[Draft] Markets Guidance

[Draft] Markets Remedies Guidance

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CMA
Competition & Markets Authority

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1. Preface

1.1 The Competition and Markets Authority (the CMA) helps people, businesses, and the UK economy by promoting competitive markets and tackling unfair behaviour. As part of this, the CMA has powers to undertake market studies and investigations which are commonly referred to as its "markets function" or the "markets regime".[1] [2] Through this regime, the CMA monitors and may investigate markets within the United Kingdom with a view to meeting its duty to promote competition for the benefit of consumers.[3]

1.2 The protection and promotion of consumers' interests is central to the CMA's work, including in performing its markets functions. When markets are working well, firms compete to win business through offering better value for money for their products and services, and by developing new products and services in response to customer demand. The process of competition encourages innovation and this ensures a greater range of choice. Innovation can often be an important parameter of competition impacting the development and growth of markets over the longer-term. Markets that work well should drive better outcomes for customers, and ultimately consumers. The way the CMA exercises its market function and seeks to protect and promote consumers' interests is described in further detail in paragraphs 2.1 to 2.34 of the Markets Substantive Assessment Guidance.

1.3 This guidance (Markets Remedies Guidance) forms part of the advice and information published by the Competition and Markets Authority (CMA) under section 171 of the Enterprise Act 2002 (the EA02), as amended (including by the Digital Markets Competition and Consumers Act 2024 (DMCCA24)). It is intended for parties subject to a market review, market study or market investigation, and their advisers. The purpose of this guidance is to explain the CMA's approach and requirements in the selection, design, and implementation of remedies. It should be read alongside the Markets Procedural Guidance and Markets Substantive Assessment Guidance. The Markets Procedural Guidance in particular highlights the differences in the

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[1] References in this guidance are to the Enterprise Act 2002 (EA02) as amended by the Enterprise Regulatory Reform Act 2013 and the Digital Markets, Competition and Consumers Act 2024.

[2] The CMA also has the function under section 5 of the EA02 of conducting market reviews. These reviews sit outside the framework in Part 4 of that Act which applies to market studies and market investigations. They are covered in Chapter 6 of this document.

[3] In *CMA v Apple* [2023] EWCA Civ 1445, at paragraph 49, the Court of Appeal has also confirmed that that, "*When applying a purposive construction to the EA 2002, whilst protection of investigated undertakings from undue investigatory burdens is a relevant consideration, the principal purpose of the Act is to promote competition and protect consumers.*"

remedies regime for market reviews, market studies, and market investigations.

1.4 This document seeks to provide a single source of guidance on remedies for markets cases. It therefore supersedes guidance on remedies set out in: (i) Market investigations and guidelines (CC3);[4] and (ii) How market studies are conducted (OFT519),[5] and replaces (iii) Market studies and market investigations: guidance on the CMA's approach (CMA3).[6,7]

1.5 The approach outlined in this document is consistent with these previous documents, but it has been updated and extended to take account of the CMA's experience of markets cases in recent years, judgments of the Competition Appeal Tribunal (CAT) and the CMA's research into the outcomes of remedies that it has imposed. Likewise, to take account of changes to the law made by the DMCCA24. This guidance also takes into account our experience of international best practice.

1.6 This guidance reflects the views of the CMA at the time of publication and may be revised from time to time to reflect changes in best practice, legislation and the results of experience, legal judgments, and research. Where there is any difference in emphasis or detail between this guidance and other guidance produced or adopted by the CMA, the most recently published guidance takes precedence.

1.7 The CMA will have regard to this guidance in considering remedial action in markets cases. However, in each case, the appropriate remedy will be determined by having regard to the particular circumstances of the case. The CMA will therefore apply this guidance flexibly and may depart from the approach described in the guidance where there are appropriate reasons for doing so.[8]

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[4] Guidelines for market investigations: Their role, procedures, assessment and remedies (CC3).
[5] Market studies: Guidance on the OFT approach (OFT519).
[6] Market studies and market investigations: Supplemental guidance on the CMA's approach (CMA3).
[7] This document does not seek to replace the markets guidance set out in: CC7, OFT1113, CC2com3, or OFT511. Further, it does not seek to replace the CMA's guidance relating to Super-complaints (OFT548 and OFT514).
[8] In market studies, the decision on outcomes including whether to make a market investigation reference (MIR) and any decision on undertakings in lieu of a reference is made by the CMA Board. In market investigations, the final decision-making authority is an independent group of experts selected from a panel appointed by the Secretary of State (the Inquiry Group). Some market investigation references may be made by the Secretary of State in cases that raise defined public interest issues (further defined as either (i) restricted public interest references; (ii) or (ii) full public interest references). In these cases, the decision falls to the Secretary of State.

2. Introduction

Scope of the guidance

2.1 This guidance sets out the criteria that the CMA applies in determining the appropriate remedial action in markets cases.

2.2 This guidance does not address whether the CMA has jurisdiction under the EA02, and the policies and procedures that the CMA will use in discharging its functions under the EA02.[9] It also does not address the substantive tests applied for identifying concerns in markets cases.[10]

Structure of the guidance

2.3 This guidance explains the purpose of remedial action and the process for the selection, design and implementation of remedies. It is structured as follows:

(a) Section 3 explains the purpose and key principles of remedial action.

(b) Section 4 outlines the various types of remedies available to the CMA.

(c) Section 5 discusses the remedies process (and is particularly to be read with the Markets Procedural Guidance).

[9] Further procedural details are set out in the Markets Procedural Guidance.
[10] Further details on how the CMA identifies concerns in market studies, and the AEC test used in market investigations, as well as how the CMA undertakes its assessment, are set out in the Markets Procedural Guidance and the Markets Substantive Assessment Guidance.

3. Purpose and principles of remedial action

3.1 The CMA undertakes or recommends remedial action to resolve concerns highlighted in the context of a market[11] assessment. In market reviews and market studies the CMA may find that there are effects adverse to the interests of consumers in the markets under consideration, and in market investigations it may identify an adverse effect on competition (AEC) and/or resulting detrimental effects. To resolve these concerns, the CMA has a number of options available to it.

3.2 Depending on whether the CMA is undertaking a market review, market study or market investigation, the CMA may have to intervene directly in the structure of established markets and/or address the conduct of firms and their customers or recommend that a third party take appropriate remedial action. Consideration of whether remedies are necessary and identification of the right remedy are highly dependent on the facts and context of the particular case.[12]

3.3 The starting point for the CMA's remedies assessment is the identification of concerns arising in the market. In market reviews and studies, this is the explanation of why the markets under consideration may present effects adverse to the interests of consumers. In market investigations, it is the features that give rise to an AEC and the related findings of fact. More broadly, throughout its review, study or investigation, the CMA will have developed a detailed understanding of the market and an appreciation of the way in which it is capable of working.

3.4 In choosing a remedy the CMA will normally have to consider the interaction of a range of legal, factual, and economic considerations.

3.5 This section first sets out the objectives of remedial action, including a discussion of the remedy questions that must be addressed, followed by consideration of how remedies should resolve concerns. Second, this section discusses the key considerations in determining appropriate remedies, including the assessment of: (i) effectiveness; (ii) proportionality and the cost of remedies; and (iii) relevant customer benefits (RCBs).

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[11] In this document, we generally refer to 'markets'. However, as well as taking a look at particular markets, market reviews and market studies can relate to practices (eg sales and marketing techniques) across a range of goods and services. The term 'market studies' is therefore not limited to markets in the economic sense.
[12] See the Markets Procedural Guidance for information on Inquiry Groups and the CMA Board, and their roles in markets cases.

Objectives of remedial action

3.6 The remedial action that may be taken by the CMA will differ depending on the type of case.

Market reviews and market studies

3.7 A market review or market study is an examination 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.[13]

3.8 When the CMA identifies concerns as a result of a market review or market study, it has a number of options available to it including:

(a) giving advice and making recommendations to national or local governments (or other regulatory bodies) to change regulations or public policy;[14]

(b) taking competition or consumer enforcement action;

(c) taking action for the benefit of consumers (eg taking actions which improve the quality and accessibility of information to consumers);

(d) making recommendations to business (eg encouraging businesses in the market to self-regulate);

(e) accepting undertakings in lieu of a market investigation reference; and

(f) making a market investigation reference.

3.9 Further detail on what actions arising from these options might involve is set out in the Markets Procedural Guidance.

Market investigations

3.10 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.

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[13] Please refer to section 2 of the Markets Substantive Assessment Guidance for further information relation to the policy behind market reviews and market studies.

[14] As explained further at paragraph 3.16, the UK Government has committed to respond to any recommendation made to it within 90 days of publication of the CMA's final report.

3.11 A market investigation is one possible outcome of a market study.[15] It is commenced by the making of a market investigation reference (MIR). 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.[16]

3.12 The range of options available to the CMA in a market investigation is broader than in a market review or market study. In addition to the options available to the CMA at market review or market study stage, a market investigation allows the CMA to exercise its order-making powers under the MIR regime to take action itself to remedy, mitigate or prevent an AEC or the detrimental effects on customers resulting from an AEC.

The remedy questions

3.13 The questions that the CMA must consider in deciding what remedies may be required to address an AEC identified following a market investigation contextualise how the CMA approaches its consideration of remedies. In ordinary and cross-market MIRs where the CMA has found an AEC, it is required to decide the following questions:[17]

(a) whether action should be taken by it for the purpose 'of remedying, mitigating or preventing' the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition;

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition; and

(c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.

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[15] Or a market review. As set out in further detail in the Markets Procedural Guidance, the CMA has the power to make standalone Market Investigation References without a prior Market Study.
[16] Section 131(1) of the EA02.
[17] Section 134(4) of the EA02.

3.14 The questions that the CMA will be required to decide are slightly different in the case of public interest references, discussed further in the Markets Procedural Guidance.[18]

3.15 A detrimental effect on customers is defined as one taking the form of:[19]

(a) higher prices, lower quality or less choice of goods or services in any market in the UK (whether or not the market to which the feature or features concerned relate); or

(b) less innovation in relation to such goods or services.

3.16 Whether action should be taken therefore involves consideration of both the action the CMA can take and the action the CMA can recommend others to take (and specific details of the action that may be taken in market studies and market investigations differ between the two tools, as set out at paragraphs 3.8 and 3.12). The CMA may act itself through exercising its order-making or through accepting undertakings from parties (see paragraphs 5.45 to 5.48). The CMA may recommend that remedial action should be taken by others, such as government, regulators, and public authorities. Such recommendations do not bind the person to whom they are addressed, although the UK Government has committed to respond to any recommendation made to it within 90 days of publication of the CMA's final report.[20] When deciding on certain remedial actions in regulated sectors the CMA has to have regard to the relevant statutory functions of the sectoral regulator concerned.[21] In all cases, the CMA will state the action that should be taken and what it is designed to address.

3.17 In considering the questions set out at paragraph 3.13, the EA02 requires the CMA 'in particular to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as resulting from the adverse effect on competition.'[22] To fulfil this requirement, the CMA will consider how comprehensively possible remedy options address the AEC and/or its detrimental effects and whether they are effective and proportionate. The CMA may also have regard, in accordance with the EA02, to any RCBs of the

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[18] Section 141A of the EA02.
[19] Section 134(5) of the EA02. The reference to customers includes future customers.
[20] The Enterprise White Paper, *A World Class Competition Regime,* Department of Trade and Industry, July 2001 Cm 5233, p12. This position was more recently confirmed in the Department for Business & Trade's 'Strategic steer to the Competition and Markets Authority 2023', published 23 November 2023.
[21] Section 168 of the EA02, as amended by section 140 DMCCA24.
[22] Section 134(6) of the EA02.

market feature(s) giving rise to the AEC.[23] Paragraphs 3.45 to 3.61 provide greater detail about these factors and their interaction, the ways in which the CMA seeks to assess the impact of remedies and the possible outcomes that may arise from balancing these factors.

3.18 In practice, the CMA may decide to take several actions itself and/or make several recommendations. This combination of actions and/or recommendations is sometimes referred to as a 'package' of measures. Unless otherwise specified, reference to a remedy or a remedy option in this section also encompasses the package of measures the CMA is taking and/or recommending.

Market investigations: a comprehensive solution to the AEC and/or detrimental effects

3.19 The purpose of the CMA's remedies process in market investigations is to remedy, mitigate or prevent the AEC or its detrimental effects on customers. The CMA will seek to achieve as comprehensive a solution to the cause or causes of AECs and/or their detrimental effects as is reasonable and practicable.[24] In doing so, the CMA seeks to significantly increase competitive pressures in a market within a reasonable period of time.

3.20 AECs are likely to result in costs to the UK economy in general and to customers in particular. Remedies that are effective in generating competition are likely to deliver substantial benefits, by driving down prices and costs and increasing innovation and productivity, thereby facilitating economic growth and increasing the choice available to customers.

3.21 In deciding what action to take, the CMA will typically consider whether tackling some or all of the features it has identified as giving rise to an AEC will remedy, mitigate or prevent the AEC. In some situations, for example where an AEC arises from a combination of features, it may be necessary to devise a package of remedies to address the AEC, generally by addressing its causes. However, the remedy that is ultimately selected need not directly address every feature identified, if for example, tackling a subset of features directly would be sufficient to generate effective competition and thereby remedy the AEC.

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[23] Section 134(7) of the EA02 and section 136(3)(d) of the DMCCA24.
[24] Section 134(6) of the EA02.

3.22 The CMA will seek to address the AEC[25] and it will also consider introducing measures which mitigate the harm to customers created by the AEC.[26] The CMA may choose to introduce measures which mitigate the resulting harm to customers created by the AEC – rather than the direct causes of the AEC – where measures to address the direct cause of the AEC itself are not available, or as an interim solution while measures to directly address the AEC take effect.[27] Such measures, which seek to control outcomes, may be able to reduce the harm to customers associated with high prices, for example. However, these are unlikely to generate the dynamic benefits, such as innovation, that are normally associated with competitive markets. These measures are therefore likely to represent a less comprehensive remedy to the AEC and any detrimental effects.

Assessing the effectiveness of possible remedies

3.23 The CMA will assess the extent to which different remedy options are likely to be effective in achieving their aims, including their practicability. The effect of any remedy is always uncertain to some degree. When assessing whether a remedy is likely to be effective in achieving its intended aim, the CMA will have regard to a number of factors, including but not limited to:

(a) the likely impact on the AEC and, in addition, any detrimental effects, either already arising or expected to arise from it;

(b) the timescale over which the remedy is likely to have effect (ie how timely its impact is expected to be);

(c) practical consideration associated with the remedy, including relating to effective implementation, monitoring and enforcement; and

(d) the risk of the remedy not meeting its intended purpose and/or giving rise to unintended consequences.

3.24 We consider each of these factors in turn.

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[25] Section 138(2)(a) of the EA02.
[26] Section 138(2)(b) of the EA02.

[27] However, the CMA is prevented by section 138(6) of the EA02 from taking action to address future detrimental effects on customers if (i) no detrimental effect on customers has resulted from the adverse effect on competition and (ii) the adverse effect on competition is not being remedied, mitigated or prevented.

Impact on AEC

3.25 The CMA will consider the impact that the remedy is likely to have in providing as comprehensive a solution as is reasonable and practicable to the AEC and/or its detrimental effects. This will be dependent on the AEC and/or detrimental effects in question, with certain types of remedies being more or less well-suited to tackling different concerns – we set out further detail on the choice of remedies from paragraph 4.1 below.

Duration and timing

3.26 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 for how long it would endure.

3.27 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 part of the design of individual measures.[28] 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.[29]

3.28 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',[30] including:

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[28] 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.

[29] 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.

[30] Some of these considerations may also be relevant to decisions about whether to initiate a review of a remedy.

(a) The length of time over which the AEC is expected to persist. For example, where a foreseeable event would bring the AEC and/or its detrimental effects to an end.

(b) The role that the measure is expected to play in tackling the AEC and/or resulting customer detriment. For example, some measures may be a temporary arrangement and so would be more suitable candidates for a sunset clause triggering relatively quickly, whereas remedies intending to create enduring changes to a market may require a relatively long period or not have a defined time at which they sunset.

(c) The extent to which the measure is robust to future market changes, particularly in areas of expected technological, policy or regulatory change. Notwithstanding that the CMA will generally seek to 'future-proof' its remedies to prolong their effectiveness, it may be appropriate to include a sunset clause in some cases to reflect this, taking into account the characteristics of the market and remedy concerned.

3.29 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 a matter for the CMA to decide on a case-by-case basis.

3.30 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[31] and may vary, supersede or remove those that are no longer appropriate.[32]

Practicality

3.31 A remedy should be capable of effective implementation, monitoring and enforcement to deliver ongoing compliance. To enable this to occur, 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 practicality of any remedy is likely to be reduced if elaborate and intrusive monitoring and compliance programmes are required.

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[31] A statutory duty under sections 162(1), (2) and (3) of the EA02; and sections 88(4) and (5) of the Fair Trading Act (FTA) (as preserved in Schedule 23 of the EA02).

[32] The CMA's guidance on this topic is set out in CMA11: Guidance on the CMA's approach to monitoring compliance with, and the variation, supersession and termination of merger, monopoly and market undertakings and orders.

3.32 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 overseas legislation and could cover any aspect, such as competition law, health and safety, or data protection. Where existing laws or regulations may impede the actions that the CMA considers necessary to achieve an effective remedy, the CMA may make recommendations to the body responsible for those laws or regulations.

3.33 Further, 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.[33]

Acceptable risk profile

3.34 The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the CMA will seek remedies that have a high degree of certainty of achieving their intended effect. Customers or suppliers of parties should not bear significant risks that remedies will not have the requisite impact on the AEC or its detrimental effects.

3.35 The CMA has the power to vary remedies if, following their implementation, they are found to be ineffective.[34] The CMA uses these powers to protect customers or suppliers of parties against the harm which would arise from a remedy (or remedies) not having their intended effect. However, we are aware that frequent variation of remedies in a market can itself have a detrimental impact on many or all participants, in particular in terms of increasing uncertainty and burdens from the associated changes. The CMA will seek to

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[33] For example, the package 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, as well as more recently in the Retail banking market investigation (August 2016) and the Investment Consultants market investigation (December 2018).

[34] Further detail on when and how the CMA varies remedies is set out within: CMA11: Guidance on the CMA's approach to monitoring compliance with, and the variation, supersession and termination of merger, monopoly and market undertakings and orders. Note that this power is different from our ability to trial remedies, as set out in more detail from paragraph 5.23.

remedy the AEC and/or its detrimental effects in an effective and comprehensive manner in the first instance, and generally will not design its initial remedy with a view to relying on the ability to (under certain circumstances) vary the remedy subsequently.

Proportionality and cost of remedies

3.36 Having decided which remedy option(s) would be effective in addressing the AEC and/or its detrimental effects, the CMA will then consider the costs and proportionality of those remedies. A proportionate remedy is one that:

(a) is effective in achieving its intended purpose;

(b) is no more onerous than it needs to be to achieve its intended purpose;

(c) is the least onerous remedy or package of remedies, where the CMA has identified several equally effective measures; and

(d) does not produce disadvantages which would be disproportionate to its intended purpose.

3.37 The CMA's choice of remedy will depend on the particular circumstances of the case. The CMA will seek to:

(a) take into account the potential effects – both positive and negative – of the proposed remedy on those most likely to be affected by it; and

(b) consider those effects in the round, rather than seeking necessarily to quantify them precisely.

3.38 Applying these principles to the circumstances of particular cases usually involves consideration of remedy options both relative to other effective measures as well as relative to taking no action.

Assessing benefits and costs

3.39 The CMA will assess the potential beneficial effects of its interventions. In considering how markets may develop with remedies in place, the CMA will consider both benefits that are relatively easy to quantify (such as lower prices) and benefits that are more difficult to quantify (for example, the dynamic benefits of increased rivalry on productivity and innovation). Both can be important, though the CMA's ability to quantify cost and benefits depends on the nature of the case or the market. On this basis, the CMA will not always place more weight on costs or benefits which can be quantified. The more an AEC reflects longer-term and structural problems within a

market, the greater the significance the CMA is likely to accord to the long-term development of competition in the market and to the less quantifiable consequences of an improvement in the competitive pressures in the market.[35] Conversely, if addressing the AEC requires a remedy focused on achieving relatively predictable changes to outcomes in the shorter term, quantification of these changes is more likely to be a material aspect of the CMA's assessment of the beneficial effects of the remedy. However, any such quantification is likely to involve some uncertainty and so may involve identifying a reasonable range of quantified benefit, taking into account possible scenarios and assumptions for how the market may develop.

3.40 The CMA will consider the potential negative effects of a remedy, including the costs to business. Such negative effects may arise in various forms, for example:

(a) A remedy may result in unintended distortions to market outcomes. This is more likely to be the case where behavioural remedies are used which intervene directly in market outcomes, especially over a long period. Such distortions may reduce economic efficiency (including dynamic incentives to invest and innovate) and adversely affect the economic interests of customers over the longer term.

(b) A remedy may result in implementation costs (for example, modifying a distribution system), ongoing compliance costs (for example, providing the CMA with periodic information on prices or reporting to the CMA on other aspects of compliance), and monitoring costs (for example, the costs of the CMA or other agencies in monitoring compliance). The CMA will normally collect information from parties about the potential costs of implementing or complying with its remedies. In evaluating such information, the CMA will bear in mind that it has less information than the parties have about how such potential costs have been estimated and that there might be incentives for parties to overstate the cost of those remedies that they do not support. The CMA is likely to place most weight

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[35] For example, in the BAA airports market investigation (March 2009), the CC concluded that the main benefits from the divestitures of Gatwick and Stansted airports would result from the dynamic aspects of competition, for example in relation to the delivery and allocation of airport capacity. While it was not possible to quantify the benefits of divesting these airports, given among other factors the interaction with the regulatory regime, the CC was confident that the expected benefits would outweigh the costs of divestiture. In the evaluation of the Competition Commission's 2009 market investigation remedies for BAA airports (May 2016), the CMA found strong evidence of benefits arising as a result of the remedies imposed following the 2009 market investigation, including: (i) growth in passenger numbers; (ii) increased efficiency; (iii) improvement in service quality; (iv) increased efforts to improve route choice; (v) the agreement of competitive deals for airport charges; (vi) improved structure of charges; (vii) more efficient use of existing capacity; (viii) new capacity; and (ix) stronger relationships across the airport community and stakeholder engagement.

on estimates of implementation and compliance costs where parties have provided a clear explanation of how the estimate was reached, together with supporting evidence as to the assumptions used to derive those estimates.

(c) If remedies extinguish RCBs, the amount of RCBs foregone may be considered to be a relevant cost of the remedy (see discussion of RCBs at paragraphs 3.45 to 3.61).

3.41 To avoid imposing unnecessary burdens on business, the CMA will seek (as stated in paragraph 3.36(b)) to ensure that its remedies are no more onerous than is necessary to remedy the AEC it has identified. In selecting and designing remedies, the CMA will also have regard to the potential for more competitive markets to create profitable opportunities for new and innovative competitors as well as the cost of remedial measures on established businesses. However, there may be cases of poor competition where businesses are earning returns, or incur costs, above what might be expected in a competitive market, and as such these firms may earn lower profits or incur losses as a result of the introduction of greater competition.[36] The CMA would not usually give significant weight to the anticipated reduction of such profits as a negative effect of a remedy.

3.42 In considering the costs and benefits of remedies, the CMA will assess whether it is most appropriate to undertake its assessment with regard to only the individual measures within a package of remedies, or the wider package (see paragraph 3.21). In considering the inclusion of individual measures within a package of remedies, the CMA will consider the extent of synergies with other measures.

3.43 Where the CMA is considering whether modifying licence conditions in a regulated sector would be proportionate, it will have regard to the relevant statutory functions of the regulator concerned.[37]

Possible remedy outcomes

3.44 In reaching a decision on what remedial action to take, the CMA will seek a comprehensive solution to the AEC and resulting customer detriment. In doing so, it will have regard to the need for the solution to be both reasonable and practicable. A consequence of balancing these considerations is that there

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[36] For example, it may be that firms have been found to be earning profits persistently in excess of their cost of capital as a direct result of a feature of the market and are likely to continue to do so in the absence of intervention.

[37] Section 168 of the EA02, as amended by section 140 DMCCA24.

may be circumstances where the CMA determines, for example on the basis of considerations of proportionality, that it should not pursue an effective remedy option that is potentially available to it. There may also be very rare cases where, having found an AEC, the CMA chooses not to take any remedial action, for example:

(a) where there are no practicable remedy options available to the CMA, including possible recommendations to others.

(b) Where the cost of each practicable remedy option is disproportionate compared with the extent that the remedy option resolves the AEC and / or its detrimental effects. This might be the case, for example, if the market in which the AEC was found was small in relation to the costs of each practicable remedy option and/or if it was only practicable to mitigate some of the negative consequences of an AEC and the costs of doing so were prohibitively high.

(c) Where RCBs accruing from the market features are both large in relation to the AEC and would be lost as a consequence of any practicable remedy (see paragraphs 3.45 to 3.61).

Relevant customer benefits

Introduction

3.45 The CMA, in deciding the question of remedies, may in particular 'have regard to the effect of any action on any RCBs of the feature or features of the market concerned.' [38] [39]

3.46 RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy by the CMA. The CMA may modify a remedy to ensure retention of an RCB or it may change its remedy selection including, in very rare cases, deciding that no remedy is appropriate.[40]

3.47 RCBs are limited to benefits to relevant customers in the form of:[41]

[38] Section 134(7) of the EA02, as amended by section 136(3)(d) DMCCA24.
[39] As set out further in the Markets Substantive Assessment Guidance.
[40] As at the time of publication of this guidance, the CMA had not to date concluded that no remedy was appropriate as a result of RCBs in any markets case.
[41] Section 134(8)(a) of the EA02.

(a) lower prices, higher quality or greater choice of goods or services in any market in the UK (whether or not these occur in the market in which the feature or features concerned relate); or

(b) greater innovation in relation to such goods or services.

3.48 The EA02 also provides that a benefit is only an RCB if the CMA believes that:

(a) the benefit has accrued as a result (whether wholly or partly) of the feature, or features, concerned, or may be expected to accrue within a reasonable period of time as a result (whether wholly or partly) of that feature or those features; and

(b) the benefit was, or is, unlikely to accrue without the feature or features concerned.[42]

3.49 In considering potential RCBs, the CMA will therefore need to ascertain that the market feature(s) with which it has been concerned results, or is likely to result, in lower prices, higher quality, wider choice or greater innovation, and that such benefits are unlikely to arise in the absence of the market feature(s) concerned. RCBs may include benefits to customers in the market in which the CMA has found an AEC and to customers in other markets within the UK,[43] provided these benefits meet the criteria set out in paragraphs 3.47 and 3.48.

3.50 In general, the CMA would expect parties to put forward for the CMA's consideration any RCBs they think relevant. Parties doing so will be expected to provide convincing evidence regarding the nature and scale of any RCB that they claim to result from the market feature(s) concerned and to demonstrate that these fall within the EA02's definition of such benefits.

Possible relevant customer benefits

3.51 Whether a particular claimed benefit to customers is found to be an RCB will depend on the facts of the case and the characteristics of a particular market.

3.52 It would normally be expected that market features that have been found to adversely affect competition – after consideration of any potential rivalry-

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[42] Section 134(8)(b) of the EA02.

[43] For example, in the PPI market investigation (January 2009), the CC found that credit prices, and credit cut off scores, were lower than they otherwise would be because of PPI income generated at the credit point of sale and that this was an RCB.

enhancing efficiencies[44] – would also have detrimental effects on customers. For example, one usual consequence of a failure of competition is that prices will be higher than they would otherwise be. Nevertheless, it is possible that features that adversely affect competition could result in beneficial effects on customers, either in the market in which competition is adversely affected, or in other related markets. The potential loss of such beneficial effects on customers may therefore be taken into account by the CMA in its consideration of remedies. In the following paragraphs, examples of possible RCBs are given. In all instances the CMA will need to consider whether the criteria set out in paragraphs 3.47 and 3.48 are met.

3.53 Some possible benefits that may be claimed to arise from market features – such as privacy, security, convenience, and improved access / support for vulnerable groups – have the potential to be RCBs if the evidence demonstrates that they constitute improvements, for example, in quality, and meet the other requirements of the statutory test (which they may or may not do). Where they do qualify as RCBs, the CMA may have regard to them when assessing whether it is appropriate to proceed with the proposed remedy package. The CMA may consider whether its proposed remedies preserve the RCBs, including whether the remedies may increase competition in relation to any of those benefits. When considering so, the CMA may qualitatively consider possible trade-offs between long- and short-term effects of losing such benefits as a result of a proposed remedy.

3.54 Aspects of market structure that could adversely affect competition, such as a high level of concentration, might enable economies of scale and/or scope to be obtained that would not be available if there were a larger number of firms in the market. Whether scale or scope economies would constitute an RCB in a particular case would depend partly on the extent to which, in practice, any cost economies were being passed on to customers as lower prices, improved quality, greater innovation or more choice.

3.55 Similarly, on the demand side, network effects and the operation of multi-sided markets or platforms[45] may lead to barriers to entry and sustained

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[44] In some circumstances, the positive effects of efficiencies on competition associated with a particular market feature may outweigh the harmful effects of that feature, which would otherwise cause an AEC (or a market to not work well). Efficiencies can enhance rivalry when they induce one or more firms to follow a course of action of benefit to customers (eg lowering prices or increasing innovation) in response to actual or expected actions by rivals. Such efficiencies are discussed in more detail in section 10 of the Markets Substantive Assessment Guidance.

[45] Where network effects are present, the need to attract many customers to one or both sides of the entrant's platform in order to be an effective constraint on the incumbent platform may make entry and expansion both costly and risky, particularly in the presence of larger incumbents. Many markets are characterised by

market concentration, but may also bring benefits to customers of being able to participate in a larger and/or better integrated network or platform.[46] In determining whether a particular form of network effects constitutes an RCB, the CMA will consider whether customers benefit in practice from such effects and whether such benefits are unlikely to arise in the absence of the AEC resulting from the network effects.[47]

3.56 Generally, customers are unlikely to enjoy any benefits as a direct result of entry barriers. However, some entry barriers may indirectly secure other kinds of benefit.[48] For example, regulations that limit entry to persons of proven competence or with adequate capital resources may lead to an improvement in product or service quality. The CMA will generally have regard to the wider purpose of such regulations in considering their effects on customers. In the absence of clear, countervailing customer benefits from barriers to entry, the CMA would normally expect customers to benefit from any reduction of entry barriers as this would be expected to facilitate dynamic competition and better market outcomes.[49]

3.57 As set out in further detail in the Markets Substantive Assessment Guidance, cross-market relationships (including vertical[50] and / or adjacent market[51] links)[52] can give rise to beneficial effects. For example, better coordination of activities at different stages in the supply chain or in adjacent markets, may deliver savings in transaction and inventory costs, create incentives to reduce the price of complementary products, and integrate digital ecosystems which can bring about benefits and improve user experience. However, practices arising from cross-market relationships may also have negative effects on competition and lead to an AEC in a market.[53] Where an AEC has arisen from

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considerable network effects, particularly digital markets. Further detail is set out at paragraph 3.8 of the Markets Substantive Assessment Guidance.

[46] For example, in the Stagecoach / Preston Bus merger inquiry, the CC took into account an RCB associated with integrated ticketing brought about by the merger.

[47] For example, it may be possible for network benefits to be preserved through requiring interoperability between competing networks.

[48] See paragraphs 6.13 to 6.14 of the Markets Substantive Assessment Guidance in which we discuss the potential positive effects of a barrier.

[49] See also paragraphs 6.1 to 6.3 of the Markets Substantive Assessment Guidance.

[50] A vertical link occurs where a firm, or firms, is active at different levels of a supply chain.

[51] An adjacent market link occurs where a firm, or firms, is active in separate markets that are not part of the same supply chain, but are related, eg markets where products are complements, purchased together or part of the same digital ecosystem.

[52] Cross market relationships can involve one or more firms. In particular, it may include one firm being active in both markets, or agreements between two or more firms active in different markets. Further detail and examples are set out at paragraph 8.2 of the Markets Substantive Assessment Guidance.

[53] Further detail on what these negative effects can include is set out at paragraph 8.7 of the Markets Substantive Assessment Guidance.

cross-market links within a market, the CMA will consider whether these relationships have resulted in RCBs.

3.58 The CMA will similarly consider, when AECs have arisen from the many forms of business conduct that can have either positive or negative effects, depending on the context, whether these conducts have resulted in RCBs. Tie-in sales or product bundling, for example, may sometimes be convenient to customers, reduce transaction costs or provide quality assurance.

Relevant customer benefits and remedies

3.59 If the CMA is satisfied that there are RCBs deriving from a market feature that has resulted in an AEC, it will consider whether to modify the remedy that it might otherwise have imposed or recommended. The CMA will consider several factors including the size and nature of the expected RCB, what proportion of the benefit will be preserved through the modification, and how long the RCB may be sustained. The CMA will also consider the different impacts of the features on different customers or groups of customers.

3.60 It is possible that the RCBs are of such significance compared with the effects of the market feature(s) on competition that the CMA will decide that no remedy is called for (see paragraph 3.46). This might occur if no remedies can be identified that are able to preserve the RCBs whilst also remedying or mitigating the AEC and / or the resulting customer detriment. This situation has not arisen in a market investigation to date.

3.61 Alternatively, the CMA, as a result of identifying RCBs, may choose a different remedy, for example a behavioural remedy rather than a structural remedy (see paragraph 4.3 for an explanation of this distinction). In this case, the CMA will have to weigh the disadvantage of a less comprehensive solution to the competition problem against the preservation of the RCBs that result from the feature concerned.

4. Choice of remedy

4.1 This section provides an overview of different types of remedies and the considerations the CMA will take into account when choosing an appropriate remedy. Its contents are likely to be more relevant in market investigations than market reviews or market studies given the differences in the relevant statutory framework in each. However, there may be overlap in some cases, for example, with respect to recommendations.[54] The section covers:

(a) First, at paragraphs 4.2 to 4.4, an overview of various types of remedies.

(b) Second, the different types of remedies and their characteristics:

(i) divestiture (at paragraphs 4.5 to 4.34);

(ii) hybrid remedies (at paragraphs 4.35 to 4.42);

(iii) behavioural remedies, including enabling measures and controlling outcomes (at paragraphs 4.43 to 4.111); and

(iv) recommendations (at paragraphs 4.112 to 4.119).

(c) Finally, a discussion of how remedies are selected by applying a decision framework, at paragraphs 4.120 to 4.132.

Types of remedies

4.2 In selecting a remedy or a package of remedies, the CMA will focus its consideration on the change that it is intending to create as a result of its intervention. In other words, a focus on what it is trying to do to address the concerns it has identified. It will consider what would be the most effective means of generating the required change, and associated improvements in outcomes, within the context of the market being investigated and the specific characteristics of any concerns identified. On that basis, the choice of remedy in markets cases will be case-specific and the CMA will focus its attention on the likely impact of different remedy approaches, rather than the form or classification of remedy options. It also implies that different remedy choices may be made in light of variations in market circumstances.

[54] This section does not specify which parts apply to market reviews and market studies specifically because this will be evident from the outcomes that may result from market reviews and market studies, as described earlier in this guidance.

4.3 Against that background, Figure 4-1 below illustrates some of the main categories of remedies. Remedies are conventionally classified as either structural or behavioural:

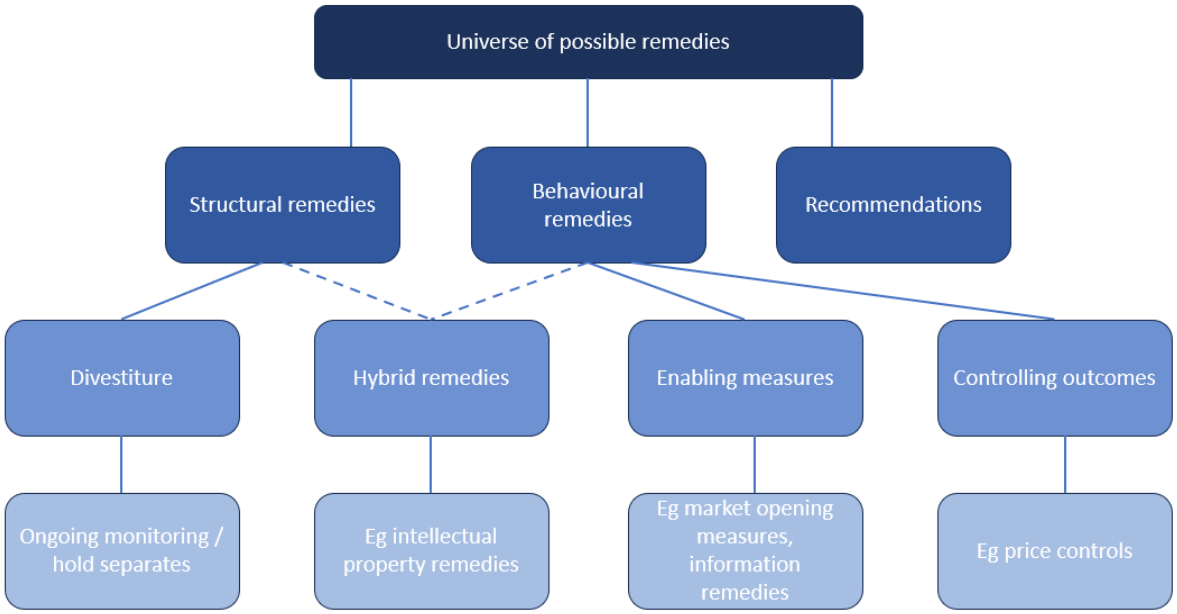
(a) Structural remedies, such as prohibition and divestiture, are generally one-off measures that seek to increase competition by altering the competitive structure of the market.

(b) Behavioural remedies are normally ongoing measures that are designed to regulate or constrain the behaviour of parties and/or empower customers to make effective choices.

(c) Hybrid remedies, such as those relating to access to IP rights, may have features of structural or behavioural remedies depending on their particular formulation.

(d) Likewise, recommendations to others may be structural or behavioural in nature, depending on their content.

Figure 4-1: Overview of the universe of possible remedies



Source: CMA

4.4 This section considers each of these types of remedies in more detail, including providing examples of where they have been used in previous cases, what they are seeking to achieve and the key risks that often arise from that remedy type.

Divestiture

Introduction

4.5 The aim of divestiture in market investigations will generally be to address competition problems resulting from structural features of a market.[55] This may be done by either creating a new source of competition through disposal of a business or assets to a new market participant, or by strengthening an existing source of competition through disposal of a business or assets to an existing market participant that is independent of the divesting party (or parties).

4.6 A successful divestiture will address at source the lack of rivalry resulting from structural features of a market. Divestiture remedies will generally not require detailed ongoing monitoring beyond the completion of the disposal of the business or assets in question, although, in some cases, an effective divestiture may require supplementary behavioural measures for an interim period (eg to ensure compliance with hold separate measures,[56] secure supplies of an essential input or service from the divesting party to the divested business).

4.7 The design of a divestiture remedy will seek to address the underlying cause of an AEC and will take account of any risk of not addressing the AEC and any RCBs that may be affected by the form of divestiture.

Divestiture risks

4.8 Divestitures may be subject to a variety of risks that may limit their effectiveness in addressing an AEC. To be effective in increasing rivalry—and managing divestiture risks—a divestiture remedy should involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process.

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[55] For example, in the BAA airports market investigation (March 2009), the CC required the divestiture of Gatwick and Stansted airports and either Edinburgh or Glasgow airport (with Edinburgh airport later being chosen by BAA as the Scottish airport to be divested) as part of its package of remedies. The CC also required the divestiture of one of two of Lafarge Tarmac's cement plants and one of Hanson's ground granulated blast furnace slag (GGBS) plants to enhance competition in the cement and GGBS markets as part of its Aggregates, cement and ready-mix concrete market investigation (2014).

[56] Where divestitures occur, it is common practice for the CMA to introduce hold separate measures which prohibit the re-acquisition of assets or shareholdings sold as part of the divestiture package or acquiring material influence over them. The CMA will normally limit this prohibition to 10 years and will monitor compliance throughout this period.

4.9 It is helpful to distinguish between three broad categories of risks that may impair the effectiveness of divestiture remedies as follows:

(a) Composition risks – these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract suitable purchasers or may not allow a purchaser to operate as an effective competitor in the market.

(b) Purchaser risks – these are risks that a suitable purchaser is not available or that the divesting party (or parties) will dispose to a weak or otherwise inappropriate purchaser (further details on suitable purchasers is set out at paragraphs 4.21 to 4.26).

(c) Asset risks – these are risks that the competitive capability of a divestiture package will deteriorate before completion of the divestiture, for example through loss of customers or key members of staff.

4.10 The incentives of divesting parties may serve to increase the risks of divestiture. Although divesting parties will normally have an incentive to maximise the disposal proceeds of a divestiture, they will also have incentives to limit the future competitive impact of a divestiture on themselves. Parties may therefore seek to sell their less competitive assets/businesses and target them to firms which they perceive as weaker competitors. They may also allow the competitiveness of divestiture packages to decline during the divestiture process.[57]

4.11 Divestiture risks can be overcome, at least in part, through the design of the divestiture and by adopting protective measures such as appointment of monitoring and divestiture trustees and alternative divestiture packages as shown later in this section. The critical elements of the design of a divestiture remedy are discussed in detail in the following sub-sections.

Scope of divestiture packages

Package definition

4.12 In defining the scope of a divestiture package that will satisfactorily address an AEC, the CMA will normally seek to identify a divestiture package that

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[57] See the Federal Trade Commission's A Study of the Commission's Divestiture Process (1999), DG COMP's Merger Remedies Study (2005) (for example, paragraph 44 of Summary and Conclusions), and the CC's Understanding past merger remedies: report on case study research (2007). More recently, the CMA's evaluation of case studies in the Merger remedy evaluations (October 2023) highlighted the importance of a full assessment and active assessment of divestiture risks throughout the divestiture process.

comprises a viable, stand-alone business that can compete successfully on an ongoing basis and is of sufficient scale and scope to enable its acquirer to become an effective competitor. This may comprise a division or the whole of an operating company functioning in the market affected by the AEC. Depending on the nature of the AEC, it may be necessary to identify more than one divestiture package to achieve a comprehensive solution—for example, if several distinct businesses under common ownership need to be divested to remedy the AEC.[58]

4.13 In order to achieve a proportionate solution, the CMA will seek to identify the smallest such package (or packages) that is likely to be a viable competitor and satisfactorily addresses the AEC. Following discussion with divesting parties, the CMA may modify the scope of the proposed divestiture package (or packages) provided that the divesting parties can demonstrate, to the CMA's satisfaction, that the modified package (or packages) addresses the AEC and the modification does not create significant additional new costs or composition, purchaser or asset risks after taking account of protective measures.

4.14 The scope of a divestiture package will be outlined, with reasons, in the CMA's report. The package will generally be specified in greater detail in the undertakings accepted or orders made by the CMA when implementing the remedy. The divesting parties may also add further assets to the specified package at their request with the approval of the CMA, or may be required to do so by the CMA, to secure divestment to a suitable purchaser. The divesting parties will generally be prohibited from subsequently purchasing assets or shareholdings sold as part of a divestiture package or acquiring material influence over them. The CMA will normally limit this prohibition to a period of 10 years.[59]

Divestiture of an existing business or package of assets

4.15 The CMA will generally prefer divestiture of an existing business that can compete effectively on a stand-alone basis independently of the divesting party (or parties), to divestiture of part of a business or a collection of assets. This is because divestiture of a complete business is less likely to be subject

[58] As was the case in the BAA Airports market investigation.
[59] Where hold separate clauses are in place to prohibit reacquisition, the CMA will monitor ongoing compliance. The CMA may, for example, also include shareholding restrictions on directors. On this basis, ongoing behavioural remedies may be in place to support any divestiture remedy.

to purchaser and composition risk and can generally be achieved more quickly.

4.16 Where a proposed divestiture comprises part of a business or specified assets, such as IP rights (discussed further in the context of hybrid remedies at paragraphs 4.35 to 4.42), the capabilities and resources of prospective buyers are likely to be more critical to a successful outcome than for a standalone business. A package of assets proposed for divestiture may, for example, lack an established infrastructure and its viability may therefore be more dependent on an appropriate match with the capabilities of the purchaser.

4.17 A package of assets may also be far more difficult to define or 'carve out' from an underlying business[60] and the CMA may have less assurance that the purchaser will be supplied with all it requires to operate competitively. In such circumstances, the CMA is likely to require additional protective measures such as identification of an alternative divestiture package (see paragraphs 4.18 to 4.19) to mitigate increased purchaser and composition risk. Where a package of assets is proposed for divestiture, the CMA will require the divesting parties to specify the composition and operation of the package in detail.

Alternative divestiture packages

4.18 In some limited circumstances, it may be appropriate to define a more extensive and/or more marketable divestiture package ('alternative divestiture package', sometimes known as a 'fallback remedy')[61] which the CMA would require the parties to sell if the initially proposed divestiture package were not sold within a specified period. Alternative divestiture packages may be appropriate if there is doubt as to the marketability of the initially proposed divestiture package or where a business is subject to major asset risks and speed of divestiture is likely to be a critical requirement.[62] In such circumstances, prior identification of an alternative, more extensive and more marketable package may be the most effective means of facilitating rapid

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[60] DG COMP's Merger Remedies Study (2005) found that carve-out problems were a common cause of serious design and implementation issues in a significant proportion of divestiture remedies within its purview – see section 6 of Summary and Conclusions (pp152 – 155, public version).

[61] Such packages are sometimes also referred to as 'crown jewel' packages; however, in view of the wide variety of usage of this term, the CMA uses the more closely defined terminology of 'alternative divestiture packages'.

[62] Other measures are also available to the CMA to manage the risk that a divestiture is not implemented to the timescales set out by the CMA in its final report. These include the ability to appoint monitoring or divestiture trustees (see paragraphs 4.30 and 4.33). The specification of an alternative divestiture package may be used in conjunction with such measures.

disposal if the initial package cannot be sold to a suitable purchaser within a specified period.[63] In specifying an alternative divestiture package the CMA would wish to satisfy itself that divestiture of such a package would be effective and (in the event that the proposed divestiture package had not been disposed to a suitable purchaser) proportionate.

4.19 The alternative divestiture package will include all the core assets necessary to remedy the AEC. The CMA will wish to satisfy itself that the purchaser of such a package is committed to operate the core assets so as to compete effectively in the market(s) affected by the AEC and not primarily attracted by the additional assets. The CMA will identify the alternative package in its report but the precise nature, and in some cases the existence, of an alternative package may be excised from the published version of the report to prevent the existence of the alternative package undermining divestiture of the initial package.

4.20 While the CMA will maintain the option of utilising an alternative divestiture package in some limited circumstances, such remedy options may not significantly mitigate the risks associated with initial divestiture packages – in particular, those relating to the carve-out of a subset of assets – given the low probability of their use and their limited assistance to prospective purchasers in negotiating divestiture packages.[64]

Suitable purchasers

Criteria

4.21 The identity and capability of a purchaser will be of major importance in ensuring the success of a divestiture remedy. The divesting party (or parties) will therefore need to obtain the CMA's approval of the prospective purchaser(s). The CMA will wish to satisfy itself that a prospective purchaser is independent of the divesting parties, has the necessary capability to compete, is committed to competing in the relevant market(s) and that divestiture to the purchaser will not create further competition concerns. The relative importance that the CMA attributes to each of these criteria will depend on the circumstances of the inquiry. These criteria are considered in more detail below:

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[63] The EWS Railway Holdings / Marcroft Engineering (2006), Stericycle International LLC / Sterile Technologies Group Limited (2006) and Capital / IBS (2009) merger inquiries provide examples of the use of alternative divestiture packages.

[64] The CMA discusses this further in its 2023 research and analysis paper on 'Understanding past merger remedies – 2023 update' (CMA186), 24 October 2023.

(a) The acquisition by the proposed purchaser must remedy, mitigate or prevent the AEC concerned or any detrimental effect on customers resulting from it, achieving as comprehensive a solution as is reasonable and practicable.

(b) *Independence*. The purchaser should have no significant connection to the divesting parties that may compromise its incentives to compete with them or, where relevant, with other major suppliers in the relevant market(s). Significant connections may include, for example, an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance. The CMA will seek to understand the significance of such connections in the context of the overall relationship between the parties concerned, in order to form a view of their cumulative effect on incentives to compete.

(c) *Capability*. The purchaser must have access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor. For example, a highly leveraged acquisition of the divestiture package that left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion. Where the purchaser takes the form of a consortium, the CMA will wish to satisfy itself that the structure and governance arrangements of the consortium will permit appropriate access to expertise and finance.[65] The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority.[66]

(d) *Commitment to relevant market.* The CMA will wish to satisfy itself that the purchaser has an appropriate business plan and objectives for competing in the relevant market(s), and that the purchaser has the incentive and intention to maintain and operate the relevant business as

[65] The CMA reviewed consortium arrangements in the divestiture of Gatwick Airport (BAA Airports).
[66] This is because the CMA wishes to be satisfied that the divestment to the proposed purchaser will in fact go ahead. To the extent that a purchaser would face difficulties in obtaining such consents, this may call into question the suitability of the purchaser.

part of a viable and active business[67] in competition with the divesting party (or parties) and other competitors in the relevant market(s).[68]

(e) *Absence of competitive or regulatory concerns.* Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.

4.22 Except in circumstances, as specified below, where a divestiture trustee is in place, the divesting parties are responsible for securing a prospective buyer and demonstrating that it satisfies the CMA's criteria for a suitable purchaser. However, the CMA will keep the progress of the divestiture under close scrutiny.

4.23 Where divesting parties receive interest in the divestiture package from multiple prospective buyers, they may ask the CMA to evaluate the suitability of a small set of short-listed purchasers. This is to avoid a divesting party progressing one prospective purchaser, possibly through lengthy due diligence, but this purchaser then being found not to satisfy the CMA's purchaser suitability criteria, and the divesting party having to start the assessment process afresh.

4.24 In certain cases, for example where the effectiveness of a divestiture remedy is particularly dependent on the long-term development of the divested entity, the CMA may require a purchaser to provide it with undertakings that it will not sell on the divested entity within a limited period other than with the CMA's approval that the new purchaser satisfies the same purchaser criteria as applied in the initial divestiture. Whether such a restriction is necessary and the time period over which any such restriction will apply will be determined by the facts of the case.[69]

Continuing links and purchaser protection

4.25 A purchaser should not have continuing links with the divesting party (or parties) after divestiture that may compromise the purchaser's incentives to compete with these parties, for example, financial, ownership or management links. However, purchasers may require access to key inputs or services on

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[67] The CMA will routinely ask to see the proposed purchaser's annual accounts and business plan for the acquired business in assessing whether this criterion is satisfied.

[68] This approach was upheld by the CAT in the Somerfield v Competition Commission case (2006). The CC excluded limited assortment discount retailers from acquiring Somerfield stores on the basis that these were insufficiently close competitors to conventional supermarkets.

[69] This restriction was required in the BAA divestitures, for which a period of five years was specified. This is the only instance to date in which the CMA (the CC at the time) has specified a restricted period of this type in either a merger inquiry or a market investigation.

appropriate terms from the divesting party (or parties), on an interim basis, in order to enable the divestiture to operate effectively. Such transitional service arrangements may be permitted by the CMA for a limited period. The timescale over which transitional service arrangements will be permitted is likely to vary from case to case, depending on the time that it may reasonably be expected to take potential purchasers to develop their own independent access to the inputs or services in question.

4.26 The CMA may also permit or require non-solicitation clauses or other measures to protect the purchaser from the divesting party (or parties) for a limited period to enable the purchaser to become established as an effective competitor in the relevant market(s). In order to ensure a timely remedy, the CMA will seek to ensure that any period of purchaser protection is no longer than necessary and can be justified by reference to the steps necessary for the purchaser to become established as an effective competitor. In any event, given the desirability of achieving a timely remedy, the CMA would not normally expect to permit or require such measures for more than two years.

Effective divestiture process

Objective of process

4.27 An effective divestiture process will protect the competitive potential of the divestiture package before disposal and will enable a suitable purchaser to be secured in an acceptable timescale. The process should also allow prospective purchasers to make an appropriately informed acquisition decision.

Protecting the divestiture package

4.28 Divesting parties may have significant incentives to run down or neglect the business or assets of a divestment package, and/or continue to extract know-how and other commercially sensitive information from the divestment package. Such incentives, if acted upon, are likely to reduce the future competitive impact of the divestment package. The resulting asset risk may also be influenced by such factors as the length and complexity of the divestiture process and the pace at which customer goodwill and employee relations may erode.

4.29 To protect against asset risk, the CMA will generally make orders and/or accept undertakings from the relevant parties which impose a general duty to maintain the divestiture package in good order and not to undermine the competitive position of the package. The CMA may also require 'hold-separate' orders and/or undertakings to mitigate asset risk. These will require

the divestiture package to be held and managed separately from the retained business. Protection measures specified in final orders and/or undertakings may sometimes continue existing measures specified in any interim orders and/or undertakings that have been accepted by the CMA (although interim undertakings can only be accepted in market investigations following publication of the final report). The appointment of a hold-separate manager or management team may also be required to manage the assets/business to be divested so as to maintain their competitiveness and establish separation from the retained assets.[70] Establishing separation may be a more complex issue than in merger inquiries. We discuss interim measures further at paragraphs 5.43 to 5.44.

Use of monitoring trustees

4.30 Where divestiture undertakings are in place, the CMA will normally require the appointment of an independent monitoring trustee to oversee the parties' compliance with the undertakings and, if applicable, the performance of the hold-separate manager. The monitoring trustee will have an overall duty to act in the best interests of securing an appropriate divestiture. The monitoring trustee will monitor the ongoing management of the divestiture package and the conduct of the divestiture process. The CMA will have the right to propose and direct measures necessary to ensure compliance with the undertakings. The trustee will report to the CMA at regular intervals.

The divestiture period

4.31 The CMA will state in its report the period in which the parties should achieve effective disposal of a divestiture package to a suitable purchaser (ie the 'initial divestiture period'). However, this period may be excised from the report if it is considered that disclosure to third parties may undermine the divestiture process. The length of this period will depend on the circumstances of the case but will normally have a maximum duration of six months in relatively straightforward divestiture cases. The CMA, when determining the initial divestiture period, will seek to balance factors which favour a shorter duration, such as minimising asset risk and giving rapid effect to the remedy, with factors that favour a longer duration such as canvassing a sufficient selection of potential suitable purchasers and facilitating adequate

[70] The appointment of a hold-separate manager is particularly likely where strong incentives exist for the current senior management of the divestiture package to operate the divestiture package on behalf of the divesting party and/or if there is a high risk of deterioration of the business, for example through loss of key customers or members of staff.

due diligence. The initial divestiture period may be extended by the CMA where this is necessary to achieve an effective disposal.

4.32 While the divesting parties are responsible for securing a suitable purchaser in the initial divestiture period, the CMA will keep the progress of the divestiture process under close review through regular reporting and, where applicable, the scrutiny of a monitoring trustee.

Use of divestiture trustees

4.33 If the divesting parties cannot procure divestiture to a suitable purchaser within the initial divestiture period, then, unless this period is extended by the CMA, the CMA may require the parties to appoint an independent divestiture trustee to dispose of the package within a specified period (the 'trustee's divestiture period'). The divestiture will be at the best available price in the circumstances, but subject to prior approval by the CMA of the purchaser and the divestiture arrangements. The CMA may require a divestiture trustee to be selected and made ready prior to the end of the initial divestiture period in order to prevent any delay in appointment following the end of the divestiture period. Alternatively, the CMA may require that a divestiture trustee is appointed before the end of the initial divestiture period (eg if the CMA is not satisfied that divestiture is likely to take place within that period), or in unusual cases, at the outset of the divestiture process.[71] The role of a divestiture trustee is distinct from that of a monitoring trustee, but the two roles may be performed by the same person subject to consideration of any potential conflict of interest.

Review of divestiture documentation

4.34 The CMA will wish to ensure, before providing its final approval of the divestiture, that the divestiture agreement and relevant supporting documentation include all assets required to be divested and contain no provisions that are inconsistent with the remedial objectives of the divestiture.

[71] The Tesco/Co-op store acquisition inquiry (2008) is an instance where the CC required the appointment of a divestiture trustee from the outset of the divestiture period.

Hybrid remedies

Introduction

4.35 Hybrid remedies are remedies which have both structural and behavioural elements. Intellectual property remedies are the most common form of hybrid remedy used in the past by the CMA.

4.36 The aim of an intellectual property (IP) remedy is that the party or parties acquiring the IP rights should thereby be able to compete effectively with other companies in the market. A remedy that licenses or assigns intellectual property,[72] including patents, licenses and brands, may be viewed generally as a specialised form of asset divestiture.[73] However, in certain cases, the terms of a licence may contain ongoing behavioural elements such that the remedy is a structural/behavioural hybrid. The key element is therefore the extent to which any material link between licensor and licensee will exist following award of the licence. A remedy that requires an assignment or licence of an IP right that is exclusive, irrevocable and non-terminable with no performance-related royalties will effectively be treated by the CMA as structural in form and subject to similar consideration and evaluation as an asset divestiture.

4.37 Where the terms of an IP remedy result in a material ongoing link between the original owner of the IP and the parties gaining the IP (eg where the licensee relies on the licensor for updates of the technology or continuing access to specialist inputs or know-how) an IP remedy may take on some or all of the characteristics of a behavioural commitment, which may require ongoing monitoring and enforcement and is generally subject to greater risks of not being an effective remedy.

4.38 For licensing of IP alone to be effective as a remedy, it must be sufficient to enhance significantly the acquirer's ability to compete with other parties in the market and thus address the AEC or the detrimental effects on customers

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[72] For example, patents, licenses and brands.

[73] At the time of publication of this Guidance, the CMA had not used an IP remedy in market investigation. There have been instances in which the CMA has used IP remedies in merger cases, which can provide helpful guidance on how an IP remedy may work in practice. For example, in the Reckitt Benckiser/K-Y brand merger inquiry (August 2015), Reckitt was required to license the K-Y brand and related IP rights on an exclusive, comprehensive and irrevocable basis for a total period of eight year, including a blackout period of at least one year, to enable the licensee to successfully transition from the K-Y brand to its own brand. In addition, the package of remedies applied in the Nufarm Ltd/AH Marks Holding Ltd merger inquiry (February 2009) had some characteristics of an IP remedy.

resulting from it.[74] Such a remedy may not be effective if the IP needs to be accompanied by other resources (for example, technical expertise and sales networks) to enable effective competition if these resources are unlikely to be available in potential purchasers of the IP.

4.39 In view of the possible risks to effectiveness, as outlined in paragraph 4.38, that may result from using IP remedies, the CMA will generally prefer to divest a business including IP rights, where this is feasible, rather than rely on licensing IP alone. This is because divestiture of a business including IP rights is more likely to include all that the acquirer needs to compete effectively with other parties in the market.

Design factors

4.40 The appropriate design of an IP remedy may be influenced by several case-specific factors such as:

(a) *The form and jurisdiction of the relevant IP (eg patent, exclusive licence, trademark etc).* The CMA will wish to ensure that the IP to be divested is sufficient to enable a purchaser to compete effectively. This may sometimes include less easily transferable forms of IP (eg 'know-how'). Where there is uncertainty regarding the scope of a licence or its terms and conditions, the parties may be required to divest the underlying right and accept a licence back.

(b) *The relative specialisation of the IP.* Highly specialised IP may impose particular constraints on selecting a suitable acquirer as there may be few parties competent to use the IP.[75]

(c) *The rate of innovation expected in the relevant market.* A high rate of innovation may imply a shorter required duration for a licensing remedy than in a more stable market.

(d) *Forms of payment for IP.* The form of payment (eg one-off payment, royalties or profit shares) may have an effect on competitive incentives.

4.41 IP rights generally enable the remuneration of investment in innovation by granting time-limited exclusivity. In considering the design and scope of IP

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[74] In the Thermo Electron Manufacturing / GV Instruments merger inquiry (2007), the CC rejected a licensing remedy proposed by the parties on the basis that it would not adequately restore competition lost by the merger.
[75] See, for example, the SHELL/BASF case in which the EC found that difficulties in transferring 'know how' and other types of IP could have significantly reduced the scope and effectiveness of a licensing commitment (as outlined in Appendix D of the ICN's Merger Remedies Review Project).

remedies, the CMA will recognise the need for preserving incentives for innovation while addressing competitive concerns.

4.42 Remedies relating to the transfer of IP rights may have international repercussions due, for instance, to international filing and licensing of patent rights. International cooperation with other competition authorities is therefore often particularly necessary in these cases.

Behavioural remedies

Introduction

4.43 Behavioural remedies are designed to address an AEC and/or its detrimental effects on customers by regulating the ongoing conduct of parties. In market investigations the CMA may use behavioural measures as a main remedy or as an adjunct to other measures (eg structural measures or recommendations). We may also recommend that behavioural remedies are considered following a market study or market review.[76]

4.44 The variety of market features and possible behavioural measures that may be encountered on individual investigations is extensive. This guidance therefore seeks to outline the CMA's general approach to behavioural remedies, making some reference to the types of measure that have been implemented in previous investigations, rather than dealing with all possibilities.

4.45 In the rest of this section some general issues are first considered relating to the design, monitoring and enforcement of behavioural remedies and their duration (paragraphs 4.46 to 4.51). The two main categories of behavioural remedies are then considered, namely enabling measures (paragraphs 4.52 to 4.103) and measures to control outcomes (paragraphs 4.104 to 4.111). The former address an AEC by seeking to remove obstacles to competition or stimulating competition within a market, whereas the latter seeks to prevent the exercise of significant market power and thereby control the detrimental effects arising from an AEC rather than remedy the AEC itself. A comprehensive and timely solution to an AEC and its detrimental effects on customers may require both categories of remedy.

[76] For example, recommendations were made following market studies in Electric vehicle charging (July 2021) and Children's social care (March 2022).

General issues

Design, monitoring, and enforcement

4.46 Behavioural remedies seek to change aspects of businesses' conduct from what may be expected based on their incentives and resources. The design of behavioural remedies should seek to avoid four particular forms of risk to enable these measures to be as effective as possible:

(a) *Specification risks* – These risks arise if the form of conduct required to address the AEC or its detrimental effects cannot be specified with sufficient clarity to provide an effective basis for monitoring and compliance. The intended operation of the measure needs to be clear to the persons to whom it is directed and other relevant parties, so that it is apparent what conduct constitutes compliance and what does not. For example, a commitment to permit access 'on fair and reasonable' terms, without further clarification of what this means in practice, may create significant specification risk as the provision may be insufficiently specific to allow effective enforcement. Markets that are subject to frequent change in products or supply arrangements may be particularly prone to specification risk if the definition of required conduct is vulnerable to such changes.

(b) *Circumvention risks* – As behavioural remedies do not always deal with the source of an AEC, it is possible that other adverse forms of behaviour may arise if particular forms of behaviour are restricted.[77] For example, if prices are controlled, a firm may reduce product quality. To avoid or reduce these risks, behavioural measures will generally need to deal with all the likely substantial forms in which enhanced market power may be applied. In some cases this may not be feasible or may make the behavioural measures too complex to monitor and/or enforce.

(c) *Distortion risks* – These are risks that behavioural remedies may create market distortions that reduce the effectiveness of these measures and/or increase their effective costs. Distortion risks may result from remedies overriding market signals or encouraging circumvention behaviour. For example, prohibiting the use of long-term contracts may result in a lack of incentives to compete for new business.

(d) *Compliance risks* – Even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement. This may be

[77] This general phenomenon may sometimes be referred to as a 'waterbed effect'.

due to a variety of causes such as the volume and complexity of information required to monitor compliance, limitations in monitoring resources, asymmetry of information between the monitoring agency and the business concerned and the long timescale of enforcement relative to a rapidly moving market.

4.47 For behavioural remedies to have the desired impact it is essential that there are effective and adequately resourced arrangements in place for monitoring and enforcement, so that there is a powerful threat that non-compliance will be detected, and that action will be taken to enforce compliance where this is necessary.

4.48 The CMA, or the relevant sectoral regulator where appropriate, is responsible for monitoring and enforcing compliance of remedies under the EA02 as amended by the DMCCA24.[78] Customers and competitors of the firms subject to behavioural remedies may be in a strong position to report to the CMA, or the relevant sectoral regulator, on instances of non-compliance where they have appropriate resources and incentives to do so. However, such persons may be inhibited from fulfilling this reporting role by lack of resources and verifiable information, lack of understanding of the measures, fear of reprisals and other disincentives.

4.49 In view of constraints on the CMA's resources and the possible limitations in the reliance that can be placed on the reporting role of customers and competitors, it may be necessary for the CMA to require that the relevant parties appoint and remunerate a third-party monitor to enable the CMA, or the relevant sectoral regulator, to fulfil its monitoring responsibilities effectively. Alternatively monitoring may be facilitated by the CMA making an order requiring the relevant parties to publish certain information[79] or to produce compliance reports that have been verified by an independent third party.[80] The likelihood of effective monitoring will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime.

4.50 If some of the parties subject to an investigation have a dominant market position, then certain types of conduct that behavioural remedies may seek to prevent (eg predation or foreclosure of access) may already be prohibited under the CA98's Chapter II Prohibition. Similarly, a behavioural remedy may

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[78] Sections 162 and 162A of the EA02, as amended by section 139 DMCCA24.
[79] The Home Credit market investigation (November 2006) and Funerals market investigation (December 2020) both provide examples where parties were required to publish product and price information on a website.
[80] The PPI market investigation provides an example where the largest providers were required to produce compliance reports and to have these verified by an independent third party. Likewise, in the Mobile radio network services (Airwave) market investigation (2023).

seek to prevent the making of agreements that may be prohibited under the CA98's Chapter I Prohibition. The CMA recognises the importance of ex post competition enforcement. However, the CMA has an obligation to achieve as comprehensive a solution to the AEC and its detrimental effects as is reasonable and practicable. The CMA will therefore normally prefer to specify its own remedial measures rather than rely on the general provisions of competition law, as this has the advantages that the CMA measures can be designed to take account of the particular circumstances of the case and the provisions for monitoring and enforcement can be fully defined.

Duration

4.51 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. As set out at paragraphs 3.27 to 3.29, 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 part of the design of individual measure. The period used for the long-stop date will depend on the circumstances of the case.[81]

Enabling measures

4.52 Enabling measures aim to remedy an AEC by removing obstacles to competition or stimulating actual or potential competition. Most enabling measures that have been introduced by the CMA to date may be classified as:[82]

(a) market-opening measures;

(b) informational remedies; or

(c) measures to restrain the impact of non-horizontal relationships.

4.53 Enabling measures are generally likely to require ongoing intervention and monitoring. In some instances, this may involve complex issues, for instance the pricing of access to facilities that are subject to rapid technological change.

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[81] See the CMA's investigation into the anticipated acquisition by Mastercard UK Holdco Limited of Vocalink Holdings Limited (2017). Likewise, the Mobile radio network services (Airwave) market investigation (2023).
[82] This is not an exhaustive classification. For example, in a situation where the CMA found an AEC resulting from tacit coordination, remedy options might include enabling measures designed to prevent or restrict the flow of information between market participants, alongside other measures (eg structural remedies or measures to facilitate new entry).

4.54 In some cases, enabling measures may take the form of more significant interventions, such as the creation of an industry wide body to review and manage the monitoring of remedies.[83] This sort of remedy is significantly more complex than some of the more straightforward enabling measures (for example, information remedies such as publishing price lists), and is likely to require more detailed analysis and review at both the design and implementation phases.

4.55 Where a remedy establishes a new entity or a large and enduring CMA function, it is important that the CMA considers a number of specific aspects of remedy design to ensure that the remedy is appropriately configured to allow for effective implementation. These aspects may include:

(a) the need for clarity over the scope, purpose, status and funding of the entity; and the adequacy of its proposed governance arrangements, including periodic future reviews of the effectiveness of the entity's Board and governance;

(b) a clear delineation of the roles, responsibilities and accountability of different stakeholder groups, including the CMA, and overall decision-making processes governing each of them;

(c) a process for managing conflicts of interest that may arise within the entity, or involving any Trustee;

(d) clear lines of communication between the entity, the CMA and external stakeholders;

(e) processes for escalation of issues to the CMA; and

(f) appropriate line management/reporting lines from the external body, or any Trustee involved in the implementation process, to the CMA.

4.56 The CMA may also wish to refer to and consult other bodies performing similar functions, such as standard setting organisations, regulators, or commercial representative bodies such as trade associations, when determining these questions.

4.57 This section now turns to a discussion of key enabling measures used by the CMA. It sets out key considerations in relation to: (i) market opening

[83] See the Retail banking market investigation and the Private healthcare market investigation.

measures; (ii) information remedies; and (iii) remedies that restrain the adverse effects of non-horizontal relationships.

Market opening measures

4.58 Market-opening measures are intended to open up a market to new sources of competition by removing impediments to effective competition, such as barriers to entry, expansion or switching. Such impediments may result from structural features of the market or from the behaviour of individual firms in that market .

4.59 This is a diverse category of remedies. The specific aim of any market-opening measure and the particular mechanism that is used in any case, will depend on the market features that have been identified as preventing, restricting or distorting competition and the practical opportunities available for addressing those features. Market-opening measures can be further subdivided into the following two categories:

(a) Firm-specific measures to restrain horizontal market power.

(b) Market-wide measures to reduce barriers to entry, expansion and switching.

Firm-specific measures to restrain horizontal market power

4.60 Where a firm enjoys significant market power it may be able to use the strength of this position in a number of ways to limit or restrain competition. Practices that may be used to limit or restrain competition include:

(a) requiring customers to enter into long-term and/or exclusive contracts;

(b) creating switching costs for customers through, for example, volume discounts, contractual penalties or requiring complex switching procedures;

(c) bundling or tying the sale of particular products;

(d) self-preferencing;

(e) selective discounting or predation; and

(f) changing the level of effort required for a customer to make a choice, eg by creating excessive or unjustified friction which makes it difficult for customers to get what they want or do as they wish, or by creating

practices which make it easy for customers to make a choice that may not ultimately be in their best interest.[84]

4.61 Remedies may be introduced that prohibit, restrict or discourage types of behaviour, such as those listed above that may prevent, restrict or distort competition. The selection and design of these measures will depend critically on the circumstances revealed by the inquiry and the need to manage specification, circumvention, monitoring and enforcement risks. Where circumstances point to the use of these measures, the CMA will follow the general approach of considering the anti-competitive behaviours that the relevant firm(s) may have an incentive and ability to engage in. It will then consider the measures that may be taken to prevent or limit these behaviours and the effectiveness and costs of these measures.

4.62 As an example of this approach, the use of long-term and/or exclusive contracts by a firm with significant market power may create a barrier to entry or expansion. However, if, in the relevant market, firms need to invest heavily to acquire new customers (eg by investing in new facilities or systems), then requiring a firm with significant market power to have contracts that are short term in nature may generate distortion risks as this could reduce incentives to compete for new contracts if firms do not have sufficient opportunity to recoup their initial investment. In implementing a constraint on the use of long-term contracts, the CMA will therefore seek an appropriate balance between facilitating switching and permitting sufficient incentives to compete for new contracts.

4.63 Likewise, selective discounting or price discrimination by a firm with market power can also have the effect of creating barriers to entry or expansion when used systematically to reduce prices to particular customers that are more likely to switch to other suppliers.[85] Measures to restrict selective discounting or price discrimination may therefore sometimes be necessary to address an AEC. However, such restrictions may themselves generate significant distortion risk by adversely affecting the competitive dynamics of a market if maintained in the long term. They may therefore be most appropriate as a transitional measure until other sources of competition develop.

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[84] Further discussion of these practices are set out at paragraph 9.26 of the Markets Substantive Assessment Guidance.

[85] The CC considered introducing measures designed to reduce the scope for selective discounting in the LPG market investigation.

4.64 A lack of interoperability (most common in digital markets) may create barriers such that firms restrict customers to using their own service or product.[86] The CMA may implement enabling measures to require firms to ensure that their products, applications and services are interoperable with that of an existing competitor or a new entrant. This may include, for example requiring that firms create a new product or functionality, or increase transparency of their systems to enable other firms to interoperate with their services / products.[87]

4.65 The CMA will have particular regard to avoiding circumvention risk in implementing measures limiting the behaviour of firms with significant market power that has been found to prevent, distort or restrict competition. This is because firms with significant market power may readily evolve new forms of behaviour to replace prohibited or restricted conduct.

Market-wide measures to reduce barriers to entry, expansion and switching

4.66 Market-opening measures may also be applied where incumbency advantages and other barriers to entry or switching have been found to prevent, restrict or distort competition. In this type of situation, market-opening measures to address these features may be applied to a market as a whole or, if this is not necessary and/or practicable, to the largest suppliers within the market.

4.67 The selection and design of these measures will depend critically on the specific features that have been identified as preventing, restricting or distorting competition. The types of measures that might be considered by the CMA include:

(a) measures to address barriers to switching; and

(b) measures to reduce incumbency advantages and other barriers to entry and expansion.

4.68 In some markets, customers may be put off switching suppliers by a perception that switching is costly, complex, time consuming and/or risky. This perception may be grounded in customers' own experience. Where barriers to switching have been identified as causing competition problems, measures

[86] Interoperability refers to the ability of different devices, applications, systems and platforms to communicate with each other and exchange information and data effectively.
[87] In digital markets, for example, the CMA may require that the firm exposes some of its Application Programming Interfaces (APIs) or builds new APIs.

may be introduced to make it easier for customers to switch.[88] For example, the CMA may introduce obligations on a customer's existing supplier to cooperate with the proposed new supplier to ensure that costs and disruption to customers are minimised. Generally, a new supplier will have significant incentives to make the switching process as easy as possible for the customer and will not normally require corresponding obligations.

4.69 Another factor that can deter customers from switching is if an important attribute of their current service is not transferable (or 'portable') from one provider to another and this leads them to remain loyal to their current supplier. For example, customers may wish to retain their existing telephone number if they change suppliers and may be deterred from doing so if this were not possible. Interventions to increase the portability of product attributes are most likely to be beneficial when the attribute that customers value is easily identifiable, and the ownership rights of the attribute are easily transferable to rival firms or customers.

4.70 Portability is becoming an increasingly important topic, for example in ensuring that all of the relevant data for the customer can be maintained and/or transferred. [89] In assessing remedies of this type, the CMA is likely to evaluate the extent of any material benefits to customers associated with non-portability such as, for example, being able to identify the network to which a call is being made.

4.71 Remedies may also be introduced to address competition problems in markets where some existing providers have significant incumbency advantages over other providers (eg potential entrants), which are found to act as a barrier to entry and/or expansion. In some cases, 'incumbency advantages' may result from good commercial decisions made in the past (eg to invest in and patent a successful new technology) and interventions to overcome these sources of competitive advantage may risk undermining dynamic incentives to invest and innovate. In other situations, the source of incumbency advantages may result from firms having preferential access to

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[88] For example, in the LPG market investigation, the CC found that a major barrier to switching was the requirement to replace a customer's existing tank with the one owned and operated by the new supplier. This was costly and disruptive to customers. To overcome this barrier to switching, the CC developed and implemented a 'tank transfer' remedy requiring suppliers to transfer the ownership of the LPG tank from one supplier to another when a customer switched. The tank transfer remedy was accompanied by other measures aimed at preventing contract terms that acted as a barrier to switching and informational remedies to raise customers' awareness of the options available to them.

[89] The introduction of Open Banking as a result of the Retail banking market investigation (2016) is an example of increasing the portability of data.

key resources, information or customers and it may be possible to intervene to promote competition without adversely affecting dynamic incentives.[90]

4.72 A further potential source of incumbency advantage, which may sometimes require intervention, is the 'point-of-sale advantage'. This occurs when a particular supplier has systematically better access to customers than potential rivals. A range of possible approaches might be taken to remedying competition problems resulting from a point-of-sale advantage. For example:

(a) customers may be encouraged to search for alternatives (eg through informational remedies) before they reach a particular point of sale;

(b) providers who enjoy a point-of-sale advantage may be prohibited from completing a sale until a customer has an opportunity to shop around;[91] or

(c) providers who enjoy a point-of-sale advantage may be required to offer customers a choice of products at the point of sale.[92]

4.73 Firms may take advantage of an incumbency advantage by self-preferencing.[93] In doing so, firms may present their own services or products more favourably than those of competitors, thereby restricting new entry (or expansion). Remedies may therefore be implemented to have the effect of requiring firms to change their behaviour to limit self-preferencing.

4.74 In considering such measures, the CMA will consider the effectiveness and proportionality of different approaches, for example their impact on the behaviour of customers and suppliers as well as whether there are benefits to customers associated with purchasing a product at a particular point of sale.[94]

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[90] For example, in the Home Credit market investigation, the CC found that an existing home credit lender had a critical incumbency advantage in lending to its existing customer base over all other potential lenders. This was its knowledge of its customers' repayment history in relation to loans taken out with it. This acted as a barrier to customer switching and as a barrier to entry and expansion. It also served to restrict competition from mainstream lenders. As part of a package of measures, the CC required the largest home credit lenders to share their repayment data with other lenders by entering into agreements with at least two credit reference agencies.
[91] For example, the point-of-sale prohibition in the PPI market investigation.
[92] For example, the so-called 'guest beer' provision in the 'Beer Orders'.
[93] While self-preferencing may be more likely where a firm has an incumbency advantage, such an advantage is not necessary for a firm to engage in self-preferencing.
[94] For example, in the PPI market investigation and the subsequent remittal, the CC considered the implications of any loss of convenience for the assessment of the proportionality of including the point-of-sale prohibition in the remedy package.

Information remedies[95]

4.75 Information remedies are aimed at giving customers information to help them make choices and thereby increase competitive pressure on firms in the market. They can be used to address competition problems that are caused by shortfalls in the information that customers have to enable them to make informed purchasing or switching decisions. Informational remedies can lead to changes in customer behaviour, for example by reducing search costs, increasing customers' awareness of alternatives and making it easier for customers to make comparisons between products when making an initial purchase or when switching suppliers. Informational remedies can also lead to changes in suppliers' behaviour— for example, suppliers may improve their offering, in order that their products appear attractive in terms of the information that customers receive. Information remedies may also facilitate new entry, if a lack of awareness by customers of alternatives was a factor that was restricting entry.[96]

4.76 Information remedies may take a variety of forms, with the appropriate format being dependent on the market, good, or service subject to the remedy.[97] Where an AEC results from coordinated effects[98] the CMA may consider remedies that prevent the sharing of information between firms, if sharing such information has been found to facilitate coordination.

4.77 The CMA's starting point for the selection of appropriate informational remedies will generally be the identification of the particular barrier to search or other information shortfall which is causing or contributing to the AEC. This will help identify the information or message that needs to be communicated to customers: for example, if switching is suppressed because many

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[95] Note that information remedies are the only type of remedy that the CMA may trial in markets cases as a result of DMCCA24. Further detail on trialling of remedies is set out at from paragraph 5.23.

[96] A survey of the economic literature on different types of information remedies may be found in Garrod et al, Assessing the effectiveness of potential remedies in consumer markets, OFT research paper 994, April 2008.

[97] Information remedies have been used in a number of CMA markets cases. The package of remedies implemented following the Retail banking market investigation (August 2016) included a broad range of remedies, including information remedies. These included requiring the publication of data such as service quality scores and fees, as well as the automatic enrolment of customers into unarranged overdraft alerts, and information remedies, among others. In the Investment Consultants market investigation (December 2018), the CMA imposed a number of information-based remedies including clearly separating marketing material from financial advice and requiring firms to more clearly disclose fees to existing and prospective customers. In the Funerals market investigation (December 2020), the CMA implemented a package of remedies, part of which included information remedies to tackle price and commercial information transparency via methods such as the provision of itemised price lists. In the Road fuel market study (July 2023), the CMA recommended the implementation of an open data fuel finder scheme for the UK road fuel sector, for the purpose of allowing consumers to compare accurately the price and quality of products in a way that drives good decisions.

[98] See the Markets Substantive Assessment Guidance for further discussion on coordinated effects.

customers have a mistaken belief that they are unable to switch suppliers, then an informational remedy could focus on correcting this misperception.

4.78 The CMA will also consider how information may best be communicated to customers (eg via a website, through companies' marketing material, or by periodic statements to customers). The choice between these options may depend on a number of factors, including:

(a) *The ways in which customers currently obtain information about the product.* It may be more practicable to introduce informational remedies that build on existing sources of information used by customers.

(b) *Customers' ability to access particular information channels*. For example, the level of online access or literacy among a customer base is likely to be relevant to consideration of whether to require firms to disclose prices on a price-comparison website.

(c) *The nature of the information to be provided to customers*. For example, the CMA will generally consider whether information needs to be tailored to individual customers or a specific category of customer (eg via a customer statement) or whether a common message needs to be communicated to all customers (eg in marketing materials).[99]

4.79 Any obligation to provide information to customers will usually fall on the providers of the product under investigation.[100] If information is to be provided using a medium over which providers have control, the CMA may find it necessary to specify in some detail what information is to be provided and how. This is particularly likely to be the case if:

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[99] For example, in Store Cards, information on the option to pay by direct debit and any APR that was over 25 per cent was provided to customers on statements; and in Northern Irish personal banking, information on charges relating to overdrafts was required to be communicated in marketing materials. Similarly, in PPI the CC required PPI providers to provide existing customers with a personalised annual review and to include a small number of 'key messages' (not customer specific) in their marketing material. More recently, in the Investment Consultants market investigation (December 2018), the CMA required fiduciary management firms to provide potential clients with clear information on their fees and to use a standard approach to show how they have performed for other clients.

[100] In some circumstances (eg an obligation to publish information on an existing website) a third party may control the final presentation of customer. In such cases, the CMA would need to be satisfied that the way in which information was provided by a third party would be effective in addressing the competition problem identified. This may give rise to a recommendation to the third party concerned.

(a) the disclosure is intended to help customers make comparisons between providers and a standard format for disclosure will help achieve this objective;[101] or

(b) providers have incentives to conceal or marginalise information that presents them in an unfavourable light, or which encourages their customers to switch or shop around.

4.80 The CMA will also have regard to the potential benefits of taking a less prescriptive approach. The cost to firms of complying with informational remedies will generally be lower if they have some flexibility as to how they meet their requirements. It may also be necessary to allow some flexibility, in order to 'future proof' the remedy, so that it is still effective in relation to new or unusual situations or products.

4.81 In considering the design of informational remedies, the CMA will generally be mindful of how the remedy is likely to interact with existing obligations on firms relating to information provision.[102] The CMA will look, where possible, to exploit positive synergies between existing regulations and CMA proposed remedies.[103] It may sometimes be possible to implement informational remedies by building on existing mechanisms for communication with customers. Where this is the case, this may be a lower cost option than requiring the establishment of a new form of communication.[104]

4.82 In specifying information remedies, the CMA will look to ensure that information is provided at a time that the recipient can make use of it. For example, informational remedies that are intended to help customers search the market and compare products will tend to be most effective when customers see this information before they have made their main purchase decision. So, for example, providing price and product information in writing

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[101] See, for example, Consumers and mortgage disclosure documentation, September 2006, FSA, p9 and Insight Research PPI forms consumer testing, April 2009, CC, p4.
[102] For example, the content of advertisements may already be regulated (as was the case in Home Credit) or firms may already be required to give various disclosures to customers at the point of sale (as was the case in PPI).
[103] For example, the review on the Northern Ireland Personal Current Account Banking Order took into account the information obligations banks face under two European Directives (the Payment Services Directive and the Consumer Credit Directive) and under other UK regulations (eg the FSA's Banking Conduct of Business Sourcebook).
[104] For example, in PPI the CC obliged firms to provide information to the Money Advice Service for publication in its comparative tables, rather than developing a new site.

after a sale has been concluded – while sometimes required for consumer protection – may only have a limited impact on search behaviour.[105]

4.83 Information remedies that are intended to facilitate switching will tend to be most effective if they are targeted at those customers who are able to switch, at a time when they are likely to be interested in switching (eg on invoices or statements setting out how much they have paid over a period).[106]

4.84 The CMA may consider whether introducing an information remedy might have the unintended consequence of facilitating coordination between suppliers. As not all markets are conducive to coordination and as suppliers will generally have better information than customers about the prices charged by their competitors, this is most likely to be a material risk if the conditions for coordination are met and if prices are opaque to competitors in the absence of the remedy (eg because prices are subject to individually negotiated discounts).[107]

4.85 The CMA will consider carrying out specific customer research into informational remedies (or 'road-testing') before they are put in place.[108] Road-testing may be carried out during a market investigation to inform choices between alternative remedy options and the design of individual options. As set out in further detail from paragraph 5.23 to 5.42, the CMA also has the power to trial information remedies prior to their final implementation.

Choice architecture

4.86 The CMA may also seek to consider any choice architecture practices in its specification of remedies, particularly information remedies which consider what and how information is presented to consumers. When consumers are faced with complex language or a large volume of information (eg information overload), they may not have the ability or incentive to go through the necessary steps to make the choice that is in their best interests.

4.87 When specifying and designing remedies, the CMA will have regard to the impact that complexity may have on the decision-making process, in order to

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[105] There is evidence from the academic literature that consumers can display a 'status quo' bias, which makes them more reluctant to change decisions that they have already made than to consider alternatives when making an initial choice. See, for example, FSA, Financial Capability: A Behavioural Economics Perspective, July 2008.
[106] For example, in Northern Irish personal banking, a switching leaflet was required to be provided alongside customers' annual summaries.
[107] For example, the CC considered the possibility that information remedies could facilitate coordination in the LPG and Home Credit market investigations.
[108] See Road Testing of Consumer Remedies, London Economics, July 2009.

ensure that information remedies are effective in practice. In doing so, the CMA will consider the different types of complexity that a consumer may face:

(a) Complex choice – for example, consumers may be required to make a number of decisions formed of many different steps before making a final choice, which may lead to 'choice overload'.

(b) Complex information – for example, where consumers are presented with information that is difficult to understand due to complex language (eg technical jargon) being used, which may lead to a less-informed choice as a result of a lack of comprehension.

4.88 Further information in relation to choice architecture is available in the Online Choice Architecture discussion paper.[109]

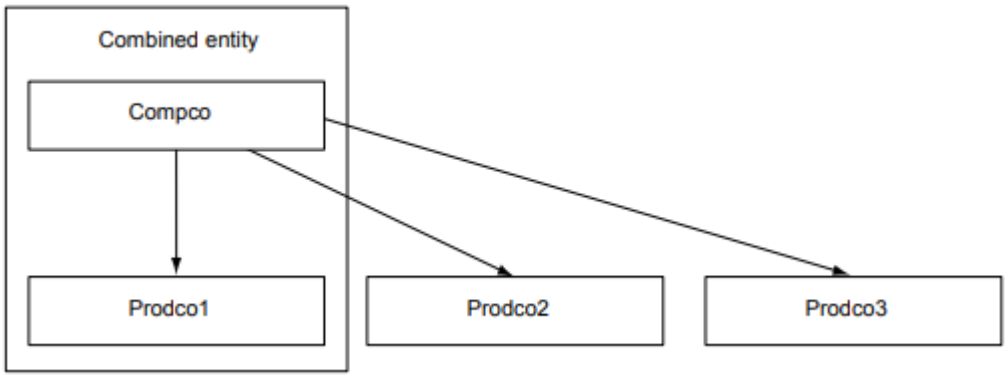
Remedies that restrain the adverse effects of non-horizontal relationships

4.89 Competition problems can sometimes arise where individual firms are active at different levels of the supply chain of particular goods or services, or where a firm is active in two or more adjacent markets (non-horizontal integration). Similar problems can arise from contractual arrangements between firms active at different levels of the supply chain, or from contractual arrangements between firms active in adjacent markets (non-horizontal arrangements). Where a party has significant market power at one or more levels of the supply chain or in one or more related markets, non-horizontal integration and/or non-horizontal arrangements (collectively, non-horizontal relationships) may contribute to an AEC, typically through the firm's incentive and ability to disadvantage competitors by foreclosing access to key inputs, facilities or customers and/or exploiting access to confidential information.

4.90 For example, if, as illustrated in Figure 4-2 below, the manufacturer (Compco) of most of a key industry component also owns a major user of this component (Prodco1), the ability of other users (Prodco2 and Prodco3) to compete could be disadvantaged by the combined entity through restricting supply of this component to Prodco2 and Prodco3 or making use of information concerning component orders by Prodco2 and Prodco3.

[109] For more detail see Online Choice Architecture: how digital design can harm competition and consumers, CMA, 2022

Figure 4-2: Illustration of vertical configuration



Source: CMA

4.91 An AEC resulting from non-horizontal relationships might be remedied by structural measures. Such measures might involve vertical or cross-market separation (eg requiring divestiture of ProdCo1),[110] but could also involve reducing the significant market power that the combined entity has at the critical stage of the supply chain (eg partial divestiture of Compco).

4.92 If non-horizontal relationships produce substantial RCBs that would be largely reduced by structural measures, or if divestiture is otherwise not appropriate or feasible, then behavioural measures may be selected by the CMA that enable continued access to necessary products or facilities on appropriate terms and/or measures that prevent the combined entity exploiting privileged access to information.

Access remedies

4.93 Access remedies seek to address competition problems by enabling competitors to have access on appropriate terms to the products and facilities of a firm that they require to be an effective competitor.

4.94 An access remedy will normally need to specify an access commitment by the firm concerned to third parties in sufficient detail so that third parties and monitoring agencies can enforce the commitment effectively. This will include details of the product or facility to be provided, including quality and technical parameters, and the terms of supply of the product or facility, including service levels and the basis of pricing. The latter may be particularly complex and may be subject to some of the same issues that are encountered with price caps, as discussed in paragraphs 4.108 to 4.111. If the access commitment is not specified or monitored in sufficient detail, then

[110] Or in the case of non-horizontal arrangements, prohibiting the commercial arrangements between Compo and Prodco1.

the measure may be vulnerable to specification risk and the firm may be able to avoid its obligations. In such circumstances, the CMA may need to consider alternative forms of remedy (eg divestiture) that are likely to be more effective.

4.95 To overcome specification risk, the CMA will generally require that an access remedy should make explicit provision for accommodating future changes, for example, in product specifications or supply arrangements. Where a market is likely to be subject to frequent technological change or other wide-ranging market developments, there is likely to be a significant risk that an access remedy will become ineffective if the terms of the access commitment do not accommodate these changes. However, significant technological change might also reduce the market power that results in the AEC (eg if – see Figure 4-2 – effective substitutes are developed for the component supplied by Compco).

4.96 In some supply arrangements, certain factors may be particularly important for competitive access that are not easily specified (eg quality of product support, priority for system upgrades, and quality of management assigned to a customer's account). Such factors may result in 'soft biases' in access to supply that may generate significant circumvention risk and may significantly undermine the purpose and suitability of an access remedy.[111]

4.97 In certain circumstances it may be possible to simplify the specification of an access remedy by obliging the combined entity to supply a particular product on fair, reasonable and non-discriminatory (FRAND) terms, where supplies to external customers are provided on the same or similar terms as apply to its own businesses (see paragraph 4.46). For this to be effective, the nature of FRAND terms must deal adequately with the circumstances of external customers and must be transparent to customers and monitoring agencies in sufficient detail to enable effective enforcement.

4.98 The use of FRAND terms may still leave competitors vulnerable to a margin-squeeze by the combined entity as it may have an incentive to charge all downstream businesses, including its own, a uniformly high price since reduced profitability in its downstream business can be offset by higher profitability in its upstream business. The CMA may therefore require that use of FRAND terms is accompanied by provisions to protect against a

[111] In the London Stock Exchange plc merger inquiry (2005), the CC rejected a solely behavioural access commitment to clearing and settlement services due, in part, to the likely difficulty of 'soft biases'.

margin squeeze (eg submission of regular reports demonstrating full cost recovery in the downstream business).

4.99 Where it is necessary to preserve access to a key facility owned or controlled by a non-horizontally integrated company and the usage and capacity of the facility is readily assessed, the CMA may determine that the most practical and effective means of providing access to competitors is to cap usage of the facility by the combined entity and require it to auction remaining capacity to third parties.[112] This would be effectively a form of 'virtual divestiture'.

Operational separation

4.100 Operational separation measures seek to create boundaries between business segments or operations. In such cases, affected businesses within a firm operate separately and independently from one another but are still owned by and remain under the overarching control of the same firm. Operational separation measures may include, but are not limited to: (i) the separation of assets, (ii) the requirement for separate management teams with local incentive structures; (iii) a requirement for equivalence of treatment for internal and external parties; (iv) transparency requirements, eg relating to operational and financial performance. Some operational separation measures will be more 'structural' in nature than others, and the extent of the separation will be dependent on the level of risk and complexity in each specific case.[113]

4.101 In some cases, these may be referred to as 'firewall' measures, and may, for example, seek to prevent vertically integrated companies and companies integrated across complementary markets from accessing and using privileged information generated by competitors' use of the company's facilities or products. For example, in Figure 4-2, in the absence of firewall provisions, Prodco1 may be able to exploit privileged information regarding the orders and deliveries of key components from Compco to Prodco2 and Prodco3.

4.102 Operational separation can prevent access to privileged information by effectively insulating the firm or division generating the information from

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[112] In the Centrica/Dynegy Storage merger inquiry (2003), the CC required Centrica to restrict its usage of the Rough Gas Storage Facility to a percentage of total capacity to prevent the foreclosure of access.
[113] The CMA's Statutory audit market study (April 2019) made a recommendation to the Secretary of State that an operational split be implemented between the audit and non-audit practices of the four largest providers of audit services in the UK. This included a proposal for separate governance and strategy, separate accounts and remuneration policies, and no profit-sharing between audit and non-audit.

other group companies. The particular approach used in each case will be dependent on company structures and the flow of information, and is generally achieved by restricting information flows and use of shared services, physically separating premises and staff, and regulating transfers of management and any permitted interactions between relevant staff.[114]

4.103 To ensure effective compliance with operational separation, the relevant firm will normally need to commit significant resources to educating staff about the requirements of the measures and supporting the measures with disciplinary procedures and independent monitoring.

Controlling outcomes

4.104 Remedies that control or restrict the outcomes of business processes, such as price caps, supply commitments and service level agreements, seek to prevent firms from exercising significant market power. As such, these remedies seek to restrict the customer detriment arising from an AEC, rather than addressing its cause.[115]

4.105 In order to overcome specification risk, remedies that control outcomes normally need to specify in significant detail the products or services that are subject to control and the basis of the control (eg the application of price indices to a price cap). The remedy will generally also need to specify how the control will deal with changes, such as the introduction of new products.

4.106 Measures to control outcomes are often used in regulated sectors, where it may not be feasible to introduce effective competition. The introduction of such measures is also a potential outcome of market investigations, particularly where it is difficult to identify effective ways of addressing the causes of the AEC or where competition-enhancing measures are likely to take a long time to remove the customer detriment that results from the AEC. However, such measures are vulnerable to the main risks associated with behavioural remedies (see paragraph 4.46) and this can have a negative impact on their effectiveness and cost, in particular:

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[114] The Centrica/Dynegy Storage merger inquiry provides an example of the measures that may be required by the CMA to make firewalls effective.

[115] In the Classified Directions market investigation, the CC found that the prices of Yell, the largest provider, had been largely constrained by an existing price cap rather than competition. Were it not for the price cap, customers of Yell would be paying more for advertisements in Yellow Pages than they would if the market was functioning well. However, the CC expected that growing competition would increasingly constrain Yell's prices and that Yell would feel more pressure due to the Internet. The CC's remedies included a revised price control to prevent Yell from exploiting its market power and other measures designed to preserve developing competition from actions that could be targeted at competitors.

(a) Defining appropriate parameters for the control measure (eg the level of a price cap) may be complex and, in some cases, impractical, and the measure may therefore be vulnerable to specification risks. Complexity will be greater where one or more of the following conditions apply:

(i) Pricing in the relevant market is volatile, for example because of variability in input costs.

(ii) Products or services are differentiated rather than homogenous; this may increase the complexity of any control in order to capture adequately the diversity of products on offer.

(iii) Prices are individually negotiated.

(iv) Supply arrangements and products are subject to significant ongoing change, which may require the control measure to change to reflect new developments.

(b) This class of remedy directly overrides market signals and so may generate distortion risks over time, increasing the effective cost of the remedy or reducing its effectiveness. For example, a supply commitment for a particular product may discourage product innovation. Whilst it may sometimes be possible to design measures to minimise distortion risk (sometimes referred to as 'incentive regulation') this may be at the expense of increasing the complexity of the control.

(c) The measure may be vulnerable to circumvention risks. For example, a price cap might be circumvented by a firm reducing the quality of controlled products or restricting the supply of controlled products. It may be sometimes possible to add preventative provisions to reduce the risk of circumvention, though this may be at the expense of increasing the complexity of the control too.

(d) Monitoring and enforcement may be costly and/or intrusive and, in the absence of an industry-specific adjudicator or regulator,[116] this may

[116] Monitoring and enforcement of measures to control outcomes may be facilitated by the existence or appointment of a sufficiently resourced monitoring or adjudication body and/or a specialist industry regulator. For example, in the Macquarie UK Broadcast Ventures / National Grid Wireless Group merger inquiry, an independent adjudicator was appointed to resolve disputes arising in relation to the commitments that formed the package of behavioural remedies in this case. The adjudicator is paid for by the parties but is accountable to the CMA (previously the OFT) and under the guidance of Ofcom. In reaching its decision in this case, the CC had regard to the fact that Ofcom already had regulatory responsibilities for the relevant market.

compromise effectiveness, especially where the form of remedy is complex.

4.107 While there are a number of risks associated with controlling outcomes, they remain an effective remedy option for the CMA. In some cases, they will be used on a temporary basis unless there is no alternative to a continuing regulatory solution, although they may also form a core part of the remedies package.

Price caps

4.108 Price caps are a common form of measure for controlling outcomes.[117]

4.109 Different approaches may be adopted to defining the products and prices to be controlled depending on the circumstances of the case:

(a) Prices of all affected products may be individually capped. This may be impractical where a large number of products are involved and may be inflexible in dealing with product changes.[118]

(b) The average price of a basket of products may be capped. This allows greater flexibility in taking account of shifts in demand between products, but the weighting of the constituents of the basket may be problematic and subject to distortion, for example, if revenue-weighting is used and the firm introduces a number of low-cost product variants.[119]

(c) The price cap may apply to key benchmark products. This approach could simplify monitoring and compliance, but may only be effective if a few key products are likely to continue to account for a large proportion of sales and the pricing of other products is expected to remain closely related to the benchmark products.

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[117] Examples of where the CMA has utilised price caps in recent cases include the Energy market investigation (2016) and the Mobile radio network services market investigation (2023).
[118] For example, in the Classified Directories market investigation, consideration was given to how new local and re-scoped directories should be taken into account in order to avoid circumvention of the price control. The final remedies package included a provision within the price cap which set maximum prices that Yell could charge in new directories created as a result of re-scoping.
[119] For example, in the Classified Directories market investigation it was noted that although a basket may be preferable for regulated monopolies, its use on an incumbent facing emerging competition may not be beneficial. In this instance, it was considered that the greater flexibility that a basket mechanism would give to Yell would enable it to target price-sensitive customers of its competitors and so undermine emerging competition. It would also enable it to target less price-sensitive Yell customers with price increases. Finally, it was also noted that a basket control introduced greater complexity, making it more difficult for customers and the OFT (at the time) to monitor compliance.

(d) The price cap may apply to particular product terms (eg 'hidden charges'). Again, this approach could simplify monitoring and compliance and may increase the overall level of price transparency for customers, though it may result in a 'waterbed effect' whereby other charges increase.[120]

4.110 The CMA will seek a basis for the price cap which will prevent or restrict the extent to which a firm's market power is reflected in prices. The basis of a price cap may take a variety of forms:

(a) Prices may be benchmarked to the prices of products in analogous markets that are determined by competition. In practice, this may only be feasibly in limited circumstances due to the lack of an analogous market.

(b) Prices may be determined on the basis of input cost data and an approved return on capital. This resembles the approach adopted by many sectoral regulators. In some cases, this may require a resource-intensive regulatory process backed by information-gathering and enforcement powers to be effective.

(c) A hybrid approach may be taken whereby an initial price reduction is determined on the basis of input cost data and an approved return on capital, with subsequent changes to the level of the price cap being updated by reference to an index that is representative of input cost changes after incorporating current productivity gains.[121] The CMA will wish to use an index which has robust data sources which cannot be influenced by the parties subject to the price control. The use of such an index may provide a broad approximation to a competitive price outcome in the short-term but is at risk of departing significantly from such an outcome in the medium- to long-term.

4.111 The CMA may require that price caps are accompanied by measures to prevent circumvention risk that may arise, for example, through the firm restricting the supply or service levels of price-controlled products or reducing product quality.

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[120] For example, in the Home Credit market investigation, the CC increased the value of the rebates paid to customers when they settled a loan early.

[121] For example, variation to the original FirstBus/SBH Undertakings was made to allow revenue to rise by a hybrid index calculated using costs from the Confederation of Passenger Transport UK (CPT) Scotland index, rather than the original 1997 fare cap which was based on increases to RPI. This was because there was concern that the previous method was distorting competition by restricting fare increases below increases in bus industry costs.

Recommendations

4.112 The CMA will often make recommendations to other bodies to take action following market reviews, market studies, and market investigations.

4.113 Recommendations can be thought of as falling into one of two categories:

4.114 In some cases, the legal framework, regulations or conduct applicable to a market may be a structural feature which could give rise to an AEC; for example, planning or certification requirements may inhibit entry or restrict market outcomes.[122] In such cases, the CMA may recommend modifications of these requirements to the Government or other controlling body to help address the adverse effects to the interests of consumers (in market studies), or, in the case of a market investigation, an AEC and/or its detrimental effects. For example, the CMA may recommend the removal or reform of regulatory requirements that have been found to constitute a barrier to entry.[123]

(a) The CMA may also make recommendations in situations where it is more practicable, or otherwise preferable, to implement a remedy by means of a recommendation.[124]

4.115 Recommendations will be directed to the party that is best able to implement the necessary action. It will be for the person to whom a recommendation is addressed to decide whether to act on the recommendation. The UK Government has made a commitment to give a public response to any recommendation made to it within 90 days of the publication of a CMA report. In its response, the UK government will set out where it does or does not propose to make changes in light of the report, or where it proposes to consult on options. The UK government will take into account all public policy and

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[122] Barriers to entry or expansion are discussed in further detail from paragraph 6.4 of the Markets Substantive Assessment Guidance.

[123] See the CMA's Housebuilding market study (2024) for examples of this.

[124] For example, in the Retail banking market investigation (August 2016), the CMA made a number of recommendations to the FCA and HMT as part of its package of remedies. The recommendations were broad and included recommending the introduction of regulatory oversight for a current account switching service, and the identification, research, testing and implementation of measures to increase overdraft customers' engagement with their overdraft usage and charges, among others. In the Road fuel market study (July 2023) the CMA made two recommendations to Government: (i) for the implementation of an open data 'fuel finder' scheme for prices in the retail road fuel sector; and (ii) for the creation of an ongoing road fuels price monitoring function for the UK market, by tasking a public body with the role and providing it with information-gathering powers needed to generate insights in the complex and changing UK market.

welfare considerations, including considerations of Better Regulation[125] in making its assessment.

4.116 The fact that recommendations are not binding on the party to which they are addressed represents a risk to their effectiveness as a remedy. A recommendation may not be accepted, may not be implemented in a way that is consistent with the CMA's intentions, or may become redundant following a change of policy. There may be a risk to the effectiveness of a wider package of remedies if the success of other measures in the package is dependent on a recommendation being followed.

4.117 In evaluating the effectiveness of a recommendation as a potential remedy, the CMA will form a view on the likelihood that the recommendation will be acted on and the timescale over which this might be expected to occur. In reaching this view, the CMA will have regard both to the stated policy of the body to which the recommendation is to be directed and to the possibility that the stated policy may change, either in light of the CMA's recommendation, or subsequent events.

4.118 When considering the specification of recommendation, the CMA will normally consider a range of factors including:

(a) what change is required to remove or reduce the obstacle to competition that has been identified or its detrimental effects on customers;

(b) who is best placed to take the action necessary to effect the necessary change;

(c) how that change might be best achieved by the party to which the recommendation is addressed; and

(d) the likelihood of a recommendation being implemented, the timescale within which this would happen under different assumptions, and the likelihood that change, if implemented, would be sustained.

4.119 In relation to these factors, the CMA will have regard to the degree of complexity and the number of institutions involved in making the change. Recommendations that are relatively straightforward to specify and to introduce are generally more likely to be implemented than recommendations

[125] The Better Regulation Framework is the system government uses to manage the flow of regulation and understand its impacts. Further detail on the framework can be found in the Better Regulation Framework Guidance.

which are more complex, or which require closely coordinated action by a large number of bodies.

4.120 There may sometimes be a trade-off between these factors. For example, the ideal outcome from a competition perspective might be very difficult to achieve in a reasonable timescale, whereas it may be possible to achieve a material improvement in competition by means of a recommendation that can be implemented more quickly. In such circumstances, the CMA will weigh up the relative merits of increased certainty of implementation against the possibility of achieving a better outcome, but with less certainty or over a longer timescale.

Selection of remedies

4.121 The identification of the CMA's preferred remedy is an iterative process in which a potentially wide range of remedy options are progressively narrowed down until a solution has been found that enables the CMA to meet its statutory duties. This process involves public consultation on those remedy options that appear to the CMA to have the best chance of being effective and proportionate. Some of the key considerations that affect the selection of remedies are set out in the remainder of these guidelines.

Approach to resolving the AEC

4.122 In deciding what remedial action should be taken, the CMA will first look for a remedy that would effectively address the causes of the AEC directly and thereby deal with any detrimental effects on customers of the AEC.[126]

4.123 The type of action that will be effective in increasing competition will depend on the nature of the AEC concerned. The range of potential competition problems that may be identified as giving rise to an AEC is wide, as is the range of potential remedies. The relative merits of different remedy options will be determined by the facts of the case and, in particular, the nature of the underlying competition problem that gives rise to the need for remedial action.

4.124 In choosing between structural remedies and enabling measures that impact on market structure indirectly, the CMA will consider whether the market

[126] The test is different in a Market Study – in which the CMA undertakes an assessment of whether the market is working well – where the CMA's powers to intervene are more limited but include recommendations.

response to either type of remedy will be timely and of sufficient scale to represent a comprehensive solution to the AEC.

4.125 In remedying competition problems arising from high concentration, structural remedies have some advantages over other measures. Once implemented, structural remedies may be expected to increase competitive constraints on the behaviour of firms in the market within a short timescale and without requiring ongoing detailed monitoring by the CMA and/or any other body such as the relevant sector regulator.[127]

4.126 The underlying cause of high concentration may also be relevant, however. For example, if certain features of a market (eg network advantages or other barriers to entry and expansion) result in a tendency towards high levels of concentration, enabling measures that address the underlying causes of high concentration (eg by lowering barriers to entry or expansion) might be more appropriate. The costs of different remedy approaches, including the extent to which any RCBs are retained may also be relevant to this choice.

4.127 In other circumstances, structural remedies may not address the features giving rise to the AEC and behavioural remedies are likely to be preferred. For example, enabling measures are more likely to be chosen where:

(a) the conduct of firms has given rise to an AEC – for example, by raising barriers to entry or facilitating coordination. In such situations the CMA may consider restrictions on firms' behaviour that constrain firms' future ability to engage in such conduct;

(b) switching costs or barriers to entry or expansion are among the features that give rise to an AEC. Here, the CMA may consider market-opening measures that address the main barriers to switching, entry or expansion that it has identified; or

(c) search costs and other information shortfalls are among the features giving rise to an AEC. In such situations, information remedies that make it easier for customers to search and switch may be an appropriate response.

4.128 Remedial action may also be required to address customer detriment directly, for example where effective remedies aimed at introducing competition by addressing the AEC are unavailable or will not bear fruit in the short term (see paragraphs 4.104 to 4.111). Price controls are the most obvious example. However, such measures to control outcomes are not likely, by their nature, to

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[127] See: BAA airports: evaluation of remedies (May 2016).

provide a solution to the underlying problem and may also give rise to distortion risks, if retained over a long period. For these reasons (as stated in paragraphs 3.19 to 3.22), remedial action by the CMA to control outcomes will not generally be preferred as a long-term solution.

CMA action or recommendations

4.129 As described in paragraphs 4.112 to 4.119, recommendations may be considered where an aspect of regulation or government behaviour is itself giving rise to an effect adverse to consumers' interests or an AEC, or where it would be more practicable (or otherwise preferable) to implement a remedy by means of a recommendation rather than by the CMA taking action itself. This may include situations in which other bodies have powers that are unavailable to the CMA[128] or where a recommendation enables a remedy to be better Integrated with existing interventions or regulation in a sector. It may also include cases where a remedy to increase competition in a market has the potential to come into conflict with other important public policy objectives and it is more appropriate for another regulatory body (eg the UK or national governments, the Bank of England, local authorities or a sector regulator), rather than the CMA, to balance these conflicting objectives. The CMA will also have regard to whether it thinks that a recommendation to a third party will assist in achieving the aim of achieving a comprehensive solution to the AEC, in the context of market investigations, and more broadly whether it is likely to be effective in resolving concerns arising from a market review or market study.

Timeframe

4.130 In looking for remedies that would be likely to increase competition in the relevant market(s), the CMA will give attention to the time period within which the remedy can be expected to show results. If a remedy is not likely to have rapid results, the CMA may choose an alternative remedy or implement additional remedies such as measures to address the detrimental effects on customers during the interim period. Otherwise, not only might there be uncertainty as to whether the beneficial effects of the remedy would materialise, but, in the meantime, customers would continue to suffer from the consequences of the AEC.

4.131 The CMA's experience to date suggests that remedies often take the form of a 'package' of measures, rather than the implementation of a single measure

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[128] For example, in the Local bus services market investigation the CC made several recommendations to the OFT about the operation of existing competition law mechanisms that were the responsibility of the OFT.

(see paragraph 3.21). This may be because there are several features giving rise to an AEC, and consequently an individual measure may be incapable of addressing the AEC in its entirety. For example, to deal with problems associated with a lack of customer switching it may be necessary both to remove contractual barriers to switching and also to put in place informational remedies that raise customer awareness of the potential benefits of switching. Where more than one measure is being introduced, the CMA will consider the way in which the measures are expected to interact with each other.

Consideration of implementation of process at design stage

4.132 When the CMA is designing remedies, it should also have regard to how remedies will be delivered and implemented. This is particularly relevant for the design and implementation of complex remedies. The CMA will have regard to the following implementation and procedural considerations at the remedy design stage:

(a) The CMA will assess whether there are suitable checks and balances, governance mechanisms and processes in place for the overall delivery phase, including in relation to both the CMA and key stakeholders. For example, this may also include processes for interpretation of aspects of the order/undertakings during delivery where appropriate.

(b) The CMA will consider whether it will be responsible for the monitoring of the remedy. This will include consideration of the resource implications for the CMA, processes to adjust resources where required, and the use of CMA's enforcement powers, for example to enforce any order.

(c) The CMA will take into account the lifetime of the remedy. It will seek to identify the resources required throughout the lifetime of the remedy, including whether these will be CMA or external resources, and whether any specialist expertise may be required – for example, at the design stage or during delivery and implementation.

4.133 To the extent that certain aspects cannot be foreseen at the remedy design phase, the CMA will undertake ongoing review of remedies. At the design stage, the CMA may also have regard to its ability to trial remedies in assessing which remedy design it considers may be most appropriate, and which it may choose to trial (see further discussion of trialling from paragraph 5.23).

5. Remedies process

Introduction

5.1 This section provides an explanation of the remedies process in markets cases. The Markets Procedural Guidance sets out further detail on the processes and procedures relating to markets cases generally and should be read alongside this section.

Remedies process in market studies

5.2 The Markets Procedural Guidance discusses the overall process of a market review or market study. It includes an overview of the processes relating to remedies. Here, we set out the key stages relating to the remedies process in additional detail.

5.3 As explained above, the remedial powers available to the CMA resulting from a market review or market study are more limited than in market investigations and the remedy options available generally involve less direct intervention from the CMA. On this basis, the remedies process for such reviews and studies is generally more streamlined and flexible than in the case of a market investigation, when more detailed engagement with parties may need to occur due to the potential for the CMA to take remedial action itself.

5.4 Following the launch of a market study and completion of initial analysis, the CMA will generally publish an update report for consultation which will set out its initial findings and indicate views on appropriate remedies.

5.5 Where the CMA considers that an MIR should be made, the CMA will publish a notice of proposal to make a market investigation reference. This will often fall around the same time as an update report. Taking into account responses to its consultation, the CMA must publish a final report into the market study within 12 months of commencement of the market study.

5.6 Where the CMA has identified concerns in the market, it will confirm in the final report any proposed remedial action, including consumer-focused action,

recommendations, investigation and enforcement action, and/or a market investigation reference.[129]

Remedies process in market investigations

5.7 This sub-section focuses on the key stages relating to the remedies process in market investigations.[130] The process for designing remedies in market investigations is more detailed than that in market studies, largely due to the enhanced powers in market investigations that enable the CMA to take action itself by making Orders or accepting undertakings.

5.8 The CMA will publish an issues statement at an early stage in the investigation process. In addition to setting out the theories of harm framing the analysis that the CMA intends to pursue, the issues statement may invite views on potential remedies from any interested parties.

5.9 Evidence on potential remedies will also be gathered during the course of the investigation (for example, via information requests and hearings or other meetings with market participants).

5.10 Using the information gathered, the CMA will consider possible remedies alongside its competition assessment. This means that the CMA will consider and discuss potential remedies alongside working on understanding what features of the market may give rise to adverse effects. The consideration of possible remedies is always contingent on an AEC finding having been reached.

5.11 If an AEC has provisionally been found, the provisional decision report will also contain a provisional decision on remedies that address the AEC(s), or the resulting detrimental effects on customers, including its view on their effectiveness and proportionality. A public consultation will then be held on this report.

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[129] The outcomes of a market review may be similar. The CMA may form the view that any concerns relating to consumers' interests can be addressed by using its other tools. That may include taking action to enforce consumer protection law, or issuing advice to businesses, consumers, or governments and regulators (and which advice may include recommendations to such governments and regulators). Alternatively, the CMA may come to the view that there are concerns with the way the market operates that it needs to assess further using its formal powers to gather information and evidence. In those cases, the CMA may decide either to undertake a market study or a market investigation.

[130] This section should also be read in conjunction with the Markets Procedural Guidance, where further detail is set out on each of the key stages of markets cases (including an overview of the remedies process).

5.12 After publication of the provisional decision report, response hearings will take place and these are likely to focus in some detail on any potential remedies.

5.13 The final report will, if it confirms the finding of an AEC, contain sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies by the CMA.[131] The CMA will aim to include a clear description of the remedies and the AEC and/or detrimental effects that they aim to resolve. As part of this, it will explain how it intends to assess whether the remedy has been effective.

5.14 Where the CMA plans to impose particularly complex remedies, the final report will set out a process for implementation, oversight and, where appropriate, review of the remedy (or remedies) at key stages to assess whether the existing arrangements of the remedy are still working and are appropriate.[132] These gateways or checkpoints will provide an opportunity for the CMA to consider whether structures and resourcing for delivery and/or monitoring of the remedy remain appropriate, as well as whether additional input – for example, technical expertise – is required.

5.15 The CMA will more generally keep the remedies it introduces under review and may take additional action outside of the specified checkpoints. Further detail on how the CMA reviews remedies is set out in CMA 11.

Implementation of remedies

5.16 The remedies implementation process will begin following the publication of the final report.

5.17 Where the CMA has determined to take action itself, the CMA has the choice of implementing remedies by accepting undertakings from the relevant parties (if offered) and/or by making an order. Factors relevant to the choice the CMA may make in any particular case are described in paragraphs 5.45 to 5.48 below.

5.18 The CMA may choose to trial certain remedies[133] prior to settling on the final remedy package, with the implementation trial beginning by the acceptance of

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[131] Section 136 of the EA02.

[132] In Mobile radio network services, the CMA imposed a charge control order on Airwave and Motorola which was subject to a review three years after its start. A Committee was formed following the order to oversee and provide strategic direction in all matters relating to the implementation of the charge control, monitoring and enforcement, management of risk, resource allocation and prioritisation, reputational and wider issues, and to determine the approach to overseeing the 2026 charge control review anticipated in the order.

[133] Information-based remedies, or remedies relating to any other matter as specified by the Secretary of State.

undertakings or making of an order relating to the trial.[134] This section covers the trialling of remedies at paragraphs 5.23 to 5.42 below.

5.19 The CMA will publish an administrative timetable for the implementation of those remedies where it has decided to take action itself. There are statutory time limits which will apply in many cases: where the CMA does not trial remedies, it must accept final undertakings or make a final order within six months of the date of publication of the market investigation report.[135] However, if the CMA has determined that it should undertake a trial of one or more remedies, there is not a set timeframe in which it is required to complete the trialling process, as it is dependent on the specific circumstances of each case. The CMA will, nevertheless, set an appropriate deadline upfront for clarity.[136] And, the CMA is required to begin an implementation trial either: (i) within six months from the publication of the final report (extendable by four months) where the trial immediately follows a market investigation; or (ii) within six months of the decision to vary a remedy due to it being ineffective.[137] In relevant cases, the administrative timetable will set out anticipated timeframes for the trialling process and final implementation of the remedy.

5.20 The action the CMA takes in implementing remedies must be consistent with the decisions in the final report unless there has been a material change of circumstances since the preparation of the report or the CMA has a special reason for acting differently.[138] This also applies to elements which are subject to implementation trials, ie decisions concerning implementation trial measures must be consistent with the decisions included in the final report, unless there has been a material change of circumstances since the preparation of the report, or the CMA otherwise has a special reason for deciding differently. The CMA would not expect a finding of a trial not having

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[134] See section 161C(4) of the EA02, Schedule 8 DMCCA24 and Schedule 9 DMCCA24.

[135] 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.

[136] See paragraphs 5.34 to 5.42 for further detail on the relevant part of the trialling process.

[137] See sections 138A, 161A to 161E, 162A and 162B of the EA02, as amended and / or inserted by Schedule 8 DMCCA24 and Schedule 9 DMCCA24. See further details on the powers to vary remedies in CMA11.

[138] See section 138 of the EA02, as amended or applied by Schedule 8 DMCCA24 and Schedule 9 DMCCA24. To illustrate a case where this point was relevant, following the Court of Appeal's judgment on 13 October 2010 to reinstate the CC's findings on the BAA airports investigation (March 2009), the CC invited representations from all interested parties as to whether there had been any developments since the publication of the CC's report which constituted a material change of circumstances or a special reason within the scope of section 138(3) of the EA02, to the extent that it should amend the remedy package set out in the report, for example the timing of proposed airport divestitures. In its decision of July 2011, the CC found that while the change in government policy on building new runway capacity in south-east England represented a significant change of circumstances, it did not remove the scope for, and the need for, competition between airports in south-east England as claimed by BAA. Consequently, the CC did not change its decision on the appropriate remedy.

the anticipated impact to constitute a material change of circumstances. However, were the CMA to find that a remedy was ineffective following the trial, it may: (i) trial a new version of the remedy; or (iii) reconsider remedies it did not select to begin with.[139]

5.21 Once Final Undertakings have been accepted or an order to implement remedies has been imposed, an Inquiry Group will normally be disbanded.[140] Responsibility for overseeing any further implementation activity that falls to the CMA, such as the implementation of any divestiture remedy, is the responsibility of the CMA Board. The CMA Board may delegate such responsibilities to the Executive, to a Steering Group, or to a Group specifically appointed to oversee further implementation activity, which may include some or all members of the original Inquiry Group). The governance arrangements for such follow-up activity is determined in light of factors such as the type of remedy to be implemented, the availability and expertise of CMA staff and Panel members and the extent to which implementation is expected to be resource- and/or time-intensive. The CMA is also normally responsible for monitoring and enforcement of behavioural remedies[141] following acceptance of undertakings or the imposition of an order by the CMA. Compliance with undertakings or an order is enforceable in the courts.[142]

5.22 To ensure appropriate CMA oversight and governance of complex remedies in market investigations, the CMA will set out clearly the governance and processes applicable from the point of handover from the Inquiry Group to the CMA Board and Executive, including the oversight of any ongoing development or monitoring of remedies following the final report and any order or undertakings.[143]

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[139] See section 138 of the EA02, and section 138 Schedule 9 DMCCA24.
[140] If all remedies are being implemented by means of recommendations to other bodies, the Inquiry Group originally appointed is normally disbanded at an earlier stage - following publication of the final report.
[141] Section 162 of the EA02, and amendments made to the EA02 by section 138 and Schedule 8 DMCCA24.
[142] If a person fails to comply with any undertakings that it has given or any order imposed on it by the CMA, compliance may be enforced by means of civil proceedings brought by the CMA (under section 167 of the EA02). In addition to enforcement by the CMA, any person affected by the contravention of undertakings or an order who has sustained resulting loss or damage may also bring an action against the relevant party.
[143] While Inquiry Groups act independently of the CMA Board in taking decisions in market investigations, this does not prevent the Board from giving information to an Inquiry Group, nor the Inquiry Group from giving information to the Board. See paragraph 49 of Schedule 4 of to the Enterprise and Regulatory Reform Act 2013. See also section 162 of the EA02 and section 139 DMCCA24.

Trialling of remedies

Introduction

5.23 As noted in paragraph 5.18 above, the EA02 as amended by the DMCCA24 provides for the CMA to conduct trials of certain remedies prior to settling a final remedy package.[144]

5.24 The relevant provisions give the CMA with the power to trial remedies relating (i) to the provision of information to consumers, whether directly or through an intermediary (ie information-based remedies), or (ii) to any other matter as specified by the Secretary of State.[145] As such, in the period between the CMA publishing its final report and the reference being finally determined (by final undertakings being accepted or a final order made), the CMA may choose to trial remedies.[146]

5.25 A trial in this context means any activity or function to implement a remedy on a trial basis to assist in establishing whether the measures being considered would be effective at remedying, mitigating or preventing: (i) the relevant AEC;[147] and (ii) any detrimental effect resulting, or expected to result, from that AEC.

5.26 Here, we set out a summary of:

(a) the purpose and timeframe for implementation trials;

(b) the trialling process; and

(c) other procedural considerations.

The purpose of implementation trials

5.27 The purpose of implementation trials is to allow the CMA to trial a remedy or package of remedies prior to its final implementation (either through the acceptance of undertakings or the imposition of an order). This allows the CMA to refine potential remedies to increase the likelihood of their effectiveness. The purpose is not to reopen the question of whether a

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[144] See sections 161A to 161E and 162B of the EA02, as amended by section 138 and Schedule 9 DMCCA24.
[145] See section 161C of the EA02, section 138 of the DMCCA24 and Schedule 9 of the DMCCA24.
[146] Where the CMA chooses to trial remedies, the time period for the implementation of remedies is extended to the date the CMA specifies as being when the trial comes to an end and, correspondingly, when the remedy is adopted. See section 161 of the EA02 and Schedule 9 of the DMCCA24.
[147] Trials begin by the CMA accepting undertakings from appropriate parties, or making an order, relating to trials of remedies for an AEC. The relevant AEC is that to which the undertakings or order relates.

remedy should be implemented (ie they are not an opportunity to review the finding of the AEC or detrimental effects identified), but to ensure that the final designs of specific remedies are effective.

5.28 Implementation trials can be used in market investigations but not market studies. They are only used, unless and until the Secretary of State makes orders to broaden their scope, to trial information remedies (see paragraphs 4.75 to 4.88 for more detail on information remedies).

5.29 When the CMA will utilise implementation trials is case dependent, but it is more likely that they will be used in scenarios in which:

(a) The information to be presented to consumers has been determined, but there are a number of different formats that may be used to do so, and the CMA wishes to determine which is likely to be most effective. For example, the remedy may require the presentation of a price list with key categories determined by the CMA, but it may be that it is important to test the structuring of that information to get the best response from customers.

(b) There are a number of different channels that may be used to convey information, and a trial may help determine which is the most effective.

(c) There is a level of complexity associated with the information to be presented and a greater risk of the implementation of the remedy not achieving its intended purpose.

5.30 An implementation trial is begun by the CMA when it accepts an undertaking or makes an order relating to the implementation trial. The undertaking or order will be clear that it is for the purposes of assessing the likely effectiveness of the qualifying remedial action.

5.31 There is no prescribed limit on how long an implementation trial may last, as each will need to be designed according to the needs of the particular market(s). However, the CMA will seek to ensure that an information trial is completed in a reasonable timeframe, and will specify the timing in its trial notices – further relevant details of the trialling process are at paragraphs 5.34 to 5.42 below.

5.32 While an implementation trial period is underway, the CMA may accept undertakings or make orders such that part of a remedies package is implemented prior to the completion of the trialling process. This provides the CMA with flexibility to design implementation trials according to the needs of the market.

5.33 One option, for example, is for the CMA to impose an interim remedy (eg one that does not require trialling) in relation to one section of the market, while other remedies are trialled with other cohorts, allowing the CMA to start taking action in some areas while it finalises the remedy in others.[148] The provisions also mean that, where AECs are linked such that it is not reasonably practicable to determine a final remedy package while the implementation trial is ongoing, an interim remedy may be put in place in relation to a related adverse effect on competition pending the outcome of the trial.

The trialling process

5.34 The CMA considers that there will be no 'one-size-fits-all' approach to trialling remedies. As such, the specific process will be dependent on the particular circumstances of the case, and the remedy being tested.

5.35 The success of an implementation trial (and the implementation of remedies more broadly) will be dependent on the clear identification of:

(a) the AEC and/or any detrimental effects that the remedy is anticipated to mitigate or resolve;

(b) how the remedy is expected to resolve the AEC (or one or more of the features comprising the AEC) and/or any detrimental effects; and

(c) how the effectiveness of the remedy will be assessed.

5.36 In determining the success of the implementation trial, the CMA will have regard to these three factors qualitatively. There is, however, no requirement for the CMA to have regard to the need to ensure that trialled remedies are as comprehensive as is reasonably practicable, given the nature of an implementation trial.

The provisional implementation trial notice

5.37 Prior to undertaking an implementation trial, the CMA will publish a notice which sets out and consults on the details of the implementation measure (ie the undertaking or order) that it is minded to accept or impose.[149] This is known as a provisional implementation trial notice (provisional trial notice).

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[148] The purpose of an interim remedy is to allow the CMA to begin the remedies process for those remedies that do not require trialling prior to the completion of the implementation trial. This has no impact on the AEC decision, nor the overall remedies package decision.

[149] See section 161D(1) of the EA02 and Schedule 9 DMCCA24.

5.38 Within the provisional trial notice, the CMA will specify the relevant adverse effect that each measure is intended to address. It will also include any other facts that it considers justify the imposition of the measure, as well as how it intends to assess the effects of the measure and the last day on which it intends for the measure to have effect. The parties which will be impacted by the measure will have at least 15 days to make representations to the CMA on the points set out within the provisional notice.[150]

5.39 Following consultation on the provisional trial notice and any further discussions and meetings with parties that the CMA considers necessary, if the CMA considers it appropriate to begin an implementation trial, then it will publish the final implementation trial notice (the final trial notice).

The final implementation trial notice

5.40 The final trial notice must include the implementation trial measures the CMA intends to impose and, in relation to each such measure, how it intends to assess the effect of the measure, and the last day on which the measure is to have effect.[151] [152]

5.41 Since trials are likely to be undertaken in circumstances where it is not clear what the most effective approach to the remedy is, there is no statutory time limit set in relation to the trial period itself. However, to ensure that a trial cannot continue indefinitely, the final notice must specify the last day on which each implementation trial measure is to have effect. This acts as a long-stop on the implementation trial and is the date by which final action must be taken by the CMA. On this basis, the period specified in the final trial notice will take account of the time needed to allow the remedy to take effect, for the remedy's effectiveness to be assessed, and for any consultation to take place about the final measure to be imposed, taking into account the conclusions of the trial.

5.42 The key factors affecting the expected length of an implementation trial will include the complexity of the remedy, the market in which it is being trialled and the method of assessment used.[153] While the length of this period will

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[150] See section 161D(2) and (3) of the EA02 and Schedule 9 DMCCA24.

[151] See Sections 161D(5) and 161E of the EA02 and Schedule 9 DMCCA24.

[152] In addition, the EA02 (as amended by the DMCCA24) requires that the CMA, before accepting an undertaking for the purpose of an implementation trial, provides the person who is expected to comply with it with information about the possible consequences of failing to do so. On this basis, it is expected that the CMA will set out the consequences of failure to comply within its Provisional and Final Notices to ensure clarity.

[153] For example, methods such as an AB test may require less time to collect an outcome measure and result in being able to analyse data earlier than might be the case in, for example, using surveys or interviews. Other

depend on the circumstances of the case, in less complex cases the CMA would expect to complete an implementation trial within 3 to 9 months of the date of the final trial notice for non-complex cases.

Interim measures

5.43 In some circumstances, the CMA may also implement interim measures. 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 the final action in relation to the investigation.[154] 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.[155]

5.44 The CMA can also take steps to require parties to reverse any action that has already occurred before any interim measures have been put in place.[156] 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.

Undertakings and orders

5.45 The CMA's decision whether to implement remedies by means of accepting undertakings or making an order is determined on a case-by-case basis. Often, the CMA will make its decision based on practical issues such as by considering the number of parties concerned, and their willingness to negotiate and agree undertakings. Another consideration is the scope of the CMA's order-making powers and whether the remedy it is considering falls within those powers.

5.46 The content of any orders made by the CMA is limited by the EA02 as amended by the DMCCA24.[157] In contrast, the subject matter of an undertaking is not similarly limited.[158] This, and the process involved in agreeing undertakings, can help the CMA and the parties, in terms of

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factors such as the need for a firm to create new metrics could further increase the length of time taken to complete a trial.

[154] 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).

[155] Sections 157 and 158 of the EA02.

[156] Sections 157(2B) and 158(2B) of the EA02.

[157] See Schedule 8 of EA02.

[158] Section 164(1) of the EA02.

flexibility and suitability, in implementing remedies. However, because market investigations are likely to be market-wide rather than focused on the conduct of one firm, it may be more practical to implement remedies by order rather than through undertakings, so as to avoid the likely delay and complexity of negotiating undertakings with several parties.[159] In regulated sectors, if the CMA decides to modify licence conditions to give effect to, or take account of, any provision of a proposed remedy, it will make an order.[160]

5.47 Generally, undertakings will be accepted following the publication of the final report, and in the case of trialling of remedies, after the completion of the implementation trial. However, the EA02 as amended by the DMCCA24 provides for the CMA to accept voluntary commitments at any stage of a market review,[161] a market study[162] or market investigation[163] and allows the CMA to accept undertakings that tackle some but not all of the issues in scope, to narrow the issues which require further investigation.[164] The effect is such that certain concerns may be remedied sooner than others, for example where one remedy can be implemented via an undertaking prior to another remedy being trialled and later implemented via a different undertaking. The decision whether to do so will be case dependent and the CMA will give due consideration to issues such as the complexity and interlinkages of remedies. A more detailed discussion of the process surrounding the acceptance of undertakings and the making of orders is set out in the Markets Procedural Guidance.

5.48 When accepting an undertaking or issuing an order, the CMA should seek to explain how the remedy or remedies package seeks to resolve the concerns identified, as well as an explanation of how the CMA would intend to assess whether the remedy has been effective. In line with the final report, the

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[159] For example, in Home Credit and PPI, the remedies applied to a large number of parties and this was a reason or implementing these measures by means of an order. By contrast, in Classified Directories, the remedies applied to only one party and undertakings were preferred. In other cases (eg Groceries, Rolling Stock Leasing market (ROSCOs)), some measures were implemented by means of an order, while others were implemented through undertakings.

[160] The CMA has the power to make such changes by Order through the amendments made to sector specific legislation by Part 1 of Schedule 9 to the EA02.

[161] Provided that the CMA considers that it has the power to make a market investigation reference and intends to do so – section 154A of the EA02, as inserted by section 137 and Schedule 8 DMCCA24.

[162] Where a market study notice has been published but no market investigation reference made - section 154A of the EA02, as inserted by section 137 and Schedule 8 DMCCA24.

[163] Where a market investigation reference has been made but no final report published - section 154A of the EA02, as inserted by section 137 and Schedule 8 DMCCA24

[164] Section 137 and Schedule 8 DMCCA24 amends Part 4 of the EA02, through the introduction of a new section 154A of the EA02, which allows the CMA to accept undertakings in lieu at any stage of a market review or market study either partially or fully in lieu of a reference.

undertakings or order will set out a process for review of the remedy / remedies package at key stages to assess whether the remedy continues to operate effectively. The CMA's approach to monitoring, variation and enforcement of remedies is set out in further detail in CMA11.