Draft new guidance for the markets regime in the Enterprise Act 2002

Linklaters' Response

6 October 2025

1 Introduction

(1) Linklaters is pleased to respond to the Competition and Markets Authority's ("**CMA**") consultation on the draft Markets regime guidance (the "**Draft Guidance**") and we welcome the CMA's commitment to integrating its 4Ps approach into its markets practice. The markets regime is an important part of the CMA's toolkit and includes processes ranging from informal market reviews with no remedial or even mandatory information gathering powers, to market investigations in which the CMA has virtually unlimited power to intervene in markets and even break up businesses, even absent any finding of illegal behaviour. This means the opening of *any* markets process begins a period of significant uncertainty for the sector under scrutiny and markets processes, especially market investigations, impose significant burdens on market participants.

(2) Given that markets processes can come in many shapes and sizes, integration of the 4Ps approach, in our view, demands first and foremost active and early scoping of issues and potential interventions. This should enable the CMA to narrow the focus of its inquiry and critically, to announce publicly and promptly when more interventionist options are taken "off the table". Such transparency will in turn enable a proportionate approach to be taken to information gathering. In many cases, this will reduce burdens on both businesses and the CMA. However, it is also important to recognise that where a market investigation contemplates significant interventions, an in-depth evidence-based process with appropriate "rights of defence" for the potentially affected businesses is not only proportionate, but critical, even where that process is burdensome for the CMA and the relevant parties.

(3) The Draft Guidance rightly recognises that one size will not fit all in markets processes. This response is focused on highlighting where we believe further clarity or explanation would be helpful. We have covered **Questions 1** and **2** of the CMA's consultation together in **Section 2** (covering the changes referred to in the consultation document) and **Section 3** (covering other changes that have been made in the Draft Guidance). Our response to **Question 3** is set out in **Section 4** below.

2 Comments on the Changes Proposed in the Draft Guidance and Mentioned in the Consultation Document

2.1 Project Roadmaps

(4) We welcome the CMA's proposal to publish a Project Roadmap on launch of a market review, study or investigation that will be tailored, taking into account the scope and complexity of the case. The inclusion of proposed timeframes, key stages and whether the CMA intends to gather input through sector expertise should increase transparency in how the review will be run and will provide businesses with an ability to plan ahead to reduce the burdens associated with a markets case. We would suggest that the main interested parties have the opportunity to comment on the Project Roadmap prior to publication.

(5) It is right that the Project Roadmap will set out the opportunities for parties to engage with the CMA during the process. One key challenge in markets processes is that intense periods of information gathering and engagement are often followed by long periods of silence / non-

engagement, often followed by publication of voluminous documents. While we appreciate a markets process necessarily involves distinct phases, we would encourage the CMA to ensure that opportunities for testing emerging thinking with the main parties continues through the "assessment" phase.

(6) In turn, it will be important that the CMA sticks to its proposed Roadmap. Businesses participating in the CMA's markets work plan around the CMA's published timetables and around indications given by case teams on timing, setting aside executive and senior management time to allow for full engagement in CMA processes and in some cases planning announcements or business developments with the timetable in mind (this issue is particularly acute for listed companies). In recent market investigations, both the statutory timeframe and individual milestones on the CMA's administrative timetable have been pushed out, often at short notice. This reduces predictability and has presented significant challenges for the parties to the investigation which can limit parties' ability to engage fully with CMA, which in turn damages business confidence in the process.

2.2 Sector Expertise

(7) The CMA's proposal to leverage external sector expertise in markets projects has the potential to be positive if used appropriately and transparently. We believe incorporating sector expertise could assist in narrowing the scope of the investigation swiftly and that it could be particularly helpful in designing workable and proportionate remedies. However, this must not come at the expense of due process.

(8) We note that the CMA is already using sector experts in the Vets Market Investigation, as well as convening a sector panel in the Civil Engineering Market Study. Thus far, it has not been clear to the main parties to those investigations how experts' input has been gathered, evaluated and incorporated into the CMA's analysis. Transparency on these issues is crucial. Critically, main parties to an investigation must have the opportunity to understand the input provided by any sector experts and comment on (and if relevant, challenge) it. We would welcome further clarification on this in the final guidance.

2.3 Internal State of Play Meetings

(9) Planned internal state of play meetings towards the end of the evidence gathering phase of a markets case should be followed by a meaningful update to parties and we support the CMA's commitment to this via email, progress report or external state of play meeting. Whichever format is used, the update should be as detailed as possible to allow the parties to fully understand the CMA's evolving thinking. This is important both to reduce burdens on the main parties, but also because main parties may be in a position to provide the CMA with useful further evidence proactively and/or to further engage in a way that supports the CMA's inquiry.

2.4 Enhanced and Earlier Engagement with Parties

(10) The proposals to facilitate enhanced and earlier engagement with affected parties are welcome. In particular, we support formalising the process of holding a 'teach-in' session at the outset of a market study and/or investigation, updating parties after internal state of play meetings and providing regular updates through informal calls or progress reports. However, our experience in recent investigations with regular update calls has been mixed and in some cases they have become purely administrative without meaningful updates on the substance of the case. To be valuable, these touchpoints must involve meaningful and substantive engagement, including input and questions from the parties and feedback from the CMA.

2.4.1 Removal of Working Papers

(11) While we recognise the desire to streamline the process, we have significant concerns regarding the proposal to only publish working papers in market investigations on an "exceptions-only" basis.

(12) To ensure robust outcomes, the main parties affected by the CMA's markets process should be afforded multiple opportunities to test the CMA's analysis throughout the process. The benefits of working papers are that the parties receive in writing a detailed insight into the CMA's current evidence and emerging assessment of a specific issue at an intermediate stage, which gives parties an opportunity to engage in detail on the data and evidence and respond to these issues *before* the CMA reaches a public provisional landing on the AEC question.

(13) Although the proposed enhanced engagement measures should enhance transparency about the CMA's emerging thinking, these are unlikely to provide adequate detail to allow thorough analysis and where necessary challenge to the CMA's evidence base. We are concerned that parties will, therefore, lose the opportunity to engage in a meaningful way in detail on the evidence before the CMA publicly commits to its emerging thinking in an interim report, and this will in turn compromise the robustness of the provisional conclusions reached by the CMA.

(14) We note the suggestion at paragraph 8.36 that, in some cases, key elements of the analysis could be disclosed before the interim report. We encourage the CMA to set out in more detail when and how such a process would work. While "one size" may not fit all cases, the more interventionist the remedies under consideration, the more critical it is that the CMA disclose its analysis so its robustness can be challenged and accordingly enhanced. While this need not necessarily be in public working papers, this critical stage should not be cut out of the process.

2.5 Intention to Reduce Length of Markets Work

(15) We welcome the CMA's proposals to improve end-to-end timelines in its markets work. One of the major concerns with markets work has been the length of these inquiries, which can cast a shadow on an industry for many years. The use of bespoke timings for each project, a more streamlined approach to the 'put back' process and the use of market review/study time to narrow issues for a market investigation should create a more efficient and less burdensome process for all parties involved in markets work.

(16) However, given the broad range of markets processes where potential consequences for the main parties range from no commercial impact to serious intervention and even break-up of businesses, it is important that the process and timeline scale accordingly. Where the CMA is seriously considering the most interventionist measures it can take with its market investigation tools, it is critical that drive for expedience does not compromise due process for the main parties, or (relatedly) the robustness of the analysis.

2.6 Remedies

2.6.1 Undertakings in Lieu of Reference ("UILs")

(17) The use of UILs can advance the '4Ps', including by enabling an outcome in a shorter timeframe than would be possible under a market investigation (pace), minimising the burden on businesses associated with long-running markets work (proportionality) and facilitating increased engagement from businesses in respect of remedies (predictability and

process). The increased clarity on when undertakings will be accepted in lieu of a market investigation reference, either fully or partially, is generally helpful, but could be even clearer about how the CMA will weigh the significant public and private cost of a market investigation reference and consider the prospect of whether a putatively "better" remedy outcome is sufficiently better to justify such a process.

2.6.2 Sunset Clauses

In relation to the CMA's proposal that, by default, remedies will have sunset clauses, we note that the proposal is subject to an exception in circumstances where the CMA "*judges that there is a good reason for the remedy to remain in place (which it would explain in the particular case)*". We would recommend making clear that this exception will only be exercised (with sufficient explanation) in limited cases where a sunset clause is not considered appropriate at all, rather than introducing the possibility of removing or extending sunset clauses prior to their expiry, which would defeat the object of such clauses.

2.6.3 Trials of Information Remedies

(18) We support the commitment to ensuring trials are efficient, proportionate and delivered in the shortest timeframe appropriate and to consider the costs to parties of the proposed trial. We agree that early discussion (i.e. prior to the final report) with the affected firms about their willingness and ability to conduct a trial is important to provide transparency and efficiency in the process.

(19) However, we have some concerns about whether the remedy trialling process will improve the speed of delivering effective and proportionate information remedies as well as reduce overall uncertainty and burden for affected parties and consumers. In particular, the default approach of running concurrent trials where there is more than one variant being tested has the potential to impose considerable burdens on the affected parties, which may not always outweigh the anticipated reduction in overall timelines. Further, we note that trialling remedies runs a real risk of prolonging the material uncertainty faced by businesses participating in a market under review as regards the range of proposed / potential remedies. Therefore, the CMA must take particular care to ensure that the uncertainty impact of such trials does not outweigh the benefits of those trials should they be successful.

(20) In addition, the Draft Guidance does not adequately explain what happens if the trial is not successful. It is noted that the CMA has the power to conduct another trial within six months in these circumstances, albeit this is expected to only be exercised in exceptional cases,[1] but it does not cover what happens after a second unsuccessful trial, or if another trial is not appropriate. It would be helpful to have clarity on what the steps are in this scenario, in particular whether there would be another consultation opportunity at this point, whether the CMA's assessment of the remedy would need to be re-opened and the impact on overall timeframes in this scenario. Without any such clarity, this will exacerbate the risks associated with the prolonged uncertainty on businesses as regards the potential for wide-ranging remedies being imposed on them.

2.7 Remedy Reviews

(21) The CMA's proposed commitment to retain only remedies that remain appropriate, and that where this is not the case, acting swiftly to review and amend or remove the remedy concerned, in line with its statutory duties, is a welcome change.

[1] Draft Guidance, footnote 191.

(22) We note that paragraph 3.13 of the current CMA11 states that the CMA will "*inform relevant parties as soon as practicable of its intention to commence a remedies review*" and provide them with specific information prior to announcing its decision to commence a review. The Draft Guidance removes this requirement, stating at paragraph 9.55 that the "*CMA will publish its decision to launch a review*", without providing for relevant parties to be informed prior to such announcement.

(23) Providing parties with information throughout the review process, including at the commencement, is an important part of ensuring procedural fairness. Directly contacting parties in advance is also important from a practical standpoint, as it ensures parties can start gathering the business resources required to respond to the CMA's questions, thereby facilitating an efficient and effective review process, as well as allowing parties to prepare any necessary communications in anticipation of the CMA's publication. To this end, we suggest that the requirement to inform relevant parties as soon as practicable be re-instated in the Draft Guidance.

(24) Finally, we would urge the CMA to use the power to conduct remedies reviews carefully. Use of the power to recalibrate remedies where they are no longer effective or proportionate would generally be welcomed by businesses. However, there is a risk remedy reviews (or the threat of them) prolong uncertainty as to the wide range of potential remedies that market participants may face beyond that which is faced currently. It is important that, at the conclusion of a markets review, study, or investigation, market participants have a clear view of what the CMA's intervention will look like, and over what time period and that *additional* burdens on business are reserved for truly exceptional cases of change of circumstance – and commitment to this should be reflected in the Guidance.

(25) We would also urge the CMA to consider, as part of this wider exercise, how existing remedies can be efficiently reviewed, including the possible introduction of sunset clauses to pre-existing remedies that would reduce the burden of individual remedy reviews.

3 Other Comments on the Draft Guidance

(26) In this section we include our comments on changes made to the Draft Guidance but not expressly covered in the current consultation document which we consider need further clarification, explanation or changes. These comments repeat some of the concerns we raised in our response to the CMA's November 2024 consultation on the markets regime guidance documents which have not been addressed or implemented in the updated Draft Guidance subject to the current consultation.

3.1 Commitment to Proportionality in Information Gathering

(27) In our experience, market investigations and market studies can necessitate a large number of detailed requests for information ("**RFIs**"), including those with tight timeframes for response. While this is understandable, given the importance of such investigations and the depth of information required to make an informed assessment of the market, the need to gather information must be balanced against the principle of proportionality and should have regard to the burdens imposed on the affected businesses. This is especially important where those businesses are not at a scale to have large in-house legal or regulatory teams available to respond to such RFIs.

(28) While we welcome the statements in the Draft Guidance that the CMA will "*undertake reasonable evidence gathering, targeting its focus as appropriate*" (paragraph 4.73) and "*in all cases exercise its statutory information gathering powers in a proportionate manner*"

(paragraph 6.13), we consider that the CMA should go further in its commitment to proportionality in information gathering, for example, by:

(i) acknowledging the need for a context and firm-specific balancing exercise when seeking information from parties; and

(ii) ensuring there is ongoing communication between the CMA and parties to ensure that responding to RFIs is feasible and proportionate for the parties.

3.2 Treatment of Buyer Power

(29) The relevance of buyer power in the Draft Guidance has significantly changed from the existing guidance, with buyer power now being treated as a structural feature of a market only in "limited instances", whereas it was previously treated as a structural feature alongside market concentration, high entry barriers, and government policy and regulation.[2] The Draft Guidance explains the reason for this different treatment of buyer power at footnotes 65 and 126, stating that "*while buyer power generally helps markets work well (as it represents the other side of the coin to suppliers' market power), there may be certain circumstances in which it raises concerns*." The footnote then references the Groceries market investigation, and the exercise of buyer power in the context of joint buying groups.

(30) In other areas, the references to buyer power have been removed. For example, in setting out the factors that might benefit competition and outweigh harm as the AEC test, the guidance now excludes countervailing buyer power.[3] Countervailing buyer power has also been removed from the factors the CMA will consider when assessing the external sustainability of coordination.[4]

(31) The potential exclusion of countervailing buyer power from the analytical framework is concerning for several reasons, namely:

(i) Removal of buyer power from the list of factors the CMA considers (at paragraphs 4.44(c) and 4.45 and the section on "Countervailing factors" at paragraphs 4.54 – 4.63(c)) is inconsistent with including buyer power as a structural feature (even in limited instances) at paragraph 8.6(a) and conflicts with the acknowledgement at footnote 126 that buyer power "*generally helps markets work well*".

(ii) Even if there are instances where buyer power could give rise to concerns (for example, in rare situations involving joint purchasing[5]), there may also be many instances where buyer power helps markets work well – in both cases it would be sensible to consider the impact of that buyer power on the functioning of competition in a particular market.

(iii) Such an approach would be inconsistent with the CMA's competitive assessment using its other powers, such as in antitrust proceedings (where market power is

[2] See Draft Guidance, paragraph 8.6(a). Reference to buyer power in this scenario is currently included in CC3, at paragraph 157 – 161.

[3] See Draft Guidance, paragraphs 4.54 – 4.63(c). Reference to countervailing buyer power in this scenario is currently included at CC3, paragraph 176.

[4] See Draft Guidance, paragraphs 4.44(c) and 4.45. Reference to countervailing buyer power in this scenario is currently included at CC3, paragraph 255.

[5] The Horizontal Guidance (CMA184) at paragraph 6.27 now expressly links the existence of buying power on the purchasing market to the ability to cause harm to consumers in the downstream market, which the previous horizontal guidance did not. The envisaged harm upstream includes the possibility that the joint purchasing by a buying group with market power may dampen incentives of the affected suppliers to invest and innovate and the possibility of forcing suppliers without countervailing seller power to reduce the range or quality of their products.

assessed by taking into account the existence of customer's countervailing buyer power[6]) or in a mergers context (where buyer power is viewed as a countervailing factor which might go some way to constraining market power).[7]

(32) We therefore suggest that the Draft Guidance be amended to:

(i) Remove "limited instances" from describing when buyer power will be treated as a structural feature at paragraph 8.6(a); and

(ii) Retain reference to buyer power in the section on "Countervailing factors" at paragraphs 4.54 – 4.63(c) of the Draft Guidance.

3.3 Testing of Evidence

(33) Paragraph 4.74 of the Draft Guidance states that where the CMA has "persuasive evidence" on a particular proposition there may be "*little additional value in gathering further evidence on the same point and the CMA often will not do so*".

(34) This proposed approach to testing evidence in our view increases the risk of confirmation bias in that it would essentially see the CMA ceasing to gather information on a point once it is 'persuaded' the information gathered so far points in a particular direction. Such an approach threatens the robustness of the CMA's conclusions and risks the CMA taking decisions that would not survive scrutiny against the CMA's statutory duty to conclude on the statutory questions on the basis of all the available evidence assessed in the round.[8]

(35) We recommend that the CMA reconsider this proposed approach to ensure that it has a sufficiently large pool of evidence against which to evaluate and test evidence obtained at an early stage of a market study or market investigation, which will best protect against confirmation bias.

3.4 Factors Taken into Account When Considering AEC

(36) Paragraph 4.50 of the Draft Guidance sets out a list of factors the CMA will "*typically take into account*" when considering whether a practice arising from a cross-market relationship has an adverse effect on competition. While these largely appear to be based on similar guidance, such as the CMA's Guidance on Vertical Agreements (Vertical Guidance)[9] and CC3,[10] there are several factors which are notably missing, such as, for example, the nature of the product.

(37) At paragraph 4.50(a), the CMA has identified "*an assessment of market power*" as an "*important part of considering the overall impact of cross-market relationships*." We understand that this assessment of market power would take into account both the market position of the parties and their customers. We would recommend that this be stated explicitly to avoid any confusion and to bring this guidance in line with the CMA's Vertical Guidance.

(38) Given that nature of the product, the market position of the parties and the market position of customers are factors that would normally be considered when assessing effects on competition, we assume any omission here was an oversight. To remedy this, and to avoid

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6 Horizontal Guidance (CMA184) at paragraph 7.21.

7 Merger Assessment Guidelines (CMA192) at paragraph 4.20.

8 See Draft Guidance at paragraph 4.80.

9 See Vertical Guidance (CMA166) at paragraph 10.17.

10 See CC3 at paragraph 277.

any confusion, we suggest that the CMA clarify that the list at paragraph 4.50 is not exhaustive, or to include the missing factors to ensure alignment with the CMA's Vertical Guidance.

3.5 Relevant Customer Benefits (RCBs)

(39) Currently, where possible benefits qualify as RCBs, the CMA is required to consider whether its proposed remedies preserve those RCBs.[11] Paragraph 8.99 and paragraph 14 of Appendix 4 of the Draft Guidance proposes changing this to an optional consideration, with the wording "the CMA expects to" instead of "will consider". In our view, considering whether remedies preserve RCBs is a crucial part of determining the appropriate and economically beneficial remedial action in markets cases, and the original wording of "will consider" should be retained.

(40) In addition, paragraph 9 of Appendix 4 of the Draft Guidance gives examples of some entry barriers that might indirectly secure other kinds of benefits. While helpful, this proposed drafting omits the example, included in the existing CC3 guidance, of regulations that protect intellectual property rights that may lead to improvements in innovation by enabling companies to benefit from the new ideas that they generate.[12] We consider this is still be a valid and helpful example and therefore suggest that the example is retained in the Draft Guidance.

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

(41) We agree with the proposal to update and consolidate the relevant guidance into one document. The updates are clearly necessary to implement both new legislative changes as well as to reflect the CMA's new approach. Providing a consolidated guidance document should improve certainty and accessibility for parties and practitioners as it avoids the need consult the many different existing guidance documents that relate to the CMA's markets work and provides an easier and more digestible reference point.

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[11] See CC3 at paragraph 367, which states "will consider".

[12] CC3 at paragraph 364.