

Reforming the framework for better regulation

Response from the Competition and Markets
Authority

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1. Overview

- 1.1 The CMA is the UK's principal competition and consumer authority. It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers, markets and the regulated industries, and enforcing competition and consumer law. The CMA's statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 The CMA is not a regulator, but in meeting its duty and performing its functions, it interacts in several ways with the regulatory environment.¹ Of particular relevance in the context of this consultation is its role in providing advice and recommendations to government and public authorities through its markets and advocacy functions.² The CMA's advice and recommendations are made with a view to ensuring that policy decisions (including on whether and how to regulate) take account of the impacts on competition and on consumers.³ These impacts can be key to the success or failure of regulatory initiatives and the outcomes they seek to achieve. But they are sometimes overlooked or under-analysed during policy appraisal, design, implementation and evaluation. This is especially so for regulation made by central government departments, which may be acting in markets that are less well understood and less closely monitored than, for instance, those that fall within the remits of economic and financial regulators.⁴
- 1.3 As a result of concerns about the proliferation of regulation, successive governments have encouraged departments and regulators to consider alternatives. From the CMA's perspective, whether there is 'more' or 'less' regulation overall matters less than whether it promotes or inhibits well-functioning, competitive markets. This is ultimately what matters for growth and

¹ These are explained in full in the CMA's response to the Reforming Regulation Initiative (p.10) and include some appeals and redeterminations of decisions made by sector regulators. The CMA may also acquire regulatory functions in some digital markets through the establishment of the statutory Digital Markets Unit (for further information see the UK government's consultation, [A new pro-competition regime for digital markets](#)), and is currently working with Ofcom, the FCA and the ICO through the [Digital Regulation Cooperation Forum](#) (DRCF) to deliver coherent regulation across digital markets, for the benefit of industry and consumers.

² Under Section 7(1) of the Enterprise Act 2002, the CMA has a function of making proposals, or giving information and advice, "on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law)."

³ Under the UK Internal Market Act 2020, the CMA – through the Office of the Internal Market (OIM) – also has functions to provide advice and reports to all four governments of the UK on the effect of regulatory provisions on the internal market. This consultation response contains some additional considerations that are relevant to the OIM's functions (see para 2.1 and 2.26).

⁴ Specifically the Civil Aviation Authority (CAA), Office of Communications (Ofcom), Gas and Electricity Markets Authority (Ofgem), Financial Conduct Authority (FCA), Payment Systems Regulator (PSR), NHS Improvement (NHSI), Office of Rail and Road (ORR), Water Services Regulation Authority (Ofwat) and Northern Ireland Authority for Utility Regulation (NIAUR).

productivity. The characteristics of a market, or the objective government is seeking to achieve, may mean that well-designed regulation is the best approach available. In other cases, alternatives to regulation will be preferable. This may be the case, for example, where regulation is excessively onerous or prescriptive, inhibiting innovation and competitive pressures or imposing disproportionate costs, to the detriment of consumers.

1.4 Understanding the market at the policy appraisal stage is essential in determining which approach to take; and maintaining and updating that understanding as regulation is implemented and evaluated is key to ensuring it remains proportionate and effective and does not unduly hold back competition or innovation.

1.5 The remainder of this response sets out the CMA's views on some of the specific questions raised in the consultation, focusing on areas of particular relevance to its remit. It builds on earlier CMA work and recommendations on regulation and the regulatory framework, including its report on *Regulation and competition*⁵ and its response to the government's *Reforming Regulation Initiative*.⁶ In summary:

- Acquiring and maintaining a strong understanding of the markets affected by regulation, and how they operate, is a precondition of making policy choices that promote competition, innovation and the consumer interest. Policymakers should be encouraged and enabled to build and maintain this understanding, and consider the potential impact of regulation on markets throughout the policy cycle (rather than solely at the point where impact assessments are completed).
- The existing pro-competition provisions in the Better Regulation Framework should be retained or strengthened.⁷
- With the exception of certain statutory duties of the CAA, the CMA does not see a need to strengthen the existing competition duties of the sector regulators. Giving a still wider set of regulators competition duties would

⁵ [Regulation and competition: a review of the evidence](#), January 2020

⁶ [Reforming Regulation Initiative: CMA response](#), July 2020

⁷ Specifically, these are:

- Advice in the framework guidance to review the CMA's "competition assessment checklist" and to carry out a competition impact assessment if the proposed regulation is likely to lead to a restriction of competition.
- The exclusion of pro-competition regulatory provisions from the Business Impact Target (so that such provisions do not "score against" the Target).

require a case-by-case assessment of the bearing of their work and decisions on markets.⁸

- Given the strong link between competition and innovation, adding statutory innovation duties could create risks for sector regulators (including lobbying from incumbents to be protected from competitive pressure) without corresponding benefits.
- As currently framed, the Business Impact Target, and other metrics such as “one-in-X-out” (OIXO), risk decision-making on regulation being guided by factors – notably, the direct cost to business – that are the easiest to monetise. This may lead to decisions that are inconsistent with the government’s other stated regulatory objectives (e.g. promoting competition and innovation, and setting high standards at home and globally). The CMA therefore supports proposals made in the consultation to fundamentally reconsider the BIT; and if the government decides to reintroduce OIXO, the CMA supports proposals for a more targeted version that focuses on particular sectors or types of regulation. Whatever approach is taken, as set out above, suitable exemptions, including for pro-competition measures, will be needed.

⁸ For some regulators – such as fire and rescue authorities – competition duties are likely to be irrelevant or inappropriate.

2. Response to specific questions

“Common law” approaches, and the adoption of a proportionality principle

What areas of law (particularly retained EU law) would benefit from reform to adopt a less codified, more common law-focused approach?

- 2.1 The CMA has no view on this question. However, it notes that the UK Internal Market Act gives to the CMA a responsibility for monitoring and providing advice and reports to government (specifically Ministerial departments) on the effects of regulatory decisions upon the UK’s internal market, where there is regulatory divergence in different parts of the UK as a result of those decisions. A move by the UK government and Parliament to “a form of common law approach to regulation” may have implications for this regime.

Regulators' role in promoting innovation and competition

Should competition be embedded into existing guidance for regulators or embedded into regulators' statutory objectives? a. Embedded into existing guidance b. Embedded into statutory objectives c. Creating reporting requirements for regulators d. Other (please explain)

Sector regulation

- 2.2 The sector regulators⁹ have statutory duties or objectives¹⁰ to promote competition, together with concurrent powers to undertake competition enforcement, carry out market studies, and make market investigation references. In addition, under the primacy obligations, sector regulators must consider competition enforcement before taking specific regulatory steps. In this sense, for this group of regulators, competition is already “embedded” into their statutory objectives.
- 2.3 Competition objectives are framed differently across the sector regulators, and sit alongside other objectives. Often, competition can be complementary to these objectives: for example, Ofcom has been able to use competition to drive major strategic investments, such as 5G and full fibre coverage.¹¹ In other cases, the objectives can be in tension: for example, as the FCA has acknowledged, requirements for financial services firms to hold minimum levels of capital help to serve financial stability, but can make it harder for new firms to enter the market.¹²
- 2.4 With the exception of certain statutory duties of the CAA (see below), the CMA does not see a need to strengthen the competition duties or objectives of the sector regulators. In addition to duties and objectives, the CMA also notes a number of other existing practices that can further support competition in the regulated sectors:
- Guidance or recommendations from government (e.g. through Strategic Policy Statements or remit letters) relating to competition in strategic steers.

⁹ CAA, Ofcom, Ofgem, FCA, PSR, NHSI, ORR, Ofwat, NIAUR. In February 2021, the UK government published its white paper with proposals to remove NHSI's competition roles as introduced in the Health and Social Care Act 2012 (including concurrency and its general duty to prevent anticompetitive behaviour), so that it can focus fully on NHS provider development and oversight. The CMA and NHSI have worked closely together on the development of these proposals. (See DHSC (2021), [Working together to improve health and social care for all](#)).

¹⁰ The term “objective” is intended to encompass both statutory duties and objectives.

¹¹ Thereby contributing to its objective to “ensure that a wide range of electronic communications services – including high speed data services – is available throughout the UK”

¹² FCA (2018), [Our approach to competition](#).

- “State of competition” assessments from regulators on how the markets that fall within their remit are performing and identifying where barriers exist to competition and good consumer outcomes. For example, Ofcom publishes an annual “State of the Market” report.
- Clarity from sector regulators on how they approach their objectives, and how they make decisions when the promotion of competition might conflict with other objectives. For example, the FCA’s *Our approach to competition* sets out how it advances its competition objective, its assessment of what a well-functioning market looks like, and how it balances competition with its other statutory objectives.

Aviation

2.5 Although the CAA has a statutory duty to promote competition, contained within the Civil Aviation Act 2012 and the Transport Act 2000, these duties are limited in scope.¹³ The duty in the Civil Aviation Act 2012 relates to the CAA’s regulation of dominant airports’ provision of airport operation services. The duty in the Transport Act 2000 relates to CAA’s regulation of air traffic services.

2.6 Currently the CAA has no statutory duty to promote competition between airlines. The government has proposed elsewhere that the CAA take on an enhanced role in the monitoring of airline services and competition.¹⁴ Extending the CAA’s duty to promote competition in the provision of aviation services more widely, including: (a) between all airports in the provision of airport operation services rather than only airports with substantial market power; (b) between airlines; and (c) in other markets for which the CAA has a regulatory role (e.g. ground-handling), would provide an enhanced mechanism for CAA to promote policies to strengthen competition (for example, reform of slot allocation), which could ultimately deliver better outcomes for passengers.

Other regulators

2.7 The merits of competition duties for a wider group of regulators (beyond the sector regulators) would require a case-by-case assessment of the bearing of their work and decisions on markets. For some regulators, competition duties are likely to be irrelevant or inappropriate.¹⁵

¹³ Section 1(2) of the [Civil Aviation Act 2012](#) and section 2(4) of the [Transport Act 2000](#).

¹⁴ [Aviation 2050 The future of UK aviation](#) consultation, paragraph 3.62: “The government proposes that: the CAA takes on an enhanced role in the monitoring of airline services and competition, giving it the scope to intervene in some way if problems arise in the future, even if there are no current concerns”.

¹⁵ The fire and rescue authorities, for example.

Should innovation be embedded into existing guidance for regulators or embedded into regulators' statutory objectives? a. Embedded into existing guidance b. Embedded into statutory objectives c. Creating reporting requirements for regulators d. Other (please explain)

- 2.8 Competition and innovation are closely linked. So-called “dynamic competition” – where suppliers compete with each other to develop new products, technologies or business models – is a crucial driver of innovation. For instance, in the UK, Public Service Broadcasters have faced a growing competitive challenge from video streaming services (such as Netflix, Now TV, Amazon Prime) for viewers’ attention. They have responded by developing their own Video on Demand services (e.g. iPlayer, ITV Hub, All4, My5 and, most recently, BritBox) and offering those services across a range of fixed and mobile platforms.
- 2.9 The argument is sometimes made that competition and innovation can be in tension with one another. Specifically, if fierce competition prevents firms from profiting from their innovation (for example, because it is quickly copied by rivals), they may not want to make the necessary investment. Intellectual property rights and patent rights mitigate this risk, by allowing businesses to reap the returns of their successful innovations.
- 2.10 With this in mind, it is not clear what additional benefits an innovation duty on sector regulators would bring, over and above existing competition duties. There is a risk, however, that it could lead to a greater intensity of lobbying by incumbents for protection from normal competitive forces, on the grounds that only by being shielded in this way can they have the certainty necessary to make risky investments in new technologies or processes. The available empirical evidence indicates that policies – including regulatory forbearance – that shield incumbents in this way are unlikely to be growth- or productivity-enhancing in the long run.¹⁶
- 2.11 Were tensions to arise between the competition and innovation impacts of a regulatory measure, these could in principle be explored in a joint assessment. However, such trade-offs are unlikely to arise very often in practice; it is hard to envisage circumstances where a regulatory measure that intentionally

¹⁶ A wide range of sources highlight the links between pro-competition and pro-innovation interventions. For example, see from the recent academic literature *The power of creative destruction: economic upheaval and the wealth of nations* (Aghion et al, 2021), which finds that, particularly for countries operating close to the technological frontier, strong competition policy and a pro-competitive approach to regulation are likely to provide the strongest stimulus to innovation. The BEIS (2020) research [paper *Regulator approaches to facilitate, support and enable innovation*](#) also highlights evidence linking innovation-friendly regulation and increased competition.

restricted competition could be justified on the grounds that, in so doing, it promoted innovation.

An early regulatory gateway

Do you think that the early scrutiny of policy proposals will encourage alternatives to regulation to be considered?

- 2.12 The CMA strongly supports the suggestion made by the government for earlier scrutiny of policy proposals, with the intention of placing more emphasis on alternatives to regulation in the earlier stages of the policy development cycle. The current IA process, and associated scrutiny, often come too late in the policy development cycle for alternatives to regulation to be meaningfully considered.
- 2.13 Whether alternatives to regulation are preferable will depend on the characteristics of the market.¹⁷ As important as the timing of the scrutiny, therefore, is the development of an understanding of the market at the policy appraisal stage and then maintaining and updating that over time. This understanding should be supported, as far as possible, by external engagement with market participants. A number of existing sources provide relevant information to gather, which can be used to help support this engagement.¹⁸
- 2.14 By way of example, the CMA's recent *Electric vehicle charging* market study illustrates the potential benefits of early scrutiny. Through building a strong understanding of the market, the CMA was able to make a set of recommendations to help ensure a competitive market develops and potentially avoid the need for a more heavy-handed approach in the future (noting the need for continued monitoring given existing uncertainties). Though the study looked at an entire market rather than a specific policy, there is a clear parallel to the

¹⁷ Features that influence whether alternatives to regulation might achieve the same or better results include whether the market is undergoing rapid change and innovation; the strength of consumer engagement; the similarity of the goods or services on offer; and the alignment between policy objectives and industry incentives. (See, for instance, [OFT \(2009\)](#), [Government in markets](#)).

¹⁸ Sources include: [CMA Market Investigation Guidelines:CC3](#) pp 24-30 (noting for example, market shares, nature and characteristics of the products and substitutes, nature of the customer base, legal and regulatory framework, industry practices, the history of the market, and market outcomes such as prices, profitability, quality, innovation and other non-price indicators); [HM Treasury Green Book](#) (noting for example, evaluation of previous interventions and what works, background academic research, specially commissioned research or surveys, and international comparisons); and [Government Commercial Function Market Management Guidance Note](#) pp 11-13. This list is indicative, and the CMA can provide further sources and information on understanding markets.

benefits of early scrutiny and market understanding to inform policy making and regulation.¹⁹

Should the consideration of standards as an alternative or complement to regulation be embedded into this early scrutiny process?

- 2.15 Voluntary standards can be a suitable alternative to regulation and can in some cases be more adaptable to technological change. They also have the potential to enhance competition, by providing a level playing field that facilitates the entry of newcomers, and by lowering the costs attached to signalling quality.
- 2.16 However, there can be risks to competition associated with industry-led standard-setting and self-regulation that policymakers and regulators must be alert to and should consider how to avoid or mitigate. These risks include:
- (a) Providing increased opportunities to engage in illegal anti-competitive practices, such as price fixing.²⁰
 - (b) Incumbent firms using self-regulation to restrict entry of new firms by imposing requirements that benefit the incumbent businesses or existing business models, prevent the development of innovative products or services, or reduce the incentives to do so.²¹
 - (c) Rules or standards set in self-regulatory regimes ultimately serving the interests of industry participants, rather than consumers.
 - (d) False or misleading quality signals where the standards sustained by self-regulatory schemes fall below the reasonable expectations of consumers, either due to the standards set or the potentially limited enforceability of voluntary schemes and associated limited incentives for compliance.
- 2.17 Where government is involved in the development and implementation of self-regulation, it can take steps to avoid these risks, including establishing robust governance arrangements to avoid capture by a subset of suppliers, and ensuring stakeholder participation in the development of self-regulation.

¹⁹ CMA (2021) [Electric vehicle charging market study: final report](#). More generally the CMA has extensive experience in understanding markets and then designing robust remedies and recommendations based on an assessment of the market impacts. The CMA can provide further views and information on this.

²⁰ The CMA blog post '[Trade Associations: are you complying with competition law?](#)' (2018) notes a number of CMA cases which highlight the risks of providing increased opportunities to engage in illegal anti-competitive practices. For further details refer to CMA guidelines on [Trade associations, professions, and self-regulatory bodies](#), OFT408 (2004).

²¹ For instance, in its work on the Scottish legal services sector, the CMA has raised concerns about the regulators also acting as representative bodies for the main legal professions. Among other factors, this may have held back the development of more flexible business models in the sector that stand to benefit consumers.

Streamlining regulatory impact assessments

Do you think that a new streamlined process for assessing regulatory impacts would ensure that enough information on impacts is captured?

What impacts should be captured in the Better Regulation framework? Select all which apply: a. Innovation b. Trade and investment c. Competition d. Environment

How can these objectives be embedded into the Better Regulation Framework? Can this be achieved via: a. A requirement to consider these impacts b. Ensuring regulatory impacts continue to feature in impact assessments c. Encouragement and guidance to consider these impacts, but outside of IAs d. Other? (please explain)

Competition assessments

- 2.18 The CMA supports the government's efforts to minimise unnecessary burdens arising from the impact assessment process. IAs should assist policymakers in deciding whether and how to regulate to achieve public policy goals. It is therefore important that they are not – and are not seen to be – unduly onerous, or a purely administrative (“box-ticking”) exercise.
- 2.19 The consideration of competition impacts has been part of the regulatory impact assessment process since 2002. It is a non-mandatory assessment, intended to apply to a subset of regulatory proposals that are most likely to restrict competition, and to prompt policymakers to consider changes or alternatives that might be less distortive. The Independent Verification Body cannot “red rate” an IA on the basis that a competition assessment has not been carried out.
- 2.20 In the CMA's view, this approach strikes the right balance: that is, it assists decision-making, without unnecessarily hindering the policy making process. For this reason, the CMA favours continuing to include competition assessments as a non-mandatory part of the impact assessment process, supported by guidance on when and how these should be carried out.
- 2.21 More important than the formal completion of competition assessments at a particular point in time, however, is maintaining an understanding of the market and considering impacts on competition and consumers throughout the policy cycle. These impacts can be overlooked and under-analysed, especially for regulation developed by central government, which may be acting in markets that are less well understood and less closely monitored than, for example, those that fall within the remits of economic and financial regulators.

2.22 Whether or not the government decides to remove guidance in the better regulation framework on competition impact assessments, it will be important for the reformed framework for better regulation to emphasise the importance, throughout the policy development cycle, of:

- ***Acquiring and maintaining a strong understanding of the markets affected by regulation, and how they operate.*** This is a precondition of making policy choices that promote competition, innovation and the consumer interest; and it will help to fulfil a number of the principles that the government has said will underpin its approach to regulation. In particular, understanding the markets that government has intervened in – or in which it is contemplating regulatory intervention – can assist in:
 - (a) identifying the underlying cause of bad outcomes in markets, so that **policy objectives** can be framed accordingly;
 - (b) understanding the likely consequences of various types of intervention (including alternatives to regulation), thereby assisting **policy appraisal and design**, and supporting the government’s principle of “proportionality”;
 - (c) providing a framework for **reviewing and evaluating** the effect of policy interventions and for assessing the appropriate time frame for review, supporting the government’s principle of “recognising what works”;
 - (d) **identifying opportunities** for pro-competitive, pro-consumer policy interventions, supporting the government’s principle of “leading from the front” and “setting high standards at home and globally”.
- ***Using existing guidance to inform decisions on whether and how to intervene.*** In recent years, there has been a significant volume of work on effective regulatory intervention, including the [FCA’s ‘Economics for Effective Regulation’ framework](#); the [UK Competition Network’s consumer remedies project](#); and the [NAO review](#) and the [PAC review](#) of consumer protection in regulated sectors. Together with the [CMA’s competition impact assessment guidance](#), this work can help support pro-competitive, pro-consumer regulatory choices.
- ***Collecting and sharing real-world evidence.*** Ex-post review of regulation can provide practical lessons about what works and why, provided an open and appropriately critical approach to self-evaluation is taken. Collecting and continually updating the stock of regulatory best practice will enable policymakers to better design remedies that can achieve their stated policy goals while minimising the risk of harming competition and innovation.

- ***Avoiding certain regulatory features that can be particularly harmful to competition and consumers.*** On the supply side, these include quantity-restricted licensing regimes;²² rules that have a disproportionate impact on new entrants or smaller firms compared to larger incumbents;²³ and the granting of exclusive rights (particularly for a long duration) to access a resource,²⁴ or to supply a particular good or service. On the demand (consumer) side, these include measures that increase the costs of shopping around and switching suppliers, and measures that weaken customers' rights under existing consumer law.

2.23 The importance of properly understanding a market and considering competition and consumer impacts early and throughout the policy and regulatory cycle is highlighted by the CMA's recent work on the market for PCR travel tests.²⁵ The CMA has now made a number of recommendations to ensure consumers are protected from potentially harmful practices. It is likely that earlier and continued consideration of competition and consumer impacts could have helped inform earlier action to ensure the testing market worked well. This in turn could have avoided heavy-handed intervention that may now be required. In this rapidly developing market, it is unlikely that the formal completion of a competition assessment at a single point of time would have been as effective as continuous monitoring and evaluation.

Innovation assessments

2.24 The impact that regulation has on dynamic competition – and in particular the ability and incentive for firms to innovate – is also something that should be taken into account throughout the policy development cycle. The CMA is currently updating its Competition Impact Assessment guidance to provide additional advice to policymakers on identifying and assessing these impacts.

2.25 Given the inter-relationship between competition and innovation (set out in paragraphs 2.8 to 2.11 above), there may be merit in both being assessed

²² For example, the CMA's (2017) [review of taxi and private hire vehicle \(PHV\) licensing conditions](#) highlighted how quantity restrictions could harm passengers by reducing availability, increasing waiting times, and reducing the scope for downward competitive pressure on fares and that other policy objectives could be addressed through measures less harmful to passengers' interests than quantity restrictions.

²³ For example, the CMA's (2016) [Retail banking market investigation](#) found that differences in regulatory treatment of capital requirements between older and newer banks in the residential mortgage lending sector could present a barrier to entry and expansion in the wider retail banking market.

²⁴ For example, the CMA's (2018) [Advice for the Department for Transport on competition impacts of airport slot allocation](#) made the case to DfT that the existing system for allocating airline slots resulted in rigid slot holdings, especially at congested airports, compounding an underlying capacity constraint. As a result, airlines found it difficult to obtain additional slots to expand existing and launch new services; and competition in air services markets is constrained to the detriment of consumers.

²⁵ CMA (2021) [Advice on PCR travel tests](#).

together in a joint “competition and innovation assessment”, rather than separately as proposed.

Internal market effects

2.26 The CMA also notes that departmental assessments of the effects of regulation on innovation, trade and competition could usefully include consideration of how these play out in different parts of the UK, thereby contributing to evidence on the effective operation of the internal market.²⁶

Post implementation review

The current system requires a mandatory PIR to be completed after 5 years. Do you think an earlier mandated review point, after 2 years, would encourage more effective review practices?

2.27 Policy reviews and evaluation are important to understanding and recognising what works. The value of such reviews is likely to be enhanced if regulation is designed in a way that is sufficiently flexible to be rapidly adapted or unwound in the light of evidence from this review process.²⁷ This is particularly important when introducing regulation in fast-moving markets characterised by disruption and change, where assessments of the effects of intervention may be highly uncertain. Such markets are likely to benefit from regular or continuous post-implementation review, rather than one review at a single point in time.

2.28 In light of this, and in line with comments in the competition assessments section, the most suitable timing for post implementation review and appropriateness of ongoing monitoring and evaluation are likely to depend on the nature of the market facing regulation.

²⁶ For further information refer to [Guidance on the operation of the CMA's UK Internal Market functions](#), in particular chapter 3, Analytical Framework.

²⁷ The CMA has committed to considering the use of sunset clauses and to reviewing the continuing need for remedies (in respect of the remedies it imposes following market investigations [CMA, Market Studies and Market Investigations: Supplemental guidance on the CMA's Approach](#). January 2014 (revised July 2017).

Measuring the impact of regulation: reviewing the BIT

Which of the four options presented would be better to achieve the objective of striking a balance between economic growth and public protections? a. Adjust b. Change c. Replace d. Remove e. Other (please explain)

2.29 While the CMA supports the government in reducing the cost burden of regulation to businesses, it considers that the BIT has a number of shortcomings:²⁸

- There is not an accurate understanding of the current costs business incur as a result of existing regulations. This means that the government is unlikely to know how ambitious its target for reducing regulatory costs is when setting the annual BIT.
- Regulators and government departments undergo a lengthy and stringent process when calculating the BIT for their regulatory activities, which may not be the most efficient and effective use of their resources.²⁹
- The focus on direct impacts could give a misleading picture of the economic effects of regulation, for instance when a regulation is important in promoting consumer confidence and enabling markets to operate effectively. It also fails to account the role of regulation in advancing the government's other objectives (e.g. setting high standards at home and globally).

2.30 While Option 1 (adjust) and Option 2 (change) acknowledge some of these shortcomings and intend to broaden the scope of the BIT, they remain limited principally to aspects which are more easily monetised. They would therefore not fully account for costs and benefits of impacts that are harder to monetise, but that are nonetheless central to the government's regulatory objectives (including competition and innovation impacts).

2.31 In the longer term, the CMA therefore supports a broader approach to evaluating the cost of regulation, which should include the impact on the effective functioning of markets and consider and explain trade-offs between

²⁸ These shortcomings have also been raised by others, for example the NAO: [The Business Impact Target: Cutting the cost of regulation June 2016](#)

²⁹ As noted in the NAO's report (paragraph 3.21), several departments raised concerns that the costs they incur in meeting the BRE's rules do not contribute to the overall objective of reducing regulatory costs. One department claimed that "80% of the resource dedicated to delivering against our budget and the Business Impact Target goes directly on managing better regulation accounting". It said that it had to move resources away from valuable Cutting Red Tape reviews into a BRE-facing team to deal with expanded better regulation rules.

competing objectives. The CMA therefore supports Options 3 (replace) or Option 4 (remove, but likely strengthen review and evaluation).

- 2.32 If Option 1 (adjust) or Option 2 (change) are pursued and the BIT is retained, it is important that exemptions for pro-competition measures are maintained.³⁰

Regulatory offsetting: One-in, X-out (OIXO)

Should the One-in, X-out approach be reintroduced in the UK?

- 2.33 As set out in the response to questions on the BIT, the narrow basis on which regulatory impacts are calculated for the purposes of the BIT is not a strong basis for judging the appropriateness, proportionality, or comparative merits of regulation. Since it is based on the same metric, OIXO suffers from similar shortcomings; and it may not be conducive to effectively encouraging better regulation or delivering on policy objectives. Concerns about the impact on business of regulatory compliance may be more effectively addressed through a dedicated exercise to identify those that are unduly burdensome, and removing or updating them as appropriate.
- 2.34 If a 'one-in, X-out' approach is adopted, it will be important that that there is careful scoping and suitable exemptions, including for pro-competition measures.³¹

³⁰ [Business Impact Target, Statement made on 15 December 2020](#)

³¹ See [CMA Market Investigation Guidelines:CC3](#) pp 73 for the CMA's approach to reasonableness and proportionality of remedies in market investigations. An OIXO restriction on the CMA's Order making powers would, for example, severely constrain its future ability to take forward major pro-competitive remedies such as Open Banking.