RPC case histories guidance on competition assessments

Summary and key points

OAs/IAs should include a proportionate assessment of competition impacts in the regulatory scorecard (Part B: Business environment).

Regulatory measures that affect a market where goods and services are provided by private or public sector organisations may also impact on competition. Good practice, and Better Regulation Framework (BRF) guidance, is that the OA/IA on the regulatory proposal should include an assessment of impacts on competition. In doing so, the Treasury Green Book and Better Regulation Framework guidance indicate departments should proportionately consider completing the Competition and Markets Authority's (CMA) "competition assessment checklist" to assess the likelihood and significance of impacts on competition.

The framework and this RPC guidance document encourage a proportionate assessment of competition impacts. Application of the CMA checklist allows departments to strengthen their competition assessments in a proportionate manner. The document is aimed primarily at those writing OAs/IAs. The intention of the document is to encourage deeper/wider thinking on competition and more assessment of competition effects, as a matter of course, in OA/IAs.

The CMA checklist includes five questions for departments to consider, to identify if their measure has resulting impacts on competition. There is likely to be a significant impact on competition if the measure:

1. Directly or indirectly limits the number or range of suppliers;
2. Limits the ability of suppliers to compete;
3. Limits the incentives for suppliers to compete; or
4. Limits the information and/or choices available to consumers.
5. Affects suppliers' ability or incentive to introduce new technologies, products, business models.

Where significant competition impacts are identified, a more detailed competition assessment might be appropriate, using the CMA's in-depth competition checklist.

This guidance provides examples of departmental assessments in relation to each of the CMA checklist questions. These examples are across a range of policy areas and types of intervention, including TV advertising, domestic energy markets and financial services. Finally, an example provided by the CMA is presented which was considered by them to be a particularly detailed competition assessment within an IA.

Introduction

The Competition and Markets Authority (CMA) published its report *Regulation and Competition* in January 2020. The report recommended the RPC to develop case studies of good practice in assessing competition impacts in regulatory impact assessments. This document addresses this recommendation and provides guidance to departments on producing assessments of competition assessments within OA/IAs. The CMA also published guidelines in 2023 that include an extra fifth question.

The guidance does not reflect any changes to broader government guidance and adds no new framework rules or scrutiny requirements. It is aimed at clarifying expectations around the application of existing rules/guidance, providing additional information on what the RPC looks for in its scrutiny in this area. The focus of the guidance is on dynamic market impact of a regulation on competition. These impacts will generally be wider, consequential impacts of a regulation. Under the OA/IA template, these impacts would typically be reported in part B of the regulatory scorecard under 'business environment'. Weak analysis can undermine proportionality and the small and micro business assessment (SaMBA), and may lead to a red rating where evidence is missing for material competition effects.

The Better Regulation Framework does require a proportionate consideration of wider impacts, such as those on competition, to inform decision-making. This is something the RPC will comment on, as appropriate.

The RPC considers whether a department's assessment of competition impacts within an OA/IA is proportionate. This document does not set out any absolute requirements; nor does it expect departments to produce competition assessments to the same standard as, say, the CMA would. The objective is to encourage departments to assess competition impacts in terms of such market dynamics, where this is appropriate and to a level proportionate to the expected impacts of the measures.

Departments will take account of any significant competition impacts as part of their assessment of impacts on small and micro businesses. For example, a measure disproportionately affecting small businesses could have a detrimental impact on competition, such as by creating barriers to market entry and growth. More generally, departments will wish to consider any connection between competition assessments and other parts of the OA/IA, such as the assessment of impacts on trade and investment.

'Pro-competition' does not necessarily mean 'pro-small business'. There will be instances where the interests of small businesses will not necessarily align with greater competition; for example reducing barriers to entry could enable larger

businesses to enter new markets and compete against smaller businesses e.g. liberalising in-store pharmacies in supermarkets.

This document has three sections:

Existing guidance
A description and link to existing material for assessing competition impacts.

Review of types of cases that are likely to involve significant competition impacts
The RPC reviewed cases in to identify the type of cases that are likely to involve significant competition impacts. We identified which of the CMA checklist questions they address and further categorised these cases into the following types of measures:

- banning/restricting products/marketing/consumer eligibility
- price or charges regulation
- trade agreements and immigration measures
- national security measures
- extension of regulation into new areas
- employment rights
- measures implementing (at least in part) CMA recommendations
- data portability and interoperability

A particularly good example of a competition assessment suggested by the CMA
This provides a strong application of its guidance/checklist.

The document seeks to identify areas of good practice within these and provide an indication of the RPC's expectation for a good assessment of competition impacts within OA/IAs.

1) Existing guidance

Assessing competition impacts:
The CMA provides guidance for policymakers for how to identify markets in which competition might be affected by new policies or spending proposals. This guidance is cited by the Treasury Green Book and the Better Regulation Framework guidance. Part 1 of the CMA guidance provides an overview and summarises the process in a flow chart, see guidance linked above.

The CMA's approach has two stages: an initial screening and, if this reveals a likely restriction of competition, a second more in-depth assessment. Such a two-stage method is a proportionate way of approaching the assessment of potential competition impacts of regulation. Presented below is the CMA's 'competition checklist'. This cross-references to areas of the more detailed 'Part 2 guidelines' CMA competition assessment document. The sub-questions presented in the in-depth checklist are intended to help departments consider how competition may be affected; there is no expectation that all will be relevant to a given policy.

CMA competition assessment checklist

Q1a: will the measure directly limit the number or range of suppliers by:

- Awarding exclusive rights to supply?
- Resulting in procurement from a single supplier or restricted group of suppliers?
- Introducing a licensing scheme that places a fixed limit on the number of suppliers?
- Introducing a licencing scheme that controls market entry through quality?

See Chapter 3 of CMA's Competition impact assessment Part 2 guidelines. Examples to help you consider whether this issue applies to your proposal:

- Commercial Use of Public Information (CUPI) market study, page 13
- Pharmacies, page 17, Part 2

Q1b: will the measure indirectly limit the number or range of suppliers by:

- Significantly raising the costs of current suppliers, causing them to leave the market?
- Significantly raising the costs of new suppliers relative to existing suppliers?
- Significantly raising the costs of some current suppliers relative to other current suppliers?

See Chapter 3 of Part 2 guidelines. Examples to help you consider whether this issue applies to your proposal:

- Grandfathering airport slots, page 21
- Competitive neutrality in the higher education sector, page 24

Q2: will the measure limit the ability of suppliers to compete by:

- Controlling or substantially influencing the price a supplier may charge?
- Controlling or substantially influencing the characteristics of the products supplied?
- Limiting the sales channels a supplier can use, or the geographic area in which a supplier can operate?
- Substantially restricting the ability of suppliers to advertise their products?
- Introducing restrictions on production processes or choice of organisational form?

See Chapter 4 of Part 2 guidelines. Examples to help you consider whether this issue applies to your proposal:

- Price controls in Greece, page 26
- Price caps in the payday lending sector, page 27
- Regulating the quality of bottled water, page 29
- US motor vehicle manufacturers, page 31

Q3: will the measure limit suppliers' incentives to compete by:

- Incentivising suppliers to coordinate their behaviour or publish competitively sensitive information and thereby dampen competition?

  See Chapter 5 of Part 2 guidelines. Examples to help you consider whether this issue applies to your proposal:

  - Risks created by policies that encourage information sharing, page 35

Q4: will the measure affect consumers' ability to engage with markets and make choices that align with their preferences **by:**

- Limiting the ability of consumers to decide from whom they purchase?
- Limiting consumers ability to make informed decisions?
- reduce consumer switching by increasing the explicit or implicit cost of changing supplier?

  See Chapter 6 of Part 2 guidelines.

Q5: will the measure affect suppliers' ability or incentive to introduce new technologies, products or business models by:

- Affect markets in which innovation has been a key feature in recent years? Constrain the deployment of new technology or prevent firms operating a particular business model?
- Limit the prospect of future innovation?

See Chapter 7 of Part 2 guidelines. Examples to help you decide:

- TfL Proposals for Private Hire Vehicles

This aligns with the OECD's Competition Assessment Toolkit, which uses similar questions to identify competition impacts. The Operational Manual, vol. 3 of the toolkit includes legislative examples of each of the sub-questions in the OECD checklist, which may be of use to departments.

2) Review of types of cases likely to involve significant competition impacts

In this section, we provide examples of cases reviewed by the RPC since January 2019 that involve significant competition impacts. Case studies include numbers 1-5 in the bottom right to signify which of the five kinds of competition impact, from the CMA checklist have been addressed, with the question addressed in the most detail shown in green. Each example reflects the policy and evidence as assessed by the RPC at the time of its opinion; some proposals have since developed through later iterations.

Measures that ban or restrict products, marketing or consumer eligibility

Restrictive measures introduced in pursuit of objectives, such as human health or welfare, could potentially have significant impacts on competition. For example, measures aimed at reducing childhood obesity through restrictions on advertising or sales promotion within stores are likely to affect competition between suppliers, retailers and make it more difficult for a business to enter the market or increase its market share.

RPC-4332-DHSC 2019: Restricting volume promotions for HFSS products
(consultation stage IA)

The Department for Health and Social Care's (DHSC) IA considered policy proposals intended to ensure shopping environments do not encourage excess consumption of high fat, sugar and salt (HFSS) products. Price promotions, especially volume offers, cause consumption of HFSS products above a normal response to pricing changes. The preferred option at consultation was a ban on volume offers for HFSS products included in Public Health England's sugar and calorie reduction programme. DHSC provisionally estimated an equivalent annual net direct cost to business of £12 million and net present value of £2,940 million.

DHSC acknowledged the effect on competition in their competition test in the IA, stating: "Volume promotions are a method of competition, which will be restricted under this proposal, but we believe firms will adapt to compete on absolute price level instead" p62. The RPC noted DHSC should consider further the effect of the regulations reducing competition between retailers and manufacturers of HFSS goods and the potential of pushing up prices. Competition was relevant in assessing the overall impacts of the policy, as the restriction on volume promotions would have a direct impact on the incumbent firms' ability to compete and potential entrants to the market. Therefore, it was appropriate for DHSC to consider the wider implications of competition effects, using the competition checklist.

DHSC uses the CMA checklist to structure its competition assessment and addresses the first three questions. Whilst a more substantive explanation of possible direct limitations to suppliers would have been useful, DHSC provides a thorough discussion of possibility of indirectly limiting supply, focusing on potential barriers to entry created by promotional pricing. DHSC does not explicitly address the 4th question on consumer choice, however this is implicit in the policy design.

1 2 3

RPC-4344-DCMS 2021: TV advertising of HFSS (food and drink that are high in fat, salt and sugar) products and similar protection for children viewing adverts online - introducing a 21:00-05:30 watershed (consultation stage IA)
The Department for Culture, Media and Sports' (DCMS) IA concerned proposals to create a watershed between the hours of 2100-0530 in which HFSS products can be advertised on television. The policy aimed to influence children's consumption behaviour, by reducing the amount of advertising that they see for HFSS products on television and online.

The Department conducted a relatively detailed 'competition test' within the IA. This noted that the proposal is likely to incur high costs to broadcasters and online platforms, while allowing less restricted forms of advertising to continue marketing HFSS, thus providing these with a competitive advantage. The Department also considered the disproportionate impact on suppliers whose revenue is mainly derived from HFSS products, providing a competitive advantage to those selling non-HFSS products. In summary, as this measure was a ban on the supply of advertising, competition impacts were relevant as it directly limited the ability of suppliers to compete, whilst also altering the information available to consumers. Hence, a more detailed discussion surrounding competition impacts was relevant to the analysis informing the policy decision.

The Department similarly used the CMA checklist structure. The competition assessment strongly addressed the second question - on the supplier's ability to compete - enabling the Department to identify the impact on new entrants, specific media channels and the resulting competitive advantages.

1 2 3

RPC-4302-DHSC 2019: Ending the Sale of Energy Drinks to Children (final IA)
The proposal was to ban the sales of energy drinks to children under 16, including sales from vending machines. The policy aimed to mitigate potential harms from excessive consumption of energy drinks. This restriction had been voluntarily adopted by a portion of the market, but this measure would "level the playing field".

As this measure was directly banning the sale of a product, it would have an impact on the structure of the market, and therefore it was important for the Department to consider competition impacts.

The Department found a link between lower-income families and an increased level of consumption of energy drinks. An option of restricting the sale of energy drinks in areas with a lower average disposable income was considered, however, consultation highlighted that this would hamper competition in these areas and brought in equity issues.

The RPC also advised the Department to seek further evidence to support the premise that operators may simply replace energy drinks in vending machines with soft drinks due to their lack of prevalence (2 out of 40 slots on average), instead of

introducing age verification methods on the machines. Failure to consider this when implementing vending machine requirements would have resulted in restricting the available markets energy drink provides could sell in.

The Department uses the CMA checklist structure; considering the second question on the ability of suppliers to compete is answered thoroughly. The competition assessment is particularly strong here, segmenting the response for both manufacturers and retailers.

1 2 3

There have also been measures directly aimed at restricting economic activity or shrinking the market to reduce individual/societal harm.

RPC-4137-DCMS 2018: Gaming machines and social responsibility measures
This measure principally reduced the maximum stake on B2 gaming machines (known as fixed odds betting terminals). This category of gambling machines has the highest maximum stake. The Department argued that government intervention was needed to strike the right balance between socially responsible growth of the gambling industry, and the protection of consumers and wider communities. The ultimate policy aim was to reduce gambling related harm. This measure follows other legislation which takes a behavioural approach to addressing problem gambling.

DCMS noted this regulation would have a significant effect on the industry. The impact on competition was *"considered through the lens of substitution"* (paragraph 38, p34), i.e. what products would the consumer turn to in the absence of fixed odds gambling machines? The Department considered casinos and online gambling but concluded that neither are direct substitutes for the B2 machines, and would require significant behavioural changes from the consumer. Fixed odds gambling machines are fast-paced and allow the individual to lose large amounts of money in a short time, whereas casinos and online gambling do not allow such quick transactions. As a result, the IA stated that 'the fundamental nature of B2 gaming may be altered by the proposed regulatory intervention.' The competition impacts were particularly relevant to the assessment of the policy, as the measure directly restricted the economic activity of using the machines. It was therefore important for DCMS to assess the scale of this potential competition impact within the impact of the policy.

In focusing on the substitution effect of consumers, DCMS addressed the fourth checklist question on consumer choice. It discussed the ability of various suppliers to compete, through online means for example, but did not go further to consider how this might affect the overall range of suppliers. Use of the checklist format would have been useful to more clearly explain how the questions were covered.

2 4

There was a measure to cap what debtors would pay under 'payday loans'.

RPC13-1984-HMT 2014: Amendment to the Financial Services (Banking Reform) Act - restricting charges for high-cost short-term credit

HM Treasury identified that borrowers within the high-cost short term credit market are not price sensitive, due largely to the fact many face a lack of alternative options or prioritise other factors over price in borrowing decisions. Furthermore, firms are incentivised to take advantage of the borrowers' lack of choice and price insensitivity, and as a result can impose disproportionately large interest rates for the resulting short term loans.

Government therefore legislated to require the FCA to use its existing powers to introduce a cap on the costs of high-cost short-term credit. The Department proposed that it was likely that many firms would exit the market. The policy could therefore affect competition, by restricting the number and range of suppliers in the market.

The Department conducted a short competition assessment in the IA. *'The intended consequence of the policy is that the impact should be felt by those firms that provide credit at high cost to borrowers (particularly where these high costs are associated with unaffordable lending) or that rely on multiple rollovers or defaults for maintaining profitability. Evidence from international comparisons suggests that a number of firms may exit the market altogether.'* (paragraph 68, page 19).

In the event, the measure resulted in a shrinkage of the market of well over 90 percent.

It was relevant for the Department to assess the impacts on competition, which allowed them to conclude that efficient firms, lending responsibly and at lower cost would be less affected by the cap. The Department does not use the checklist template, but nonetheless broadly addresses the first three of the checklist questions.

1 2 3

Price/charges regulation

Measures placing restrictions on what businesses can charge consumers are perhaps the most obvious interventions to promote consumer welfare that could affect competition: restricting price competition between firms and potentially discouraging market entry.

RPC-4212-BEIS 2018 and RPC-4358-BEIS-Ofgem 2019: Domestic gas and electricity default tariff cap (final stage IAs)
The Domestic Gas and Electricity (Tariff Cap) Act 2018 created a new duty for Ofgem to design and implement a temporary cap on domestic standard variable and default gas and electricity tariffs ('the default tariff cap'). This was introduced after a CMA investigation into the energy market found energy prices were much higher than they would be under a perfectly competitive market. However, the CMA recommended price caps only for the most vulnerable users (implemented in 2017 for customers on prepayment meters and extended in 2018 for customers who receive the Warm Homes Discount). Therefore, whilst the Department relied largely on references to the CMA to support its rationale for intervention and overall assessment of consumer detriment, it could not simply reference CMA analysis in support of its preferred option. The Department's argument for extending the cap to all households appeared to be mainly based upon equity rather than economic efficiency. In this case, it was relevant for the Department to identify the scope of any detrimental effects on competition, in order to compare with the equity impact.

The Department's IA considered a risk of reduced competition in the short term, as the gains from actively switching would decrease, weakening incentives for customers to switch.

Ofgem subsequently produced assessments for the chosen level of the cap, monetising the direct cost to business (mainly lost profit but also familiarisation and administrative costs). The Ofgem assessment referenced its detailed wider economic analysis supporting the level of the cap, including an assessment that price competition would be "*...at a reduced level when compared to the baseline scenario*". (paragraph 6.30, page 94). Furthermore, Ofgem stated that "*The cap could encourage suppliers to innovate more rapidly to remain competitive, and encourage the entry of firms with innovative new business models. But it could also reduce incentives to enter the market because of reduced opportunities to earn above normal profits."* (paragraph 6.50, page 97).

The Department most specifically addressed the third checklist question relating to possible impacts on supplier's incentives to compete. There was some discussion of the behaviour of consumers, partly addressing the fourth checklist question, but this could have been made clearer.

3 4

RPC-3339-BEIS 2016: Teaching excellence framework (final stage IA)
A cap of £9,000 for university tuition fees had been in place since 2012. By 2016 this had been eroded to around £8,500 in real terms. There was also an unintended consequence in that the large majority of higher education institutions were charging at or just under the cap.

For higher education institutions (HEIs) that can demonstrate high quality teaching, the Government proposed to introduce the Teaching Excellence Framework (TEF), which would allow institutions to increase their fee caps in line with inflation. This was intended to inform students about the quality of teaching at different HEIs and incentivise these institutions to deliver excellent teaching.

The Department proposed that by having an incentive to increase their fees and therefore revenue, universities would begin to compete with each other to deliver a higher standard of teaching. The Department provided a fairly comprehensive discussion of the benefits of competition within a market. *'Competitive pressure in a sector drives the suppliers (HE providers in this case), to make their offer more attractive to the students, either through reducing prices, improving the offer, or both'.* (paragraph 27, page 68).

It was relevant for the Department to consider the impacts on competition, as introducing a fee cap which changes in line with inflation would have a resulting effect on demand and supply in the market for higher education. In order for the Department to effectively analyse the extent of this impact on the policy outcome, they identified how this may reduce barriers to entry, therefore increasing the supply of higher education providers, increase their incentives to compete and lead to better information available to inform potential students.

In the detailed version of the IA, the Department addressed three of the checklist questions; although this was not the case for the summary version. Although an explicit response to the fourth question was not provided, the Department did provide a discussion of the increased information available to inform student choices.

1 2 3

Trade agreements and immigration measures

Regulations giving effect to trade agreements are likely to affect competition by providing for greater access to UK markets to overseas companies. Measures affecting UK businesses' ability to recruit workers from overseas are also likely to have differential impacts on UK businesses, for example affecting businesses whose 'employment models' rely more upon importing labour.

RPC-4328-DIT 2019: Impact assessment of the EU-Vietnam Free Trade Agreement (EVFTA) on the UK (final stage IA)
The EU-Vietnam FTA (EVFTA) was intended to eliminate most tariffs between the EU and Vietnam and to reduce the non-tariff barriers that businesses face in the trade of goods and services. The Department expected the FTA to increase bilateral trade and economic growth, with the UK supporting Vietnam's integration into the global economy and in return Vietnamese trade increasing the welfare of UK households by lowering the price of certain goods. The EVFTA includes provisions for public procurement, services, investment, intellectual property rights, regulatory issues, technical barriers to trade, and sustainable development.

The Department expected the EVFTA to increase UK business productivity through increased competition but also noted that this could lead to declining profits for less competitive UK firms. This higher level of competition was also the basis for many of the FTA's benefits. With greater levels of competition, the Department argued that there would be: higher quality final goods and services produced, lower prices of imported final goods and services and lower prices of final goods and services produced with imported inputs. It calculated that consumer welfare would thereby increase by £290 million per annum in the long run.

The Department did, however, note that in the long run some UK firms may be forced to exit domestic markets as a result of increased competition. As such, it was relevant for the Department to assess competition, given the potential effect on domestic producers who would now be exposed to more international competitors. The RPC opinion commented in detail on competition effects:

"*The lowering of tariff and non-tariff barriers may have structural effects throughout the value chain. While the short-run effect may be to increase domestic-market competition between UK and Vietnamese firms, in the medium term this can lead to exit of uncompetitive UK firms and ultimately to a more concentrated market than at present. The resulting concentrated UK market may be dominated by Vietnamese firms or even by UK firms, if the Vietnamese competitors serve only as 'kingmakers' to drive domestic competitors out of business before succumbing themselves. Conversely, some of this adverse impact may be offset by increases in the competitiveness of UK firms (both small and large) selling into Vietnamese markets, with similar medium-to-long run structural and competition impacts. The IA would benefit from a description of these indirect impacts, even though they cannot easily be quantified with the tools available*."

The RPC also noted that the SaMBA would benefit from sectoral analysis to indicate whether SMBs could be disproportionally affected by increased competition from Vietnamese firms.

The Department does not use the checklist format in its competition assessment, but broadly addressed the second and fourth questions.

2 4

Data Portability and Interoperability Measures

RPC-5009-BEIS 2022: Smart Data – Enabling Data Portability and Market Contestability in Consumer Markets (final stage IA)

The Smart Data initiative aimed to empower consumers, and small businesses, by enabling the secure sharing of customer data - at the customer's request - with authorised third parties, who use this data to provide products and services that benefit the customer, in sectors such as banking, energy, and telecoms. The policy sought to facilitate switching, drive innovation, and enhance competition by mandating secure data sharing and interoperability protocols. The IA provides an example of how to address CMA Question 5.

As this measure required firms to provide consumers with access to their data in a standardised, portable format, it had a direct impact on the structure and dynamics of affected markets. The IA considered how Smart Data would lower barriers to entry for new providers by mandating interoperable data interfaces, enabling consumers to port their data securely and easily. The IA discussed switching rates, reductions in search and transaction costs, and innovative business models (such as comparison tools and switching services).

The Department considered risks of market concentration if only large incumbents could afford compliance, and proposed mitigations such as support for SMEs. The RPC opinion noted the dynamic competition impacts, including innovation incentives and the potential for new entrants to disrupt established markets. The IA and the opinion highlight the importance of ongoing monitoring of innovation and consumer outcomes.

The IA provides an example of addressing the CMA fifth question, by linking contestability and innovation, dynamic impacts, and identifying mitigations for small providers.

5

Extension of regulation into new areas

RPC-4347-DCMS 2021: Proposal to introduce a regulatory framework for online harms (consultation stage IA)
The Department identified this measure could disproportionately impact smaller firms, create barriers to entry, and reduce the number and range of suppliers. The RPC noted that section 7 of the IA stated that the proposals may impact competition in the market and offered suggestions for the final stage IA. These included:

- providing a full assessment of the impacts of the proposal on competition and consider whether compliance costs could create a barrier to entry, leading to further monopolisation of an already concentrated market.

- assessing the competition impacts of requiring companies to share technologies to combat online harm including co-developed and individually developed solutions, and how this work in relation to protection of intellectual property rights.

The Department did not use the checklist format, and indirectly addressed the ability of suppliers to compete through potential barriers to entry. It did not consider the latter three checklist questions in any detail; doing so would have improved the IA.

1

National security

Measures might be introduced to restrict business freedom or investment from overseas on the grounds of national security. By restricting who can supply essential goods and services, these measures can have significant impacts on competition.

RPC-4173-BEIS 2020: National Security and Investment (consultation stage IA)
Under the proposed reforms the Government would legislate so that it could scrutinise more circumstances where acquisitions of control over entities or assets may raise national security risks. Assessing competition was relevant in this case as the introduction of further scrutiny into foreign direct investment could affect the number and range of suppliers.

As such, the IA addressed the risk the proposal might deter legitimate foreign direct investment into the UK (p.41 and annex). In doing so, it commissioned external research on the sources of capital for companies from the UK national infrastructure sectors. The Department's assessment suggested the risk might be low but, as this was an area of uncertainty, the RPC recommended that the Department should make use of consultation to gather further views and evidence on this.

The Department does not use the competition checklist format; however, it suggests the measure will only impact a few firms and so not generate cause for concern over competition. Use of the format would have been welcome, making identification of how the Department considered the impacts on competition more straightforward.

1

RPC-3792-BEIS 2020: Downstream Oil Supply Resilience Bill (final stage IA)
The proposal aimed to improve the resilience of the downstream fuel supply market, including the power to conduct 'control tests' on new buyers of downstream oil sector infrastructure, to ensure that they are financially sound and operationally capable and being able to direct individual companies in extreme circumstances. Competition impacts were relevant in this case because of a potential impact on suppliers.

The IA provided a descriptive assessment of possible impacts on market competition (section 6.7, pages 28-29). The Department noted that the 'resilience direction' was a backstop power to address extreme circumstances, and if the Government intended to use the power, they would have to demonstrate that any direction was fair, reasonable, proportionate, and would not result in undue impacts on market competition. The RPC opinion noted that the IA would benefit from setting out how it would make these assessments. The RPC opinion also noted that the Department had provided a strong SaMBA, considering exemption and quantitative assessment of impact on small and micro businesses, demonstrating that impacts do not disproportionately fall on small businesses.

The Department did not use the checklist format and, therefore, it was difficult to identify where the questions have been addressed.

Employment rights

Measures aimed at protecting or improving workers' employment rights could have impacts on the market and competition, particularly if they affect smaller businesses disproportionately.

RPC-4405-BEIS 2019: One-sided flexibility (consultation stage IA)
The proposal sought to address the issue of 'one-sided flexibility' where some employers misuse their labour market power and flexibility to transfer risk to workers. This imbalance between employer and workers can result in some workers having hours changed or cancelled at short notice. The IA considered two options: introduce a right to reasonable notice of work schedules and introduce a right to compensation. The proposal could affect suppliers' costs and potentially affect competition in the market.

The Department provided a well-structured and detailed assessment of costs for a consultation stage IA. The RPC noted the IA could be improved by further discussion of potential spillover and labour market equilibrium effects, such as whether the loss in flexibility may reduce employment levels, innovation, and consideration of potential impacts on businesses to react in an agile and innovative way. The Department helpfully identified that 'one-sided flexibility' appears more prevalent in larger businesses. However, the issue of whether the proposals could disproportionately affect small and microbusinesses could have been examined further for final stage.

The Department did not use the checklist structure, but broadly considered the ability of suppliers to compete, as a result of no longer facing potentially unfair competition

resulting from the abuse of labour standards. There was no significant discussion of the other questions.

2

Measures implementing (at least in part) CMA recommendations

RPC-4427-BEIS 2020: Heat Networks Future Market Framework (consultation IA)
Heat networks are a system of insulated pipes that connect multiple buildings or a single multi-tenanted building to a heat source. The Competition & Market Authority (CMA) set out recommendations for the regulation of heat networks. The Government's preferred option addressed the recommendations of the CMA and defined extra rights and powers to be given to heat networks.

The Department's IA drew on evidence from the CMA's market study and its recommendations. This case is relevant as the Department provided a good explanation for why it is going beyond the CMA's recommendations by providing extra rights and powers for heat network operators (HNOs), which would give opportunities to reduce costs to business, therefore benefitting market competition.

RPC-3544-DFT 2016: Buses Bill – franchising and partnership improvements – secondary legislation
The proposals for this bill provided additional partnership options and franchising powers to local transport authorities, with the aim of encouraging the operation of more effective local bus markets. This case is relevant since within the IA, the Department provided answers to each of the questions in the pro-competition exclusion test., which resulted in most of the impact of the proposal deemed pro-competition, with an equivalent annual net direct cost to business (EANDCB) of £37 million. The Department's assessment was that franchising will strengthen the ability of a range of operators to compete, through removing barriers to entry of the incumbents' anti-competitive practice and that the introduction of a tendering and contracting process would lead to a more effective competition process.

3) Particularly good example of a competition assessment in an IA

The CMA suggested the case below as providing a particularly good application of its guidance/checklist. This was in an IA produced for the Scottish Government and was not, therefore, within the scope of RPC scrutiny. It should be emphasised that the RPC is not suggesting that it would always expect this level of detailed analysis; in most cases a less-detailed level of analysis would be proportionate. However, it may be useful as an example where departments expect competition impacts to be particularly important. Given the depth of the analysis produced, we have separated the responses to checklist questions.

A Deposit Return Scheme for Scotland. Business Regulatory Impact Assessment

In September 2017, the Scottish Government announced in the Programme for Government that it would move to implement a deposit returns scheme (DRS) for Scotland single-use drinks containers. Following consultation, a system was designed to meet Scotland's specific aims of increasing recycling rates to 70% by 2025 and reducing littering. It was proposed that, by placing a financial value on selected single-use drinks containers, the DRS would encourage consumers to return them for recycling, encouraging wider behavioural change and maximising economic, societal and environmental benefits for Scotland. The final scheme design enabled consumers to take single-use containers back to any retailer covered by the scheme, in return for a 20p deposit.

The competition assessment stated that DRS was not expected to have a material effect on competition, and no significant restrictions on suppliers in the Scottish market were expected. Further, the obligations placed on producers and retailers were not expected to have disproportionate impacts on any particular market participants. The flexibility of the scheme was argued to mitigate any potential impact on smaller producers and retailers, including *"the fraud-prevention measures to be adopted by producers and alternative collection mechanism for smaller retailers"* (page 32). The assessment also considered the potential for fraudulent activity, with non-DRS containers being transferred from England to Scotland in order to obtain deposits. It was deemed that the relatively low levels of population with easy access to the English market and the low costs to the consumer of the deposits paid, would ensure these impacts are minimal. Considering the potential impact across borders, given differing regulations between administrations, was a useful addition to the competition assessment.

The assessment considered all elements of the CMA checklist in detail, following the checklist structure. However, before doing so, the markets affected directly and indirectly are identified, which provides useful context and scope for the rest of the competition assessment. Markets directly affected included drinks retailers and wholesalers to the Scottish market and producers and importers for the Scottish market. Markets indirectly affected included bottling, labelling and packing, packaging, glass, plastic, aluminium and steel production.

Question 1a: Will the measure directly limit the number or range of suppliers?

No direct competition impacts were anticipated. Research by Zero Waste Scotland suggested the Scottish drinks market is competitive and DRS would not award limited exclusive rights to supply the market or introduce a licensing scheme restricting the number of suppliers. Conversely, it was identified that any incentives improving the quality of materials within the DRS, would not constitute a direct restriction on participation in the market.

Question 1b: Will the measure indirectly limit the number or range of suppliers?

This question was answered by firstly addressing the impacts by producers and retailers, and then by types of potential costs incurred. Potential cost types for producers discussed in the assessment included barriers to entry, producer fees, higher first year costs, changes to packaging processes and administrative costs. Cost types identified for retailers included retailers using reverse vending machine method, retailers using manual collection and return, level of handling fee, online retailers, retailers operating close to border between Scotland and England, familiarisation costs, communication costs and impacts on the hospitality sector. Across all these costs, little or no significant competition impacts were found. Departments may find it useful to look at the analysis for each of these impacts, where it may apply to their own policy.

Question 2: Will the measure limit the ability of suppliers to compete?

No significant impacts were anticipated given the overall low-price impacts associated with the scheme once returns were accounted for. Nonetheless, the assessment considered how the volume of containers, quality of products, impact on choice of materials used in drinks packaging, sales channels, geographical areas of supply, advertising of products and restrictions on products processes and governance of suppliers may limit the ability of suppliers to compete. This section uses sensitivity analysis to consider potential impact on suppliers at three different real consumer cost scenarios (0.5p, 1p and 1.5p). This leads to the conclusion of little to no impact on supplier's competitive abilities. The RPC notes that this analysis was particularly well-quantified but this is not always possible. A qualitative discussion of these issues may be enough to address this question.

Question 3: Will the measure limit suppliers' incentives to compete vigorously?

No competition impact was anticipated on suppliers' incentives, and it was argued *"the introduction of DRS should not incentivise suppliers to coordinate activities over which they would ordinarily compete"* (Page 53). The assessment stated that the Scottish drinks market is a competitive one, where products are sufficiently differentiated, with a range of producers and retailers. This qualitative response may not appear as comprehensive as the prior response but given the competition

assessment already provided a quantified overview of the Scottish drinks market structure, this response did not require further justification.

Question 4: Will the measure limit the choices and information available to consumers?

The assessment considered the limit of consumers' ability to decide from whom they purchase, possible limits to information available to consumers and costs of changing supplier and anticipated no significant competition impacts. Although there was no quantification, the qualitative response addressed all parts of the checklist question in sufficient detail. This demonstrates a more feasible level of depth for departments to consider as part of their analysis, where there may not be the resources to fully quantify all potential impacts.