune of £400 or £600 each. These claims are insufficiently reasoned and should not form the basis for any conclusions or decision in the Final Report. It is unacceptable and harmful to the reputation of all funeral directors, given that the CMA has disclosed insufficient information as to the methodology used to arrive at these figures. We do not believe they are correct.

At para 8.33, the Provisional Report states that, "*for the large funeral directors, the detriment arising in the form of economic profits, i.e. profits in excess of the level required for a reasonable return on capital, is approximately £400 on average per funeral. This means that had the profits of these firms been at the level we would expect in a well-functioning market, their customers would have paid approximately £400 less for a funeral*". In para 8.40 and 8.41 the Report suggests a further £200 excess for cremations, so suggesting a significant proportion of these customers could have experienced detriment of £600 or more.

The CMA has not presented enough evidence to demonstrate that these claims are valid across all large funeral directors, “large” itself being a subjective construct. There is inadequate explanation of how the CMA arrived at its “expectation.”

Further, the use of a percentage increase in CPI or RPI to determine the aggregate level of increase in the cost of a funeral over time takes no account of finance costs over the quoted periods. As a practical example, applying the above reductions to our funeral business for the last financial year [2018/19] and, therefore, we consider these figures to be overstated. In addition to the lack of sufficient evidence, it is also noted that the calculations are based on historical information to 2018/19, as it did for other providers (for example Dignity plc’s operating profit reduced by 40%) and, therefore, using up-to-date information may provide a significantly different conclusion to that shown in the Report.

Therefore, we urge the CMA to drop these quantified claims from its Final Report. They are subjective and will inevitably be used in the press to tar the reputations of even the smaller funeral directors. Their inclusion will compromise the independence of any future market investigation as they will form an assumption as to the correct starting point for further analysis. The CMA will not want to be seen to back track on a fundamental finding of the current investigation, so creating bias.

Any future market investigation (which we oppose) would need to engage much more fully with the funeral sector in determining the range for a reasonable return on capital in this sector. The role of the funerals industry as a critical protector of public health outcomes makes it a very different industry from those the CMA normally investigates and in respect of which it normally estimates a reasonable return on capital employed.

The Provisional Decision also presents conflicting evidence as to whether grief is a “vulnerability” in all cases in terms of compromising a person’s capability to make the purchase they want. More work is needed on this subject before a firm conclusion, backed by evidence rather than subjective opinion, can be drawn.

## **2. All funeral directors to disclose prices and terms to customers**

Subject to any remedy lacking adequate underpinning in evidentiary terms, we support the concept that there should be full pricing transparency to the consumer prior to arranging a funeral and at the time of arranging the funeral. We agree that funeral directors should publish, and make available to customers, their terms and conditions of business. These proposals are consistent with our values and philosophy as a member-owned co-operative.

We urge the CMA to ensure that, in the proposed Order, there is clarification as to when and where pricing must be displayed. For example, display on a website should only be required where the organisation operates separate websites for each branch or sets its prices on a national basis. [2018/19], we could not list these on our one central website and each branch does not have its own website. Pricing would have to be presented in ranges only and/or the consumer directed to contact its local branch for details. We have no objection to any form of display at the branch itself but consider it would be unrealistic and inappropriate to require us to publish 132 different sets of prices on our one central website, particularly bearing in mind our website also covers our food retail businesses. Similarly, we do not believe it would be proportionate to require us to establish and maintain 132 websites for this sole purpose.

It is important that the requirements of this remedy are kept in proportion to the size of the customer-base likely to benefit. According to the CMA's own research, only 17% of customers shop around for funeral services. There is no reason to believe this will change materially, so expansive publication of pricing is not necessary. What matters is that customers who contact a funeral director are given full and clear information on pricing and terms, in person or by email.

In this regard, we believe that the CMA should consider, as part of its transparency remedy, defining one or two standard funeral packages to be offered, as a minimum, by all funeral directors, so enabling easier price comparison. This commoditisation would particularly suit the lower cost packaged products of Unattended Funeral and Simple Funeral.

This year, prior to COVID restrictions being introduced, we undertook a high-level review of Funeral Director prices for Unattended Funeral (Cremation) and Simple Funeral across our wide trading area. From a sample of 30 funeral directors, published prices ranged from £1164 - £1950 for Unattended Funeral and £1485 - £3479 for Simple Funeral. However, on closer inspection, it was apparent that different funeral directors include different components in these labelled packages, resulting in the great variation in price. Evidently, as things stand, it is not easy to compare different funeral directors. Requiring comparable packages would increase competition, while still allowing each funeral director still to offer a mix and match bespoke service.

### **3. Some funeral directors to be subject to reporting requirements**

#### 3.1 Reporting remedy is *ultra vires*

Of the remedies proposed, this one raises the greatest concerns. First, we do not believe that a reporting obligation, particularly one imposed on some, only, of the participants in the funeral industry, would stand up to legal challenge before the Competition Appeals Tribunal. Section 138(6) Enterprise Act 2002 only allows the CMA to impose such remedies as "remedy, mitigate or prevent the adverse effects on competition" as identified by the CMA in its Final Report. The adverse effect the reporting appears to be designed to address is the alleged excess pricing of funerals.

After-the-fact reporting of information by a few industry participants will not "mitigate" this, or any other, adverse effect, as is claimed in the Provisional Decision. It is hard to see how reporting of commercially sensitive business secrets to the CMA, or the publication of a generic report on trends, will alter the conduct of those few companies reporting, or of the remaining market participants. The CMA may believe funeral prices are too high but the reporting of price information will not reduce prices or increase competition.

The publication of actual or future prices by the CMA risks creating the very harm it is seeking to avoid. It could increase transparency and facilitate price following. Unlike the price transparency remedy above, it will have no bearing on the competition needed for prices to be competed downwards.

#### 3.2 Reporting remedy is disproportionate

The proposed reporting remedy is also disproportionate. A cheaper and simpler remedy to implement would be one in which the CMA conducts (or engages a third party to conduct) mystery shopping. But still, what mitigation of the adverse effects identified would even this achieve?

This remedy is also disproportionate in the sense of the cost and upheaval it will potentially cause to some parties, [X]. Central England Co-operative Funeralcare is not a separate legal entity. To comply, depending on the detailed reporting requirements, Central England Co-[X]. In the absence of this [X], irrelevant and misleading data would be reported. This would be of no use to the CMA in annual reporting.

Further, given [X], if this remedy were to be imposed, we could not hope to comply within the three-month implementation timeframe currently proposed.

### 3.3 Design of reporting remedy is inappropriate

We believe that, if reporting requirements are to be imposed, they should either be narrower or broader in scope:

- **Narrower:** If reporting is, in fact, for the purpose of monitoring the conduct or alleged excesses of the major players, then it should apply only to Co-op Group and Dignity, which together control 30% of branches (see Chapter 2, Provisional Report). All other operators (including us) are of minor significance, with shares of 3% or less.
- **Broader:** If reporting is designed to give an annual overview of how the sector is performing, then it must extend to a much larger proportion of the industry. As currently proposed, reporting would apply to only 42% of the industry (by branches), with 58% not being required to report anything. Producing an annual report using just 42% of market data would give consumers a meaningless, and misleading, overview. At minimum, a significant sample of smaller funeral directors should be included. We do not see what a reporting obligation on some funeral directors, but not others, seeks to achieve in terms of “mitigating” the adverse effects claimed.
- **Whole industry:** In our view, if broader reporting is to be required, it should also apply across the whole industry, to include a significant sample of smaller funeral directors, funeral brokers and price comparison websites. The CMA already recognises that there are issues with price comparison websites in the funeral sector, and problems relating to the operation of these digital information sources is well rehearsed in other industries. In some instances, these websites have been shown to operate anti-competitively. We also believe that, if there is to be reporting, it must encompass larger companies also such as Beyondlife, Farewill and Funeralguide, together with new market entrants emerging from the COVID-19 experience, e.g., Tehy Care.

## **4. All funeral directors to be prohibited from entering into third-party arrangements**

We are in broad agreement with the proposed remedy and remedy design as it relates to the procurement of referrals.

However, the definition in para 9.32(c) could be interpreted very broadly and this needs clarification as the CMA prohibiting democratically approved distributions (i.e. sums that are set aside and approved by our members) for the benefit of the community or for charitable purposes would contravene our legitimate operation as a co-operative business. Central England Co-operative comprises a food, property and funeral business, and there will be occasions where community and charitable initiatives cross over between these sectors. It is important that the ban does not inadvertently affect or unreasonably restrict our ability to operate as a member-owned co-operative business or indeed harm consumers and the wider community.

As a members-based organisation, we offer our members discounts and offers. These are pro-consumer initiatives and they must not be caught in the ban on dealings with third parties. For example, we may offer our members that are also members of the Royal British Legion discounts on funerals. We provided PPE to care homes during the pandemic and gave food offers to NHS workers. As a food retailer, we also continue to use funds from the sale of carrier bags to donate significant amounts to charitable and environmental causes, consistent with the carrier bag levy. Donations are made to food banks as part of the Fareshare scheme.

In the Final Report, the scope of this obligation needs to be narrowly defined so as only to catch funeral-related matters. The wording of the proposed Order should form part of a consultation to ensure implementation does not produce unintended consequences and is appropriate for businesses operating in multiple sectors, avoiding a significant administrative burden to provide information that is not relevant to the CMA's requirements.

## **5. Recommendation to establish an inspection and registration regime**

While we believe a full regulatory regime is not necessary for this sector, we consider inspections would improve consumer outcomes. As the CMA has acknowledged, consumers cannot know what happens behind the scenes. We believe inappropriate practices are engaged in by some funeral directors and these could be stamped out by a monitoring body, independent of the funeral sector.

If a regulatory regime is to be introduced, we consider that the one operating in Scotland works reasonably well.

In the development of this regime, the best practice currently operated by industry bodies, such as NAFD and SAIF, for the fair handling of customer complaints should be retained. In particular, the role played by mediation in complaint resolution is particularly valuable when dealing with consumers.

## **6. CMA to conduct a supplementary market investigation at the earliest opportunity**

We are opposed to any attempt, for the foreseeable future, to subject this industry to a further market investigation. The statutory duties on the CMA, and the rights of participants to due process, mean that a second investigation could not simply be an expedited "supplementary" process. The whole statutory exercise would have to be undertaken again, with new data and all the attendant work involved, both on the part of the industry and by the CMA at the taxpayer's expense.

The current market investigation is subject to strict time limits to which the CMA must adhere. Suggesting another market investigation in the near term is an attempt to circumvent the will of Parliament with respect to those time-limits. The latter are intended to prevent an industry from being investigated endlessly. In any event, it will take years for the dust to settle from the COVID-19 crisis. No meaningful conclusions could be drawn from data pertaining to 2020 and 2021.

What the COVID-19 crisis has demonstrated is the need for the UK funeral industry to be sufficiently well-funded, stable and resilient to be able to respond flexibly and urgently to future pandemics and other large-scale disasters. The stark reality is that the COVID-19 crisis has reminded everyone, politicians included, of the unique and critical role this industry plays and of its strategic importance to public health.

## **7. Miscellaneous**

Complaints: In para. 9.163, the CMA refers to ‘whistleblowing’ powers in the form of complaints from funeral directors, crematorium operators, third parties and customers. As a market investigation, such as this, is only allowed to address competition concerns, and the CMA already has procedures in place for whistleblowers to approach it regarding anti-competitive practices, we do not understand what additional powers the CMA is now seeking and in respect of what types of conduct anyone would be “blowing the whistle.” If it is conduct outside the scope of competition law, the CMA cannot use its market investigation powers to set itself up to receive those complaints. It has no authority to establish itself as an interim funeral sector regulator.

Local authority contracts for pre-agreed fixed rate services: COVID-19 has severely tested local authority capability for what is referred to by central government as the ‘death management process’ and this issue remains live as we head into the winter peak for deaths. Local authorities have limited experience of the death management process, as well as of commercial contracting for funeral services to be supplied to consumers by funeral directors. Based on our experience of working with local authorities during the COVID crisis, we believe it may be optimistic to expect local authorities to become involved in a consistent and good-quality manner without central government rule-making (e.g., requiring tenders, transparency and the provision of full information to consumers). We would be willing to share our further thoughts with the CMA to enable a successful implementation of this proposal.

## **8. Conclusion**

In summary, while we are in broad agreement with some of the remedies proposed, others are not supported by the evidence presented and/or go beyond what is appropriate in all the circumstances.

We would be happy to engage further with the CMA on any of the above.

17 September 2020