

Funerals Market Investigation

Westerleigh Group's response to the CMA's Provisional Decision Report: Proposed Remedies

1. Introduction

1. On 13 August 2020, the CMA published the Provisional Decision Report ("**PDR**") in its funerals market investigation. This submission sets out Westerleigh's response to the remedies package proposed by the CMA in the PDR, focusing on those proposals relevant to crematoria operators. It should be read in conjunction with our response to the CMA's competitive assessment, including its proposed findings of AECs and customer detriment as regards the crematoria sector ("**Main PDR Response**").
2. Without prejudice to Westerleigh's position that the CMA has failed to establish to the requisite standard that there are any AECs in relation to the supply of crematoria services, Westerleigh is broadly supportive of the package of remedial measures proposed by the CMA. In particular, we welcome the principle of remedies designed to increase the availability of information to customers.
3. Westerleigh has helped to transform the sector by developing new purpose-built crematoria that offer customers a significantly higher quality experience than had been previously available, and we believe that it is important that customers are well informed. Westerleigh has led the way in providing easily accessible and understandable information on the services it offers, including prices and other information which families might find useful when arranging a funeral. We are keen to work with the CMA to ensure that these remedies are designed to enable families to make well informed choices.
4. We note, however, that the remedies currently proposed by the CMA seem to have been designed on the false premise that quality is not important to customer choice, or variable between crematoria. We strongly disagree with this, as explained more fully in our Main PDR Response. It is important that any information remedies provide customers with sufficient information on qualitative factors, as well as price. We explain in this response how we feel that qualitative aspects can be incorporated within the proposed remedies. Westerleigh will continue providing full information on the quality of its facilities and services in any event, but it is concerned that a remedy focussed primarily on price would leave families unable to make a properly informed comparison between alternative crematoria in their local area.
5. We also believe that customers could benefit from an expansion of the geographic remit for the CMA's proposed information remedies, since (as accepted by the CMA in the PDR) many customers travel further than the narrow 30-minute cortege speed drive time proposed. Unduly restricting the area within which funeral directors are required to provide customers with information on available crematoria would therefore risk restricting, rather than enhancing, customer choice.

6. We consider that the CMA has reached the right outcome in not proposing to take forward price regulation proposals. This would have carried significant risks of harming competition in the long term. However, we strongly disagree with the CMA's provisional conclusion that, absent the impact of COVID-19, it would have been appropriate and feasible for the CMA "*to develop an effective and proportionate methodology for controlling the pricing outcomes*" identified in the PDR.¹ The CMA has not demonstrated that price regulation would be a proportionate response to the issues outlined in the PDR, and has failed to recognise or properly take account of features of the crematoria sector which in any event make it unfeasible to implement this form of regulation without giving rise to unacceptable risks of distortions of competition and customer detriment.
 7. For this reason, we do not believe that recommending the CMA Board to consider a supplementary market investigation reference ("**SMIR**") would be appropriate. In any event, it is clear that the CMA may not pre-judge the need for (or likely outcome of) any SMIR at this stage, which must be based on an objective review of the available evidence, taking account of the change that has occurred in the sector at an appropriate point in future, once the COVID-19 pandemic has passed and the sector has stabilised. Furthermore, if the CMA were to undertake a SMIR, it could not be focused only on the question of price regulation. Rather, in accordance with the provisions of the Enterprise Act, the CMA would first need to reassess whether there are any AECs in the crematoria sector. In doing so, it would need to fundamentally revise the approach taken in the current market investigation to gathering and analysing the evidence in several key areas, including the CMA's assessment of local competition, its evaluation of the quality of crematoria facilities and services across the sector, and its limited 'sampling' approach in relation to local authorities which constitute the large majority of the operators in the crematoria sector.
 8. This response sets out Westerleigh's initial comments on the information remedies proposed by the CMA, before setting out our views on the CMA's statements regarding the potential need for price regulation in the crematoria sector in the future and its proposals for a SMIR.
- 2. Westerleigh's comments on the CMA's proposed information remedies**
9. The information remedies proposed by the CMA which are relevant to the provision of crematoria services take the form of:
 - (a) A requirement on all crematorium operators to disclose price information to customers.
 - (b) A requirement on all funeral directors to disclose price and particular commercial information to customers.
 10. As highlighted in Westerleigh's submissions throughout the market investigation, Westerleigh supports measures aimed at ensuring that families have as much information as possible prior to selecting the venue for the funeral, both in order that the family can make the correct choice, as well as to ensure that the funeral goes to plan and all their personal needs are met.

¹ PDR, paragraph 9.227.

Westerleigh has led the market on transparency of cremation fees, with full pricing information available on its websites, and printed price lists provided to funeral directors to pass on to families. Westerleigh also provides qualitative information on the facilities and service provided and welcomes and encourages customers to visit its sites to inform their decision making ahead of arranging the funeral.

11. Westerleigh's Survey demonstrates that properly informed customers will make active choices, taking account of the different aspects of crematoria offerings (including quality, distance and price).² Appropriately designed remedies of this nature will, therefore, directly address the CMA's concerns regarding the challenges which the bereaved face in exercising choice at the point of need and, in doing so, further enhance competition between crematoria in order to attract customers to their facilities. This will ultimately lead to better outcomes for families.
12. We note the CMA's position that "*transparency by itself will not be sufficient to fully address*" the concerns it has outlined in the PDR.³ However, as explained further in section 4 below, the CMA must keep an open mind to this as the remedies take effect. In particular, any consideration of whether to initiate a SMIR must involve a proper assessment of customer behaviour (including the full range of factors which customers take into account, such as quality, distance and price) and the impact of the CMA's immediate remedies on such behaviour and outcomes.
13. We provide specific comments on the proposed design of these remedies below. Westerleigh believes the changes proposed in this section would be reasonably straightforward for crematoria and funeral directors to implement and would not materially increase the costs of implementation.

2.1 Comments on crematoria operator information remedies

14. Westerleigh is supportive of the proposed obligation for crematoria operators to provide pricing information to funeral directors and to customers on request and agrees with the proposed specifications outlined in the PDR.⁴
15. Westerleigh notes, however, that customers could benefit significantly from the scope of the proposed remedy being widened. The CMA's current proposals could result in too limited a range of information being provided to customers on the crematoria available to them. While Westerleigh agrees that information should be provided on the three types of service, the information provided should go beyond just information on fees, slot lengths, and the

² See Westerleigh's submission on its customer survey dated 19 June 2020.

³ PDR, paragraph 9.200.

⁴ Westerleigh assumes that the statement in paragraph 9.53 of the PDR, that "*funeral directors and crematorium operators should be required to provide price information to customers prior to the arrangement meeting*" is an inadvertent error. Given that crematoria operators will typically not have had any contact with a customer prior to the arrangement meeting with the funeral director, it would obviously be impossible for crematoria operators to comply with such an obligation.

elements that are included in or excluded from the service. To assist families in making their decisions, the information provided should include detail on qualitative aspects which are important to customers, including range of facilities, nature of the music/AV offering, the size and quality of the grounds and buildings, and the age of the site.⁵

16. This is needed in order to be consistent with the CMA's finding that "*quality is more important than price to customers generally and to...customers who compare alternatives more specifically*".⁶ Indeed, Westerleigh believes that transparency measures which help customers to become better informed about the variability in quality of crematoria would result in qualitative aspects driving customer choice to an even greater extent than they do already. This depends, however, on qualitative information being given sufficient emphasis.
17. Westerleigh looks forward to further constructive engagement with the CMA on the design of this remedy during the remainder of the market investigation, including in relation to:
 - (a) **The form and content of price lists.** In this regard, Westerleigh draws the CMA's attention to the recent guidance issued by the Scottish Government ("*Guidance on funeral costs published under Section 98 of the Burial and Cremation (Scotland) Act 2016*") which includes clear and straight forward guidance on the composition and availability of price lists for crematoria.
 - (b) **The need for precise definitions of service types and slot length.** For example, Westerleigh notes that the term "unattended service" should be clarified as service types can vary from operator to operator. Similarly, there is some variation in whether operators specify "slot length" or "service length" (which is typically the time allowed for the service itself).
 - (c) **The appropriate mechanism for crematoria operators to provide information to funeral directors.** As noted in the PDR, there is no definitive register of funeral directors in the UK. This may be addressed by the CMA's proposals for the registration of funeral directors in the UK, but in the meantime Westerleigh would recommend that the CMA hold, publish and keep up to date a list of funeral director branches and postcodes, so that crematoria operators can comply fully with the remedy.
18. Westerleigh also encourages the CMA to consider whether other interested stakeholders would benefit from the provision of information on crematoria, such as local Citizens Advice services.
19. In any event, notwithstanding the comments above, Westerleigh is keen to provide as much information to customers and funeral directors as possible, and so would not view the information remedy as a minimum requirement. Westerleigh will continue to seek to provide

⁵ Westerleigh recognises that some of the most important aspects of quality (such as mourner comfort, peacefulness of the site) will be difficult to capture in a comparable way, but this does not mean that the above quality aspects should not be included alongside price information, so that customers can assess what they are getting.

⁶ PDR, paragraph 6.194.

accessible information to any funeral directors who assist families which may be interested in choosing a Westerleigh crematorium as possible.

2.2 Comments on funeral director information remedies

20. As Westerleigh has previously outlined, funeral directors play an important role in helping families with the options for choice of crematorium, and advising on the comparative services offered, prices and quality of facilities.⁷ Remedies designed at enhancing the provision of information to customers by funeral directors are therefore most likely to be effective in increasing transparency and enhancing customers' ability to exercise choice. Westerleigh agrees with the CMA's proposal for funeral directors to be required to provide customers with pricing information on the crematoria in their local area, both on request and prior to the arrangement meeting. However, Westerleigh believes that the CMA can and should go further.
21. First, as noted above, the information provided to customers should include qualitative information. Indeed, the importance of including qualitative factors is, if anything, more relevant to the funeral directors' remedy, as families typically look to funeral directors for advice on the funeral and what to expect from a crematorium. The provision of comparable information on the quality of different crematoria would assist this process.
22. Second, the scope of the remedy should be widened to include crematoria located from a much wider area than 30 minutes cortege drive time from the funeral director. Regardless of whether the CMA finds that crematoria catchment areas are limited to 30 minutes cortege drive time (which Westerleigh strongly disagrees with for the reasons set out in its Main PDR Response), this is far too narrow for the purposes of a measure designed to enhance customers' ability to exercise effective choice. In particular:
 - (a) First, as the CMA acknowledges in the PDR, many customers are willing and do travel much further than 30 minutes cortege drive time.⁸ Under the CMA's proposals, many of these customers would likely not have been presented with the relevant Westerleigh crematorium as an option by their funeral director.⁹ Westerleigh believes

⁷ Westerleigh notes that the PDR is internally inconsistent in this regard, noting on the one hand that "*funeral directors play a very important role in shaping customer decision-making*" (PDR, paragraph 5.30), and at the same time that "*generally the funeral director does not play a role in the choice of crematorium for the vast majority of customers*" (PDR, paragraph 6.15). The latter finding is based, in large part, on the CMA's flawed consumer survey, as discussed in Westerleigh's Main PDR Response. Westerleigh believes that customers are active decision makers, make trade-offs between options and the customer experience available, and that choice can be improved by the provision of information. As noted above, this is corroborated by Westerleigh's Survey.

⁸ For example, Westerleigh's Survey found that [60-70%] of respondents indicated a drive-time of greater than 30 minutes cortege drive time (the deceased lived on average [X] cortege drive time from the crematorium used).

⁹ Similarly, the CMA accepts that its entry analysis demonstrates crematoria experiencing entry from an entrant that is located between 33 minutes and 42 minutes away (at cortege speeds) lose volumes (PDR, paragraph 4.46).

that there is potential for customers across a far wider area to benefit from the information remedies, and would urge the CMA to recognise this in its remedy design.

- (b) Second, as noted above, Westerleigh believes that measures of the nature proposed by the CMA – effectively implemented – have the potential to encourage many customers to travel further for a funeral than is currently the case. Greater awareness of the availability of higher quality services and facilities is likely to lead customers to make more informed choices about the distance they are prepared to travel. This, in turn, would promote enhanced competition between crematoria as the number of 'marginal' customers would increase.¹⁰
 - (c) Third, given that the remedy is based on the location of the funeral director, it is inevitable that it would not provide customers with details of all crematoria (even within a 30 minute cortege drive time) of either the deceased's address or the customer's address. While it makes sense from a practical perspective for the remedy to be based on crematoria located within a defined area around the funeral director, the area must be widened to ensure it captures all crematoria that a customer would be willing to travel to (which as noted above for many customers is much further than 30 minutes cortege drive time). For example, funeral directors located just outside the 30-minute cortege drive time area of a crematorium may serve families which themselves are actually located very close to that crematorium.
23. Westerleigh also considers that the remedy would be easier to implement for funeral directors and crematoria if it were specified in terms of normal drive times, which are much more commonly used and more readily determined, rather than cortege drive times. For this reason, the CMA should also give consideration to specifying a mechanism for calculating drive times (e.g. Google maps/AA drivetimes).
24. For these reasons, Westerleigh suggests that the remedy should be widened to capture all crematoria within 45 minutes normal drive time (75 minutes cortege drive time) of the funeral director. Restricting this measure to a 30 minute cortege drive time area would represent a missed opportunity for the CMA to enhance customers' ability to exercise choice.

3. The CMA has not set out a valid basis for price regulation or a supplementary market investigation

25. In the PDR the CMA sets out its provisional view that "*measures that control pricing outcomes are also likely to be necessary*" and that "*it would be feasible to develop an effective and proportionate methodology for controlling the pricing outcomes that we have provisionally found*".¹¹ While the CMA does not propose to take forward price regulation in the current market investigation, these conclusions form the basis for the CMA's proposal to recommend

¹⁰ Westerleigh already provides information to funeral directors across a wide area, with particular attention to areas distant to the site, as it is in these areas where Westerleigh can best achieve additional growth, by attracting families who are prepared to make the trade off of travelling further to experience a better quality of service.

¹¹ PDR, paragraph 9.227.

to the CMA Board to "*consider consulting on a supplementary MIR at the earliest opportunity once the impact and consequences of COVID-19 on the funerals sector are sufficiently understood and the sector is more stable*".¹²

26. Westerleigh strongly disagrees with the conclusions reached by the CMA in this respect. As set out below:

(a) The evidence base the CMA has presented in the PDR is inadequate to form the basis for the imposition of a price control remedy. In particular, the CMA has failed to demonstrate that price regulation is required to address the AECs it has provisionally identified, or that the pricing concerns it has provisionally identified result from those AECs. Moreover, the CMA's evidence is deficient in relation to issues which are key to determining the need for, and appropriate design of, any price control remedy, including in relation to qualitative factors.

(b) The CMA has failed to demonstrate that it is feasible to design an effective and proportionate form of price control for the crematoria sector. This is simply asserted. The CMA has not engaged with Westerleigh's previous submissions, which set out various reasons why any form of price regulation would be liable to result in significant distortions of competition and, ultimately, long term customer detriment.

27. As set out in Westerleigh's Main PDR Response, the evidence available to the CMA shows that the crematoria market is working well, delivering positive customer outcomes and improvements in customer experience. Customer choice, competition and quality in the sector are all increasing as a result of sustained investment, primarily by the private sector. For these reasons, Westerleigh does not believe the CMA has set out a valid basis for recommending a future SMIR, as explained more fully in section 4 below.

3.1 The CMA has not demonstrated a legal basis for imposing price control remedies

28. Under the Enterprise Act 2002, the CMA may only take remedial action which is necessary for "*remedying, mitigating or preventing the AEC or any detrimental effect(s) on customers so far as it has resulted from, or may be expected to result from, the AEC*". In other words, the remedy proposed must be designed to address either:

(a) The causes of one or more AEC(s) identified by the CMA; or

(b) Any detrimental effect(s) on customers which the CMA has established result directly from those AEC(s).

29. The CMA also has a duty to ensure that any remedies that it proposes are proportionate. Under the "double proportionality" principle, the more intrusive, uncertain in its effect, or wide-reaching a proposed remedy is likely to be, the more detailed or deeper the investigation

¹² PDR, paragraph 9.257(c).

of the justification for that remedy must be.¹³ Even if the CMA ultimately finds one or more AEC(s), the evidence and analysis presented in the PDR falls a long way short of the standard that would be required to demonstrate that the imposition of a highly restrictive pricing remedy would be an appropriate or proportionate response.

30. As the CMA acknowledges, a price control remedy would not address the AECs the CMA has provisionally identified.¹⁴ Rather, it would be intended to directly intervene in consumer outcomes to mitigate the alleged consumer detriment identified by the CMA (which Westerleigh strongly disputes is applicable to its crematoria services, for the reasons set out in the Main PDR Response). Importantly, this means that the CMA must be able to prove a clear causal link between its pricing concerns and the AECs it has identified.
31. As explained in section 5 of Westerleigh's Main PDR Response, the CMA has failed to demonstrate such a causal link. Specifically, while the CMA provisionally concludes that "*high prices in the supply of crematoria services are likely to reflect the exercise of market power arising from limited competitive constraints*"¹⁵, it has failed to establish any link between the alleged lack of competitive constraints in certain local areas and 'high' prices. Indeed, the CMA explicitly acknowledges this at various points in the PDR. For example:
- (a) The evidence "*does not show significant differences between prices and the number of rivals*" in local areas.
 - (b) The CMA's analysis indicates that "*crematoria in local areas where concentration is lower...do not offer consistently lower prices (or higher quality)*".¹⁶
 - (c) For "*crematoria with at least one rival, fees do not vary significantly with the number of competitors*".¹⁷
 - (d) "*We agree with Westerleigh that generally these results do not show significant differences between prices and the number of rivals*".¹⁸
32. In addition, as explained in section 8 of Westerleigh's Main PDR Response, the CMA has largely failed to appreciate the importance of quality or to properly understand the interaction between price, quality and customer experience. The evidence shows that there is a significant variability in quality between private sector crematoria and those operated by local authorities, yet only small differentials in price (especially when considering service length).

¹³ Competition Appeal Tribunal (CAT) judgments: in *Barclays Bank plc v Competition Commission* (2009), CAT 27 (paragraph 21); citing *Tesco v Competition Commission* (2009), CAT 6 (paragraph 139).

¹⁴ PDR, paragraph 9.11.

¹⁵ PDR, paragraph 7.290.

¹⁶ PDR, paragraph 7.286.

¹⁷ PDR, paragraph 7.238.

¹⁸ PDR, paragraph 7.240.

As such, the CMA has failed to demonstrate that higher prices are not simply reflective of superior quality, and customer preferences, rather than the exercise of market power.

33. Furthermore, if the CMA were to rely on the AEC concerning customer engagement to impose price regulation, this would not represent a proportionate response. Specifically, it is evident that information and transparency measures represent both a more direct and effective remedy to address those concerns and a less onerous remedy than price regulation.
34. As such, even if the CMA were able to establish one or more AECs to the requisite legal standard (which is not accepted), the CMA has not established a valid legal basis for the imposition of price regulation to control allegedly 'high' prices.

3.2 The CMA has incorrectly asserted that it can design an effective and proportionate remedy

35. The issues set out above are further compounded by the particular difficulties which the CMA faces in designing an effective and proportionate form of price regulation in the crematoria sector. Westerleigh's response to the CMA's working papers set out a series of issues with the CMA's earlier proposals for price regulation, summarised below, which the CMA has not engaged with in the PDR.¹⁹
36. ***Sector-wide price control is a disproportionate response to profitability concerns limited to certain, predominantly public sector, operators:***
- (a) The CMA's primary rationale for considering price regulation in the crematoria sector is its finding of "*returns (for a substantial proportion of the sector) above the level which one would expect to see in a well-functioning market*".²⁰
 - (b) However, the CMA's profitability analysis (from which only limited conclusions can be drawn given the limitations set out in section 9 of the Main PDR Response), has only found significant and persistent 'excess' profits for a single private sector operator, as well as 18 public sector providers. [X].²¹ The CMA has not shown that "*profits have been significantly and persistently above the cost of capital for crematoria operators representing a substantial part of the market*", as asserted in the PDR.²² The profitability analysis shows reducing profitability, which reflects the impact of greater competition on volumes and prices, together with the cost of investment in quality measures, needed to retain and attract business in a competitive market.
 - (c) It would be unsound for the CMA to use such concerns as the justification for imposing restrictive price regulation on an industry-wide basis, which would disproportionately affect those private sector operators, such as Westerleigh, which have been investing most heavily in the sector in recent years and delivering significantly improved

¹⁹ See Westerleigh's response to the CMA's working paper on price regulation for crematoria services, dated 16 June 2020, for further details.

²⁰ PDR, Annex W, paragraph 97.

²¹ As explained more fully in Westerleigh's Main PDR Response. [X].

²² PDR, paragraph 7.289.

customer outcomes. Certainly, the CMA could not rely on this as a basis for imposing regulation only on the private sector, as contemplated in Annex W of the PDR. Such an approach would be wholly disproportionate, would not effectively address the issues the CMA has identified, and would also give rise to significant distortions of competition in local areas and raise difficult legal questions around compliance with rules on State aid (among other issues).

- (d) Put simply, it would not be defensible for the CMA to impose highly intrusive remedies on private sector operators based on profitability concerns which do not, on the whole, apply to them. Nor can the CMA impose price regulation upon all private operators on the basis of excess profits earned by one operator alone. This is even more so given that, as set out below, the most significant risks of unintended consequences arising from a remedy of this nature relate to the impact on the incentives of private sector operators to continue investing in new and improved crematoria in coming years.

37. ***Price regulation risks deterring much-needed investment:***

- (a) As Westerleigh has highlighted throughout the market investigation, it is critical for the crematoria sector and ultimately for consumer welfare that any remedies do not deter private sector investment in new and upgraded crematoria facilities. The CMA has not properly engaged with this issue despite investigating the sector for over two years.
- (b) The recent COVID-19 outbreak has proven just how vital private sector investment seen in recent decades has been for customer outcomes, and over the next 20 years sustained investment in the sector is required to meet continued growth in demand for cremation and to replace or upgrade the existing stock of local authority facilities as it becomes increasingly obsolete. Public sector provision generally does not provide the best consumer outcomes, and many local authority crematoria require improvement to meet the changing needs of bereaved families.
- (c) As with any other industry, private sector development in the crematoria sector requires a return on capital sufficient to stimulate investment. Given that the CMA has only found that one private sector is currently earning 'excess' returns, Westerleigh believes that any form of price regulation would carry a very significant risk of reducing investment incentives and/or driving operators to build new sites that are of a lower quality standard (e.g. smaller, in less desirable locations, lower specification) and therefore less suited to the needs of the bereaved.
- (d) Ultimately, this would result in a less dynamic sector and customer detriment in the long run. For this reason, Westerleigh strongly believes that a fair and objective cost-benefit analysis would find that any benefits from price regulation would be heavily outweighed by the disadvantages.

38. ***The significant quality differentials between crematoria make price regulation inherently unsuitable and liable to disproportionately affect higher quality operators:***
- (a) As set out in Westerleigh's Main PDR Response and in its previous responses, there is a vast difference between the quality of service offered by crematoria across the UK. In the PDR, the CMA has correctly changed its earlier view that crematoria are "*relatively homogenous*", now acknowledging that there is a "*degree of differentiation across providers in terms of the products and services offered and service quality*"²³ (although it continues to wrongly downplay the extent of the quality differentials) and, in particular, that private crematoria "*differentiate themselves through their newer buildings, facilities and grounds*".²⁴
 - (b) The CMA's own guidance recognises that in markets characterised by differentiated products or services, defining appropriate parameters for remedies designed to control outcomes, including price control, is likely to be "*complex and, in some cases impractical*" since it is necessary to "*capture adequately the diversity of products [on] offer*" and, as a result, remedies of this nature will be "*vulnerable to specification risks*".²⁵ A price remedy which reflected the extensive quality differentials between crematoria would be likely to require a highly complex design, involving significant costs, and would be prone to significant uncertainty and risks of errors of assessment.
 - (c) While a price cap which applied equally to all crematoria regardless of quality may be attractive to the CMA on account of its perceived relative simplicity, such an approach would raise significant risks of distorting operators' incentives to invest in providing quality services to customers and therefore dampening competition on this key element. It would benefit those operators who currently offer a low quality service, typically offering worse customer outcomes and create incentives for operators to cut costs at the expense of quality and customer experience. It would also disproportionately affect those operators which have invested in higher quality facilities, to the benefit of customers, which as noted above are precisely the operators in relation to which the CMA has not found profitability concerns.
 - (d) Based on the PDR, it appears that the CMA has given no consideration to how a price regulation regime could be designed to avoid these risks, which would result in significant customer detriment.
39. ***The highly fragmented nature of the sector further increases complexity and risks:*** The complexity of designing an appropriate form of pricing remedy, which fairly reflects the different circumstances of different operators, is significantly greater as a result of the large number (184) of crematoria providers, both public and private sector, which operate under a diverse range of business models and with large variances in their underlying cost bases.

²³ PDR, paragraph 7.3.

²⁴ PDR, paragraph 6.192.

²⁵ CC3, paragraph 88.

Again, this would increase the risk of errors in assessment and harmful distortions of competition.

40. ***The need for geographic differentiation:***

- (a) Even to the extent that price regulation could be shown to be necessary and feasible to implement (which Westerleigh rejects), it must be appropriately targeted. This means that price caps should only be applied in local areas where customers do not have an effective choice of crematoria and entry is unlikely to occur, where there is compelling evidence that the lack of competition has led to poorer outcomes for customers, and other, more proportionate, remedies such as the information remedies proposed by the CMA in the PDR are unable to improve those outcomes. This means that the CMA could not simply apply a blanket approach across the UK.
- (b) As set out in the Main PDR Response, the local concentration analysis set out in the PDR is plainly inadequate for determining which areas of the country are characterised by weak competitive interactions between crematoria. Accordingly, any consideration of price regulation would necessarily require a much deeper consideration of local competition for the CMA to ensure that any price controls were proportionate and in accordance with its legal duties.

41. ***The need for exceptions and adjustments:***

- (a) Any form of price remedy would also need to be designed to allow for regular and frequent adjustments and exceptions, further adding to the cost and complexity of such regulation in the crematoria sector.
- (b) This would include the need to take account of changing circumstances, such as changes in operators' cost bases (including, for example, increased costs of compliance with future environmental and other regulations) and unforeseen events – as evidenced most clearly by the recent pandemic, which required operators like Westerleigh to be able to react and adapt quickly to continue serving customers as best possible. In Westerleigh's view, the market is best placed to manage these issues and react to events, free from restrictions arising from a prescriptive regulatory process.
- (c) As the CMA has accepted, exceptions to price controls would also be required in the event of new investments.

42. The CMA has not engaged with these issues at all in the PDR. Instead, the CMA simply asserts that they "*can be addressed*" and that it "*would be possible to implement price control regulation of crematoria services which would be both effective and proportionate*".²⁶ While Westerleigh understands that the CMA has decided to devote its attention to other remedies in the remainder of the market investigation, it is inadequate for the CMA to make assertions

²⁶ PDR, Annex W, paragraphs 112 and 113.

of this nature regarding the appropriateness of price regulation, given that these will potentially (under the CMA's current proposals) form the basis for a further, costly and time consuming SMIR for the sector. In Westerleigh's view, for the reasons set out above and in Westerleigh's previous responses, any SMIR devoted to considering price regulation ultimately prove to be a waste of resource for the CMA and the sector, as the CMA would be unable to establish that a highly intrusive remedy of this nature would be necessary, appropriate or proportionate.²⁷

43. Furthermore, while the CMA states that it has "*not identified, nor has any party suggested to us, any RCBs resulting from the features we have provisionally found*"²⁸, this is not correct. Westerleigh has repeatedly emphasised that important and significant customer benefits have been realised in recent decades as a result of sustained investment into the sector. Changes in the crematoria sector in recent years have been transformational for bereaved families. The emergence of, and investment by, high quality operators has brought with it, among other benefits, the opening of new, purpose-built, well designed crematoria offering a comfortable and pleasant experience meeting the needs of the bereaved, increased service lengths, greater availability of capacity at peak times, and a shift away from the traditional 'conveyor belt' experience of the past. While these benefits are unlikely to be materially affected by the CMA's current proposed remedies package, any consideration of price control remedies would need to take account of the impact of price regulation on operators' continued incentives to invest in developing new and improved crematoria and the potential for the reversal of the consumer benefits that have been delivered in recent years.

4. A SMIR is not warranted and could have detrimental impacts on customers

44. Westerleigh understands the CMA's desire to keep the funerals market under review. However, for the reasons set out above, Westerleigh does not consider that the CMA has established either a need, or appropriate method, for imposing price regulation in relation to the crematoria sector. For these reasons, Westerleigh is of the view that a SMIR focused on the imposition of price controls would not be warranted. Moreover, and as explained below, a SMIR focused only on the question of price regulation would not be consistent with the provisions of the Enterprise Act.
45. As such, should the CMA proceed with a recommendation to the CMA Board in this regard, the CMA may not pre-judge the need for (of likely outcome of) a SMIR at this stage, and Westerleigh is concerned by statements in the PDR that suggest this may be the case.²⁹ Indeed, Westerleigh believes that, if effectively implemented, the information remedies proposed by the CMA – alongside the continuation of existing market trends outlined in

²⁷ As set out below, a SMIR solely devoted to the issue of price regulation would also be inconsistent with the requirements of the Enterprise Act.

²⁸ PDR, paragraph 9.219.

²⁹ For example, paragraph 9.158: "*it would be appropriate for the remedies that we have provisionally decided not to proceed with (see Appendix W), in particular price control regulation of funeral director and crematoria services, to be given closer and renewed consideration in the context of a supplementary MIR*".

section 4 of the Main PDR Response – should be sufficient to address the concerns the CMA has identified in the PDR. Westerleigh's specific concerns with the CMA's consideration of a SMIR include the following.

46. First, the CMA has recognised that the impact of the information remedies should increase over time.³⁰ This impact should, therefore, form an important part of the CMA Board's future assessment of whether, and if so when, it is appropriate to initiate any new market inquiry. That assessment must also take account of other market developments in the intervening period and should, therefore, not (as suggested in the PDR) be limited only to considering the impact of COVID-19 on the sector and when it has sufficiently stabilised.³¹ Before carrying out this assessment, the CMA must allow sufficient time for any remedies adopted in this market investigation to be implemented and have effect.
47. Second, Westerleigh is particularly concerned with the manner in which the CMA appears to be proposing that any SMIR would proceed. As an initial point, the concept of a "supplementary" MIR is not one that exists in law. Rather, each MIR is standalone and, in each instance, the CMA is required to answer the questions listed in section 134 of the Enterprise Act afresh. It is not, therefore, open to the CMA to conduct a SMIR which considers only the question of price regulation without first determining, on the basis of the evidence available at the time of any SMIR, whether there are any AECs which require remedial action.
48. Similarly, the requirements of section 134 are such that the CMA cannot simply 'cut and paste' its findings from the present market investigation to a subsequent one. In particular, given that the findings from this market investigation would not be binding on the CMA in any SMIR, it follows that the CMA would be fettering its discretion, or otherwise be relying on irrelevant factors, if it chose to unduly rely on the findings of the present market investigation in that context. Accordingly, it is not open CMA to 'bank' its findings in the present market investigation and then, in a SMIR, take those findings as proven. The substantive issues would need to be considered objectively and independently by a newly appointed Panel.
49. Put simply, the CMA cannot simply rely on its proposed AEC findings in the current market investigation as a platform for a future investigation to focus solely on the question of price regulation. Indeed, the CMA must recognise that given the dynamic nature of the market – with new entry happening regularly across the UK – much of its analysis in the PDR (dating back to 2018) is already out of date and unreflective of the current state of the market.

³⁰ PDR, paragraph 9.180: "we can envisage its [the proposed transparency remedy's] impact increasing over time, as the benefits of greater transparency in enabling customers and others to hold suppliers to account are realised".

³¹ PDR, paragraph 9.181: "The consideration of a supplementary MIR should be primarily determined by the CMA board's assessment of the impact of COVID-19 on the funerals sector and the point at which the CMA board is of the view that the sector is sufficiently stable."

50. Third, Westerleigh is concerned that any SMIR would be subject to a high degree of confirmation bias. The CMA should ensure that any consideration of a SMIR³² is undertaken objectively, by a different case team and Panel, and based on a fresh review of the available evidence at an appropriate point in future.³³ The CMA must, in particular, ensure that it does not simply pursue the same conclusions and interpretations which it appears to have rigidly followed since setting out its initial views at the start of the current review in June 2018, despite a significant body of evidence to the contrary. Rather, it must approach the issues with a fresh mind.³⁴
51. Fourth, as set out in Westerleigh's Main PDR Response, any SMIR would need to involve a fundamentally revised approach to the CMA's analysis in several key areas, as well as a significant amount of fresh evidence gathering by the CMA. The CMA would then need to conduct a fresh and objective consideration of whether the alleged AECs and customer detriment set out in the PDR (if confirmed in the CMA's final decision, which Westerleigh does not believe they should) could still be found to be features of the market to the requisite standard and, if so, whether price regulation would be an appropriate and proportionate response. Areas of particular focus and reconsideration as part of any SMIR would need to include, among others:
- (a) A revised consideration of the impact and variability of quality. In the present market investigation, the CMA appears to have started with the assumption that quality is not an important factor and has been reluctant to move away from this position despite a weight of evidence to the contrary. This underlying assumption needs to be dropped, with the evidence properly and objectively considered afresh.
 - (a) A comprehensive and robust assessment of the quality of crematoria facilities and services across the UK (in particular of older local authority sites, which represent the majority of facilities and the crematoria market). As set out in Westerleigh's Main PDR Response, the absence of such an assessment is a major deficiency in the CMA's analysis to date which undermines many of the conclusions in the PDR.
 - (b) Undertaking new and thorough consumer research to develop a much better informed understanding of what is important to customers and how they make decisions. This new research would need to be undertaken not only to address the deficient nature of the surveys the CMA has relied upon in the PDR, but also to evaluate whether and how customer behaviour changes as a result of market developments, the COVID-19 pandemic and the CMA's proposed information remedies. This would need to include a fresh assessment of customers' ability and

³² As well as the subsequent implementation of any second market investigation.

³³ I.e. once the COVID-19 pandemic has passed, the sector has stabilised, and sufficient time has passed for the CMA to assess the impact of the pandemic on the sector, as well as the impact of the CMA's proposed information remedies on customer behaviour and competition between crematoria.

³⁴ Appointing a different case team and undertaking a fresh review of the evidence would also be consistent with the requirement of the Enterprise Act which, as noted above, requires the CMA to answer the questions listed at section 134 afresh.

willingness to compare crematoria and their propensity to travel further in order to access higher quality facilities.

- (c) Fundamentally revising its approach to assessing local concentration and competition between crematoria in local areas across the UK, based on a proper methodology rather than the circular approach adopted in the PDR which produces an inevitable finding of 'high' concentration. Specifically, the basic nature of the CMA's local concentration in the PDR could not serve as the basis for the imposition of highly intrusive pricing remedies.
 - (d) Gathering evidence on new entry and operators' plans for development of new crematoria in the intervening period, which would be relevant both to the CMA's assessment of local concentration and barriers to entry.
 - (e) Updating the CMA's analysis to take account of financial data for 2019 and the period between the CMA's final decision and any SMIR, including to assess whether the existing trend for declining profitability in the crematoria sector continues: this would be a clear indicator of a well-functioning market.
 - (f) A proper evaluation of the value of crematoria land, involving the appointment of a suitably qualified independent expert, to enable the CMA to conduct a robust profitability analysis.
 - (g) More generally, a redressing of the significant bias in the CMA's evidence gathering and analysis towards private sector operators, which represents only around 30% of the crematoria sector, and the failure to obtain sufficient evidence in relation to the public sector.³⁵
 - (h) Evidence gathering to understand the evolution of other industry trends which are evident today, including the shift towards direct cremations as an increasing proportion of cremations, and the increasing availability of options and new operators.
52. Finally, Westerleigh considers that the CMA should specify a period during which its monitoring activity will continue, taking account of the need to allow sufficient time for the sector to stabilise post-COVID-19 and for its information remedies to take effect before the CMA could consider whether a SMIR was necessary. Westerleigh does not believe that it would be appropriate for the CMA to have an ongoing, indefinite (and unprecedented) monitoring role in relation to the funerals sector.
53. Westerleigh looks forward to working with the CMA to ensure that the CMA's proposals for monitoring the sector are designed in an appropriate manner and would welcome an early sight of the proposed template for information collection. We would also suggest that the

³⁵ See further section 3 of Westerleigh's response to the CMA's working papers published on 30 January 2020, dated 2 March 2020.

CMA consider an appropriate mechanism to facilitate data collection (for example, an appropriate digital platform to which operators can easily upload data).

5. Local authority tendering

54. Finally, Westerleigh notes that while the CMA has, correctly in our view, dropped its earlier proposal for a 'local authority tendering' remedy, in the PDR it has nevertheless encouraged *"those local authorities who do not currently have a tender process for funeral services to consider launching similar schemes and to learn from those local authorities who already have such schemes in place"*.³⁶
55. Westerleigh has highlighted a number of concerns regarding these local authority tendering processes – including the potential for them to result in an undue restriction of customer choice of crematoria – which the CMA does not appear to have considered.³⁷ Westerleigh restates the concerns it set out in its response to the relevant working paper: it could lead to anti-competitive behaviour, could result in consumers being offered only a poor quality experience, and/or business being funnelled to local authorities' own crematoria. This recommendation also seems to be at odds with the objectives of the proposed information and transparency remedies which are designed to improve customer awareness and choice. These concerns apply equally to the practice itself as they would to a CMA-designed remedy. For this reason, Westerleigh would urge the CMA to reconsider its endorsement of these schemes before publishing a final decision.

³⁶ PDR, paragraph 9.22.

³⁷ See Westerleigh's response to LA tendering remedy proposal working paper, dated 16 June 2020.