

# Market Studies and Market Investigations: Supplemental guidance on the CMA's approach

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## PREFACE

The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's economy-wide competition authority responsible for ensuring that competition and markets work well for consumers. On 1 April 2014, the functions of the Competition Commission (CC) and many of the functions of the Office of Fair Trading (OFT) were transferred to the CMA and those bodies abolished. The CMA's primary duty is to promote competition, both within and outside the UK, for the benefit of consumers.

The ERRA13 also made a number of changes to the markets regime by amending the Enterprise Act 2002 (EA02).<sup>1</sup>

This guidance is being issued in order to explain the changes introduced to the markets regime by the ERRA13. It supplements the existing guidance on the markets regime<sup>2</sup> and should be read in conjunction with that guidance. Where sections of the three existing main markets guidance documents are significantly amended or superseded by the changes that are outlined in this guidance, these are listed in Annexe A to this guidance. Annexe B indicates which existing markets-related guidance documents have been adopted by the CMA Board. To the extent that any conflict arises between the content of such existing guidance and this guidance, the content of this guidance will prevail.

This guidance sets out the CMA's practice (and intended future practice) as from 1 April 2014. The new powers and procedures set out in it will apply to all cases, subject to the transitional arrangements provided for by the Secretary of State for market studies and market investigations that are ongoing as at 1 April 2014.<sup>3</sup>

This guidance reflects the views of the CMA as at 1 April 2014 and may be revised from time to time to reflect changes in best practice, legislation and the results of

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<sup>1</sup> References in this guidance are to the EA02 as amended by the ERRA13 unless otherwise stated.

<sup>2</sup> There are three main existing guidance documents that relate to the markets regime: *Market studies: Market Studies: Guidance on the OFT approach* (OFT519), *Market investigation references* (OFT511), and *Guidelines for market investigations* (CC3 (revised)). Other guidance documents also contain information relevant to markets cases, including: *Super-complaints: guidance for designated consumer bodies* (OFT514) and *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)). See further Annexes A and B, which explain the status of OFT and CC markets-related guidance.

<sup>3</sup> For information on the transitional arrangements that apply to market studies and market investigations, see *Transitional Arrangements: Guidance on the CMA's approach - Part 1* (CMA14).

experience, legal judgments and research. This guidance may in due course be supplemented, revised or replaced. The CMA's webpages will always display the latest version of the guidance.

Although it covers most of the points likely to be of immediate concern to businesses and their advisers, this guidance makes no claim to be comprehensive. It cannot, therefore, be seen as a substitute for the EA02 and the ERRA13 and the regulations and orders made under these Acts, nor can it be cited as a definitive interpretation of the law. Anyone in any doubt about whether they may be affected by the legislation should consider seeking legal advice.

The CMA will apply this guidance flexibly. This means that the CMA will have regard to the guidance when handling market studies and market investigations under the EA02, but that, when the facts of a case reasonably justify it, the CMA may adopt a different approach.

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# 1 INTRODUCTION

## Scope of this guidance

- 1.1 This guidance provides an overview of the changes to the markets regime introduced by the ERRA13. It outlines:
- the legal framework that applies to market studies and market investigations, including the roles of the CMA, the Secretary of State, and sectoral regulators
  - the ERRA13 provisions on the CMA's governance and decision making structure, and
  - key procedural aspects of market studies and market investigations.
- 1.2 The main body of this guidance is structured to reflect the key stages of a market study that results in undertakings in lieu (UIL) of a market investigation or in a market investigation. Chapter 2 addresses the market study stage and the reference process; chapter 3 addresses the in-depth market investigation stage that follows a reference; and chapter 4 addresses the remedies implementation stage following a finding of an adverse effect on competition (AEC).
- 1.3 The CMA Board has adopted, amongst others, the three main existing markets guidance documents, namely:
- *Market studies: Guidance on the OFT approach* (OFT519)
  - *Market investigation references* (OFT511), and
  - *Guidelines for market investigations* (CC3 (revised)).
- 1.4 Where sections of these guidance documents are significantly amended or superseded by the changes that are outlined in this guidance, these are listed in Annexe A to this guidance. Annexe B explains which existing OFT or CC guidance documents containing information relevant to markets cases have been adopted by the CMA Board, and which documents have been replaced or rendered obsolete by CMA guidance or publication.

## What is a market study?

- 1.5 Market studies are one of a number of tools at the CMA's disposal to address competition or consumer protection problems, alongside its enforcement and advocacy activities. They are examinations into the causes

of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour.<sup>4</sup>

1.6 Market studies may lead to a range of outcomes, including:<sup>5</sup>

- a clean bill of health
- actions which improve the quality and accessibility of information to consumers
- encouraging businesses in the market to self-regulate
- making recommendations to the Government to change regulations or public policy
- taking competition or consumer enforcement action, and
- making a market investigation reference, or accepting a UIL.

1.7 Market studies are conducted under the CMA's general review function in section 5 of the EA02.<sup>6</sup> The ERR13 introduced a formal requirement for a market study to be commenced by the issuing of a market study notice when the CMA exercises its function under section 5 for certain specified purposes.<sup>7</sup> This guidance explains the process for issue of a market study notice and the consequences that follow from it. These include statutory time limits and formal investigatory powers for the CMA. Further information on the management of market studies is contained in chapter 4 of *Market Studies: Guidance on the OFT approach* (OFT519).

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<sup>4</sup> For a more detailed explanation of the purpose of market studies, see chapter 2 of *Market Studies: Guidance on the OFT approach* (OFT519).

<sup>5</sup> This guidance focuses on the changes to the markets regime introduced by the ERR13 and therefore does not cover all the various possible outcomes of a market study. For information on the possible outcomes of a market study see chapter 5 in *Market Studies: Guidance on the OFT approach* (OFT519).

<sup>6</sup> See chapter 3 of *Market Studies: Guidance on the OFT approach* (OFT519) for an explanation of how market studies are chosen.

<sup>7</sup> See paragraph 2.6.

## **Other work carried out under section 5 of the EA02**

- 1.8 The CMA may carry out a range of other work under its general review function in section 5 of the EA02. Such work enables the CMA to assess markets and it may, but need not be a pre-cursor to a market study. The form such work may take will vary from desktop research only through to engagement with market participants and other interested persons. This may include seeking views of stakeholders in advance of the launch of a market study on such matters as the potential issues identified and scope of a possible market study. These types of work enable the CMA to decide whether further consideration of an issue or market is or is not appropriate and so facilitates the efficient and effective use of the resources of the CMA and other persons. For example, where the CMA decides to undertake a market study in relation to a matter that it has previously considered under its general review functions in section 5 of the EA02, this may enable it to reduce the time taken to complete the market study or to focus the scope of the market study.
- 1.9 Unless the CMA has issued a market study notice, when conducting work under its general review function in section 5 of the EA02, it is not bound by statutory time limits nor does it have any of the compulsory information gathering powers set out in section 2 of this guidance.
- 1.10 If the CMA engages with stakeholders as part of these types of work, for example, by seeking their views and requesting information (sometimes referred to as 'Calls for Information') the CMA will also inform them of the scope and purpose of the work on which it engages with them. It will also provide them with an indicative timetable of next steps in the work (although there is no associated statutory time period). If part of pre launch work in advance of a possible market study, the timetable will cover the period up to the decision being taken on whether to launch a market study.

## **What is a market investigation?**

- 1.11 Market investigations are more detailed examinations into whether there is an AEC in the market(s) for the goods or services referred. If so, the CMA must decide what remedial action, if any, is appropriate. Section 131 of the EA02 sets out the power of the CMA to make references (see paragraphs 1.21 to 1.22 on the identity of the decision makers).



1.12 When the findings of a market study give rise to reasonable grounds for suspecting that a feature or combination of features<sup>8</sup> of a market or markets in the UK prevents, restricts or distorts competition, and a market investigation reference appears to be an appropriate and proportionate response, the CMA is able to make such a reference. However, a market study is not a prerequisite to a reference: references may be made of matters which have not been the subject of a market study,<sup>9</sup> provided the statutory reference thresholds are satisfied and the CMA has consulted in accordance with section 169 of the EA02.<sup>10</sup>

### Types of market investigation reference

1.13 The following types of market investigation reference may be made by the CMA:

- **ordinary references** (these are references which are not cross-market references and do not raise public interest issues),<sup>11</sup> and
- **cross-market references** (this is a new type of reference in respect of specific features or combinations of features that exist in more than one market).<sup>12</sup>

1.14 The following types of market investigation reference may be made by the Secretary of State in cases that raise defined public interest issues:

- **restricted public interest references** (these are references that require the CMA to investigate competition issues, while the Secretary of State investigates defined public interest issues in relation to the matter referred),<sup>13</sup> and

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<sup>8</sup> Section 131(2) of the EA02 sets out what is to be construed as a feature for the purposes of Part 4 of the EA02.

<sup>9</sup> For example, following a super-complaint under section 11 of the EA02, the CMA may make a market investigation reference. For further information on super-complaints, see *Super-complaints: guidance for designated consumer bodies* (OFT514).

<sup>10</sup> For further information on the consultation process, see paragraphs 3.6–3.10 in *Market investigation references* (OFT511).

<sup>11</sup> This is a form of reference that existed under the EA02 prior to 1 April 2014.

<sup>12</sup> Cross-market references are considered further in paragraphs 2.31–2.37 and 3.20–3.23.

<sup>13</sup> This is a form of public interest reference that existed under the EA02 prior to 1 April 2014.

- **full public interest references** (this is a new type of reference requiring the CMA to investigate defined public interest issues alongside competition issues in relation to the matter referred).<sup>14</sup>

## Who does what

- 1.15 The ERRA13 assigns distinct roles to the CMA, the Secretary of State and the sectoral regulators in relation to the markets regime. These roles are summarised in the following paragraphs.

### *The CMA*

- 1.16 The CMA replaced the OFT and the CC on 1 April 2014 as part of the reforms to the UK competition regime introduced by the ERRA13. The CMA is responsible for conducting both market studies and market investigations.
- 1.17 The ERRA13 makes provision for the governance and decision making structure to take account of the formation of the CMA. These are described further below.

### *Sectoral regulators*

- 1.18 Under Part 4 of the EA02, the CMA and the Sector Regulators may, in the respective sectors for which they have responsibility, undertake market studies, and make market investigation references to the Chair of the CMA for the constitution of a CMA group to conduct an in-depth market investigation into single or multiple markets for goods or services in the UK.<sup>15</sup>
- 1.19 As at the date of publication the regulators are the Civil Aviation Authority (CAA), the Financial Conduct Authority (FCA), NHS Improvement (NHSI),<sup>16</sup> Northern Ireland Authority for Utility Regulation (NIAUR), the Office of Communications (Ofcom), the Office of Rail and Road (ORR), the Gas and

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<sup>14</sup> Public interest references may be made on an ordinary or cross-market basis. Public interest cases are considered further in paragraphs 2.18–2.30 and 3.8–3.19.

<sup>15</sup> Further information on the concurrency regime is contained in *Regulated Industries: Guidance on concurrent application of competition law to regulated industries* (CMA10).

<sup>16</sup> NHS Improvement is the operational name for the organisation that brings together Monitor, NHS Trust Development Authority, Patient Safety, the National Reporting and Learning System, the Advancing Change Team and the Intensive Support Teams.

Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), and the Payment Systems Regulator (PSR)

### ***The Secretary of State***

- 1.20 The Secretary of State has the power to intervene in certain markets cases which raise defined public interest issues (see chapters 2 and 3). The Secretary of State is also able to modify by order certain provisions of the EA02, for example, the time limits that apply to market studies, market investigations and the remedies implementation period.
- 1.21 Ministers also have a reserve power to make ordinary and cross-market references under section 132 of the EA02.<sup>17</sup> In addition to applying the same criteria set out in the EA02 for the making of a reference, a minister must either be ‘not satisfied’ with a CMA decision not to make a reference or, having brought information to the attention of the CMA, that the CMA will decide whether to make a reference in such period that the minister considers is reasonable.

### **Decision-making by the CMA in markets cases**

- 1.22 The ERRA13 makes provision for the governance and decision making structure of the CMA to take account of the fact that the CMA is responsible for the conduct of both market studies and market investigations. These processes are outlined below. They ensure that key decisions in market studies and subsequent market investigations are made by separate groups within the CMA.
- 1.23 At operational (staff) level, in order to avoid unnecessary duplication and to facilitate an efficient end-to-end markets process, the CMA would normally expect to have a degree of case team continuity by retaining at least some of the market study case team to work on the larger market investigation case team when a matter is referred.<sup>18</sup>

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<sup>17</sup> Under Part 5 Section 63 of the [Scotland Act 2016](#), the Scottish Ministers now also have the power to make such references acting jointly with the Secretary of State, or the Secretary of State and one or more than one other Minister of the Crown.

<sup>18</sup> In the case of a market investigation referred to the CMA by a regulator, some of the market study case team may be seconded to the CMA to be part of the relevant market investigation case team.

## **Market studies and market investigation references**

- 1.24 The CMA Board is responsible for key decisions relating to market studies and the making of market investigation references. These decisions cannot be delegated. They include decisions as to: <sup>19</sup>
- whether the duty to publish a market study notice applies<sup>20</sup>
  - whether to propose to make, or to make, a market investigation reference
  - the CMA's obligation to consult relevant persons in specified circumstances on such a proposal,<sup>21</sup> and
  - whether to accept an UIL instead of making a reference, or whether to vary, supersede or release an UIL that has been given.
- 1.25 If the CMA Board decides that a market investigation reference is to be made, it refers the matter to the CMA Chair, who is responsible under the ERA13 for constituting the market reference group that will undertake the market investigation. In practice, the CMA Chair will delegate these responsibilities to the CMA Panel Chair (or one of the Deputy Panel Chairs).<sup>22</sup> The CMA Panel Chair must ensure that any Board member who might reasonably be expected to be a member of the market reference group does not participate in the Board's consideration of whether to refer the matter.<sup>23</sup>

## **Market investigations**

- 1.26 The market reference group appointed by the CMA Panel Chair is responsible for the conduct of a market investigation. The group must consist of at least three members selected from the CMA panel.<sup>24</sup>

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<sup>19</sup> Paragraph 29 of Schedule 4 to the ERA13.

<sup>20</sup> The CMA must publish a market study notice when it proposes to carry out its functions under section 5 of the EA02 for certain specified purposes. This is explained further in paragraph 2.6.

<sup>21</sup> For further information see paragraphs 29(2)(c) and (f) of Schedule 4 to the ERA13.

<sup>22</sup> The CMA Panel Chair is a member of the CMA Board.

<sup>23</sup> Paragraph 33 of Schedule 4 to the ERA13.

<sup>24</sup> Paragraph 38 of Schedule 4 to the ERA13. The CMA panel is a panel of persons available for selection as members of a group in accordance with Part 3 of Schedule 4 to the ERA13.

- 1.27 The market reference group is required to decide whether there is an AEC in the market(s) referred and, if so, whether and what remedial action is appropriate.<sup>25</sup> In order to make a valid finding of an AEC that can be subject to remedial action, a decision must be taken by at least a two-thirds majority of the market reference group.<sup>26</sup> The group oversees the implementation of remedies up to the point at which the reference is finally determined.<sup>27</sup>
- 1.28 The CMA Board is required to make rules of procedure for market reference groups (the Rules). Subject to these Rules, groups can decide their own procedures.<sup>28</sup> The CMA Board may also issue guidance on market investigation procedures, to which market reference groups must have all due regard when conducting market investigations.<sup>29</sup>

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<sup>25</sup> The statutory questions that the group must decide on an ordinary reference (as defined in section 131(6)(b) of the EA02) are explained at paragraphs 28 and 325 of *Guidelines for market investigations* (CC3 (revised)). See paragraphs 3.10, 3.12 and 3.21 in relation to the questions that the group must decide on restricted public interest references, full public interest references and cross-market references respectively.

<sup>26</sup> Paragraphs 55–58 of Schedule 4 to the ERA13.

<sup>27</sup> See paragraph 91 of *Guidelines for market investigations* (CC3 (revised)) which explains the process for any further remedies implementation that may be required once the group has been disbanded. Section 183 of the EA02 explains when a reference is ‘finally determined’. For example, depending upon the circumstances, it may be when the final report is published or, if remedial action is to be taken, when the remedies are implemented (that is, either by the making of an order or acceptance of final undertakings).

<sup>28</sup> Paragraph 51 of Schedule 4 to the ERA13.

<sup>29</sup> Paragraph 52 of Schedule 4 to the ERA13.

## 2 MARKET STUDIES

- 2.1 Market studies are examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour. Guidance on the conduct of market studies is contained in *Market studies: Guidance on the OFT approach* (OFT519). OFT519 remains applicable after 1 April 2014, subject to the changes set out in the ERA13 that are explained in this guidance. Annex A to this guidance lists the parts of OFT519 that are significantly amended, or superseded, by those changes.
- 2.2 This chapter explains the changes to the market study process.<sup>30</sup> These are, in summary:
- changes to the requirements for commencing a market study
  - the introduction of a statutory time limit within which market studies must be completed, and
  - changes to the powers of investigation available to the CMA in relation to market studies, and to the sanctions for non-compliance.
- 2.3 As explained in chapter 1, one possible outcome of a market study is a market investigation reference. Guidance on the market investigation reference process is contained in *Market investigation references* (OFT511). OFT511 remains applicable after 1 April 2014, subject to the changes set out in the ERA13 that are explained in this guidance. Annex A to this guidance lists the parts of OFT511 that are significantly amended, or superseded, by those changes.
- 2.4 Accordingly, this chapter also explains the changes to the market investigation reference process.<sup>31</sup> These are, in summary:
- changes to the way in which cases raising public interest issues are handled, and
  - the introduction of a new power to make cross-market references.

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<sup>30</sup> For information on the transitional arrangements see *Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14).

<sup>31</sup> For information on the transitional arrangements see *Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14).

2.5 Each of these changes to market studies and market investigation references is explained below.

### **Market study notices**

2.6 A market study formally begins with publication of a market study notice by the CMA.<sup>32</sup> A market study notice must be published where the CMA is proposing to carry out its functions under section 5 of the EA02 for the following purposes:

- to consider the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the UK has or may have effects adverse to the interests of consumers, and
- to assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.<sup>33</sup>

2.7 The CMA Board is responsible for deciding whether the duty to publish a market study notice applies in a particular case. It is therefore the CMA Board that will decide whether to launch a market study in a particular case.

2.8 A market study notice must contain the following information:

- the scope of the market study
- the period during which representations may be made to the CMA in relation to the study, and
- the timescales within which the study will be completed.<sup>34</sup>

### ***Time limits for proposals and market study report***

2.9 Publication of a market study notice triggers the following statutory time limits:<sup>35</sup>

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<sup>32</sup> Chapter 4 of *Market studies: Guidance on the OFT approach* (OFT519) explains the typical project stages of a market study.

<sup>33</sup> Section 130A of the EA02.

<sup>34</sup> Section 130A(3) of the EA02.

<sup>35</sup> The procedures and time limits differ in a case where a public interest intervention notice has been issued by the Secretary of State. See paragraphs 2.18–2.30. The statutory time periods are upper time limits and may be adjusted downwards by order. If the Secretary of State proposes to make an order adjusting these periods, he/she must consult the CMA and other relevant persons before doing so.

- where the CMA proposes to make a market investigation reference in relation to the subject matter of a market study, it must publish notice of its proposed decision and begin the process of consulting relevant persons within six months of publication of the market study notice<sup>36</sup>
- where the CMA does not propose to make a market investigation reference, but has received (non-frivolous) representations in response to a market study notice arguing that a reference should be made, it must, within six months of publication of the market study notice, publish notice of its proposed decision and begin the process of consulting relevant persons<sup>37</sup>
- where the CMA does not propose to make a market investigation reference and no representations have been made in response to a market study notice arguing that a reference should be made, it must publish notice of its decision not to make a reference within six months of publication of the market study notice<sup>38</sup>
- the CMA must within 12 months of publication of a market study notice publish a market study report setting out its findings and the action (if any) it proposes to take.<sup>39</sup> When the CMA's decision is to make a reference, not to make a reference (when non frivolous representation have been received to the effect a reference should be made) or to accept undertakings in lieu of a reference, the market study report must in particular contain the decision, the reasons for the decision and such information the CMA considers appropriate for facilitating a proper understanding of its reasons for the decision,<sup>40</sup> and
- where a market study report sets out a decision to make a market investigation reference, the reference must be made at the same time as the report is published.<sup>41</sup>

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<sup>36</sup> Section 131B(1) of the EA02.

<sup>37</sup> Section 131B(1) of the EA02.

<sup>38</sup> Section 131B(2) and (3) of the EA02.

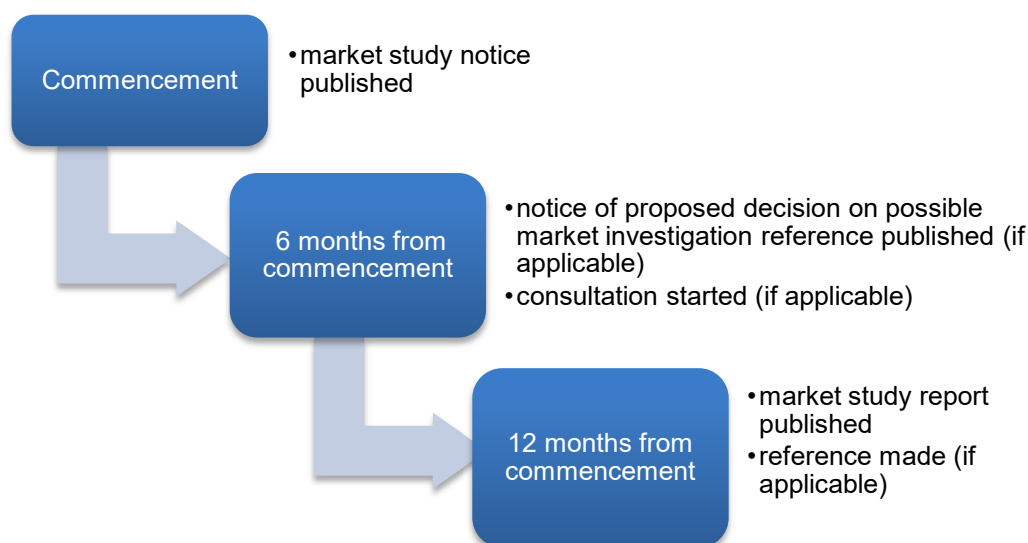
<sup>39</sup> Section 131B(4) of the EA02.

<sup>40</sup> Section 131B(5) of the EA02.

<sup>41</sup> Section 131B(6) of the EA02.



2.10 The statutory upper time limits<sup>42</sup> that apply to the market study process leading to a market investigation reference are set out below in simplified diagrammatic form.<sup>43</sup>



### ***Investigatory powers for market studies***

2.11 Publication of a market study notice triggers the CMA's ability to exercise statutory investigatory powers to assist it in carrying out its functions under section 5 of the EA02.<sup>44</sup> The powers are:

- to give notice requiring any person to attend a specified place to give evidence to the CMA or a person nominated for the purpose
- to give notice requiring any person to produce specified documents or categories of documents that are in that person's custody or under his control, and
- to give notice requiring any person carrying on business to supply specified forecasts, estimates, returns or other information in a specified form and manner.<sup>45</sup>

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<sup>42</sup> The CMA aims to complete the market study process in a shorter period of time, if possible.

<sup>43</sup> The procedures and time limits differ in a case where a public interest intervention notice has been issued by the Secretary of State. See paragraphs 2.18–2.30.

<sup>44</sup> Section 174(1)(a) of the EA02.

<sup>45</sup> Sections 174(3) to (5) of the EA02.

- 2.12 The CMA has the same investigatory powers available to assist it in monitoring and enforcing compliance with any UIL that it has accepted instead of making a reference.<sup>46</sup> These powers are also available during the market investigation and remedies implementation stages (see chapters 3 and 4).<sup>47</sup>
- 2.13 Where the CMA considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice issued by the CMA using its statutory investigatory powers or intentionally obstructed or delayed another person in the exercise of its powers under section 174(7) of the EA02, the CMA has the power to impose an administrative penalty (non-compliance includes failures to attend interviews or meetings with the CMA, failure to provide evidence, and failure to produce documents required by the CMA).<sup>48</sup>
- 2.14 It is a criminal offence for a person intentionally to alter, suppress or destroy any document which the person has been required by notice to produce.<sup>49</sup> Where an act is capable of constituting both (a) a failure warranting an administrative penalty and (b) a criminal offence, the CMA cannot impose a financial penalty if the CMA has brought criminal proceedings against the person. Similarly, criminal proceedings cannot be brought against the person if an administrative penalty has been imposed in respect of the same act.<sup>50</sup>
- 2.15 Administrative penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts are set by order and are, as at 1 April 2014, £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily penalty).<sup>51</sup> Persons committing a criminal offence are liable, on summary conviction, to a fine not exceeding the statutory maximum, and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.<sup>52</sup>

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<sup>46</sup> Sections 174(1)(b) and (c) of the EA02. Further information on the process for acceptance of UIL is contained in chapter 2 of OFT511.

<sup>47</sup> Sections 174(1)(b) and (c) of the EA02.

<sup>48</sup> Section 174A(1) to (3) of the EA02.

<sup>49</sup> Section 174A(4) of the EA02.

<sup>50</sup> Sections 174A(4) and (5) of the EA02.

<sup>51</sup> See The Competition and Markets Authority (Penalties) Order 2014 and *Administrative Penalties: Statement of policy on the CMA's approach* (CMA4).

<sup>52</sup> Section 174A(6) of the EA02.

2.16 The CMA aims to be fair and reasonable in its requests for information and the deadlines it sets for parties to respond to such requests. The CMA will use its statutory investigatory powers where necessary to ensure that information requests are answered completely and in a timely manner. It will adopt a flexible approach – the form of engagement with parties may differ depending on the individual circumstances (for example, the extent of informal co-operation achieved or the nature of the information requested) may affect the CMA’s decision whether to proceed initially on an informal basis or formally.

### **Market investigation references**

2.17 The ERR13 makes changes to the reference process in certain cases, by:

- amending the process for intervention by the Secretary of State in cases raising public interest issues, and
- introducing a new power to make cross-market references.

The remainder of the chapter explains these changes.

### ***Cases raising public interest considerations***

2.18 The Secretary of State may intervene in markets cases that raise one or more specified public interest considerations but is expected to do so rarely. In these cases, where the CMA decides that a reference (ordinary or cross-market) should be made on competition grounds, the Secretary of State shall decide whether one or more than one specified public interest consideration is relevant to the case and, if so, the type of public interest reference that should be made.<sup>53</sup>

2.19 There are two types of public interest reference, both of which are initiated by the Secretary of State giving a public interest intervention notice to the CMA before a reference is made:

- a **full public interest reference**, where the Secretary of State requests the CMA to investigate the defined public interest issues alongside the competition issues, and
- a **restricted public interest reference**, where the Secretary of State retains the ability to consider the defined public interest issues

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<sup>53</sup> See section 139 of the EA02.

him/herself whilst requesting the CMA to investigate the competition issues.<sup>54</sup>

- 2.20 The ability of the Secretary of State to make full public interest references gives the Government the option of drawing on the CMA's investigative expertise to look across markets cases at issues that relate to competition and go wider, rather than having to create independent inquiry bodies.
- 2.21 The interests of national security is currently the only specified public interest consideration in relation to the markets regime. The Secretary of State may by order introduce new public interest considerations.<sup>55</sup>

### *Issuing intervention notices*

- 2.22 The Secretary of State may give an intervention notice to the CMA if he/she believes that it is or may be the case that one or more than one specified public interest consideration is relevant to the matter being investigated by the CMA.<sup>56</sup> The CMA has a corresponding duty to bring to the attention of the Secretary of State any case that it believes raises a specified public interest consideration.<sup>57</sup>
- 2.23 The intervention notice must be issued:
- when a market study notice has been published, within the period commencing on the publication by the CMA of a market study notice<sup>58</sup> and ending once a reference has been made, UIL accepted, the CMA's decision not to make a reference has been published or on the expiry of the time limit for publishing a market study report if the CMA has not published such a report,<sup>59</sup>

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<sup>54</sup> Under the provisions of the EA02 that applied prior to 1 April 2014 the Secretary of State only had the ability to investigate public interest issues him/herself, under what is now termed the restricted public interest reference procedure. The ERR13 introduced the full public interest reference procedure.

<sup>55</sup> Section 153 of the EA02.

<sup>56</sup> Section 139(1) of the EA02.

<sup>57</sup> Section 152(1) of the EA02.

<sup>58</sup> Section 139(1A) of the EA02.

<sup>59</sup> Section 139(1A) of the EA02. For time limits for the making of decisions about references see section 131B of the EA02.

- if no market study notice has been published, within the period commencing with the CMA's consultation under section 169(6)(a)(i) of the EA02 on whether to make a market investigation reference and ending once a reference has been made, UIL accepted or where the CMA's decision not to make a reference has been published.<sup>60</sup>

Intervention notices cannot be issued after these periods.

2.24 Intervention notices must contain certain prescribed information:

- if a market study notice has been published, this includes:<sup>61</sup>
  - the subject matter of the market study notice
  - the date of publication of the market study notice, and
  - the public interest consideration(s) that are, or may be, relevant to the case,
- if a market study notice has not been published, this includes:<sup>62</sup>
  - the subject matter of the consultation under section 169 of the EA02
  - the date on which the process of consultation began, and
  - the public interest consideration(s) that are, or may be, relevant to the case.

2.25 Intervention notices must be published by the Secretary of State.<sup>63</sup>

2.26 Where an intervention notice is in force and the CMA proposes to make a market investigation reference, the CMA cannot itself make the reference or

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<sup>60</sup> Section 139(1B) of the EA02.

<sup>61</sup> Section 140(1) of the EA02. When a market study notice has not been published, the Secretary of State is nevertheless under a duty to consult on his decision after making an intervention notice. In such a case, the intervention notice must specify the subject matter of the consultation; the date on which the consultation process began and the public interest consideration(s) that are, or may be, relevant to the case.

<sup>62</sup> Section 140(1) of the EA02.

<sup>63</sup> Section 172(3)(c) of the EA02.

publish its market study report.<sup>64</sup> In such cases, the CMA is instead required to provide its market study report to the Secretary of State within 12 months from the date of publication of the market study notice. In a case where no market study notice has been issued the CMA must instead provide to the Secretary of State a document containing the CMA's decision and the reasons for its decision and such information as the CMA considers appropriate for facilitating a proper understanding of the reasons for its decision.<sup>65</sup> In such cases, the 12-month time limit does not apply.

- 2.27 The Secretary of State decides whether the public interest consideration stated in the intervention notice is relevant to the matter and, if so, whether to make a restricted public interest reference or a full public interest reference.<sup>66</sup> If the Secretary of State decides to make a full public interest reference, he/she must also decide whether to appoint one or more persons with relevant expertise in relation to the public interest issue in question (public interest expert(s)) to advise the CMA during the market investigation stage.<sup>67</sup>
- 2.28 If the Secretary of State decides that the public interest consideration stated in the intervention notice is not relevant to the matter, he/she will make a market investigation reference which will follow the normal procedure. In this case the CMA will conduct its investigation into the competition issues with no further involvement of the Secretary of State.<sup>68</sup>
- 2.29 The reference made by the Secretary of State must be published, together with the market study report of the CMA or in a case where no market study notice has been issued, the document which contains the CMA's reasons for its decision.<sup>69</sup>

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<sup>64</sup> Section 140A(3) of the EA02. Where an intervention notice has been issued but the CMA proposes not to make a market investigation reference, the intervention notice ceases to be in force when the matter is finally determined as defined in section 140(5) of the EA02. This is when the CMA either accepts UIL, publishes notice that it has otherwise decided not to make a market investigation reference or the period for making the market study report has expired and the CMA has not prepared a report or taken action (see section 140 of the EA02).

<sup>65</sup> Section 140A(3) of the EA02.

<sup>66</sup> Under section 140B the Secretary of State can (having consulted with the CMA if applicable) vary a restricted public interest reference or a full public interest reference.

<sup>67</sup> Sections 140A(4) to (12) of the EA02.

<sup>68</sup> Section 140A(5) of the EA02.

<sup>69</sup> Sections 140A(10), 140A(11) and 172(3)(da) of the EA02.

2.30 The procedures that apply to the CMA's conduct of cases during the market investigation stage following a restricted or full public interest reference are outlined in chapter 3.

### ***Cross-market references***

2.31 The ERA13 gives the CMA the power to make a cross-market reference: that is, to refer a specific feature (or combination of features) existing in more than one market without also having to refer the whole of each market concerned.<sup>70</sup>

2.32 In order to make a cross-market reference the CMA must have reasonable grounds for suspecting that a feature, or combination of features, of more than one market in the UK prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK.<sup>71</sup> Only features that relate to conduct can be the subject of a cross-market reference.<sup>72</sup>

2.33 A cross-market reference must specify:

- the enactment under which it is made
- the date on which it is made, and
- the feature or features concerned and the descriptions of goods or services to which it or they relate.<sup>73</sup>

2.34 The same procedural provisions apply to market studies which result in cross-market references as they do to market studies which result in ordinary references. These provisions include: the requirement to publish a market study notice, statutory time-limits, decision-making structure, and the CMA's investigatory and enforcement powers. Public interest interventions may also be made in relation both to cross-market references and to ordinary references.

2.35 Where the CMA accepts an UIL in a case instead of making a cross-market reference, no ordinary or cross-market reference can be made for a period of

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<sup>70</sup> Sections 131(2A) and (6) of the EA02.

<sup>71</sup> Section 131 of the EA02.

<sup>72</sup> Sections 131(1) and 131(2A) of the EA02.

<sup>73</sup> Section 133(1) of the EA02.

12 months that relates to or includes the same feature(s) in relation to the same market(s) as those covered by the UIL.<sup>74</sup>

2.36 The types of issue for which cross-market references are likely to be most useful include:

- features that do not fit neatly within one market (for example, the collective licensing of public performance and broadcasting rights in sound recordings), and
- recurring sources of consumer complaint or identified detriment which have the potential to affect competition adversely across multiple, distinct markets (for example, the sale of secondary products at particular points of sale).

2.37 The CMA will seek to ensure a targeted use of the cross-market reference power with a clear delineation of scope in each case, in order that its interventions across markets are made only where they are needed, and to avoid imposing unnecessary burdens on businesses involved while wishing to ensure that the ability to take effective and appropriate action is not restricted by the scope of the reference.

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<sup>74</sup> Section 156 of the EA02. The prohibition on reference does not apply where there has been a breach of an UIL, or where false or misleading information has been supplied by the person giving the UIL.



### 3 MARKET INVESTIGATIONS

- 3.1 Market investigations are detailed examinations into whether there is an AEC in the market(s) referred and, if so, what remedial action may be appropriate.
- 3.2 As explained in chapters 1 and 2, a market investigation is one possible outcome of a market study. It is commenced by the making of a market investigation reference. The CMA may make a reference where it has reasonable grounds for suspecting that any feature, or combination of features, of a market or markets in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.<sup>75</sup>
- 3.3 When a competition problem is identified, a wide range of legally enforceable remedies are available, aimed at making the market(s) more competitive in the future. Guidance on the substantive aspects of market investigations and possible outcomes is contained in *Guidelines for market investigations* (CC3 (revised)). CC3 (revised) remains applicable after 1 April 2014, subject to the changes set out in this guidance. Annexe A to this guidance lists the parts of CC3 (revised) that are significantly amended, or superseded, by those changes.
- 3.4 This chapter explains the changes to the market investigation stage following reference.<sup>76</sup> These are, in summary:
- changes to the statutory time limits within which market investigations must be completed
  - changes to the way in which cases raising public interest issues are handled
  - the introduction of a new power to conduct investigations following a cross-market reference, and
  - changes to market investigation procedures.

Each of these changes is explained below.

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<sup>75</sup> Section 131(1) of the EA02.

<sup>76</sup> For information on the transitional arrangements see *Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14).

## Time limits and procedure

- 3.5 The CMA publishes an administrative timetable setting out the key stages in the market investigation process. There is also a statutory time limit on completion of this process. A market investigation must be completed and the report published within 18 months of the date of reference.<sup>77</sup>
- 3.6 The CMA may extend this period by up to a further six months if it considers that there are special reasons why the investigation cannot be completed and the report published within 18 months.<sup>78</sup> Only one extension is possible. A decision to extend the timetable must be published.<sup>79</sup>
- 3.7 The power to extend the timetable is most likely to be used in complex cases (for example, where there are multiple parties, issues and/or markets), in order to ensure a thorough and fair consideration of the issues raised and proper engagement with parties. It should generally be clear by the time of the provisional findings (contained in the Provisional Decision Report) how likely it is that an extension will be needed. The CMA is required also to publish the reasons for any such extension (section 172(5) of the EA02).<sup>80</sup>

## Cases raising public interest considerations

- 3.8 As outlined in chapter 2, if the Secretary of State decides that one or more specified public interest consideration(s) is relevant to a matter, he/she may decide to make a restricted public interest reference or a full public interest reference. A restricted public interest reference follows a similar procedure to the public interest reference procedure before ERRA13. Under a full public interest reference the CMA is required to consider the public interest issues

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<sup>77</sup> Section 144 of the EA02. Under the provisions of the EA02 that applied prior to 1 April 2014 the statutory time limit was 24 months. This time limit differs for full public interest references where the Secretary of State proposes to appoint a public interest expert to assist the CMA. In such cases, the 18-month period runs from the earliest of: the date of the expert's appointment, the Secretary of State giving notice that he/she does not intend to appoint an expert, or the period ending two months from the date of reference.

<sup>78</sup> Section 137 of the EA02.

<sup>79</sup> Section 172(2)(za) of the EA02.

<sup>80</sup> The 18-month and additional six-month periods set out above are upper limits, and may be adjusted downwards by order. If the Secretary of State proposes to make an order adjusting those periods, he/she must consult the CMA and other relevant persons before doing so.

alongside the competition issues.<sup>81</sup> The questions the CMA must answer are explained below.

3.9 A market investigation on a public interest reference follows the same main procedural steps as a market investigation that addresses competition issues only.<sup>82</sup> There are however certain differences in relation to the questions that must be decided by the CMA following a public interest reference, and the subsequent reporting and remedies implementation processes that must be followed. These differences are outlined below.

### ***Questions to be decided on a restricted public interest reference***

3.10 Following a restricted public interest reference, the CMA is required to decide:

- whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom<sup>83</sup> and
- if the CMA finds that there is an AEC, the CMA must decide on two sets of questions concerning the taking of remedial action. First, the CMA must decide what action (if any) should be taken by the Secretary of State, or it should recommend others take for the purpose of remedying the AEC or any detrimental effect on customers resulting from the AEC.<sup>84</sup> Secondly, the CMA must decide what action (if any) should be taken by it, or it should recommend others to take for the same purpose.<sup>85</sup>

3.11 When answering both sets of remedial questions, the CMA, must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the AEC concerned and any detrimental effects on

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<sup>81</sup> See paragraph 1.14.

<sup>82</sup> The main stages of an investigation are explained in paragraphs 3.24–3.64 of this document.

<sup>83</sup> Section 141(2) of the EA02.

<sup>84</sup> Section 141(3) of the EA02.

<sup>85</sup> Section 141(4) of the EA02.

customers resulting from the AEC.<sup>86</sup> Similarly the CMA will have regard to the effect of any action on any relevant customer benefits.<sup>87</sup>

### **Questions to be decided on a full public interest reference**

3.12 Following a full public interest reference, the CMA is required to decide:

- whether any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK<sup>88</sup>
- if there is an AEC, whether, taking into account only any AEC and the admissible public interest consideration(s),<sup>89</sup> any feature or combination of features which gave rise to an AEC operate(s) or may be expected to operate against the public interest,<sup>90</sup> and
- if the CMA finds that there is an adverse effect on the public interest, it must decide on what (if any) action should be taken by the Secretary of State, or it should recommend others take for the purpose of remedying the adverse effect on the public interest,<sup>91</sup> or
- if the CMA does not find any adverse effect on public interest but finds an AEC, it must decide what (if any) action should be taken by it or it should recommend others take for the purposes of remedying the AEC or any resulting detrimental effects on customers.<sup>92</sup>

3.13 When answering the remedial questions the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the public interest consideration or the AEC (as appropriate)

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<sup>86</sup> Section 141(5) of the EA02.

<sup>87</sup> Section 141(6) of the EA02.

<sup>88</sup> Section 141A(2) of the EA02. This relates to an ordinary reference (as defined in section 131(6)(b) of the EA02). The first question that the CMA is required to decide differs slightly in relation to a cross-market reference, as explained in paragraph 3.21.

<sup>89</sup> Defined in section 141A(11) of the EA02.

<sup>90</sup> Section 141A(4) of the EA02.

<sup>91</sup> Section 141A(5) of the EA02.

<sup>92</sup> Section 141A(6) of the EA02.

and any resulting detrimental effects on customers.<sup>93</sup> Similarly the CMA will have regard to the effect of any action on any relevant customer benefits.<sup>94</sup>

- 3.14 If the Secretary of State has appointed a public interest expert the CMA must, when deciding whether there is an adverse effect on the public interest and if so, what action should be taken to remedy it, have regard, in particular, to the views of the expert.<sup>95</sup>

### ***Reporting procedure following a public interest reference***

- 3.15 Following its investigation, the CMA prepares a market investigation report containing its conclusions on both competition issues and public interest issues. If, in the case of a full public interest reference, the Secretary of State has appointed a public interest expert to assist the CMA, the CMA must include a summary of the expert's views in the report.<sup>96</sup>
- 3.16 Where the CMA decides that action should be taken by the Secretary of State, it is required to provide the report to the Secretary of State.<sup>97</sup> The report must be provided to the Secretary of State within the 18-month reporting period.<sup>98</sup>
- 3.17 Having received the report, the Secretary of State is required to decide:
- on a restricted public interest reference, whether any eligible public interest consideration is relevant; or any eligible public interest considerations are relevant to any remedial action mentioned in the report and which the CMA should take for the purpose of remedying, mitigating or preventing any AEC or any detrimental effect on customers, and<sup>99</sup>
  - on a full public interest reference, whether to make an adverse public interest finding and, if so, how the adverse effects should be remedied,

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<sup>93</sup> Sections 141A(8) and 141A(9) of the EA02.

<sup>94</sup> Section 141A(10) of the EA02.

<sup>95</sup> Section 141A(7) of the EA02.

<sup>96</sup> Section 142(2)(d) of the EA02.

<sup>97</sup> Sections 143(3) and 143A(3) of the EA02. In other circumstances the CMA publishes the report.

<sup>98</sup> Subject to the possibility of an extension of up to six months as explained in paragraph 3.6. The starting date for the 18-month period may be later in cases where the Secretary of State has proposed to appoint a public interest expert, as explained in footnote 77.

<sup>99</sup> Section 146(2) of the EA02.

taking into account the recommendations included in the CMA's report on the matter.<sup>100</sup> The Secretary of State must accept the CMA's findings and remedies in relation to competition issues.<sup>101</sup>

- 3.18 The Secretary of State's decision must be made and published within 90 days of receipt of the CMA's market investigation report.<sup>102</sup>
- 3.19 If the CMA reaches any decision on the reference which does not require action to be taken by the Secretary of State, it publishes the market investigation report itself.<sup>103</sup> In those circumstances, the remedies implementation process (if necessary) follows the normal procedure with no further involvement of the Secretary of State.

### **Cross-market references**

- 3.20 As explained in chapter 2, the CMA has the power to refer a specific feature (or combination of features)<sup>104</sup> existing in more than one market without also having to refer the whole of each market concerned. This is called a cross-market reference.
- 3.21 The statutory questions to be decided by the CMA in a cross-market investigation differ from the questions to be decided following an ordinary reference. In a cross-market investigation, the CMA must decide:
- in relation to each feature and each combination of the features specified in the reference
  - whether the feature or combination of features, as it relates to goods or services of one or more than one of the descriptions so specified,

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<sup>100</sup> Sections 146A(1) and 146A(2) of the EA02.

<sup>101</sup> Section 146A(5) of the EA02.

<sup>102</sup> Sections 143(4), 143A(4), 146(3) and 146A(6) of the EA02. The Secretary of State must also publish the CMA's market investigation report (given to the Secretary of State under section 143(3) or section 143A(3) of the EA02 no later than publication of the Secretary of State's decision under sections 146(2) or 146A(2) of the EA02 in relation to the case).

<sup>103</sup> Sections 143(1) or 143A(2) of the EA02.

<sup>104</sup> Only features that relate to conduct can be the subject of a cross-market reference. See paragraph 2.32.

prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK.<sup>105</sup>

- 3.22 If the CMA reaches an adverse finding following a cross-market reference, it must also consider remedies (see chapter 4 and Part 4 and Annex B of *Guidelines for market investigations* (CC3 (revised))).
- 3.23 The same procedural provisions (including statutory time limits) apply to cross-market investigations as to ordinary market investigations, and the CMA's investigatory and enforcement powers are the same in relation to both reference types.

### **Market investigation procedures**

- 3.24 The following paragraphs provide an overview of the procedures for a market investigation and replace the relevant paragraphs of the *Guidelines for market investigations* (CC3 (revised)) as outlined in Annex B. In practice, some aspects of the procedures used in a particular case may vary from those set out below. This is inevitable because no two market investigations are alike in all respects. The sectors under investigation can range in size from small, highly specialised industries to large-scale multi-faceted sectors.<sup>106</sup> Some references can encompass both upstream and downstream markets. Moreover, the numbers of parties with an interest in the investigation may vary from a few to several hundred.

### ***Managing investigations with a large number of parties***

- 3.25 All providers of the goods or services in a market under investigation are potentially main parties to an investigation. However, the degree of each party's engagement with the CMA may vary, particularly where there are substantial numbers of main parties. The CMA may need more information and evidence from some than from others. Some firms may choose to engage more with the CMA than others. Differences in communication by the CMA with different main parties may consequently reflect the different levels of party engagement.
- 3.26 In addition, there will be parties which are not providers of the goods or services in the market but which may be materially affected by the

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<sup>105</sup> Section 134(1A) of the EA02.

<sup>106</sup> An upstream firm provides raw materials or manufactures inputs for processing and/or distribution by a downstream firm.

investigation (including super-complainants, customers and consumer groups, upstream suppliers, and trade and professional bodies). Levels of engagement with these parties will also vary. For example, the CMA may seek information from some of them, while others may volunteer information and views to the CMA.

- 3.27 The CMA makes extensive use in market investigations of its website to communicate or to make disclosures, enabling any number of parties to follow the progress of an investigation (as far as possible the CMA notifies parties when relevant material is posted). While the detail of its processes might vary, the CMA will ensure that its procedures are fair and give parties the opportunity to participate appropriately in an investigation.

### ***Timescales***

- 3.28 The EA02, as amended by the ERA13, requires the CMA to publish its report on a market investigation within 18 months of the reference.<sup>107</sup> There is scope to extend the investigation by up to a further six months if the CMA considers there are special reasons for doing so.<sup>108</sup>
- 3.29 The timescales for the different stages of a market investigation will be decided by the Group on a case-by-case basis. The following timetable shows the stages of a typical 18-month investigation. In practice, some of the stages may overlap and developments in the investigation, for example a revision of the Provisional Decision Report and a consequent need for additional consultations, may require adjustments to the timings and procedures.

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<sup>107</sup> Section 137(1) of the Act.

<sup>108</sup> Section 137(2A) of the Act. See also paragraphs 3.5–3.7.



Stage of process	Timing within 18-month investigation
Reference	Pre-reference sharing of appropriate information with the CMA by the CMA market study team/the referring body
'First day letter'/initial information requests Publication of initial Issues Statement (setting out theories of harm and inviting views on possible remedies) Initial submissions from main and third parties	Months 1–2
Site visits and hearings	Month 3
Further interaction with parties and consultation on analysis: eg roundtables, confidentiality rings, disclosure rooms, working papers	Months 2–11
Final deadline for all parties' submissions before the Provisional Decision Report	Month 11
<b>Publication of Provisional Decision Report on the AEC and remedies (if needed)</b>	<b>Month 12</b>
Consideration of responses to Provisional Decision Report Response hearings with parties	Months 12–16
Final deadline for all parties' submissions before Final Report	Month 16
<b>Publication of Final Report</b>	<b>Month 18</b>

3.30 The CMA draws up and publishes an administrative timetable at an early stage in the investigation. A draft is sent to main parties for comment. The administrative timetable is updated as necessary during the investigation.

### ***Information provision and disclosure***

3.31 While the time taken to conclude a market investigation depends on several factors, including the complexity of the investigation and the number of parties involved, a key factor is the timely provision of information to the CMA. The CMA aims to be reasonable in its requests for information and the deadlines it sets for parties to respond to such requests. It expects parties to

meet the timescales set. The CMA is empowered to require information and the attendance of witnesses and may impose financial penalties under section 174A of the EA02 for failures to comply without reasonable excuse.<sup>109</sup> Failure to comply includes failures to answer questions asked by the CMA, failures to produce documents required by the CMA, or failures to provide adequate or accurate information in response to any requirement imposed (including the deadline) on a person under section 174 of the EA02. The provision of false or misleading information to the CMA is a criminal offence, regardless of whether that information has been provided voluntarily or in response to a statutory notice.<sup>110</sup>

- 3.32 In pursuing its aim to conduct investigations in a fair and transparent manner, the CMA discloses its key documents, mainly by publishing them (in particular an Issues Statement, key results from its analysis, a Provisional Decision Report and Final Report). Typically, it also publishes a large amount of other documentation, for example non-confidential versions of key submissions from parties, including their submissions on the Issues Statement, the Provisional Decision Report and responses to other publications, key submissions of third parties, details of points arising in hearings, survey reports and some working papers.
- 3.33 Part 9 of the EA02 provides for the protection of confidential information relating to individuals and businesses.<sup>111</sup> But the CMA may disclose information under certain circumstances and having taken into account the considerations specified in the EA02.<sup>112</sup>
- 3.34 Where issues arise as to the confidentiality of some information in the CMA's possession that underlies a decision or a piece of analysis, but the CMA nevertheless considers that disclosure of some sort is necessary to allow a

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<sup>109</sup> See also paragraphs 2.13–2.15 where the same provisions are discussed in relation to market studies.

<sup>110</sup> For more information on potential financial penalties for failing to comply with the CMA's powers of investigation see [Administrative Penalties: Statement of policy on the CMA's approach](#) (CMA4).

<sup>111</sup> [Part 9](#) of the Act, in particular [section 245](#), provides that a person commits an offence if he or she discloses or uses specified information unless in the circumstances permitted by the Act or the information is already in the public domain in the circumstances described by [section 237](#)(3).

<sup>112</sup> [Section 244](#).

party to comment on it, the CMA may decide on some form of limited disclosure.<sup>113</sup>

- 3.35 For further details on the statutory provisions relating to the information obtained during the course of an investigation and to its disclosure, see the Chairman's guidance on disclosure (CC7 Revised) and the CMA's guidance on transparency and disclosure (CMA6).

### ***The main stages of an investigation***

- 3.36 The following paragraphs describe the main stages of a market investigation and outline the key interactions which the CMA has with parties and their advisers in the course of a typical investigation. However, market investigations vary significantly and the CMA may adapt its procedures to take account of the particular circumstances of an investigation.

### ***Handover between a market study and a market investigation***

- 3.37 Where the CMA (as opposed to one of the other referring bodies) undertakes the market study, the CMA's market study team considers the appropriate scope of the market investigation following consultation on a possible reference. It will also consider whether remedies are potentially available as part of its decision to make the market investigation reference (and sometimes also in the context of an offer of undertakings in lieu of a reference from the parties).<sup>114</sup>
- 3.38 To ensure an efficient handover, the CMA begins preparatory work on a market investigation on a contingency basis before the final decision on whether or not to make a reference is taken. This will include consideration of the further information-gathering and analysis likely to be required in the market investigation. A preparatory market investigation team of staff and members is normally established to prepare for the reference and they receive briefings on the work undertaken in the market study and the key concerns underpinning any anticipated reference.

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<sup>113</sup> For example, to enable disclosure of some data used in its analysis, the CMA might set up a disclosure room or confidentiality ring in which the parties' external legal and economic advisers can review it. Rules relating to access, use and non-disclosure are applied and participants are required to sign undertakings that they will comply with the restrictions. See the [CMA's guidance and templates](#) for confidentiality rings and disclosure rooms.

<sup>114</sup> See [OFT511](#), paragraphs 2.20–2.26 and 2.30–2.31.

- 3.39 In addition to drafting the formal terms of reference for the market investigation, the CMA Board may append an advisory steer to the reference decision setting out its expectations regarding the scope of the market investigation and the issues that could be the focus of the investigation. The Inquiry Group would be expected to take this into account. However, the Inquiry Group will continue, as required by the legislation, to make its statutory decisions independently of the CMA Board.
- 3.40 Where another referring body undertakes the market study, the CMA's preparatory market investigation team will seek to engage with the referring body to share information and analysis and understand the key concerns underpinning any anticipated reference.

### *Information-gathering*

- 3.41 Once the market investigation reference has been made, the CMA formally launches its investigation with a 'first day letter' to key main parties. The letter includes information on the terms of the reference, the statutory deadline for the CMA's report, relevant guidance material, the key CMA staff working on the investigation, and the next steps to be taken. The first day letter also takes forward the information-gathering process by requesting specified information.
- 3.42 At an early stage, informal meetings are held between the staff team and selected main parties (and, where relevant, with other parties such as the super-complainant). Such meetings usually cover the procedures to be adopted for the conduct of the investigation, and seek information and views on the market. In addition, the CMA holds 'data meetings' as early as possible with appropriate main parties to discuss the organisation and availability of technical data. There may be subsequent staff meetings as the investigation progresses – see, for example, paragraph 3.53.
- 3.43 A detailed market and financial questionnaire is next sent to the main parties; and, in many cases, other information is collected from a wider range of parties. The information-gathering will be informed by the developing 'theories of harm'. When practicable, parties are consulted on questionnaires to facilitate efficient collection of useful and consistent information, whilst as far as possible minimising the burden to business.

- 3.44 The CMA may decide to conduct one or more surveys as part of the information-gathering process.<sup>115</sup> If the decision is taken to conduct a survey, relevant parties are consulted on the draft survey design and content. In some cases, so as to construct the sample for questioning, parties may be required to provide contact details for some or all of their customers or suppliers.
- 3.45 In many cases, the CMA organises early site visits to several parties. These are designed to be helpful to both the CMA and the parties involved. A site visit offers a chance for the Inquiry Group members and staff to gain a greater understanding of the party's business by visiting key facilities and meeting key operational staff. A party receiving a site visit is encouraged to organise a short presentation, and take some questions, on its business so as to explain its nature and the market context in which it is operating. In some cases, a site visit may be combined with a hearing.

### *Issues Statement*

- 3.46 An Issues Statement is published by the CMA at an early stage in the investigation process. This generally discusses the theories of harm framing the analysis the CMA intends to pursue, as well as welcoming views on potential remedies. Where the CMA conducted the market study, the Issues Statement is likely to be a short document that cross refers to the market study report and (if applicable) the Board's advisory steer. Parties are invited to provide submissions commenting on the issues and possible remedies set out in the statement.

### *Hearings*

- 3.47 The Inquiry Group holds a round of hearings with parties (individually or multi-party where appropriate) at an early stage in the investigation. The primary purpose of these hearings is to enable the CMA to understand the market, discuss the parties' submissions, and discuss the issues and possible remedies with the parties. They also provide an opportunity for the parties to explain their views in person directly to the decision-makers as their thinking is developing. The CMA aims to ensure that hearings are held with a range of parties. However, decisions on which main and third parties

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<sup>115</sup> The survey results will usually be disclosed through publication (accompanied by an explanation of the methodology) but there may be instances when it is inappropriate to publish the whole report. The Inquiry Group will consider whether other information relating to the survey should be disclosed, for example cross-tabulations of the survey results.

to invite to hearings, and the format and sequencing of any hearings, rest with the CMA.

- 3.48 Although the format of hearings varies, parties are normally given an opportunity to make brief opening and/or closing statements, and should expect to respond to the CMA's questions. A transcript of the hearing will be taken and will be sent to the relevant party for checking. Additionally, staff-led hearings (sometimes via teleconferencing) are conducted with some parties not attending hearings with the Inquiry Group, including some main parties when there are large numbers of them. Some members of the Inquiry Group may also participate. Transcripts or written notes are taken and sent to the relevant party for checking.
- 3.49 A summary of the key points raised at a hearing may be prepared by the CMA or a transcript may be published, as deemed appropriate by the Inquiry Group. The parties involved are given the opportunity to comment on both content and confidentiality before these are published. The party is also invited to follow up in correspondence any issue raised during the hearing.

### *Assessment*

- 3.50 Using the information gathered and the theories of harm postulated, the CMA progresses the competition assessment. The issues addressed will be diverse, covering the many aspects raised by the investigation: for example, background on the market, the operation of the market or the performance of parties, market definition and assessments of the relevant competition issues set out in the Issues Statement. The CMA will also consider possible remedies at the same time as assessing the problems, and provisional decisions on both are included in the Provisional Decision Report. In practice this means the CMA will consider and discuss potential remedies alongside working on understanding what features of the market give rise to adverse effects. The consideration of possible remedies is always contingent on an AEC finding having been reached.
- 3.51 The staff and the Inquiry Group work together on these issues, and many internal working papers/presentations are typically prepared on the various aspects of the investigation. Generally, internal documents are not disclosed.
- 3.52 The Inquiry Group's provisional analysis is included in the Provisional Decision Report (see paragraph 3.59). However, the Inquiry Group will disclose key elements of its analysis before publication of the Provisional Decision Report through, for example, the use of confidentiality rings where

appropriate or disclosure rooms, and/or it may disclose some of the working papers, or parts of working papers, often through publication.<sup>116</sup>

- 3.53 On occasions, specific pieces of technical analysis merit discussion between a party and the CMA on the methodology used and, possibly, the results found. The CMA arranges meetings or roundtables with one or more parties for this purpose. These are generally attended by CMA staff (together, on occasion, with members of the Inquiry Group), the party and its technical advisers.
- 3.54 The administrative timetable will include a deadline for the receipt of all parties' responses and submissions for consideration by the Inquiry Group in forming its provisional decision.

#### *Put-back*

- 3.55 The CMA may also send ('put back') text to parties for the purpose of enabling them to:
- verify the factual correctness of certain content (usually information supplied by them); and
  - identify any confidential material, prior to publication; parties are asked to provide reasons for any requests for excisions of the material from published documents.
- 3.56 The put-back process is separate from disclosure of the CMA's developing thinking.

#### *Provisional Decision Report*

- 3.57 When the Inquiry Group has provisionally formed a view on whether or not there are features of the market(s) that give rise to an AEC, its provisional findings will be published in the Provisional Decision Report, and a public consultation on them will be held.
- 3.58 If an AEC has provisionally been found, the Provisional Decision Report will also contain the CMA's provisional decision on remedies. The Provisional Decision Report will contain details of remedies the CMA has identified as addressing the AEC effectively, and may also outline details of remedies the

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<sup>116</sup> See [CC7 \(Revised\)](#), paragraphs 7.1–7.3. Disclosed working papers provide a snapshot of the issues, analysis and views that are relevant at the time of disclosure and may change.

CMA considers unlikely to be effective and the reasons why it has reached this provisional decision.

- 3.59 As set out in the Rules, the time allowed for the consultation will be no less than 21 days and the CMA applies some flexibility in setting reasonable deadlines case by case in light of the relevant circumstances.

### *Response hearings*

- 3.60 Once the CMA has published the Provisional Decision Report, response hearings (individually or multi-party where appropriate) will take place with main parties and potentially with key third parties. At a response hearing, parties will be given the opportunity to comment orally on the provisional decision on the AEC and remedies, and the CMA may seek clarification of particular points made in written submissions or at the hearing. Transcripts, or alternatively notes, of response hearings will be taken and, in most cases, summaries prepared and both will be processed in a similar way to those relating to hearings held earlier in the investigation (see paragraphs 3.47 to 3.49).
- 3.61 Having considered the responses from parties, the CMA may undertake additional consultations with parties as required. If further consultation is not needed, the CMA will proceed to publishing its final decision on the AEC and remedies in its Final Report.
- 3.62 Separately, a deadline will have been set in the administrative timetable for the receipt of all parties' responses and submissions for consideration by the Inquiry Group ahead of reaching its final decision.

### *Final Report*

- 3.63 The CMA will publish its final decision on the competition question and (if necessary) remedies together with supporting reasons and information in a Final Report.<sup>117</sup> The report will, if it confirms the finding of an AEC, contain an explanation of the AEC finding and sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies by the CMA.
- 3.64 Parties may, during the two months following the notification of the Final Report, lodge an appeal with the Competition Appeal Tribunal (CAT) against

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<sup>117</sup> [Section 136](#).



the decisions. If a judgment of the CAT upholds an aspect of an appeal, this could lead to the investigation or a part of it being remitted to the CMA for reconsideration.<sup>118</sup> Appeals against CAT judgments can, if allowed, go forward to the Court of Appeal or, in Scotland, the Court of Session and, ultimately, to the Supreme Court.

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<sup>118</sup> For example, following appeals against CC decisions, the CAT ordered the CC to reconsider parts of the remedies packages in the Final Reports on [Groceries](#) (April 2008) and [Payment Protection Insurance \(PPI\)](#) (January 2009). These aspects were, respectively, the competition test applied to grocery retail planning applications and the inclusion of a prohibition of the issuing of PPI at the point of sale.

## 4 IMPLEMENTATION OF REMEDIES

4.1 If, following any type of market investigation, the CMA finds an AEC, it is required to consider whether remedies are appropriate. In ordinary and cross-market references it must decide the following questions:

- whether action should be taken by it for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the AEC
- whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the AEC concerned or any detrimental effect on consumers so far as it has resulted from, or may be expected to result from, the AEC, and
- in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.<sup>119</sup>

4.2 If the CMA has decided to take action itself to remedy, mitigate or prevent an adverse effect on competition, it has the choice of accepting undertakings from the relevant parties and/or of making an order.

4.3 The period following publication of the final report during which the CMA puts in place its remedies is known as the remedies implementation stage.

4.4 This chapter explains the changes to the remedies implementation stage following a market investigation report finding an AEC.<sup>120</sup> These changes are, in summary:

- the introduction of statutory time limits within which remedies must be implemented by the CMA
- the introduction of mandatory investigatory powers for the CMA during the remedies implementation and subsequent monitoring periods

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<sup>119</sup> Section 134(4) of the EA02. In full public interest references, the CMA is additionally required to decide whether (and, if so, what) action should be taken by the Secretary of State to remedy, mitigate or prevent any adverse public interest effects that have been identified. In cases where the Secretary of State makes an adverse public interest finding, he/she may take action to remedy, mitigate or prevent any of the adverse effects identified.

<sup>120</sup> For information on the transitional arrangements see *Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14).

- changes to the powers available to the CMA to impose remedies by order, and
- clarification of the powers available to the CMA following a report to reverse pre-emptive action that has been taken.

Each of these changes is explained below.

### **Time limits and procedure**

- 4.5 The CMA publishes an administrative timetable for the implementation of those remedies where it has decided to take action itself. The ERA13 introduced statutory time limits for the implementation of remedies by the CMA to address findings from a market investigation. The CMA must accept final undertakings or make a final order within six months of the date of publication of the market investigation report.<sup>121</sup> This six-month period includes a period of formal public consultation.
- 4.6 The CMA may extend the six-month period by up to a further four months if it considers that there are special reasons why final undertakings cannot be accepted or a final order made within the statutory deadline. Only one extension is possible.<sup>122</sup> A decision to extend the timetable must be published.<sup>123</sup>
- 4.7 The power to extend the timetable is most likely to be used where the remedies themselves are more complex, for example where consumer testing of the detailed implementation of remedies is necessary, where proposed remedies give rise to complex practical issues, or where an additional consultation is required to address material changes arising from comments made in earlier consultations.
- 4.8 During the period covered by the statutory timetable for remedies implementation, the CMA has investigatory powers.<sup>124</sup> In addition to the

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<sup>121</sup> Section 138A of the EA02. These time limits do not apply to any further implementation required after final undertakings have been accepted or a final order made.

<sup>122</sup> The six-month and additional four-month periods set out above are upper time limits, and may be adjusted downwards by order. If the Secretary of State proposes to make an order adjusting those periods, he/she must consult the CMA and other relevant persons before doing so.

<sup>123</sup> Section 172(2)(zb) of the EA02. The CMA is required also to publish the reasons for any such extension (section 172(5) of the EA02).

<sup>124</sup> Section 174(1)(b) of the EA02. The scope of these powers and sanctions for non-compliance are explained in paragraphs 2.11–2.16. The powers remain available to the CMA in relation to the

ability to impose penalties in some circumstances, the CMA has the ability to 'stop the clock' if it considers that any person has failed (whether with or without reasonable excuse) to comply with any requirement of a notice issued by the CMA using its statutory investigatory powers (for example, a notice requiring the production of specified documents).<sup>125</sup> In this case, the time limits set out above are extended. In effect, the timetable is suspended either until the documents or information requested is provided to the satisfaction of the CMA, or until the CMA publishes a notice to cancel the extension. The extension periods described in this paragraph and in paragraph 4.6 can be used together if necessary, in which case the extension periods are added together.<sup>126</sup>

- 4.9 The process to be followed in the event of an appeal to the CAT will depend upon the circumstances and will therefore be considered on a case-by-case basis. Subject to any directions made by the CAT the CMA will, when considering the process to be followed, consider the prevailing circumstances including the terms of any remittal. It will also have regard to the statutory time limits that applied to its inquiry to which the challenged CMA decision related.

### **Scope of the CMA's order-making powers**

- 4.10 The CMA's decision as to whether to implement remedies by means of accepting undertakings or making an order is determined on a case-by-case basis. It is informed both by the scope of the CMA's order-making powers under Schedule 8 to the EA02 and by practical issues such as the number of parties concerned and their willingness to negotiate and agree undertakings.
- 4.11 The CMA has additional flexibility and stronger enforcement powers under Schedule 8 in two respects:
- parties may be required to publish certain non-price information without also being required to publish price information,<sup>127</sup> and

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enforcement and monitoring of remedies that have been implemented, and in relation to its remedies monitoring function.

<sup>125</sup> Sections 138A(3) to (5) of the EA02.

<sup>126</sup> Section 138B of the EA02.

<sup>127</sup> Under the EA02 prior to amendment a remedy implemented by means of order could require publication of non-price information only together with price information.

- parties may be required to appoint and remunerate an independent third party to monitor and/or implement remedies and to deal with disputes.<sup>128</sup>

### **Interim measures**

- 4.12 After the CMA has published its final report but before the reference has been finally determined (by final undertakings being accepted or a final order made), the CMA has the power to prevent pre-emptive action that might impede the taking of final action in relation to the investigation.<sup>129</sup> It may do so by accepting from the parties concerned interim undertakings to take such action as the CMA thinks is appropriate or by making an interim order.<sup>130</sup>
- 4.13 The CMA can take steps to require parties to reverse any action that has already occurred before any interim measures have been put in place.<sup>131</sup> This will enable the CMA, once a report has been published, to prevent the effectiveness of any ultimate remedy being jeopardised through pre-emptive action by the parties.

### **Sunset clauses and reviews of remedies**

- 4.14 As a single competition authority, the CMA is responsible for the entire remedies lifecycle and has sought to capitalise on potential benefits arising from institutional reform in this area. As a result, it has developed its guidance to commit more clearly to considering the use of sunset clauses and to reviewing the ongoing need for remedies, with a view to ensuring that remedies do not remain in force where they are no longer necessary to achieve the purposes for which they were imposed. The paragraphs below will replace the relevant paragraphs of the *Guidelines for market investigations* (CC3 (revised)) as outlined in Annex B.

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<sup>128</sup> Under the provisions of the EA02 that applied prior to 1 April 2014 the appointment of third parties and the terms of such appointment relied on the parties' agreement.

<sup>129</sup> In the case of a restricted public interest reference or a full public interest reference, this power is exercisable by the Secretary of State (section 157(6) of the EA02).

<sup>130</sup> Sections 157 and 158 of the EA02.

<sup>131</sup> Sections 157(2B) and 158(2B) of the EA02.

## **Effectiveness**

- 4.15 The CMA will assess the extent to which different remedy options are likely to be effective in achieving their aims, including their practicability.
- 4.16 The effect of any remedy is always uncertain to some degree. In evaluating the effectiveness of potential remedies, the CMA will consider the risks associated with different remedy options and will tend to favour remedies that have a higher likelihood of achieving their intended effect. Assessing the effectiveness and practicability of a remedy may involve consideration of several dimensions discussed further below.
- 4.17 First, a remedy should be capable of effective implementation, monitoring and enforcement. To facilitate this, the operation and implications of the remedy need to be clear to the persons to whom it is directed and also to other interested persons. Other interested persons may include customers, other businesses that may be affected by the remedy, sectoral regulators, and any other body that has responsibility for monitoring compliance. The effectiveness of any remedy may be reduced if elaborate monitoring and compliance programmes are required.<sup>132</sup> Remedies regulating behaviour generally have the disadvantage of requiring ongoing monitoring of compliance and may also constrain beneficial aspects of competitive rivalry.
- 4.18 Secondly, the timescale over which a remedy is likely to have effect will be considered. The CMA will generally look for remedies that prevent an AEC by extinguishing its causes, or that can otherwise be sustained for as long as the AEC is expected to endure. The CMA will also tend to favour remedies that can be expected to show results within a relatively short time. Some remedy options may have an almost immediate impact, while the effects of others will be delayed. In such instances the CMA may select a remedy package combining both types of measure, taking into account both when each measure would take effect and how long it would endure. Where an AEC is expected to be short-lived (for example, because a specific future event is expected to bring it to an end) and the timescale for implementation of a particular remedy option would extend significantly into this period, the CMA will consider whether an alternative measure would be more appropriate.
- 4.19 When designing remedies the CMA will consider whether to specify a finite duration – for example, by means of a long-stop date in a ‘sunset clause’ – as

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<sup>132</sup> The CMA will also consider the costs of compliance as part of its assessment of the impact of remedies and their proportionality (see [Guidelines for market investigations \(CC3 \(revised\)\)](#), paragraph 352).

part of the design of individual measures.<sup>133</sup> A sunset clause will generally specify when individual measures cease to have effect, whether by reference to a specific date or a clearly defined future event (for example the expiry of an intellectual property right or concession). A measure which is the subject of a sunset clause will cease to have effect on the specific date or defined event and will not be enforceable or reviewable beyond that specific date or defined event. Some measures, for example an obligation to implement a divestiture within a specified period of time, take effect when they are completed and therefore a sunset clause may not be necessary for these measures.<sup>134</sup>

4.20 A number of considerations may be relevant to the CMA's decision whether to specify a finite duration for a measure and the duration of any such 'sunset clause',<sup>135</sup> including:

- (a) The length of time over which the AEC is expected to persist. For example – if the CMA considered that an AEC and/or its detrimental effects would not endure beyond a particular date or event, then there would not need to be ongoing remedial action beyond that point, and the CMA may adopt a sunset clause linked to that date or event.
- (b) The role that the measure is expected to play in tackling the AEC and/or resulting customer detriment. For example, some measures are intended to be a temporary arrangement to deliver improvements in the short term, while other longer-term measures take effect. Such a transitional measure might be suitable for a relatively short sunset clause – for example, of less than five years – which might be linked to the length of time it was expected to take for the longer-term measures to take effect.<sup>136</sup> Other measures may be intended to work as a catalyst to introduce greater competition into a market – for example, by promoting new entry, or removing obstacles to competition – such that, once this change has

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<sup>133</sup> While consideration may be given to the individual duration of elements of a remedy package; the CMA may also give consideration to applying a sunset clause across a package of measures.

<sup>134</sup> Some ancillary measures accompanying divestitures – eg not to reacquire the divestiture package – may themselves involve ongoing obligations on parties, and these ancillary measures may themselves be subject to a sunset clause (see [Guidelines for market investigations \(CC3 \(revised\)\)](#), paragraph 27 of Annex B).

<sup>135</sup> Some of these considerations may also be relevant to decisions about whether to initiate a review of a remedy.

<sup>136</sup> For example, in the report on [Veterinary Medicines](#) (April 2003) under the FTA, the package of remedies included an obligation on veterinary surgeons not to charge for writing prescriptions for a period of three years.

become established there is no longer a need for ongoing intervention. For such a measure the CMA might consider adopting a sunset clause that might be linked to achievement of the desired change or the timescale within which it expects such a change to occur. Where remedies are intended to create enduring characteristics of how the market operates, the CMA might adopt a relatively long sunset period or not have a sunset period.<sup>137</sup>

- (c) The extent to which the measure is expected to become obsolete over time. This might sometimes be anticipated if prospective changes in technology, the policy and regulatory framework applying to the sector, consumer behaviour or other aspects of the competitive environment (for example, the way in which information is provided to consumers) mean that a measure is unlikely to serve its original purpose after a period of time. While the CMA will generally seek to ‘future-proof’ its remedies to prolong their effectiveness, all markets are subject to evolution and some more than others. The CMA might therefore adopt a sunset clause in some cases to reflect this, taking into account the characteristics of the market and remedy concerned.

4.21 Whether to include a sunset clause and the period used for any sunset date will therefore depend on the circumstances of the case and will be matters for the CMA to decide on a case-by-case basis. The duration of an AEC in the absence of an effective intervention by the CMA cannot always be predicted and there will similarly be some uncertainty about the precise timescale over which remedies will take effect. However, the CMA may nonetheless be able to identify a date or event beyond which it considers it would not be necessary to retain a remedy in force and, in these circumstances, the CMA would typically expect to adopt a sunset clause as part of the design of the remedy.

4.22 In addition to the upfront consideration that the CMA gives to duration in designing its remedies, the CMA is obliged to keep remedies under review<sup>138</sup> and may remove or revise those that are no longer appropriate. Such reviews might take place as a result of parties applying for variation or revocation of

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<sup>137</sup> For example, in the statutory audit services market investigation, the CMA introduced a requirement for FTSE 350 companies to put their statutory audit engagement out to tender at least every ten years. This type of longer-term remedy is less well-suited for a sunset clause, as it will take at least a decade to fully take effect.

<sup>138</sup> A statutory duty under [section 92\(1\), \(2\) and \(3\)](#) and [section 162 \(1\), \(2\) and \(3\)](#) of the EA02; sections 88(4) and (5) of the FTA (as preserved in Schedule 24 of the EA02).



remedies on the basis of a change of circumstances.<sup>139</sup> Alternatively, the CMA might identify a change of circumstances following a review conducted on its own initiative. Consistent with the CMA's objective to avoid retaining remedies in force when they are no longer needed, when introducing a remedy without a sunset clause (or if the sunset clause substantially exceeds ten years), the CMA would normally expect to initiate an assessment of whether the remedy remains appropriate within ten years of the remedy coming into force. In some cases, the CMA may recommend consideration of the continued need for particular measures within a shorter timescale and/or specify the types of future circumstances which might be expected to trigger such a review – for example significant new entry.<sup>140</sup>

4.23 Thirdly, remedies may need to take account of existing laws or regulations either currently applicable or expected to come into force in the near future. Such other legislation may include both UK and EU legislation and could cover any aspect, for example competition law, health and safety, or data protection. Where there is a tension between existing laws or regulations and the actions that the CMA considers necessary to achieve an effective remedy, the CMA may make recommendations to the body responsible for the laws or regulations in question. Remedies will also need to take into account the extent to which the prohibitions on anti-competitive agreements and abuses of market power are applicable to the market concerned and what impact, if any, these have on the need and ability to impose remedies (see paragraph 17).<sup>141</sup>

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<sup>139</sup> For example, in 2012, the CC decided to remove the Domestic Electrical Goods Order (the DEGs Order) (and certain associated undertakings). The DEGs Order, which was introduced in 1998, prevented suppliers of goods such as televisions and washing machines from recommending resale prices or making agreements that restricted the resale prices of wholesalers and retailers, and from restricting or withholding supply from particular retailers. In deciding to lift the DEGs Order, the CC found that a number of changes since the Order was introduced had significantly increased competition in the market and removed the need for the safeguards provided by the Order. The CC also considered that the enactment of the Competition Act 1998 provided an effective mechanism to address attempts to fix prices or restrict supply unfairly. A [memorandum of understanding](#) set out how the OFT and CC approached their respective roles on reviews of undertakings and orders.

<sup>140</sup> For example, in the 2002 report on the [supply of banking services by clearing banks to small and medium-sized enterprises](#) under the FTA, the CC recommended that, three years after implementation of the remedies, the OFT should review whether further measures were needed or, on the other hand, in the light of market developments, whether any or all of the measures in the CC's package of remedies could be modified or discontinued. Following a review by the OFT, the CC decided in 2007 to release the UK's four largest clearing banks from most of the Transitional Undertakings given by them in 2002.

<sup>141</sup> Of [Guidelines for market investigations \(CC3 \(revised\)\)](#).

4.24 Fourthly, where more than one measure is being introduced as part of a remedy package, the CMA will consider the way in which the measures are expected to interact with each other. As a general rule, measures that have a shared aim of introducing or strengthening competition within a market will tend to be mutually reinforcing. For example, where market-opening measures are being introduced that increase customer choice by facilitating entry or removing barriers to switching, these may be accompanied by information remedies that help customers choose the best product available to them.<sup>142</sup>

### ***Duration [of behavioural remedies]***

4.25 As behavioural remedies are designed to have ongoing effects on business conduct throughout the period they are in force, the duration of these measures is a material consideration. The CMA may specify a finite duration, for example, if measures are designed to have a transitional effect or are otherwise expected to become obsolete within a specified period. In such circumstances, the CMA might consider setting a finite duration or 'sunset clause' beyond which the measures will definitely not apply. The period the CMA adopts for the sunset clause date will depend on the circumstances of the case. Where no sunset date or event has been set, or if the period is for substantially longer than ten years, the CMA would normally expect to assess the continued need for the remedy within ten years. Relevant parties remain able to apply for variation or revocation of the remedies on the basis of a change of circumstances rather than awaiting an own-initiative review or the expiry of a sunset clause.<sup>143</sup>

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<sup>142</sup> For example, the packages of remedies in the market investigations into [home credit](#) (November 2006), [domestic bulk liquefied petroleum gas](#) (June 2006) and [payment protection insurance](#) (January 2009) each included a combination of market-opening measures and information remedies.

<sup>143</sup> [Section 162 of the EA02](#). For example, in 2007, acting on the basis of advice from the OFT, the CC decided to release the UK's four largest clearing banks from most of the Transitional Undertakings given by them in 2002 following the investigation into supply of banking services by clearing banks to small and medium-sized enterprises under the FTA.

## ANNEXE(S)

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## A. Key changes to existing markets guidance

A.1 The following table lists those sections of the three existing main markets guidance documents<sup>144</sup> that are significantly amended or superseded by the changes that are outlined in this guidance. It is not intended to provide a comprehensive list of all changes, nor does it address all existing guidance documents which may be of relevance to the markets regime. Note also the following general limitations which apply to all existing OFT and CC markets-related guidance documents that are listed in Annexe B as having been adopted by the CMA Board (the adopted guidance):

- in the case of conflict between this guidance and the adopted guidance, this guidance prevails
- the original text of the adopted guidance has been retained unamended: as such, that text does not reflect or take account of developments in case law, legislation or practice since its original publication, and
- all existing guidance documents should be read subject to the following cross-cutting amendments:
  - references to the OFT or CC (except where referring to specific past OFT or CC practice or case law) should be read as referring to the CMA
  - references to ‘referral to the CC’ or ‘a reference to the CC’ should be read as referring to the referral of a case by the CMA (or Secretary of State) for a market investigation by a market reference group of CMA panel members
  - references to articles of the EC Treaty should be read as referring to the equivalent articles of the Treaty on the Functioning of the European Union (TFEU)
  - certain OFT or CC departments, teams or individual roles may not be replicated in the CMA, or may have been renamed. A copy of the CMA's organisational chart is available on [www.gov.uk/cma](http://www.gov.uk/cma), and

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<sup>144</sup> *Market studies: Guidance on the OFT approach* (OFT519), *Market investigation references* (OFT511) and *Guidelines for market investigations* (CC3 (revised)).

- parties should check any contact details against those listed on [www.gov.uk/cma](http://www.gov.uk/cma), which will be the most up to date.

Existing guidance reference	Supplemental guidance reference
<b>Market studies: Guidance on the OFT approach (OFT519)</b>	
Paragraph 4.4	Should be read (with the exception of the pre-launch stage) in conjunction with paragraphs 2.6 to 2.10 which explain the requirement to publish a market study notice and the applicable timescales for the market study stage
Paragraph 4.8	Should be read in conjunction with paragraph 2.6 which explains the requirement to publish a market study notice. From 1 April 2014 market studies are launched within the meaning of paragraph 4.8 by publication of a market study notice
Paragraph 4.10 (footnote 12)	The last two sentences of footnote 12 are superseded by paragraphs 2.11 to 2.16 which explain the investigatory powers available to the CMA and when they are available in relation to market studies
Paragraphs 4.21 and 4.22	Should be read in conjunction with paragraph 2.9 which explains the requirement on the CMA to publish a market study report within the statutory timeframe
Paragraph 5.13	The last two sentences of this paragraph are superseded by paragraphs 2.9 and 2.10 which sets out the statutory timescales and consultation process that apply when the CMA proposes to make a reference
<b>Market investigation references (OFT511)</b>	
Paragraph 1.6	Should be read in conjunction with paragraphs 1.21 to 1.24 which explain how the reference process is changed to take account of the formation of the CMA
Paragraph 1.7	Should be read in conjunction with paragraph 2.32 which explains that only features relating to conduct can be the subject of a cross-market reference

<b>Existing guidance reference</b>	<b>Supplemental guidance reference</b>
Paragraph 2.19	Should be read in conjunction with paragraphs 2.6 to 2.10 which explain the requirement to publish a market study notice and the applicable timescales for the market study stage
Paragraphs 3.1 to 3.3	These paragraphs are superseded by paragraphs 2.11 to 2.16 which explain the investigatory powers available to the CMA and when they are available in relation to market studies
Paragraphs 3.6 to 3.9	Should be read in conjunction with paragraph 2.9 which sets out the statutory timescales and consultation process that apply when the CMA proposes to make a reference
Paragraph 3.10	This paragraph is superseded by paragraphs 2.18 to 2.30 which explain the changes made to the procedure for making public interest interventions
<b>Guidelines for market investigations (CC3 (revised))</b>	
Paragraphs 5 and 6	These paragraphs explain the reforms introduced by the ERR13 and therefore are superseded by this guidance
Paragraphs 22 and 46 to 48	Should be read in conjunction with paragraphs 1.23 to 1.27 which explain how the reference process and appointment of the reference group are changed to take account of the formation of the CMA
Paragraph 25	This paragraph is superseded by paragraphs 3.15 to 3.19 which explain the changes made in relation to how cases raising specified public interest considerations are handled during the market investigation stage
Paragraph 49	Should be read in conjunction with paragraph 1.22 which explains the reference process at an operational (staff) level.
Paragraphs 50 - 87	These paragraphs describe the process for undertaking market investigations, and are superseded by paragraphs 3.24–3.64.
Paragraph 54	The first sentence of this paragraph is superseded by paragraphs 3.5 to 3.7 which explain the shorter statutory timescales that apply to the market investigation stage

<b>Existing guidance reference</b>	<b>Supplemental guidance reference</b>
Paragraph 89	Should be read in conjunction with paragraphs 4.5 to 4.7 which explain the statutory timescales applicable to the remedies implementation period
Paragraphs 334 to 341	These paragraphs are superseded by paragraphs 4.15 to 4.24 which explain the CMA's new procedure relating to sunset clauses and reviews of remedies.
Paragraph 45 of Annex B	This paragraph is superseded by paragraph 4.25 which explains the CMA's new procedure relating to sunset clauses and reviews of remedies.

## B. Annexe B: Status of existing OFT and CC guidance

B.1 The table below indicates the status of OFT and CC markets-related guidance documents and publications that had been published and were in effect prior to the transfer of their market study and market investigation functions to the CMA on 1 April 2014. Certain of those documents have been adopted by the CMA Board in order to facilitate transition to the new UK markets regime, and to minimise disruption to the parties and the CMA.

OFT/CC code	Title	Status of document	
		Replaced/obsolete <sup>1</sup>	Adopted by the CMA Board <sup>2</sup>
OFT511	Market investigation references	-	✓
OFT514	Super-complaints: guidance for designated consumer bodies	-	✓
OFT518	Overview of the Enterprise Act	✓	-
OFT519	Market studies: Guidance on the OFT approach	-	✓
OFT530	Practical information – everything you need to know about the Enterprise Act	✓	-
OFT548	Super-complaint concurrent duties	-	✓
OFT1060	Memorandum of understanding between the OFT and the CC on the variation and termination of merger and market undertakings and orders	✓	-
OFT1308	Practice on consultation on proposed decisions in relation to market investigation references	✓	-
CC1	Competition Commission rules of procedure for merger reference groups, market reference groups and special reference groups	✓	-



OFT/CC code	Title	Status of document	
		Replaced/obsolete <sup>1</sup>	Adopted by the CMA Board <sup>2</sup>
CC3 (revised)	Guidelines for market investigation	-	✓
CC4	Competition Commission: general advice and information	✓	-
CC5	Statement of policy on penalties	✓	-
CC6	Competition Commission: guidance to merger reference groups, market reference groups and special reference groups	✓	-
CC7 (revised)	Chairman's guidance on disclosure of information in merger and market inquiries	-	✓
CC12	Disclosure of information by the CC to other public authorities	✓	-
	Competition Commission: suggested best practice for submissions of technical economic analysis	-	✓
	Competition Commission: guidance on outside interests of members, staff and external advisers	✓	-

<sup>1</sup> OFT and CC publications listed in this column have, with effect from 1 April 2014, been replaced, or rendered obsolete, by CMA guidance or publications.

<sup>2</sup> OFT and CC publications listed in this column have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future). See Annexe A above for the general limitations that apply to the adopted guidance.