

Consultation on proposed changes to the CMA's markets regime guidance – Response of Ashurst LLP

8 October 2025

Introduction

1. We welcome the opportunity to respond to the Competition and Markets Authority's (**CMA**) consultation on the proposed updates to its markets regime guidance (**Draft Revised Guidance**). This response contains our own views, based on our experience advising and representing clients, and is not made on behalf of any of our clients.
2. We confirm that nothing in this response is confidential. We also confirm that we would be happy to be contacted by the CMA in relation to our response.

Question 1: Overall, are the changes proposed in the draft Markets Regime Guidance sufficiently clear and useful?

3. The Draft Revised Guidance provides a helpful consolidation of the CMA's existing guidelines for market studies and market investigations. We note that a number of the CMA's existing guidance documents (which the Draft Revised Guidance is expected to replace) have not been updated for many years, and in some cases still refer to the Office of Fair Trading and the Competition Commission.
4. We also note that the Draft Revised Guidance contains substantive changes to the CMA's procedure for market studies and market investigations, including the incorporation of the '4Ps' framework within its markets work. Engaging with the CMA's markets regime involves significant business resource and can have substantial cost implications for businesses in circumstances in which there is no allegation of anti-competitive conduct by individual firms. In light of this, "proportionality" should be a key consideration when preparing the final version of the guidance, in which respect we have identified several aspects of the guidance that would benefit from additional clarity (addressed in our response to question 2 below).

Question 2: What, if any, aspects of the draft Markets Regime Guidance do you consider need further clarification or explanation, and why? In responding, please specify which Chapter and section (and, where appropriate, the issue) each of your comments relate to.

Market Reviews

5. The Draft Revised Guidance explains how the CMA intends to conduct "market reviews" through the exercise of its powers under section 5 of the Enterprise Act 2002 (the **Act**). We welcome the provision of guidance in connection with the exercise of the powers set out in section 5 of the Act when used in the context of the CMA's markets function.
6. However, we consider that stakeholders would benefit from greater clarity in the guidance as to how the CMA intends to use these powers in the future, including by distinguishing the use of "market reviews" from other general reviews or policy "projects" that the CMA may undertake when using its powers under section 5 of the Act. For example, we note that the CMA has recently exercised its general review function to undertake reviews of the groceries, road fuel and veterinary services sectors (which, in each case, were followed by a statutory market study or a market investigation). We understand that this type of work would likely be carried out under the "market review" tool in future. In contrast, we understand that the CMA's ongoing study into dynamic pricing and the recent study examining AI foundation models, each of which relied on section 5 of the Act, would not appear to be "market reviews" within the meaning of the Draft Revised Guidance.
7. Further explanation should be provided in the final guidance to explain clearly how the use of the "market reviews" tool will sit alongside other wider uses of the section 5 review powers.
8. We also have concerns that formalising the use of market reviews in the Draft Revised Guidance as a third markets "tool" (i.e. as distinct from market studies and market investigations) may create additional and unnecessary complexity and administrative burden from the perspective of businesses, in particular as businesses do not benefit from the same statutory protections in connection with a market review as are provided for in a market study.
9. The CMA's approach to markets work document, published on 24 July 2025, noted that the CMA would make "*careful selection of the appropriate markets tool*" including by "*adopting the lightest-touch, faster tool that we think can effectively address the particular issues leading us to look at a market (i.e. market review over market study, market study over market investigation)*".¹ Whilst we welcome the commitment to adopt the most efficient tool, this should not come at the

¹ [The CMA's approach to markets work](#), 24 July 2025, paragraph 4.8.

potential expense of the safeguards available to stakeholders. We note, in particular, that

- (a) if the CMA considers that a faster tool is required, it is unclear why this could not be achieved through a market study. Although the CMA anticipates that a market study will usually take between 9 and 12 months (and the Act specifies a statutory maximum period of 12 months), we are not aware of any statutory limitations that would prevent the CMA from using its market study powers to conduct more targeted and focused market studies within a shorter timeframe;
- (b) market reviews do not benefit from the statutory protections provided by the Act in relation to market studies, such as statutory time limits (which provides businesses with a definitive "*end point*"), the requirement for the CMA to publish formal notices establishing the scope of the review, and the duty to consult with relevant stakeholders before deciding whether to make a reference. The Draft Revised Guidance should make it clear that market reviews will not be used as an alternative to market studies in order to circumvent the formal requirements prescribed in the Act in relation to market studies;
- (c) it is at least possible that a market review may be followed by a market study and subsequently by a market investigation (or indeed a review may lead to other potentially lengthy enforcement action). As there is no statutory time limit for concluding a market review, we consider that the guidance should provide greater clarity over the likely timing of a review in these circumstances, to avoid a scenario in which the already lengthy markets process ends up being extended further;
- (d) market reviews may provide an appropriate tool when deciding, within an exceptionally short time period (e.g. within a matter of weeks), whether the CMA should open a market study or a market investigation, or to take enforcement action under the competition or consumer functions. An example of the use of these powers is the CMA's "*swift high level review*" into the fuel retail market, which was published on 8 July 2022, following a request by the then Secretary of State for Business, Energy and Industrial Strategy, Kwasi Kwarteng on 12 June 2022 (i.e. the review was completed within four weeks). In contrast, market reviews that run for several months (or even up to one year) may raise questions as to whether it would have been more appropriate to launch a formal market study at the outset. In this respect, we note that the Draft Revised Guidance explains that the CMA only "*generally expects*" market reviews to be shorter in duration than a market study;

- (e) the Draft Revised Guidance would also benefit from explicit assurances that the CMA does not intend to use its general review function to regularly open reviews within the same sector (which otherwise creates the risk that some sectors are kept under a permanent state of review) or to artificially extend the statutory period for undertaking a market study or market investigation (e.g. by requesting large volumes of information, on a voluntary basis, prior to launching a formal market study or investigation). Both of these outcomes would have a negative impact on pace, proportionality and process;
- (f) the Draft Revised Guidance should clarify that the CMA's commitment to providing more regular updates to parties will also apply during a market review; and
- (g) the Draft Revised Guidance notes that the CMA will publish a Project Roadmap on launch of a market review, setting out the proposed timeframe and key stages. The Roadmap, or similar launch publications, should also include other information similar to that provided in a market study notice, in particular relating to the potential scope and areas of focus of the review.

Experts

- 10. The Draft Revised Guidance states that the CMA will incorporate input from sector experts when undertaking market reviews, market studies and market investigations, as the CMA considers appropriate.²
- 11. We agree that, in some markets, the use of an advisory panel drawn from sector experts could contribute to the CMA's objective of using its markets powers with "pace", and we generally support this proposal.
- 12. However, we would request that the CMA clarify in the Draft Revised Guidance the selection process for, and anticipated responsibilities of, sector experts. In particular, we would welcome additional detail within the Draft Revised Guidance that clarifies:
 - (a) how the CMA expects the advisory panel process to work in practice;
 - (b) how the CMA will ensure parties under review have the opportunity to put forward experts and the criteria that the CMA intends to apply when evaluating and appointing experts;

² Draft Revised Guidance, paragraphs 5.5, 6.11 (b), 6.12, 6.15, 8.25.

- (c) how the CMA intends to balance between the use of independent experts and experts drawn from the relevant parties under review; and
- (d) whether the parties under review will have any opportunity to comment on the CMA's appointment of experts generally (e.g. experts nominated by other parties).

Early engagement with the case team

- 13. We welcome the CMA's commitment to providing the parties with enhanced and earlier engagement, including by providing more regular updates on the CMA's work and progress. In the context of a market investigation, we welcome the proposal to publish an interim report setting out the CMA's provisional decision on AECs at an earlier stage in the process in order to enable meaningful engagement.
- 14. We understand from the CMA's consultation document that, as a consequence of these changes, the CMA intends to only publish working papers on an exceptional basis in market studies and investigations.³ However, there appears to be no statement to this effect contained in the Draft Revised Guidance, which does not include any reference to potential working papers. As we understand that the CMA will be revoking its previous guidance (which set out its approach to the publication of working papers), the Draft Revised Guidance should reflect the CMA's proposed approach to the use of working papers as set out in the consultation document (i.e. that working papers may be published, albeit on an exceptional basis).
- 15. We also note that, as a consequence of working papers no longer being published outside of exceptional cases, other than the formal interim report the relevant parties will be largely dependant on updates provided by the CMA following internal state of play meetings. The Draft Revised Guidance specifies that "*the form of this update will be determined on a case-by-case basis but could be in the form of a short written update by email, an external state of play meeting and/or a published progress report*".⁴ In the absence of working papers, it is unlikely that a short email would contain sufficient information about the status and direction of a market study or investigation to enable the main interested parties to begin preparing their response to the CMA's interim report. Although we understand that it may not always be practicable to hold external state of play meetings with all interested parties in a market study or investigation, we would welcome confirmation that the CMA will typically hold external state of play meetings with

³ Market Reviews, Studies, Investigations and the monitoring and review of market remedies, Updated guidance on the CMA's approach, Consultation document, paragraph 2.12.

⁴ Draft Revised Guidance, paragraphs 6.18 and 8.35.

the main interested parties that are most likely to be impacted by the potential outcome of a market study or investigation.

End-to-end timeline efficiencies

16. We are generally supportive of the CMA's commitment to reducing the overall end-to-end length of markets work. However, it is important to ensure that any accelerated timescales should not be at the expense of the parties' ability to respond to the CMA's interim report or requests for information; the CMA's duty of expedition (and pace) should not undermine the CMA's public law duty to ensure a fair consultation process.

Role of Senior Responsible Officers in market investigations

17. The Draft Revised Guidance introduces the use of an SRO in the CMA's markets work. In the context of market studies, the Draft Revised Guidance notes that the SRO will be "*accountable for the markets project and for taking key decisions during the project (other than those reserved for the CMA Board)*".⁵ However, we note that the Draft Revised Guidance does not explain the role of the SRO in the context of a market investigation and in particular how the SRO will interact with the CMA Panel members, who have statutory responsibilities relating to the conduct of market investigations. In addition, the Draft Revised Guidance is unclear as to whether the SRO in the context of a market investigation will be a different individual from the individual that held the role of SRO during the market study.
18. We would therefore welcome additional guidance within the Draft Revised Guidance to clarify the role of and selection process for the SRO in the context of market investigations.

Remedy reviews

19. We welcome the CMA's commitment in the Draft Revised Guidance to the use of sunset clauses as a default when designing remedies and to providing reasons where a remedy is not subject to a sunset clause. In practice, proving a change of circumstances is an onerous burden that can require a significant investment of resources by both businesses and the CMA. The use of sunset clauses is therefore a more proportionate approach. However, we would welcome additional guidance on the factors that the CMA will consider when determining what is an appropriate long-stop date for remedies.
20. The Draft Revised Guidance provides that the CMA can review and make changes to remedies where (i) the CMA considers there has been a change of circumstances, (ii) the CMA considers the remedy is no longer effective, (iii) after

⁵ Draft Revised Guidance, footnote 86.

10 years, if the remedy is not subject to a sunset clause or (iv) where the parties demonstrate a change of circumstances.⁶ We consider, however, that the Draft Revised Guidance could provide greater clarity as to how frequently the CMA will initiate reviews of ongoing undertakings and orders, and the factors that the CMA may consider when assessing remedies.

21. Where the CMA is reviewing (or considering a request by the parties to review) remedies because there is evidence that the remedies are either ineffective or no longer required (i.e. because the remedies have resulted in changes to the market meaning that the AEC no longer exists), the CMA should conduct a cost/benefit analysis and consider the proportionality of continuing the remedy in light of the original AEC (and the extent to which this has already been remedied). This analysis should include consideration of the cost incurred by the parties to date and the projected costs of implementing the remedy given any changes in the market. For example, the projected cost of continuing the remedy (including the cost to the business of reporting compliance with the remedy and the resource required at the CMA) may not be proportionate to the residual AEC.
22. We would welcome provision in the Draft Revised Guidance for the CMA to proactively review and undertake cost-benefit analyses in connection with remedies to ensure that they remain fit for purpose.
23. From a prioritisation perspective, it would be appropriate for decisions relating to whether to extend remedies (e.g. following the expiry of a sunset provision) which apply to parties in a regulated sector to be taken by the relevant sectoral regulator.

Remedy trials

24. We welcome the provision of guidance on the use of remedy trials in the Draft Revised Guidance. We further welcome the CMA's commitment to ensuring that *"trials are used appropriately and are not prolonged"*.⁷
25. We note that the use of such trials may improve outcomes where they prevent the implementation of ineffective remedies. However, remedy trials should not be used as a means to unduly prolong the end-to-end timeline of the investigation. It is unlikely that *"pace"* will be achieved in circumstances where, the CMA takes several months to draft the provisional implementation trial notice and subsequently, the design of the remedy is left undetermined pending the outcome of a remedies trial, which could last another 12 months.

⁶ Draft Revised Guidance, paragraphs 9.40 and 9.44.

⁷ Draft Revised Guidance, Appendix 6: Trials, paragraph 3.

Question 3: Do you agree with the proposal to update and consolidate the relevant guidance?

26. We welcome the consolidation of the markets guidance into a single piece of guidance. We also welcome the guidance being updated to reflect the CMA's current practices which will provide parties with more accurate guidance.

Ashurst LLP

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