

Markets regime

Guidance

[CMA3]

**Guidance on CMA market reviews,
market studies, market investigations
and the monitoring and review of
market remedies**

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Contents

	<i>Page</i>
1. Preface	3
2. Introduction	4
3. Overview of the markets regime	6
4. Our approach to examining markets	10
5. Market reviews	41
6. Market studies	45
7. Market investigation references	52
8. Market investigations	61
9. Monitoring and review of market remedies	93
Appendix 1: Secretary of State intervention notice procedure	113
Appendix 2: Defining markets	115
Appendix 3: Measurement of profitability	118
Appendix 4: Relevant Customer Benefits (RCBs)	123
Appendix 5: Types of Remedies	127
Appendix 6: Trials	162

1. Preface

- 1.1 The Competition and Markets Authority (the CMA) will promote competition and protect consumers with a clear end goal - to drive economic growth and improve household prosperity.
- 1.2 As part of this, the CMA has a general review function under which it can undertake market reviews, as well as statutory powers to undertake market studies and investigations, which together are commonly referred to as the CMA's "markets function" or the "markets regime".¹
- 1.3 This guidance should also be read in conjunction with the following other relevant guidance:
 - (a) [Administrative Penalties: Statement of Policy on the CMA's Approach \(CMA4\)](#)
 - (b) [Transparency and Disclosure: Statement of the CMA's Policy and Approach \(CMA6\)](#)
 - (c) [Super-complaints: Guidance for designated consumer bodies \(OFT514\)](#)
 - (d) [Super-complaint concurrent duties: Terms of reference of the Concurrence Working Party \(OFT548\)](#)
 - (e) [Suggested best practice for submissions of technical economic analysis from parties \(CC2com3\)](#)
 - (f) [Chairman's guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders \(CC7\) \(revised\)](#).

¹ The CMA operates a separate digital markets competition regime. The [Digital Markets Competition Regime Guidance \(CMA194\)](#) sets out how the CMA will approach its functions under the digital markets competition regime established by Part 1 of the Digital Markets, Competition and Consumers Act 2024. The CMA explains in that guidance that only an undertaking designated as having 'strategic market status' in respect of a digital activity will be within the scope of the regime.

2. Introduction

Purpose and scope

- 2.1 This guidance forms part of the advice and information published by the CMA under section 171 of the Enterprise Act 2002 (the EA02).² It supersedes previous guidance documents and has been updated to reflect the CMA's experience of operating the markets regime, judgments of the Competition Appeal Tribunal (CAT) and changes to the law made by the Digital Markets, Competition and Consumers Act 2024 (DMCCA24).³
- 2.2 This guidance:
- (a) Provides general information and advice regarding how the CMA operates the markets regime to a wide range of groups: governments, regulators, consumer groups, companies and their advisers;
 - (b) Includes within its scope the substantive and procedural approach to examining markets and designing remedies across market reviews, market studies and market investigations. It additionally includes the monitoring and review of remedies imposed further to a market investigation. Excluded from the scope of this guidance are issues of policy, that is case selection, that can be affected by the CMA's prioritisation criteria in force at the relevant time.
- 2.3 The CMA will have regard to this guidance when exercising its powers under the markets regime.⁴ Where possible, to provide greater predictability, it indicates approaches the CMA is likely to take. The CMA will apply this guidance flexibly with the aim of delivering a tailored and proportionate approach, appropriate to the circumstances of each particular case.
- 2.4 This guidance reflects the position of the CMA as at February 2026 and may be revised from time to time to reflect changes in best practice and/or legislation.

² As amended by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) and the Digital Markets, Competition and Consumers Act 2024.

³ This guidance supersedes OFT 511, OFT 519, CC3, CMA3, CMA11, and CMA136 and applies to market reviews, market studies and market investigations that commence after the date of its publication. It also applies to the monitoring and review of markets remedies as at the date of its publication. The CMA will continue to have regard to the otherwise superseded guidance in market reviews, market studies and market investigations already underway at that date.

⁴ The CMA may depart from the approach described in this guidance where there is an appropriate and reasonable justification for doing so.

Structure

2.5 This document is structured as follows:

- (a) Chapter 3: Overview of the markets regime;
- (b) Chapter 4: Our approach to examining markets;
- (c) Chapter 5: Market reviews;
- (d) Chapter 6: Market studies;
- (e) Chapter 7: Market investigation references;
- (f) Chapter 8: Market investigations;
- (g) Chapter 9: Monitoring and review of market remedies.

3. Overview of the markets regime

The CMA's role

- 3.1 The markets regime complements the CMA's enforcement and non-enforcement work and occupies the interface between competition and consumer protection policy. The markets regime comprises a flexible set of tools that enables the CMA to assess markets holistically to see if they are delivering good outcomes for consumers and businesses, and if not, the best way of remedying them.
- 3.2 There are three markets tools available to the CMA that vary in their formality, timeframes and potential outcomes: market reviews, market studies, and market investigations. The features of the three tools reflect the scale of the possible remedies; for example, market investigations require a more detailed assessment and rigorous process in light of the possibility for direct intervention by the CMA.
- 3.3 The CMA will select the tool that is most effective and proportionate to consider and, if appropriate, address the preliminary concerns it has identified. The CMA can use these tools independently of one another; for example, provided the statutory thresholds are met, it can launch a market investigation without a preceding market review or market study.⁵

Table 1: Overview of markets tools

	Market review	Market study	Market investigation
Objective / legal test	Diagnose possible competition or consumer concerns	Assess if there is an adverse effect on consumers	Assess if there is an adverse effect on competition
Depth of assessment	Shorter, high-level assessment of market; no mandatory information gathering powers – evidence gathered voluntarily	Detailed assessment of market; statutory information gathering powers; statutory consultation requirement on any proposed market investigation reference	Rigorous assessment of market; statutory information gathering powers; statutory consultation requirements
Possible outcomes	Advice to government and/or business; recommendations;	Advice to government and/or business; recommendations;	CMA-imposed remedies (orders); undertakings; recommendations

⁵ For example, the CMA's market investigation into [mobile radio network services](#) was opened without a preceding market study.

	undertakings; market investigation reference	undertakings; market investigation reference	
Statutory timeframe	No statutory maximum timeframe	Statutory maximum of 12 months	Statutory maximum of 18 months, extendable by up to 6 months Remedies implementation period (if relevant): maximum of 6 months, extendable by up to 4 months (subject to the timetable of any possible remedies trial (see Chapter 8 and Appendix 6))

The role of advocacy in our markets work

- 3.4 The CMA has a statutory function to provide advice and make proposals to Ministers and public authorities on matters relating to any of its functions.⁶ This ‘advocacy’ function sits alongside its markets tools and is generally used to support the UK Government and devolved administrations to design and implement policy that harnesses the benefits of competition and promotes the interests of consumers.
- 3.5 Advocacy can be used as an alternative to the CMA’s markets tools: for example, where it is clear that a change to law or policy could improve outcomes for consumers and businesses, the CMA may advise government, informally or formally, to this effect.⁷ Such informal or formal advice may also be the most effective way to assist government where it requests analysis or input from the CMA on competition and consumer issues, including those arising from law or policy. Advocacy can also be used following the completion of markets work, to support government in implementing advice or recommendations that are put forward as remedies.
- 3.6 The CMA will consider on a case-by-case basis whether to use advocacy as an alternative to its markets tools, taking into account its prioritisation principles. For markets projects that result in recommendations to government, the CMA will generally offer advocacy support to government,

⁶ Section 7 of the EA02.

⁷ See, for example, [CMA response to airport slot allocation system reform consultation](#).

reflecting the critical importance to the overall impact of its markets work of such recommendations being accepted and implemented.

Sector regulators

- 3.7 The CMA shares certain powers related to markets work with sector regulators. Sector regulators may, in the respective sectors for which they have responsibility, undertake market studies, and make market investigation references that are binding on the CMA.⁸
- 3.8 Together, the CMA and sector regulators operate under a system of concurrency, which ensures that the markets toolkit can be applied effectively, without duplication or inconsistency and by the regulator who is best placed to carry out markets work in the circumstances.

Secretary of State

Public interest interventions

- 3.9 The Secretary of State has the power to intervene in certain markets cases which raise defined public interest issues. There are two types of public interest reference that could be made by the Secretary of State giving a public interest intervention notice to the CMA:
- (a) a full public interest reference, where the Secretary of State requests the CMA to investigate the defined public interest issues alongside the competition issues; and
 - (b) a restricted public interest reference, where the Secretary of State retains the ability to consider the defined public interest issues themselves whilst requesting the CMA to investigate the competition issues.⁹

⁸ These are the Civil Aviation Authority (CAA), the Financial Conduct Authority (FCA), Northern Ireland Authority for Utility Regulation (NIAUR), the Office of Communications (Ofcom), the Office of Rail and Road (ORR), the Gas and Electricity Markets Authority (Ofgem), the Water Services Regulation Authority (Ofwat), and the Payment Systems Regulator (PSR). (Further information on the concurrency regime is contained in [Regulated Industries: Guidance on concurrent application of competition law to regulated industries \(CMA10\)](#).)

⁹ See sections 139 to 141A of the EA02.

3.10 The interest of national security is currently the only specified public interest consideration in relation to the markets regime. The Secretary of State may by order introduce new public interest considerations.¹⁰

3.11 The procedure related to intervention notices is set out at Appendix 1.

Other ministerial powers

3.12 The Secretary of State is also able to modify by order certain provisions of the EA02, for example, the time limits that apply to market studies, market investigations and the remedies implementation period.¹¹

3.13 Ministers also have a reserve power to make references where they are 'not satisfied' with a CMA decision not to make a reference, where the CMA has published a market study notice but the period for the preparation and publication by the CMA of a market study report has expired, or where, having brought information to the attention of the CMA which the minister considers to be relevant to the question of whether the CMA should make a reference, the minister is not satisfied that the CMA will decide whether to publish a market study notice in such period that the minister considers is reasonable.¹²

¹⁰ Section 153 of the EA02.

¹¹ Sections 131C, 137 and 138 of the EA02.

¹² Under section 132 of the EA02. In addition, under Part 5 Section 63 of the Scotland Act 2016, the Scottish Ministers also have the power to make such references acting jointly with the Secretary of State, or the Secretary of State and one or more than one other Minister of the Crown.

4. Our approach to examining markets

- 4.1 This section sets out the CMA's approach to:
- (a) Diagnosing possible concerns in a market; and
 - (b) Evidence gathering and assessment.

Diagnosing possible concerns

The role of competition in how markets function

- 4.2 When markets are working well, firms are able to innovate, invest, improve productivity and grow. Markets that work well should drive better outcomes for businesses, their customers and ultimately consumers, as well as fostering economic growth, as firms respond to competitive pressure by striving for efficiency and directing their resources to customers' priorities.
- 4.3 In particular:
- (a) When markets work well, firms can compete to win business through offering better value for money for their products and services (for example by cutting prices or improving quality or variety), and by developing new products and services in response to customer demand.¹³
 - (b) 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. There may also be benefits from expansion by efficient firms and the entry into the market of new firms with innovative products, processes and business models, and the exit of less successful ones.
 - (c) Customers can stimulate rivalry between suppliers by making informed decisions which reward those firms that best satisfy their needs or preferences.
- 4.4 Given the importance of the competitive process for how markets function, when considering whether a market is working well and delivering good

¹³ In some instances firms compete for a market, rather than in a market, for example, by competing to be the first to claim a patent in a key area, the first to achieve scale in a new market, or to win a public procurement contract or franchise to supply a public service.

outcomes, a key focus will often be whether competition is working effectively and, as a result, driving better outcomes for customers in markets and, ultimately, for consumers.

- 4.5 The CMA's consideration of whether a market is working well may also take into account how consumers interact with the market and government policy and regulation.

Our approach

- 4.6 The CMA's approach to diagnosing concerns will be tailored to the circumstances of the case. For example, a complex case where the CMA anticipates use of its remedy powers will typically involve a more rigorous assessment and evidence gathering, whereas a case where an outcome is needed at pace (eg to shape the development of nascent markets) may take an approach focused on select key issues with targeted and proportionate evidence gathering to support that assessment.

- 4.7 In general, however, the CMA's assessment will consider some or all of the following factors in forming its view of how the market is working:

- (a) **Key characteristics of the market and the nature of competition.** Understanding how competition operates in practice in a market is important as it allows the CMA to apply the appropriate framework to its analysis and collect the relevant evidence.
- (b) **Market outcomes.** Understanding the outcomes being produced in a market (such as levels of prices, profit and quality) can help the CMA to understand whether or not the market is functioning well.
- (c) **Exploring areas of concern.** This involves understanding the potential sources of competitive harm the CMA observes, and countervailing factors that may remove or mitigate the competitive harm.
- (d) **Market definition.** The CMA's assessment will also consider the relevant goods and services which should be included within its analysis, although the CMA does not have to provide a precise or detailed definition of the relevant market or markets it is considering. More detail on the CMA's approach to market definition is at Appendix 2.

- 4.8 As part of its assessment, the CMA may gather and analyse a wide range of evidence, and we set out at the end of the section some of the considerations which will inform the CMA's approach.

4.9 The remainder of this section considers each of the factors in paragraph 4.7 in turn.

Key characteristics of the market and nature of competition

4.10 Understanding how competition takes place in practice in a market is important as it allows the CMA to apply the appropriate framework to its analysis and gather the relevant evidence to carry out its assessment. In doing this, the CMA is likely to consider both how the market currently operates and the likely development of the market in the future.

4.11 Examples of factors which the CMA will typically consider include:

- (a) how products are purchased: negotiations, tenders, list prices, framework agreements;
- (b) what the main parameters of competition are: price, quantity, quality, brand and reputation, convenience, innovation;
- (c) how these parameters are flexed: per individual customer, customer category, channel, nationally, globally;
- (d) how pricing works at a high level: per unit, fixed fees, subscriptions;
- (e) firms' business models: how products are supplied, links to the firms' broader activities (eg complements, ecosystems, two-sided platforms, secondary products) and monetisation strategies;
- (f) customer behaviour and decision-making processes: what customers want, what they know about the products available, their purchasing journey, whether they demonstrate certain behaviours such as inertia, lock-in, multi-homing, preference for bundles, etc;
- (g) regulation and government policy: how regulation shapes the nature and type of products or services which can be provided, what requirements are placed on firms seeking to operate in the market, whether and how different branches of government get involved in supply or procurement of products or services, etc;
- (h) the appropriate time and investment horizons: frequency of purchases and switching, length of contracts and procurement, foreseeability of future developments;
- (i) the history of the market and any significant changes that are anticipated in the market in the foreseeable future;

- (j) possible network effects¹⁴ (as where these are important, larger platforms are more likely to have market power as they will be a more attractive option for users when compared to smaller platforms with less significant network effects); and
- (k) whether parties compete at the local, regional, national or international level. The CMA will typically conduct its competitive assessment at the aggregate level where firms mainly compete by improving aspects of their offer in a uniform way or where the local variation in the competitive offering is not driven by differences in competitive conditions (but rather, for example, by differences in local demand), or where the competition concerns under investigation apply across local markets.¹⁵ Where firms mainly compete by flexing aspects of their competitive offering that are tailored for the specific competitive conditions within each local area, the CMA's assessment is more likely to focus on competition at this narrower level. The CMA will typically only carry out an assessment at both the local and the aggregate level where important aspects of competition take place at each level.

Market outcomes

- 4.12 Outcomes in a market can provide evidence about how that market is functioning. Evaluating these outcomes helps the CMA assess the areas of concern it is considering and the extent to which customers may be being harmed,¹⁶ ie the degree and nature of 'customer detriment'.
- 4.13 Prices, profits and concentration are among the more observable and measurable outcomes. An analysis of these may be useful in assessing customer detriment.¹⁷ However, even if other non-price outcomes, such as quality and innovation, are less quantifiable they may be no less important to

¹⁴ Direct network effects arise where the value of the product for customers on one side of the platform depends on the volume of users on the same side of the platform. Indirect network effects arise where the value of the product for customers on one side of the platform depends on the volume of users on the other side of the platform.

¹⁵ In some cases or in relation to certain issues, while there may be aspects of local competition, it may not be necessary to engage in a detailed assessment of local competition where the competition concerns under consideration apply across those local markets. This was the case in the [Funerals market investigation](#) where the CMA stated that 'Our analysis of potential distortions in competition is not focused on individual local markets, but rather on market structure or behaviour that potentially distorts competition between funeral directors across many, or all, local markets.' See paragraph 8.13 of the [Funerals market investigation final report](#).

¹⁶ See paragraph 4.13 onwards.

¹⁷ Outcomes in terms of prices and profitability may indicate that a market is not working well, but they are not features of the market giving rise to any AEC or other concern in themselves.

customers. In addition, there may be linkages between outcomes and therefore the CMA will not normally consider them in isolation.

- (a) **Prices:** In markets subject to effective competition, prices are likely to respond to changing supply and demand conditions and firms will seek to win business by improving their prices and other aspects of their offer. The CMA may analyse pricing data in different ways, ranging from simple comparisons to more sophisticated methods involving econometric analysis. There may be several factors affecting prices and the CMA will take this into account when considering what inferences can be made from its analysis of prices. In particular, the CMA will consider any pricing analysis alongside other evidence as appropriate. For example, when observing a trend of increasing prices the CMA will seek to understand the extent to which costs have increased at the same time.
- (b) **Profitability:** One approach to the question of whether prices are above competitive levels is to consider the profitability of the business activity being investigated. In principle, firms in a competitive market would not generally earn more than a 'normal' rate of profit over a sustained period – ie the minimum level of profits required to keep the factors of production in their current use in the long run.¹⁸ In its analysis, the CMA is concerned with economic profits, and these can differ in important respects from accounting profits. See Appendix 3 for more detail on our assessment.
- (c) **Non-price:** Lack of innovation,¹⁹ poor quality²⁰ or limited product ranges can be other indicators of competition in a market not being

¹⁸ The rate of return on capital employed for a particular business activity would be equal to the opportunity cost of capital for that activity. Where the business activity being investigated is only one part of the firms' activities, it will be necessary to take this into account in ensuring the profitability analysis focuses on the activities relevant to the investigation.

¹⁹ When firms face competition (either from existing competitors or the threat of entry by new competitors), the possibility of generating high profits or protecting existing profits encourages them to discover new products and processes. In contrast, firms that do not face competitive pressures may choose not to invest significantly in R&D. However, the relationship between market power and innovation is not always clear cut. Large incumbent firms, who may be more likely to have market power, may benefit from significant economies of scale in the innovative process. On the other hand, an incumbent firm with market power may have a lower incentive to innovate than a smaller competitor or new entrant because it has less to gain.

²⁰ In some cases, the CMA will take into account evidence on the experience of customers, including levels of, and changes in, customer satisfaction. However, high levels of satisfaction are not always a good indicator that a market is functioning well. This may be the case where, for example, general levels of satisfaction hide particular concerns for some customer groups or in relation to particular aspects of a service.

effective. Similarly, security and privacy may also be important in certain markets, and in particular digital markets.

Exploring areas of concern

- 4.14 In each case the CMA will apply an approach appropriate for the circumstances of the case. This may involve considering more structured ‘theories of harm’,²¹ particularly where the depth of analysis is more rigorous such as in a market investigation.
- 4.15 There are a range of possible concerns the CMA may explore, including different sources of market power, the effect of government policy and regulation, and other factors such as externalities and market design.
- 4.16 When exploring areas of concern, the CMA will typically consider what good outcomes in the relevant market could look like. This may involve applying the analytical framework of thinking about a ‘well-functioning market’.
- 4.17 This section sets out:
- (a) the CMA’s approach to the well-functioning market.
 - (b) How the CMA will consider market power, and its sources.
 - (c) Other concerns the CMA may consider as relevant: the effect of government policy and regulation and other factors as noted above.

Well-functioning market

- 4.18 The well-functioning market benchmark is not a statutory test, but rather an analytical tool. The CMA uses the term ‘a well-functioning market’ to mean one that displays the beneficial aspects of competition which make markets work well for customers and ultimately leads to the best outcome for consumers, but not an idealised, perfectly competitive market.
- 4.19 What a well-functioning market benchmark looks like in practice may differ significantly from case to case, depending on the nature of competition and different underlying market features.

²¹ The use of the term does not imply any prejudgement of a competition problem in a given market.

- 4.20 However, the indicators that the CMA will typically consider when assessing whether the market it is considering is ‘well-functioning’ may include (but are not limited to) whether:
- (a) Customers are able to make effective decisions between a range of alternatives and are able to switch between products or suppliers.
 - (b) Firms face low barriers to entry, expansion and exit and are able to be/are rewarded for operating efficiently, innovating and competing to supply the products that customers want.
 - (c) Profits earned by firms in the market reflect a ‘reasonable’ or ‘normal’²² rate of return based on the nature of competition.
 - (d) Market shares reflect the relative strengths and weaknesses of different firms’ product offerings (eg all else being equal, firms that better meet customers’ needs through a better price/quality offering are rewarded with a larger share).
 - (e) Firms flex parameters of competition in response to rivals and wider market developments (eg prices broadly track market wide costs, rivals react to each other’s prices and quality changes/innovations/product developments).
- 4.21 When describing a well-functioning market, the CMA will not seek to set out in detail the competitive conditions that would prevail in such a market. Rather, for example, in its assessment of whether there is an Adverse Effect on Competition (‘**AEC**’), the CMA will focus on whether certain feature(s) prevent in some way the effective interaction of the demand and supply sides of the market, compared to what the market may look like absent the feature(s) and/or absent the effect of the feature(s).²³ Where there are such features, the CMA will consider what effect the feature(s) have in shaping competition. The CMA may use a similar framework in market studies or reviews (for example, considering what it would expect to see in a market without competition issues in its analysis for a market study), but in less detail than for a market investigation.
- 4.22 The focus of the CMA’s analysis will depend on the specifics of the case and, in particular, the nature of the features identified. For example, certain

²² The minimum level of profits required to keep the factors of production in their current use in the long run, as described at paragraph 4.13(b). What constitutes a ‘reasonable’ or ‘normal’ rate of return will be specific to each case.

²³ Taking account of what might be expected in a well-functioning market as described in paragraph 4.18 above.

features may be intrinsic to some extent (as in the case of a natural monopoly) such that the relevant market cannot realistically be envisioned without them or there are no interventions that could directly address the feature itself. In such situations the CMA is likely to focus more on what the market may look like absent the effect of the feature rather than absent the feature itself.²⁴ In addition, where competition in a market is affected by an intrinsic feature, this is something that may influence the assessment of remedies, for example pointing towards remedies that mitigate the effect of the feature rather than addressing the cause (see section 9 on monitoring and review of markets remedies).

Market power

- 4.23 When one or more suppliers enjoy a significant degree of market power,²⁵ they are able to influence market outcomes and other important aspects of competition to increase their profits to the detriment of customers.
- 4.24 Such market power can be exerted by a single firm, or by several firms acting independently of one another in a market (this is termed ‘unilateral market power’). It can also arise as a result of several firms coordinating their conduct in the market. Such coordination can be tacit, making it difficult to distinguish from non-coordinated oligopolies.²⁶
- 4.25 The sources from which market power can arise are numerous and specific to different markets. This section considers each of the following in turn:
- (a) Inhibited customer response;
 - (b) Limited alternatives available for customers;

²⁴ For example, in a market characterised by natural monopoly, the well-functioning market may be envisioned as one where the incumbent firm acted as if the market were contestable and so set prices, quality and other parameters of competition as if it were constrained by potential competition.

²⁵ There are gradations of market power. Often many firms have limited or transitory market power and only some have a significant degree of market power, which endures over time and gives them the ability to maintain prices above, or restrict output or quality below, the level which would be observed in a competitive market, without the consequent loss of sales becoming unprofitable. In general, the CMA is concerned with more significant or enduring market power, and this is what is referred to in this guidance.

²⁶ Whilst market power can manifest itself through coordinated conduct, unilateral market power can be enjoyed by a number of firms even where they act independently, albeit aware of each other’s presence—so-called ‘non-coordinated oligopolies’. In such situations, each firm knows that it can affect market prices and hence its rivals’ profits. This awareness conditions the way in which competition occurs, although the precise way it does so will depend on the specific characteristics of the market in question. In practice, it may on occasion be difficult to assess whether a particular market outcome has been driven by tacitly coordinated conduct or is the result of a non-coordinated oligopoly.

- (c) Barriers to entry and expansion;
- (d) Coordinated conduct; and
- (e) Cross-market relationships.

Inhibited customer response

4.26 In order to understand the drivers for inhibited customer response in a market, it is important to consider the broader context in which the customer is making purchase decisions. Factors the CMA will typically consider in order to understand the broader context include:

- (a) **When and why the customer is purchasing the good or service**, eg whether customers face pressure when making a decision; whether there is time sensitivity in their purchase; how frequently customers purchase the product or service.
- (b) **Process by which customers make decisions**, eg how customers go about narrowing their options and the information they use or have available for this; at what point they are contractually or psychologically committed; how complex the decision-making process will be.
- (c) **How customers weight different factors in their decisions**, eg whether customers can access and judge salient information on price and quality; whether there are other market-specific reasons which may affect the importance placed on some product features.²⁷
- (d) **Baseline level of customers' awareness and engagement in the market**, eg what awareness customers have of the existing market choices; whether customers' choices are more passive, restricted or pre-determined (eg defaults).
- (e) **How vulnerable customers might be when making decisions**, eg whether customers have certain personal characteristics such as financial resilience, level of education and age or a context-dependent vulnerability such as bereavement or divorce.

4.27 These factors are likely to influence the way in which customers make decisions (for example, the resources they choose to use to inform choices; the importance attached to some features of the product over others). As a

²⁷ See for example the discussion of how people choose a funeral in the [Funerals market investigation final report](#).

result, they are likely to both influence and be influenced by firms in how they compete. The CMA will also consider how choice architecture – how the decisions customers make are affected by factors controlled by firms, such as the layout or ordering of choices that are available – may influence consumer responses.²⁸

4.28 To drive effective competition, customers need to be both willing and able to:

- (a) **access** information about the various offers available in the market;
- (b) **assess** these offers to identify the good or service that provides the best value for them; and
- (c) **act** on this assessment by switching to purchasing the good or service from their preferred supplier.

4.29 These three requirements are each necessary conditions for effective competition and provide a useful framework when considering theories of harm relating to inhibited customer response. However, the CMA's analysis will not necessarily be framed rigidly around each of these individual requirements. That could be because the same underlying issue may affect more than one of these requirements. It may also not be necessary to specifically identify which of these requirements is being affected if the underlying cause, and the effect it has on customer choice and outcomes, is clear.

4.30 Concerns may arise in relation to:

- (a) **Information asymmetries:** Information asymmetries between suppliers and customers might have adverse effects on competition, particularly in markets for goods or services where firms have access to more information than customers about product or service characteristics, quality, availability, and production processes, as well as data on customer behaviour and preferences. The effects of asymmetric information are generally commensurate with the degree of asymmetry: the greater the asymmetry, the greater the effect. The potential effects of asymmetric information on competition may be mitigated by other factors, which the CMA will also take into account in its analysis.²⁹

²⁸ For more detail see [Online Choice Architecture: how digital design can harm competition and consumers](#), CMA, 2022.

²⁹ Mitigating factors could include: standards and certifications, liability laws, professional regulation, warranties or guarantees.

- (b) **Barriers to accessing information:** Firms can enjoy market power if customers cannot effectively compare their products with others on offer.³⁰ Where it is difficult or costly to obtain information, customers may not search the market but simply choose a firm randomly; firms may respond by charging a high price to these customers. Firms may sometimes engage in practices that increase search costs so as to obtain market power, for example, through information overload or framing information to obscure cheaper options. Online price comparison sites and advertising might be expected to reduce search costs, although their influence may be limited in some cases.^{31,32}
- (c) **Barriers to identifying best value offers:** Even if customers are able to access several offers, their assessment of those offers may be affected by factors such as information asymmetries (as described above) or behavioural biases, among other factors. Customers may, for example: have limited cognitive bandwidth while making decisions; find it difficult to assess the value of products that involve complex estimations of risk³³ or probability; be required to make a choice when they do not fully understand the options available to them; or have vulnerabilities or lower literacy or digital skills due to personal characteristics or situations. Choice architecture practices employed by firms may exploit the biases that are common in customers' purchasing decisions, which can harm competition to the detriment of customers, such as choice overload or bundling/tying.³⁴
- (d) **Barriers to switching suppliers:** Costs of switching from one supplier or provider to another, in response to attractive offers, can act as a disincentive to do so. Factors that can lead to high switching costs can

³⁰ If, for example, one store raises its price for a commonly available good above the level of other stores, and all customers know this and switch to rivals, that store would lose all its business. In contrast, if some or all customers do not know that other stores charge lower prices and hence do not switch, the store may be able to raise its price without losing all its sales, ie the store has some degree of market power.

³¹ For example, see the considerations set out in the [Digital comparison tool market study](#).

³² It is worth noting that providing and obtaining information can have spillover benefits to others in the market. The 'positive externalities' associated with the provision of information in consumer markets affect both buyers and sellers: buyers because, for example, search by some individuals may improve the market for all customers; and sellers because, for example, advertised information that applies to more than a single brand may help sellers of competing brands or other competing products. Where these external benefits are significant relative to the private benefits enjoyed by those providing or using the information, such information may be underprovided and/or underused compared to what would be expected to make the market work well.

³³ This may, for example, be the case where they are making choices about products and services that affect the health or well-being of themselves or others, causing them to be more risk averse.

³⁴ For a more detailed list and discussion of how choice architecture in online markets can lead to harm to competition and customers see [Evidence review of online choice architecture and consumer and competition harm](#).

include contractual terms, choice architecture which increases the level of effort required to make a choice,³⁵ and the presence of network effects³⁶ or the need to make large investments in a piece of equipment or product-specific skills.³⁷

Limited alternatives available for customers

- 4.31 In many instances, the degree of market power a firm has depends on the number of alternatives to the firm's products or services that are available to customers and the extent to which they are substitutable. The market power of a firm will be strong if customers have few alternatives and/or those alternatives are not close substitutes. Alternatives include products or services available in the present (through current competition between firms active in the market) and products and services that could be available in the future through firms' entry and expansion (potential competition).³⁸
- 4.32 Generally, the most common reasons or indicators that customers have few alternatives to choose from and, as a result, one or more firms in the market have market power are:
- (a) **High market concentration:** The CMA's assessment of whether firms enjoy market power, and competitive constraints are weak, will often have regard to measures of concentration. The CMA will generally consider market concentration, if possible over several years, among the suppliers of the products or services under consideration. Concentration can be measured in different ways, and the relevance of different measures to a given assessment will depend on the specific circumstances of a case. The CMA will determine the appropriate weight that it can place on concentration measures depending on the specific facts and circumstances of each case, including how reliable an estimate can be calculated and how far firms are differentiated.³⁹

³⁵ This can include sludge (excessive or unjustified friction eg inconvenience and administrative obstacles, making it difficult for customers to get what they want or to do as they wish) or dark nudges (practices which make it easy for customers to make a choice that may not ultimately be in their best interests). For examples of dark nudge practices, see [Evidence review of online choice architecture and consumer and competition harm](#).

³⁶ See paragraph 4.11(j).

³⁷ However, such a cost may not reduce competition if customers are able to make a fully informed choice about the lifetime costs of all the alternatives at the time of the initial investment.

³⁸ Potential competition includes both future competition, which is the competition that happens among firms after entry or expansion has occurred, and dynamic competition, which is the ongoing competition that happens before entry or expansion among firms which are making efforts or investments in the present for future entry or expansion, or to protect future sales from potential competitors.

³⁹ The CMA will interpret evidence on concentration in the broader context of the nature of competition and wider evidence. For example taking into account: the extent to which shares change over time and how far this reflects

- (b) **Capacity constraints:** In markets involving relatively undifferentiated products, one or more suppliers may exercise market power by unilaterally reducing output and increasing the market price (eg by leaving capacity idle or diverting production to another market). Such a strategy is more likely to be profitable when rivals' ability to respond (eg by increasing their output) is limited by capacity constraints or the demand for rivals' products is not very responsive to changes in price. In these markets, shares of capacity will often be more informative of the extent of market power than shares of supply. In assessing the ability and incentive of a firm, or firms, to suppress output unilaterally in this way, the CMA focuses on the degree of spare capacity other firms in the market may possess, the ease with which these firms could expand existing capacity, and their commercial incentive to counteract any overall output shortfall.
- (c) **Lack of close substitutes:** In differentiated product markets, while some products can be close substitutes and compete strongly with each other, others are more distant and compete less strongly.⁴⁰ Closeness of competition⁴¹ is not limited to products or services that have similar characteristics. A firm may be a close competitor if it represents a significant competitive force or exerts a strong constraint on other firms. For example, a firm that has a particular reputation or incentive to compete aggressively or otherwise behave as a 'maverick', or that is actively disrupting the status quo using a new technology or business model, may represent a close competitor to other firms, even if their respective offerings are quite different.

Barriers to entry and expansion

4.33 Barriers to entry and expansion are specific features of the market that give incumbent firms advantages over potential competitors. They hinder the ability of potential entrants, or firms looking to expand, to constrain the exercise of market power by incumbents. Evidence of persistent high profits within an

changes in the competitive process; the extent to which the market is characterised by bidding for large contracts, which may significantly affect shares when those contracts come up for tender; and how recent or ongoing changes in the market may affect the reliability of current shares as an indicator of future market power.

⁴⁰ For example, one high-end product may compete more directly with another high-end product than with a low-end product. Similarly, to the extent there is a geographical dimension to competition, then two suppliers may compete more intensely the closer they are located to each other.

⁴¹ Closeness of competition is discussed in more detail in paragraphs 4.8 to 4.11 of the [Merger Assessment Guidelines](#).

industry or among large incumbents could suggest there may be entry barriers in the market.

- 4.34 A major source of competitive discipline is therefore eliminated or reduced if there are high barriers to market entry and expansion. As such they may constitute a feature, often in combination with other features, that results in market power and harms competition.
- 4.35 In assessing the factors influencing entry decisions, the CMA will typically consider:
- (a) the costs involved in entry and in operating at the minimum efficient scale necessary to achieve a reasonably competitive level of costs;
 - (b) the likelihood of entry within a timescale that would bear on the incentives and decisions of the existing firms in the market;
 - (c) the cost of exiting the market; and
 - (d) the likely response to entry by incumbent firms.
- 4.36 The CMA will also examine the history of entry or expansion, and evidence of planned entry or expansion. This assessment will consider the extent to which past entrants and smaller firms have successfully gained market share and, more generally, the cost of gaining a significant share of the market, as well as effects that entry or expansion had on competition in the market. However, previous episodes of entry do not necessarily prove that entry was easy, that it was competitively significant, that it is likely to take place again, or that the possibility of entry is imposing a competitive constraint. Moreover, current potential entrants may not face the same market conditions that previous entrants faced. These factors would need to be weighed in the CMA's assessment of entry barriers.
- 4.37 In some circumstances barriers to entry can have a positive impact, including where:
- (a) Some behaviours act as a barrier to entry or expansion, and which also provide benefits to customers. For example, safety regulation can be important in protecting customers from faulty or dangerous products, even though they raise the costs of production for firms.

(b) Some regulations which restrict entry and achieve important social goals which are not the focus of competition policy.⁴²

4.38 Such positive impacts could be taken into account at different stages of an investigation and the CMA will usually consider whether it is appropriate to do so. They may be considered as part of the competitive assessment. They may also be considered during the remedies process as relevant customer benefits (RCBs) where the statutory conditions are met.

Coordinated conduct

4.39 Rivalry between firms operating in the same market may be restricted due to the presence of coordination in that market. Coordination can take different forms and can affect any aspect of competition.

4.40 Firms can use algorithms to implement, monitor or enforce anticompetitive coordination. Even without explicit coordination, where firms use algorithms that inform or set prices, a coordinated outcome may grow out of repeated interaction between algorithms.⁴³

4.41 Regardless of the mechanism used, coordination will often result in firms in the coordinating group collectively enjoying market power and thus worsening the terms on which products are offered to customers, reducing customer choice and holding back efficiency and innovation. In many instances, prices will be higher than they would otherwise have been if the firms had competed effectively.

4.42 Evidence of some competition between some or all firms in a market may be consistent with also finding evidence of coordination. For example, coordination may not cover all competitive parameters or all regions, may not include all firms in the market and may be characterised by periods during which the coordinating group reverts to fully competing.

4.43 While coordination between firms can be explicit, it can also be tacit. Tacit coordination is achieved through an implicit understanding between the firms,

⁴² For example, in the [Housebuilding market study](#) the CMA recognised that planning systems, by their nature, aim to control the type of development that may take place, trading off the need to deliver appropriate levels and types of building against other desirable outcomes. As a result, the CMA acknowledged that its analysis of how the planning system facilitates meeting housing need was necessarily partial and that policymakers taking decisions on the overall design of the planning system would need to consider a wider range of policy objectives.

⁴³ However, given that firms can independently use algorithms to monitor the prices of competitors and to inform their own price setting, the use of algorithms may lead to more intense competition, reduced costs and/or reduced barriers to entry. See further discussion of how algorithms can affect horizontal cooperation in [Guidance on horizontal agreements](#), for example paragraphs 8.24 to 8.27.

but without any explicit arrangement or contact between them. In using its markets tools, the CMA can investigate whether and why a coordinated outcome is present without needing to establish whether the firms involved have reached a common understanding or whether that understanding is tacit or explicit.⁴⁴

- 4.44 Not all forms of cooperation between firms will be harmful to competition. Cooperation may also bring about pro-competitive effects, which benefit customers. For example, joint R&D collaborations can help companies speed the development of improved products or processes, and in some financial markets, credit providers and insurers routinely share certain data (eg about customers' repayment or claim history) that facilitates the efficient operation of those markets.^{45,46}
- 4.45 The CMA will consider whether market conditions are conducive to coordination. In particular, the CMA will analyse the extent to which the following three conditions are met:
- (a) Firms are able to reach a coordinated outcome. Where there is no explicit agreement, firms need to have sufficient awareness of each other's actions and be able to anticipate each other's reactions so as to identify a mutually beneficial outcome. Such an understanding need not involve a precise outcome but needs to be sufficiently clear to enable their behaviour to be aligned. The repeated interaction between algorithms used by firms in a given market to inform or set prices may result in a coordinated outcome in certain circumstances. The ability to reach a coordinated outcome may be influenced by factors such as the number of firms involved, the symmetry of those firms, and whether they have any structural links, as well as whether there is a suitable focal point or means for coordination.⁴⁷

⁴⁴ By contrast, the CMA can only take enforcement action in respect of coordinated conduct under the Competition Act 1998 (CA98) where that conduct amounts to an agreement or concerted practice within the meaning of Chapter 1 of the Competition Act 1998. However, where the nature of the conduct does take the form of an agreement or concerted practice, that conduct may be subject to action under CA98.

⁴⁵ The CC found that the absence of such data sharing was a feature harming competition in [the market for home credit](#) and required lenders above a certain size to provide credit reference agencies with full data on the payment records of customers.

⁴⁶ Some forms of cooperation may bring about other benefits to consumers – for example, see [green agreements guidance](#) on how competition law applies to environmental sustainability agreements.

⁴⁷ This may be more challenging in a complex environment, for example where products are differentiated, firms sell a large number of products, or differ in their capabilities, product portfolios, customer mix and strategies. However, even in these circumstances, firms may be able to reach a coordinated outcome through simplifying the parameters of competition or focusing on a subset of parameters such as coordinating on known pricing points or dividing up the market. Algorithms may also make it easier for firms to find a focal pricing point. See

- (b) Coordination is internally sustainable among the coordinating group, ie firms find it in their individual interests to adhere to the coordinated outcome. Typically, firms will make a short-term gain by deviating from the coordinated outcome by having a more competitive offer than the coordinating firms; therefore, for coordination to be internally sustainable, the gain to firms from deviation must be outweighed by the costs of future reduced profits. This depends on the gains from deviation, the ability of firms to detect and respond to deviation by rivals in a timely manner, and whether other firms' responses would be sufficient to disincentivise deviation and thus sustain coordination.
- (c) Coordination is externally sustainable, ie it is unlikely that coordination will be undermined by competition from outside the coordinating group. In assessing external sustainability, the CMA is likely to consider whether existing competitors outside the coordinating group (the competitive 'fringe') make up a significant proportion of the market or are able to impose a strong competitive constraint, as well as the likelihood of entry or expansion of any competitive fringe. The CMA may also consider whether any firm has the capacity to take significant share from any group of firms that tried to coordinate without its participation (especially if that firm is a 'maverick').
- 4.46 The CMA will also look at whether would-be competitors have taken any actions⁴⁸ to reach, sustain or enhance coordination. Practices by firms may facilitate coordination, for example by facilitating the exchange of information, deterring competitive price cutting or reducing the incentive to deviate, eg through best price policies or parity obligations.

Cross-market relationships

- 4.47 Poor market outcomes may sometimes be the result of relationships which take place across different products or services (cross-market relationships). Cross-market relationships may involve one or more firms where there is either:
- (a) a vertical link: where a firm, or group of firms, is active at different levels of a supply chain;⁴⁹ or

further discussion of how algorithms can affect horizontal cooperation in [Guidance on horizontal agreements](#), for example paragraphs 8.24 to 8.27.

⁴⁸ Equivalent, in economic parlance, to 'facilitating practices'.

⁴⁹ This captures relationships where one market is linked to another because it provides an input to the other. These links take a variety of forms and those links may be more obvious (eg where iron ore is used as input to

- (b) an adjacent market link: where a firm, or group of 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.
- 4.48 Cross-market relationships can involve one or more firms. In particular, the relationship can involve one firm being active in both markets⁵⁰ or agreements between two or more firms active in different markets.⁵¹
- 4.49 Practices arising from cross-market relationships can have beneficial effects for customers. For example:
- (a) They can improve the coordination of activities at different stages of the supply chain or in adjacent markets and deliver savings in transaction and inventory costs.⁵² This may arise from a firm bringing ‘in-house’ activities which would otherwise be carried out in separately-owned businesses,⁵³ or from a closer alignment of the incentives of firms towards the achievement of complementary objectives.⁵⁴
 - (b) They can assist suppliers to open up or enter new markets, for example where some sunk investment is required to begin supplying a new geographic area, a distributor may need some assurance it will be able to recoup these investments. This may justify a supplier entering into an exclusive agreement with one distributor for that area.
 - (c) Integrated digital ecosystems can bring about benefits through well-integrated products and services which can lead to a simple and convenient user experience and additional or better functionality.

the production of iron) or less obvious (eg where data collected in one market is used to improve products in another market).

⁵⁰ For example, a firm may be vertically integrated which means that it is active at upstream and downstream levels of the supply chain. Similarly, a firm may be active in two adjacent markets where the products are complements or may provide a range of products within a digital ecosystem.

⁵¹ For example, a vertical arrangement may involve agreed pricing schemes or other contractual provisions between firms at different levels of the supply chain.

⁵² For example, by helping guarantee stability of supplies, improve coordination on product design, production process and the way in which the products are sold.

⁵³ For example, in the absence of vertical coordination, if both producers and distributors add mark-ups over their costs, the resulting ‘double’ mark-up—or ‘double marginalization’—may lead to inefficiently high prices. This is because each partner, when setting its price (the wholesale price for the producer and the retail price for the distributor) takes no account of the effect of this price on the other’s profit. By aligning incentives, vertical relationships may lead to a coordinated reduction of the mark-ups at different levels in the supply chain, both increasing firms’ profits and benefiting customers.

⁵⁴ The CMA sets out the positive effects on competition that vertical agreements may produce in the [Vertical agreements block exemption order guidance](#), paragraphs 10.6 to 10.12.

4.50 However, practices arising from cross-market relationships can have negative effects on competition. Examples of possible negative effects that the CMA is likely to be concerned about include:

- (a) Anti-competitive foreclosure of other existing firms or potential entrants in the downstream, upstream or adjacent market (depending on the circumstances and conduct) by making it more difficult for them to compete effectively and/or by raising barriers to entry or expansion. Foreclosure can involve rivals being forced to exit from the market, being prevented from entering, or being materially disadvantaged and consequently competing less effectively.
- (b) The softening of competition between a supplier and its competitors or the facilitation of (explicit or tacit) collusion between suppliers. This softening can occur in either the upstream, downstream⁵⁵ or adjacent market.
- (c) The creation of limitations on customer choice or ability to purchase products in any part of the UK.

4.51 The CMA will typically take into account the following when considering if a practice arising from a cross-market relationship has an adverse effect on competition:

- (a) For practices arising from cross-market relationships to have negative effects on competition, the firms involved must have a significant degree of market power in one or more of the markets (ie in one of the markets in the supply chain or one of the adjacent markets). Therefore, an assessment of market power will be an important part of considering the overall impact of cross-market relationships.
- (b) The nature of the practice or practices (eg what it is, duration, exceptions, coverage, implementation). For example, vertical agreements can take many shapes and forms. It is therefore important to analyse the nature of the agreement in terms of the restraints that it

⁵⁵ Where the softening occurs in the downstream market it is important to consider the extent to which there is a reduction in intra-brand competition (ie competition between downstream firms that distribute the products of the same upstream firm) or a reduction in inter-brand competition (ie competition between downstream firms that distribute the goods or services of different upstream firms). If inter-brand competition is strong, it is unlikely that a reduction of intra-brand competition alone will have negative effects for customers.

contains, the duration of those restraints and the share of total sales on the market affected by those restraints.⁵⁶

- (c) The coverage of any agreement or conduct in terms of suppliers, buyers, customers etc, including whether there is a network of agreements. The CMA is likely to be more concerned about cross-market relationships where they relate to a larger proportion of activity in a market as any negative effects are likely to be more widespread.
- (d) The behaviour and market position of customers in the markets. For example, a firm may make purchasing products together the default option.⁵⁷ The extent to which this creates competition problems will depend on how many customers opt out of this default and decide either not to purchase the additional product or to purchase it from a different supplier.
- (e) The rationale for the cross-market relationships. This will likely include considering the pro-competitive benefits they may result in (see paragraphs 4.56 to 4.60 below which set out the framework for considering efficiencies), and also the context around any agreements or conduct such as the timing of them relative to other developments in the markets.
- (f) The extent to which there are barriers to entry and expansion. Cross-market relationships in markets with barriers to entry and expansion are more likely to be of concern. In addition, cross-market relationships may also work as a barrier to entry and expansion and are more likely to be a cause for concern where these relationships reinforce other such barriers.
- (g) The extent to which competitors have effective and timely counterstrategies which allow them to protect themselves against any cross-market relationships and to prevent any harm to competition. The CMA will often consider if competitors can replicate any cross-market relationships and if this mitigates any negative effects.

⁵⁶ In some cases it may be necessary to go beyond the express terms of the agreement. The existence of implicit restraints may be deduced from the way in which the agreement is implemented by the parties to the agreement and the incentives that they face.

⁵⁷ That is, the firm may bundle the purchase of one product with the purchase of another related product from the same supplier (for example, adding an extended warranty to the purchase of a durable good unless the customer actively decides not to take the warranty).

Government policy and regulation and other factors affecting market functioning

- 4.52 Market power is not the only factor which the CMA will consider in understanding why a market may not be working well. Another factor the CMA will consider, where relevant, is the presence and effects of government policy and regulation.
- 4.53 This can include, for example, how such policy contributes to the form or shape of the market. It can also include whether particular regulatory provisions (i) achieve their intended objectives; and (ii) may lead to unintended consequences, such as a reduction in output or barriers to entry, that affect the operation and effectiveness of the market. In those cases, the CMA will also typically take account of public policy considerations that underpin regulation and identify the trade-offs for policy makers to consider, even if it is not for the CMA to resolve them. Conversely, the CMA may consider whether the absence of regulation may create or exacerbate issues in the market (for example given some of the beneficial effects regulation can have as described at paragraph 4.37 above).
- 4.54 Other factors which affect how well markets deliver for consumers, and which in relevant cases will form part of the CMA's considerations, include:
- (a) The existence of costs or benefits which are not reflected in prices (known as externalities), which may lead to under- or over-provision of products or services compared to the level desired by society.⁵⁸
 - (b) The need for costly upfront investments where the benefits may not fully accrue to a firm making them, or the pay-off may be uncertain, which may mean no firm is incentivised to undertake such investment.⁵⁹
 - (c) Competition problems and poor outcomes for customers and consumers can also arise from what might be described as poor market design. As well as issues connected with developments in regulation,⁶⁰ these can relate, for instance, to poorly designed or

⁵⁸ See for example [Electric vehicle charging market study](#) paragraphs 25 to 27, [Housebuilding market study](#) paragraph 4.120(b).

⁵⁹ See for example the discussion of the 'chicken and egg problem' of interrelated demand for EVs and charging infrastructure in the [Electric vehicle charging market study](#), paragraphs 3.30 to 3.31.

⁶⁰ Such as uneven or problematic developments in regulatory systems where, for example, incremental regulation adds up to significant barriers and distortions (as in [Housebuilding](#)), or where market participants change their behaviour in response to existing regulation and the regulatory framework is not effectively updated.

executed privatisation or Private Finance Initiative arrangements;⁶¹ or where public sector provision is replaced by private operators without the adoption of a sufficient regulatory or demand side framework to protect consumers.⁶²

Countervailing factors

4.55 In assessing the potential sources of harm, the CMA also considers factors that may, on the other hand, benefit competition and operate to the benefit of customers. While such factors can be considered in all markets tools, in market investigations the CMA will assess whether the benefits to competition outweigh the harm as part of the AEC test (as discussed in paragraph 8.3).

Efficiencies

4.56 In some circumstances, features investigated by the CMA will have positive effects such as efficiencies. 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. Examples of such rivalry-enhancing efficiencies include:

- (a) **Lower prices:** The CMA will generally view features which lead firms to have lower marginal or variable costs as being more likely to result in an incentive to reduce price or make short-run improvements in quality than reductions in fixed costs. Some fixed cost savings or other efficiencies may enhance the ability of firms profitably to innovate or invest in entry or expansion (see next bullet), although cost reductions from a reduction in output will not be considered as efficiencies.
- (b) **Greater innovation or quality:** Large incumbent firms may benefit from significant economies of scale or scope in the innovative process. For example, these firms might bring together complementary assets in research and development activities or otherwise reduce incremental costs in innovation.⁶³
- (c) **Cost savings and the elimination of double marginalisation:** Since cross-market relationships may involve complementary products,

⁶¹ See for example, [Mobile radio network services](#).

⁶² See, for example, the discussion of private estate management of amenities in [Housebuilding market study](#).

⁶³ For example, integrated digital ecosystems can bring about benefits through well-integrated products and services which can lead to a simple and convenient user experience and additional or better functionality, but may prevent third parties from providing products or services which compete with those incorporated into the ecosystem.

services or activities, each firm would like the other to lower the price of its product. Such a relationship can therefore have the effect of lowering prices that would be charged to customers if the firms acted independently and in this way can sometimes benefit customers.⁶⁴ Other ways in which cross-market relationships may give rise to efficiencies are considered in paragraph 4.49 above.

4.57 The CMA will use the following criteria when it assesses efficiencies. Efficiencies must:

- (a) enhance rivalry in the supply of products;
- (b) be sufficient to mitigate the harm to competition and customers where they currently occur or be timely, likely and sufficient to mitigate it, where they are expected to occur in the future;
- (c) be unlikely to accrue without the feature or features concerned; and
- (d) benefit consumers in the UK.

4.58 In considering potential efficiencies, the CMA will therefore need to ascertain that the market feature(s) with which it is concerned results, or is likely to result, in lower prices, higher quality, wider choice or greater innovation, and that such efficiencies are unlikely to arise in the absence of the market feature(s) concerned. If efficiencies are to be relevant in the CMA's competitive assessment, those efficiencies must be expected to affect competition in the relevant market.

4.59 In general, the CMA would expect parties to put forward for consideration any efficiencies they think relevant. Parties doing so will be expected to provide verifiable evidence regarding the nature and scale of any efficiencies that they claim to result from the market feature(s) concerned.

4.60 The greater the expected adverse effect of a feature, the greater the expected efficiencies must be. Whether the efficiencies associated with a feature or features of the market could occur in the absence of that feature or features is also likely to be relevant to the CMA's assessment.

⁶⁴ For example, non-compete obligations may help to resolve the 'free-rider' problem in markets where suppliers require their distributors to incur certain costs if advice and other pre-sale services are to be provided in a sustained way, although they restrict competition between distributors.

Relevant customer benefits (RCBs)

- 4.61 Should the CMA decide that, despite the existence of some efficiencies that benefit customers, there is still an AEC in the market, these efficiencies may be taken into account as RCBs when the CMA considers possible remedies where the statutory conditions are met (see paragraphs 8.104 to 8.106 and Appendix 4 below).

Entry and expansion

- 4.62 The prospect of entry or expansion — and therefore of stronger competition in the longer term — may also sometimes offset the competitive harm associated with a particular market feature or features. However, where the CMA has concerns over how competition is working in a market, the CMA would need robust evidence as to why entry or expansion is likely to be effective in driving the market towards good outcomes in future.
- 4.63 The CMA will use the following framework to determine whether entry or expansion would offset competitive harm. The entry or expansion must be:⁶⁵
- (a) **Timely:** The CMA will consider whether the effect on competition and the market will be timely. It is not just a case of entry or expansion occurring in a timely manner but the effectiveness of that entry or expansion on market outcomes must be timely. Generally, the further out in time that entry or expansion is expected to occur the less weight the CMA can attach to such entry or expansion as an offsetting factor to the competitive harm in the market.
 - (b) **Likely:** In considering the prospect of entry or expansion, the CMA must be satisfied that the firm(s) expected to enter or expand have both the ability and incentive to do so. The CMA will consider the scale of any barriers to entry and/or expansion (see paragraphs 4.33 to 4.38 above).
 - (c) **Sufficient:** Entry or expansion should be of sufficient scope and effectiveness to outweigh the competitive harm. Entry or expansion needs to be successful over a sustained period of time. Sufficiency may come from a single entrant or firm expanding or from several, in aggregate.

⁶⁵ These conditions are cumulative and must be satisfied simultaneously.

- 4.64 The CMA will assess the robustness of evidence in relation to the timeliness, likelihood and sufficiency of entry or expansion. Some factors which may be relevant, depending on the nature of the claimed entry or expansion, include:
- (a) The CMA is likely to place greater weight on detailed consideration of entry or expansion and experience of past entry and expansion (including how frequent and recent it has been).
 - (b) Where the CMA is considering the threat of potential entry or expansion as a factor that may prevent competitive harm from arising, it will need to be assured that this is sufficient to exercise a constraint on the incumbent firms in the present even though no actual entry has occurred.
 - (c) Where either a customer itself enters (self-supply) or a firm is encouraged and supported by customers to enter or expand (sponsored entry), the CMA will also consider whether supply will be available to the market or only to the individual customer. Even if self-supply or sponsored entry protects particular customers, it may not prevent higher prices or poor quality of service for other customers. In addition, the CMA will consider how far such action by customers may be effective in mitigating competitive harm over time: a customer self-supplying may be far less effective over time than a firm entering or expanding into the market, especially if the self-supply activity is not the customer's core business.⁶⁶

Market definition

- 4.65 In its markets work, the CMA will generally seek to identify the goods or services for whose supply or acquisition competition may be adversely affected. When making a market investigation reference, these goods or services must be specified in the Terms of Reference. This will require consideration of the definition of the relevant market (or markets). However, as explained further below, the CMA does not have to provide a precise or detailed definition of the market or markets to which any market investigation

⁶⁶ Where a customer has the ability and incentive to trigger new entry, it may be able to ensure there is effective competition in the market. Most other forms of buyer power that do not result in new entry – for example, buyer power based on a customer's size, sophistication, or ability to switch easily – are unlikely to prevent or mitigate an AEC. This is because a customer's buyer power depends on the availability of good alternatives they can switch to. In that sense, market power and buyer power are two sides of the same coin, and an AEC can be interpreted as customers' buyer power being ineffective or insufficient.

reference relates. In many market studies and market reviews the CMA has not needed to conclude on a formal market definition.

- 4.66 The starting point for market definition in a market investigation will be the goods and services or areas of supply set out in the Terms of Reference. However, the CMA may conclude that the market definition goes wider or is narrower than those goods and services.
- 4.67 Market definition involves identifying the most significant competitive alternatives available to customers of the goods or services under consideration. While market definition can be an important part of the overall assessment, it is not an end in itself. The evidence gathered as part of the competitive assessment, which will assess the potentially significant constraints on the relevant firms' behaviour, captures the competitive dynamics more fully than formal market definition.
- 4.68 The outcome of any market definition exercise does not determine the outcome of the CMA's competitive assessment of a market in any mechanistic way. The CMA's competitive assessment may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others. In many cases, especially those involving differentiated products, there is often no 'bright line' that can or should be drawn. Rather, it can be more helpful to describe the constraint posed by different categories of product or supplier as sitting on a continuum between 'strong' and 'weak'. The CMA will generally not need to come to finely balanced detailed judgements on what is 'inside' or 'outside' the market. Not every firm 'in' a market will exert an equal level of constraint and the CMA will assess how closely different firms compete. The constraint posed by firms 'outside' the market will also be carefully considered.
- 4.69 There will, accordingly, often be no need for the CMA's competitive assessment to be based on a highly specific description of any particular market definition (including, for example, descriptions of the precise boundaries of the relevant markets and bright-line determinations of whether particular products or services fall within the relevant market). In some cases, the CMA will take a simple approach to defining the market – for example, by describing the market as comprising the most important constraints on relevant firms providing goods or services under consideration. This is likely to be informed by the same or similar evidence that will be taken into account when conducting the competitive assessment. Further, in some cases, the

CMA may treat a group of product, geographic or other types of markets together for the purposes of assessing competitive effects.⁶⁷

4.70 More detail on our approach to considering product and geographic markets is set out at Appendix 2.

Evidence gathering and assessment

Information gathering powers

4.71 The CMA's market study and market investigation tools are supported by statutory information gathering powers.⁶⁸ These powers are:

- (a) to give notice requiring any person to attend a specified place to give evidence to the CMA or a person nominated by the CMA for that purpose;⁶⁹
- (b) to give notice requiring any person to produce specified documents or categories of documents that are in that person's custody or under that person's control;⁷⁰ and
- (c) to give notice requiring any person carrying on business to supply specified forecasts, estimates, returns or other information in a specified form and manner.⁷¹

4.72 Where a person fails to comply with these statutory information requirements without a reasonable excuse, the CMA has the power to impose penalties. Further detail in relation to penalties is provided in [CMA4](#).

4.73 The CMA can issue information requests in market reviews, market studies and market investigations, in respect of which it is an offence to submit false or misleading information.⁷²

⁶⁷ For example, this may be appropriate where an issue manifests itself in a similar way across several different markets and the CMA is able to reach a view about the effects of that issue on competition across the group of markets as a whole.

⁶⁸ Statutory information gathering powers do not apply to market reviews. See also [Administrative Penalties: Statement of Policy on the CMA's Approach \(CMA4\)](#)

⁶⁹ Section 174(3) of the EA02.

⁷⁰ Section 174(4) of the EA02.

⁷¹ Section 174(5) of the EA02.

⁷² Section 180 of the EA02. Further, section 174A(1A) allows the CMA to impose a penalty on a person who, without reasonable excuse, supplies information that is false or misleading in a material respect.

Sector engagement and expert panels

- 4.74 As part of its evidence gathering, the CMA will typically meet with a range of participants in the market and other relevant bodies. The form this engagement will take will be tailored to the circumstances of the particular case; for example, there may be webinars, roundtables with key stakeholders, and/or direct engagement with a sector regulator (where relevant), amongst other forms of sector engagement.
- 4.75 The CMA will typically aim to draw in sector knowledge and/or expertise. This may be by engaging directly with one or more experts. This may, on occasion, take the form of an expert panel constituted at the outset of a project. In any case the aim of drawing in sector knowledge and/or expertise is to support the CMA to make informed decisions efficiently.
- 4.76 Where the CMA uses an expert or expert panel, their role will be determined on a case-by-case basis. In general, the CMA would expect to use an expert or expert panel to inform itself about technical matters, obtain sector knowledge and experience (for example, trends, common practices) and to help consider the practicality and anticipated impact of any potential remedies.
- 4.77 Where applicable, the process for appointing an expert or panel of experts is conducted by the CMA and in accordance with the rules on public sector procurement. The make up of any panel will depend on the nature of the issues to be discussed but could, where appropriate, draw in a diverse set of perspectives and/or technical expertise (e.g. covering both the demand and supply side of the market or different business sizes and models). An expert or expert panel members must declare any actual, potential or perceived conflicts of interest.
- 4.78 The CMA will publish details about those appointed to any expert panel through the roadmap, typically at the start of a markets project (subject to the pace at which an expert panel can be constituted).
- 4.79 The amount of engagement the CMA will have with an expert or expert panel will depend on the circumstances of the case; for example, where technical expertise is needed to assess the market, the CMA may meet with an expert panel more regularly in the early stages of a markets project.
- 4.80 Expert input (including expert panels) provide one source of information that the CMA will weigh and consider in the round with the wider body of evidence (see paragraph 4.86 below). When considering the weight to attach to such information, the CMA will consider whether it is provided by an individual that is a subject matter expert or an individual with knowledge/experience of the

market, and will be mindful of the differences between factual information and opinion evidence. Input provided by an expert or expert panel does not outweigh other evidence simply because it has been provided through these means; the salience and cogency of evidence gathered from interaction with the expert or expert panel will be scrutinised and weighted as any other piece of evidence.

Our approach to evidence gathering

- 4.81 The CMA does not have a prescriptive list of evidence that it will take into account in its assessments. Instead, it will in each case undertake reasonable and proportionate evidence gathering, targeting its focus as appropriate. In market studies and market investigations, for example, that means taking reasonable steps to acquaint itself with relevant information in order to reach a decision on the statutory questions.
- 4.82 The depth and breadth of evidence gathering will be tailored to the circumstances of the case.⁷³ After the initial evidence gathering phase, if the CMA has persuasive evidence of a particular point when looking at the evidence in the round, there may be little additional value in gathering further evidence on the same point and the CMA often will not do so. In considering challenges to CMA decisions, the CAT has said that it will not intervene merely because it considers that further inquiries would have been desirable or sensible, but will assess whether the CMA has a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did.⁷⁴
- 4.83 The CMA will typically request internal documents in market investigations. It may also do so in market reviews and market studies where those documents are likely to contain relevant evidence that the CMA needs to further its work.
- 4.84 The interpretation of internal documentary evidence will be affected by the context in which it was generated. For example:
- (a) The CMA will usually consider the purpose and effect of any internal document (for example, whether it was a document for the board or

⁷³ The need for the CMA to focus on the bigger issues in reaching a decision on the statutory questions has been underlined in Competition Appeal Tribunal (CAT) judgments: in [Barclays Bank plc v Competition Commission \(2009\)](#), CAT 27 (paragraph 21); citing [Tesco v Competition Commission \(2009\)](#), CAT 6 (paragraph 139), the CAT said: ‘the depth and sophistication called for in relation to any particular relevant aspect of the inquiry needs to be tailored to the importance or gravity of the issue within the general context of the Commission’s task.’

⁷⁴ [BAA Limited v Competition Commission \[2012\] CAT 3](#), paragraph 20; [R v Royal Borough of Kensington and Chelsea, ex p. Bayani \(1990\) 22 HLR 406](#), at 415.

executive decision-making). When considering the weight to place on internal document evidence the CMA will consider that evidence alongside all of the evidence that it has.

- (b) Where internal documents support claims being made by market participants or third parties that have an interest in the outcome of the CMA's investigation, the CMA is likely to attach more evidentiary weight to such documents if they were generated prior to the opening of any market study or market investigation, or if they are consistent with other evidence.
- (c) An absence of internal documents pointing to, for example, competitive interactions between certain market participants is unlikely to be probative if the market participants do not normally generate documents in the ordinary course of business.

Assessment of evidence

- 4.85 The CMA has a wide margin of appreciation in its approach to analysing evidence. Given the case-specific nature of market reviews, market studies and market investigations, the CMA may apply different analytical methodologies and approaches in different cases. For example, the CMA is not required to quantify any of its findings but may choose to do so in particular cases depending, for example, on the scale of the effect in question, the practicality of undertaking such analysis and resource implications for the CMA and others of doing so.
- 4.86 The CMA will consider the body of evidence as a whole and does not normally assess specific pieces of evidence in isolation. In attaching weight to different pieces of evidence, there is no set hierarchy between quantitative evidence, such as consumer surveys or statistical or econometric analysis, and qualitative evidence, such as internal documents, the statements or conduct of market participants or, as noted above, the views of any experts or expert panel appointed by the CMA to act in an advisory capacity. The CMA will determine the appropriate weight to attach to each form of evidence depending on the relative quality of such evidence.⁷⁵
- 4.87 In assessing the evidence, the CMA is not required to make precise predictions about the future, such as whether any particular innovations will take place or whether certain firms will enter or exit the market.

⁷⁵ [Aberdeen Journals v Office of Fair Trading\[2003\] CAT 11](#), paragraphs 126-127.

4.88 Some aspects of the CMA's assessment may be subject to a large degree of uncertainty. Whilst the degree of uncertainty will be appropriately weighted in the CMA's assessment of whether the relevant standard of proof is met, the presence of some uncertainty will not in itself preclude the CMA from drawing conclusions on the basis of all the available evidence. The absence of certain types of evidence, such as historical data, will also not in itself preclude the CMA from reaching conclusions that are supported by the available evidence assessed in the round.

5. Market reviews

- 5.1 As explained in Section 3, market reviews are shorter, higher-level assessments aimed at diagnosing possible competition and/or consumer concerns. Market reviews are the least intensive of the CMA's market tools.
- 5.2 This section sets out:
- (a) The legal framework related to market reviews;
 - (b) The procedure of a market review; and
 - (c) Remedies available in a market review.

Legal framework

- 5.3 The power to conduct a market review comes from the CMA's general review function under section 5 of the EA02.⁷⁶ Decisions regarding the initiation of a market review may be taken by the CMA Executive Committee as they are not reserved to the CMA Board.
- 5.4 The CMA has no statutory information gathering powers as part of this general review function. There is no statutory time limit for a market review and the CMA has no statutory powers to impose remedies at the end of a market review but a review can lead to a range of other possible outcomes as set out below.

Market review procedure

- 5.5 The procedure of a market review is not defined in legislation. In order to provide greater clarity and predictability, the CMA will publish a 'Project Roadmap' on launch of a market review that will be tailored to the review.
- 5.6 A Project Roadmap is intended to be a short, accessible document targeted at the stakeholders affected by our work to explain the key staging points of the project. A Project Roadmap supplements the administrative timetable by setting out (where relevant) additional information regarding *how* the project will be run; for example, whether the CMA has, or intends to, appoint an expert panel.

⁷⁶ Market reviews sit outside the framework in Part 4 of that Act which applies to market studies and market investigations.

- 5.7 The procedure of a market review is likely to vary based on the nature and complexity of the issues being considered. However, a market review will typically involve the following key stages:
- (a) Launch;
 - (b) Evidence gathering and market engagement;
 - (c) Analysis and conclusion.
- 5.8 A market review may or may not result in a published report; for example, a market review could result in the provision of advice directly to the Government.
- 5.9 While the CMA is not bound by statutory time limits, it generally expects market reviews to be shorter in duration than a market study. To help achieve this, the CMA is reliant on market participants supporting its review by, for example, promptly responding to requests for information and providing accurate information. As such, it is unlikely that a market review would be the appropriate tool for extensive or more in-depth evidence gathering and analysis.
- 5.10 The remedies procedure is similarly not defined in legislation. The CMA generally expects any remedies process to be short and streamlined. However, in cases where the CMA anticipates a transition from a market review to a market investigation, it is likely to consider remedies in more depth, to enable a swift transition between the processes.

Remedies in a market review

- 5.11 Remedies in a market review are often focused on influencing the design and operation of the market (for example, through recommendations or guidance). The remedial options available to the CMA in a market review are more limited than in a market investigation as the CMA does not have the power to impose remedies (see section 8).
- 5.12 When the CMA identifies concerns in a market review, it has a number of potential options for addressing them:
- (a) **Recommendations to government (national or local), or other regulatory bodies, to change regulations or public policy.** These are likely where the CMA concludes that changes in the law, government policy, and/or regulatory provisions or practice are necessary to remedy any problems identified in the market. The UK government has committed to issuing an official response to the CMA's

recommendations within 90 days, with a presumption that the Government will accept the recommendations unless there are compelling policy reasons not to do so. In the event that the Government does not accept a recommendation made by the CMA, a clear explanation will be provided in its response. The more the CMA is able, through its market study report, to assess the effectiveness and proportionality of a particular recommendation being implemented, the more willing and able government may be to act quickly upon it. The CMA will take this into account in determining how detailed an assessment is needed in relation to making a particular recommendation. The CMA will actively engage with the Government and/or other public bodies to promote such recommendations.

- (b) **Recommendations to business.** These are likely where market problems can be addressed through changes to business behaviour. Recommendations may address a range of issues. Examples include raising awareness amongst firms of their legal obligations to their customers, encouraging firms to provide better information on pricing or services, changes to the standard terms and conditions of consumer contracts, improvements to avenues for consumer redress in the event of problems or disputes, and/or the development or improvement of a code of conduct. As businesses' responses would be voluntary, the CMA will be more likely to make these sorts of recommendations if there is evidence that they will be widely adopted and complied with by firms in the market. The CMA will actively engage with business and may follow up recommendations on codes of conduct by providing support to trade bodies to ensure their codes address the issues identified in the market review report.
- (c) **Consumer-facing actions.** Action taken for the benefit of consumers may focus on improving the quality and accessibility of information to consumers. This could take the form of a CMA-led information campaign, providing guidance, or working in partnership with organisations that assist consumers and other government bodies.⁷⁷ The objective of these actions is to raise consumer awareness or tackle the concerns identified in other appropriate ways so that consumers are able to make better decisions about the goods and services they buy.

⁷⁷ If the market involves a particular group of consumers, the CMA may work with the most appropriate organisation to help ensure that the campaign is successful.

- (d) **Action to investigate and enforce consumer or competition law.** The CMA will consider whether to use its other tools to address the issues identified, particularly if evidence obtained through the market review indicates that there may have been breaches of competition law or consumer protection legislation. In those situations, the CMA has discretion over which tool to use and will use the most suitable one for each case. The findings of the relevant market review will inform that action.
- (e) **Acceptance of undertakings in lieu of a reference.** The CMA can accept undertakings (partially or fully) in lieu of a market investigation reference at any stage of a market review provided that it considers that it has the power to make such a reference and intends to do so (see paragraph 7.12 below).⁷⁸ The design and implementation considerations applying to behavioural, hybrid, and structural remedies adopted in market investigations can be relevant to the design and acceptance of undertakings in lieu of a reference (see Appendix 5). The CMA's process for accepting undertakings in lieu of a reference is explained at section 7 of this guidance.

Market investigation references.

- 5.13 When the findings of a market review give rise to reasonable grounds to suspect that a feature or combination of features of a market in the UK prevents, restricts or distorts competition, and a market investigation reference appears to be an appropriate and proportionate response, the CMA is able to make such a reference.⁷⁹ A reference is likely to be made where the CMA considers that its order making powers will probably be needed to resolve the market concerns identified.

Where a market investigation reference is a possible outcome, the CMA will aim to conduct the market review in a way that enables an efficient transition to a market investigation and with a view to minimising the end-to-end duration of its work. The aim would be to enable the market investigation to focus on the key issues, including any remedies that may be required. In those cases, and where appropriate, the evidence and findings in a market review report⁸⁰ could be used to progress more swiftly to a provisional AEC finding in any subsequent market investigation.

Section 154A of the EA02. Undertakings fully in lieu of a reference will address all competition concerns identified whereas undertakings partially in lieu of a reference will address some but not all of the competition concerns.

⁷⁹ See section 7 of this guidance.

⁸⁰ Or similar publication.

6. Market studies

- 6.1 As explained in Section 3, market studies are a detailed assessment of a market to assess if there is an adverse effect on consumers.
- 6.2 This section sets out:
- (a) The legal framework related to market studies;
 - (b) The procedure of a market study; and
 - (c) Remedies available in a market study.

Legal framework

- 6.3 Market studies are conducted under the CMA's general review function in section 5, together with section 130A, of the EA02. Their purpose is to:
- (a) consider the extent to which a matter in relation to the acquisition or supply of goods or services of one or more than one description in the UK has or may have effects adverse to the interests of consumers; and
 - (b) assess the extent to which steps can and should be taken to remedy, mitigate or prevent any such adverse effects.⁸¹
- 6.4 The CMA Board is responsible for the decision to launch a market study.⁸² A market study can lead to a range of outcomes as set out below.
- 6.5 Market studies are subject to a 12-month maximum statutory timeframe.⁸³

Market study procedure

- 6.6 Market studies vary in scope and complexity; there is therefore no standard timeframe. Nonetheless, a market study will typically follow the key stages that are illustrated and explained in further detail below.⁸⁴

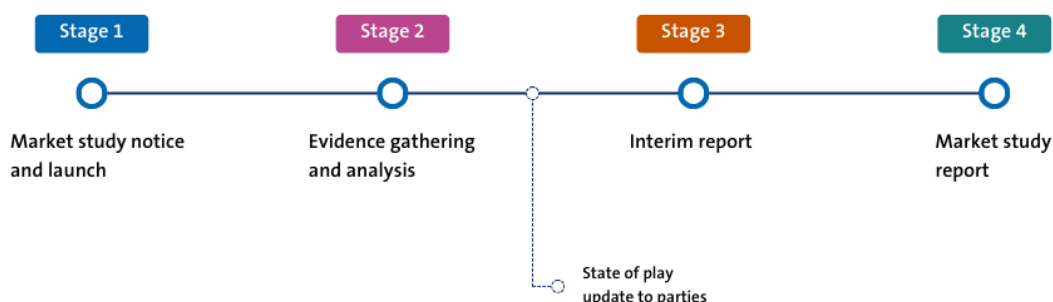
⁸¹ Section 130A of the EA02.

⁸² Paragraph 29 of Schedule 4 to the [ERRA13](#): the CMA Board decides whether the duty to publish a market study notice applies.

⁸³ Section 131B(4) of the EA02.

⁸⁴ The timing of the different stages is not prescribed because it is likely to vary on a case-by-case basis and, in practice, some stages may overlap.

Key stages of a market study



- 6.7 The CMA will consider in each case the most efficient way to run a market study. The proposed timeframe and key staging points will be set out in a 'Project Roadmap' (see paragraph 6.13 below).
- 6.8 In considering the appropriate duration of a market study, the CMA will take into account, amongst other things:
- (a) The scale and complexity of the market and issues under consideration;
 - (b) Proposed engagement points with parties tailored to the circumstances of the project, with a view to offering meaningful opportunities to engage with the CMA and a fair end-to-end procedure;
 - (c) The end-to-end timeline of markets work, for example, if there has been a preceding market review or a market investigation reference is anticipated (see paragraphs 6.31 in relation to the process where a market investigation is likely, and 8.55 to 8.57 on how a market investigation procedure may differ if there is a preceding market review or market study).
 - (d) The CMA's duty of expedition; and
 - (e) The 12-month statutory maximum to complete a market study
- 6.9 More broadly, the CMA will seek to operate in a transparent and participative manner, engaging with a wide range of stakeholders as part of its invitation to comment or consultation processes, in order to inform its decision-making.

Market study launch

- 6.10 Three documents will be published upon launch of a market study: a market study notice, a 'Statement of Scope' and a 'Project Roadmap'.
- 6.11 A market study formally begins with publication of a market study notice by the CMA, following a decision by the CMA Board to launch a study. A market study notice must be published where the CMA is proposing to carry out its functions under section 5 of EA02 for the purposes described in paragraph 6.3 above. The notice must contain the following information:
- (a) the scope of the market study;
 - (b) the period during which representations may be made to the CMA in relation to the study; and
 - (c) the timescales within which the study will be completed.⁸⁵
- 6.12 In addition, the CMA will publish a 'Statement of Scope'. This document sets out the areas of concern that the CMA intends to explore and invites written feedback.
- 6.13 The CMA will also publish a 'Project Roadmap'. A Project Roadmap is intended to be a short, accessible document targeted at the stakeholders affected by the CMA's work to explain the key staging points of the project. A Project Roadmap supplements the administrative timetable by setting out (where relevant) additional information regarding *how* the project will be run, for example:
- (a) The nature/timing of any sector engagement through webinars or roundtables;
 - (b) Engagement opportunities with the Senior Responsible Officer (SRO)⁸⁶;
 - (c) Whether the CMA intends to gather consumer survey evidence and the timing of that;
 - (d) Whether the CMA has, or intends to, appoint an expert panel (and the identity of that expert panel); and/or

⁸⁵ Section 130A(3) of the EA02.

⁸⁶ The SRO is accountable for the markets project and for taking key decisions during the project (other than those reserved for the CMA Board).

- (e) Whether the circumstances of the case merit preparing one or more working papers, or a written progress report, for comment ahead, or in place, of the Interim Report.⁸⁷
- 6.14 The Project Roadmap may be updated from time-to-time to reflect the CMA's updated view (for example, on timing).⁸⁸ The CMA will not usually invite written feedback on the Project Roadmap as it is primarily aimed at incorporating the key stages into one accessible document; however, if stakeholders have concerns, the CMA may consider representations they make.
- 6.15 The CMA will also consider holding a Launch Webinar, where appropriate, to provide interested stakeholders with the opportunity to engage with the SRO.

Evidence gathering

- 6.16 A market study may gather information from a wide range of sources. Examples include evidence from the participants in the market, evidence from customers, potentially by means of primary market research and evidence from consumer groups, experts, regulators or key government bodies that affect how the market works.
- 6.17 Publication of a market study notice triggers the CMA's ability to exercise its statutory information gathering powers. The CMA is likely to use these powers in a market study. This is to enable the CMA to proceed with its evidence gathering swiftly and to gather the full range of information needed to conduct its assessment. The CMA will in all cases exercise its statutory information gathering powers in a proportionate manner.
- 6.18 In addition to requesting information, the CMA will in most cases offer relevant parties a 'teach in' meeting with the case team.⁸⁹ A 'teach-in' may be an 'in-person' event or by videoconference and may also involve a site visit where appropriate in light of the nature of the businesses involved. A teach-in is an opportunity for the CMA to gain a greater practical understanding of the businesses.

⁸⁷ The CMA will not default to a position where it routinely publishes working papers. It is more likely to do so where, for example, it is exploring a novel, complex or technical issue or its views of the evidence or the likely answers to relevant statutory questions fundamentally change.

⁸⁸ Including where circumstances arise in which the CMA is more likely to prepare a working paper or written progress report, such as where its views of the evidence or the likely answers to the relevant statutory questions fundamentally change during the course of an investigation. An update to the Project Roadmap would reflect this.

⁸⁹ An introductory teach-in may not be offered where the CMA has previous experience or a sufficient understanding of the sector, for example, if there has been a previous market review.

6.19 As part of its evidence gathering, the CMA may meet with a range of participants in the market and other relevant bodies. The CMA encourages interested stakeholders (and where relevant, their advisers) to liaise closely with the case team during the lifetime of a market study. As noted, the CMA may also draw in sector expertise through the use of experts (see paragraphs 4.75 to 4.80)).

State of play

6.20 Towards the end of the evidence gathering phase, the CMA will have an internal 'state of play' discussion attended by the SRO and key members of the case team.

6.21 The purpose of this discussion is to assess the areas of concern being explored against the evidence gathered to date and determine, applying the CMA's prioritisation principles, whether to continue, amend or remove any areas of analysis.

6.22 The CMA will update relevant parties after the internal state of play. 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.

6.23 There may be additional state of play meetings, on a case-by-case basis. Any proposed additional meetings will be set out in the Project Roadmap.

Interim report

6.24 The CMA's approach to market studies will vary, but in many cases we will publish an interim report.

6.25 The interim report is likely to set out the evidence gathered, any emerging findings and may set out emerging thinking on potential remedies, so that interested parties can make representations on these or provide further relevant evidence. Interim reports will only typically address points that are both material and relevant to the analysis. They will not, therefore, address each and every argument put forward by parties which they claim is relevant but which does not materially impact the assessment.

6.26 If a market investigation is a possible outcome, the CMA must also consult on any market investigation reference it proposes to make.⁹⁰

Market study report

6.27 The final report of the market study must set out the CMA's findings on the market, and what (if any) remedial action it proposes to take or has taken.⁹¹

6.28 The report must in particular include the CMA's decision, the reasons for the decision and such information the CMA considers appropriate for facilitating a proper understanding of the reasons.⁹² The CMA must also publish its decision on whether it plans to make a market investigation reference⁹³ or any decision to accept undertakings in lieu of a reference.

Remedies in a market study

6.29 Where, in a market study, the CMA identifies matters that have, or may have, effects that are adverse to the interests of consumers,⁹⁴ it will consider taking action to address them.

6.30 When the CMA identifies concerns in a market study, it has the same options as in market reviews to seek to address those concerns (see paragraph 5.12).⁹⁵

6.31 As noted in relation to market reviews, where a market investigation reference is a possible outcome, the CMA will aim to conduct the market study in a way that enables an efficient transition to a market investigation and with a view to minimising the end-to-end duration of its work. The CMA will aim for the market investigation to focus on the key issues, including any remedies that may be required. In those cases, and where appropriate, the evidence and

⁹¹ Section [131B\(4\)](#) of the EA02.

⁹² Section [131B\(5\)](#) of the EA02.

⁹³ Section [131B\(5\)](#) of the EA02.

⁹⁴ Section [130A](#) of the EA02 refers to, '... matter[s] in relation to the acquisition or supply of goods or services of one or more than one description in the United Kingdom has or may have effects adverse to the interests of consumers.'

⁹⁵ For instance, the CMA has relied on other tools to address concerns identified in a market study in the CA98 investigation opened following the conclusion of the Housebuilding market study: [CMA finds fundamental concerns in housebuilding market](#). The CMA proposed making a market investigation reference into the mobile radio network for the police and emergency services: [Proposal to make a market investigation reference](#).

findings in a market study report⁹⁶ could be used to progress more swiftly to a provisional AEC finding in any subsequent market investigation.

⁹⁶ Or similar publication.

7. Market investigation references

- 7.1 As explained in Section 3, provided the statutory thresholds are met, a reference for a market investigation can be made directly or following a market review or market study.
- 7.2 This section explains:
- (a) The legal framework for a market investigation reference;
 - (b) The ability to agree undertakings in lieu of a market investigation reference; and
 - (c) The procedure for making a market investigation reference and immediate steps that arise.

Legal framework

The reference test

- 7.3 The CMA may make a market investigation reference where it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom 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.⁹⁷
- 7.4 A feature for these purposes should be construed as a reference to:
- (a) the structure of the market concerned or any aspect of that structure;
 - (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
 - (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services.⁹⁸

⁹⁷ Under section 131 of the EA02. The Competition Appeal Tribunal has considered the ambit of the CMA's power to make a reference in *Airwave Solutions Limited v CMA* [2022] CAT 4, paragraphs 8 to 12.

⁹⁸ Section 131(2) of the EA02. In the case of an 'ordinary reference' (see paragraph 7.7(a) below) the features for the purposes of the reference may relate to the market structure or conduct. In a 'cross-market reference' (see paragraphs 7.7(b) and 7.8 below), however, only features that relate to conduct can be the subject of the reference (see sections 131(1) and 131(2A) of the EA02).

- 7.5 The CMA has a discretion rather than a duty to make a market investigation reference where the statutory criteria appear to be met. The CMA will only make references when the reference test set out in section 131 EA02 is met and, in its view, each of the following applies:
- (a) it would not be more appropriate or proportionate to deal with the issues identified by using other powers available to the CMA or, where appropriate, to sectoral regulators;
 - (b) it would not be more appropriate or proportionate to address the problem identified by means of undertakings in lieu of a reference;⁹⁹
 - (c) the scale of the suspected problem, in terms of its AEC, is such that a reference would be an appropriate and proportionate response to it;¹⁰⁰ and
 - (d) there is a reasonable chance that appropriate and proportionate remedies will be available.¹⁰¹
- 7.6 The CMA will also consider whether a market investigation reference would be the most appropriate way of proceeding, considering the possible need for

⁹⁹ See paragraph 7.12 below.

¹⁰⁰ The CMA will consider whether these suspected adverse effects are likely to have a significant detrimental effect on customers through higher prices, lower quality, less choice or less innovation. Where it seems likely that this effect is not significant the CMA will normally take the view that the burden on business is likely to be disproportionate in relation to any benefits from remedying the adverse effects. It is not possible to make a definitive statement about the circumstances in which adverse effects on competition, or the customer detriments arising from them, will be regarded as not significant. However, the size of the market may be relevant. Generally speaking, the cost of a market investigation into a very small market would not be justified. However, problems in some relatively small specialised or local markets could have a significant detrimental impact on customers affected by them, in which case a reference may be justified. In addition, if the feature concerned seems likely to be short lived (for example, because of an expected change in regulations) or clearly relates to a one-off incident, and there are no other market features giving cause for concern, then a reference is not likely to be justified.

¹⁰¹ The CMA will also take into account the likely availability of appropriate remedies in the event that the suspected adverse effects on competition were identified. Where the CMA has not investigated a market in sufficient depth to be confident that it is in a position to identify the possible remedies it will not give this factor much weight. However, where the CMA has a reasonably good understanding of a market, perhaps because it has already performed a market study, or because a reference is being considered following an investigation under CA98, it may decide not to make a reference when it believes that no appropriate remedies by means of direct action through a market investigation are likely to be available. The CMA will have regard, however, to situations in which an investigation and report with recommendations for action (including recommendations for action by government) is likely to make a useful contribution to better outcomes for customers and consumers in a market. Similarly, where the CMA is satisfied that adverse effects on competition arise primarily from laws, regulations, or government policies it will have regard to the fact that a market investigation will not be able directly to remedy such adverse effects. In such circumstances, the CMA itself may submit a report to the government as an outcome of a market study or it may make a reference when it considers a market investigation and report would be more appropriate.

remedies imposed by CMA order and in light of the CMA's prioritisation principles.

Types of market investigation reference

7.7 The following types of market investigation reference may be made by the CMA (or sector regulators):

- (a) ordinary references (these are references which are not cross-market references and do not raise public interest issues);¹⁰² and
- (b) cross-market references (these are references in respect of specific features or combinations of features that exist in more than one market).¹⁰³

7.8 The types of issue for which cross-market references are likely to be most useful include:

- (a) features that do not fit neatly within one market (for example, the collective licensing of public performance and broadcasting rights); and
- (b) recurring sources of consumer complaint or identified detriment which could affect competition adversely across multiple, distinct markets (for example, the sale of secondary products at particular points of sale or the practice of "loyalty penalties").¹⁰⁴

7.9 Where appropriate, the CMA will seek to ensure a targeted use of the cross-market reference power with a clear delineation of scope in each case. It would do so in order that its interventions across markets are made only where they are needed, and to avoid imposing unnecessary burdens on businesses involved while ensuring that the ability to take effective and appropriate action is not restricted by the scope of the reference.

Limitations on power to make a reference

7.10 There are two limits to the CMA's power to make a reference where the CMA has previously published a market study notice but decided not to make a

¹⁰² And in which the relevant features of the market may relate to the market structure or conduct – see sections [131\(1\)](#), [131\(2A\)](#) and [131\(6\)](#) of the EA02.

¹⁰³ And in which only features that relate to conduct can be the subject of the reference. Certain sector regulators who are able to make market investigation references to the CMA can make both ordinary and cross-market references within their respective sectors (see paragraph 4.1 of [Regulated Industries: Guidance on concurrent application of competition law to regulated industries \(CMA10\)](#)).

¹⁰⁴ See [Tackling the loyalty penalty \(publishing.service.gov.uk\)](#).

reference in relation to the matter specified in the notice. These are that the CMA may only subsequently make a reference in relation to the same matter where:

- (a) it is made two or more years after the publication of the market study report in relation to the aforementioned market study notice; or
- (b) there has been a 'material change in circumstances' since the market study report was published.¹⁰⁵

7.11 There are also limitations on the CMA's ability to make a reference where it has previously accepted undertakings in lieu of a reference.

Undertakings in lieu of a reference

7.12 The CMA has the power to accept undertakings instead of making a reference.¹⁰⁶ The CMA can accept undertakings fully or partially in lieu of a reference at any stage of a market review (provided that the CMA considers that it has the power to make a market investigation reference and intends to do so) or a market study.¹⁰⁷

7.13 The CMA recognises that undertakings in lieu of a reference can bring benefits in terms of remedying, mitigating and/or preventing AECs fully or partially in a shorter timeframe than conducting a market investigation. Resolution in full or in part through undertakings in lieu of a reference enables consumers to benefit earlier from measures that address detriment (in full or in part), and may be a more proportionate outcome in the circumstances. Accordingly, the CMA will be open to considering undertakings in lieu of a reference where they are effective in remedying, mitigating or preventing any AECs.

7.14 The CMA will engage with parties early in any markets work which will allow for a discussion on the possibility of undertakings in lieu of a reference and, where appropriate, conduct analysis of whether they could be accepted in a given case. When the CMA conducts a market study, it will seek to do so with a view to considering potential remedies to an AEC in order to more readily move towards accepting undertakings in lieu of a reference.

¹⁰⁵ See section 131B(8) and (9) of the EA02.

¹⁰⁶ Section 154A of the EA02.

¹⁰⁷ Section 154A of the EA02 allows the CMA to accept undertakings at any stage of a market review or market study. Undertakings may be accepted either partially or fully in lieu of a reference. Where undertakings in lieu have been accepted, the CMA will publish a notice of its decision, and this may form part of its final report. See also section 8 below in relation to the acceptance of undertakings in lieu of a report during a market investigation.

- 7.15 Where the CMA accepts undertakings in lieu of a reference in a case instead of making a reference, no ordinary or cross-market reference can be made for a period of 12 months that relates to or includes the same feature(s) in relation to the same market(s) as those covered by the undertakings in lieu.¹⁰⁸ The CMA will have careful regard to this point in considering whether accepting such undertakings is an appropriate course. It would need to be confident that accepting the undertakings, and fully or partially constraining its ability to conduct a market investigation, would lead to good market outcomes (and preclude the need for further CMA investigation in full or in part).
- 7.16 In exercising the relevant power fully in lieu of a reference, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to any AECs identified in the market study final report (and any detrimental effects on customers so far as they result or may be expected to result from such AECs).¹⁰⁹ It may also have regard, as appropriate, to the effect of the possible undertakings in lieu on any relevant customer benefits¹¹⁰ arising from a feature or features of the markets concerned.
- 7.17 The possibility of undertakings in lieu of a reference will depend on the specific circumstances at hand:
- (a) In some cases, the CMA will not have done a sufficiently detailed investigation of a competition problem, prior to making a reference, to be able to judge with sufficient certainty whether undertakings fully in lieu of a reference will achieve as comprehensive a solution as is reasonable and practicable. This is likely to be the case, for example, when the AEC arises from a complex set of market features involving industry-wide practices. Moreover, trying to negotiate undertakings in lieu of a reference industry-wide with multiple parties and on a time-constrained basis may pose practical difficulties in some circumstances.
 - (b) The CMA is more likely to be able to accept undertakings in lieu of a reference where an AEC arises from the conduct of a few firms, for

¹⁰⁸ Section 156 of the EA02. The prohibition on reference does not apply where there has been a breach of undertakings in lieu of a reference, or where false or misleading information has been supplied by the person giving the undertakings in lieu of a reference.

¹⁰⁹ Section 154A of the EA02.

¹¹⁰ In assessing customer benefits the CMA will take into account the same factors as it would consider during a market investigation. Such benefits comprise lower prices, higher quality or greater choice of goods or services in any UK market, or greater innovation in relation to such goods or services.

example where doing so could positively influence the behaviour of the wider market.

- 7.18 The CMA can also accept undertakings partially in lieu of a reference, which need not be comprehensive and can help improve market outcomes quickly. These may be appropriate, for example, in a scenario where there are several features of a market that may be having or contributing to an AEC, and one (or more) specific feature(s) can be effectively addressed by accepting undertakings partially in lieu of a reference.
- 7.19 For example, the relevant features of a market may include that one party operating in the market is able to impose contractual terms on its customers that create barriers to entry or expansion by rival firms. If the party offered the CMA an undertaking that it would no longer use such terms, and the CMA assessed that the undertaking remedied the relevant feature of the market, it could accept the undertaking partially in lieu of making a reference. There could then be no reference in respect of that feature for 12 months. Any reference that is made could only relate to other features (and would cover all firms in the market).¹¹¹

Market investigation reference procedure

- 7.20 The procedure for a market investigation reference involves:
- (a) Specifying the terms of reference;
 - (b) The possibility of a steer from the Board to the inquiry group; and
 - (c) The appointment of an inquiry group.
- 7.21 If the CMA intends to make a reference, it must consult any person whose interest is likely to be substantially affected by the proposed reference as far as practicable.¹¹² The duty to consult can be discharged as part of any preceding market review or market study (see section 5 and 6), or directly via issuing a public consultation.

¹¹¹ In other words, undertakings partially in lieu of a reference are market feature-specific, not party or firm-specific.

¹¹² See sections 169(1) and (2) of the EA02. In addition, when the CMA consults, it must also, so far as practicable, give reasons for its proposed decision. See section 169(3) of the EA02.

Terms of Reference

- 7.22 The Terms of Reference (ToR) set the parameters of a market investigation for the inquiry group.
- 7.23 The ToR for a market investigation must specify:
- (a) the enactment under which it is made;
 - (b) the date on which it is made;
 - (c) in the case of an ordinary reference, the description of goods or services to which the feature or combination of features concerned relates; and ¹¹³
 - (d) in the case of a cross-market reference, the feature or features concerned and the descriptions of goods or services to which it or they relate.¹¹⁴
- 7.24 The reference may also limit the scope of the market investigation, for instance, to either the supply or the acquisition of the goods or services, in particular by reference to the place where the goods and services are supplied or acquired or the persons by or to whom they are supplied or acquired. It may also limit the market investigation to considering the effects of particular features of the markets of such supply or acquisition of goods or services.¹¹⁵
- 7.25 The 'relevant market' is defined in the EA02 to mean the market for the goods or services described in the ToR given to the CMA for investigation.¹¹⁶ The market definition(s) used by the CMA in the market investigation need not always correspond with the 'relevant market(s)' used in the ToR.¹¹⁷
- 7.26 The ToR may be varied, either at the instigation of the referring body, after consultation with the CMA, or at the request of a CMA Inquiry Group. In principle this could be to widen or narrow the scope of the investigation while

¹¹³ Section 133(1)(c) of the EA02.

¹¹⁴ Section 133(1)(d) of the EA02.

¹¹⁵ The scope of a market investigation may also be limited to the effects of particular features of such markets. See section 133(1A) of the EA02.

¹¹⁶ Section 134(3) of the EA02. An alternative description could be 'reference market'.

¹¹⁷ In these Guidelines, 'relevant market' is used in two contexts: first, when referring to the statutory test, it has the meaning as defined in section 134(3) (in other words, the reference market); secondly, when referring to market definition, the relevant market is the market defined by the CMA (an alternative description of which could be 'economic market').

it is in progress.¹¹⁸ A variation would not affect the statutory time limit for the market investigation, but it may have implications for the processes the CMA follows and the timing with which an investigation is completed in practice. For those reasons, the CMA would carefully consider the need for any variation, and the management of any consequences.

7.27 Where another regulator is contemplating or undertaking a market study, the CMA's preparatory market investigation team will engage with the regulator to obtain information ahead of any anticipated reference.¹¹⁹

7.28 The ToR will be published on the CMA's website.

CMA Board steer

7.29 Where the CMA Board is making the reference, in addition to issuing the ToR for the market investigation, it may append an advisory steer to the reference decision, setting out its expectations regarding the scope of the market investigation and the issues that could be the focus of the investigation. For example, the advisory steer may suggest areas of focus for additional evidence gathering or potential remedies.

7.30 The inquiry group would be expected to take the advisory steer into account. However, the inquiry group is required to make its statutory decisions independently of the CMA Board.

Appointment of inquiry groups

7.31 As soon as practical after receiving the reference, the CMA Panel Chair identifies and appoints an inquiry group to lead the market investigation. The appointment of the inquiry group is made for the duration of the investigation, up to the point at which the reference is 'finally determined'.¹²⁰

7.32 The inquiry group provides the strategic direction, weighs the evidence and considers the arguments from parties, both received in writing and given

¹¹⁸ The ToR in the Payday lending market investigation (2013) was first published in June 2013 and then varied in June 2014.

¹¹⁹ Information gateways are made available under [Part 9 EA02](#)

¹²⁰ Generally a reference is finally determined, as defined in section 183(3)-(6) of the EA02, when the final report is published or, if remedial action is to be taken by the CMA, when the remedies are implemented (ie either by the making of an Order or acceptance of Final Undertakings). Paragraph 43 of Schedule 4 to ERRA13 provides that the CMA Chair may appoint replacements to the inquiry group if necessary. Members may be reappointed to deal with matters arising from the reference following final determination, for example to consider any ongoing remedy implementation or post-litigation issues.

orally, and directs and assesses the analysis produced by the staff team. It makes the final decisions on the statutory decisions for the investigation.

- 7.33 The inquiry group is made up of (usually three or four) independent CMA Panel members.¹²¹
- 7.34 The composition of the inquiry group and details of its members are sent to the main parties to the investigation and published on the CMA's inquiry webpage.
- 7.35 Before appointing a member to an inquiry group, the CMA will assess (by reference to the CMA's conflicts of interest policy¹²²) whether the proposed member has any outside interests that could give rise to a conflict of interest which would affect, or be seen to affect, the Inquiry Group's impartiality (a potential conflict of interest). The CMA's practice is not to appoint a member to an Inquiry Group where a conflict of interest is likely to arise. In limited cases, the CMA may contact the main parties to the investigation to disclose an outside interest ahead of appointing a member even though the CMA believes that the potential conflict of interest would not affect, nor be seen to affect, the Inquiry Group's impartiality. Where appropriate, particular interests may also be disclosed on the relevant case page.

¹²¹ A pool of members—currently 28—is appointed by the Department for Business and Trade (DBT) for eight years, following open competition. Members are selected for their experience, ability and diversity of skills in economics, law, finance and industry.

¹²² Please see: [Conflicts of interest policy](#).

8. Market investigations

- 8.1 As explained in section 3, market investigations are the most intensive of the CMA's markets tools, enabling the CMA to conduct a rigorous assessment of a market and impose legally binding remedies on parties.
- 8.2 This section sets out:
- (a) The legal framework related to market investigations;
 - (b) The ability to agree undertakings in lieu of a report;
 - (c) The procedure of a market investigation;
 - (d) Remedies available in a market investigation;
 - (e) The assessment of those remedies, including:
 - (i) Effectiveness and proportionality;
 - (ii) Relevant customer benefits;
 - (iii) Types of remedies;
 - (iv) Remedy selection; and
 - (v) Remedies process.

Legal framework

- 8.3 In an ordinary reference, the inquiry group is required to decide 'whether any relevant feature of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom or a part of the United Kingdom'.¹²³ If that proves to be the case, this constitutes an AEC.¹²⁴
- 8.4 In forming its judgement, the CMA will apply a 'balance of probabilities' threshold to its analysis. This means that it addresses the question: is it more likely than not that features or a combination of features lead to an AEC?
- 8.5 The CMA interprets the phrase 'prevents, restricts or distorts' in EA02 broadly to cover any AEC, whether actual or potential. It will therefore consider

¹²³ Section 134(1) of the EA02.

¹²⁴ Section 134(2) of the EA02.

features that affect potential competition in a market (for example, by preventing entry and expansion) as well as those that affect the existing levels of competition in the market.

8.6 A market feature may relate to the structure of the market or may arise from the conduct of any market participant.¹²⁵ Specifically:

- (a) Structural features may include high levels of market concentration, high entry barriers, common ownership of competing assets and, in certain limited instances, buyer power.¹²⁶ They may also include government policy and regulation.
- (b) ‘Conduct’ of a market participant (whether supplier, acquirer or customer and whether or not in the goods or services referred for investigation) may include sellers’ strategies which foreclose rivals, co-ordinate behaviour to limit competition or impose high switching costs on customers. The behaviour of customers can also be a feature limiting competition between firms¹²⁷ and may involve customers being unable or unwilling to shop around or being unable to fully assess all competitive parameters of a good or service. Conduct features also include any failure to act, whether intentional or not, and any other unintentional conduct.¹²⁸

8.7 The EA02 does not require the CMA to state whether particular features of a market are to be considered structural features or an aspect of conduct. Since the concept of a feature is broad, the CMA has the flexibility to investigate a wide range of possible market features, each of which may have effects on different aspects of competition.

¹²⁵ Section 131(2).

¹²⁶ Buyer power is the ability of a firm to secure from its supplier(s) prices or other terms in its favour. 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. For example, in the [Groceries market investigation](#) the CC found the exercise of buyer power by certain grocery retailers in relation to their suppliers of groceries, through the adoption of supply chain practices that transfer excessive risks and unexpected costs to those suppliers, was a feature of the markets for the supply of groceries by all grocery stores, which prevents, restricts or distorts competition in connection with the acquisition of groceries by large grocery retailers and some wholesalers and buying groups.

¹²⁷ Market investigations allow the CMA to look at customer behaviour and customer vulnerability in relation to their implications for competition, instead of just looking at them as consumer protection issues. See for example the [Funerals market investigation](#).

¹²⁸ Section 131(2) and (3) of the EA02. For example, customers remaining with a default option rather than actively considering and selecting alternative options may weaken competitive pressure on the provider of the default option. Another example may be firms failing to provide information or infrastructure to allow competitors to integrate complementary products or services with their products such that other firms are prevented from offering effective alternative options.

- 8.8 Moreover, how directly any feature identified by the CMA results in harm to competition may vary (ie some may be directly causing harm and others may be doing so indirectly).
- 8.9 On opening a market investigation, the CMA makes no presumption that there are market features that harm competition. A CMA market investigation may find that there are no such features giving rise to an AEC in the relevant market.¹²⁹
- 8.10 In a cross-market reference, the statutory questions to be decided by the CMA differ. The CMA must decide in relation to each feature and each combination of the features specified in the reference whether the feature or combination of features, as it relates to goods or services of one or more than one of the descriptions so specified, 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.
- 8.11 The inquiry group has a statutory duty to consult, as far as practicable, on its proposed decisions on the AEC test and the remedy questions, when it considers a decision likely to have a substantial impact on any person's interests.¹³⁰
- 8.12 Inquiry groups are also required by the CMA's Rules of Procedure for market reference inquiry groups (the Rules)¹³¹ to:
- (a) draw up and notify the parties of the administrative timetable for each investigation (and to prepare a revised timetable if required);
 - (b) decide the forms of hearings (public or private, joint or individual) and who should attend them;
 - (c) notify the main parties of their provisional findings on the statutory questions (on the AEC issue) and allow them at least 21 days to comment on the provisional findings; and
 - (d) notify main parties of actions which may be taken to remedy the AEC and give the parties the chance to make representations about the Group's proposed actions.

¹²⁹ For example, see [Movies on pay TV market investigation](#), 2 August 2012.

¹³⁰ See section 169 of the EA02.

¹³¹ See CMA17 for the CMA's rules of procedure for merger, market and special reference groups.

8.13 Subject to complying with their statutory duties, the Rules and having regard to any guidance issued by the CMA Board, inquiry groups are free to decide how they conduct a market investigation.¹³²

Undertakings in lieu of a report

8.14 The CMA can accept undertakings in lieu of a report at any time once a reference has been made.¹³³ The undertakings may be fully or partially in lieu of a report.¹³⁴

8.15 Where the CMA is considering accepting undertakings fully in lieu of a report, it must, in particular, have regard to the need “to achieve as comprehensive a solution as is reasonable and practicable” to:

(a) the AEC concerned, and

(b) any detrimental effects on customers so far as resulting from the adverse effect on competition.¹³⁵

8.16 The CMA will also have regard to the same considerations detailed above in relation to the acceptance of undertakings in lieu of a reference, insofar as applicable to its consideration of undertakings in lieu of a report. In particular, the CMA may accept undertakings in lieu of a report where undertakings are effective and would lead to a quicker substantial resolution of its concerns.

8.17 If the CMA has decided to accept undertakings fully in lieu of a report it is no longer required to produce a report.¹³⁶

8.18 Instead, in such cases, the CMA must prepare and publish a report containing:

(a) its decision to accept the undertaking,

¹³² See ERRA13, Schedule 4, paragraph 31.

¹³³ Section 154A of the EA02.

¹³⁴ By way of example, which is given for illustrative purposes only, partial undertakings in lieu of a report may be appropriate in a scenario where the CMA has identified several potential AECs during a market investigation. One of these AECs may relate to a lack of transparency of key information to consumers across the relevant market. In this case, it may be possible and desirable for the firms in the market to address this potential AEC as comprehensively as is reasonable and practicable by agreeing through undertakings in lieu to publish the key information in question. However, the other potential AECs may not be addressed by this measure. In this scenario, there may be scope for firms to offer partial undertakings in lieu of a report.

¹³⁵ Section 154A (5) EA02. The way in which the CMA expects to meet the requirements of section 154A (5) EA02 is set out in greater detail in the Markets Remedies Guidance.

¹³⁶ Section 156 of the EA02.

- (b) the reasons for the decision, and
- (c) such information as it considers appropriate for facilitating a proper understanding of the decision and its reasons for the decision.¹³⁷

8.19 Where the CMA has accepted undertakings partially in lieu of a report, it will produce a report on the remaining aspects of the reference under section 136 EA02.¹³⁸

Market investigation procedure

- 8.20 A market investigation reference can be made directly or further to a market review or market study.
- 8.21 The CMA will consider in each case the most efficient way to run a market investigation. The proposed timeframe and key staging points will be set out in a 'Project Roadmap' (see paragraph 8.28 below).
- 8.22 In considering the appropriate duration of a market investigation, the CMA will take into account, amongst other things:
- (a) The scale and complexity of the market and issues under consideration;
 - (b) Proposed engagement points with parties tailored to the circumstances of the project, with a view to offering meaningful opportunities to engage with the CMA and a fair end-to-end procedure;
 - (c) The end-to-end timeline of markets work, for example, if there has been a preceding market review or a study (see paragraphs 8.55 to 8.57 on how a market investigation procedure will differ if there is a preceding market review or market study).
 - (d) The CMA's duty of expedition; and
 - (e) The 18-month statutory maximum to complete a market investigation.¹³⁹

¹³⁷ Section 156(6) of the EA02.

¹³⁸ See sections 136 and 154A of the EA02.

¹³⁹ The 18-month timetable can be extended by a period of up to 6 months for special reasons. See section 137 of the EA02

8.23 More broadly, the CMA will seek to operate in a transparent and participative manner, engaging with a wide range of stakeholders as part of its invitation to comment or consultation processes, in order to inform its decision-making.

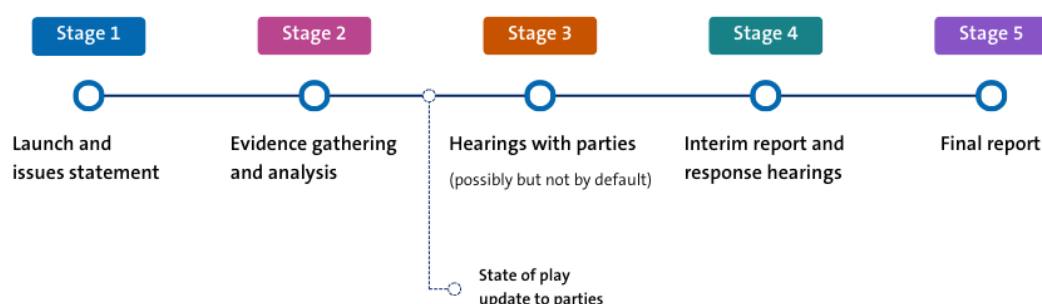
8.24 This remainder of this section is structured as follows:

- (a) The procedure for a market investigation made directly without a preceding market review or market study; and
- (b) The procedure for a market investigation further to a market review or market study.

Market investigation where no preceding market review or market study

8.25 A market investigation will typically follow the key stages illustrated and summarised further below.

Key stages of a market investigation



Launch and issues statement

8.26 Three documents will be issued and/or published upon launch of a market investigation: a ‘first day letter’, a ‘Project Roadmap’ and an ‘Issues Statement’.

8.27 The ‘first day letter’ sets out administrative and procedural information and is typically communicated to the main parties to the investigation immediately upon launch of the investigation. The communication is also likely to begin the information-gathering process by requesting specified information from each party.

8.28 The CMA will publish a ‘Project Roadmap’ on the CMA case page. A Project Roadmap is intended to be a short, accessible document targeted at the stakeholders affected by the CMA’s work to explain the key staging points of

the project. A Project Roadmap supplements the administrative timetable by setting out (where relevant) additional information regarding *how* the project will be run, for example:

- (a) The nature/timing of any sector engagement through webinars or roundtables;
 - (b) Engagement opportunities with the Senior Responsible Officer (SRO)¹⁴⁰;
 - (c) Whether the CMA intends to gather consumer survey evidence and the timing of that;
 - (d) Whether the CMA has, or intends to, appoint an expert panel (and the identity of that expert panel); and/or
 - (e) Whether the circumstances of the case merit preparing a working paper or written progress report for comment outside of the Interim Report.¹⁴¹
- 8.29 A Project Roadmap may be updated from time-to-time to reflect the CMA's updated view (for example, on timing).¹⁴² The CMA will not usually invite written feedback on the Project Roadmap as it is primarily aimed at incorporating the key stages point into one accessible document; however, if stakeholders have concerns, the CMA will consider representations they make.
- 8.30 In addition, an 'Issues Statement' will be published by the CMA, typically at the start of an investigation. This sets out the areas of concern that the CMA intends to explore, as well as setting out initial views on potential remedies. Parties are invited to provide submissions commenting on the issues and possible remedies set out in the statement.
- 8.31 The CMA will also consider holding a Launch Webinar, where appropriate, to provide interested stakeholders with the opportunity to engage with the SRO.

¹⁴⁰ The SRO is accountable for the markets project and for taking key decisions during the project (other than those reserved for the CMA inquiry group).

¹⁴¹ The CMA will not default to a position where it routinely publishes working papers. It is more likely to do so where, for example, it is exploring a novel, complex or technical issue or its views of the evidence or the likely answers to relevant statutory questions fundamentally change.

¹⁴² Including where circumstances arise in which the CMA is more likely to prepare a working paper or written progress report, such as where its views of the evidence or the likely answers to the relevant statutory questions fundamentally change during the course of an investigation. An update to the Project Roadmap would reflect this.

Evidence gathering

- 8.32 At an early stage, informal meetings are held between the staff team and selected main parties (and, where relevant, with other parties). These meetings can cover the procedures to be adopted for the conduct of the investigation and seek information and views on the market. In addition, the CMA is likely to hold early stage ‘data meetings’ with appropriate main parties to discuss the organisation and availability of technical data. There may be subsequent informal, staff-led meetings as the investigation progresses.
- 8.33 In addition, the CMA is likely to offer the main parties meetings with the SRO and/or inquiry group to facilitate engagement with senior staff and decision makers.
- 8.34 In addition to requesting information, the CMA will in most cases offer key interested stakeholders a ‘teach in’ meeting with the case team.¹⁴³ A ‘teach-in’ may be an ‘in-person’ event or by videoconference and may also involve a site visit (potentially to several parties) where appropriate in light of the nature of the businesses involved. A teach-in is an opportunity for the CMA to gain a greater practical understanding of the businesses.
- 8.35 The CMA begins its detailed information gathering, via requests for information to market participants, which is likely to include using its formal powers under section 174 of the EA02, and a range of other methods.¹⁴⁴ Where practicable, the CMA will usually share in draft the questions it intends to send to market participants under section 174 of the EA02 for their comments on feasibility and timing.¹⁴⁵ This is to ensure compliance is possible and to facilitate efficient collection of useful and consistent information, whilst as far as possible minimising the burden to business.
- 8.36 The CMA may also decide to commission primary research as part of the information-gathering process (and as noted in the Project Roadmap).¹⁴⁶ If the primary research takes the form of a survey, the CMA may consult relevant parties on the draft survey design and content. It will not do this for qualitative research.¹⁴⁷ In some cases, in order to construct the sample for primary

¹⁴³ An introductory teach-in may not be necessary where the CMA has previous experience or sufficient understanding of the sector.

¹⁴⁴ These may include voluntary telephone calls, stakeholder ‘roundtable’ events and surveys.

¹⁴⁵ Though not necessarily in all cases, if there are good reasons not to do so: see paragraph 4.5 of [CMA6 Transparency and disclosure: Statement of the CMA’s policy and approach](#).

¹⁴⁶ See also CMA procedures as set out in: [Good practice in the design and presentation of customer survey evidence in merger cases](#).

¹⁴⁷ In *Tobii AB (PUBL) v CMA [2020] CAT 1*, at paragraphs 291 and 220, the CAT found that the CMA’s “Good practice in the design and presentation of consumer survey evidence in merger cases (CMA78)”, which refers to

research, parties may be required to provide contact details for some or all of their customers or suppliers.

State of play

- 8.37 Towards the end of the evidence gathering phase, the CMA will have an internal 'state of play' discussion attended by the SRO and inquiry group and key members of the case team.
- 8.38 The purpose of this discussion is to assess the areas of concern being explored against the evidence gathered to date and determine, applying the CMA's prioritisation principles, where to continue, amend or remove any areas of analysis.
- 8.39 The CMA will update relevant parties after the internal state of play. 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. The update to the parties is aimed at providing an interim update and to keep parties informed, rather than a detailed and resource intensive engagement point.
- 8.40 The inquiry group may also disclose key elements of its analysis before publication of its interim report through, for example, the use of confidentiality rings where appropriate or disclosure rooms, and/or it may disclose some early thinking in progress reports.¹⁴⁸
- 8.41 There may be additional state of play meetings, on a case-by-case basis. Any proposed additional meetings will be set out in the Project Roadmap.

Hearings

- 8.42 The inquiry group may hold hearings with parties, either individually or in groups if appropriate. Where, for example, the CMA has had substantial early engagement with the parties through informal staff team meetings, or with the main parties through meetings with the SRO and/or inquiry group, the CMA may determine that no additional hearings are necessary.

consulting parties, is targeted at commissioned statistical sample research surveys rather than qualitative research methods.

¹⁴⁸ See [CMA6 Transparency and disclosure: Statement of the CMA's policy and approach](#).

- 8.43 When any such hearings are held, their primary purpose is to enable the CMA to understand the market, discuss the parties' submissions, and discuss the issues and possible remedies with parties.
- 8.44 The CMA aims to ensure that any such hearings are held with a range of parties. However, decisions on which main and third parties to invite to hearings, and the format and sequencing of any hearings, rest with the CMA. Some may be more formal and in-person while others may be virtual meetings. Where the CMA considers it appropriate and practicable to do so, it is likely to also prepare and share a transcript or provide a summary of the key points raised at a hearing. A summary of the key points may be published.

Interim report

- 8.45 When the inquiry group has provisionally formed a view on whether or not there are features of the market(s) that give rise to an AEC, its provisional findings will be published in an interim report, and a public consultation on them will be held.
- 8.46 It will also consider possible remedies at the same time as assessing the potential problems. In practice, this means 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.
- 8.47 If an AEC has provisionally been found, the interim report will usually also contain the CMA's provisional decision on remedies. In such cases, the report will contain details of remedies that the CMA has provisionally identified as addressing the AEC or its detrimental effects on customers effectively, and may also outline details of remedies the CMA considers unlikely to be effective and the reasons why it has reached this provisional decision.
- 8.48 The CMA may, where appropriate, send extracts from its draft interim report to relevant parties to identify potentially confidential material, prior to disclosure of the material. This is known as putback and is separate from disclosure of the CMA's developing thinking. Parties should give reasons for any requests they make for material to be excised from the interim report on this basis by reference to section 244 of the EA02. The CMA will aim to run the putback process as efficiently as possible to enhance the overall pace of the investigation. For example, the CMA will typically require that non-confidential versions of written submissions are provided at the same time as confidential versions to facilitate this process. A more streamlined approach to 'putback' (the need for which will also be reduced by decreasing the number

of the documents we publish) will minimise the burden to businesses, and the timescales, of our investigative processes.

- 8.49 As set out in the Rules, the time allowed for the consultation on the CMA's provisional decisions will be no less than 21 days and, where possible, the CMA will apply flexibility in setting reasonable deadlines on a case-by-case basis in light of the relevant circumstances. The CMA may publish a summary of responses and/or non-confidential versions of submissions received in response to the consultation.

Response hearings

- 8.50 Once the CMA has published its interim report, response hearings (individually or multi-party where appropriate) will take place with main parties and any key third parties. The CMA will generally hold response hearings after the deadline for written responses to the interim report has passed.
- 8.51 At a response hearing, parties will be given the opportunity to comment on the provisional decision(s) on the AEC(s) and any possible remedies, and the CMA may seek clarification of particular points made in written submissions or at the earlier hearing.
- 8.52 Having considered the responses from parties, the CMA may undertake additional consultations with parties as required. If further consultation is not needed, the CMA will proceed to publishing its final decision on the AEC and remedies in its final report.

Final report

- 8.53 The CMA will publish its final decision on the AEC question and (if necessary) remedies together with supporting reasons and information in a final report.¹⁴⁹
- 8.54 The report will, if it confirms the finding of an AEC, contain an explanation of the AEC finding and sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies.

Market investigation after a market review or market study

- 8.55 In circumstances where there is a preceding market study or market review resulting in a published report, the CMA will aim to run a swifter market

¹⁴⁹ See section 136 of the EA02. Any person aggrieved by a CMA market investigation decision may, during the two months following the notification of the final report, apply to the CAT for a review of that decision (See section 179 of the EA02).

investigation drawing where possible on the evidence gathered and analysis carried out in the preceding market study or review.

8.56 The investigation stages and time frames will vary based on the depth of analysis conducted in the preceding market review or market study, the extent to which affected parties have had the opportunity to engage with the CMA on that analysis and the scope of the market investigation reference. In each case, a tailored and proportionate timeframe will be set out at the start of a market investigation in the published Project Roadmap and administrative timetable.

8.57 In broad terms, the CMA would expect:

- (a) The preceding market review report or market study report to consider and set out any possible AECs, and possible remedies;
- (b) The market review or market study report to be the starting point in a market investigation for the theories of harm that a market investigation will consider (and a separate issues statement will not typically be published);
- (c) A shorter evidence gathering period than would have been the case had there not been a preceding market review or market study and/or consultation focused on key evidential gaps (gathered, for example, through information requests or main party hearings) and wider engagement as necessary with stakeholders;
- (d) In some cases, for example where the CMA's analysis has considered AECs and is well developed at market study or market review stage, the inquiry group may be able to reach a provisional finding earlier than it would have been able to had there not been a preceding market review or market study and without additional evidence gathering.

Remedies in a market investigation

8.58 Where the CMA has found an AEC, it is required to decide whether action should be taken to remedy, mitigate or prevent the AEC concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the AEC. The CMA is also required to decide whether such action should be taken by it or recommended for others, such as government, regulators, or public authorities, to take. In either case, the CMA

has to decide what action should be taken and what is to be remedied, mitigated or prevented.^{150,151}

8.59 A detrimental effect on customers is defined as:¹⁵²

- (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.

8.60 The main objective of remedies in market investigations is therefore to remedy, mitigate or prevent the AEC concerned and/or its detrimental effects.

Possible remedies outcomes

8.61 The range of options available to the CMA in a market investigation is broader than in a market review or market study. It can accept undertakings (fully or partially) in lieu of a report at any stage of a market investigation.¹⁵³ It can also, where its final report contains findings that there is an AEC, make recommendations to others to address that AEC and/or its detrimental effects on customers, or take action itself by accepting undertakings from the relevant parties and/or by making orders (see below).¹⁵⁴

8.62 In practice, the CMA may decide to take several actions itself and/or make several recommendations. The 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.

Assessment of remedies in a market investigation

Principles of remedial action

8.63 When considering remedies to remedy, mitigate or prevent the AEC and/or its detrimental effects in a market investigation, the CMA will have regard to the

¹⁵⁰ Section 134(4) of the EA02.

¹⁵¹ The questions that the CMA is required to decide are slightly different in the case of public interest references – see Sections 141 and 141A of the EA02.

¹⁵² Section 134(5) of the EA02. The reference to customers includes future customers.

¹⁵³ Where a market investigation reference has been made but no final report published – (section 154A of the EA02). Undertakings fully in lieu of a report will address the AEC and/or its detrimental effects whereas undertakings partially in lieu of a report will address some but not all of the competition concerns.

¹⁵⁴ Sections 157-161 EA02.

need to achieve as comprehensive a solution as is reasonable and practicable to the AEC and its detrimental effects on customers.¹⁵⁵

- 8.64 The CMA will consider whether the remedy (or package of remedies) is effective in addressing the AEC and/or its detrimental effects. In assessing the effectiveness of possible remedies, the CMA will consider their practical impact, including the risks that a remedy might distort outcomes in the market, be circumvented or lead to unintended consequences.
- 8.65 The CMA will also consider whether the remedy (or package of remedies) is proportionate. The proportionality assessment involves considering the costs of the remedy (or package of remedies); selecting the least onerous remedy (or package of remedies) if there are several effective remedies; and ensuring that no remedy (or package of remedies) is disproportionate in relation to the AEC and/or its detrimental effects. This will include consideration of any costs to business that could arise through a remedy remaining in place too long.
- 8.66 When considering remedies, the CMA expects also to have regard to the effect of any action on any RCBs of the market feature(s) giving rise to the AEC.¹⁵⁶ When it is deciding whether certain actions in regulated sectors (eg modifying licence conditions) would be reasonable and practicable for the purposes of remedying, mitigating, or preventing the AEC and/or any detrimental effects, the CMA has to have regard to the relevant statutory functions of the sectoral regulator concerned.¹⁵⁷

Effectiveness and proportionality

- 8.67 The CMA's approach to effectiveness and proportionality (including RCBs) is explained below.

Effectiveness

- 8.68 The CMA's assessment of a remedy's (or package of remedies') effectiveness will consider the following key factors:
- (a) the likely impact on the AEC and, in addition, any detrimental effects, either already arising or expected to arise from that AEC;
 - (b) the timescale over which the remedy is likely to have effect (ie how timely its impact is expected to be);

¹⁵⁵ Section 134(6) of the EA02.

¹⁵⁶ Section 134(7) of the EA02.

¹⁵⁷ Section 168 of the EA02.

- (c) practical considerations associated with the remedy; and
- (d) the risk of the remedy not meeting its intended purpose and/or giving rise to unintended consequences.

8.69 We consider each of these factors in turn below.

Impact on the AEC

- 8.70 The CMA's starting point is to identify remedies which seek to address or resolve the AEC. Where an AEC arises from a combination of features of the market, the CMA will often devise a package of remedies because an individual measure may not be capable of addressing the AEC in its entirety.
- 8.71 If more than one measure is being introduced, the CMA will consider the way they are expected to interact with each other. However, the remedy (or package of remedies) ultimately selected does not need to directly address every feature identified. In some situations, addressing a subset of features directly can be sufficient to generate effective competition and thereby address the AEC.
- 8.72 In certain circumstances, the CMA can also consider introducing measures which mitigate the AEC and/or its detrimental effects. The CMA is likely to choose those measures where reasonable and practicable measures to address the AEC itself are not available,¹⁵⁸ or as an interim solution while measures to directly address the AEC take effect.¹⁵⁹
- 8.73 Measures which mitigate the AEC and/or its detrimental effects seek to control outcomes and may, for instance, reduce the harm to customers associated with high prices. However, those measures are less likely to generate the dynamic benefits, such as innovation, that are normally associated with competitive markets. They are, therefore, likely to represent a less comprehensive remedy to the AEC and/or its detrimental effects.
- 8.74 The suitability of individual remedies (and any package of remedies) to address the AEC and/or its detrimental effects will depend on the facts and circumstances of each case. The various types of remedies that the CMA can implement in a market investigation are identified and explained from paragraph 8.107 below.

¹⁵⁸ Or the feature itself is inherent in the operation of the market, even where it is a well-functioning market.

¹⁵⁹ 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.

Duration and timing

- 8.75 The timescale over which a remedy is likely to have effect will be considered. The CMA is likely 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.
- 8.76 When designing remedies the CMA will seek to minimise the costs or burden of remedies or remedies packages. One way it will do that is by adopting a default position that, where it imposes a remedy using a CMA order, it will include a long-stop date via a 'sunset clause'¹⁶⁰ unless it judges that there is a good reason for the remedy to remain in place (which it would explain in the particular case).
- 8.77 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 occurring or not occurring (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.¹⁶¹

Practicality

- 8.78 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 those to whom it is directed and to other interested parties. Other interested parties 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.

¹⁶⁰ 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.

¹⁶¹ 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. Some ancillary provisions accompanying divestitures – eg not to reacquire the divestiture package – may themselves involve ongoing obligations on parties, and these ancillary measures may be subject to a sunset clause.

- 8.79 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 is more likely to make recommendations to the body responsible for those laws or regulations (see paragraph 5.12 above).
- 8.80 The CMA will consider whether there is a need for complementary measures and what those should be. 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.¹⁶²
- 8.81 The CMA will have regard to other important practicality considerations that can affect how well a remedy works and its impact on businesses who are subject to it.
- 8.82 For example, some remedies, like those which seek to regulate behaviour or control outcomes, can override market signals in ways that reduce their effectiveness or increase their effective costs. In other words, they can unhelpfully distort market outcomes, especially if they are imposed over a long term.
- 8.83 Where a firm with significant market power uses long term and/or exclusive contracts and these create barriers to entry, for instance, the prohibition of those contracts might reduce the barriers but may also disincentivise investment (if the periods of the remedied contract are too short to recoup substantial investments). These points are considered further in other parts of this guidance (see, for example, Appendix 5).
- 8.84 Similarly, remedies like price controls can result in firms adopting other adverse forms of behaviour (referred to as ‘circumvention risks’). A price control, for example, may lead to firms reducing quality or may discourage innovation. While these risks might be managed by the addition of

¹⁶² 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).

preventative provisions, this may come with the expense of increased cost and complexity. These points are also considered in more detail elsewhere in this guidance (see, for example, Appendix 5).

- 8.85 Having regard to matters and risks of the kind described in the preceding paragraphs will be an important part of the CMA's overall balanced assessment of the effectiveness of possible remedies.

Acceptable risk profile and other unintended consequences

- 8.86 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 for which it has a high degree of confidence that they will achieve their intended effect. Customers or suppliers of parties should not bear significant risks that remedies will not have the requisite impact on the AEC and/or its detrimental effects.
- 8.87 Unintended consequences can also be considered as costs of a remedy and limits on its effectiveness. The CMA will have regard to this possibility when it considers the effectiveness of possible remedies. Introducing an information measure, for example, could make coordination between suppliers easier. The CMA would therefore consider whether and to what extent market conditions are liable to lead to co-ordination, and whether prices would be opaque to competitors absent the remedy. These points are considered further in other parts of this guidance (see, for example, Appendix 5).

Proportionality

- 8.88 The CMA will only select remedies that are reasonable and proportionate. A proportionate remedy is one that:¹⁶³
- (a) is effective in achieving a legitimate aim;
 - (b) is no more onerous than it needs to be to achieve its legitimate aim;
 - (c) is the least onerous remedy or package of remedies, where the CMA has identified several effective measures; and
 - (d) is not disproportionate to the AEC and its detrimental effects.

¹⁶³ R. v Ministry of Agriculture, Fisheries and Food Ex p. Federation Europeene de la Sante Animale (FEDESA) (C-331/88), [1991] 1 C.M.L.R. 507; [Tesco v Competition Commission](#) (2009), CAT 6.

- 8.89 The CMA's proportionality assessment will seek the active participation of businesses and others who may be affected by those remedies. This will include engaging with businesses on the benefits and costs of a proposed remedy. As noted at paragraph 8.58 above, 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.¹⁶⁴
- 8.90 Where the CMA's analysis concludes that one or more potentially effective remedies being considered are not proportionate, the CMA will remove these from consideration.
- 8.91 The key steps of the proportionality assessment are explained below.

Assessing the onerosness of effective remedies

- 8.92 The CMA will consider, and seek representations on, the potential negative effects of a remedy, including the costs to businesses. Such negative effects may arise in various forms.
- 8.93 As well as the possibility of unintended distortions to market outcomes that the CMA will take into account (see paragraph 8.68 above), a remedy may result in a range of costs to businesses that the CMA will consider. These include implementation costs (for example, modifying a distribution system) and ongoing compliance costs (for example, providing the CMA with periodic information on prices or reporting to the CMA on other aspects of compliance). The CMA will also consider monitoring costs (for example, the costs of the CMA or other agencies in monitoring compliance).
- 8.94 The CMA will normally collect information from parties about the potential costs of implementing or complying with its remedies and about their effects on those parties. In evaluating such information, the CMA will bear in mind that there might be incentives for parties to overstate those for remedies that they do not support. The CMA is likely to place most weight on estimates of implementation and compliance costs, and other effects, where parties have provided a clear explanation of how those estimates were reached, together with supporting evidence as to the assumptions used to derive them.
- 8.95 If remedies extinguish RCBs, the amount of RCBs foregone are likely to be considered to be a relevant cost of the remedy (see discussion of RCBs from paragraph 8.104).

¹⁶⁴ Section 168 of the EA02.

- 8.96 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. There may be cases of poor competition where businesses are earning returns, or incurring 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.¹⁶⁵ The CMA would not usually give significant weight to the anticipated reduction of such profits as a negative effect of a remedy.
- 8.97 The CMA will consider the costs of remedies or remedies packages in the round. For remedies packages, this may involve consideration of the costs of individual measures within the package. In considering the inclusion of individual measures within a package of remedies, the CMA will consider the extent of synergies with other measures.

Ensuring a remedy is no more onerous than it needs to be

- 8.98 The requirements of a remedy should only be those necessary to address the AEC and/or its detrimental effects. To avoid imposing unnecessary burdens on business, the CMA will seek to minimise costs to ensure that its remedies are no more onerous than is necessary to remedy the AEC it has identified.

Choosing the least onerous remedy/remedies package if there is more than one effective remedy/remedies package

- 8.99 In situations where the CMA has identified several effective remedies or packages of remedies, the CMA will seek to select the least costly and intrusive. For instance, if the CMA identifies a remedy (or package of remedies) that is effective in addressing the AEC and/or its detrimental effects with high costs and another effective remedy (or package of remedies) with lower costs, the CMA will choose the latter on the basis that it is the least onerous of the two effective remedies.

Proportionality of the remedy in relation to the AEC and its detrimental effects

- 8.100 The last step of the proportionality assessment involves considering whether the chosen remedy or package of remedies is proportionate in relation to the AEC and any customer detriment. This involves weighing the relevant costs of

¹⁶⁵ 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.

the remedy (including the loss of any RCBs) against its relevant benefits in addressing the AEC and/or any detrimental effects on customers.

- 8.101 The CMA's assessment of the potential costs (including the costs to businesses) is explained at paragraphs 8.87 to 8.92 above. The CMA's assessment of the potential beneficial effects (including how markets may develop with remedies in place) 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).
- 8.102 The CMA's ability to quantify costs and benefits depends on the circumstances of a case and the characteristics of the market under consideration. Therefore, the CMA will not always place more weight on costs and benefits which can be quantified. The CMA will consider the costs and benefits in the round, rather than seeking necessarily to quantify them precisely.
- 8.103 There may be circumstances where the CMA determines that it should not pursue an effective remedy option on proportionality grounds (or should not apply it to all firms in a market on those grounds). For instance, where the relevant costs of an effective remedy (for some or all firms) are disproportionate compared with its benefits in addressing the AEC and/or its detrimental effects. In rare cases, the CMA may decide not to take any action on proportionality grounds. For instance, where the relevant costs of all available remedy options to address or mitigate the AEC and/or its adverse effects are disproportionate compared with the relevant benefits of those remedies in addressing or mitigating the AEC and/or its detrimental effects.

RCBs

- 8.104 As noted above, when considering remedies, the CMA expects to have regard to the effect of any remedial action on any RCBs of the market feature(s) giving rise to the AEC. RCBs that will be foregone due to the implementation of a particular remedy may be considered as costs of that remedy by the CMA in its proportionality assessment.
- 8.105 In practice, RCBs can influence the remedy assessment in a number of ways including:
- (a) leading to modifications of a remedy (where feasible) in order to preserve RCBs to the extent possible without impairing the remedy's effectiveness;
 - (b) influencing selection as between effective remedies; and/or

- (c) leading to a decision to mitigate the AEC, or take no remedial action, where the relevant costs of all available remedies (including the loss the RCBs) would be disproportionate compared with their relevant benefits.

8.106 Appendix 4 explains:

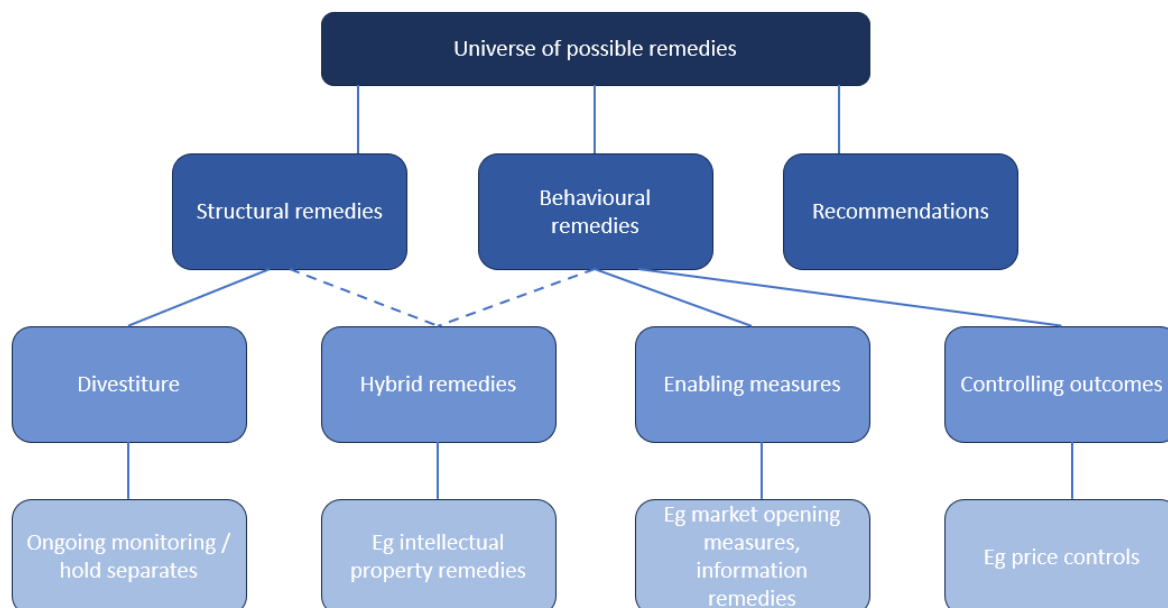
- (a) The statutory definition of RCBs, including examples of possible RCBs; and
- (b) The CMA's approach to RCBs, including the potential impact of RCBs on remedies.

Types of remedies

8.107 Figure 8.1 below illustrates some of the main categories of remedies the CMA can consider in a market investigation. Remedies are conventionally classified as either behavioural or structural:

- (a) Recommendations to others may be structural or behavioural in nature, depending on their content.
- (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) 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.

Figure 8-1: Overview of the universe of possible remedies



Source: CMA

8.108 The CMA’s approach to behavioural, structural, and hybrid remedies is considered in more detail in Appendix 5, including examples of where they have been used in previous cases, what they are seeking to achieve and the key risks that often arise from each remedy type.

Selection of remedies

8.109 The choice of remedies will reflect the particular circumstances of each market investigation. As explained at paragraph 8.68 above, the CMA will seek to select remedies that effectively address the AEC and/or its adverse effects in the least onerous way. This process involves public consultation on those remedy options that appear to the CMA to have the best chance of being effective and proportionate.

8.110 When deciding on the appropriate remedy option, the CMA will consider the following main factors:

- (a) The ability of a remedy (or package of remedies) to address or resolve the AEC and/or its detrimental effects. This will depend on the specific facts and circumstances of each case. In some cases, structural remedies may be more appropriate to address the AEC and/or its detrimental effects (eg cases where competition concerns arise from high concentration in a market). In other cases, behavioural remedies may be more appropriate to address the AEC and/or its detrimental effects (eg enabling measures may be chosen where the conduct of

firms has given rise to an AEC or market opening measures may be chosen where the AEC results from switching costs or barriers to entry or expansion).

- (b) The expected timeframe for addressing the AEC and/or its adverse effects. Whilst the CMA will typically prefer remedies likely to have rapid results, in some cases the CMA may prefer remedies requiring a longer timeframe to address the AEC and/or its detrimental effects.¹⁶⁶ The CMA can also implement measures to address the detrimental effects on customers during the interim period.
- (c) How remedies will be implemented and delivered. The CMA will consider (i) whether there are suitable checks and balances, governance mechanisms and processes in place for the overall delivery phase (for both the CMA and key stakeholders);¹⁶⁷ (ii) whether it will be responsible for monitoring compliance with any undertakings it accepts or orders it makes or will appoint a third-party to do so;¹⁶⁸ and (iii) 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. At the design stage, the CMA will also have regard to its ability to trial the way information remedies¹⁶⁹ are implemented, to help it decide which, if any, to trial (see further discussion of trialling from paragraph 8.119 below).

Remedies process

- 8.111 The remedies process in market investigations is more detailed than in market studies and reviews.
- 8.112 Having considered the evidence and developed possible remedies throughout the market investigation, and consulted on them at the interim report stage, the final report in a market investigation 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 their subsequent implementation.¹⁷⁰ The CMA will aim to include a

¹⁶⁶ For example, the [Open Banking](#) remedy following the [Retail banking market investigation \(2016\)](#).

¹⁶⁷ These may include, for example, processes for interpretation of aspects of the order/undertakings during that phase.

¹⁶⁸ As well as its duties to keep remedies under review (as described in section 9 of this document), the CMA has powers under paragraph 20C of [Schedule 8](#) to the EA02 to appoint third parties to monitor compliance with orders it imposes. Any decision to exercise this power will involve 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.

¹⁶⁹ Information-based remedies, or remedies relating to any other matter as specified by the Secretary of State.

¹⁷⁰ Section [136](#) of the EA02.

clear description of the relevant measures 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 remedies have been effective.

8.113 Where the CMA plans to impose particularly complex remedies, the final report will set out a process for their implementation, oversight and, where appropriate, review at key stages. That will help the CMA to assess whether the remedy continues to be effective.¹⁷¹ These gateways or checkpoints will also, in the interests of proportionality, 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. Identifying them in advance will provide greater certainty for businesses and their customers.¹⁷²

Implementation of remedies

8.114 The remedies implementation process will begin following the publication of the final report. The CMA has a choice of implementing remedies by accepting undertakings from the relevant parties or making an order (see paragraphs 8.121 to 8.123 below). The CMA will also consider whether interim measures should be put in place pending the implementation of final remedies (see paragraphs 8.133 to 8.134 below).

8.115 The CMA will publish an administrative timetable to implement undertakings offered by the relevant parties or orders.

8.116 The CMA may choose to trial the way information remedies¹⁷³ are implemented prior to settling on the final remedy package, with the implementation trial beginning by the acceptance of undertakings or making of an order relating to the trial.¹⁷⁴ The trialling of remedies is covered in more detail at paragraphs 8.124 to 8.132 below and in Appendix 6.

8.117 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

¹⁷¹ 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.

¹⁷² The CMA will more generally keep the remedies it introduces under review and may take additional action outside of the specified checkpoints.

¹⁷³ Information-based remedies, or remedies relating to any other matter as specified by the Secretary of State.

¹⁷⁴ Section [161C\(4\)](#) of the EA02.

reason for acting differently.¹⁷⁵ This also applies to elements which are subject to implementation trials. That is, decisions concerning implementation trial measures must also 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.¹⁷⁶

Statutory deadlines

8.118 Where the CMA does not trial remedies, the CMA must accept final undertakings, or make a final order, within six months of the date of publication of the market investigation report.¹⁷⁷ The CMA may extend the six-month period by up to a further four months if it considers that there are special reasons why final undertakings cannot be accepted or a final order made within the statutory deadline. The power to extend the timetable is most likely to be used where the remedies themselves are more complex, for example where consumer testing of the detailed implementation of remedies is necessary, where proposed remedies give rise to complex practical issues, or where an additional consultation is required to address material changes arising from comments made in earlier consultations. Only one extension is possible.¹⁷⁸ A decision to extend the timetable must be published.¹⁷⁹

¹⁷⁵ See section 138 of the EA02. 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.

¹⁷⁶ The CMA would not expect a finding of a trial not having 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, for example, trial a new version of the remedy.

¹⁷⁷ 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. The time limits also do not apply to remedies that are being trialled or any other remedies that the CMA considers cannot reasonably practicably be put in place while such a trial is taking place (although the CMA will seek to put such remedies in place as promptly as it can and they must be in place by the end of any trial period).

¹⁷⁸ The six-month and additional four-month periods set out above are upper time limits and may be adjusted downwards by order. If the Secretary of State proposes to make an order adjusting those periods, they must consult the CMA and other relevant persons before doing so. See section 138B (6)-(8) of the EA02.

¹⁷⁹ Section 172(2)(zb) of the EA02. The CMA is required also to publish the reasons for any such extension (section 172(5) of the EA02).

8.119 During the period covered by the statutory timetable for remedies implementation, the CMA has investigatory powers.¹⁸⁰ If the CMA considers that any person has failed (with or without reasonable excuse) to comply with any requirement of a notice issued by the CMA using its investigatory powers,¹⁸¹ it can ‘stop the clock’ for remedies implementation.¹⁸² In this case, the time limits set out above are extended. In effect, this means that the timetable is suspended either until the documents or information requested is provided to the satisfaction of the CMA, or until the CMA publishes a notice to cancel the extension. The extension periods described in this paragraph and in paragraph 8.118 above can be used together if necessary, in which case the extension periods are added together.¹⁸³

Remedies implementation during litigation

8.120 The decisions contained in the CMA’s final report may be challenged by way of an application to the CAT during the remedies implementation stage. The process to be followed in the event of an application to the CAT will depend upon the circumstances and will therefore be considered on a case-by-case basis. Subject to any directions made by the CAT, the CMA will, when considering the process to be followed, consider the prevailing circumstances. It will also have regard to the statutory time limits that applied to its inquiry to which the challenged CMA decision related.

Post-implementation

8.121 The Inquiry Group will normally disband following its acceptance of undertakings or the imposition of an order implementing remedies.¹⁸⁴ 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 and may be delegated to the CMA Executive Committee or a steering group.

8.122 The CMA is also normally responsible for monitoring and enforcement of remedies¹⁸⁵ following acceptance of undertakings or the imposition of an order

¹⁸⁰ Section 174(1)(b) of the EA02.

¹⁸¹ For example, a notice requiring the production of specified documents.

¹⁸² Sections 138A(3) to (5) of the EA02. In some circumstances, the CMA can also impose penalties (see CMA4 in relation to CMA’s guidance on administrative penalties).

¹⁸³ Section 138B of the EA02.

¹⁸⁴ 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.

¹⁸⁵ Section 154A, 162, 162A, and 162B of the EA02.

by it. Compliance with undertakings or an order is enforceable in the courts¹⁸⁶ and the CMA can impose penalties where a party does not comply with an undertaking or order and has no reasonable excuse for not doing so.¹⁸⁷

8.123 To ensure appropriate CMA oversight and governance of complex remedies in market investigations, and so that it operates at pace and in proportionate and predictable ways, 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 Committee. These will include the oversight of any ongoing development or monitoring of remedies following the final report and any order or undertakings.¹⁸⁸

Trials

Remedies that can be trialled and tested

8.124 The EA02 provides for the CMA to conduct trials of the way information remedies are implemented in market investigations¹⁸⁹ prior to settling a final remedy package.^{190 191} An information remedy includes the way information is framed and presented to consumers.

8.125 Not all information remedies and not all markets will be suitable for a trial, for example, if the nature of the market means it will be difficult to gather robust data.

The CMA's use of trials

8.126 The CMA aims to deploy trials in the limited circumstances where early refinement of a remedy would be beneficial for businesses and the CMA, as

¹⁸⁶ 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.

¹⁸⁷ See sections 167A-167C of the EA02 and [Administrative Penalties: Statement of Policy on the CMA's Approach](#) (CMA4).

¹⁸⁸ 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 the Enterprise and Regulatory Reform Act 2013. See also section 162 and 162A of the EA02.

¹⁸⁹ The trialling powers do not apply in market reviews or studies.

¹⁹⁰ See sections 161A to 161E and 162B of the EA02.

¹⁹¹ The relevant provisions give the CMA the power to trial the implementation of remedies relating (i) to the provision of information to consumers, whether directly or through an intermediary (ie information remedies), or (ii) to any other matter as specified by the Secretary of State. No other matters have yet been specified.

well as for customers and consumers. The CMA will consider the anticipated benefit of a refined remedy and the anticipated costs to businesses of a trial.

8.127 The purpose of a trial is to ensure that effective and proportionate measures are in force as quickly as possible. It is not to reopen the question of whether a remedy should be implemented at all,¹⁹² but to ensure that the final designs of specific measures work and impose no more burdens than necessary on businesses. Trials also mitigate the risk that ineffective remedies are put in place initially and need to be re-assessed and varied, and so reduce the overall period in which businesses and consumers face uncertainty. They are accordingly intended to operate in businesses', and their customers' and consumers', best interests.

8.128 The CMA will exercise its trial powers with the aim of delivering these benefits. In particular, it will take careful steps to ensure that trials are only used in appropriate cases, that they are efficiently designed and subject to appropriate safeguards and can be concluded as swiftly as possible. More detail is set out below and in Appendix 6.

8.129 The CMA intends to apply the following broad principles to deliver efficient and proportionate trials:

- (a) Applying a default of running concurrent trials rather than successive ones, where there is more than one variant being tested, to deliver results in the shortest timeframe feasible;¹⁹³
- (b) Limiting the scope of a live trial with businesses to focus on collecting only the data, evidence or other information that is necessary to reach robust findings on the effectiveness of the remedy;
- (c) Ceasing a trial early if early results give a clear signal of the target impact and moving to final order drafting;
- (d) Ensuring the end-to-end timeframe for a trial is delivered in the shortest timeframe appropriate.

¹⁹² That is, they are not an opportunity to review the finding of the AEC or detrimental effects identified.

¹⁹³ If a trial indicates that a means of implementing a remedy is ineffective, the CMA does have the power to conduct another trial beginning within a further period of six months. The CMA's approach is intended to mitigate the risk that further trials are necessary. It accordingly anticipates that the power to conduct further trials would only be exercised in exceptional cases. In circumstances where it is unavoidable to run trials successively rather than concurrently, we would apply the principles in sub-paragraphs **8.129(b) to (d)**.

Remedy trial process

- 8.130 If the CMA has determined that it should undertake a trial of the way one or more information remedies should be implemented, it is required to begin an implementation trial within six months from the publication of the final report (extendable by four months).¹⁹⁴ The relevant legislation does not, however, set a timeframe in which the CMA is required to complete the trialling process, as that is dependent on the specific circumstances of each case.
- 8.131 The CMA will, nevertheless, set an appropriate deadline upfront to give businesses and their customers greater certainty (see Appendix 6 below),¹⁹⁵ and the administrative timetable will set out anticipated timeframes for the trialling process and final implementation of the remedy.
- 8.132 While the exercise of the trial powers will depend on the circumstances of each case, Appendix 6 provides further guidance on where and how the CMA is more likely to exercise them, in particular:
- (a) the key procedural considerations; and
 - (b) the trialling process, including the timeframe for such trials.

Interim Measures

- 8.133 The CMA will consider whether interim measures should be put in place pending the implementation of final remedies (including cases where it conducts implementation trials). These are measures to prevent pre-emptive action by parties that might impede the taking of any remedial action in relation to a market investigation. The CMA can implement these measures after it has published its final report but before the reference has been finally determined (by final undertakings being accepted or a final order made).¹⁹⁶ It can 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.¹⁹⁷
- 8.134 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.¹⁹⁸ This

¹⁹⁴ This is the timeframe which applies where a trial immediately follows a market investigation. Different requirements apply if the CMA has exercised its power to review a remedy and decided to vary it because it is ineffective. In that case, any implementation trial must begin within six months of that decision. See sections [138A](#), [161A](#) to [161E](#), [162A](#) and [162B](#) of the EA02..

¹⁹⁵ See Appendix 6 for further detail on the relevant part of the trialling process.

¹⁹⁶ 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).

¹⁹⁷ Sections [157](#) and [158](#) of the EA02.

¹⁹⁸ Sections [157\(2B\)](#) and [158\(2B\)](#) of the EA02.

enables 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

- 8.135 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. In deciding the appropriate course, the CMA is likely to consider practical matters such as 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.
- 8.136 The content of any orders made by the CMA is limited by the EA02.¹⁹⁹ The subject matter of an undertaking is not similarly limited.²⁰⁰ The fact that the content of undertakings is not subject to those statutory limitations, and the process involved in agreeing undertakings, can confer greater flexibility than in the case of orders. Undertakings can also bring benefits in terms of the speed with which the CMA can conclude its work and help focus the outcomes, and the CMA will consider the use of undertakings where they are effective in remedying, mitigating or preventing any AECs swiftly.
- 8.137 Undertakings are generally accepted following the publication of the final report, and in the case of trialling of remedies, after the completion of the implementation trial.
- 8.138 Some concerns can, however, be remedied sooner than others. An example is where an aspect of an AEC arises from the conduct of a small number of firms (and could be addressed by them giving undertakings partially in lieu of a report). Another is where one remedy can be implemented via an undertaking prior to another remedy being trialled and later implemented via a different undertaking. The CMA will therefore typically consider, at an early stage (as well as after its final market investigation report), whether undertakings are appropriate and, where it thinks they may be, it will engage with relevant parties about their provision.
- 8.139 In some cases, for instance market investigations which are market-wide rather than focused on the conduct of one firm or a small number of firms, it will be more practical for the CMA to implement remedies by order rather than through

¹⁹⁹ See [Schedule 8](#) of EA02 and section [161\(3\)](#) of the EA02

²⁰⁰ Section [164\(1\)](#) of the EA02.

undertakings (notwithstanding the above). That would avoid the likely delay and complexity of negotiating undertakings with several parties and be more likely to result in an effective remedy being put in place promptly.²⁰¹ 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 where it has the power to do so.²⁰²

8.140 When accepting an undertaking or issuing an order, the CMA will explain how the remedy or remedies package seeks to resolve the concerns identified, as well as explaining how the CMA intends to assess whether the remedy has been effective. In line with the final report, the 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.

²⁰¹ For example, in [Home Credit](#) and [PPI](#), the remedies applied to a large number of parties and this was a reason for 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.

²⁰² 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.

9. Monitoring and review of market remedies

Introduction

- 9.1 This section sets out the CMA's approach to the monitoring and review of undertakings and orders imposed following market investigations.
- 9.2 It covers how the CMA:
- (a) monitors compliance with, and investigates breaches, of remedies; and
 - (b) amends or removes remedies under statutory powers where a change of circumstances is identified or a remedy is deemed fully or partially ineffective.
- 9.3 It does not cover:
- (a) interim undertakings or orders, such as undertakings under section 157 or orders under section 158 of the EA02; and
 - (b) the CMA's approach to enforcement action in response to breaches of remedies. This is covered in Administrative Penalties: Statement of Policy on the CMA's Approach (CMA4).

CMA's statutory role

- 9.4 Undertakings and orders are the primary means by which remedies are implemented following the determination of market investigation references under the EA02. Under the EA02, undertakings are accepted and orders imposed by the CMA, except in certain public interest cases where the Secretary of State is responsible for accepting undertakings or imposing orders.
- 9.5 The CMA has a statutory duty to keep under review undertakings and orders made under the EA02. In summary, section 162 of the EA02 provides that the CMA must consider whether an undertaking or order has been or is being complied with. Moreover, and from time to time, the CMA must consider whether, by reason of any change of circumstances, undertakings or orders are no longer appropriate and need to be amended or removed.
- 9.6 The CMA has a duty under section 162A of the EA02 to take action on ineffective remedies. This applies to remedies that are made on or after 1 January 2025 to implement the determination of a market investigation reference and allows the CMA to amend or remove a remedy if it is found to be ineffective, even in the absence of a change of circumstances.

Monitoring compliance with CMA undertakings and orders

- 9.7 CMA undertakings and orders are designed to remedy identified competition problems by placing effective and proportionate obligations on specific parties, within an appropriate timeframe. They are subject to consultation prior to introduction.
- 9.8 The CMA is committed to the effective and proportionate monitoring of compliance with its remedies. The CMA seeks to ensure that a remedy achieves its intended objective without placing unnecessary burden on the parties subject to the remedy. Where another regulator or regulators are present, the CMA will engage closely with them to avoid inconsistency with, or duplication of, the existing regulatory regime.
- 9.9 The CMA's approach to monitoring compliance with a remedy may change over time as the CMA seeks to recalibrate its approach to reflect, for example, whether the remedy has been implemented, the levels of compliance with the remedy and the actions of the parties subject to the remedy in identifying and addressing any breaches of the remedy which have occurred.
- 9.10 The CMA will work closely with the parties subject to the remedy to ensure that they understand how to comply with their obligations, are able to achieve compliance in a timely manner and the action they must take when this is not the case.

Compliance with undertakings and orders

- 9.11 Parties subject to CMA undertakings and orders are required to comply with these at all times from their introduction and throughout the time they remain in force.
- 9.12 Taking action to address breaches of remedies is an important way in which the CMA delivers the outcomes of its markets work. Breaches of remedies can mean that benefits for customers from the CMA's work are not being realised, rivalry is reduced and that competition in relevant markets is not working as well it otherwise would.

Monitoring compliance

- 9.13 In most cases, the CMA is responsible for monitoring and enforcing compliance with its undertakings and orders.²⁰³ Some undertakings and orders impose compliance reporting requirements on parties. In addition, the CMA proactively seeks information and monitors compliance.
- 9.14 The CMA may direct parties subject to the remedy to appoint a monitoring trustee or other appointed body that has specific responsibilities in relation to specific undertakings and orders, while overall responsibility for compliance remains with the CMA.²⁰⁴ However, this will only be the case for complex behavioural undertakings and orders or to oversee structural changes. In considering whether to appoint a monitoring trustee or other appointed body to monitor compliance, the CMA will consider the cost of appointment, as well as the ongoing cost and operation of the arrangement.
- 9.15 The CMA may find out about breaches of its undertakings and orders through a variety of routes, including:
- (a) proactive monitoring of individual parties and markets;
 - (b) investigations of parties carried out by the CMA under a variety of tools;²⁰⁵
 - (c) liaison with sector regulators and industry or other representative bodies;
 - (d) third parties, including individual consumers, consumer representative bodies and parties or whistle-blowers, assessing and reporting on the compliance of others;
 - (e) compliance reports submitted to the CMA by parties; and
 - (f) self-assessments of compliance carried out at other times by parties.

²⁰³ Sections 162 and 162A of the EA02, see also [Schedule 24](#) of the EA02 for provision in respect of the remaining Fair Trading Act 1973 (FTA73) remedies.

²⁰⁴ For example, the [Private Healthcare Market Investigation](#) Order 2014 involves the appointment by the CMA of an Information Organisation to provide information for patients on hospitals and consultants, while the CMA has used divestment and/or monitoring trustees in a range of cases.

²⁰⁵ Including competition and consumer investigations, Digital Market Unit investigations, merger investigations, market reviews, market studies, market investigations and investigations of previous breaches of orders and undertakings under the EA02.

Reporting breaches of remedies to the CMA

- 9.16 The CMA's portfolio of market undertakings and orders includes varying types of legal obligation in relation to reporting breaches, with some imposing specific deadlines on parties for reporting breaches while others require parties to report on an annual basis about breaches. The CMA will ensure that the legal obligations in relation to reporting breaches are appropriately configured to enable it to effectively monitor and enforce the relevant undertaking(s) or order(s) without placing unnecessary burden on parties.
- 9.17 The CMA encourages all parties to report to the CMA all breaches of its undertakings and orders as soon as these are discovered, even where a full account of the details is not yet available. Such cooperation benefits both the CMA and the party concerned, as it enables a timely and efficient assessment of the scale of the breach, and of what action may be necessary in response, including potential enforcement action. It also facilitates the efficient use of investigative resource both in the CMA and the party concerned.
- 9.18 If a party is aware of a breach and takes action to remedy the breach without informing the CMA at the time, there is a risk that the CMA may not be satisfied with the action taken, and this may lead to the party having to take separate and additional action to satisfy the CMA at additional cost. The CMA will take into account any action taken by the party to remedy the breach and the reporting of the breach to the CMA when it determines the appropriate enforcement action.²⁰⁶
- 9.19 Where a party becomes aware that it will breach undertakings or an order in the near future and this cannot be avoided, the CMA would also encourage the party to contact the CMA as soon as it is aware of this possibility, to explain the circumstances surrounding this and to explore with the CMA what actions the party can take to mitigate the duration and the effects of the breach.
- 9.20 All contact in relation to breaches of the CMA's market undertakings and orders covered by this guidance should be with the CMA's markets remedies monitoring and enforcement team (remediesmonitoringteam@cma.gov.uk).²⁰⁷

²⁰⁶ See [CMA4](#) for details of the factors the CMA considers in enforcement in relation to breaches of undertakings and orders.

²⁰⁷ To facilitate prompt handling of correspondence, parties contacting the CMA via this email address should include a reference to the relevant undertaking/order in the email title.

9.21 The CMA would expect to receive the following information with all reports of breaches, while recognising that all aspects of this list may not be available at the point at which a breach is first identified and notified to the CMA:

- (a) a description of the relevant provision(s) of the undertakings or order to which the breach relates;
- (b) a full description of the breach itself, including whether, and if so how, it might have an impact on relevant third parties, and consumers;
- (c) how the breach occurred and how and when it was discovered;
- (d) the duration of the breach and whether it is ongoing;
- (e) the size and significance of the breach and likely harm caused, both for the party and for third parties and consumers;
- (f) details of whether any third parties are involved, including suppliers, systems providers and other contracted parties; and
- (g) whether any relevant regulators have been informed (for breaches in regulated sectors).

Investigations of breaches of undertakings and orders

9.22 The CMA's approach to an investigation into breaches of its undertakings and orders will depend on the nature and severity of the breach. The CMA may use information-gathering powers contained in particular clauses of undertakings and orders, or broader information-gathering powers, such as notices under section 174 of the EA02 or use of the CMA's general function in section 5 of the EA02 to obtain, compile and keep under review information about matters relating to the carrying out of its functions.

9.23 Certain breaches of the CMA's undertakings and orders could also represent a breach of other laws which the CMA is tasked with enforcing, including competition or consumer protection legislation. Where the CMA considers this to be the case, the CMA will prioritise the most appropriate tool or tools under which to conduct its investigation, based on the circumstances of the breach concerned, including, where appropriate, the enforcement mechanisms available to deliver redress to consumers.

9.24 Those providing information to the CMA have an obligation to provide truthful, complete and accurate information. It is an offence under sections 117 and 180 of the EA02 to knowingly or recklessly provide information to the CMA that is false or misleading in a material respect. Further, the CMA may impose

a turnover based penalty on any person where it considers that information that is false or misleading in a material respect has been supplied without reasonable excuse (section 174A of the EA02). The CMA also notes that failure to comply with a requirement of a notice issued under s174 of the EA02 without reasonable excuse can lead to the imposition of a penalty.²⁰⁸

9.25 The decision of the action to be taken in response to a breach will be taken by a senior CMA member of staff.

9.26 If multiple breaches by different parties indicate that there may be a problem with the remedy rather than compliance, the CMA will work closely with the parties concerned to understand the issue and resolve it as efficiently as possible.

Public register of breaches of undertakings and orders

9.27 The CMA has two public registers on its website – a register of all market orders, undertakings and directions and a register of all material breaches of market remedies. These registers are updated every quarter.

9.28 To determine whether a breach is material and should be included on the register of material breaches, the CMA will consider:

- (a) the actual or potential substantive effect (if any) on customers and/or the competitive process;
- (b) the impact (if any) on the CMA's ability to carry out its functions, particularly in relation to remedy monitoring and enforcement;
- (c) the duration of the breach and how quickly it was reported and rectified; and
- (d) the extent, if any, of any exacerbating factors, such as the extent of previous non-compliance by the party concerned or the extent to which a remedy and its requirements are well-established. These factors will be considered on a case-by-case basis.

9.29 The CMA will record the following information about material breaches in its register:

- (a) the undertakings or order breached;

²⁰⁸ More information on the imposition of penalties may be found in [CMA4](#).

- (b) the party that breached the undertakings or order;
- (c) a short description of the breach, including whether it is a breach of administrative, reporting or substantive obligations;
- (d) the duration of the breach;
- (e) when the breach was notified to the CMA;
- (f) any action taken by the party to address the breach and to put things right for consumers (such as through providing refunds to compensate for any loss or damage); and
- (g) action taken by the CMA in response.

9.30 Prior to publishing details of a breach on the register of breaches, the CMA will notify the relevant party of its decision to make an entry on the register and provide such of its reasoning as the CMA considers appropriate in the circumstances.

Review of undertakings and orders

Introduction

9.31 The CMA has the duty arising from sections 162 and 162A of the EA02 to keep under review undertakings or orders, and may make changes:

- (a) where the CMA considers by reason of a change of circumstances a market undertaking or order is no longer appropriate;²⁰⁹ or
- (b) where the CMA concludes that a market undertaking or order has been ineffective.²¹⁰

9.32 The review is the process that the CMA uses to determine whether the undertaking or order in question may no longer be appropriate and/or has been ineffective and needs to be amended or removed.

9.33 In fulfilling its statutory duty, the CMA is committed to retaining only those remedies that remain appropriate on the basis that they continue to address the competition problem and consumer detriment identified through its markets work. Where this is not the case, the CMA will act swiftly to review and amend or remove the remedy concerned. The CMA will typically seek to

²⁰⁹ Section 162(2) and 162(4) of the EA02; see [Schedule 24](#) to EA02 for the remaining FTA73 remedies.

²¹⁰ Section 162A(4) and 162A(5) of the EA02.

remove the remedy and will only consider amending the remedy if there is clear evidence that the relevant competition problem has endured and is material. Where this is the case, the CMA would generally expect to narrow the scope of the remedy's application.²¹¹

Change of circumstances

9.34 To consider that a remedy may no longer be appropriate, the change of circumstances must be of sufficient magnitude, relevance and importance that the undertaking or order becomes no longer appropriate in dealing with the competition problem and consumer detriment which it was designed to remedy. For example, past changes of circumstances have included:

- (a) products or services being either changed in nature or no longer offered by parties;
- (b) changes in consumer tastes and preferences over consumption of particular products or services;
- (c) changes in market and broader industry supply conditions or structure that may affect the conditions of competition and the need for a particular undertaking or order;²¹² or
- (d) a range of legislative changes, including the requirements of an undertaking or order being superseded by other legislation or regulatory controls, as well as other changes to legislation that may affect the application of an order or undertaking.²¹³

9.35 In cases where the changes are complex or uncertain, a detailed investigation may be required in order to evaluate whether or not there has been a change of circumstances (and, if so, what, if any, changes to undertakings or an order may be appropriate). In these circumstances, the CMA will undertake a substantive review of an individual undertaking or order. The CMA will engage closely with the parties subject to the remedy and other interested parties prior to launch to ensure that the review is run efficiently and without unnecessary burden for those parties.

9.36 In contrast, where the changes of circumstances are clear and straightforward, and the action necessary is clear and straightforward to

²¹¹ This approach may not be appropriate, though, where there has been circumvention or failure to implement the remedy, which has resulted in its ineffectiveness - see paragraph 9.34(a) below.

²¹² For example, the [review of undertakings given by British Sky Broadcasting](#).

²¹³ For example, the [review of the Retail Banking Market Investigation Order 2017](#).

determine, the CMA may undertake a strategic review of a number of undertakings and orders together. A strategic review enables the CMA to review and amend or remove multiple remedies efficiently, thereby reducing the regulatory burden on businesses subject to undertakings and orders and allows the CMA to focus on monitoring and enforcing those undertakings and orders that remain appropriate.

Effectiveness

9.37 The CMA can amend or remove an ineffective remedy within 10 years of publication of the final report. However, this power does not apply for two years from introducing the remedy or for two years from when it last amended the remedy.²¹⁴ However, during this period, the CMA can amend or remove a remedy if it considers by reason of a change of circumstances that the remedy may no longer be appropriate.

Ineffective undertakings and orders

9.38 An ineffective remedy is a remedy that has been partially or fully ineffective in delivering the action, or actions, as decided on in the final report²¹⁵ to remedy, mitigate or prevent the competition problem and any detrimental effect on consumers, within the timeframe that was anticipated.²¹⁶

9.39 Ineffective remedies will be those where, for example, the undertaking or order has:

- (a) been circumvented or not implemented by the party concerned, such that it has had little or no impact on the relevant party and the market concerned;²¹⁷

²¹⁴ Section 162A(4) of the EA02. The effect of this is the CMA may vary a remedy within the period of 10 years of final report but may not vary a remedy (under this power) for either: a) two years from first making an order or accepting an undertaking, or b) two years from when it last amended it using this effectiveness power. However, the CMA separately retains the section 162 EA02 power to change a remedy where the change of circumstances power is applicable.

²¹⁵ Section 134 sets out the questions that must be decided in the final report, and 134(4)EA02 requires the CMA to decide what is to be remedied, mitigated or prevented, and what action it should initially take to do so.

²¹⁶ When implementing the remedies in its final report, the CMA exercises a discretion whether to make, or accept, provision for remedies in a single instrument, or to make provision across a number of orders and undertakings (eg where there are a number of distinct remedies or a mix of undertakings and orders are being made). However, where the CMA uses a single instrument for a number of distinct remedies, that does not prevent it from reviewing the effectiveness of those on a remedy-by-remedy basis. In appropriate cases, the CMA may therefore prioritise a review of the effectiveness of part of an undertaking or order. Where that part is found ineffective, the CMA may make changes to just that part.

²¹⁷ The CMA can impose an order on the party concerned where the undertakings are not being fulfilled (see section 160 of the EA02 for final markets undertakings).

- (b) been implemented by the party concerned, but has had little or no impact when considered against the purpose and objective of the applicable part of the undertaking or order;
- (c) led to substantial unintended consequences, which have undermined the purpose and objective of the applicable part of the undertaking or order (eg the remedy is having a detrimental effect on competition);
- (d) had a substantially lesser effect than expected, which has been insufficient to deliver the scale of change sought in the market, or no effect at all when considered against the purpose and objective of the applicable part of the undertaking or order, taking into account the cost of complying with the undertaking or order; or
- (e) had a substantially slower effect than that planned, such that the benefits have not been realised in the timeframe anticipated.

9.40 Where a remedy is found to be ineffective, the CMA will consider whether it is appropriate to amend or remove the remedy. The CMA will typically seek to remove the remedy and will only consider amending the remedy if there is clear evidence that the relevant competition problem has endured and is material.²¹⁸

9.41 If the CMA considers that amendment is appropriate, in order to decide what amendment to make, the CMA will consider alternative remedy options considered in the final report, alongside other options from its own analysis and any options put forward by parties and other stakeholders. The CMA would typically expect to narrow the scope of the remedy's application. However, in its market investigations, the CMA chooses the remedy that it considers the most proportionate effective to remedy, mitigate or prevent the competition problem. Therefore, if the remedy has been found to have been ineffective, the amendment proposed by the CMA may, in some cases, involve the imposition of an expanded or supplemental remedy, provided that the remedy is deemed proportionate to address the competition problem that has endured since the market investigation.

9.42 The complexity of analysis required in a review of effectiveness will vary significantly depending on factors, such as the nature of the ineffectiveness identified, the age of the order or undertaking and the nature and characteristics of the market. As with reviews concerning change of

²¹⁸ An amendment is more likely, though, where there has been circumvention or failure to implement the remedy, which has resulted in its ineffectiveness. In those circumstances, the further evidence the CMA will gather of an enduring competition problem is likely to be limited.

circumstances, in some cases, detailed investigation may be required in order to evaluate whether an order or undertaking has been ineffective and, if so, what, if any, alternatives may be imposed to address the failure to remedy the competition problem identified effectively and proportionately.

Process for reviews of undertakings and orders

- 9.43 This section sets out the process for reviews of undertakings and orders, including the:
- (a) initial screening, including the ways in which a review may be initiated and deciding whether to conduct a review;
 - (b) process for a review, including the decision maker, the timescale, the key stages of the CMA's decision-making process, and the conclusion of a review; and
 - (c) procedure for dealing with undertakings or orders that are time expired, lapsed or have been superseded by new CMA undertakings or orders.
- 9.44 The CMA is committed to conducting a review in an efficient and timely manner, so that it can amend or remove a remedy and reduce the burden on parties subject to a remedy that is no longer appropriate and focus its monitoring and enforcement activity on those remedies that continue to remain appropriate.

Initial screening

The ways in which a review may be initiated

- 9.45 A review may be initiated by the CMA on its own initiative or at the request of parties subject to the remedy or other interested parties.

CMA's own-initiative activity

- 9.46 The CMA may begin a review on its own initiative when (a) it has identified a possible change(s) of circumstances; (b) it has evidence that an order(s) or undertaking(s) may be ineffective; or (c) where the report(s) in which the undertakings or order(s) were originally determined recommended a

timeframe for review of effectiveness or considering changes in circumstances.²¹⁹

Requests from parties

9.47 Any submission making a request for a review concerning a change of circumstances should set out clearly and with supporting evidence:

- (a) what the change of circumstances is;
- (b) how and why this makes it appropriate to amend or remove the undertakings or order;
- (c) the possible consequences for consumers and businesses impacted by the undertakings or order which could result from it being amended or removed;²²⁰
- (d) why a review of the undertakings or order meets the CMA's published prioritisation principles; and
- (e) whether the request is related, at least in part, to a failure, or anticipated failure, to comply with the undertakings or order.²²¹

9.48 Any submission making a request for a review concerning the effectiveness of undertakings or an order should set out clearly and with supporting evidence:

- (a) the reason for the intervention being ineffective in addressing the relevant competition problem from the final report of the investigation, including whether it has or has not had particular effects;
- (b) the implications of the failure for competition, businesses and consumers;
- (c) why a review of the order and undertakings meets the CMA's published prioritisation principles; and

²¹⁹ Consistent with the CMA's objective to avoid retaining remedies in force when they are no longer needed, where a remedy is not automatically 'sunset' after 10 years from the final report, or if the sunset clause exceeds 10 years, the CMA will review, on its own initiative, whether the remedy remains appropriate within ten years of the remedy coming into force.

²²⁰ Where the request is made by other interested parties (that is, those not subject to the undertakings or order), they should explain their interest in the undertakings or order.

²²¹ Where the possible change of circumstances is such that it would lead to a breach of the undertakings or order, the CMA may be able to prioritise considering it as quickly as possible. However, parties can assist the CMA by giving it notice of such changes of circumstances in good time and thereby avoid being placed in potential breach.

- (d) whether the request is related, at least in part, to a failure, or anticipated failure to comply with the undertakings or order.
- 9.49 Parties should provide both a confidential and a non-confidential version of their submission.
- 9.50 Parties can approach the CMA prior to submitting a request, in order to discuss what sort of evidence would be expected to be included in any particular request.

Deciding whether to conduct a review

- 9.51 The CMA may, upon receipt of a request for a review or following its own-initiative assessment, issue an invitation to comment.²²² The form of publication, duration of the period for public comment (typically three weeks) and extent of detail will depend on the circumstances of the case. When publishing an invitation to comment for a review, the CMA will include a brief description of the undertakings or orders included in the review and the reasons for considering that those remedies are no longer appropriate.
- 9.52 In some cases, the publication of an invitation to comment may not occur if, for example, the CMA believes that the request and the evidence provided gives it sufficient information to reach a decision on whether to launch a review or on the most appropriate provisional outcome without the need for consultation, or where the request and evidence surrounding this constitutes specified information which would need to be excluded from disclosure.²²³
- 9.53 The CMA will assess the responses to any consultation and then decide whether a review should take place. In doing so, the CMA will consider whether there is a realistic prospect of finding a change of circumstances or of establishing that an order or undertaking is ineffective.
- 9.54 In deciding whether to conduct a review, the CMA will act in accordance with its published prioritisation principles. This may mean that the CMA will choose not to conduct a review within time frames recommended in the report in which the undertakings or order were originally determined. However, where a CMA Group has indicated that a remedy should be reviewed within a

²²² Where the request for a review has been made by other interested parties (that is, those not subject to the undertakings or order) or the review is an own-initiative CMA review, and in order to ensure an effective public consultation and to establish whether such a public consultation can take place, the CMA will normally consult informally with those directly affected by the undertakings or order prior to the public consultation. This informal consultation is likely to be a short period of no more than two weeks.

²²³ See [Part 9](#) of the EA02.

specified timeframe, the CMA will apply a strong presumption in favour of conducting a review in line with that indication.

- 9.55 If the CMA decides not to proceed with a review, in the case of a requested review, it will inform the relevant stakeholder(s) that a review will not take place and may set out briefly its reasons for not conducting a review at that time. This decision may be published, although the CMA will have due regard to its obligations in relation to specified information, as set out in Part 9 of the EA02.

The process for a review

Decision maker

- 9.56 The CMA has a discretion as to whom to appoint as decision maker for most remedy reviews.²²⁴ The CMA appoints a Remedy Group comprising members of the CMA panel²²⁵ and/or appropriate senior CMA member(s) of staff to conduct the review. The parties will be informed of the relevant decision maker when the review is launched.

Timescales for reviews

- 9.57 Once the decision maker(s) for a review have been appointed, they will decide upon an appropriate timetable for the review. The CMA will endeavour to conduct its review as efficiently as possible. However, the time taken to conduct a review will vary depending on the complexity of the issues involved, the available resources at the time and the extent to which stakeholders engage in a timely manner.
- 9.58 The CMA will publish its decision to launch a review on its website. Relevant parties will be notified of the CMA's intention to commence a review prior to the publication of its decision.

²²⁴ This is because when a review of a Phase 2 remedy is launched, the original CMA Group will generally have ceased to exist and so the decision reverts to the CMA Board to be delegated as appropriate (section 133A(1)(g) and 133A(2)(c) of the EA02). The exceptions are a small number of remaining undertakings and orders made under the FTA73, where responsibility for their review has been passed from the Secretary of State to the CMA, and the legislation prescribes the appointment of a CMA Group (see [Schedule 24](#) to the EA02).

²²⁵ For more information on delegation to Remedy Groups, see the published [Case and Policy Committee terms of reference](#). The Remedy Group is a sub-committee of the Case and Policy Committee, accountable to the CMA Board. The Remedy Group will follow broadly the same approach to its decision making as other groups of panel members.

9.59 At the same time or shortly thereafter, the CMA will also publish information about the review including:

- (a) a brief description of the case, the relevant legislation, the industry sector concerned and the CMA's reasons for commencing a review – the level of information may vary according to the circumstances of the case;
- (b) an indicative timetable showing the anticipated dates of key milestones; and
- (c) details of how to respond to the consultation, including the first point of contact for general queries and submission of information.

9.60 The CMA will keep up to date the information provided to the parties and published about the review and its progress.

Key stages of the CMA's decision-making process

Initial assessment

9.61 The CMA will consider whether the initial submissions received from all relevant parties are sufficient to allow it to reach a provisional decision:

- (a) If the CMA considers that relevant parties have had sufficient opportunity to make their case and the initial submissions indicate clear cut grounds for amendment or removal, it will provisionally decide whether the undertakings or order should be amended (and how) or removed. Where amendments are minor or urgent, the CMA will seek to deal with these as swiftly as possible.
- (b) If the CMA considers that further information and/or analysis is necessary before it can reach a provisional decision, it will consider what steps should be undertaken and how the further information and/or analysis required affects the timetable for the review.

9.62 Where the CMA has identified the need for further information and/or analysis, it may invite or request submissions from those parties subject to the undertakings or order and/or interested third parties, including those that have not responded to any initial invitation to comment. In certain circumstances,

particularly for complex reviews,²²⁶ the CMA may consider it necessary to hold a hearing with relevant parties.

- 9.63 The CMA will have regard to the need to ensure due process for both parties directly involved and other interested persons. The CMA will also have regard to the need to conduct reviews effectively and efficiently, and the need to reach properly reasoned decisions.
- 9.64 Where the CMA wishes to test some of its initial thinking on the review, the CMA may decide to disclose this to the parties for comment. The CMA will take a flexible approach to sharing its developing thinking and/or evidence with parties directly involved and other interested persons, having regard to the desirability of ensuring that such parties are kept informed of key developments in the progress of the review.
- 9.65 When considering what documents may be disclosed during the course of a review, the CMA will have regard to Transparency and disclosure – statement of CMA’s policy and approach ([CMA6](#)).

Provisional decision

- 9.66 Before reaching a final decision, the CMA will make a provisional decision on which it will consult publicly. The provisional decision will be published on its website.
- 9.67 The CMA’s provisional decision will address the question of whether there has been a change of circumstances or whether the remedy or part of it has been found ineffective, and whether the CMA intends to amend or remove the remedy.
- 9.68 If the CMA is proposing to amend a remedy, it will seek views on the nature and scope of the proposed amendment at the time of publishing the provisional decision. The CMA will consider amendments proposed by parties (if any) as well as its own proposals. Parties will be expected to explain how their proposed amendments will effectively address the original competition problem, either in light of any change of circumstances provisionally identified, or the finding of ineffectiveness. The CMA will set out a time limit within which any proposed amendments must be submitted.

²²⁶ For example, where there are changes in market conditions which require detailed analysis; where the change of circumstances suggests a range of possible variations for the undertakings or order; or where establishing whether an intervention is effective or ineffective requires significant and detailed analysis.

9.69 In some reviews, the case for removal or the precise nature of the appropriate amendment may be sufficiently clear at the time of making the provisional decision that the CMA may draft the text of revised undertakings or a revised order at the same time as its provisional decision. The CMA may therefore decide to set out its provisional decision and reasoning, including a notice of intention to amend or remove the undertakings or order. Such a notice will be given in accordance with the procedural requirements set out in Schedule 10 to the EA02. Where this is not the case, the CMA may consider it appropriate to consult on a range of possible amendments and the CMA's provisional decision will include a notice of possible amendments.

9.70 The consultation period for proposed changes to undertakings and orders will typically be 15 days for undertakings and 30 days for orders, in accordance with Schedule 10 of the EA02. In cases where the provisional decision is to retain the remedy, the consultation period may be shorter, but generally no less than 14 days.

Final decision

9.71 The CMA will consider all submissions received during the consultation period before reaching a final decision. The final decision and the reasons for it will be published.

9.72 The undertaking or order in question will remain in place if the final decision is any of the following:

- (a) the CMA has identified no change of circumstances;
- (b) the CMA finds that the undertakings or order are not ineffective; or
- (c) the CMA finds that the change of circumstances or finding of ineffectiveness is not a matter that warrants any amendment or removal.

9.73 If the final decision is that there has been a change of circumstances or that an undertaking or order is ineffective and that amendment or removal is appropriate, at the same time as the CMA's final decision or as soon as possible thereafter, the CMA will, unless it has already done so at the provisional decision stage, give notice of its intention to amend or remove the undertakings or order.²²⁷

²²⁷ Where the CMA has decided in its final decision that a change to an in-scope market undertaking or order is appropriate, the CMA must make that change within six months of publishing that decision.

- 9.74 Such notice shall be given in accordance with the procedural requirements set out in Schedule 10 to the EA02. Changes to undertakings will be consulted upon for at least 15 days and changes to an order will be consulted upon for at least 30 days.²²⁸
- 9.75 The CMA will have regard to any representations made in response to the notice and may make modifications to the proposed revised undertakings or order as a result. If the CMA considers that any representation necessitates material change to the proposed revised undertakings or order, it will give notice of the proposed modifications with a further consultation period of no less than seven days.
- 9.76 On consideration of representations made on a notice of intention to amend, or in the absence of any such representations, the CMA will proceed with accepting and publishing revised undertakings or by publishing an amendment order.
- 9.77 On consideration of representations made in response to a notice of intention to remove the undertakings/order, or in the absence of any such representations, the CMA will proceed to remove the remedy. In the case of undertakings, the CMA will notify relevant parties of the release. In the case of orders, the CMA will publish a revocation order.

Conclusion of a review

- 9.78 The CMA's review concludes either once a final decision has been made that there are no changes to be made to the undertakings or order, or once the undertakings or order have been amended or removed.²²⁹ For a strategic review, the CMA will also list any undertakings or orders that are retained and the rationale for this decision.
- 9.79 On the outcome of a review, the CMA will make any appropriate amendment to its published register of orders and undertakings. The CMA is responsible for monitoring and enforcing any undertakings and orders that remain in force, except where specifically indicated otherwise.

²²⁸ [Schedule 10](#), paragraph 7(2) of the EA02.

²²⁹ A review may also be concluded if a new market investigation reference is made under section [131](#) of the EA02 by the CMA Board, or by the Secretary of State (sections [132](#) and [140A](#) of the EA02), or by a sectoral regulator, which relates to the existing undertakings or order under review. In these exceptional circumstances, the CMA will notify relevant parties that this action is being taken and publish the fact the review is concluding on its website. The existing undertakings or order remain in force and continue to bind the parties unless or until such time as the undertakings or order is amended or removed following the market investigation.

9.80 In some circumstances, responses to a strategic review may suggest that an undertaking or order should not be amended or removed without further consideration. Where this is the case, the CMA will decide whether to retain the remedy or whether the remedy requires further consideration under a separate, substantive review, because, for example, the issues appear to be complex or the remedy requires amendment rather than removal. If the CMA decides that the remedy requires further consideration under a separate, substantive review, it may deprioritise enforcement of the remedy, where appropriate, until it is able to conduct this further review.

Procedure where undertakings or orders are time-expired, lapsed or superseded by new CMA undertakings or orders

9.81 There may be cases in which undertakings or orders are time-expired or have lapsed. This may be as the result of a predetermined event having taken place or where a specified timescale has elapsed, or where they have been superseded by new CMA undertakings or orders. For example:

- (a) where undertakings or an order include a specified time period for the application for the substantive elements of the remedy and that period has ended, or where undertakings or orders include an overall expiry date (sunset clause) which has now passed;
- (b) where undertakings or an order specify that they will expire upon a certain specified event happening; or
- (c) where it is clear cut that the substantive obligations have been superseded by new undertakings or a new order resulting from a new CMA inquiry.

9.82 In the case of such time-expired, lapsed or superseded undertakings or orders, there is no requirement for further investigation or consultation, as the undertakings or orders will already have ceased to have effect. In such circumstances, the CMA will remove the undertakings or orders from its register of orders and undertakings, notify the parties subject to the undertakings or order, and publish a notice that the undertakings or order have/has been amended or removed.

9.83 Some of the CMA's remedies contain a specified time period or event beyond which they cease to have practical effect, but do not provide for the remedy itself to automatically terminate. In these cases, the CMA will discharge its duty under Schedule 10 to the Enterprise Act 2002 by publishing a notice of its intention to remove such remedies and to consult on that notice for a minimum of 15 days (in the case of undertakings) or 30 days (in the case of

orders). This will allow the remedy to be removed as quickly as possible, thus reducing the burden on parties subject to the remedy.

Appendix 1: Secretary of State intervention notice procedure

1. The Secretary of State may give an intervention notice to the CMA if they believe that it is, or may be, the case that one or more than one specified public interest consideration is relevant to the matter being considered by the CMA.²³⁰ The CMA has a corresponding duty to bring to the attention of the Secretary of State any case that it believes raises a specified public interest consideration.²³¹
2. The intervention notice must be issued:
 - (a) when a market study notice has been published, within the period commencing on publication by the CMA of a market study notice²³² and ending once a reference has been made, undertakings fully in lieu of a reference accepted, the CMA's decision not to make a reference has been published or on the expiry of the time limit for publishing a market study report if the CMA has not published such a report,²³³
 - (b) if no market study notice has been published, within the period commencing with the CMA's consultation under section 169(6)(a)(i) of the EA02 on whether to make a market investigation reference and ending once a reference has been made, undertakings fully in lieu of a reference accepted or where the CMA's decision not to make a reference has been published.²³⁴
3. Intervention notices must be published by the Secretary of State²³⁵ and must contain, as applicable, the subject matter of the market study notice or the consultation under section 169 of the EA02, the date of publication of the market study notice or on which the consultation process began, the public interest consideration(s) that are, or may be, relevant to the case and where any public interest consideration concerned is not finalised, the proposed timetable for finalising it.²³⁶
4. Where an intervention notice is in force and the CMA proposes to make a market investigation reference, the CMA cannot itself make the reference or

²³⁰ Section 139(1) of the EA02.

²³¹ Section 152(1) of the EA02.

²³² Section 139(1A) of the EA02.

²³³ Section 139(1A) of the EA02.

²³⁴ Section 139(1B) of the EA02.

²³⁵ Section 172(3)(c) of the EA02.

²³⁶ Section 140(1) of the EA02.

publish its market study report,²³⁷ but must instead provide to the Secretary of State:

- (a) its market study report within 12 months from the date of publication of the market study notice where such a notice has been issued; and
 - (b) a document containing the CMA's decision, the reasons for its decision and such information as the CMA considers appropriate for facilitating a proper understanding of such reasons where no market study notice has been issued.²³⁸
5. The Secretary of State decides whether the public interest consideration stated in the intervention notice is relevant to the matter and, if so, whether to make a restricted public interest reference or a full public interest reference.²³⁹
6. If the Secretary of State decides that the public interest consideration stated in the intervention notice is not relevant to the matter, they will make a market investigation reference which will follow the normal market investigation procedure conducted by the CMA.²⁴⁰ This reference must be published, together with the documents referenced at paragraph 4 above.²⁴¹

²³⁷ Section 140A(3) of the EA02. Where an intervention notice has been issued but the CMA proposes not to make a market investigation reference, the intervention notice ceases to be in force when the matter is finally determined as defined in section 140(5) of the EA02. This is when the CMA either accepts undertakings fully in lieu of a reference, publishes a notice that it has otherwise decided not to make a market investigation reference or the period for making the market study report has expired and the CMA has not prepared a report or taken action.

²³⁸ Section 140A(3) of the EA02. In such cases, the 12-month time limit does not apply.

²³⁹ Sections 140A(4) to (12) and 140B of the EA02. Under section 140B of the EA02, the Secretary of State can (having consulted with the CMA if applicable) vary a restricted public interest reference or a full public interest reference.

²⁴⁰ Section 140A(5) of the EA02.

²⁴¹ Sections 140A(10), 140A(11) and 172(3)(da) of the EA02.

Appendix 2: Defining markets

Product markets

1. Product market definition starts with the relevant goods or services under consideration (for market investigations, these will be the goods or services set out in the Terms of Reference). In identifying the most significant competitive alternatives for these goods or services that should be included in the relevant market, the CMA will pay particular regard to demand-side factors (the behaviour of customers). The CMA may also consider supply-side factors.

Demand-side factors

2. The relevant product market is identified primarily by reference to demand-side substitution. One framework the CMA may use for considering substitution involves considering evidence on the response of customers to a small but significant increase in price (or equivalent reduction in the value offered to customers in terms of quality, range or service) of the products under consideration. The CMA will often consider qualitative evidence on demand-side responses and often will not seek to produce quantitative estimates of what customers would do in response to price increases or how such responses would affect the profitability of a supplier or suppliers.

Supply-side factors

3. The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the CMA may aggregate several narrow relevant markets into one broader market based on considerations relating to the response of suppliers to changes in prices. The CMA may aggregate markets when:
 - (a) firms routinely use their existing production assets to supply a range of different products that are not demand-side substitutes²⁴² and there is evidence that firms in practice shift their existing capacity between these different products depending on demand for each; and

²⁴² Production assets may include traditional physical assets such as premises and equipment, it may also include other assets. Some examples might include human capital, know-how or intellectual property, technology, reputation and experience.

- (b) the same firms compete to supply these different products and the conditions of competition between the firms are the same for each product; in this case aggregating the supply of these products and analysing them as one market does not affect the CMA's decision on either a market investigation reference or an AEC.²⁴³
4. These conditions are cumulative. Examples of cases where they may be satisfied might include:
- (a) where a set of retailers all offer the same broad range of products (eg different types of outdoor clothing) and each retailer shifts between offering different specific products simply by changing the products in stock, without any significant adjustments to their supply chain, distribution network, retail stores or brand, and none has a particular strength in any subset of products;
 - (b) in a market where suppliers bid competitively to supply services which are bespoke to the customer and are therefore not demand-side substitutes, but where those suppliers use the same production assets to compete across tenders, and competitive conditions are similar across those tenders; or
 - (c) a two-sided market, for example of social media platforms, where the services provided to the two customer groups are different (and therefore not substitutable), but competitive conditions are very similar on both sides because the same set of social media platforms compete for both sets of customers, and the platforms are similarly competitive for both groups.²⁴⁴

Parameter flexing

5. Where multiple product markets cannot be aggregated on the basis of demand-side or supply-side considerations, the CMA may aggregate them if the main parameters of competition are set uniformly across those markets.

²⁴³ When this second condition is not met but the first is then the CMA may still consider these supply-side constraints within its assessment. In cases where firms do not currently shift their capacity across different products as a matter of routine, it may be more appropriate for the CMA to consider the prospect that they may start doing so using the CMA's framework for assessing entry by rivals (see paragraphs 4.62 to 4.64 above).

²⁴⁴ In other cases, each side of a two-sided market may constitute a different relevant market and the CMA will in each case determine the most appropriate approach (see paragraph 6 below).

Two-sided markets and local markets

6. The CMA's approach to market definition is likely to reflect its approach to conducting the competitive assessment where there are:
 - (a) Two-sided markets. To the extent the CMA assesses the two sides separately, it may be more likely to define two separate markets.
 - (b) Aspects of national and local competition or where firms are active across multiple markets or segments of other types. This may include defining more than one market for the same product or service, such as where some aspects of competition are determined at a local level and others at a national level.

Geographic markets

7. As with product markets, the CMA's focus in defining geographic markets is on identifying the most important competitive alternatives available to customers of the relevant products/services. The types of evidence that CMA will typically consider include:
 - (a) information on the competitive performance of firms supplying from different geographic areas or over different distances;
 - (b) information on differences in pricing, sales, advertising and marketing strategies by area, as well as information on delivery costs or barriers to entry when supplying into an area, over different distances or across borders;
 - (c) the views of market participants on customer preferences; and
 - (d) product characteristics such as perishability.
8. When determining whether supply-side substitution is sufficient to aggregate geographic markets, the CMA will have reference to the same conditions.
9. If there are a large number of local geographic markets, the CMA may examine the geographic catchment area within which the great majority of a store's/site's custom is located. Catchment areas are a pragmatic approach to identifying the most significant competitive alternatives available to customers. Where multiple geographic markets cannot be aggregated on the basis of demand-side or supply-side considerations, the CMA may aggregate them if the main parameters of competition are set uniformly across those markets.

Appendix 3: Measurement of profitability

1. One approach to the question of whether prices are above competitive levels is to consider the profitability of the business activity being investigated.
2. In many cases, the CMA's focus will be on the largest incumbent firms in the market or sector. However, in some cases the CMA will also consider the profitability of less well-established firms with smaller market shares, eg for comparative purposes, or to ensure it gathers a sufficient coverage of data where markets are more fragmented. Where the business activity being investigated is only one part of the firms' activities, it will be necessary to take this into account.
3. In its analysis, the CMA is concerned with economic profits, and these can differ in important respects from accounting profits. The CMA will generally derive the profitability of the relevant business activity by identifying the relevant revenues and costs for that business activity, including appropriate treatment of assets and liabilities in determining the capital employed.
4. In principle, firms in a competitive market would not generally earn more than a 'normal' rate of profit – ie the minimum level of profits required to keep the factors of production in their current use in the long run.²⁴⁵
5. In practice, a competitive market would be expected to generate significant variations in profit levels between firms and over time as supply and demand conditions change, but with an overall tendency towards levels commensurate with the cost of capital of the firms involved. At points in time the profitability of some firms may exceed what might be termed the 'normal' level. There could be several reasons, including cyclical factors, transitory price or other marketing initiatives, and some firms earning higher profits as a result of past innovation or superior efficiency.
6. However, a situation where the profitability of firms in the market has exceeded the cost of capital over a sustained period can be an indication of limitations in the competitive process.
7. For example, the ability of firms to earn profits persistently above the competitive level can indicate the presence of entry barriers. A situation where a firm (or a few firms) with a large market share has earned profits that have been persistently above the competitive level may indicate significant market

²⁴⁵ The rate of return on capital employed for a particular business activity would be equal to the opportunity cost of capital for that activity.

power, which in turn may arise from various sources. A situation where levels of profitability have remained persistently high and stable over time across several incumbent firms may indicate coordinated conduct.

8. The extent to which the results of profitability analysis indicate limitations in the competitive process is likely to depend on both the size of the gap between the level of profitability and the cost of capital, and the length of the period over which the gap persists.
9. The appropriate time-period over which to examine the persistence of the gap between profitability and the cost of capital will vary according to the specific market. The pattern of investment and the nature of sources of competitive advantage (eg advertising, research and development (R&D), more efficient production) will in some cases affect the CMA's view of the timescales over which it would expect to see competition playing out in the market. Where large and risky investments have been made, the CMA may expect to see a normal level of profitability restored over a relatively longer timescale.
10. The variation in profits over time will be an important consideration and the CMA will seek to understand the reasons for the observed trend. Where the size of the gap between the level of profitability and the cost of capital has grown over a period, the competitive conditions may have worsened. Where that gap has fluctuated, the CMA is likely to consider whether, taking the time-period as a whole, profits have exceeded the cost of capital for firms in the market.
11. The CMA will consider the analysis of profitability in conjunction with other information about the operation and nature of the market concerned. Moreover, as with other forms of analysis, the CMA's interpretation of profitability analysis can be affected by the quality of the data available.
12. A CMA finding of low profitability would not necessarily signify that competition in the market is working well. Low profitability may be concealing ineffective competition. Reasons for this may include:
 - (a) A period of low profitability may occur during the course of a downturn in trading conditions, regardless of the state of competition in the affected market.
 - (b) Inefficiency of firms may result in firms charging high prices but earning low profits.
13. In some cases, the CMA will consider whether actual costs have been efficiently incurred when looking at the level of profitability achieved by firms, but this may not always be practical. To assess whether actual costs are

efficient, in cases where it is practical to do so, the CMA will consider if there are suitable benchmarks available to inform this assessment. For example, the CMA could compare costs over time and across different companies within the market, or consider if there are suitable benchmarks outside of the market.

14. In measuring profitability, the CMA's approach will often be to start with accounting profit produced in line with generally accepted accounting principles,²⁴⁶ and then to make adjustments to arrive at an economically meaningful measure of profitability, usually in terms of rates of return on capital.²⁴⁷
15. The CMA will often inform its judgement of what is an 'economically meaningful' measure of profitability by examining the management accounting records of the firms in question. The manner in which industry participants – including firms, analysts, and investors – assess profitability for the purposes of monitoring and reporting performance may also inform our view as to what is an appropriate measure and timescale for evaluating profitability in an industry.²⁴⁸ For example, in the financial sector the CMA has previously considered return on equity over a five-year period as its primary measure of profitability. In other industries, the CMA has considered the return on capital employed over a similar period.²⁴⁹
16. The appropriateness of a given measure will also depend on the nature of the industry and the pattern of investment. Where investment is characterised by large one-off expenditure, or the industry has experienced a period of growth, it may be desirable to consider profitability over a relatively long period of time, or on a project appraisal basis. For example, it may be appropriate to use a cash-flow based model to compute a measure of the internal rate of return (IRR) where reliable data is available on this basis.²⁵⁰
17. Whatever measure of profitability is used, the calculation of profitability for the purposes of competition analysis is often not straightforward because of the need to obtain an appropriate value for capital employed, as described below. In industries with a relatively low level of tangible assets, such as some service, knowledge, and technology-based industries, the book value of capital employed may only bear a limited relationship to the economic value

²⁴⁶ For example, UK GAAP, US GAAP, and IFRS.

²⁴⁷ Where the capital base is valued appropriately.

²⁴⁸ See, for example, the [Payment protection insurance \(PPI\) market investigation \(CC\)](#).

²⁴⁹ See, for example, the [Funerals market investigation](#).

²⁵⁰ In the [Mobile radio network services](#) market investigation, the CMA adopted a discounted cashflow approach over a given segment of an activity's lifespan (also called a truncated IRR, or TIRR).

because of the presence of significant intangibles that have not been fully reflected in accounting valuations. In some cases, the replacement cost of assets may be different from historical costs due to the length of time elapsed and changes in asset prices and efficient technologies over time.

18. Obtaining a value for capital employed can present difficulties irrespective of the choice of model. For example, the use of a truncated IRR requires the assets to be valued appropriately at the beginning and end of the period selected. Similarly, a return on capital approach – whether return on equity or return on capital employed – requires an economically meaningful value for the capital base which may not accord with the value ascribed in the financial records.
19. Hence, it may be necessary to make adjustments to accounting data produced in line with generally accepted accounting standards. In particular, the following adjustments may be considered:
 - (a) Under current accounting standards, most assets are held at historical cost and this may differ substantially from the ‘replacement cost’ or ‘Modern Equivalent Asset value’,²⁵¹ which the CMA considers to be the economically meaningful measure for its purposes in most cases. In these circumstances, and where this would be likely to have a material effect on its calculations, the CMA will consider whether replacement cost values can be derived reliably.
 - (b) The CMA is more likely to consider the inclusion of certain intangible assets where the following criteria are met:
 - (i) it must comprise a cost that has been incurred primarily to obtain earnings in the future;
 - (ii) this cost must be additional to the costs necessarily incurred at the time in running the business; and
 - (iii) it must be identifiable as creating such an asset separate from any arising from the general running of the business.

In establishing a value for intangible assets meeting the above criteria, the CMA will have regard to similar principles as for other types of assets.

²⁵¹ These terms are used interchangeably to mean the current cost of acquiring assets which yield equivalent services to those currently used by the firm, based on the most efficient technology and optimal configuration.

(c) Other adjustments may be considered on a case-specific basis.

20. In situations where capital employed cannot be reliably valued, the CMA may consider alternative measures, such as the return on sales or other relevant financial ratios. For instance, comparisons with businesses operating in different but similar markets may on occasions be helpful. In some circumstances, the CMA may consider it appropriate to use a range of measures.²⁵²
21. In assessing levels of profitability, the CMA will have regard to its view of firms' cost of capital. The CMA will generally look to the capital asset pricing model (CAPM) when considering the cost of capital, since this is a widely understood technique with strong theoretical foundations. However, the CMA will have regard to alternative models where appropriate.

²⁵² For example, in the [Funerals market investigation](#), the CMA measured funeral director profitability using a number of different metrics including average revenues, cost-plus, ROCE, and economic profits.

Appendix 4: Relevant Customer Benefits (RCBs)

Statutory definition of RCBs

1. RCBs are limited to benefits to relevant customers in the form of:²⁵³
 - (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.
2. 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.²⁵⁴
3. 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,²⁵⁵ provided these benefits meet the criteria set out above.

Possible RCBs

4. Whether a particular claimed benefit to customers is an RCB will depend on the facts of the case and the characteristics of a particular market. The following paragraphs, nevertheless, seek to provide clarity about where the CMA is more likely to identify and take account of RCBs.
5. It would normally be expected that market features that have been found to adversely affect competition – after consideration of any potential rivalry-enhancing efficiencies²⁵⁶ – would also have detrimental effects on customers.

²⁵³ Section 134(8)(a) of the EA02.

²⁵⁴ Section 134(8)(b) of the EA02.

²⁵⁵ 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.

²⁵⁶ 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

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, and the following paragraphs contain examples of possible RCBs. In all instances the CMA will need to consider whether the criteria set out in paragraph 2 above are met.

6. 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. Where they qualify as RCBs, the CMA is likely to have regard to them when assessing whether it is appropriate to proceed with the proposed remedies. In doing so, the CMA would consider whether its proposed remedies preserve the RCBs, including whether the remedies may increase competition in relation to any of those benefits. The CMA would be likely to consider qualitatively the possible trade-offs between long-term and short-term effects of losing such benefits as a result of a proposed remedy.
7. 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. If they are, the CMA is more likely to take the RCB into account.
8. Similarly, on the demand side, network effects and the operation of multi-sided markets or platforms²⁵⁷ may lead to barriers to entry and sustained market concentration, but may also bring benefits to customers of being able

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 4 above.

²⁵⁷ 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 considerable network effects, particularly digital markets.

to participate in a larger and/or better integrated network or platform.²⁵⁸ 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.²⁵⁹

9. 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.²⁶⁰ 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.²⁶¹
10. As set out in further detail in section 4 above, cross-market relationships (including vertical²⁶² and / or adjacent market²⁶³ links)²⁶⁴ 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.²⁶⁵ Where an AEC has arisen from cross-market links within a market, the CMA will consider whether these relationships have resulted in RCBs.
11. The CMA will similarly consider, when AECs have arisen from the many forms of business conduct that can have either positive or negative effects,

²⁵⁸ 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.

²⁵⁹ For example, it may be possible for network benefits to be preserved through requiring interoperability between competing networks.

²⁶⁰ See paragraph 4.37 above in which we discuss the potential positive effects of a barrier.

²⁶¹ See also paragraphs 4.33 to 4.34 above.

²⁶² A vertical link occurs where a firm, or firms, is active at different levels of a supply chain.

²⁶³ 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.

²⁶⁴ 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 from paragraph 4.47 above.

²⁶⁵ Further detail on what these negative effects can include is set out at paragraph 4.50 above.

depending on the context, whether the conduct has resulted in RCBs. Tie-in sales or product bundling, for example, may sometimes be convenient to customers, reduce transaction costs or provide quality assurance.

Evidence and engagement with the CMA on RCBs

12. Parties can make submissions on RCBs in a market investigation. Where the CMA expects RCBs are likely to be relevant, it will invite parties to make any such submissions. Parties doing so will be expected to provide verifiable 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. The CMA will typically consult relevant sector regulators regarding any claimed RCBs and may consult other industry experts where relevant.
13. Parties are encouraged to submit any information or evidence they consider relevant to the CMA's consideration of RCBs and engage with the CMA on RCBs at an early stage of the market investigation. This helps to ensure that the CMA has the relevant information and evidence to effectively assess any RCB claims within the constraints of the statutory timeframe.

RCBs and remedies

14. If the CMA is satisfied that there are RCBs deriving from a market feature that has resulted in an AEC, it may consider whether to modify the remedy that it might otherwise have imposed or recommended. This would typically involve consideration of 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 would also typically consider the different impacts of the features on different customers or groups of customers.
15. Alternatively, RCBs may influence the choice of remedy. For instance, if there are several effective remedies, the CMA may choose a remedy which preserves RCBs over a remedy which results in their loss. An effective behavioural remedy that would preserve RCBs, for example, may be selected over an effective structural remedy that would not.

Appendix 5: Types of Remedies

Recommendations

1. The CMA is likely to make recommendations if a market investigation concludes that the legal framework or regulation in a market is a structural feature giving rise to an AEC. 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. For example, where:
 - (a) there is a broad set of measures that would require substantial public policy changes;²⁶⁶
 - (b) other bodies have powers that are unavailable to the CMA;²⁶⁷
 - (c) a recommendation enables a remedy to be better integrated with existing interventions or regulation in a sector; or
 - (d) 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 devolved governments, the Bank of England, local authorities or a sector regulator), rather than the CMA, to balance these conflicting objectives.
2. Recommendations will be directed to the party that is best able to implement them. It will be for the person to whom a recommendation is addressed to decide whether to act on it. Similar to market reviews and market studies, the CMA can make recommendations to the UK or devolved governments (and/or other public agencies or regulators), or to businesses (see paragraphs 5.11 to 5.14 above).
3. In deciding whether to make a recommendation, the CMA will consider the effectiveness of the recommendation to address the AEC and/or its detrimental effects; the likelihood that the recommendation will be acted on; the timescale over which this might be expected to occur; the cost and burden

²⁶⁶ 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.

²⁶⁷ 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.

on businesses; the degree of complexity of the recommendation; and the number of bodies involved in making the recommended change(s).

Behavioural remedies

4. 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).

Design, monitoring, and enforcement

5. 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.²⁶⁸ 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

²⁶⁸ This general phenomenon may sometimes be referred to as a 'waterbed effect'.

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) *Monitoring and enforcement risks* – Even clearly specified remedies may be subject to significant risks of ineffective monitoring and enforcement. This may be 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.
6. 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.
7. The CMA, or the relevant sectoral regulator where appropriate, is responsible for monitoring and enforcing compliance of remedies under the EA02.²⁶⁹ 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.
8. 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, the CMA is likely to consider if it is necessary 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. The CMA is also likely to consider whether monitoring can be facilitated by making an order requiring the relevant parties to publish certain

²⁶⁹ Sections 162 and 162A of the EA02.

information²⁷⁰ or to produce compliance reports that have been verified by an independent third party.²⁷¹ The likelihood of effective monitoring will be significantly increased if it is possible to involve a sectoral regulator in the monitoring regime.

9. 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. The CMA recognises the importance of ex post competition enforcement. However, the CMA is required to have regard to the need to achieve as comprehensive a solution to the AEC and its detrimental effects as is reasonable and practicable. Given this duty, the CMA will consider whether identifying effective and proportionate ex ante behavioural remedies is appropriate to ensure that competition functions effectively across the market, providing certainty for businesses and customers.

Duration

10. 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 8.72 to 8.73 above, when designing remedies the CMA will often 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.²⁷²

Enabling measures

11. 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 set out below (although in practice the distinction is not rigid and they may overlap):²⁷³

²⁷⁰ 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.

²⁷¹ 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).

²⁷² 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).

²⁷³ 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

- (a) market-opening measures;
 - (b) information remedies; or
 - (c) measures to restrain the impact of non-horizontal relationships.
12. Enabling measures are generally likely to require ongoing intervention and monitoring. In some cases, enabling measures take the form of more significant and complex interventions (such as the creation of an industry wide body to review and manage the monitoring of remedies),²⁷⁴ which are likely to require more detailed analysis and review at both the design and implementation phases.
13. 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 will often 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.
14. The CMA will also often wish to refer to and consult other bodies performing similar functions, such as standard setting organisations, regulators, or

of information between market participants, alongside other measures (eg structural remedies or measures to facilitate new entry).

²⁷⁴ See the [Retail banking market investigation](#) and the [Private healthcare market investigation](#).

commercial representative bodies such as trade associations, when determining these questions.

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

Market opening measures

16. 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.
17. 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

18. 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.²⁷⁵
19. Remedies can 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 consider the measures that may be taken to prevent or limit these behaviours and the effectiveness and costs of these measures.
20. 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.
21. 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.²⁷⁶ Measures to restrict selective discounting or price discrimination can 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 are therefore more likely to be appropriate as a transitional measure until other sources of competition develop.

²⁷⁵ Further discussion of these practices is set out at footnote 35 above.

²⁷⁶ The CC considered introducing measures designed to reduce the scope for selective discounting in [the LPG market investigation](#).

22. A lack of interoperability (most common in digital markets) may create barriers such that firms restrict customers to using their own service or product.²⁷⁷ Where that is the case, the CMA is likely to consider implementing 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 can 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.²⁷⁸
23. 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

24. The CMA is likely to consider applying market-opening measures 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 can be applied to a market as a whole or, if this is not necessary and/or practicable, they are more likely to be applied to the largest suppliers within the market.
25. 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.
26. 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, the CMA is likely to consider the introduction of measures to make it easier for customers

²⁷⁷ Interoperability refers to the ability of different devices, applications, systems and platforms to communicate with each other and exchange information and data effectively.

²⁷⁸ In digital markets, for example, the CMA may require that the firm exposes some of its Application Programming Interfaces (APIs) or builds new APIs.

to switch.²⁷⁹ For example, obligations on a customer's existing supplier to cooperate with a 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.

27. 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.
28. Portability is important, for example, in ensuring that all of the relevant data for the customer can be maintained and/or transferred.²⁸⁰ 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.
29. 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

²⁷⁹ 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 information remedies to raise customers' awareness of the options available to them.

²⁸⁰ 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.²⁸¹

30. 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. In such cases, the CMA is likely to consider a range of possible approaches that 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 information 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;²⁸² 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.²⁸³
31. Firms might take advantage of an incumbency advantage by self-preferencing.²⁸⁴ In doing so, firms may present their own services or products more favourably than those of competitors, thereby restricting new entry (or expansion). In that case, the CMA will often consider remedies that have the effect of requiring firms to change their behaviour to limit self-preferencing.
32. 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.²⁸⁵

²⁸¹ 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.

²⁸² For example, the point-of-sale prohibition in [the PPI market investigation](#).

²⁸³ For example, the so-called ‘guest beer’ provision in the [‘Beer Orders’](#).

²⁸⁴ 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.

²⁸⁵ 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*²⁸⁶

33. 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.
34. Information 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. Information 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.²⁸⁷
35. Information remedies may take a variety of forms, with the appropriate format being dependent on the market, good, or service subject to the remedy.²⁸⁸ Where an AEC results from coordinated effects the CMA is more likely to consider remedies that prevent the sharing of information between firms, if sharing such information has been found to facilitate coordination.
36. The CMA's starting point for the selection of appropriate information 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 customers

²⁸⁶ Note that information remedies are the only type of remedy that the CMA may trial in markets cases. Further detail on trialling of remedies is set out at in Appendix 6 below.

²⁸⁷ 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.

²⁸⁸ 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.

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

37. 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 is likely to depend on a number of factors, including:
- (a) *The ways in which customers currently obtain information about the product.* It can be more practicable to introduce information 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).²⁸⁹
38. Any obligation to provide information to customers will usually fall on the providers of the product under investigation.²⁹⁰ If information is to be provided using a medium over which providers have control, the CMA will consider if it is necessary to specify in some detail what information is to be provided and how. This is particularly likely to be the case if:

²⁸⁹ 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 [personal banking in Northern Ireland](#), 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.

²⁹⁰ 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;²⁹¹ 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.
39. The CMA will also have regard to the potential benefits of taking a less prescriptive approach. The cost to firms of complying with information 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.
40. In considering the design of information remedies, the CMA will generally be mindful of how the remedy is likely to interact with existing obligations on firms relating to information provision.²⁹² The CMA will look, where possible, to exploit positive synergies between existing regulations and CMA proposed remedies.²⁹³ It may sometimes be possible to implement information 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.²⁹⁴
41. 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, information 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,

²⁹¹ See, for example, [Consumers and mortgage disclosure documentation](#), September 2006, FSA, p9 and [Insight Research PPI forms consumer testing](#), April 2009, CC, p4.

²⁹² 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](#)).

²⁹³ 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). The CMA will also take into account that general consumer protection law may require businesses to give consumers certain information. Those laws, and their ex-post enforcement, are important and it may be that, in some cases, no specific action is required in a market investigation. However, the CMA is required to have regard to the need to achieve as comprehensive a solution to an AEC and its detrimental effects as is reasonable and practicable. The CMA will therefore normally prefer to specify its own remedial measures, that can be designed to take account of the particular circumstances of the case and provide for monitoring and enforcement, rather than rely on the general provisions of consumer law.

²⁹⁴ 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.

for example, providing price and product information in writing after a sale has been concluded – while sometimes required for consumer protection – may only have a limited impact on search behaviour.²⁹⁵

42. 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).²⁹⁶
43. The CMA will often 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).²⁹⁷
44. The CMA will consider carrying out specific customer research into information remedies (or ‘road-testing’) before they are put in place.²⁹⁸ 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 in Appendix 6 below, the CMA also has the power to trial information remedies prior to their final implementation.

Choice architecture

45. In cases where an AEC derives from the information consumers are given (or not given), the CMA will also often 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.

²⁹⁵ 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.

²⁹⁶ For example, in [personal banking in Northern Ireland](#), a switching leaflet was required to be provided alongside customers’ annual summaries.

²⁹⁷ For example, the CC considered the possibility that information remedies could facilitate coordination in the [LPG](#) and [Home Credit](#) market investigations.

²⁹⁸ See [Road Testing of Consumer Remedies](#), London Economics, July 2009.

46. When specifying and designing remedies with choice architecture in mind, the CMA will have regard to the impact that complexity may have on the decision-making process, in order to 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.
47. Further information in relation to choice architecture is available in the Online Choice Architecture discussion paper.²⁹⁹

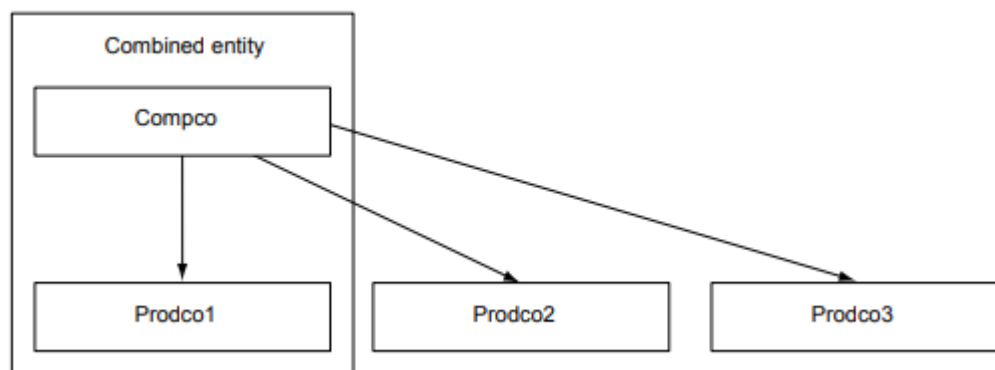
Remedies that restrain the adverse effects of non-horizontal relationships

48. 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).
49. 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. That effect would typically occur 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.
50. For example, if, as illustrated in Figure 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

²⁹⁹ For more detail see [Online Choice Architecture: how digital design can harm competition and consumers](#), CMA, 2022.

component to Prodco2 and Prodco3 or making use of information concerning component orders by Prodco2 and Prodco3.

Figure 2: Illustration of vertical configuration



Source: CMA

51. An AEC resulting from non-horizontal relationships can often be remedied by structural measures. Such measures could involve vertical or cross-market separation (eg requiring divestiture of ProdCo1),³⁰⁰ 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).
52. If non-horizontal relationships produce substantial RCBs that would be lost as a result of a structural remedy, or if divestiture is otherwise not appropriate or feasible, the CMA is more likely to consider adopting behavioural remedies. These could enable continued access to necessary products or facilities on appropriate terms and/or comprise measures that prevent the combined entity exploiting privileged access to information.

Access remedies

53. 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.
54. 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

³⁰⁰ Or in the case of non-horizontal arrangements, prohibiting the commercial arrangements between CompcO and Prodco1.

may be subject to some of the same issues that are encountered with price caps, as discussed in paragraphs 66 to 70 below.

55. If an access commitment is not specified or monitored in sufficient detail, then the measure may be vulnerable to specification risk and the firm may be able to avoid its obligations. In such circumstances, the CMA will often also need to consider alternative forms of remedy (eg divestiture) that are likely to be more effective.
56. To overcome specification risk where it uses access remedies, the CMA will generally require that the 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 2 – effective substitutes are developed for the component supplied by Compco) and the CMA will often also consider this possibility.
57. 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 (to the supplier's own businesses). Those biases can generate significant circumvention risk and significantly undermine the purpose and suitability of an access remedy.³⁰¹
58. 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. Under such terms, supplies to external customers are provided on the same or similar terms as apply to the supplier's own businesses. 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.
59. 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

³⁰¹ 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'.

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 will therefore also consider whether to require that the use of FRAND terms is accompanied by provisions to protect against a margin squeeze (eg submission of regular reports demonstrating full cost recovery in the downstream business).

60. 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.³⁰² This would be effectively a form of ‘virtual divestiture’.

Operational separation

61. Operational separation measures seek to create boundaries between a firm’s 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.
62. Operational separation measures 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; and (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.³⁰³
63. In some cases, the measures may be referred to as ‘firewall’ measures, and seek, for example, 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. To illustrate, in Figure 2, in the absence of firewall

³⁰² 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.

³⁰³ 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.

provisions, Prodco1 could exploit privileged information regarding the orders and deliveries of key components from Compco to Prodco2 and Prodco3.

64. Operational separation can prevent access to privileged information by effectively insulating the firm or division generating the information from 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.³⁰⁴
65. 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

66. 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.³⁰⁵
67. 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).³⁰⁶ The remedy will generally also need to specify how the control will deal with changes, such as the introduction of new products.
68. Measures to control outcomes are often used in sectors where there are inherent features that limit the introduction of effective competition, and where there is existing regulation or a need for ongoing regulation to be introduced or enhanced. The introduction of such measures is also a potential outcome

³⁰⁴ The [Centrica/Dynegy Storage merger inquiry](#) provides an example of the measures that may be required by the CMA to make firewalls effective.

³⁰⁵ In the Classified Directories 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.

³⁰⁶ In order to overcome specification risk.

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 that effect.

69. Measures to control outcomes, such as price controls, can, however, be complex to design in ways that are effective in limiting the harm arising from an AEC whilst not introducing unintended consequences or imposing unreasonable costs. Where it is considering imposing measures to control outcomes, the CMA will typically take these risks into account:
- (a) Defining appropriate parameters for the control measure (eg the level of a price cap) can be complex and, in some cases, impractical. 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 can lead to unintentional distortions in market outcomes 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 (sometimes referred to as 'incentive regulation') this may be at the expense of increasing the complexity of the price control design.
 - (c) The measure might be circumvented by a firm reducing the quality of controlled products or restricting their supply. It is 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 can be costly and/or intrusive and, in the absence of an industry-specific adjudicator or regulator,³⁰⁷ this can compromise effectiveness, especially where the form of remedy is complex.
70. While there are a number of risks associated with controlling outcomes, they remain a potentially appropriate remedy option for the CMA, especially in the circumstances in paragraph 68 above. However, given that measures to control outcomes – such as price controls – can be difficult to design and costly for industry, the CMA is more likely to consider them on a short or medium term basis, with review processes built in, and where significant detriment is expected to persist after taking into account the impact of any market opening and information remedies on the features giving rise to the AEC.³⁰⁸

Price caps

71. Price caps are a common form of measure for controlling outcomes.³⁰⁹
72. Different approaches are likely to be adopted to defining the products and prices to be controlled depending on the circumstances of the case:
- (a) Prices of all affected products can be individually capped. However, this approach can be impractical where a large number of products are involved, and can be inflexible in dealing with product changes, and so is less likely to be adopted in cases where those considerations are relevant.³¹⁰
- (b) The average price of a basket of products can be capped instead. This allows greater flexibility in taking account of shifts in demand between

³⁰⁷ 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.

³⁰⁸ Although this does not preclude their use over a longer term if there is no alternative to a continuing regulatory solution, nor that, in some cases, they can be a core part of the remedies package.

³⁰⁹ 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 \(2023\)](#).

³¹⁰ 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.

products, but the weighting of the constituents of the basket can be problematic and subject to distortion, for example, if revenue-weighting is used and the firm introduces a number of low-cost product variants.³¹¹ Where it is considering this approach, the CMA will usually consider the likelihood and consequences of these risks before it decides what to do.

- (c) The price cap can alternatively apply to key benchmark products. This approach could simplify monitoring and compliance, but is more likely to be effective, and to be adopted, 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.
 - (d) The price cap can apply to particular product terms (eg 'hidden charges'). Again, this approach could simplify monitoring and compliance and it could increase the overall level of price transparency for customers,³¹² though it may result in a 'waterbed effect' whereby other charges increase. The CMA will usually consider the likelihood and consequences of that effect, though this will typically inform how the price cap is designed and implemented, rather than the decision on whether it is appropriate to impose one.
73. 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 can take a variety of forms:
- (a) Prices can be benchmarked to the prices of products in analogous markets that are determined by competition. In practice, this is only likely to be feasible in limited circumstances where there is an analogous market.
 - (b) Prices can 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-

³¹¹ 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.

³¹² 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.

intensive regulatory process backed by information-gathering and enforcement powers to be effective and the CMA will consider whether this is appropriate.

- (c) A hybrid approach can be taken, where 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.³¹³ 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, and the CMA will consider this when designing any price control.
74. The CMA will often require that price caps are accompanied by measures to prevent circumvention risk that may arise. For example, to prevent a risk of a firm restricting the supply or service levels of price-controlled products or reducing product quality.

Hybrid Remedies

75. Hybrid remedies are remedies which have both structural and behavioural elements. Intellectual property (IP) remedies are the most common form of hybrid remedy used in the past by the CMA.
76. The aim of an intellectual property remedy is that the party or parties acquiring the IP rights should be able to compete effectively with other companies in the market. A remedy that licenses or assigns intellectual property,³¹⁴ including patents, licences and brands, can be viewed generally as a specialised form of asset divestiture.³¹⁵ However, in certain cases, the terms of a licence may

³¹³ 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.

³¹⁴ For example, patents, licenses and brands.

³¹⁵ At the time of publication of this Guidance, the CMA had not used an IP remedy in a 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

contain ongoing behavioural elements such that the remedy is a structural/behavioural hybrid.

77. A key element is 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.
78. 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.
79. 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 so address the AEC or the detrimental effects on customers resulting from it.³¹⁶ 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.

Design factors

80. The appropriate design of an IP remedy is likely to 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.

package of remedies applied in the [Nufarm Ltd/AH Marks Holding Ltd merger inquiry](#) (February 2009) had some characteristics of an IP remedy.

³¹⁶ 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.

- (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.³¹⁷
 - (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.
81. IP rights generally enable the remuneration of investment in innovation by granting time-limited exclusivity. In considering the design and scope of IP remedies, the CMA will recognise the need for preserving incentives for innovation while addressing competitive concerns.
82. 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.

Divestiture

83. The aim of divestiture in market investigations will generally be to address an AEC resulting from structural features of a market.³¹⁸ 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).
84. 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

³¹⁷ 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).

³¹⁸ 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).

period (eg to ensure compliance with hold separate measures,³¹⁹ secure supplies of an essential input or service from the divesting party to the divested business).

85. A divestiture remedy will involve the sale of an appropriate divestiture package to a suitable purchaser through an effective divestiture process. The design of a divestiture remedy will consider the effectiveness of the divestiture in addressing the AEC and/or its detrimental effects, and any RCBs that may be affected by the form of divestiture.

Divestiture risks

86. Divestitures may be subject to a variety of risks that may limit their effectiveness in addressing an AEC. The three broad categories of risks that may impair the effectiveness of divestiture remedies are the following:
- (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 100 to 104 below).
 - (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.
87. 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

³¹⁹ 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.

allow the competitiveness of divestiture packages to decline during the divestiture process.³²⁰

88. 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

89. 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 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.³²¹
90. 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.
91. 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

³²⁰ 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.

³²¹ As was the case in the [BAA Airports market investigation](#).

remedy. The divesting parties may subsequently decide to add further assets to the specified package at their request with the approval of the CMA. The undertakings accepted or orders made may include an obligation that requires additional assets to be included in the package to secure divestment to a suitable purchaser.

92. 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.³²²

Divestiture of an existing business or package of assets

93. 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 to purchaser and composition risk and can generally be achieved more quickly.
94. 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 75 to 79 above), 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.
95. A package of assets may also be far more difficult to define or ‘carve out’ from an underlying business³²³ 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 96 to 99 below) to mitigate increased purchaser and composition risk. Where a package of assets is proposed for divestiture, the CMA will require the

³²² 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.

³²³ 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).

divesting parties to specify the composition and operation of the package in detail.

Alternative divestiture packages

96. In some circumstances, it is appropriate to define a more extensive and/or more marketable divestiture package ('alternative divestiture package', sometimes known as a 'fallback remedy')³²⁴ which the CMA would require the parties to sell if the initially proposed divestiture package were not sold within a specified period.
97. Alternative divestiture packages are more likely to 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.³²⁵ In such circumstances, prior identification of an alternative, more extensive and more marketable package can be the most effective means of facilitating rapid disposal if the initial package cannot be sold to a suitable purchaser within a specified period.³²⁶ 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.
98. 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.

³²⁴ 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'.

³²⁵ 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 108 and 112 to 113 below). The specification of an alternative divestiture package may be used in conjunction with such measures.

³²⁶ 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.

99. While the CMA will maintain the option of utilising an alternative divestiture package in some 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.³²⁷

Suitable purchasers

Criteria

100. 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).
101. 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:
- (a) *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 can 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. However, purchasers may require access to key inputs or services on 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.³²⁸ The CMA may also permit or require non-solicitation

³²⁷ The CMA discusses this further in its 2023 research and analysis paper on '[Understanding past merger remedies – 2023 update](#)' (CMA186), 24 October 2023.

³²⁸ 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.

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).³²⁹

- (b) *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.³³⁰ The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority.³³¹
- (c) *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 part of a viable and active business³³² in competition with the divesting party (or parties) and other competitors in the relevant market(s).³³³
- (d) *Absence of competitive or regulatory concerns*. Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.

³²⁹ 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.

³³⁰ The CMA reviewed consortium arrangements in the divestiture of [Gatwick Airport \(BAA Airports\)](#).

³³¹ 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.

³³² 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.

³³³ This approach was upheld by the CAT in the [Somerville v Competition Commission case](#) (2006). The CC excluded limited assortment discount retailers from acquiring Somerville stores on the basis that these were insufficiently close competitors to conventional supermarkets.

102. Except in circumstances where a divestiture trustee is in place (see paragraphs 112 to 113 below), 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 seek to assess the suitability of a potential purchaser (through eg interviews and questionnaires) and will keep the progress of the divestiture under close scrutiny.
103. 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.
104. 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 is more likely to 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.³³⁴

Effective divestiture process

Objective of process

105. 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

106. 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

³³⁴ 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.

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.

107. 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 generally require the divestiture package to be held and managed separately from the retained business. 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.³³⁵ Establishing separation may be a more complex issue than in merger inquiries. We discuss interim measures further at paragraphs 8.133 to 8.134 above.

Use of monitoring trustees

108. 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

109. 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 is likely to be excised from the

³³⁵ 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.

report where it is considered that disclosure to third parties may undermine the divestiture process.

110. 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 due diligence. The initial divestiture period may be extended by the CMA where this is necessary to achieve an effective disposal.
111. 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

112. 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.
113. 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.³³⁶ 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.

³³⁶ 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.

Review of divestiture documentation

114. 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.

Appendix 6: Trials

Procedural considerations

1. In considering whether and how to exercise its information remedy trialling powers, the CMA will have regard to a number of considerations including:
 - (a) The need, where it finds there is an AEC, to remedy that effect by taking effective and proportionate measures that protect consumers and give businesses the certainty and confidence to invest, innovate, compete vigorously and grow.
 - (b) That the purpose of trials is to refine potential remedies to increase the likelihood they are effective as soon as possible.
2. The CMA will carefully consider whether a case is one in which an implementation trial is appropriate. A trial will only be undertaken where the CMA considers an information remedy³³⁷ to be required. They are more likely to be used in such cases if, for example:
 - (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 and proportionate. For example, where the remedy requires the presentation of a price list with key categories determined by the CMA, and 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 would help determine which is the most effective and proportionate.
 - (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.
3. The CMA will also take steps to ensure that implementation trials are used appropriately and are not prolonged or ineffective and need to be repeated. It will take an approach that is proportionate and time-limited, and that employs clear criteria for gauging the effectiveness of any trialled measure. To that end, where it can, the CMA will structure its decisions on remedies and trials

³³⁷ Information remedies include the way information is framed and presented to consumers.

to reflect the principles set out in paragraph 8.129 of this document. The form of the trial, including the key parameters and time limit, will be the subject of consultation as described below.

4. The CMA will also seek to make use, where it can, of other provisions relating to trials that help to produce more certain and proportionate outcomes. For example, 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 and, where possible, the ability to provide additional certainty about when and where remedies will apply.
5. Another option 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.³³⁸ The provisions also mean that, where any AECs the CMA finds are linked, so that it is not reasonably practicable to determine a final remedy package while an implementation trial is ongoing, an interim remedy may be put in place in relation to some of the AECs pending the outcome of the trial.

The trialling process

6. There is unlikely to be a 'one-size-fits-all' approach to trialling remedies. This guidance, nevertheless, seeks to provide as much certainty as possible as to the processes the CMA is likely to follow.
7. The design, and assessment of the success of an implementation trial (and the implementation of remedies more broadly), will depend 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

³³⁸ 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. The CMA is more likely to impose these sorts of interim remedies where there is detriment that requires addressing as soon as possible, there are remedies that do not depend on the results of implementation trials and their imposition would not result in duplication, inefficiencies or costs that would likely outweigh the benefits.

- (c) how the effectiveness of the remedy will be assessed.
8. In designing, and determining the success of, an implementation trial, the CMA will have regard to the three listed factors qualitatively.

Initial assessment

9. During the market investigation, the CMA will consider remedies (and the possibility of conducting an implementation trial) alongside the competitive assessment. The CMA's interim report setting out the CMA's provisional decision on the existence of an AEC will also contain a provisional decision on potential remedies and will typically refer to the possible use of trials where relevant.
10. At this initial assessment stage,³³⁹ the CMA will consider the possibility of conducting an implementation trial and may engage in discussions with the affected firm(s) about this, without prejudice to the CMA's final decision on the existence of an AEC or any remedy.³⁴⁰ Given the statutory timelines involved in implementation trials and market investigations, those early discussions can help to improve the feasibility of conducting an implementation trial.
11. In appropriate cases, these discussions may cover whether the affected firm(s) would be willing to conduct a trial on a voluntary basis with the CMA prior to reaching the stage of a final report. This may enable the CMA to refine the design of remedies even more promptly.

Initial implementation trial design

12. After the publication of the final report, in relevant cases³⁴¹ the CMA will outline the key details of the implementation trial design. The CMA will set out its proposed approach, such as the remedies that will be trialed; the methodology that will be used to trial the remedies; data collection; reporting requirements (ie how and when data will be shared); measures of remedy effectiveness (eg market trends, consumer behaviour, price levels); and relevant timelines and milestones.

³³⁹ ie before the publication of the CMA's interim report.

³⁴⁰ These discussions may take place after the publication of the interim report if they have not taken place before publication.

³⁴¹ ie those where a voluntary trial has not been agreed and conducted, the CMA has decided to impose information remedies and is minded to trial their implementation using its statutory powers.

The provisional implementation trial notice

13. Following completion of the initial implementation trial design, the CMA will publish a notice which sets out and consults on the details of the implementation measure (ie the undertakings or order) that it is minded to accept or impose.³⁴² This is a provisional implementation trial notice (or ‘provisional trial notice’).
14. In the provisional trial notice, the CMA will specify the relevant AEC that each measure is intended to address. It will also include any other facts that the CMA considers justify the imposition of the measure, as well as how it intends to assess the effects of that measure and the last day on which it intends for the measure to have effect (as to which see paragraph 16 below). The provisional trial notice will also set out the penalties for a failure to comply with the trial conditions.³⁴³
15. The parties who will be affected by the measure will have at least 15 days to make representations to the CMA on the points in the provisional notice.³⁴⁴ These safeguards are intended to maintain the pace of trials, increase certainty for businesses and consumers and ensure the CMA follows a clear and fair process.³⁴⁵
16. Although there are no express statutory time limits on the trial period itself,³⁴⁶ to ensure that a trial cannot continue indefinitely the provisional notice must include a proposal for the last day on which each implementation trial measure is to have effect. This acts as a long-stop on the implementation trial. It is the date by which the CMA proposes that it must take final action (for example, by imposing final remedies).³⁴⁷
17. This long-stop date increases the predictability (and maintains the speed) of any trials. The period proposed in the provisional trial notice will take account of the time needed to allow the remedy to take effect, for the remedy’s

³⁴² See section 161D(1) of the EA02.

³⁴³ Section 167B of the EA02.

³⁴⁴ See section 161D(2) and (3) of the EA02.

³⁴⁵ As part of the consultation process, the CMA will often engage in specific discussions with the firm(s) who are likely to be subject to trials. Those discussions may cover things like the design principles for any trial, logistics, and any preparatory steps that would be required to ensure effective operation of the trial. For example, technical discussions with the firm(s), such as those related to the design of algorithms, and conversations about how and when data will be shared by the firm(s) and whether piloting should be part of any trial. These steps would be designed to identify and mitigate risks of an unsuccessful trial and to facilitate the prompt conclusion of a successful one.

³⁴⁶ As trials are likely to be undertaken in circumstances where it is not clear what the most effective approach to the remedy is.

³⁴⁷ See sections 138, 138A and 161D of the EA02.

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.

18. 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.³⁴⁸ There will be a spectrum of relative complexity:
 - (a) At the simpler end, a trial could take a minimum of six months following publication of the final report (with preparatory work beginning before that publication) and we would typically anticipate around eight months. The CMA expects the majority of trials to be at this end of the spectrum (a hypothetical example could include testing a simple message – eg a single sentence – sent digitally to consumers). It may be possible to conclude trials in a shorter period where parties cooperate with the CMA and proactively engage in trials.
 - (b) In the rarer circumstances where a more complex trial is merited, a trial may involve 12 months of work after the final report. A more complex trial of this length would likely be most valuable where it has the support of the affected businesses, and the CMA would be likely to engage in discussions with them about that. A hypothetical example of a more complex trial could include testing personalised messages to consumers across multiple in-person sites, or the complexity may relate to the length of time it takes to capture the outcome of interest (eg booking a follow-up appointment).
19. After consulting on the provisional trial notice, the CMA will finalise the design of the implementation trial. This may involve making alterations and refinements to the initial design based on feedback received during the consultation. If the CMA considers it appropriate to begin an implementation trial, after consultation on the provisional trial notice and any further discussions and meetings with parties that the CMA considers necessary, it will publish the final implementation trial notice (or ‘final trial notice’).

The final implementation trial notice

20. The final trial notice must include the implementation trial measures the CMA will impose and, in relation to each such measure, how it intends to assess

³⁴⁸ 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 factors such as the need for a firm to create new metrics could further increase the length of time taken to complete a trial.

the effect of the measure, and the last day on which the measure is to have effect (the period within which the trial will be completed and any final remedies imposed).^{349, 350} The final implementation trial notice will also set out the penalties for a failure to comply with the trial conditions.³⁵¹

Completion of trials and final remedies implementation

21. A trial will begin once the final trial notice is published and will be conducted in accordance with that notice. After the trial has finished, the CMA will assess the results. It will typically prepare a report on the trial and may share that with the affected firm(s) and/or publish it.
22. Where the results of a trial demonstrate the effectiveness of the relevant remedy, CMA will implement the final form of that remedy via a final order or undertakings.³⁵² This will be done within the period set out in the final trial notice.

³⁴⁹ See Sections [161D\(5\)](#) and [161E](#) of the EA02.

³⁵⁰ In addition, section [161E](#) of the EA02 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.

³⁵¹ Section [167B](#) of the EA02.

³⁵² Along with any other remedies that the CMA decided upon in its final report but that have not, because of the trials, been the subject of final orders or undertakings.