Competition and Markets Authority Consultation

Revised draft markets regime guidance

Response of Herbert Smith Freehills Kramer LLP

Introduction

Herbert Smith Freehills Kramer LLP welcomes the opportunity to respond to the CMA's consultation of 20 August 2025 on the *Revised draft markets regime guidance (CMA3CON)*. The comments set out below are those of Herbert Smith Freehills Kramer LLP and do not represent the views of any individual client.

We support the CMA's efforts to consolidate and modernise its approach to market reviews, market studies, market investigations, and the monitoring and review of remedies. We particularly welcome the incorporation of the "4Ps" framework – pace, predictability, proportionality, and process – throughout the revised guidance, and the CMA's responsiveness to stakeholder feedback received during its 2024 consultation.

Drawing on our experience in advising clients across regulated and unregulated sectors, we set out below our comments on the consultation questions, with reference to the draft guidance and consultation document.

1. **Question 1. Are the changes proposed in the draft Markets Regime Guidance sufficiently clear and useful?**

1.1 We consider that the revised guidance represents a significant and positive development in the CMA's approach to markets work. The consolidation of multiple predecessor documents into a single, comprehensive source enhances accessibility and consistency for stakeholders.

1.2 We welcome the formal recognition of *market reviews* as a distinct tool (Section 5). Its positioning as a less intrusive diagnostic mechanism is a constructive development. However, we are concerned that, without appropriate safeguards, market reviews risk lacking the rigour, transparency, and procedural discipline of statutory tools such as market studies.

1.2.1 In particular, we urge the CMA to commit to setting reasonably short and clearly defined timeframes in its guidance and Project Roadmaps. The absence of statutory deadlines and formal checks and balances risks allowing market reviews to evolve in scope and duration without sufficient oversight. This can lead to significant resource burdens for participants, reputational risks, and market uncertainty. The recent trajectory of the 'cost of living' market review, which

began in May 2023 and ultimately transformed into consumer protection reviews extending to November 2024, illustrates the potential for scope creep and lack of clarity around process. We are also concerned that, despite the CMA's lack of formal information gathering powers in this context, businesses may nonetheless be subject to considerable pressure to engage, respond to requests for information, and attend meetings, often without a clear understanding of the purpose, expected outcomes, or how the information provided may be used. This dynamic risks undermining the voluntary nature of participation and may deter constructive engagement.

1.2.2 Given that the remedial powers available to the CMA following a market review are, in practice, equivalent to those following a market study, we consider it essential that the same level of procedural rigour and transparency be applied, within the statutory framework. We therefore recommend that market reviews be used in a targeted and proportionate manner, with clear guidance on scope, process, and timelines. To further enhance predictability and accountability, we suggest that the CMA provide regular public updates on progress and preliminary findings, and ensure that participants are given a clear steer on how their input will be used.

1.3 The introduction of *Project Roadmaps* (paragraphs 5.5, 6.11, 8.25) is a positive step. These should be clear, accessible, and adhered to as far as practicable. We recommend that affected parties be given meaningful opportunities to provide input into feasibility and proposed approaches, particularly in complex or resource-intensive investigations.

1.4 We support the CMA's intention to draw on external *sector expertise* (paragraphs 5.5, 6.11, 6.15, 8.25). This is particularly important in fast-evolving or highly technical sectors. However, further clarity is needed on the process for identifying and appointing experts, the weight their views will carry, and how affected parties can engage with the CMA on this point to mitigate potential risks of bias or conflicts of interest.

1.5 The formalisation of internal *state of play meetings* (paragraphs 6.16–6.19, 8.33–8.37) is welcome. These meetings should be used to refine lines of inquiry and improve engagement. In order to allow affected parties to meaningfully engage with the CMA's thinking rather than simply receive updates, we would urge the CMA to, save in exceptional circumstances, offer an external state of play meeting or a call to the affected parties, followed up by an email and/or progress report in addition.

1.6 We support the CMA's commitment to *enhanced and earlier engagement with parties* (paragraphs 6.11, 6.14, 8.25, 8.30), including webinars, teach-ins, and progress reports. The move away from routine working papers and annotated issues statements is sensible and should reduce unnecessary burdens. These changes have potential to improve

transparency and streamline engagement, provided the CMA ensures that parties continue to receive sufficient visibility into its thinking, for example through interim reports containing a well-developed provisional assessment, and are given appropriate opportunities to actively engage and comment. Where working papers are used on an exceptional basis, in the interest of certainty and consistency for affected parties, we would welcome clearer and transparent reasoning for their use, and a commitment to provide advance notice of the CMA's intention to make use of these in a given case.

1.7 The guidance's emphasis on *timeline efficiencies* and narrowing of issues through earlier tools (paragraphs 5.5–5.9, 5.24, 6.6–6.22, 8.20–8.53) is aligned with the 4Ps framework. We encourage the CMA to adhere to published timelines and minimise delays, particularly where investigations impact investment decisions. The CMA's stated aim of using market reviews and studies to focus on the key issues of any subsequent market investigation is a constructive development.

1.8 We welcome the expanded *remedies* framework, including:

1.8.1 *Undertakings in lieu* (paragraphs 5.22–5.23, 7.12–7.20, 8.14–8.19): The shift in tone and introduction of partial UILs is a welcome development. However, further clarity is needed on how partial UILs would operate in practice, including the level of certainty they offer to affected parties once accepted by the CMA. In particular, it would be helpful to understand the incentives for affected parties to give partial UILs and how they would function in market reviews involving multiple stakeholders. The CMA's commitment to early engagement on UILs and its recognition of their potential benefits is a marked improvement from previous guidance. If implemented effectively, these should lead to more streamlined markets work and greater certainty for parties.

1.8.2 *Sunset clauses* (paragraph 8.72): The adoption of a default position to include sunset clauses in CMA orders improves legal certainty and reduces regulatory burden. This shift from a case-by-case approach to a default inclusion is welcome.

1.8.3 *Trials* (Appendix 6): The power to trial information remedies should be exercised proportionately and with care. We support the CMA's intention to use this mechanism in a targeted and effective manner, avoiding unnecessary burdens on businesses. This can be best achieved by engaging constructively with affected parties from the outset. We would welcome a clear commitment from the CMA to keep trials as short as possible and to actively seek feedback from stakeholders on their usefulness, associated risks, and overall necessity. Such an approach may help prevent unintended consequences, such as protracted discussions

regarding remedies or third parties reopening issues that should have been resolved during the CMA's process.

1.9 The CMA's commitment to proportionate *monitoring and compliance* (paragraphs 9.8–9.15) is welcome. Legal obligations should be calibrated to the severity of the remedy, and unnecessary duplication with other regulatory regimes should be avoided.

1.10 We also support the provisions on *remedy reviews* (paragraphs 9.34–9.39) and the introduction of 'strategic reviews' (paragraphs 9.33, 9.76). These mechanisms should be evidence-based and proportionate, with clear criteria for initiating reviews. We welcome the CMA's examples of ineffective remedies and encourage a targeted approach to further investigations in this context. We also urge the CMA to engage actively with affected parties and to conduct remedy reviews in a timely and structured manner. Reviews should not be allowed to drift without a clear timetable, as seen in historic cases such as the 'Yellow Pages Ads' remedy, which remained in place long after the market had moved on – ultimately constraining the business's ability to adapt and evolve.

2. **Question 2. What, if any, aspects of the draft Markets Regime Guidance require further clarification or explanation?**

2.1 We welcome the CMA's efforts to provide a comprehensive framework for its markets regime. However, we consider that certain aspects of the draft guidance would benefit from further clarification to ensure transparency and predictability for stakeholders.

2.2 *Prioritisation of Market Reviews* (paragraph 5.5): In addition to publishing a Project Roadmap at the launch of a market review, it would be helpful if the CMA could indicate how it prioritises future market reviews as well as envisaged timelines and scope of those reviews. This could include outlining sectoral focus areas or criteria for selection, while recognising that some reviews may arise from unforeseen developments or intelligence gathering.

2.3 *Sector Expertise* (paragraphs 5.5, 6.11, 8.25): Further detail is needed on how the CMA proposes to identify and appoint sector experts, and the weight their views will carry at different stages of the investigation. We recommend that affected parties be consulted on the proposed approach to avoid potential bias or conflicts of interest and to ensure that expert input is balanced and representative.

2.4 *Implementation of Trials* (Appendix 6): We recommend that the CMA provide additional guidance on the criteria for selecting remedies for trial, the process for concluding trials, the implications of trial outcomes for final remedies and the framework for engagement with affected parties. This would enhance legal certainty and ensure proportionality.

2.5 *Strategic Reviews* (paragraph 9.33): The scope and triggers for strategic reviews require further clarification, including how they differ from substantive reviews and how they

interact with sunset clauses. Clear criteria for initiating strategic reviews would improve predictability and stakeholder engagement. We would also urge the CMA to commit to timeline and transparency over substantive reviews, to ensure that they are run efficiently and without unnecessary burden for businesses.

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

3.1 Yes, we support the CMA's proposal to consolidate six predecessor documents into a single guidance document. This is a welcome and practical improvement that enhances legal certainty, reduces fragmentation, and supports consistent interpretation.

Herbert Smith Freehills Kramer LLP

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