

Making Markets Work Well: The U.K. Market Investigations Regime

BY ANDREA COSCELLI & ANTONIA HORROCKS¹

Competition policy is recognized by the U.K. government as a key driver of productivity and growth. The CMA's market investigations regime, which has had significant impact in the United Kingdom on a variety of key sectors such as groceries, airports, and banking, is a crucial tool in this regard. While the CMA's merger and behavioral enforcement work focuses on identifying and preventing anticompetitive arrangements between parties, abusive conduct by single firms, anticompetitive mergers, and promoting compliance with competition law, the CMA's markets work complements and supports the CMA's competition enforcement and advocacy activities, and also its consumer protection functions. It looks at markets to identify structural features or behavior preventing them from functioning well and causing consumer detriment, and has powers to impose wide-ranging remedies necessary to address any adverse effects found. This article explains the history of the U.K. market investigations regime; the legal framework for the regime; reflects on past investigations—both in terms of outcomes, procedures, and benefits to consumers; and looks forward to future CMA investigations.

I. INTRODUCTION

The Competition and Markets Authority (“CMA”) is the United Kingdom (U.K.)’s new competition and consumer authority, created by the Enterprise and Regulatory Reform Act 2013 (“ERRA 13”). The ERRA 13 brought together the U.K. Office of Fair Trading (“OFT”) and Competition Commission (“CC”) and the CMA acquired its powers on April 1, 2014.

The CMA's primary duty is to seek to promote competition, both within and outside the U.K., for the benefit of consumers² and its mission is to make markets work well in the interests of consumers, businesses, and the economy.³ It is an independent non-ministerial government department with responsibility for carrying out investigations into mergers and markets and enforcing competition and consumer law.

The CMA's market investigation powers allow it to investigate whether there are features of a market that restrict, distort, or prevent competition—an adverse effect on competition (“AEC”)—and, if so, what should be done about it. Features can include structural features (e.g. concentration, entry barriers, and regulation) and supplier or customer conduct.

Competition policy is recognized by the U.K. government as a key driver of productivity and growth. The markets regime, which has had significant impact in the United Kingdom on a variety of key sectors such as groceries, airports, and banking, is a crucial tool in this regard. The CMA's merger and behavioral enforcement work focuses on identifying and preventing anticompetitive arrangements between parties, abusive conduct by single firms, anticompetitive mergers, and promoting compliance with competition law.

The CMA's markets work complements and supports the CMA's competition enforcement and advocacy activities, and also its consumer protection functions, by looking at markets to identify structural features or behavior preventing them from functioning well and causing consumer detriment, even where there has been no breach of competition law.

The U.K. regime gives the CMA powers to impose remedies necessary to address the adverse effects on competition found following a thorough, transparent, and consultative two-phase process. Remedies need to be reasonable and proportionate.

The U.K. regime is relatively unusual globally, in providing the authority with the ability to implement structural change or legally binding behavioral remedies as a result of a market investigation. The market regime has a high reputation internationally for its quality of analysis, flexibility, and transparency. It was preserved by the latest reforms to U.K. competition law. In line with reforms made to other parts of the regime, there were changes made to strengthen the regime (extending the scope of the regime to cover cross-market issues and to enable public interest references, increasing information gathering powers) and changes to streamline the regime (tighter statutory timetables).

THE U.K. REGIME IS RELATIVELY UNUSUAL GLOBALLY, IN PROVIDING THE AUTHORITY WITH THE ABILITY TO IMPLEMENT STRUCTURAL CHANGE OR LEGALLY BINDING BEHAVIORAL REMEDIES AS A RESULT OF A MARKET INVESTIGATION

This article explains the history of the U.K. market investigations regime; the legal framework for the regime; reflects on past investigations—both in terms of outcomes, procedures, and benefits to consumers; and looks forward to future CMA investigations.⁴

II. HISTORY OF U.K. MARKET INVESTIGATIONS

Although the U.K. market investigations regime in its present form was created by the Enterprise Act 2002 (“EA02”), its origins can be traced to 1948 when the Monopolies and Restrictive Practices Commission was established to review monopolistic practices. This regime was substantially continued in the Fair Trading Act 1973. The Fair Trading Act required the Director General of Fair Trading to keep commercial activities under review in order to discover monopoly situations⁵ and gave the Director General the power to make monopoly references to the Monopolies and Mergers Commission (“MMC”).⁶ The MMC then had to apply a “public interest” test to what were known as “complex monopolies” before making recommendations to ministers. The Minister would take the final decision as to whether and how to remedy the complex monopoly situation.⁷

In 2001 the Department of Trade and Industry carried out a consultation on the U.K. competition regime (*2001 White Paper*).⁸ This followed the introduction of a new framework for investigating anticompetitive agreements and abuses of dominance in the Competition Act 1998. At that stage the U.K. antitrust regime was unusual compared to some of its more established global counterparts in having decision-making power in relation to mergers and market investigations vested with government ministers. The *2001 White Paper* set out a blueprint for a world-class independent competition regime for the United Kingdom,

noting the importance of competition to strong and effective markets, helping consumers get a good deal and driving innovation and productivity. This blueprint resulted in the creation, from the MMC, of the CC and wider powers for the OFT.

In recommending retaining the ability to investigate markets, the *2001 White Paper* noted that:

The ability to investigate markets as a whole is an important feature of our competition regime. Where a market is not working well, the complex monopoly provisions of the Fair Trading Act 1973 provide a very effective means of taking action, complementing powers under the Competition Act 1998 and EC law. Economic evidence shows that in markets where competitors engage in parallel behaviour, competition is often reduced to the cost of consumers.⁹

The U.K. market investigations framework was established by EA02. It gave the CC ultimate decision-making power in relation to both the assessment of harm and remedies. Ministerial power was retained in relation to a small, defined set of markets where public interest issues might arise (national security), with the addition of any other public interest markets requiring Parliamentary approval. The EA02 gave the CC the power to remedy any AECs it found, as well as implement structural changes or legally binding behavioral remedies to address market-wide issues.¹⁰

The regime set up a two-stage administrative review process, with the decision on substance at Phase 2 taken by an independent panel, rendering a full review on the merits unnecessary. This process has been replicated in the CMA.

MARKET INVESTIGATIONS ARE COMPLEX AND INTENSIVE—FOR BOTH THE PARTIES INVOLVED AND THE AUTHORITY

The 2001 changes also set up a specialist tribunal to hear appeals in competition matters—the Competition Appeals Tribunal (“CAT”).¹¹ Appeals in markets cases are on judicial review grounds.¹² The legal framework of the regime is described further below.

A market investigation (or “Phase 2” investigation) could be commenced as a result of a reference by either the OFT or a sector regulator, on the basis that there were features of a market that may have an adverse effect on competition.¹³ The OFT was under a duty to keep markets under review and refer those which it found were not working appropriately.¹⁴

Market investigations are complex and intensive—for both the parties involved and the authority. As such, prior to referring a market for investigation, the first-phase regulator would generally carry out a market study to examine the causes of why particular markets may not have been working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behavior.

These market studies (or “Phase 1”) examine the causes of why particular markets are not working well for consumers, leading to proposals as to how they might work better. Market studies can be used proactively to target areas where competition might not have been working very well for consumers, but for reasons that

might not be readily addressable using standard enforcement routes. The proactive nature of market studies was a key part of the underlying thinking of the government in introducing the regime, as competition policy had increasingly been seen as a key element of overall productivity policy, and it was consequently thought to be important to allow the competition authority discretion to target specific areas of the economy where competition problems might be particularly pronounced.

Market studies can look beyond individual abuses of dominance, agreements that reduce competition, or breaches of specific consumer protection legislation and consider all aspects of market structure and conduct. They were also the tool that best linked the consumer protection and competition responsibilities of the OFT (and now do so in the CMA), and which can respond to concerns where public restrictions may be distorting a market. As such, market studies can lead to a wide range of outcomes,¹⁵ including: (i) a clean bill of health, (ii) actions which improve the quality and accessibility of information to consumers, (iii) encouraging businesses in the market to self-regulate, (iv) making recommendations to the government to

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change regulations or public policy, (v) taking competition or consumer enforcement action, or (vi) accepting undertakings in lieu of reference.^{16 17} The majority of market studies have led to outcomes other than a market investigation reference.

The OFT carried out more than 50 market studies and the CC 16 market investigations between 2004 and the end of March 2014, developing detailed guidance and processes to ensure expert analysis, flexibility, and transparency. A 2007 peer review noted that the regime was at the forefront of global best practice in these areas.¹⁸

In 2011, as part of the U.K. government's growth agenda, the Department for Business Innovation & Skills ("BIS") issued a consultation for further reform, having noted that despite its strengths there were aspects of the regime that it believed could work better.¹⁹

These reforms led to the creation of the CMA, creating a unitary authority that would undertake both Phase 1 and Phase 2 investigations. The market investigation framework was retained with some amendments, which included changes to the time frames for market investigations and remedies to reduce the time scales of these processes, as well as a decision to widen the scope for investigations to include cross-market practices.²⁰ A further change was to provide the CMA with powers to report on public interest issues in markets, when requested by the government. Despite the ERRA13 amendments, the substantial characteristics of market investigations remain the same, having been reviewed for the second time in a decade. Details of changes to the market investigations framework and process are further set out below.

III. THE LEGAL FRAMEWORK AND CHANGES UNDER THE ERRA13

A. *Enterprise Act 2002*

1. Market Studies

The first step towards a full market investigation has, to date, generally been a preliminary investigation into a market to determine whether there are characteristics of that market that deem it worthy of further study. The OFT was required under the Enterprise Act to keep U.K. markets under review.²¹ It would carry out preliminary work as to whether further investigation of a market was warranted (as part of its general prioritization of work)—this was the “pre-market study” stage. To do so, it used a tool called a “market study.” As noted above, these were informal investigations into certain areas of economic activity, and they were not specifically recognized in law until ERRA 2013. There was no legal test for instigating a market study.

Some examples of the range of forms which market studies can take, and the range of outcomes which can result, are set out in Table 1 below.

Table 1: Market studies can take a range of forms and result in a range of outcomes²²

Strategic studies	Remote Communities – aimed to understand responsibility for frequent concerns raised by such communities	Advertising of Prices – research into advertising and pricing to determine which practices may mislead consumers and prioritise where to take action
Longer & larger studies	Personal Current Accounts – included analysis of bank data and customer surveys including psychological research. Significant recommendations and follow-up	Homebuilding – included surveys, analysis of land-banks, planning permissions and carried out case studies. Sector found to be broadly competitive
Shorter studies	Sale & Rent-back – a quick study of a growing sector which recommended statutory regulation	Medicines Distribution – examined changes to distributing medicines following significant volume of complaints. Recommended regulatory change
Led to enforcement	Quick House Sales – launched due to concerns about vulnerable consumers. Study led to consumer enforcement and undertakings being given by three firms	Outdoor Advertising – study prompted by concentration in the sector. Led to competition enforcement action on media owners’ contracts with local authorities
Led to MIR and significant reform	BAA Airports – A market study and investigation of BAA’s airports led to structural changes	Payment Protection Insurance - Super-complaint, market study led to market investigation and subsequent action
Recommendations for change to Government	Pharmaceutical Price Regulation Scheme – proposed a value-based pricing alternative to current scheme. Recommendations gradually taken forward over recent years	Defined Contribution Workplace Pensions - agreement secured from Pensions Regulator at the time of conclusion of the study for reforms to the sector

As shown in the above table, a market study can lead to a wide variety of further action (consumer information campaigns, recommendations to government, consumer or competition enforcement). However, some remedies could only be effected following a Phase 2 market investigation. When considering whether it was appropriate to make a reference, the OFT would consider whether it (or another regulatory or government) could remedy the issue.

The OFT had the power to refer a market to the CC for a statutory market investigation. The reference test was whether:

the OFT 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 United Kingdom or a part of the United Kingdom.²³

The market investigation reference was required to specify the goods and services to which the feature of the market related and could be framed to confine the CC's investigation to considering certain features of the relevant market.

The OFT exercised the power to make market investigation references concurrently with sector regulators and two references were made to the CC by sector regulators between 2004 and the end of March 2014 (Rolling Stock Leasing and Movies on Pay TV).²⁴ As at the date of publication the Office of Communications (“Ofcom”), the Gas and Electricity Markets Authority (“Ofgem”), the Water Services

THE SUPER-COMPLAINT PROCESS WAS INTENDED TO BE A FAST-TRACK SYSTEM FOR THESE BODIES TO BRING THESE MARKET FEATURES TO THE ATTENTION OF THE OFT OR ANOTHER REGULATOR IN ORDER TO OBTAIN A VIEW ON WHAT ACTION (IF ANY) IT WOULD TAKE

Regulation Authority (“Ofwat”), the Northern Ireland Authority for Utility Regulation (“URegNI”), the Office of Rail Regulation (“ORR”), the Civil Aviation Authority (“CAA”), and Monitor have concurrent competition powers and the ability to make market references. Under the Financial Services (Banking Reform) Act 2013 the Financial Conduct Authority (“FCA”) will also have the concurrent power to apply Part 4 of the EA02. These powers will take effect on 1 April 2015.

Generally these regulators will also carry out a market study prior to making a reference (see, for example, the recent Ofgem/CMA market study into the energy market that led to a market investigation reference to the CMA in June 2014).

The OFT or the current regulator also had powers—when it considered that the test for a reference to the CC was met—to accept undertakings to remedy the AEC or detrimental effects on customers resulting from it, in lieu of such a reference.²⁵

In addition, section 11 EA02 provided designated consumer bodies the right to make a complaint about any feature or combination of features of a market in the United Kingdom for goods or services that

appeared to be significantly harming the interests of consumers (a “super-complaint”). The super-complaint process was intended to be a fast-track system for these bodies to bring these market features to the attention of the OFT or another regulator in order to obtain a view on what action (if any) it would take. Some of the early references were made following complaints by super-complainants (Home Credit, Northern Ireland Personal Current Account Banking and Payment Protection Insurance).

The Act also provided for ministerial power to make references, under certain conditions, if dissatisfied with a decision of the OFT not to make a reference, but none were made in the 2004-2014 period.²⁶

Given this structure for receiving references, the CC did not decide which cases it would receive and devote resources to, as references would be made by the OFT, a sector regulator, or Government.

2. Market Investigation References

The CC was required to decide whether any feature or combination of features of each relevant market prevents, restricts, or distorts competition in connection with the supply of any goods or services in the U.K.²⁷ The decision-makers were members of the CC, appointed to form an inquiry group for the purpose of making a decision on the market investigation reference. The members were independent decision-makers at the second phase who had no involvement with the decision to initiate or refer the case. They were drawn from a panel of experienced industry and competition experts, with a range of skills and backgrounds.²⁸

If an AEC was found, the CC was required to decide whether action should be taken to remedy, prevent, or mitigate that effect or any detrimental effect on customers that resulted from or might be expected to result from the AEC.²⁹ The CC was required to achieve as comprehensive a solution as was reasonable and practicable, having regard to the AEC. It could take into account any relevant customer benefits of the market concerned when determining the remedy. The CC had order-making powers to oblige firms to change behavior, but could also agree on behavioral and/ or structural changes with parties via the use of undertakings. Once final undertakings or orders were in place, the enforcement obligation shifted back to the OFT (or sectoral regulator, as relevant). The approach to remedies, an area of major innovation by the CC, and some of the remedies that have been applied in previous market investigations, are further explained below.

The EA02 placed timeliness and transparency requirements on the CC, requiring that the CC publish a report setting out its decisions, reasons for its decisions, and such information as it considered appropriate for facilitating a proper understanding of those questions and its reasons for its decisions, within two years of the reference.³⁰

B. Changes to the Regime—ERRA 13

Following the BIS Consultation of 2011 the market investigations regime was kept largely the same, with the framework outlined above little changed.

The ERRA13 makes provision for the governance and decision-making structure of the CMA reflective of the fact that the CMA is responsible for the conduct of both Phase 1 market studies and Phase 2 market investigations. The design of the new institution has kept the use of an independent panel of decision-makers at Phase 2.³¹

The CMA Board is responsible for key decisions relating to market studies and the making of market investigation references. If the CMA Board decides that a market investigation reference is to be made it refers the matter to the CMA Chair, who is responsible under the ERRA13 for constituting the market reference group that will undertake the market investigation. In practice, the CMA Chair will delegate these responsibilities to the CMA Panel Chair. As in the previous institutional structure, the decision-makers are groups of CMA members drawn from an independent panel (see above).

The CMA Board is required to make rules of procedure for market reference groups. Subject to these rules, groups can decide their own procedures. The CMA Board may also issue guidance on market investigation procedures, to which market reference groups must have all due regard when conducting market investigations.³³

The decision-making structure described above ensures that key decisions in market studies and subsequent market investigations are made by separate persons within the CMA. However, at the staff level, to avoid unnecessary duplication and to facilitate an efficient end-to-end markets process, the CMA would normally expect to have a degree of case team continuity between the market study and market investigation case teams.³²

THE DECISION-MAKING STRUCTURE DESCRIBED ABOVE ENSURES THAT KEY DECISIONS IN MARKET STUDIES AND SUBSEQUENT MARKET INVESTIGATIONS ARE MADE BY SEPARATE PERSONS WITHIN THE CMA

In addition to the changes in institutional structure affecting the market investigation regime, the ERRA 13 introduced some specific changes, which are summarized in Table 2 below.

Table 2: Key changes to the market investigation regime from ERRA13

Status of Market Studies	Not formally defined in law. Undertaken under OFT’s general powers. Have, however, always been approved by OFT Board.	Formally defined in law. To commence requires CMA Board approval to issue a market studies notice
Delivery timescales for market studies	Not specified – although OFT had set internal ambition to deliver references in 6 months and full studies in 12 months.	Reference required to be consulted on within 6 months of notice being issued - reference within 12 months. Full market studies within 12 months.
Information gathering powers at phase 1	None (aside from in period when a reference is being consulted upon)	CMA has information gathering powers once market studies notice has been issued
Types of reference	Standard market references – whether features of a market prevent restrict or distort competition.	In addition, introduced: cross-market references public interest references to look at competition issues alongside other pre-specified public policy objectives.
Delivery timescales for market investigations	Two years	18 months (plus 6 months for “special reasons”)
Delivery timescale for implementation of remedies following a market investigation	Unspecified	6 months (plus 4 months for “special reasons”)

Market studies are conducted under the CMA’s general review function in section 5 of the EA02. The ERRA13 introduced a formal requirement for a market study to be commenced by the issuing of a market study notice when the CMA exercises its function under section 5 for certain specified purposes.³⁵ Once such a notice has been issued, the statutory time limits and compulsory information gathering powers come into effect. These two changes were designed to work together—the assumption being that quicker studies could not be carried out unless information could be gathered more quickly. The OFT had previously gathered information on a voluntary basis.

The ERRA 13 also brought in statutory time limits for Phase 1 market studies (12 months), market investigations (18 months—extendable by six months for special reasons) and implementation of remedies

following a market investigation (six months—extendable by four months for special reasons). If the CMA wishes to make a market investigation reference, it must commence consultation within six months of initiating a market study.

A further change introduced by the ERA 13 is to enable the CMA to review conduct features that affected a number of markets (“cross-market references”), where it is expedient to do so. Such references are not expected to be numerous (as in many cases even a specific feature, e.g. barriers to switching, will differ significantly depending on the market) but this new ability will assist the CMA where features are identified which can be remedied in more than one market without requiring the significant resource of two separate inquiries.

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THE CC HAS GENERALLY TAKEN A CONSERVATIVE VIEW IN DETERMINING LIKELY DETRIMENTS, MEANING THAT THE ACTUAL BENEFITS MAY BE GREATER THAN ESTIMATED

Finally, the ERA 13 introduced an ability for the CMA to investigate public interest issues in market investigation references. The Secretary of State now has the power to make two different types of public interest references, only the latter of which is new: restricted public interest references (these are references that require the CMA to investigate competition issues, while the Secretary of State investigates defined public interest issues in relation to the matter referred); and full public interest references (this is a new type of reference requiring the CMA to investigate defined public interest issues alongside competition issues in relation to the matter referred). Part of the rationale for this wider scope was the view that the CMA may be well placed in future to carry out the sort of public interest-focused market reviews that had previously required the setting up of Independent Commissions (e.g. the Independent Commission on Banking).³⁷

IV. MARKET INVESTIGATIONS UNDER EA02

The first market investigation to occur under the EA02 was Store Cards,³⁸ which the CC received in 2004. Over the following decade, the OFT conducted over 50 market studies,³⁹ 11 of which resulted in a reference to the CC for a market investigation. The five other CC investigations resulted from regulator referrals and super-complaints.

It is estimated that over the period 2007-2010 consumers directly saved £345m per year⁴⁰ as a result of the OFT’s work on market studies, the CC’s work on market investigations, and reviews of orders and undertakings.⁴¹ However, measuring the avoided detriment is not straightforward and the CC has generally taken a conservative view in determining likely detriments, meaning that the actual benefits may be greater than estimated.

As noted above, the CC carried out 16 market investigations under the EA02, three of which (Private Motor Insurance, Payday Lending, and Private Healthcare) had not reached the stage of final report at the time of creation of the CMA. The work on these cases, along with cases which were already in the remedies implementation phase (such as Aggregates, Cement and Ready-Mix concrete) continues in the CMA.⁴²

Like market studies, market investigations can also vary widely in their scale, depending on the complexity of the market, the number and type of parties involved, and the data available to assess the market. Figure 1 below shows the size of some of the sectors investigated.

Figure 1: Size of sectors investigated

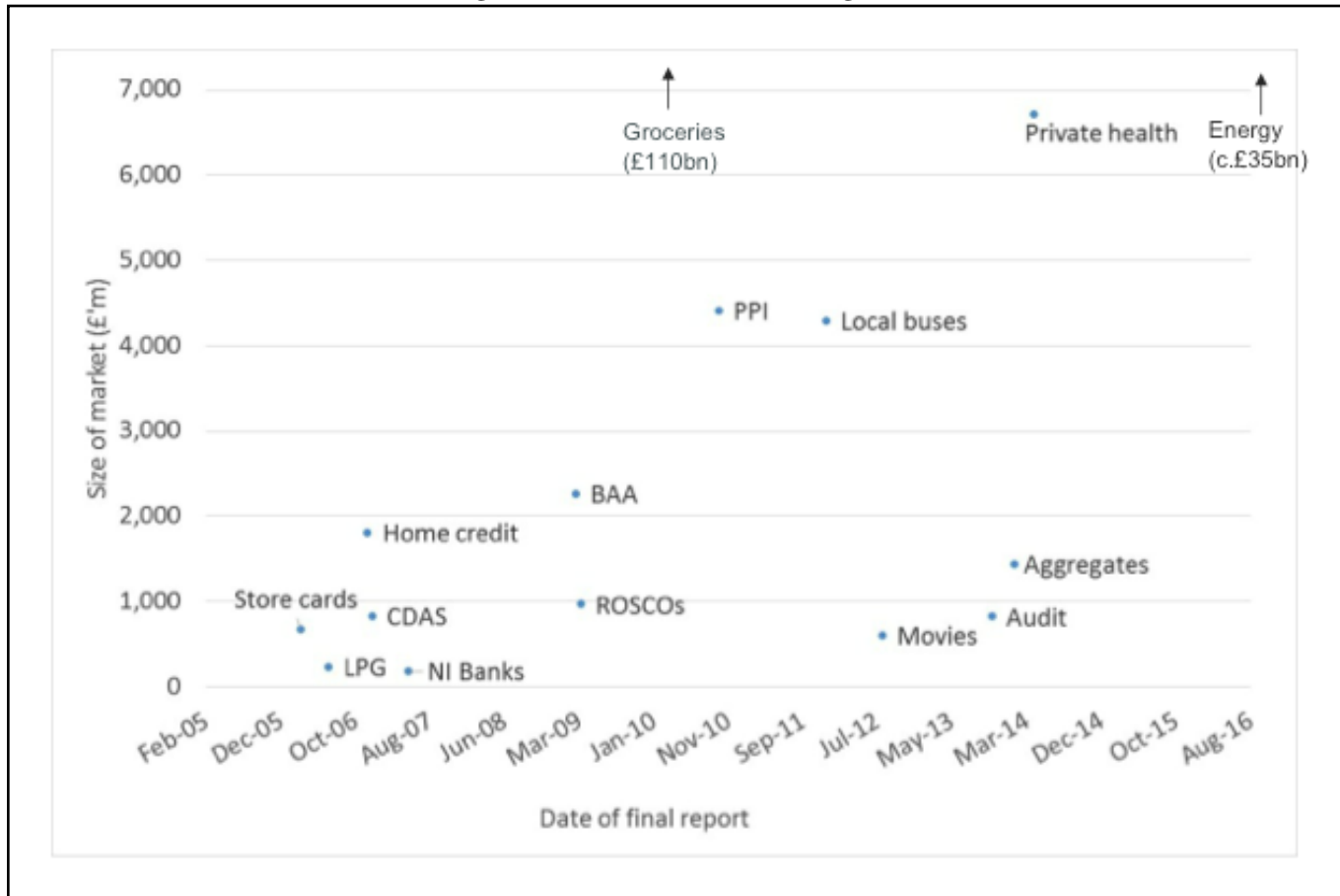


Table 3 sets out the market investigations carried out by the CC between 2004 and 2014.

Table 3: Competition Commission market investigations under EA2002

Name	Decision Date	Origin	AEC Finding	Appeal	Appealed / change in remedy	Remedies
Store Cards	2006	OFT	Yes	No	No	Credit providers required to provide more and better information on monthly statements (e.g. APR warning) PPI to be unbundled from other elements of store card insurance
Liquefied petroleum gas	2006	OFT	Yes	No	No	Measures to be introduced to enable tank transfer to make switching easier Changes to customer contracts required (including to notice and exclusivity periods) Information on the switching process to be standardised and improved
Home credit	2006	Super-complaint	Yes	No	Yes - order varied due to change of circumstances namely the coming into effect of the EU's Consumer Credit Directive (CCD)	Lenders obliged to share creditworthiness data with Credit Reference Bureaux Price comparison website established Early settlement rebate rules made fairer

Classified Directory Advertising Services	2006	OFT	Yes	No	No	Yell's Yellow Pages advertisements to remain subject to a price control Yell required to publish rate card and prepare accounts for the OFT of its UK printed regulated directory business. ⁶⁹
Northern Irish Banks – Personal Current Accounts	2007	Super-complaint	Yes	No	Yes - order varied due to change of circumstances namely the coming effect of CCD as transposed into UK law via a group of six Consumer Credit Act 1974 Regulations.	Banks required to provide better and clearer information on services, charges and interest rates Customers to be given at least 14 days' notice before charges and interest deducted from account Improvements to switching process introduced

Rolling Stock Leasing companies	2009	Office of Rail Regulation	Yes	No	No	Rolling Stock Leasing companies obliged to provide set of information to train operating companies in lease rental offer Non-discrimination requirements in Rolling Stock Leasing companies' Codes of Practice removed Recommendations made to DfT and Transport Scotland (including to introduce longer franchise terms) - not pursued by Government
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Groceries	2010	OFT	Yes	Yes ⁷⁰	Partial - the remedy to introduce a competition test in planning decisions on larger grocery stores was amended to include a materiality threshold (less than 300 sq metres groceries sales area and the store has not in the immediately preceding five years been extended).	Recommended a 'competition test' be included in planning decisions on larger grocery stores – not pursued by Government Large grocery retailers prohibited from imposing new restrictive covenants Groceries Supply Code of Practice strengthened and extended and recommendations made about its enforcement; Government introduced legislation that created an Adjudicator
Payment Protection Insurance	2011	Super-complaint	Yes	Yes ⁷¹	Partial - the point-of-sale prohibition remedy would stop the completion of sales of PPI during the sale of the associated credit product, however retail PPI was exempted from this remedy	Ban on sale of PPI during sale of credit product and for 7 days afterwards Single-premium policies prohibited Measures to improve information available to make it easier to compare, search and switch

BAA Airports	2011	OFT	Yes	Yes ⁷²	No	BAA to sell three of its airports within two years (starting with Gatwick, then Stansted, followed by either Glasgow or Edinburgh) BAA required to improve consultation with airlines at Aberdeen airport and publish certain financial and other information Recommendations made to CAA (about Heathrow) and DfT (airport policy)
Local Buses	2011	OFT	Yes	No	No	Local bus operators that manage bus stations required to provide access to bus stations for rival operators on fair, reasonable and non-discriminatory terms. Number of recommendations made to DfT (eg on conduct and powers of local transport authorities)
Movies on Pay TV	2012	Ofcom	No	No	N/A	N/A

Audit	2013	OFT	Yes	No	No	FTSE 350 companies to tender for audit services at least every 10 years and their audit engagement to be reviewed on average every 5 years 'Big 4 only' clauses in loan agreements prohibited Accountability of external auditors strengthened
Aggregates, Cement & Ready-Mix concrete	2014	OFT	Yes (in cement ⁷³ only)	Yes ⁷⁴	Ongoing	Lafarge Tarmac to divest a cement plant (and some accompanying RMX plants if necessary) to facilitate entry of new cement producer Restrictions placed on timing of publication of GB cement market data and suppliers prohibited from generic price announcement letters to customers Measures to promote competition in GGBS supply chain

Private Healthcare ⁷⁵	2014	OFT	Yes	Yes	Ongoing	A restriction or ban on certain benefits and incentive schemes provided by private hospital operators to clinicians. A combination of measures to improve the public availability of information on consultant fees and of information on the performance of consultants and private hospitals The divestiture by HCA of either the London Bridge and the Princess Grace hospitals or the Wellington hospital including PMC Measures to ensure that arrangements between NHS trusts and private hospital operators to operate or manage a PPU will be capable of review by the CMA.
Private Motor Insurance	Ongoing	OFT	Ongoing	-		-
Payday Lending	Ongoing	OFT	Ongoing	-	-	-

In all but one case to date (Movies on Pay TV) an AEC was found in at least one market and remedies imposed.

Table 4: Competition Commission market investigations remedies under EA02⁴³

	Customer information	Switching Remedies	Lower entry barriers	Recommendations	Controlling outcomes	Structural remedies
Store Cards	X	(X)				
Domestic bulk liquefied petroleum gas	X	X				
Home credit	X	X	X	(X)	X	
Classified Directory Advertising Services					X	
Northern Ireland Personal Current Account Banking	X	X				
Groceries				X		X
Payment Protection Insurance	X	X		(X)		
BAA Airports			X	X		X
Rolling Stock Leasing	X	X	X	X		
Local Bus Services	(X)		X	X		
Statutory Audit Services	(X)	X	X			
Aggregates, Cement and Ready-mix Concrete	X					X
Private healthcare	X	(X)	X			X

Market investigation remedies typically focus on addressing the cause of the competition problem in order to make the market more competitive in future. They may be behavioral (e.g. information remedies or measures to reduce barriers to switching) or structural (e.g. divestment of business or assets). Remedies may also include recommendations to others—such as government, regulators and public authorities—in particular to change existing legislation. Successive governments have committed to respond within 90 days to any recommendation, indicating what action, if any, they propose to take.

Most remedies have been designed to open up markets, improve information to customers, or lower barriers to entry or switching. Out of all cases⁴⁴ to date, the CC decided that divestments were necessary in three cases—BAA-Airports; Aggregates, Cement and Ready-mix Concrete; and Private Healthcare—of which the latter two are currently under appeal. Remedies controlling outcomes (e.g. regulation of prices) have only been imposed twice.⁴⁵ Many of the CC's remedies have involved addressing consumer behavior rather than, or in addition to, the behavior of the supplier being investigated. For example, in Store Cards, Home Credit, and PPI a variety of information remedies were imposed to enable the customers to make better-informed choices, in order to improve competition.

REMEDIAL POWERS HAVE BEEN USED CAREFULLY, TO DESIGN PROPORTIONATE RESPONSES TO BEHAVIOR AND MARKET FEATURES THAT ARE ADVERSELY AFFECTING COMPETITION.

The CC was able to utilize the wide powers available to it, which the CMA has retained, to design the most appropriate remedy to address the harm in a proportionate, consumer-focused manner.

While the OFT was responsible for monitoring market investigation remedies generally, in many cases the investigation involved regulated markets and, therefore, third-party regulators or government departments (e.g. in the case of Rolling Stock Leasing Companies) were also involved in designing and monitoring the remedy implementation. It is notable that a number of investigations involved elements of financial or insurance regulation (Store Cards, Home Credit, Northern Irish Banks—Personal Current Accounts, Payment Protection Insurance, Audit, Private Motor Insurance, Payday Lending) and another three investigations involved regulators with concurrent competition powers (Rolling stock leasing companies, BAA-Airports, Movies on Pay TV). One further investigation—Groceries—resulted in the creation of an additional regulatory scheme for the sector in the form of a strengthened Groceries Supply Code of Practice and a new Groceries Adjudicator.

A. Consumer Benefits of Market Investigation Remedies

Creation of market investigation remedies is by its nature a complex, information-intensive, and time-consuming process, with the need to not only consult with market participants but also with industry-specific regulators. The CC honed its ability to design complex remedies over the past decade, which will stand the CMA in good stead to continue this work.

There are several means by which market investigations can create benefits for customers: introducing measures that directly address or resolve the AEC and any customer detriments (i.e. remedies); affecting or influencing other regulators; creating an effect on parties' behavior via scrutiny of the sector;⁴⁶ and empowering customers to make better choices and address detriments. Remedial powers have been used carefully, to design proportionate responses to behavior and market features that are adversely affecting competition.

Evaluating Impact

Having determined that there are features of the market which may give rise to an AEC, the CMA then uses a benchmark of “a well-functioning market” to determine how the market may be judged to be performing. If it determines there are features in a market leading to an AEC, it moves to consider appropriate remedies.

Remedies seek to provide as comprehensive a solution as possible to the adverse effects on competition and any detrimental effects on customers, both price and non-price. That is, the remedy should address the detriment found but, as explained above, this is not something that can be quantified precisely. As such, the impact on competition needs to be assessed broadly.⁴⁷

Consideration of whether remedies are necessary and identification of the right remedy are highly dependent on the facts and context of the investigation. The clear preference is to deal comprehensively with the cause(s) of the AECs wherever possible, and by this means significantly increase competitive pressures in a market within a reasonable period of time. AECs are likely to result in costs to the U.K. economy and remedies can facilitate substantial benefits, facilitating economic growth and increasing choice for customers.

The CMA will assess the extent to which different remedy options are likely to deal comprehensively with the AECs. In evaluating the effectiveness of a particular remedy, the CMA will take account of: (i) the fact a remedy should be capable of effective implementation, monitoring, and enforcement; (ii) the timescale over which a remedy is likely to have an effect (with remedies showing results in a short time being favored, but packages of measures which show effects over a longer duration being considered in some cases); (iii) current law and regulation and legal/ regulatory changes which are expected to occur; and (iv) the manner in which the measures may interact with each other.

The CMA will also have regard to the proportionality of different remedy options, guided by the principle that a remedy should: (i) be effective in achieving its legitimate aim; (ii) be no more onerous than needed to achieve its aim; (iii) be the least onerous if there is a choice of measures; and (iv) not produce disadvantages disproportionate to the aim.

In reaching a judgment on a particular remedy, the CMA will consider its potential effects on those persons most likely to be affected by it, paying particular regard to customers but also paying regard to the impact on the businesses subjected to the remedies and other affected parties. In its assessment it will take into account a variety of evidence and use a variety of techniques (quantitative and qualitative) to analyze potential effects of remedy options.

The CMA will also assess *ex post* the potential beneficial effects of its interventions. Evaluating the effect of the remedial action is affected by:

- a. the difficulty of determining the extent to which change results from market investigation measures rather than other factors;
- b. the ability to gather relevant information—historically parties have been less forthcoming in market rather than merger evaluation and quality/ service effects are generally difficult to measure; and
- c. the need for a reasonable period to elapse, in many cases, before the impact of measures is apparent.⁴⁸

The more an AEC reflects longer-term and structural problems within a market, the greater significance the CMA will place on long-term development of competition, rather than quantifiable benefits. However, if the remedy aims to achieve relatively predictable short-term outcomes, the CMA may choose to quantify the changes as part of its evaluation of remedies. Similarly, the CMA will consider the potential negative effects of a remedy, including the costs to business.

THE IDENTIFICATION OF ANTICOMPETITIVE FEATURES OR IMPOSITION OF REMEDIES DO NOT MEAN THAT MARKET PARTICIPANTS HAVE INFRINGED THE LAW

THE MORE AN AEC REFLECTS LONGER-TERM AND STRUCTURAL PROBLEMS WITHIN A MARKET, THE GREATER SIGNIFICANCE THE CMA WILL PLACE ON LONG-TERM DEVELOPMENT OF COMPETITION, RATHER THAN QUANTIFIABLE BENEFITS

The CC evaluated the effectiveness of the remedies it imposed as a result of market investigations and the CMA intends to continue this program. Two such assessments have been published—in relation to the Store Cards and Home Credit market investigation remedies.⁴⁹ The Store Cards assessment found that many beneficial changes to the industry (lowering of APRs and lower outstanding credit balances on store cards) occurred. The assessment also found that these changes occurred *during* the market investigation, as retailers anticipated the changes likely to be required, rather than following remedies implementation. The Home Credit assessment found that a decline in bad debts had occurred—partially due to the remedy and partially due to more stringent lending criteria during the period analyzed.

From its internal assessments, the CC saw positive impacts as a result of market-opening remedy measures in relation to the Store Cards, Home Credit, Domestic Bulk Liquefied Petroleum Gas (where rates of switching increased from 0.5 percent to 4.0 percent between the period prior to the reference to 2013), and PPI markets (where as a result of the inquiry showing the extent of mis-selling in the industry the market reduced from £4.4 billion to c£1.2 billion in size and U.K. banks put aside c€27 billion for compensation to customers).

The CC also found positive impacts for consumers resulting from the divestiture measures imposed in BAA-Airports. Since the divestiture of Gatwick Airport by BAA, customer service has improved on a number of metrics (ratio of complaints, length of security queues, customer service); capital expenditure reports have shown foreseen efficiency savings from a different approach to capital expenditure (e.g. a proposal to improve

the baggage system costing £70 million rather than £120 million under BAA's proposal); and London airports are now competing for new capacity. Finally, in a number of cases the market investigation reports have had an impact with other regulators (e.g. PPI—for the FSA; Audit—for the European Union).

The remedies imposed by the CC have resulted in substantial positive impacts and the CMA foresees this trend continuing as measures from more recent and future market investigations are implemented.

B. The Market Investigation Process—Checks and Balances

Market investigations are a thorough examination of the market referred. The CMA seeks evidence from market participants, and has extensive powers to gather information. The process is investigative and the emphasis is on diagnosis and cure rather than prohibition, punishment, or deterrence. The identification of anticompetitive features or imposition of remedies do not mean that market participants have infringed the law. However, separate enforcement action can be taken by the CMA where there is a suspected breach of the law.

Given the potential costs to business of a market investigation, the case for referral, the case for information requests, the substantive case and any remedies must be explained to the parties. The CMA has detailed processes to allow for this, as set out in its guidance.⁵⁰

Table 5 below sets out the market process, from market study through to remedial action. This set of indicative timeframes does not take into account either extensions (on the basis of special reasons) or litigation which, as explained above, can significantly increase the overall timeframe of a market investigation reference, in particular the remedies implementation phase.

Table 5: CMA market study, market investigation and remedies timeframe

Stage of process	Timeframe
Market study notice published	Commencement of market study
Notice of proposed decision on possible market investigation reference published (if applicable) • consultation started (if applicable)	Within 6 months
Market study report published • reference made (if applicable)	Within 12 months
Reference	Pre-reference sharing of appropriate information with the CMA by the referring body
'First day letter'/initial information requests Publication of initial issues statement (setting out theories of harm) Initial submissions from main and third parties	Months 1=2
Site visits	Month 3
Publication of relevant working papers Publication of annotated issues statement Hearings with parties Final deadline for all parties' responses before provisional findings	Months 5-9
Publication of provisional findings Publication of remedies notice (if relevant)	Months 11-12
Consideration of responses to provisional findings and consultation on remedies (if needed). Response hearings with parties	Months 13-15
Publication of provisional decision on remedies (if needed) Final deadline for all parties' responses before final report	Month 16
Publication of final report Remedies implementation	Month 18
Accept final undertakings or make final order	6 months
Extension ability if special reasons why final undertakings cannot be accepted or a final order made within the statutory deadline	4 months

A market investigation will generally start with a first-day letter being issued to the key main parties and a period of detailed information gathering. An issues statement is released by the CMA at an early stage in the investigation, discussing theories of harm which frame the analysis the CMA intends to pursue. The CMA's analysis is developed during this phase and internal working papers are prepared. The approach will be

disclosed ahead of the main party hearings in an annotated issues statement and possibly also working papers. The CMA's provisional view as to whether there is an AEC will be published in its provisional findings. If there is a provisional AEC finding, the CMA will consult on this finding and seek views as to possible remedies and, at a later stage, publish its provisional decision on remedies for consultation.

The investigatory procedures are set out in the detailed guidance document CC3 (revised): *Guidelines for market investigations, their role, procedures, assessment and remedies*.⁵¹ Procedures have been developed to:

LITIGATION CAN ASSIST THE AUTHORITY TO CLARIFY AND CONFIRM THE SCOPE OF ITS POWERS AND MANY OF THESE CASES HAS DONE SO

(i) fulfill and balance different demands; (ii) meet statutory time limits; (iii) use CMA and parties' resources efficiently; and (iv) ensure a thorough, disciplined, and fair process. The requirement for fairness includes giving the parties opportunities to understand the CMA's analysis affecting them; the CMA accordingly aims to be open and transparent in its work.⁵²

The statutory requirements to consult on provisional decisions which are likely to have an impact on the interests of any person (such as the finding of an AEC or a proposed remedy), together with the investigatory procedures developed by the CC and the information shared by the CMA on its website and with relevant parties as part of its commitment to transparency, provide the parties (including third parties) with an opportunity to understand and rebut, where necessary, provisional findings made by the CMA.

One way to consider how the regime has been working is the level of change in decisions between provisional findings and final report (which show an ability by the authority to adapt its decision to new information) and the level of, and success in, appeals.

In some cases the detailed consultation process that occurred during the inquiry resulted in significant changes in the decision between the provisional findings and final report, either regarding an AEC finding or remedies. For example, in *Movies on Pay TV*, the market changed significantly following publication of provisional findings and, as a result, the CC ultimately found there was no AEC in the relevant market(s). In the *Private Healthcare* inquiry, the CC changed its findings on some aspects of the case using information provided after provisional findings and in other cases the CC used information provided in response to its provisional decision on remedies to change or further tailor its proposed remedies.

ONE WAY TO CONSIDER HOW THE REGIME HAS BEEN WORKING IS THE LEVEL OF CHANGE IN DECISIONS BETWEEN PROVISIONAL FINDINGS AND FINAL REPORT AND THE LEVEL OF, AND SUCCESS IN, APPEALS

A further safeguard to the process is the ability to appeal a decision to make a market investigation reference; a decision regarding the AEC test; or a decision as to remedies, on judicial review grounds. Appeals can be made to the CAT with, following CAT's decision, further rights of appeal to higher courts: the Court

of Appeal, and then the Supreme Court. Decisions to impose remedies in five market investigations out of 13 decisions where remedies have been imposed (BAA-Airports, Groceries, PPI, Aggregates, Cement and Ready-Mix Concrete, and Private Healthcare) have been appealed.

Litigation can assist the authority to clarify and confirm the scope of its powers and many of these cases has done so. CAT judgments, and even some unsuccessful appeals, have resulted in internal reviews of the checks and balances in the processes, to ensure the best overall procedure possible. In particular, improvements have been made in relation to explaining the cost/benefit analysis in relation to particular remedies,⁵³ transparency,⁵⁴ evidence-based decision-making, and member and case team selection.⁵⁵ Details of some of these appeals are described further below.

In two market investigations, the CC amended its remedies as a result of these interventions (PPI, Groceries) and reassessed the manner in which it analyzed the effectiveness, timeliness, and proportionality of remedies.

In 2009 the Court of Appeal found that the CC had failed to take account of relevant considerations, including in the context of proportionality, when determining the remedy in the Groceries case.⁵⁶ The Court of Appeal stated, “Whilst the precise methodology adopted for assessing these matters, and the weight to be attributed to the results of such assessments are (subject to rationality or questions of law) likely to fall within the margin of appreciation of the CC, the assessments and the weighing must take place.” An appeal in PPI involved a similar finding and remittal to the CC to review the balancing of factors when considering a remedy.⁵⁷

The BAA market investigation resulted in two further appeals.⁵⁸ In relation to one of these, on further appeal from the CAT the Court of Appeal held that in assessing the proportionality of a remedy the assessment does not occur in a vacuum. The Court of Appeal upheld the CC’s decision to require the sale of Stansted Airport, finding that it was the only effective remedy.⁵⁹

The level of appeals to the CAT has increased in recent years. Two recent challenges have been on interim procedural decisions in market investigations and were made during the course of the investigation. These resulted in amendments to the CC’s process in one case. The second was stayed, with the CAT noting that the appeal would be better pursued after the CC’s final decision.⁶⁰

V. MARKET INVESTIGATIONS IN THE CMA—MAKING MARKETS AND MIR PROCESSES WORK WELL

During 2014-2015, the CMA aims to launch at least four new calls for information, market studies, or market investigations where it has the requisite evidence, and meet all statutory deadlines on new studies launched in 2014. The CMA will seek to use its tools across its portfolio to best deliver value and meet its aims and statutory objective.

The CMA's recent vision and values statement sets out the overall ambition of the CMA, and in particular to "Use the markets regime to improve the way competition works where evidence shows it can most benefit consumers."⁶¹ The focus is both on identifying and intervening in priority sectors where

WHEN CONSIDERING REGULATORY INTERVENTION, IT IS CRITICAL TO ACKNOWLEDGE THAT INTERVENTION IS NOT A COMPLETE PANACEA TO MARKET ISSUES AND THAT REGULATORY INTERVENTION CAN FAIL

market deficiencies are clearly harming consumers, including addressing competition in developing sectors such as online markets, where consumers are vulnerable to information asymmetries biases.

This strategic emphasis is complementary to the CMA's statutory functions to "conduct studies and investigations into particular markets where there are suspected competition and consumer problems, and to require market participants to take steps to address these problems."⁶²

When considering regulatory intervention, it is critical to acknowledge that intervention is not a complete panacea to market issues and that regulatory intervention can fail, either by not having the desired consequence or by having undesired consequences. The Chairman of the CMA David Currie recently acknowledged that because of the risk of government failure, government intervention needs to be carefully limited and focused on tackling the most egregious market failures. The intervention may not be simple—functional separation for BT in the telecoms sector was a technically complicated intervention—but it needs to be focused.⁶³

By having both phases of a market review in a single agency and having stronger relations with sectoral regulators, the CMA will be better placed than its predecessors to use the markets regime to improve the way competition works where it can most benefit consumers. A joined, end-to-end process will enable the CMA to use its resources efficiently across the spectrum of work undertaken in market cases (i.e. from initial scoping, to market study, to market investigation (where relevant)).

In addition to traditional sources of comment on the regime (from judgments, parties, and their advisers), the CMA has the benefit of a wide set of third-party views on the MIR regime—both from respondents to the 2011 BIS consultation and from respondents to its own more recent consultations on markets guidance. These comments shed light not only on what worked particularly well under the market investigations regime but also on what was perceived as not working well, or was subject to limitations. It has considered these views in relation to its guidance and its internal processes and has issued guidance reflecting the changes in the regime.⁶⁴ It has also adopted the OFT's guidance on Market Investigation References and the CC's guidance on Market Investigations.⁶⁵ It has expanded on how it aims to meet its ambition of delivering faster, better markets work in its Vision & Values Statement and its Annual Plan.

THE NEW SHORTER STATUTORY TIMETABLE WILL PLACE GREATER BURDENS ON BUSINESSES INVOLVED TO PROVIDE COMPLETE, ACCURATE INFORMATION AT THE RIGHT TIME

The market investigation process has been lauded for its transparency and for the in-depth nature of

its analysis. However, the new shorter statutory timetable will place greater burdens on businesses involved to provide complete, accurate information at the right time and on the CMA to ensure its processes are robust within this new timeframe.⁶⁶

The CMA is working hard to meet the challenge of ensuring this shorter timetable does not lead to either a move to gathering significant amounts of information (and therefore impose a burden on businesses) in an informal “pre-market study” phase and/or result in a truncated process whereby greater speed undermines the procedural safeguards required for a fair process.

In line with both the CMA’s Vision & Values framework and the Government’s strategic steer, the CMA is considering potential streamlining improvements, particularly around information gathering at Phase 1, handover between Phase 1 and Phase 2, and during Phase 2, in order to meet the new 18-month timetable for completing a market investigation.⁶⁷

VI. CONCLUSION

The U.K. markets regime has recently been endorsed through the BIS Consultation as a necessary and well-functioning tool for making markets work well in the U.K. and contributing to economic growth. The CMA has carefully considered comments about the regime in the process of designing the structure of the new authority, publishing guidance, and designing internal processes. The CMA is committed to better market intervention to ensure positive impacts for consumers and business in appropriate cases.

Alongside the markets investigation regime, the CMA also has a variety of tools to investigate and prevent anticompetitive mergers, halt and impose penalties on parties abusing a dominant position, entering into cartels or other anticompetitive arrangements or abuse, and remedy unfair consumer practices. However, for the reasons described above, and as shown by the outcome of previous market investigations, promoting competition and compliance with competition and consumer laws may not suffice to ensure all markets are working effectively in the best interests of consumers.

The CMA will continue to use the market investigation regime in an objective and proportionate manner to investigate key markets and implement effective and proportionate remedies where markets are found to be dysfunctional. As the Chairman of the CMA, David Currie, recently noted:⁶⁸

while markets represent the most effective way to organise complex and dispersed economic activity, markets do not always work well. This may be because there are impediments, such as entry barriers, to competition. It may also be because competition takes a malign form, with businesses competing to gouge, rather than serve, customers. [...] designing market interventions that enhance market performance is a complex, difficult and time-consuming task, and one that is best done calmly and out of the political spotlight. And that is particularly so because it requires a lot of careful analysis to avoid interventions that have unconsidered consequences.

Promoting effective competition on a fair basis is likely to be the best way to improve outcomes for consumers. But it may require more than that. In some cases, behavioural remedies may be the right way to go [...]. In others, structural remedies in the form of divestment may be appropriate [...]. And in some cases a package may be called for.

There is no science to the devising of remedies that improve failings in markets but which avoid adverse side effects. But there is no substitute for deep, considered analysis so that remedies are based on a sound understanding of how a market operates and focused on the features that need adjusting.

That takes time, diligence, objectivity and independence. That has underpinned the reputations of the OFT and Competition Commission, and is what the CMA is determined to uphold. ▲

¹ Andrea Coscelli is the CMA's Executive Director, Mergers and Markets, and Antonia Horrocks is a CMA Project Director. The authors would like to thank Dan Cliffe for his significant contribution to this article.

² ERA 13 s25(3).

³ The CMA's Vision and Values, Annual Plan 2014/15 and Prioritisation Principles.

⁴ For further information on the institutional structure and governance of the CMA see David Currie, Alex Chisholm, & Tim Jarvis, *Institutional Design and Decision-Making in the Competition and Markets Authority*, 10(1) COMPETITION POL'Y INT'L (Spring/Summer, 2014).

⁵ The definition of monopoly included not only monopoly and dominance situations but also conscious parallelism and agreements not caught by the Restrictive Trade Practices Act 1976.

⁶ Fair Trading Act 1973, section 78.

⁸ 'A World Class Competition Regime', Department of Trade and Industry, July 2001, Cm5233

⁹ 'A World Class Competition Regime', Department of Trade and Industry, July 2001, Cm5233, paragraphs 6.1 to 6.2.

¹⁰ EA02 S138.

¹¹ EA02 s12.

¹² The Court of Appeal has made it clear in various appeals (e.g. In *British Sky Broadcasting v Competition. Commission* [2010] EWCA Civ 2) that the standard for judicial review in the CAT is no different from that in non-specialist courts (such as the High Court or the Court of Appeal itself).

¹³ EA02 s131.

¹⁴ EA02 s5 & s131

¹⁵ See further *Market Studies: Guidance on the OFT approach* (OFT519), adopted by the CMA.

¹⁶ CMA3 – Market Studies and Market Investigations: Supplemental guidance on the CMA's approach.

¹⁷ An ICN report on market studies as carried out by regulators globally noted that "The most commonly acknowledged benefits of market studies were: to identify and address market failures; to build the authority's knowledge base; to address public restrictions on competition by means of advocacy; and to reach

better and more targeted enforcement decisions.” Market Studies Project Report, ICN Advocacy Working Group, 8th Annual Conference of the ICN. Zurich, June 2009.

¹⁸ P46, Peer Review of Competition Policy, by KPMG for Department for Business, Innovation and Skills, June 2007

¹⁹ *A Competition Regime for Growth: A Consultation on Options for Reform*. The Government considered that, while the U.K. competition regime was world-leading, there was scope for improvement, in particular to improve the robustness of decisions and strengthen the regime; to support the competition authorities in taking forward high impact cases; and to improve the speed and predictability for business. Many features of the consultation did not relate to the markets regime but rather factors such as strengthening the voluntary merger regime, the operation of concurrent competition powers with the sector regulators (an area where few cases had been brought since those powers were granted in 2004), and reforming the criminal cartel dishonesty office. The features of reform considered regarding the markets regime included:

- Enabling the CMA to carry out investigations into similar practices across different markets.
- Giving the CMA powers to report on public interest issues.
- Extending the super-complaint system to SME bodies.
- Streamlining the regime by reducing timescales and strengthening information gathering powers.
- Simplifying the remedies process and updating remedial powers.

Following the consultation (*see* Government Response to Consultation March 2012), the Government decided not to extend the super-complaint system to SME bodies. Most of the other features consulted on were amended to an extent—*see* Table 3.

²⁰ In some previous cases, there was a perception that the authorities had been hindered by the requirement to refer “a market” to the CC for review when, in fact, some practices affected multiple markets and could potentially have been remedied in a single investigation, and that this may have resulted either in narrower references than appropriate or in duplicative references.

²¹ EA02 s5.

²² Table sources: Remote Communities, Advertising of Prices, Personal Current Accounts (currently being updated), Homebuilding, Sale and Rent-back, Medicines Distribution, Quick House Sales, Outdoor Advertising, BAA Airports, Payment Protection Insurance, Pharmaceutical Price Regulation, Defined Contribution Workplace Pensions.

²³ EA02 s131. A “feature of a market” was to be construed as a reference to the structure of the market or any aspect of that structure; any conduct of one or more person who supplies or acquires goods or services in the market concerned; or any conduct relating to the market concerned of customers of any person who supplies or acquires any goods or services. EA02 131(2).

²⁴ EA02 Part 4.

²⁵ EA02 ss154 and 156. This occurred in relation to the creation of Openreach following Ofcom’s Strategic Review of Telecommunications, and following the OFT’s market study into Domestic Electrical Goods.

²⁶ EA02 s132.

²⁷ EA02 s134.

²⁸ The Act enabled the Secretary of State to make a public interest intervention if relevant, EA02 s139. In such cases the CC could, if it had found an AEC, make recommendations as to remedial action to be taken

by the Secretary of State. The Secretary of State had powers to decide whether any eligible public interest consideration was relevant to the report and, ultimately, whether any remedial undertaking should be vetoed as it may operate against the public interest. EA02 s150.

²⁹ EA02 explains that a detrimental effect would be higher prices, lower quality or less choice of goods or services for consumers or future consumers, or less innovation in relation to such goods or services.

³⁰ EA02 s136 -137.

³¹ *See, supra* note 4.

³² CMA 17

³³ CMA 3

³⁴ CMA 3

³⁵ For a more detailed explanation of the purpose of market studies, see chapter 2 of *Market Studies: Guidance on the OFT approach* (OFT519). Further information on the management of market studies is contained in chapter 4 of *Market Studies: Guidance on the OFT approach* (OFT519).

³⁶ During the 26 years in which the 1973 Fair Trading Act was in force there were three pan-market references: Collective Licensing 1988; Discounts to Retailers 1981; Full-line forcing and tie-in sales 1981.

³⁷ The Vickers Commission on Banking.

³⁸ Store cards.

³⁹ OFT Market Studies. This excludes Residential Property Management and SME Banking. PCA Banking is included in the original list, and is currently being updated.

⁴⁰ Positive Impact 09/10, OFT 2010.

⁴¹ BIS Consultation 2011, p20, and footnote 11: Note that this figure (£345m) for the direct financial benefits to consumers from market studies and reviews and MIRs is different from those presented as direct benefits for consumer from the market investigation regime (£317m) in the CC's Annual Report as: i) the former takes into account all OFT market studies, including those where referral to the CC is not considered a possible option, and ii) the latter includes referrals to the CC from other regulators and the OFT is not apportioned any benefits from these MIRs.

⁴² Payday Lending Provisional Findings and Private Motor Insurance Provisional Decision on Remedies.

⁴³ Remedies in Aggregates and Private healthcare are under appeal as at June 2014 and therefore shown in a different color in Table 1.

⁴⁴ Excluding Private Motor Insurance and Payday Lending, which are active cases.

⁴⁵ Classified Directory Advertising Services and Home Credit.

⁴⁶ *See* for example Store Cards, where APRs for store cards lowered during the course of the investigation.

⁴⁷ *See* further CC3 Revised, ¶¶ 322 onwards

⁴⁸ The time frame from decision to remedy implementation can be significant when the decision is appealed. For example, the CC issued a final report in BAA-Airports in 2009, which was appealed, reconsidered in part, and a supplementary report issued in 2011 with a timeframe of two years for BAA to sell the relevant airports. This decision was also appealed. As such, although the initial reference was in 2007, the full set of remedies have only been in place since 2013.

⁴⁹ Store Cards and Home Credit market investigation assessments.

⁵⁰ CC3 (Revised), CMA 17, CMA3, CC7 Revised.

⁵¹ CC3 (Revised).

⁵² The EA02 provides for the protection of confidential information relating to individuals and businesses. But the CMA may also disclose information under certain circumstances. The CMA has processes to protect confidential information and provide disclosure where necessary. For further details, see Chairman's Guidance on Disclosure of Information (CC7 Revised).

⁵³ Tesco, PPI, BAA.

⁵⁴ BMI Healthcare v CC [2013] CAT 24.

⁵⁵ CAT and CA Appeal on BAA – EWCA 2012 Civ 1077.

⁵⁶ Tesco v CC [2009] CAT 6.

⁵⁷ Barclays v CC [2009] CAT 27.

⁵⁸ BAA v CC (No 1) [2009] CAT 35; BAA v CC (No 2) [2012] CAT.

⁵⁹ “BAA's contention that the Tribunal erred in its approach to the assessment of proportionality ignores the fact that proportionality is not to be assessed in a vacuum. Whether a remedy under section 138 of the Act is proportionate must be considered in the context of the statutory scheme as a whole. In accordance with the statutory scheme in the Act, it has been decided that there is an AEC, that action should be taken to remedy it, and that the only effective remedy is a requirement that BAA sells Stansted. That requirement is in the public interest. It is inherent in such a statutory scheme that in order to secure the public interest, BAA will lose its freedom of choice as to whether and when to sell its asset.” BAA v Commission, Court of Appeal, [2012] EWCA Civ 1077.

⁶⁰ BMI Healthcare v CC[2013] CAT 24; Lafarge & Hanson v CC [2013] CAT 27.

⁶¹ Vision, values and strategy for the CMA, p.1.

⁶² Vision, values and strategy for the CMA, p.16

⁶³ *The case for the British model of independent regulation 30 years on*, The Currie Lecture, Cass Business School (21 May 2014).

⁶⁴ Market Studies and Market Investigations: Supplemental guidance on the CMA's approach (CMA3).

⁶⁵ There are three main existing guidance documents that relate to the markets regime: *Market studies: Market Studies: Guidance on the OFT approach* (OFT519), *Market investigation references* (OFT511), and *Guidelines for market investigations* (CC3 (revised)). Other guidance documents also contain information relevant to markets cases, including: *Super-complaints: guidance for designated consumer bodies* (OFT514) and *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973* (CC7 (revised)).

⁶⁶ As noted by Laura Carstensen, a former Deputy Chair of the Competition Commission, “Can we go faster? Maybe—we are always looking for ways to do so consistent with fair procedure; ay, there's the rub. It is interesting that whilst business in general tends to demand greater speed, business in particular (ie when it is their case under consideration) tends to value a careful approach and adequate time allowance both for them to assemble their case and for us to consider it.” She goes on to note, “The levels of transparency currently adopted in the CC may arguably exceed those that are necessary for a legally fair process. But they are an important procedural safeguard and facilitate the taking of difficult decisions.” Speech by Laura Carstensen, Deputy Chairman, Competition Commission, ‘What is a good competition authority?’, Eversheds' General Counsels' Forum, 12 November 2010.

⁶⁷ CMA Vision & Values; BIS Strategic Steer, Annex 1. The CMA's Vision & Values statement notes

that the reforms are designed to: Improve the quality of decisions and strengthen the regime; Support the competition authorities in taking forward the right cases; and Improve speed and predictability for business.

⁶⁸ *Supra* note 63.

⁶⁹ Following a review of these remedies in 2012/13 the CC decided that, due to increased internet access, these remedies should be removed immediately.

⁷⁰ Tesco appeal to groceries market investigation.

⁷¹ Barclays appeal to payment protection insurance market investigation.

⁷² BAA airports appeal to BAA airports market investigation.

⁷³ And Ground Granulated Blast furnace Slag (GGBS) a substance with similar properties.

⁷⁴ Lafarge appeal to aggregates, cement and ready-mix concrete market investigation and Hope construction appeal.

⁷⁵ Subject to appeal.

⁷⁶ BMI appeal, and AXA appeal to private healthcare market investigation.