

# Market Reviews, Studies and Investigations

Updated guidance on the  
CMA's approach

Consultation document

5 November 2024



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# 1. Introduction and background

## About the CMA

- 1.1 The Competition and Markets Authority (CMA) is the UK's primary competition and consumer protection authority. We help people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour.
- 1.2 The CMA has a range of competition and consumer law powers to tackle unfair behaviour, practices and conditions that threaten to undermine competitive markets. This includes powers under the Enterprise Act 2002 "markets regime" to monitor and investigate markets within the United Kingdom that may not be working well for consumers and address any competition and consumer protection issues. The CMA has a number of tools available to it, including market studies, market investigations and market reviews. As part of its role, the CMA produces guidance for a wide range of groups including governments, regulators and consumer groups.

## Markets regime guidance

- 1.3 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. Certain OFT and CC markets-related guidance documents and publications that had been published and were in place at this date were subsequently adopted by the CMA Board. This was to facilitate the transition of UK markets regime powers, and to minimise disruption to the parties and the CMA.
- 1.4 Currently, the CMA's guidance on its approach to the markets regime is set out across a range of guidance documents published or adopted by the CMA:
  - (a) [Market studies: Guidance on the OFT approach](#) (OFT519)
  - (b) [Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act](#) (OFT511)
  - (c) [Guidelines for market investigations: Their role, procedures, assessment and remedies](#) (CC3 (revised))
  - (d) [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach](#) (CMA3)
  - (e) [Market investigation references: Guidance about the making of references under Part 4 of the Enterprise Act](#) (OFT511)
  - (f) [Super-complaints: Guidance for designated consumer bodies](#) (OFT514)

- (g) *Market studies: Guidance on the OFT approach* (OFT519)
  - (h) *Super-complaint concurrent duties: Terms of reference of the Concurrency Working Party* (OFT548)
  - (i) *Guidelines for market investigations: Their role, procedures, assessment and remedies* (CC3 (revised))
  - (j) *Suggested best practice for submissions of technical economic analysis from parties* (CC2com3)
  - (k) *Chairman's guidance on disclosure of information in merger and market inquiries Market Investigations and Reviews of Undertakings and Orders* (CC7) (revised)).
- 1.5 The CMA has reviewed whether the current guidance should be updated both in view of the Digital Markets, Competition and Consumers Act 2024 (DMCCA24) and changes in other legislation and CMA practice since the Enterprise and Regulatory Reform Act 2013.
- 1.6 The CMA proposes that certain existing markets guidance should be updated to reflect developments in legislation and CMA practice over time. It also proposes that the guidance should be simplified by consolidating certain existing guidance documents published or adopted by the CMA into a new package of guidance.
- 1.7 The CMA has therefore prepared a draft package of new guidance which are the subject of this consultation. The three modules are:
- (a) CMA [3a]: *Markets Procedural Guidance*;
  - (b) CMA [3b]: *Markets Substantive Assessment Guidance*; and
  - (c) CMA [3c]: *Markets Remedies Guidance*.
- 1.8 The CMA has also prepared for consultation an updated draft version of *Remedies: Guidance on the CMA's approach to the variation and termination of merger, monopoly and market undertakings and orders* (CMA11). This is to reflect the changes the DMCCA24 will make to markets remedies described in paragraph 2.8(f) below. As part of the exercise of updating guidance to reflect developments in legislation and CMA practice over time, and simplifying by consolidating guidance, the CMA also proposes this updated version of CMA11 should incorporate the material currently covered in *Merger and*

*market remedies: Guidance on reporting, investigation and enforcement of potential breaches* (CMA136 (revised)).<sup>1</sup>

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<sup>1</sup> The CMA has also previously consulted on incorporating the remaining material from CMA136 (revised) in updated *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4). As explained below in paragraph 2.5, if this happens then CMA136 (revised) will in due course be revoked and cease to have effect.

## 2. Scope of the consultation

- 2.1 This consultation seeks views of interested parties on the draft package of guidance for the markets regime as set out below. In particular:
- (a) Do you agree with the proposal to update and consolidate the relevant guidance?
  - (b) Do you agree that that proposed updated guidance has the appropriate scope and covers the relevant matters in an appropriate way (is it sufficiently clear and helpful)?
  - (c) If not in relation to (b), what else needs further clarification or explanation, and how?
  - (d) Is there anything else which you consider should be included in the proposed updated guidance?

Please provide reasons for your answers.

- 2.2 The final guidance will take effect from the date of its publication, subject to the provisions of Statutory Instruments the Government will make with respect to commencement of the administrative penalties powers that the final CMA4 covers.

### The draft package of new guidance

#### ***Consolidations and revisions***

- 2.3 The CMA considers that the current suite of markets guidance would benefit from consolidation and revision. Accordingly, the draft updated guidance streamlines the current markets guidance documents previously published or adopted by the CMA Board. The draft updated guidance also reflects changes to both CMA practice and broader market developments, and it also introduces guidance on the CMA's use of its market review function.
- 2.4 The following existing guidance is being consolidated and updated in draft updated guidance:
- (a) *Market studies: Guidance on the OFT approach (OFT519)*
  - (b) *Market investigation references (OFT511);*
  - (c) *Market Studies and Market Investigations (CMA3);*
  - (d) *Market investigation references (OFT511);*

- (e) *Guidelines for market investigations* (CC3 (revised));
  - (f) *Market Studies and Market Investigations* (CMA3);
  - (g) *Market studies: Guidance on the OFT approach* (OFT519)
  - (h) *Merger and market remedies: Guidance on reporting, investigation and enforcement of potential breaches* (CMA136 (revised))
- 2.5 The above markets guidance will be revoked and cease to have effect at the time the final version of the package of updated guidance is published.
- 2.6 Please note, however, that the following pieces of existing guidance have not been updated. These are the following:
- (a) *Super-complaints: Guidance for designated consumer bodies* (OFT514). This was not updated because it does not require substantive changes at this time.
  - (b) *Super-complaint concurrent duties: Terms of reference of the Concurrency Working Party* (OFT548). We will revisit whether this should be updated once the Concurrency review is published.
  - (c) *Suggested best practice for submissions of technical economic analysis from parties* (CC2com3)
  - (d) *Chairman's guidance on disclosure of information in merger and market inquiries Market Investigations and Reviews of Undertakings and Orders* (CC7) (revised)).

### **DMCCA24 updates**

- 2.7 The DMCCA24 will make a number of changes or additions to the markets regime to enable more efficient, flexible and proportionate CMA markets work.<sup>2</sup>
- 2.8 In addition to the consolidation and general guidance updates, the updated guidance includes a range of amendments and additions to outline the CMA's approach for the following DMCCA24 markets regime changes:
- (a) The removal of the six-month time-limit to consult on a proposal to make or not make a market investigation reference.

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<sup>2</sup> See Chapter 3 of Part 2 of the DMCCA24: [Digital Markets, Competition and Consumers Act 2024](#) ([legislation.gov.uk](#)).



- (b) Clarifying that the CMA may make a market investigation reference after previously deciding not to do so where two years has passed since the market study report or where there has been a material change of circumstances since the preparation of the market study report.
- (c) Amendments to enabling the CMA to confine the scope of market investigations to the particular features specified in the reference.
- (d) A new power for the CMA to accept partial or full undertakings under Part 4 of EA02 (market studies and market investigations) at any stage during a market study or market investigation.
- (e) A new power for the CMA or the Secretary of State to conduct trials to assess the likely effectiveness of potential undertakings and orders and determine their final format.
- (f) Amendments to the requirement for the CMA to keep the effectiveness of Part 4 EA02 undertakings or orders under review and a new power for the CMA to replace, vary, or revoke undertakings and orders in certain circumstances (or advise the Secretary of State to do so) that are not effective.
- (g) Minor amendments to the provision for the power of the CMA or the Secretary of State to take action in relation to regulated markets.

2.9 The DMCCA24 also introduced civil penalties for breaches of markets remedies. Guidance on these penalty powers is set out in *Administrative Penalties: Statement of Policy on the CMA's approach* (CMA4) on which the CMA is also consulting.

### **3. Consultation process**

- 3.1 We are publishing this consultation on our case page and sharing it with a range of interested parties to seek views on the draft updated guidance and questions raised in this document.

#### **How to respond**

- 3.2 The CMA is publishing this consultation on the CMA webpages and drawing it to the attention of a range of stakeholders to invite comments on the Draft guidance.
- 3.3 The CMA encourages you to respond to the consultation in writing (by email) using the contact details provided in paragraph 3.6 below. Please provide supporting evidence or examples for your views where possible.
- 3.4 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role or interest.
- 3.5 In accordance with the CMA's policy of openness and transparency, the CMA will publish non-confidential versions of responses on its webpages. If your response contains any information that you regard as sensitive and that you would not wish to be published, please provide at the same time a non-confidential version for publication on the CMA's webpages which omits that material and which explains why you regard it as sensitive.

#### **Duration**

- 3.6 The consultation will run for four weeks from 5 November 2024. Responses should be submitted by email by 5pm on 3 December 2024 and should be sent to: [markets.guidance@cma.gov.uk](mailto:markets.guidance@cma.gov.uk).

#### **How the CMA will use information provided in consultation responses**

- 3.7 Any personal data that you supply in responding to this consultation will be processed by the CMA, as controller, in line with data protection legislation. This legislation is the General Data Protection Regulation 2016 (GDPR) and the Data Protection Act 2018. 'Personal data' is information which relates to a living individual who may be identifiable from it.

- 3.8 The CMA is processing this personal data for the purposes of its work. This processing is necessary for the performance of its functions and is carried out in the public interest, in order to take consultation responses into account.
- 3.9 For more information about how the CMA processes personal data, your rights in relation to that personal data, how to contact us, details of the CMA's Data Protection Officer, and how long the CMA retains personal data, see the CMA's Privacy Notice.
- 3.10 The CMA's use of all information and personal data that it receives is also subject to Part 9 of the Enterprise Act 2002 (EA02). The CMA may wish to refer to comments received in response to this consultation in future publications. In deciding whether to do so, the CMA will have regard to the need for excluding from publication, so far as practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, might, in the CMA's opinion, significantly harm the individual's interests, or, as the case may be, the legitimate interests of that business. If you consider that your response contains such information, please identify the relevant information, mark it as 'confidential' and explain why you consider that it is confidential.
- 3.11 Please note that information and personal data provided in response to this consultation may be the subject of requests by members of the public under the Freedom of Information Act 2000. In responding to such requests, if you have made any representations about the confidentiality of any information contained in your response, the CMA will take such representations into consideration. The CMA will also be mindful of its responsibilities under the data protection legislation referred to above and under Part 9 of the EA02.
- 3.12 If you are replying by email, this statement overrides any standard confidentiality disclaimer that may be generated by your organisation's IT system.

### **Compliance with the Cabinet Office Consultation Principles**

- 3.13 This consultation is compliant with the latest Cabinet Office Consultation Principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders. The Cabinet Office Consultation Principles criteria can be found at <http://www.gov.uk/government/publications/consultation-principles-guidance>.

## **Next steps**

- 3.14 The CMA will collate and analyse the responses to the consultation and amend the draft guidance as appropriate. The CMA will also publish non-confidential versions of the responses received during the consultation.
- 3.15 The CMA intends to publish the final version of the guidance later in 2024 or in January 2025. This will be available on our webpage at [www.gov.uk/cma](http://www.gov.uk/cma) and respondents will be notified when it is available.