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Quickguides

# The use of market studies and market investigations in UK competition law



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## Quickguide overview

As well as their powers to investigate specific infringements of competition law, the UK competition authorities have powers to investigate whole market sectors which do not appear to be working well for consumers. This guide summarises the market investigations regime in the UK.

Topics covered include:

- The rationale for opening a market investigation
- The legislative framework
- Procedure
- Remedies
- Implications for businesses

For further information on any of these areas please speak to one of the contacts listed on the final page of this Quickguide, or your usual Ashurst contact.

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## 1. The rationale

Market investigations allow the UK competition authorities to investigate markets where particular features of the market may give rise to anti-competitive effects which might not be captured by other competition law rules (in particular, the prohibition-based rules on anti-competitive agreements and abuse of dominance). There may be no wrongdoing by firms in terms of unlawful conduct, but there may still be adverse effects on competition which give rise to significant consumer harm. As such, the focus of these investigations is generally upon industry-wide practices (or, indeed, consumer behaviour) that appear to be harming competition, rather than the behaviour of a specific firm or firms. There are exceptions to this, however, such as the investigation of BAA's ownership of airports in South East England and Scotland.

## 2. The legislative framework

### Overview

The Enterprise and Regulatory Reform Act 2013 (ERRA13) established the Competition and Markets Authority (CMA) as the UK's competition authority responsible for ensuring that competition and markets work well for consumers. The functions of the Competition Commission (CC) and many of the functions of the Office of Fair Trading (OFT) were transferred to the CMA on 1 April 2014.

Under section 131(1) of the Enterprise Act 2002 as amended by the ERRA13 (EA02), the CMA may launch a market investigation if it has reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK.

A reference may also be made by a sectoral regulator with concurrent competition powers (these include, Ofcom, Ofgem, Ofwat, the Office of Rail Regulation, the Civil Aviation Authority, and the Northern Ireland Authority for Utility Regulation) or, in certain circumstances, by government ministers in relation to cases which involve public interest considerations (see below).

Section 131(2) of the EA02 defines "feature" in this context as:

- the structure of the market concerned or any aspect of that structure;
- any conduct (whether or not in the market concerned) of one or more persons who supply or acquire goods or services in the market concerned; or
- any conduct relating to the market concerned of customers or any person who supplies or acquires goods or services.

It is this broad definition of "feature" which allows market investigation analysis to go beyond looking at conduct of market participants which could potentially be assessed under the rules on anti-competitive agreements and abuse of dominance. In particular, the definition encompasses inherent structural issues not attributable to the conduct of any particular business or businesses and also encompasses the behaviour of customers, including both end-consumers and intermediate purchasers. In addition, in cases where "conduct" is a feature of concern, the reforms under the ERRA13 allow for a market investigation reference to be made in more than one market if necessary (e.g. where behaviour in an upstream market is foreclosing competition in a downstream market), known as a "cross market reference".

As a result, the authorities are able to address issues such as the situation where a lack of customer understanding and information about the product or service under consideration makes comparing competing offers difficult and results in muted competition because customers are reluctant to switch suppliers. Importantly, the definition also allows market investigations to cover government behaviour and legislation, often called "public" distortions of competition. Accordingly, the authorities are able to recommend changes to government behaviour or legislation which is harming competition.

In order to inform its decision as to whether to make a market investigation reference, the CMA can first undertake a "market study" under the CMA's general review function in section 5 of the EA02. In broad terms, the CMA uses market studies to educate itself about a market, looking at the economic and regulatory drivers and patterns of consumer and business behaviour.

Generally speaking, market studies are undertaken in markets where there has been some suggestion that competition is not functioning optimally. The CMA can proactively initiate such a study or, alternatively, a study may be launched in response to a so-called "super-complaint". Super-complaints can be brought by certain designated consumer bodies, such as the Consumers' Association (Which?) and the National Association of Citizens Advice Bureaux. The CMA must respond to super-complaints within a statutory deadline of 90 days. However, this may simply mean that a market study is launched within that 90-day period. Where the CMA launches an own-initiative study, this is often because there have been complaints from business, trade associations, representative consumer bodies, government or other public bodies. Of the market studies that have been undertaken by the CMA (and its predecessor, the OFT), the majority have been initiated as a result of competition concerns identified by the CMA/OFT itself. The CMA's decision on whether to make a market investigation reference is subject to judicial review by the Competition Appeal Tribunal. Market studies are considered further below.

Following a market investigation reference, the CMA is required to decide whether there is an "adverse effect on competition" (AEC). If any feature (the definition of which has been set out above), or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the UK or a part of the UK, this constitutes an AEC. The CMA's reference decision will describe the goods or services in question and the feature or features that are believed to have adverse effects on competition. However, while this provides a starting point for the market investigation reference, the CMA must reach its own conclusions on whether there are any adverse effects on competition. If the CMA decides that there is an AEC, it must then decide whether action should be taken to remedy the effects identified, and if so, what action. Following a market investigation the CMA has the power to impose remedies which go significantly beyond the outcomes available in a market study (see the section below on remedies).

## Cross market references

In situations where the CMA has reasonable grounds for suspecting that a feature, or combination of features, of more than one market in the UK prevents, restricts or distorts competition, the ERA13 gives the CMA the power to make a cross-market reference: that is, to refer a specific feature (or combination of features) existing in **more than one market** without also having to refer the whole of each market concerned. Only features that relate to conduct can be the subject of a cross-market reference.

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

- features that do not fit neatly within one market (for example, the collective licensing of public performance and broadcasting rights in sound recordings); and
- recurring sources of consumer complaint or identified detriment which have the potential to affect competition adversely across multiple, distinct markets (for example, the sale of secondary products at particular points of sale such as extended warranties or payment protection insurance).

The same procedural provisions apply to market studies which result in cross-market references as they do to market studies which result in ordinary references (see below). These provisions include:

the requirement to publish a market study notice, statutory time-limits, decision-making structure, and the CMA's investigatory and enforcement powers. Public interest interventions may also be made in relation to cross-market references.

### 3. The CMA's general review function

The CMA has a general function to keep under review information about matters relating to the carrying out of its regulatory role under section 5 of the EA02. As part of this general function, it may carry out a range of other work to assess markets, which can often be a precursor to a market study. The form such work may take will vary from desktop research only through to engagement with market participants and other interested persons (e.g. by issuing a "call for evidence"). These types of work enable the CMA to decide whether further consideration of an issue or market is appropriate in the form of a market study. Unless the CMA has issued a market study notice, it is not bound by statutory time limits nor does it have any of the compulsory information gathering powers when conducting work under its general review functions.

### 4. Market studies

Market studies are examinations into the causes of why particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour. As indicated above, the CMA can launch market studies under its general powers to keep competition and consumer matters under review. The decision whether to launch a market study will take into account a range of factors including the scale and significance of possible consumer harm, the prospects for obtaining evidence and of identifying remedies, the relative costs and benefits of a study, whether the CMA is the most appropriate body to undertake the study and whether a study is preferable to enforcement action under other competition laws or consumer law.

A market study formally begins with publication of a market study notice by the CMA. A market study notice must contain the following information: the scope of the market study; the period during which representations may be made to the CMA in relation to the study; and the timescales within which the study will be completed. The CMA Board is responsible for deciding whether the duty to publish a market study notice applies in a particular case.

Early in the study, the CMA will normally write to a range of interested parties to seek factual information and views. Detailed questionnaires may be sent with a specified timescale within which reply is requested. The CMA may also conduct meetings, interviews and telephone surveys. The CMA seeks to be transparent about its market studies work.

Publication of a market study notice triggers the following statutory time limits:

- where the CMA proposes to make a market investigation reference, or representations have been made arguing that a reference should be made, it must publish a notice of its proposed decision and begin the process of consulting **within six months** of publication of the market study notice; and
- the CMA must publish a market study report setting out its findings and the action (if any) it proposes to take **within 12 months** of publication of a market study notice.

Where a market study report sets out a decision to make a market investigation reference, the reference must be made at the same time as the report is published.

Publication of a market study notice also triggers the CMA's ability to exercise statutory investigatory powers to assist it in carrying out its functions under section 5 of the EA02. These powers are:

- to give notice requiring any person to attend a specified place to give evidence to the CMA;
- to give notice requiring any person to produce specified documents or categories of documents that are in that person's custody or under his control; and
- to give notice requiring any person carrying on business to supply specified forecasts, estimates, returns or other information in a specified form and manner.

The CMA has the power to impose penalties for failure to comply with any requirement of a notice issued by the CMA using its statutory investigatory powers. Non-compliance includes failure to attend interviews or meetings with the CMA, failure to provide evidence, and failure to produce documents required by the CMA. Penalties may be imposed in the form of a fixed amount, by reference to a daily rate, or using a combination of the two. Maximum penalty amounts are set by order and are, as at 1 April 2014, £30,000 (in the case of a fixed amount) and £15,000 (in the case of a daily penalty).

It is also a criminal offence for a person intentionally to alter, suppress or destroy any document which the CMA has requested. Persons committing this offence are liable to fines and/or possible imprisonment for a term not exceeding two years.

It is important to note that the CMA will issue requests for information during the market study process. Although the CMA states that it "*aims to be fair and reasonable in its requests for information and the deadlines it sets for parties to respond*", such information requests can be lengthy and impose a significant burden on the business. Where necessary, the CMA will use its statutory investigatory powers to ensure that information requests are answered completely and in a timely manner.

The CMA will publish a report of its market study findings. These reports will normally be published with an accompanying news release highlighting significant conclusions. Where the CMA is proposing to make a market investigation reference or to accept undertakings in lieu of such a reference, it must first consult any person who is likely to be substantially affected by its decision and the reference decision will therefore take account of any relevant points which have arisen from the consultation process. There is no statutory period imposed for such consultations and the CMA, in its guidelines on market investigation references, states that the length of the consultation period will depend upon the complexity of the issues and the extent to which discussions with affected parties have already taken place. Given that the CMA expects to engage fully with relevant parties at the market study stage, relatively short formal consultation periods are the norm – typically five to six weeks. Where the ultimate outcome is a reference, the CMA must give reasons for its decision to refer.

The principal possible outcomes of market studies are:

- giving the market a clean bill of health;
- consumer-focused action, such as publishing information to raise consumer awareness, perhaps in conjunction with other consumer/government bodies;
- encouraging firms to take voluntary action (e.g. to self-regulate);
- making recommendations to the Government or sector regulators (for instance, to amend relevant legislation);
- initiating enforcement action against firms suspected of breaching consumer law or competition law;
- acceptance of undertakings in lieu of a market investigation reference; or
- a market investigation reference.

Under section 154 of the EA02, the CMA can accept undertakings in lieu of a market investigation reference from relevant entities to take such action as it considers appropriate. Undertakings in lieu of a reference are not used very often, because they require the CMA to have identified adverse effects on competition or detrimental effects on consumers with enough confidence to be satisfied that a proposed undertaking would remedy, mitigate or prevent those effects. Moreover, in deciding whether to accept undertakings in lieu, the CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practical to remedy the identified adverse effects on competition and any detrimental effects on consumers, an assessment which it may consider difficult on the basis of a market study alone. Undertakings in lieu may also be impracticable where the agreement of a number of market participants would be needed.

If the CMA is proposing to accept undertakings in lieu of a reference, it must comply with a number of procedural requirements in terms of public consultation before doing so.

Whilst a market study will often be undertaken prior to a market investigation reference being made, this is not obligatory. References may also be made where no market study has been undertaken, for example following a super-complaint by a designated consumer body, provided the statutory reference thresholds are satisfied and the CMA has consulted in accordance with section 169 of the EA02.

## 5. Market investigations

In common with a market study, a market investigation reference will generally focus upon the functioning of a market as a whole, rather than the conduct of individual businesses (which may be addressed by the CMA or a sectoral regulator under the Competition Act 1998). In recent years, a diverse range of markets have been investigated including payday loans, private healthcare, the supply of airport services by BAA, grocery retailing, rolling stock leasing, payment protection insurance, local bus services, the supply of audit services to FTSE 350 companies and pay-TV movies.

Market investigations consist of a detailed examination into whether there is an AEC in the market(s) referred and, if so, what remedial action may be appropriate. They are resource intensive and impose a significant burden on business, both in terms of the extensive information requested by the CMA and the requisite management time involved, particularly in light of the risk of structural divestments or stringent behavioural remedies being imposed.

Unlike a market study, which is conducted by CMA staff, a market investigation is conducted by a group of CMA Panel members, with the support of CMA permanent staff. The group consists of at least three members appointed by the CMA Chair from the CMA panel, which comprises business analysts, accountants, lawyers and economists. The market reference group is required to decide whether there is an AEC in the market(s) referred and, if so, whether and what remedial action is appropriate. In order to make an AEC finding that can be subject to remedial action, a decision must be taken by at least a two-thirds majority of the market reference group.

The EA02 imposes a statutory deadline on the CMA to complete market investigations within 18 months of the date of reference. The CMA may, however, extend this period by up to a further six months if it considers that there are "special reasons" why the investigation cannot be completed and the report published within 18 months (e.g. in particularly complex cases). A decision to extend the timetable must be published, and the CMA must include in the decision the reasons for any such extension.

Shortly after the reference is made, the CMA will publish an administrative timetable on its website. This will contain the approximate dates of the following key stages of the investigation: the initial off-the-shelf information request; the statement of issues; the market and financial questionnaires; oral hearings and site visits; publication of the annotated issues statement and working papers; provisional findings; remedies hearing(s) (if required); provisional decision on remedies; and the final report.

### Key stages of the investigation

#### Initial information-gathering

Shortly after the announcement of the reference, the CMA will write to the main participants in the market investigation notifying them of the members of the CMA's market reference group, and requesting certain factual off-the-shelf material. This will include information such as annual reports and accounts (over a number of years), details of the management and corporate structure of the business, strategy documents, business plans, market research reports, external assessments or commentaries and any broker/analyst reports, details of any subsidiaries and so on.

The CMA may also arrange meetings between the business and the CMA staff to discuss any potential timetabling issues, and to explore the type, format and availability of data in advance of the market and financial questionnaires (see below).

## **The statement of issues**

Early in the investigation, the CMA will publish an issues statement, in which it sets out, at a high level, the issues (including "theories of harm") that it proposes to investigate. This document provides a framework for the CMA's analysis and the parties are expected to take it into account in their submissions. Responding to the statement of issues is an important step in the market investigation process. The response provides the parties with the opportunity to present the key legal and economic arguments as they see them, which helps set the tone and direction of the investigation. This phase is an important opportunity for interested parties to influence the focus of the CMA's inquiry, particularly in those sectors where the CMA does not have a great deal of institutional knowledge via other recent inquiries.

## **Market and financial questionnaires**

The CMA also issue detailed market and financial questionnaires (which can be of considerable length) pertinent to the issues being considered. These questionnaires will ask for detailed information on a range of topics, typically including costs, prices, profitability, customers, barriers to entry and exit, production methods, sales methods and specific regulatory or other legal issues. Deadlines for responding to the questionnaires often coincide with preparation of the initial submission/responding to the statement of issues, which can impose significant resourcing issues on the business at this stage of the investigation.

In addition to this initial information-gathering process, the CMA may, and generally does, request further information throughout the investigation, and will often ask clarification or follow-up questions in relation to the responses to the market and financial questionnaires. In addition to the evidence obtained from questionnaires, the CMA will also seek other evidence which may include: publicly available information, such as analysts or consultants' reports; specifically commissioned expert evidence; and surveys.

## **Site visits**

The group members conducting the inquiry will normally conduct a site visit to a production (or other relevant) operation of each of the major participants in the market, to aid their understanding of the sector concerned. These visits also give parties an opportunity to present their views to the group members (and the parties are openly encouraged to give a presentation).

## **Annotated issues statement and working papers**

The CMA will publish an annotated issues statement (AIS) part way through the market investigation process, which sets out its current thinking in relation to the theories of harm set out in the Issues Statement. The AIS will be supported by the evidence that the CMA has collated during the data gathering phases, and it provides an indication of the CMA's current thinking. The CMA may also publish a number of "working papers" either before or shortly after the AIS, which provide some relatively in-depth insight into the economic analysis that the CMA has undertaken of specific issues (such as market definition, the profitability of the market participants, entry and exit analysis, levels of switching, any econometric analysis that the CMA has undertaken etc.). A number of the CMA's working papers are typically highly technical (e.g. addressing both economic and financial/accounting issues).

The parties are given the opportunity to respond to the AIS and any such working papers published by the CMA, which provides an opportunity to influence the CMA's analysis in advance of the provisional findings report. Although there is a temptation to treat this part of the process as being more administrative than substantive, in reality commenting on the AIS and working papers is an important stage in the process as it is rare for the CMA to depart materially from its conclusions once the Provisional Findings report has been published.

## **Formal hearings**

The formal hearings with the CMA group members give the CMA the opportunity to probe and test the parties' arguments/submissions and effectively to "cross-examine" the main market participants on the basis of comments received by third parties who have submitted evidence or attended their own hearings. Indeed, to facilitate this, hearings with third parties are often conducted prior to those with the main market participants. Whilst not an adversarial process, the CMA's questioning at the hearing will be detailed and searching, and will be directed to the representatives of the company (rather than its advisers). The hearings also give the parties an opportunity to answer the CMA's questions and (to some extent at least) to develop the arguments set out in their written submissions and responses to the CMA's questionnaires. Hearings are typically held with only one party present, although in some inquiries, the CMA may hold public hearings or joint hearings with more than one party present. A transcript of the hearing will be taken and circulated to the parties.

## **Provisional findings and initial remedies notice**

The provisional findings report sets out the conclusions which the CMA is minded to reach. If adverse provisional findings are reached, these findings will generally also contain an initial notice of possible remedies (in some cases, the initial remedies proposals follow shortly afterwards). The remedies notice will focus on all the remedies that are considered likely to be effective, providing details of how they might be expected to operate. The notice will also explain why other remedies are not considered likely to be effective. In practice, it is not unusual for the remedies notice to include a number of the more extreme remedies at this stage, which may subsequently be dropped following the consultation process (e.g. because they are found to be disproportionate to the AEC identified).

Interested parties are invited to respond to both the provisional findings and the remedies notice. The deadline for responding to the provisional findings is within a period of not less than 21 days; the deadline for responding to the remedies notice is usually of a similar duration (and runs concurrently). Following the consultation on the provisional findings, the investigating group will meet to discuss the responses and consider whether, in light of the responses received, the provisional findings should be altered. Where an adverse effect on competition has been provisionally identified, there may also be response hearings with the main parties and potentially third parties. However, such hearings are likely to focus on possible remedies. In practice, the CMA's provisional findings and conclusions seldom change significantly unless important new evidence is received. Accordingly, resources at this stage often focus more extensively on responding to the remedies notice rather than seeking to materially change the provisional findings (unless, as mentioned above, new evidence has come to light).

In the wake of losing two appeals before the Competition Appeal Tribunal concerning its remedies procedure, the CMA's predecessor, the CC, conducted a review in 2010. The key finding of the review was that not enough time was provided in the timetable for work on remedies and the CMA's intention is that, going forward, provisional findings should be published just after the mid-point of an investigation, thus allowing significantly more time to consider remedies, if needed.

## **Remedies hearings and final remedies proposals**

The CMA will often invite parties to hearings specifically on its initial statement of possible remedies. Following these hearings, and taking into account the written responses to its initial notice of remedies, the CMA will publish a provisional decision on remedies for consultation. At this stage, the proposed remedies are set out at a relatively high level: for example, that certain business practices should be prohibited or that certain information should be provided to consumers before they make a purchase. The detailed wording of the undertakings or orders through which the remedies will be effected is negotiated after the final report is published. The publication of the formal remedies proposals is the last opportunity for interested parties to comment before the CMA takes its final decision.

## **Final report and negotiation of any undertakings or orders to put remedies in place**

The CMA's final decisions on the competition and remedies questions are published in its final report, together with the reasons for those decisions. The final report is intended to contain sufficient detail on

remedies to provide a basis for implementation by the CMA through negotiating undertakings with relevant parties and/or imposing orders. The negotiation of the undertakings or orders takes place after the investigation has been concluded, and outside the investigation timetable. Once agreed and in force, compliance with the undertakings will be monitored by the CMA.

## CMA information gathering powers

As noted above, the CMA has wide powers under the EA02 to require persons to attend to give evidence and to require a business to provide documents and other information. Where a party fails to comply with a formal requirement by the CMA to provide information or evidence in relation to a market investigation, the CMA can impose fines of up to £30,000 and/or a daily fine for continuing non-compliance of up to £15,000. The requirement to provide information may (ultimately) be enforced by an order of the court, breach of which would constitute contempt of court and would give rise to possible fines and/or imprisonment. In practice, the CMA expects, and normally receives, full co-operation from those involved in an investigation, and does not generally use the formal powers available to it. Where necessary, however, it does do so. It should also be noted that the provision of false or misleading information to the CMA by a party or its advisers is a criminal offence, punishable by a fine and/or up to two years in prison.

## Confidentiality

The CMA is under a general duty not to disclose confidential business information obtained in the course of its investigation, with certain exceptions. Where it proposes to disclose information from one party for comment by other parties it will normally give the party who provided the information an opportunity to provide a non-confidential version. Generally, the EA02 requires the CMA to strike a balance between, on the one hand, the need to fulfil its statutory functions which include an obligation to provide reasons for its decisions and, on the other hand, the need to exclude information whose disclosure would be contrary to the public interest, or commercial information about a business whose disclosure could harm its legitimate business interests, or information relating to an individual's private affairs, where disclosure would substantially harm that individual's interests.

The CMA generally provides a comprehensive library of documents relating to an inquiry on its website.<sup>1</sup> This will include not only non-confidential versions of all key documents produced by the CMA (down to the level of working papers and survey reports/results), but also non-confidential versions of interested parties' submissions at the key investigation stages, including initial submissions and responses to the issues statement, emerging thinking, provisional findings and proposed remedies, and even responses to individual working papers in some cases. The CMA will also publish a high-level summary of the parties hearings.

## Remedies

The majority of market studies do not result in market investigation references. Most are resolved by agreed undertakings, voluntary changes, or policy recommendations to government (it is not uncommon for legislation to be amended following a market study). Full market investigation references tend to be used only in cases where competition problems are considered to be particularly significant and/or warrant further detailed investigation, and where the stronger and more wide-ranging powers available to the CMA are considered to be more appropriate.

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<sup>1</sup> [www.gov.uk/government/organisations/competition-and-markets-authority](http://www.gov.uk/government/organisations/competition-and-markets-authority)

Following a market investigation, the CMA can take remedial action itself through exercising its order-making powers or by accepting undertakings from relevant parties. Alternatively, it can recommend (but not require) that remedial action should be taken by others such as government, regulators and public authorities.

Section 134(6) of the EA02 requires the CC to take into account the following in considering potential remedial action: "*the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as resulting from the adverse effect on competition*". "Detrimental effects" in this context are defined as higher prices, lower quality, less choice of goods or services or less innovation.

The CC's April 2013 guidelines for market investigations (which have been adopted by the CMA) describe various factors that will be considered in assessing remedial action, including (amongst others):

- effectiveness and practicability – including the ease of achieving effective implementation, monitoring and enforcement;
- timing – remedies that deliver results promptly are preferred;
- reasonableness and proportionality – an assessment of the likely costs, benefits and effect of remedies, including their potential negative effects. Proportionate remedies should be no more onerous than necessary to achieve the objective; and
- focus of the remedy – the CMA prefers to remedy the adverse effect on competition (i.e. seek to introduce more/better competition) as opposed to seeking to address/mitigating the detrimental effects on customers (i.e. the consequences of the competition problem).

The CMA (and, prior to 1 April 2014, the CC) has wide powers to impose remedies and a correspondingly wide range of remedies have arisen from the market investigations undertaken to date. These include:

- far-reaching structural remedies have been required in a number of recent cases (such as the divestiture of certain airports by BAA, the divestment of certain hospitals in the private healthcare market investigation, and the divestment of a cement business in the aggregates, cement and ready-mix concrete market investigation);
- behavioural remedies (such as a point of sale prohibition in the PPI market investigation, and a price control remedy imposed on Yell as part of the review of classified directory advertising services),
- measures which focus on improving the information available to customers, making consumer switching easier, or reducing barriers to entry (seen for example, in the investigations into local bus services, Northern Irish personal banking and extended warranties on domestic electrical goods); and
- making recommendations to government for a change in policy/regulation (such as in the groceries, rolling stock leasing and airports market investigations), although the CMA does not have the powers to enforce these proposed changes.

In deciding on any remedies, it should be noted that the CMA may have regard to the effect of any action on "relevant customer benefits". This reflects the fact that in certain (rare) cases, market features that adversely affect competition could result in beneficial effects for customers. Relevant customer benefits are defined to include lower prices, higher quality, greater choice or greater innovation.

The ERRA13 introduced statutory time limits for the implementation of remedies by the CMA to address the AEC findings from a market investigation. The CMA must accept final undertakings or make a final order **within six months** of the date of publication of the market investigation report (which includes a period for formal consultation). The CMA may, however, extend the six-month period by up to a further four months if there are special circumstances (e.g. where the remedies are complex).

During the period covered by the statutory timetable for remedies implementation, the CMA continues to have investigatory powers. In addition to the ability to impose penalties in certain circumstances, the CMA also has the ability to "stop the clock" for failure to comply with a CMA request.

It should also be noted that the CMA has the power to prevent pre-emptive action being taken that might impede the remedies being implemented, and can do so by accepting interim undertakings from the parties concerned. The CMA also has the powers take steps to require parties to reverse any pre-emptive action that has occurred before any interim measures have been put in place.

## 6. Public interest references

The EA02 also provides that the Secretary of State (SoS) may intervene on specified public interest grounds and order a public interest market investigation reference. The CMA has a corresponding duty to bring to the attention of the SoS any case that it believes raises a specified public interest consideration. To date, the only specified public interest consideration in relation to which the SoS may intervene in this context is national security. However, the SoS has powers to specify new public interest grounds by Order, which can be done swiftly if required.

There are two types of public interest reference:

- **a restricted public interest reference**, where the CMA is required to investigate competition issues, while the SoS investigates defined public interest issues in relation to the matter referred; and
- **a full public interest reference**, which requires the CMA to investigate defined public interest issues alongside competition issues in relation to the matter referred.

The restricted public interest reference is the form of public interest reference that existed under the EA02 prior to 1 April 2014. The full public interest reference is a new form of public interest reference introduced by the ERRA13, which gives the government the option of drawing on the CMA's investigative expertise to look at public interest issues in tandem with its competition investigation, rather than having to create separate independent inquiry bodies to look at public interest issues.

Both types of public interest reference are initiated by the SoS giving a public interest intervention notice to the CMA before a reference is made. The intervention notice must contain certain prescribed information in relation to the subject matter, the date of publication of the market study notice, and the public interest consideration(s) that are, or may be, relevant to the case.

Where a public interest intervention notice is in force and the CMA proposes to make a market investigation reference, the CMA cannot itself make the reference. If a market study is underway, it is instead required to provide its market study report to the SoS within 12 months from the date of publication of the market study notice (see above) and the final decision on reference will be taken by the SoS. In a case where no market study is underway, the CMA must instead provide the SoS with a document containing the CMA's decision and reasoning on the question of whether a market investigation reference is recommended. In such cases, the 12-month time limit does not apply.

Following receipt of the CMA's market study report or the document setting out its decision, the SoS must decide whether the public interest consideration stated in the intervention notice is relevant to the matter, and if so, whether to make a restricted public interest reference or a full public interest reference. The reference decision must be published, together with the CMA's market study report or the document containing the CMA's reasons for its decision. If the SoS decides that the public interest consideration stated in the intervention notice is not relevant, he/she will make a market investigation reference which will then follow the normal CMA procedure (as set out above) and the SoS will have no further involvement.

Where a public interest reference is made, the main procedural steps are the same as those outlined above in relation to ordinary market investigation references. However, there are certain differences in relation to the questions that must be decided by the CMA and the subsequent reporting and remedies implementation processes that must be followed:

- **Where a restricted public interest reference is made**, the CMA must decide whether there is an AEC and, if so, what action (if any) should be taken by the SoS (or recommended to others to be taken), and what action (if any) should be taken by the CMA (or recommended to others to be taken), for the purpose of remedying the AEC or any detrimental effect on customers resulting from the AEC. The CMA must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the AEC concerned and any detrimental effects on customers resulting from the AEC, as well as the effect of any action on any relevant customer benefits.
- **Where a full public interest reference is made**, the CMA must decide whether there is an AEC and, if so, taking into account the AEC and the relevant public interest consideration(s), any feature(s) giving rise to the AEC operate(s) or may be expected to operate against the public interest. If the CMA finds that there is an adverse effect on the public interest, it must decide what action (if any) should be taken by the SoS (or recommended to others to be taken) to remedy the adverse effect on the public interest. If the CMA finds that there is no adverse effect on the public interest, it must decide what (if any) action should be taken by it (or recommended to others) for the purposes of remedying the AEC or any resulting detrimental effects on customers. The SoS may appoint one or more persons with relevant expertise in relation to the public interest issue in question (referred to as a public interest expert) to advise the CMA during this stage.

In both cases, the CMA must prepare a market investigation report setting out its findings within 18 months (which must include a summary of the public interest expert's views if one has been appointed). If the CMA concludes that no action should be taken by the SoS, it will publish the report itself. However, if it decides that action should be taken by the SoS, it is required to provide its report to the SoS (within the same 18 month time period) and the SoS is then required to decide whether any eligible public interest consideration is relevant to any remedial action mentioned in the CMA's report which the CMA should take. The SoS's decision must be made and published within 90 days of receipt of the CMA's market investigation report. The SoS may then take such action as he or she considers to be reasonable and practicable to remedy the AEC or any detrimental effect on customers resulting from the AEC and appropriate in light of the public interest consideration concerned.

## 7. Implications for business

Firms should be aware that market investigations require a significant level of input from relevant firms in terms of market and financial data and other analysis. Significant management and other resources normally need to be deployed merely to respond to the CMA's questions and information requests. Given the potentially far-reaching consequences of such investigations, it is normally also worthwhile devoting sufficient internal resources to ensure that the legal team is appropriately supported, both in terms of gathering the necessary information and formulating the firm's position on the issues being considered. Both legal and economic expertise are normally required and should be involved from an early stage in order to present the firm's position in the best possible light and protect its commercial interests.

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